



# Regulating Buy Now, Pay Later in Australia

Options paper

November 2022

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# Consultation process

## Request for feedback and comments

### Closing date for submissions: 23 December 2022

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Enquiries	Enquiries should be sent to <a href="mailto:CreditReforms@Treasury.gov.au">CreditReforms@Treasury.gov.au</a>

This is an options paper for public consideration. Feedback on the options outlined in this paper will inform any future government policy and supporting legislation.

## Executive Summary

- On 12 July 2022, the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP, announced the Australian Government's intention to publicly consult on improving the regulation of consumer credit in Australia.
- This consultation paper examines the regulatory challenges of emerging financial products, with a particular focus on buy now, pay later (BNPL) and the appropriate regulatory approach to maintain the benefits of accessing credit while ensuring consumers are adequately protected.

### *Credit provision and the role of BNPL*

- Safe and well-regulated markets for consumer credit products are necessary for an efficient financial system. Credit products allow consumers to smooth the up-front cost of purchasing a good or service over a period of time for a fee or charge.
- New credit products such as BNPL can offer consumers a cheaper and easier-to-access form of credit when compared to traditional forms of credit such as credit cards, payday loans and consumer leases. BNPL has a range of benefits to both consumers and the economy, such as:
  - improving financial inclusion by being cheaper and more convenient to consumers than many other competing products;
  - increasing competitive pressure on traditional forms of credit; and
  - driving increased business for merchants because consumers can access additional credit to spend on goods and services.

### *The Regulation of BNPL in Australia*

- BNPL is not regulated under the *National Consumer Credit Protection Act 2009* (the Credit Act), because it typically falls under the exemptions available to certain types of credit in Schedule 1 of the Credit Act (the National Credit Code).
  - BNPL products that operate within these exemptions are not subject to responsible lending standards or other requirements of the Credit Act, and BNPL providers do not need an Australian Credit License (ACL).
- Though these exemptions have supported the growth of BNPL, they were not designed with that outcome in mind. This unintended regulatory gap creates the potential for consumer harm due to the absence of key protections.
- Australia is not alone in addressing the regulatory environment for BNPL. The United Kingdom and New Zealand governments are both considering their regulatory frameworks in the context of the growing BNPL sector.

### *Regulatory issues in the BNPL sector*

- Treasury has recently undertaken targeted consultations with a range of consumer groups, BNPL providers, retailers, financial services peak bodies and regulators to identify the impacts of BNPL to inform the development of regulatory options for public consideration.

- These discussions have identified the relatively looser regulatory environment combined with the rapid growth of the BNPL industry may be contributing to poor consumer outcomes. Some of the regulatory issues stakeholders raised with Treasury include:
  - **Unaffordable or inappropriate lending practices** are contributing to financial stress and hardship, and other types of consumer harm.
  - **Poor complaints handling processes** and the lack of hardship assistance for consumers leads to delayed or unsatisfactory remediation.
  - **Excessive or disproportionate consumer fees and charges** including default fees relative to the size of the consumer’s debt.
  - **Non-participation in Australia’s credit reporting framework** means some BNPL credit information is not available for use in credit checks by other lenders.
  - **Poor product disclosure practices** and a lack of warning requirements means consumers do not have sufficient information to make informed choices about BNPL products.
  - **Unsolicited selling** and advertising practices targeting consumers at the shop checkout or encouraging the use of BNPL for essentials such as groceries or utilities.
  - **Frictionless sign-up to BNPL products** enhances other consumer harms, such as scamming, overselling, and financial abuse.
  - **Inadequate reverse charging provisions** when a good purchased with a BNPL product is returned to the merchant.

#### *Options for regulatory intervention*

- Informed by the regulatory issues identified by stakeholders, this paper puts forward for public consideration three broad options of varying levels of regulatory intervention:
  - **Option 1: Strengthening the BNPL Industry Code plus an affordability test.** This option will impose a bespoke affordability assessment for BNPL providers under the Credit Act and address any other regulatory gaps in a strengthened Industry Code to make it fit-for-purpose.
  - **Option 2: Limited BNPL regulation under the Credit Act.** This approach would require BNPL providers to obtain and maintain an ACL, plus introduce modified Responsible Lending Obligations (RLOs) under the Credit Act to determine unsuitability, combined with a strengthened Industry Code.
  - **Option 3: Regulation of BNPL under the Credit Act, with full RLOs.** Under this option, BNPL providers would need to obtain and maintain an ACL. The existing RLOs in the Credit Act will be applied to all BNPL credit, including requirements around reasonable inquiries into a consumer’s financial situation and taking reasonable steps to verify this information.

#### *Next steps*

- Submissions received during this consultation process will inform a future government decision on the regulatory framework for BNPL in Australia. Treasury anticipates undertaking further targeted consultations with stakeholders to refine these options ahead of any government decision.

## The regulation of BNPL in Australia

Historically, credit regulation in Australia focused on protecting consumers from deceptive or predatory lending practices and being charged excessively high fees. It had little consideration for whether the credit itself was affordable. This is reflected in the Credit Act, which does not apply to low-cost continuing credit and low-cost short-term credit products.<sup>1</sup> It was not until 2009 that credit regulation sought to prevent unaffordable lending beyond ensuring potential borrowers had enough information to make their own decisions.

In recent years, advancements in technology have enabled credit businesses to build a profitable market for free or low-cost credit and credit-like arrangements fitting within the low-cost continuing and short-term credit exemptions. Some consumer groups argue advancements in technology and new business models have outgrown credit regulations and have called for the Australian Government to review the scope of credit regulation, including key definitions and exemptions. Types of consumer credit falling outside of the current scope of Credit Act include (but are not limited to):

- BNPL;
- Wage advance products;
- Certain types of bridging finance to fund deposits on new residential properties;
- Certain types of invoicing facilities and in-house instalment payment plans;
- Certain types of finance for marketing costs for the sale of residential property; and
- Certain loans for rent payments and rental bonds.

These products are ‘credit’ in the ordinary sense of the word, however they fall under exemptions included in the Credit Act. The rapid growth of the BNPL sector via these exemptions has seen the risk profile of these products change and highlights the need to reconsider the current regulatory framework for credit. In Australia, BNPL transactions accounted for approximately 2 per cent of Australian card purchases during the 2022 financial year.<sup>2</sup> Low value BNPL products that provide a spending limit of typically less than \$2,000 are most popular in Australia. A small proportion of the BNPL market offers products with spending limits of up to \$30,000 for solar and renewable energy home upgrades.

The Reserve Bank of Australia’s Payments System Board reported approximately 7 million active BNPL accounts in the 2021-22 financial year and \$16 billion in transactions, an increase of approximately 37 per cent on the previous financial year.<sup>3</sup> While BNPL products can be a means of providing credit to both consumers and businesses, this paper is focused on credit provided to consumers. More information on consumer take up is at **Attachment A**.

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<sup>1</sup> Subsections 6(1) and 6(5) of the National Credit Code.

<sup>2</sup> The Reserve Bank of Australia, Payments System Board Annual Report, 2022.

<sup>3</sup> *Ibid*

## What is BNPL?

BNPL products are an alternative to more traditional forms of credit. They allow consumers to budget their spending by paying off goods and services in instalments at a comparatively cheaper rate than a credit card or payday loan.

### **Buy now, pay later arrangements:**

- involve a third-party financing entity,
- provide consumers finance which can be used to pay for purchases of goods, services and bills,
- do not provide consumers cash,
- may charge consumers low fixed fees for using the finance,
- charge merchants service fees for accepting BNPL,
- do not charge interest on the finance used,
- pay the merchants the value of the purchase upfront, less any fees, and collect repayments from consumers in instalments.

While the Credit Act is the primary legislation governing consumer credit products, not all financial products that may be considered credit according to its ordinary meaning are subject to the Act. The Credit Act only applies to credit provided under a credit contract where:

- there is a deferral of a debt or a payment of a debt;
- the credit is provided to a natural person or a strata corporation;
- the credit is predominantly for personal domestic or household use, or for purposes relating to investment properties; and
- there is, or may be, a charge for providing the credit.

This means credit products and services, such as invoicing services and BNPL products that do not charge any fees (excluding late or missed payment fees<sup>4</sup>), fall outside the regulatory scope of the Credit Act. Afterpay and StepPay are examples of BNPL products that are not considered credit to which the Credit Act applies.

### *Interest free and low fixed fee continuing credit exemption*

BNPL products typically operate under the exemption for interest-free continuing credit contracts<sup>5</sup> that only charge periodic or other fixed consumers fees for the provision of credit below prescribed fee caps of \$200 in the first 12-months and \$125 for any subsequent 12-month period thereafter.<sup>6</sup> Most BNPL products charge service fees, such as account establishment fees and account keeping fees, in a way allowing them to operate under this exemption in the Credit Act. Examples of BNPL products operating under this exemption are ZipPay and Humm – Small things.

<sup>4</sup> Ordinarily, default, late and missed payment fees are not considered a fee for providing the credit, rather a fee for contravention of any contract terms.

<sup>5</sup> Section 6(5) of the National Credit Code (Schedule 1 to the *National Consumer Credit Protection Act 2009*).

<sup>6</sup> Regulation 51 of the *National Consumer Credit Protection Regulations 2010*.



## What consumer protections are there for BNPL products?

The exemptions from the Credit Act mean RLOs do not apply to BNPL products. The RLOs require providers to assess whether a credit product or credit limit increase is not unsuitable for a consumer by gathering and considering information about the consumer's financial circumstances, as well as taking reasonable steps to verify that information.<sup>7</sup> Under the unsuitability test, a credit product is unsuitable for a person, if it is likely:

- the consumer will be unable to comply with their financial obligations; or
- the consumer will only be able to apply with their financial obligations with substantial hardship; or
- the product will not meet the consumer's requirements or objectives.

While BNPL products are exempt from certain consumer protections in the Credit Act, such as the RLOs, they do exist within the broader regulatory framework covering financial products.

The Australian regulatory framework for BNPL includes:

- **The *Australian Securities and Investments Commission Act 2001 (the ASIC Act)*** provides general financial services consumer protections (e.g., misleading and deceptive conduct) that apply to all financial products regulated by ASIC, including BNPL.
- **Some parts of Chapter 7 of the *Corporations Act 2001 (Corporations Act)***, including the Design and Distribution Obligations (DDO) and the Product Intervention Powers (PIP).
- **Schedule 2 to the *Competition and Consumer Act 2010 (the Australian Consumer Law)***, which covers some BNPL provider conduct not covered by the ASIC Act, including provisions around false or misleading presentation, unsolicited supplies, pricing and information standards.
- **The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)***, includes obligations to conduct customer identification and verification procedures, record keeping, reporting suspicious matters, and providing periodic compliance reports. The AML/CTF Act also requires reporting entities to have an AML/CTF framework in place covering money laundering and terrorism financial risk assessments.

### Complaints handling and remediation

BNPL consumers can raise concerns to ASIC and the Australian Competition and Consumer Commission (ACCC)<sup>8</sup> about provider misconduct, and through the Australian Financial Complaints Authority (AFCA) – an independent external dispute resolution service, if their BNPL provider is a member of AFCA. AFCA can provide consumers access to financial compensation, the voiding, varying, or reinstating of contracts, and privacy related remedies or formal apologies.<sup>9</sup>

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<sup>7</sup> ASIC Regulatory Guide 209 gives guidance to the industry on what ASIC considers is required under the RLOs in the Credit Act.

<sup>8</sup> While financial products and services have been explicitly excluded from the Australian Consumer Law, some peripheral conduct may still fall under its remit.

<sup>9</sup> AFCA webpage on Outcomes AFCA provides: <https://www.afca.org.au/what-to-expect/outcomes-afca-provides>. Accessed 14 November 2022.

In cases of financial difficulty, contracts may be varied to extend the contract period, postpone repayments for a specified period and change payment arrangements or reduce loan interest rates.<sup>10</sup> However, AFCA cannot make a ruling against BNPL providers in relation to the obligations of the Credit Act, such as the assessment of the credit risk posed by a borrower, and it cannot determine that a consumer should have their debt waived. This issue also applies to other credit products.

## What is the BNPL Industry Code of Practice?

Industry self-regulation can play a role in setting best business practice standards and often establishes conditions that go above what is required under the law. The Australian Financial Industry Association (AFIA) developed the BNPL Industry Code, which came into effect from 1 March 2021. Adherence to the Industry Code is monitored by its Code Compliance Committee and AFCA has regard to commitments made by signatories in its handling of complaints.

To date, nine BNPL providers are signatories of the Industry Code – Afterpay, Brighte, Humm, Klarna, Latitude, Openpay, Payright, Plenti and Zip. AFIA claims that the Industry Code covered 95 per cent of all BNPL accounts as of June 2022.<sup>11</sup> The Commonwealth Bank of Australia, PayPal, and some smaller BNPL providers are not signatories to the Industry Code. Key features of the Industry Code include:

- **Tiered suitability assessments** – For transactions above \$2,000, the Industry Code requires providers to check either customer data or third-party sourced data, such as a credit check. For amounts over \$15,000, a check of both customer data and third-party sourced data is required.<sup>12</sup>
- **Complaint handling** – The Industry Code mirrors the Credit Act by requiring signatories to implement internal dispute resolution procedures that meet the ASIC standard on dispute resolution<sup>13</sup> and to be members of AFCA.<sup>14</sup> The Industry Code also required providers to have a transparent and accessible complaints policy.<sup>15</sup>
- **Hardship provisions** – The Industry Code mirrors the Credit Act by requiring commitment to offer consumers financial hardship assistance.<sup>16</sup> This includes discussing contract variation options available to consumers, as well as considering hardship requests and providing requisite information within 21 calendar days of receipt.
- **Disclosure obligations** – The Industry Code requires BNPL providers to provide information about scheduled payments, late payments, and changes to product terms and conditions.
- **Reasonable practices** – The Industry Code requires missed or late payment fees charged by its signatories to be fair, reasonable, and capped.<sup>17</sup> Consumers must be provided timely reminders of the repayment obligation to help avoid arrears and related charges.

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<sup>10</sup> *Ibid.*

<sup>11</sup> AFIA report: The Economic Impact of Buy Now Pay Later, published June 2022.

<sup>12</sup> Clause 11 of the BNPL industry Code.


<sup>13</sup> ASIC regulatory guide 271: *Internal dispute resolution*.

<sup>14</sup> Clause 13 of the BNPL industry Code.

<sup>15</sup> Paragraphs 47(1)(h) and 47(1)(i) of the *National Consumer Credit Protection Act 2009*.

<sup>16</sup> Clause 14 of the BNPL industry Code.

<sup>17</sup> 10.1(g) AFIA Code of Practice.

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- **Minimum standards for merchant and retail partners** – BNPL providers must take reasonable steps to ensure merchants are not engaging in unsolicited marketing or unlawfully selling of its products and services. The unsolicited sale of credit cards (including increase of credit limits) and debit cards are prohibited under the Credit Act, the ASIC Act, and the Australian consumer law.

The Industry Code is not law and is not enforceable. The failure of Industry Code signatories to comply with its obligations does not attract penalties. In 2021, the Australian Government established a regime allowing industry bodies to apply to ASIC to have certain provisions of an industry code<sup>18</sup> enforceable by ASIC. However, the current Industry Code is not ASIC enforceable.

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<sup>18</sup> Currently ASIC may only approve industry codes that apply to entities that hold an AFSL or an ACL.

## Regulatory issues with BNPL

Treasury continues to monitor the BNPL market and has formally consulted with around 20 consumer groups, industry associations, regulators, BNPL providers and other financial firms, on the regulatory arrangements for BNPL. These conversations are in addition to Treasury's ongoing stakeholder engagement activities with the financial services sector where BNPL is regularly discussed.

The issues outlined below summarise what Treasury learned during this process, and where possible is supported by the available data. As a result, the evidence base for the issues identified below vary, with some issues limited to anecdotal evidence, while others are supported by limited data. The data quality and consistency also vary from issue to issue.

Consultation participants placed a significant focus on the harms consumers may experience from BNPL products. However, these issues should be understood in the context of the benefits BNPL can bring to consumers, such as income smoothing and bringing forward the consumption of goods. The BNPL industry is not homogenous, and different providers offer a range of diverse products. As a result, the nature and severity of the issues vary from product to product, and from provider to provider.

Treasury welcomes stakeholders providing supporting analysis and evidence (including data) of consumer impacts (both positive and negative) arising from BNPL products in their submissions.

### Unaffordable lending practices

#### Some vulnerable BNPL consumers are cutting back on essentials to pay BNPL debt

Some consumers who use BNPL experience increased levels of financial stress and negative outcomes, including missed BNPL repayments and additional fees, missed or late payments for non-BNPL bills, reduced expenditure on essential items such as groceries, or the need to take out additional and potentially more expensive credit to repay BNPL debts. Treasury notes these issues also apply to non-BNPL credit products.

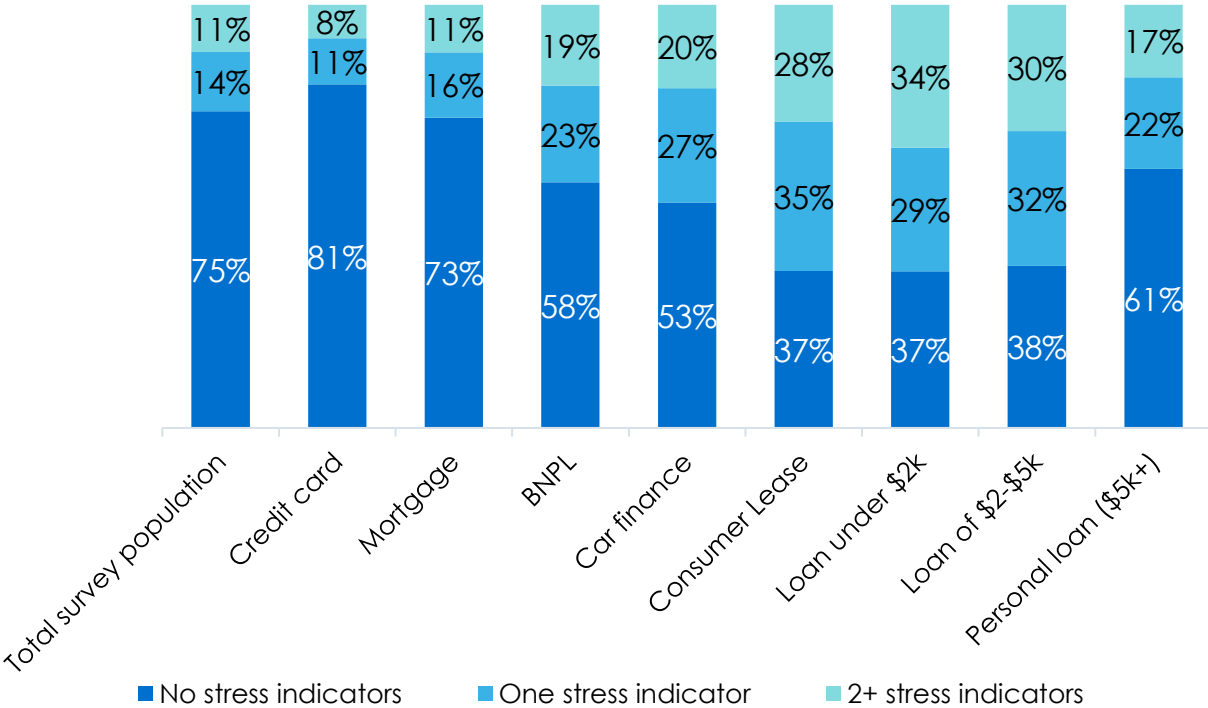
ASIC's Consumer Monitor monthly survey report for quarter 1 of 2022, found 19 per cent of BNPL consumers surveyed cut back or went without essentials to make BNPL repayments on time. Chart 1 shows a relationship between users of certain credit products and increased financial stress.<sup>19</sup> It shows 23 per cent of BNPL users experienced one of the Household Income and Labour Dynamics in Australia (HILDA) financial stress indicators;<sup>20</sup> and 19 per cent experienced two or more stress indicators.

A similar proportion of BNPL users experienced two or more financial stress indicators as recipients of regulated car finance and personal loans above \$5,000 – respectively 20 per cent and 17 per cent of relevant consumers. Fewer BNPL users reported experiencing two or more financial stress indicators than consumers of regulated consumer leases and SACCs – respectively 28 per cent and 34 per cent. More than twice as many BNPL users experienced two or more financial stress indicators than credit card users – 8 per cent.

<sup>19</sup> ASIC's Consumer Monitor report, Q1 of 2022 (unpublished)

<sup>20</sup> HILDA stress indicators include inability to pay utility bills, mortgage repayments, rent, went without meals, unable to heat home, or sought help from friends, family, or welfare organisation.

**Chart 1:** Number of stress indicators of users of credit products (Q1 2022)




Caution should be applied when interpreting this data. These findings may be a better indicator of the financial situation of consumers of these products rather than financial stress these products may cause. While some BNPL users may experience increased financial stress, it is unclear the extent to which BNPL debts contribute to a person’s financial stress and harm. For example, the Australian Financial Security Authority (AFSA) found that in 2021, while around a third of personal insolvencies (34.2 per cent) had at least one BNPL debt, by value BNPL debts only represented 0.3 per cent of all unsecured debt in personal insolvency cases.<sup>21</sup>

**Checking whether consumers can afford BNPL credit**

Consumer groups and financial counsellors advise the exemption under the Credit Act from conducting an unsuitability assessment allows some BNPL providers to ignore a consumer’s financial circumstances, including whether they have sufficient income to meet the BNPL repayment obligations, or whether they are in default with other credit products. Some BNPL providers also automatically increase a person’s spending limit, which can lead to consumers having more debt than they may have initially needed or wanted.<sup>22</sup>

<sup>21</sup> AFSA’s Strategic Analytics analysis memorandum: BNPL Industry Analysis (unpublished).  
<sup>22</sup> For example, Afterpay offers its consumers \$600 upon signing up. This limit gradually increases as the consumer makes purchases and makes repayments on time.



In 2016, credit limit increases on Credit Act regulated credit products such as credit cards were prohibited. Some consumer groups have suggested a similar ban on unsolicited BNPL limit increases may be appropriate, noting many BNPL providers provide a maximum credit limit of \$2,000, typically lower than the lowest available credit limit for some credit cards. Some BNPL providers have claimed that unsolicited credit limit increases may help consumers' build confidence around using BNPL responsibly, as well as providing consumers with an incentive to use BNPL to demonstrate positive repayment history and increase access to credit.

### Some BNPL providers are managing the risk of consumer harm

Some BNPL providers advise they have implemented various risk management practices benefiting consumers, including credit checks, considering banking account information, and providing low credit limits when a consumer opens an account. Some BNPL providers use a consumer's credit score as a proxy for the person's creditworthiness and their ability to repay the loan. A credit score may be a good predictor of a consumer defaulting in the future.

Some BNPL providers limit potential consumer harms by restricting further use of the BNPL services following missed payments. This, combined with low starting spending limits, capped late payment fees, and no compound interest, means the consequence of default on BNPL debt is generally less significant than regulated credit products, such as credit cards. Consultations heard many BNPL providers in practice readily write-off bad debts and generally do not report defaults to credit reporting bodies. It also heard that BNPL providers often gave hardship assistance where requested, though consumer groups raised issues with the quality of hardship assistance.

## Complaints handling and hardship assistance

### Some consumers complained of unsatisfactory complaint resolution and hardship support

Some consumer groups advise of inconsistent or inadequate complaint handling procedures, and that BNPL providers do not resolve complaints to a satisfactory standard or in a timely manner. Some consumer groups and financial counsellors advise of inconsistent and unsatisfactory approaches to hardship assistance by BNPL providers.

For example, some BNPL providers do not provide an option for consumers to raise a complaint or request hardship assistance over the phone and instead direct consumers to use a smartphone app or email. Consumer groups found this makes it difficult to contact a provider to make a complaint or request hardship assistance. There is a possibility these concerns may also apply to credit licensees and regulated credit products.

Some consumer groups and financial counsellors told Treasury they faced difficulty with some BNPL providers not recognising them as acting on behalf of the consumer in the complaints process. The ASIC dispute resolution standard provides that lenders should be flexible with how they receive complaints and offer multiple channels of communication—including telephone, email, letter, social media, in person, or online.<sup>23</sup>

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<sup>23</sup> ASIC Regulatory Guide 271 – Internal Dispute Resolution, September 2021.

ASIC's standard also requires complaints handling mechanisms to be adequately resourced so that it operates fairly, effectively, and efficiently. However, it does not explicitly require lenders to have a phone number for raising complaints or hardship applications. BNPL providers advise they often approve most hardship assistance requests and provide relief similar to regulated credit providers such as payment deferrals, pausing fee charges, or debt and fee waivers.

A contributing factor may be the voluntary nature of the Industry Code which requires only signatories to be members of AFCA. Some of the complaints against BNPL providers may relate to activity aimed at reducing or minimising consumer harm. For example, consumers may complain about unexpected fees, unwanted credit limited increases, account lockouts following missed payments, or application refusals.

### AFCA receives relatively few complaints about BNPL

Consumer groups advise that many vulnerable consumers are not raising complaints to AFCA, claiming that many consumers do not know of AFCA or how to raise a complaint. During the 2020-21 financial year, AFCA received 767 complaints about BNPL products, representing only 0.01 per cent of the 5.9 million active accounts during that period.<sup>24</sup> This may be due to many BNPL providers resolving complaints directly with the consumer, including by writing-off fees or outstanding debts before the matter is considered by AFCA. As a result, few complaints may progress to AFCA.

Data from ASIC's Consumer Monitor suggests that on average, across the industry, only 52 per cent of consumer's reported they knew about their rights to make a complaint to an EDR agency. Consultations also heard that some BNPL providers do not provide sufficient information to consumers about AFCA for the consumer to make a complaint if they wished. Some consumers may avoid raising complaints in the fear of losing access to the BNPL account<sup>25</sup> or may be unwilling to complain considering the often-low value amount being disputed. Additionally, ASIC's Consumer Monitor found only 3 per cent of BNPL users reported wanting to make a complaint about the product in the prior 6-month period.<sup>26</sup>

## Excessive consumer fees and charges, including default fees

Some BNPL providers charge disproportionately high consumer fees relative to the debt

Many BNPL providers already operate under a legislated fee cap exemption in the Credit Act and charge fees less than \$200 in the first year, and \$125 each year thereafter (not including late payment fees) which often include fixed fees for establishing and managing BNPL accounts.<sup>27</sup> Some of these fees, in particular late payment fees, may be disproportionate compared to the value of the credit provided.

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<sup>24</sup> AFIA industry report: The Economic Impact of Buy Now Pay Later in Australia, June 2022.

<sup>25</sup> NB: many BNPL providers business model lock accounts that are undergoing dispute.

<sup>26</sup> ASIC's Consumer Monitor report, Q1 of 2022 (unpublished)

<sup>27</sup> Missed or late payment fees or default fees may be used interchangeably by BNPL providers, and for the purposes of this paper.

Curtin University research<sup>28</sup> found falling behind on the payment schedule for a \$40 purchase on 10 fortnightly repayments would result in an effective annual interest rate as high as 28.25 per cent for Afterpay, 29.32 per cent for ZIP, and 177.44 per cent for Humm – Little things. The report also found that, with a larger purchase of \$350, the effective annual interest rate is 14.61 per cent for ZIP and 12.05 per cent for Humm – Little things on 10 fortnightly repayments.

By way of comparison, the Reserve Bank of Australia (RBA) found the average annual credit card rate in Australia as of October 2021 was 19.94 per cent<sup>29</sup> – although this does not consider any annual fees. Similarly, high effective annual interest rate figures can result from using credit cards with high annual fees for only small purchases.

The BNPL industry advise they are addressing these concerns by requiring signatories of the Industry Code to cap their late payment fees. While some BNPL providers have set this cap, and legislation may be needed if disproportionate late payment fees persist as an issue. Some industry members advise a fee cap would set an industry standard on the fees BNPL providers charge, hindering competition where all providers will charge the maximum permitted amount.

## Non-participation in credit reporting

### Generally, BNPL debts are not reported to credit reporting bodies

Australia's credit reporting system holds information about a person's credit information, which can be used by credit reporting bodies to determine a person's credit score. Many lenders commonly use the credit information held by credit reporting bodies to conduct unsuitability checks. BNPL providers generally do not report default information to the credit reporting system, nor do they report information on credit limits, repayment history, and outstanding balances. As a result, there may be problematic gaps in a person's credit file due to the non-reporting of BNPL debts to the comprehensive credit reporting framework, noting that these amounts are typically small.

Currently, only Australia's four major banks need to provide their customers' positive and negative credit information to the credit reporting system under the mandatory comprehensive credit reporting regime. Participation in Australia's credit reporting framework is voluntary for all other licensed lenders, including smaller banks, non-bank lenders, payday lenders, and consumer lessors. There are further limitations on the reporting of credit information for unlicensed credit providers under the *Privacy Act 1988*.


As a result, consumers and lenders miss out on some of the benefits of credit information reporting. 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 access credit in the future (e.g., when applying for a mortgage).

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<sup>28</sup> Comparative analysis of credit card interest rates vs BNPL fees in the consumer credit market, Curtin University, published July 2022.

<sup>29</sup> RBA Statistical Table: Table F5 – Indicator Lending Rates. Accessed 14 November 2022.





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.

### An independent BNPL credit reporting database?

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.

### Lack of transparency – Product disclosure and warning requirements

Some consumer groups advise the terms and conditions of BNPL contracts are not clear and difficult to understand. As a result, some consumers do not completely comprehend the total cost of using a BNPL product, including the potential fees they may incur if they fail to meet repayment obligations. The variety of BNPL business models and fee structures may make it difficult for consumers to compare BNPL products and determine the best option for them. This issue applies to many credit products and is not limited to BNPL. ASIC's consumer monitor found consumer understanding of BNPL fees and charges improved slightly between 2020 and 2022,<sup>30</sup> but 30 per cent of BNPL users still do not understand all the fees and charges of their BNPL arrangements in 2022.

The absence of a legislated set of precontractual information and warning requirements on terms, conditions and fees may be contributing to inconsistent information quality and availability. The BNPL industry advised it has included commitments in the Industry Code to provide information in a clear and prominent manner about repayment schedules and fees.<sup>31</sup> The Industry Code also contains commitments for BNPL providers to give consumers timely reminders of their repayment obligations.

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<sup>30</sup> ASIC's consumer monitor report, Q1 of 2022, found that in 2022 year to date, 30% of consumers surveyed did not know the fees and charges of any BNPL arrangements. This was 35% in 2020, and 33% in 2021.

<sup>31</sup> 10.1 of AFIA's BNPL Industry Code of Practice.

## Unsolicited selling, advertising and using BNPL for essentials

Treasury understands BNPL is being advertised to pay for essentials, such as groceries and utility bills. Many consumer groups and financial counsellors advise the advertising of BNPL products encourages vulnerable consumers to use BNPL, instead of other community support available to them. For example, utility companies are encouraging consumers to use BNPL to pay for utility bills instead of payment plans that utility companies must offer by law.<sup>32</sup> BNPL providers are also advertising their products to consumers in-person, at department store check-outs, which may encourage consumers to spend more than they otherwise would.

Consumer groups advised some Indigenous communities and other vulnerable consumers were using BNPL (and other credit products) to purchase gift cards which are then used to purchase alcohol and essential groceries. The Industry Code does not permit using BNPL to purchase firearms or gambling services and commits its signatories to take reasonable and appropriate steps to ensure its merchants are not providing BNPL products for these transactions. The Industry Code is consistent with legislation prohibiting using credit cards for in-person wagering.

## Frictionless process, overselling, scams, and financial abuse

### Vulnerable consumers are being sold poor quality goods, financed by BNPL

Some consumer groups raised concerns around BNPL's "frictionless" sign-up process which may lead consumers to overspend and buy goods that they may not necessarily need or really want because it can take only a few minutes to sign-up to BNPL credit. Generally, consumers are only asked to provide basic personal information, debit or credit card information, and a digital image of their ID. Consultations also heard that increasing revenue of merchants accepting BNPL includes some consumers spending more than they can afford. Treasury also heard anecdotal evidence of pressure selling of low-quality solar panels and add-ons for used cars financed by BNPL, where the goods or add-ons are relatively poor quality.

### Parallel reforms to improve clean energy sector sales practices

BNPL providers focusing on the clean energy market advised the Clean Energy Regulator introduced reforms earlier this year to strengthen its enforcement powers over poorly behaving solar retailers. The solar and storage industry has also recently announced a 'New Energy Technology Consumer Code' which will be in place by February 2023 which should extend the existing consumer protection standards to cover new and emerging technologies. Further, an Australian Competition Tribunal ruling rejected assertions BNPL financing of energy products has led to consumer harm.<sup>33</sup>

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<sup>32</sup> Utility companies in New South Wales, Queensland, South Australia, Tasmania and the Australian Capital Territory are required under the National Energy Retail Rules to offer consumers a payment plan to pay bills for free.

<sup>33</sup> Australian Competition Tribunal: Application by Flexigroup Limited (No 2) [2020] ACompT 2, File number ACT 1 of 2019, date of determination 15 September 2020. Accessed 16 November 2022.

## Financial abuse and coercive control

Consultations heard cases of scammers or abusive domestic partners taking advantage of “frictionless” BNPL sign-up processes to facilitate certain purchases. Abusive partners may be using victim information to create accounts and purchase goods in a victim’s name. The Industry Code requires consideration be given to vulnerable consumers, including staff training commitments to help ensure they can appropriately deal with vulnerable consumers and consider specific life events such as family violence when assessing the vulnerability of a person.<sup>34</sup> These issues are not exclusive to BNPL, and BNPL providers are subject to the same know-your-client obligations under anti-money laundering and counter terrorism financing legislation as other credit providers.

## Refunds, return of good and unauthorised transactions

BNPL providers do not subscribe to the voluntary ePayments Code of Practice and do not have to cover fraud losses. The ePayments Code sets out the rules for determining whether a customer is liable to pay for an unauthorised transaction. Most banks, credit unions and building societies currently subscribe to the ePayments Code, along with several non-bank businesses.

Some consumer groups raised minor concerns regarding the lack of consistent consumer protections for reverse charging BNPL when goods are returned to the merchant and fraudulent transactions occur. Generally, customers are not liable for unauthorised transactions involving their accounts, provided they have taken reasonable precautions to protect such accounts. Consumer groups advised consumers may not appreciate the differing regulatory position of BNPL providers compared to other credit providers on chargeback processes due to a lack of standardisation and transparency. Some BNPL providers told Treasury they have effective and appropriate processes in place to facilitate refunds when requested by consumers.

### Questions:

- Can you provide examples of other areas of consumer harm or industry behaviour this paper has not discussed?
- What are the main contributors of consumer harm? What evidence supports this view?

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<sup>34</sup> 8.4 and 8.5 of the AFIA BNPL Industry Code of Practice.

# Options for regulatory intervention

## Guiding principles for an approach to regulating BNPL

Australian consumers have benefited from the rise of the BNPL industry, and it is important to ensure these benefits balance any changes to the BNPL regulatory framework aimed at addressing the risk of consumer harm. Treasury has used the consultation process to develop the following guiding principles to inform the options outlined below for a new regulatory framework for BNPL:

- It should improve consumer protections by addressing the main instances of consumer harm arising from BNPL products while continuing to ensure BNPL products are accessible to consumers.
- It should be flexible enough to allow new BNPL providers into the market and for new and existing BNPL providers to bring new financial products onto the market.
- It should respect the competitive nature of the market and the roles and interests of consumers, merchants, and providers in the BNPL sector.
- It should consider the existing regulatory arrangements for comparable regulated credit products, such as credit cards, small amount credit contracts (payday loans), consumer leases, and other types of personal loans.
- It should be practicably enforceable by a regulator such as ASIC in a cost effective and efficient way that minimises the risk of avoidance behaviour while considering the existing regulatory framework for financial products and BNPL industry self-regulation.

These guiding principles have informed the development of three broad options for public consideration and consultation. Generally, these options present varying degrees of regulatory intervention in the BNPL market. Treasury is open to considering alternative options and submissions should not feel limited to commenting on only the options presented in this paper.

### Questions:

- Are the guiding principles appropriate and fit for purpose to inform the development of a BNPL regulatory framework? What other factors should be considered?
- Of the three options below, which option do you think is most appropriate? Would you change any aspects of that option?
- What do you think are the issues with the other two options?

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

This option proposes a government-industry co-regulation regime, where the current BNPL industry Code is strengthened to address current gaps in coverage, supplemented with a bespoke affordability test legislated under the Credit Act. Key features of this proposal include:

- Amending the Credit Act to impose BNPL specific requirements on providers to check that a BNPL product is not unaffordable for a person before offering it to them.
- These bespoke provisions would provide for the scalable and efficient checking of a consumer's ability to afford the BNPL credit related to the overall value of the credit being provided.
  - For example, when lending below certain thresholds, a credit score check could be used as a proxy of a consumer's credit risk, and income and expenses information would only need to be considered against a risk assessment where a person is identified as a risky borrower.
  - Such an affordability test would not include requirements to verify a customer's financial situation or check if the provision of credit aligns with a person's needs and objectives.
- No requirement to obtain and maintain an Australian Credit Licence.
- The BNPL industry would work in consultation with government to strengthen various provisions in the Industry Code to ensure higher standards for BNPL providers. The strengthening of the Industry Code should seek to address any further concerns (in addition to existing commitments) relating to:
  - product disclosure and warning disclosure requirements;
  - access and standards of dispute resolution and hardship practices;
  - excessive consumer fees and charges, including default fees;
  - refund and chargeback processes;
  - advertising and marketing;
  - mitigating risks associated with scams, domestic violence, coercive control, and financial abuse; and
  - ensuring its compliance of these requirements are adequate.
- Certain provisions in the improved Industry Code could be enforceable by ASIC, subject to the industry body's application and ASIC's approval. The Code could also be mandated for all BNPL providers, however participation in the credit reporting framework would continue to be voluntary.
- The revised Industry Code would supplement but not override the bespoke affordability checks that would be specified in the Credit Act. ASIC would be able to issue regulatory guidance on the interpretation of the statutory obligations.

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

This option proposes to bring BNPL within the Credit Act's application to apply a tailored version of the RLOs to BNPL products. This proposal could be supplemented by a strengthened Industry Code.

Key features of the proposal include:

- Amending the Credit Act to require BNPL providers to hold an Australian Credit Licence, or be a representative of a licensee, with a requirement to comply with most general obligations of a licensee, including:
  - Internal and external dispute resolution, hardship provisions, compensation arrangements, fee caps and marketing rules.
  - The provisions could be calibrated to the level of risk of BNPL products and services. This could include exemptions from reference checking, and other obligations that do not relate to issues identified in the BNPL business practices.
- This option would not require merchants who offer BNPL products to consumers to be an authorised credit representative of the BNPL provider.
- As a licensee, BNPL providers will be able to engage more meaningfully with the existing credit reporting regime under the *Privacy Act 1988*, including repayment history information and hardship information in accordance with the Principles of Reciprocity and Data Exchange.
  - Participation in the comprehensive credit reporting framework would continue to be voluntary unless the provider is a big bank.
- BNPL providers would be required to assess that a BNPL credit is not unsuitable for a person, similar to the existing RLO framework, scaled to the level of risk of the BNPL product or service.
  - This may include removing some prescriptive requirements, such as verifying a person's financial documentation and checking that the BNPL credit aligns with the person's needs and objectives.
- BNPL providers would be prohibited from increasing a consumer's spending limit without explicit instructions from the consumer.
- Fee caps for charges relating to missed or late payments would be required, combined with additional warning and disclosure requirements.
- These legislative amendments would be supplemented by the strengthened Industry Code similar to that as described in Option 1, with parts of the Code enforceable by ASIC (subject to ASIC's approval).
- This option would not require merchants who offer BNPL products to consumers to be an authorised credit representative of the BNPL provider.

### Option 3: Regulation of BNPL under the Credit Act

This option would treat BNPL products similarly to other credit products regulated under the Credit Act, and require BNPL providers to comply with regulations, such as the RLOs. Key features of the proposal include:

- Amending the Credit Act to regulate BNPL products and services. Accordingly, BNPL providers would be required to hold an Australian Credit Licence or be an authorised representative of one.
  - BNPL providers would be required to check and satisfy themselves that a BNPL is not unsuitable for a person in accordance with RLOs.
- As a licensee, BNPL providers would need to comply with all licensee obligations, including the reportable situations regime, internal and external dispute resolution, compensation arrangements, ASIC reporting obligations, as well as Credit Act requirements including information sharing, warnings, and hardship provisions.
  - We do not expect this option would require merchants who offer BNPL products to be an authorised credit representative.
- A requirement that BNPL providers would need to allow consumers to set their own spending limit and a prohibition from increasing a consumer's spending limit without their permission.
- Fee caps for charges relating to missed or late payments would be applied, combined with disclosure requirements.
- BNPL providers would be better able to engage with the credit reporting regime to share and receive all credit information, including repayment history information and hardship information because they would be licensees.
  - BNPL providers would not be captured under the mandatory Comprehensive Credit Reporting regime unless the BNPL provider is a big bank.
- A revised Industry Code could include provisions to address issues not appropriately considered within the scope of the Credit Act, including setting industry standards, refund and chargeback processes, and providing guidance to BNPL providers on identifying situations of domestic violence, coercive control and financial abuse.
  - The industry could also choose to further strengthen its Code to ASIC's approved standard and set a higher industry standard than required by law.

## Supplementary reforms to support a new BNPL regulatory framework

The options discussed in this paper can all be supplemented by improvements beyond the Credit Act. These possibilities are discussed in more detail below:

- **Improving the financial capability of BNPL consumers.** The Australian Government currently provides information on BNPL aimed at educating consumers through:
  - the Moneysmart website – which provides general information on BNPL,
  - the Money Managed website– an online resource aimed at supporting young Australians, and
  - Commonwealth Financial Counselling – a voluntary, free and confidential service to help eligible people address financial problems.

Improving the financial capability of BNPL consumers would complement efforts to protect consumers through the regulatory options presented in this paper. For example, if consumers had a better understanding of BNPL fees and charges, debt liabilities, provider incentives, personal budgeting and alternative avenues for financial assistance (for example, the No Interest Loans Scheme), they may be less likely to experience financial stress and hardship.

- **Australia’s comprehensive credit reporting framework is required by law to be reviewed** and reports provided to the relevant ministers by 1 October 2024. The framework includes voluntary arrangements legislated under the *Privacy Act 1988* and mandatory arrangements applying to the big banks under the Credit Act.<sup>35</sup> These reviews could examine in greater detail how BNPL providers can better report the credit information of BNPL consumers. In September 2022, the Office of the Australian Information Commissioner published its review of the Credit Reporting Code,<sup>36</sup> which found that BNPL products have the potential to introduce additional complexity into the credit reporting framework for some consumers.
- **An enhanced role for ASIC as the regulator of BNPL.** Formally regulating BNPL under the Credit Act may warrant a corresponding extension of ASIC industry funding arrangements to allow ASIC to recover the cost of regulating BNPL from the BNPL sector. Further consideration could also be given to putting in place arrangements to monitor and measure outcomes arising from BNPL use and the effectiveness of any reforms and industry initiatives, including the collection and comparison of data on consumer outcomes associated with other credit products.
- **Payments surcharging.** BNPL providers typically have no-surcharge rules which prevent merchants passing on the cost of BNPL to consumers. The Reserve Bank of Australia has suggested changes to these arrangements could improve competition and efficiency in the Australian consumer credit market and create a more level playing field for consumer credit.

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<sup>35</sup> Under section 25B of the *Privacy Act 1988* and section 133CZL of the Credit Act.

<sup>36</sup> OAIC 2021 Independent review of the Privacy (Credit Reporting) Code, published September 2022.



# Bilateral consultations and next steps

## Bilateral consultations

To inform the development of this options paper, Treasury formally consulted with the organisations listed below, and informally consulted with many more as part of Treasury’s routine stakeholder engagement.

**Table 1: Options Paper Consultations**

Organisation type	Organisation name
BNPL providers	Afterpay
	Brighte
	National Australia Bank
	ZIP
	Payright
Peak industry bodies	Australian Financial Industry Association
	Australian Banking Association
	Australian Retail Credit Association
	National Retail Association
Regulators and government agencies	Australian Securities and Investments Commission
	Australian Financial Security Authority
	Australian Financial Complaints Authority
Consumer groups	Consumer Action Law Centre
	CHOICE
	Consumer Credit Legal Service (Western Australia)
	Financial Counselling Australia
	Indigenous Consumer Assistance Network
	Good Shepherd
	Financial Rights Legal Centre
	Circle Green
Foreign Governments	Canadian Department of Finance
	NZ Ministry of Business, Innovation & Employment

## Next steps

Treasury expects to undertake further targeted consultations with consumer groups, industry bodies, BNPL providers and regulators in the coming months.

These conversations will seek to further the Australian Government’s understanding of the BNPL sector, and formal feedback from submissions on the options presented in this paper.

The findings of this process will inform a government decision on the future regulatory arrangements for BNPL in Australia.

# Attachment A – Additional information

## Emergence of BNPL in Australia

The BNPL sector has been rapidly growing since its emergence in around 2015, when entities like Afterpay and ZIP began offering services to consumers to purchase discretionary small retail items, such as clothing and fashion items. Since then, BNPL has continued to evolve and expand to new products and service offerings. New start-up entities, established financial institutions (such as banks), and financial technology companies (such as PayPal) have recently joined the domestic BNPL market.

Currently in the Australian market, there are around 20 BNPL providers operating. BNPL arrangements come in many shapes and sizes, and offers range from low value, short-term products, such as Afterpay, Zip and Humm Little things, to high value long-term continuing credit products, such as Brighte's zero per cent interest payment plan and Humm Big things. However, the great majority of consumer usage is concentrated around low value short-term BNPL business models.

### BNPL consumer take-up

The Reserve Bank of Australia's Payment Systems Board found the number of active customer accounts increased from approximately 5 million to approximately 7 million accounts over the year to June 2022 (which includes persons holding multiple accounts).<sup>37</sup> The Payments Systems Board also found consumers spent \$16 billion on BNPL during the 2021-22 financial year. This was equivalent to approximately 2 per cent of Australian card purchases.

BNPL arrangements are used by consumers of all ages but are more popular amongst consumers aged below 35. More than half of those surveyed by AFIA who were aged between 18 to 34 were using BNPL in March 2022. The take up of BNPL has continued to grow across all age groups. Of note, between March 2021 and March 2022, BNPL usage in age groups between 35 to 44 and 45 to 54 both increased by approximately 20 per cent each.<sup>38</sup>

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<sup>37</sup> RBA, PSB Annual report 2022

<sup>38</sup> *Ibid.*

## BNPL business models

There is a range of BNPL business models in the Australian market, which differ by characteristics such as product availability, affordability checks and fees. Table 2 below shows a sample of the currently available BNPL business models.

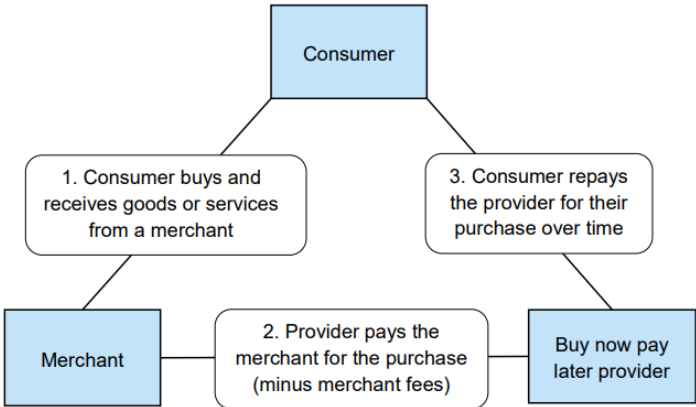
**Table 2:** Sample of BNPL business models (2022)

	Afterpay	Brighte	Humm Little things	Humm Big things	ZipPay	CBA	Paypal
Max loan	\$2,000	\$30,000	\$2,000	\$30,000	\$1,000	\$2,000	\$2,000
Loan term	6 wks	6-60 mths	10-20 wks	6-60 mths	No term	6 wks	6 wks

### Product availability

BNPL transactions allow consumers to receive goods and services from a merchant and pay for the transaction in instalments to the BNPL provider. The BNPL provider pays the full amount of the consumer’s purchase to the merchant, less any merchant servicing fees (figure 1). Many of the early entrants to the BNPL sector operate in a ‘closed loop’ system, where a BNPL product can only be accepted at merchants that have signed up with the BNPL provider (e.g., Afterpay and Brighte). More recently, the sector has seen BNPL products and services operate in an ‘open loop’ system which uses existing payment rails, such as Mastercard or VISA. Examples of an open loop system are StepPay by the Commonwealth Bank of Australia and NAB Now, Pay Later by the National Australia Bank. These products can be accepted by merchants without any additional agreement between a merchant, a BNPL provider and consumers can use these BNPL product anywhere Mastercard or VISA is accepted.

**Figure 1:** How BNPL arrangements works<sup>39</sup>



Note: This figure illustrates that when a consumer uses a buy now pay later arrangement to buy goods or services, the merchant is paid by the provider of the arrangement. The provider then collects repayments from the consumer to recover the upfront payment over time. Consumers can receive the goods or services immediately, well before the purchase price has been fully repaid.

<sup>39</sup> Figure taken from ASIC report 600: Review of buy now pay later arrangements, November 2018, p.6.

## Affordability check

BNPL providers have varying assessment practices to check whether a person can afford to repay BNPL credit. These practices range from no affordability checks, to checking of a person's credit score, or checking income and expense details by screen scraping bank account statements. Treasury has observed that providers that have loan credit worthiness assessment systems in place for other regulated credit products tend to have more developed affordability assessment processes for BNPL. Consultations also heard that some BNPL providers supplement the lack of upfront checks with product features that minimised the credit risk for a person, such as freezing of accounts upon defaults and initially providing only low credit limits.

While some providers conduct some affordability checks, BNPL providers' checks generally do not appear to satisfy the RLO requirements under the Credit Act. Of note, any checks by BNPL providers do not include any verification of financial information, nor do they consider whether the BNPL credit meets the needs and objectives of the person.

## Fees

BNPL products in Australia do not charge interest on owed amounts, and instead many providers charge consumers fixed account establishment fees, account keeping fees, and fees for missed or late payments. The type and amount of fees charged by BNPL providers varies significantly from product to product. Some BNPL products have no fees if consumers make repayments on time.

Some BNPL providers cap the amount of late payment fees they may charge a consumer for a transaction or in a year. However, the cap on late payment fees varies from product to product and there appears to be no industry consistency in the way the cap is set.

Some BNPL providers also charge fees to merchants, usually by taking a fee out of the purchase price that is financed by the BNPL provider. Merchant fees also vary significantly between providers and depend on the amount financed and the duration of the finance. For example, BNPL provided through card schemes, such as Mastercard and VISA, involve interchange-like fees being charged to the merchants' banks, which are then passed onto the merchant. These tend to be significantly lower charges than merchant servicing fees charged by BNPL providers that have a bespoke contractual arrangement with a merchant.

Usually, there are also contractual arrangements in place that prevent the merchant passing on this fee to the consumer. However, some surveys have indicated that some consumers are still seeing higher prices being charged for individual products if they seek to use BNPL (to cover the merchant fees). There are also concerns that merchant fees are being built into the prices of goods and services in general – even when they are purchased by persons not using BNPL. What this means is that some of the cost of using a BNPL product may be transferred to non-BNPL consumers who are partially absorbing a merchant's additional costs for participating in BNPL.

## Attachment B – International developments

### New Zealand

In November 2022, the New Zealand (NZ) Minister for Commerce and Consumer Affairs announced the Government's intentions to apply its *Credit Contracts and Consumer Finance Act 2003* (CCCFA) to BNPL arrangements.<sup>40</sup> Key requirements applying to BNPL include:

- Scalable affordability assessments – smaller loans below a threshold (following consultations) will be exempt from the requirement to assess affordability, so long as they carry out credit reporting. For loans above the threshold, BNPL lenders will be required to assess affordability.
- Additional obligations will apply to BNPL lenders who are exempt from affordability assessment requirements:
  - Comprehensive credit checks with a credit reporting agency; and
  - Repayment schedule and late fee disclosure requirements for each purchase.
- General lender responsibilities including assisting borrowers to make informed decisions and treating them reasonably and ethically.
- Borrowers will be protected from unreasonable default fees.
- Borrowers facing unforeseen hardship can apply to the lender to have their repayment contract varied.
- BNPL lenders will need to be part of an external dispute resolution scheme and provide details of the scheme if borrowers make a complaint or hardship application. Consumers will be able to receive compensation and statutory damages from lenders who breach relevant CCCFA rules.
- BNPL lenders will be required to provide information to borrowers who miss payments about financial mentoring services.
- BNPL lenders will have to disclose key information about credit contracts and any variations.
- Directors and senior management of BNPL lenders are required to be certified by the Commerce Commission to be fit and proper persons for their respective positions. Directors and senior management will be subject to due diligence duties.

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<sup>40</sup> Ministry of Business, Innovation & Employment (NZ Gov) media release: “Buy-Now, Pay-Later”.

## United Kingdom

In February 2021, following the release of the *Woolard Review – a review into change and innovation in the unsecured consumer credit market*<sup>41</sup>, the United Kingdom (UK) government announced its intention to regulate interest-free BNPL products. The UK government published a consultation paper<sup>42</sup> on its approach to the regulation of BNPL for public consultation on 21 October 2021.

In June 2022, the UK government released its response<sup>43</sup> to the submissions received from public consultation. The response announced that:

- The scope of regulation should capture BNPL and other currently exempt arrangements when they are provided by third-party lenders.
- The government would consider extending the scope of regulation to also apply to BNPL and exempt arrangements provided directly by merchants.
- The government will put in place exemptions for specific agreements where there is limited risk of potential consumer harm, and where regulation would otherwise adversely impact day-to-day business activities.
- The regulatory controls will be tailored under its consumer credit laws to products and the elements of lending practice most linked to potential consumer detriment.

The response also noted that the government will further engage with stakeholders to settle details of draft legislation by the end of 2022.

The UK response has yet to provide details of how affordability tests will apply – although it has stated that they will.

## United States of America

In the United States of America (USA), its consumer financial regulator, the Consumer Financial Protection Bureau (CFPB) published a report<sup>44</sup> providing key insights on the BNPL industry in the USA. The report made commitments for the CFPB to identify potential interpretive guidance or regulations to ensure that BNPL lenders adhere to many of the baseline protections that Congress has already established for credit cards, including making BNPL subject to appropriate supervisory examinations and developing appropriate and accurate credit reporting practices.

Regulation of BNPL in the USA varies between different state jurisdictions, where some states consider BNPL to be consumer credit and require state licensing or registration as well as compliance with state consumer credit laws, while other states do not require licensing or registration.

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<sup>41</sup> FCA The Woolard Review – A review of change and innovation in the unsecured credit market, published 2 February 2021.

<sup>42</sup> HM Treasury, Regulation of Buy-Now Pay-Later Consultation, October 2021.

<sup>43</sup> HM Treasury, Regulation of Buy-Now Pay-Later Response to consultation, June 2022.

<sup>44</sup> Consumer Financial Protection Bureau, Buy Now, Pay Later: Market trends and consumer impacts, September 2022.