

Consumer Credit Unit
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

CreditReforms@treasury.gov.au

Regulating Buy Now, Pay Later in Australia

BNPL has been an interesting innovation in the Australian credit and payments system. It has taken advantage of loopholes in the legislation to expand dramatically. While the innovation can be value adding there are also aspects of its current operation which can cause significant financial consumer harm.

Your consultation asks for comments on three alternative general approaches, and lists some other aspects of regulation.

In my mind the solution is relatively simple and appropriate legislation and regulation would involve the following.

1. **Amend the Credit Act.** As outlined on page 7 of the consultation document, the Credit Act only applies when four conditions of the credit contract apply. The fourth of these is that “there is, or may be, a charge for providing the credit”.

I would recommend removing that condition, such that the Credit Act applies whenever there is a deferred payment involved (by natural persons or strata corporations for personal domestic or household use, or for purposes relating to investment properties). This would involve effectively redefining the term “credit” to include any deferred payment obligation even if there is no explicit or implicit charge. Enabling deferment of a payment is, virtually by definition, granting credit.

Making such a change would lead to deferred payments such as for ex post payment of consumption over some period (such as utility or telephone bills) being classed as credit. In a number of cases that may not be appropriate, but this could be overcome by providing ASIC with the authority (conditional on public disclosure) to grant relief from the relevant provisions of the Act.

Recommendation 1: Change the legislative definition of credit to encompass granting of any deferred payment regardless of terms and conditions involved, and provide ASIC with authority to provide relief from any resulting legislative requirements where deemed appropriate.

2. **Remove the Point of Sale Exemption.** The ability of commercial enterprises to act as introducers of credit for customers engaged in a contemporaneous goods purchase transaction is fraught with problems. Vulnerable consumers can be enticed into taking on credit which they cannot afford and which may be excessively expensive. Under current legislation this can occur without

the introducer being designated as a representative of the credit provider or having its own Australian licence. The Hayne Royal Commission recommended removal of this exemption.

Current technology and payments systems developments have meant that opening an account with a BNPL provider can be done at a merchant's payments terminal – and it is that ease of opening of an account when undertaking a goods purchase which carries most risk. If customers already have an account with a BNPL provider, then the purchase decision and payments/credit decision become more independent.

Removing the Point of Sale Exemption (in conjunction with the redefinition of credit proposed above) would bring the opening of a BNPL account clearly under the Credit Act scope and lead to improved credit granting decisions. Potentially BNPL operators would need to use, or find preferable, alternative methods for opening accounts for new customers – separate from a mechanism involving a simultaneous goods purchase. (A customer could for example be able to open an account from a merchant's terminal but not when undertaking a current goods purchase). Existing account holders would face the same choices as currently apply in purchasing goods and deciding which payments/credit process to use.

Recommendation 2: Remove the Point of Sale Exemption for merchants offering BNPL.

- 3. Remove the Ability to apply a No-Surcharge Rule to Merchants.** Currently BNPL operators can apply a no-surcharge rule on merchants, preventing them from charging a different price when a BNPL transaction occurs. In this way merchants are unable to recoup the costs to them of customers using BNPL with the merchant then having to make a payment to the BNPL operator based on the value of the goods sold. It is thus the merchant who is bearing the cost of the credit extended to the customer by the BNPL operator. The customer does not know the cost of the credit they are being granted, and may choose the BNPL option even though from a societal perspective it may not be efficient. Merchants may feel obliged to offer BNPL facilities to maintain a competitive position in their product markets (because other merchants are doing so) even though they involve inefficient, expensive, credit.

Allowing merchants to apply a surcharge to goods purchased using BNPL, to compensate them for the charges they must pay to the BNPL operator makes the cost of the credit involved transparent to consumers – who are the ultimate decision-makers about BNPL use. This would enhance efficiency in this credit market and put market pressure on BNPL operators to reduce costs and charges to merchants

Recommendation 3: Remove the Ability of BNPL providers to apply a no-surcharge rule on merchants offering BNPL facilities.

Kevin Davis,
Emeritus Professor of Finance, The University of Melbourne
December 15, 2022