



Regulating Buy Now, Pay Later in Australia: Submission Response to Options Paper

This submission was prepared by FinTech Australia working with and on behalf of its 400+ members



About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 400 fintech Startups, Hubs, Accelerators and Venture Capital Funds across the nation.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to drive cultural, policy and regulatory change toward realising this vision.

About this Submission

This document was created by FinTech Australia in consultation with its members. In developing this Submission, interested members participated in a conference call roundtable to discuss key issues and provided feedback to inform our response to Treasury's Options Paper.

Fintech Australia and its Members particularly acknowledge the support and contribution of our Policy Partner **Gadens Lawyers** (www.gadens.com) to the topics explored and developed in this Submission.



1. Introduction

FinTech Australia welcomes the opportunity to engage with Treasury on the future regulatory framework of buy now, pay later (**BNPL**) arrangements and to provide a submission to the BNPL Options Paper published by Treasury on 21 November 2022 (**Options Paper**).

We note that the Options Paper sets out three proposed options for a new regulatory approach to the BNPL market, with the stated aim *to maintain the benefits of accessing credit for consumers, whilst ensuring adequate consumer protections*.

2. Executive Summary

Fintech Australia members are of the view that the emergence of BNPL has delivered significant benefits to both the Australian economy and many consumers. The growth and success of BNPL has been a driving force behind fintech innovation in Australia, supporting competition and reducing costs in consumer finance.

Australian BNPL providers have scaled and exported globally, creating jobs and leading the way for other innovative payment technology and finance providers. This success has been fostered by Australia's track record of taking a considered, proportionate approach to regulating emerging products.

The Government now has the opportunity to establish a world-leading regulatory framework for BNPL which is targeted, proportionate and ensures Australia continues to punch above its weight in financial innovation.

Our Members are of the view that in effecting a sustainable regulatory framework for BNPL in Australia, the Government must:

- ensure proportionality in its response, reflective of the evidence of consumer harm in the BNPL sector;
- consider the prevalence of lower value BNPL offerings and afford a degree of proportionality, targeting and scaling in setting any proposed obligations;
- tailor the response to the sector and fairly balance the consumer demand for BNPL products with potential consumer harm;
- ensure any prescribed regulation is based on clearly defined and supported principles



and testing criteria, which can be objectively applied;

- acknowledge the commitments made by BNPL providers who are currently accredited under the Australian Financial Industry Association (AFIA)'s [BNPL Code of Practice \(BNPL Code\)](#) (noting also the separate independent review of the BNPL Code which is ongoing in parallel);
- ensure regulation is commensurate with the obligations of other marketplace providers, including as it applies to *affordability assessments* noted in the Options Paper, which should remain flexible in recognition of BNPL products' comparatively inherent low-risk nature, in comparison to other credit products in the market; and
- be mindful of the impact that regulatory intervention would have on market entry for new BNPL providers.

Above all, Fintech Australia is of the view that any regulatory change **must be proportionate to support innovation and allow growth** of the BNPL sector **and continued competition** with other credit products in Australia and beyond.

To that end, our Members are broadly supportive of:

- **Option 1** – and the mandatory application of certain parts of the BNPL Code as appropriate; or, **where necessary**
- **a lighter touch approach to Option 2** – in particular the application of RLOs which are scaled to the level of the risk and recognition that BNPL products are not aligned with many other credit products in the market.

There is strong opposition among members to Treasury's Option 3 proposal, which is regarded as detrimental to the BNPL industry and could mean that innovation and competition provided by BNPL providers across the financial system would be in danger of being lost.



3. Views on Options

Our members' views on the key themes under each Option are set out below.

Mandatory & enforceable BNPL Code

The BNPL Code is recognised as representing a fit-for-purpose regulatory framework that goes beyond existing credit regulations and enshrines international best practice standards for those accredited under the Code. Many Fintech Australia Members are therefore broadly in favour of strengthening the BNPL Code and making material parts of it mandatory for all accredited BNPL providers.

There is broad support for the enhancement and mandatory application of certain areas of the BNPL Code, such as those pertaining to:

- warnings and disclosure requirements,
- fees and charges,
- dispute resolution; and
- mitigation of risks associated with scams and financial abuse.

Enforceability by ASIC (noting the supplementary proposals for reform put forward in the Options Paper also) is generally agreeable, though Members are also supportive of AFIA retaining regulatory oversight of the BNPL Code. *Voluntary* participation in the credit-reporting framework under the *Privacy Act* also remains supported.

We note the BNPL Code is, in parallel with this consultation, going through its first independent review - a process which will provide insights and recommendations for how the BNPL Code can be best strengthened for its members. The BNPL Code has been designed to be proportionate to the risks of BNPL products and services, and how consumers engage with these products. Overall, our Members are of the view that the BNPL Code has been effective in generating good consumer outcomes and reducing harm. For example, it has resulted in consistently low rates of IDR and EDR complaints (during the 2020-21 financial year, AFCA received 767 complaints about BNPL products, representing only 0.01% of the 5.9 million active accounts during that period, while only 0.34% of active BNPL accounts were subject to financial hardship arrangements as at 30 June 2021).



The BNPL Code is therefore generally seen as an effective tool in regulating the BNPL industry and – together with the existing regulatory framework applying to BNPL providers – a proportionate and sufficient way to regulate BNPL in Australia.

Amending the Credit Act – Affordability Testing Proposal

There was agreement among our members that Treasury's proposal to amend the *National Consumer Credit Protection Act, 2009 (Credit Act)* to incorporate an express requirement on BNPL providers to check that a BNPL product is *not unaffordable* for a person before offering it to them requires further review and clarification from Treasury. The proposed affordability testing criteria and proposals as set out in the Options Paper are not supported.

There is strong resistance to any affordability assessment requiring BNPL providers to carry out verification of a consumer's financial situation or an assessment whether the provision of credit aligns with a person's needs and objectives – this is viewed as overly prescriptive and onerous for many BNPL providers and not tailored to the unique nature of BNPL products.

In our members' views, the testing criteria applied to '*affordability*', similar to *suitability* (under existing Responsible Lending Obligations (**RLOs**) and proposed under *Option 2*) are extremely subjective and it would be challenging to derive sufficient meaning from *proxy credit information* to make any meaningful determination as to the affordability of the BNPL product for a consumer.

While certain members are of the view that the introduction of a bespoke affordability assessment regime for BNPL products has merit, there is agreement that assessments should remain non-prescriptive (at law) and flexible to allow different tools to be applied, with clear safe harbour provisions for low-risk and low-value BNPL products. Members suggest that a variety of methods could be used as part of an affordability check, including reviewing existing customer repayment data or a soft credit check; better information is also likely to be provided about a customer in the future via Open Banking/CDR powered solutions.

Some members also suggested consumers could be incentivised to use a personal finance management tool that would highlight to the consumer the timing of instalment payments, timing of other expenses, and how much total BNPL purchasing they are able to afford etc. Reference has also been made to the BNPL Paywatch initiative, currently being implemented in New Zealand by the BNPL industry, in partnership with NZ credit bureau, Centrix, which involves an indebtedness indicator/alert system to monitor and manage customer debt, as a valuable example and guide for innovative industry self-regulation.



Affordability Testing Exemption - Low value transactions

We note the Options Paper refers to '*scalability*' and our members agree that this provides a good starting point in ensuring that any test will be proportionate to the level of risk involved in any transaction.

However, the blanket requirement to conduct an affordability test for all transactions does not recognise the low value transaction nature of the majority of BNPL offerings. A prescriptive test will challenge small BNPL operators and is not viewed as commensurate or proportionate to many players in this market. For higher value transaction products, soft credit checks are a more proportionate and effective assessment tool to the traditional RLOs designed for high-cost revolving credit products and services.

Further, an individual's existing repayment history for BNPL products should be used to inform affordability assessments and support the nature of applicable capped spending limits in individual circumstances.

Accordingly, in addition to an upper transaction value threshold (ceiling), below which an affordability test should apply, we would also propose a *lower transaction value threshold* (floor), below which providers should be *exempt* from conducting an affordability test. Members are of the view that low value transaction should be treated equally to ordinary household subscriptions of same or similar value, which do not require such affordability checks.

Fintech Australia therefore proposes that lower value transactions – e.g. up to \$800 – be exempt from an affordability test, as applying the test:

- would unfairly impact BNPL providers who focus on the provision of high volume, low value transactions;
- is not commensurate of similar consumer offerings of the same value and level of financial commitment (such as ordinary household subscriptions) which are unregulated;
- would disproportionately impact the affordability and availability of low value BNPL products for consumers; and
- it is unclear how a reduced affordability test on the lowest end of the scale would give sufficient meaning to the subjective criteria of '*affordability*'.



Members' views varied on how to set the threshold for an exemption, but most suggested consideration should be given to the threshold settings in the BNPL Code and similar approaches being considered in overseas jurisdictions, like New Zealand.

Affordability Testing – Alternate Proposals

The following proposals are put forward for consideration:

Nature of Transaction	Example values	Regulatory Proposal	Affordability Testing
Low Value	Up to \$800	<ul style="list-style-type: none"> Existing 'Suitability of Products and Services' review under Clause 12 of the BNPL Code. BNPL providers monitor customers on an ongoing basis – e.g. to identify / alert on certain customer groups where late fees are incurred on a recurring basis - to determine suitability of any future BNPL products and services for such customers. 	Exempt
Mid-range transaction values OR multiple low value advances	\$800 - \$2,000	<ul style="list-style-type: none"> Obtaining the express consent from the customer - by way of written declaration or other clear confirmation prior to purchase - that the product is 'not unaffordable' for them is a proportionate action. This consent may be informed by increased product information disclosures and consumer support offerings; while increased hardship awareness training for BNPL provider staff will also help to facilitate and further mitigate financial risk for consumers. Alternative procedures could apply for 'risky borrowers' or those who have previously informed the BNPL provider of their vulnerability, but those (majority of) customers who have consistently demonstrated positive repayment behaviour should not be unfairly impacted 	Applied as amended/stated



		by additional measures.	
Mid-range to higher value transactions	\$2,000 - \$30,000	<ul style="list-style-type: none"> • Noting the above concerns raised on applying traditional RLOs, proposal to rely on the existing 'suitability' testing procedures set out in clause 11 of the BNPL Code. • Members are not averse to suitability testing processes being amended (as proposed under the Treasury's Option 2 proposal) to align with the existing RLOs in place on suitability, provided that any such amendments are proportionate and scaled to the level of risk. • Regulatory efforts should focus on the alignment of the suitability assessment already in the BNPL Code. 	Applied as amended/stated

Australian Credit Licence

We note that Option 2 proposes a requirement on BNPL providers to hold an Australian Credit Licence (**ACL**), or be otherwise authorised as a representative of a licensee, with a requirement to comply with the general obligations of a licensee.

While members are broadly supportive of BNPL providers obtaining and holding an ACL in the first instance, they also noted that significant modernisation of the credit reporting system is required for it to be effective in the BNPL context. Suggestions in relation to credit reporting included the ability to collect BNPL data in real-time and ensuring a consumer's BNPL history is reflected in their credit file in a way that does not negatively impact their credit score.

If an ACL requirement is implemented, FinTech Australia supports staged transitional arrangements which consider ASIC's credit licensing service levels (currently 150 days to apply or vary a credit licence) and the expected influx of new applications. The [2021 reforms](#) to implement a credit licensing requirement for debt management firms provides a good example of a transition to licensing for a well-established sector. These firms were required to have taken steps to comply with the transitional arrangements to continue operating by having applied for or varied an ACL (or have representative arrangements in place) by a prescribed date.



Members also noted that licensee obligations, including affording internal and external dispute resolution, hardship provisions, compensation arrangements, fee caps, and marketing rules, must be appropriately calibrated to the level of risk of the applicable BNPL product or service, including exemptions from reference checking and other obligations that do not relate to issues identified in BNPL business practices. For example, requiring mandatory credit checks on a product representing a negligible proportion of the debt of vulnerable consumers will only serve to exclude people whose lives and financial flexibility are improved by BNPL products and services. Any proposal for mandatory credit reporting for BNPL is also likely to see consumer outcomes deteriorate significantly in Australia as consumers will be forced to turn to increasingly high-cost options for credit.

Reduced RLOs

Certain reduced RLOs under Option 2, which focus on the provision of assistance and documentation to assist consumers with, and provide documents relevant to, their decision-making process with regard to BNPL offerings (e.g. to consumer's rights, aspects of the BNPL products, or an estimate of costs associated with a product etc) are generally supported – noting that full transparency with customers is a key focus for many BNPL providers. However, it must be recognised that BNPL presents a substantially lower risk of harm to consumers, when compared to many traditional credit products, and a different regulatory threshold and regime is therefore appropriate. Soft credit checks to assess affordability are generally a more effective way to regulate the provision of these products.

Accordingly, Fintech Australia Members, in principle, support Option 2 – but caveat that a proportionate and calibrated approach to incorporating BNPL into the Credit Act must be undertaken. Any reduced RLOs must be tailored to the applicable BNPL product being offered to consumers and the risks – and benefits – provided by that product.

Additional comments

We also note that there are a number of additional and parallel reviews which may have an impact on the regulation of BNPL and on which clarity would be appreciated prior to the introduction of any regulatory intervention for BNPL providers. This includes:

- Point of Sale Exemption Review – We would appreciate clarity from Treasury on the current state of this review which was flagged by the Government last year. It was understood that this was being proposed to take place in parallel with this BNPL regulatory review. Noting the impact that the removal of any POS exemption – or any



separate proposed licensing regime for merchants – may have on the BNPL industry, our Members are keen to understand the current status of this review.

- Industry Funding Model Review – We note this review is separately being considered – and that while the existing methodology for calculating levy for credit providers takes a tiered/graduated approach, it is unclear how Treasury proposes that BNPL might be treated under the IFM. Further clarity from Treasury is welcomed on this as the ongoing IFM Review is finalised.

FinTech Australia appreciates the opportunity to provide its views to Treasury. We welcome any further discussions on the appropriate regulatory framework for BNPL providers and any questions on the views set out in our submission.