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

Via email: creditreforms@treasury.gov.au

Re: Buy Now Pay Later regulatory reforms

Thank you for the opportunity to make a submission to this Exposure Draft consultation. The Finance Brokers Association of Australasia represents more than 11,900 members of the financial services and consumer credit industries in Australia.

Introduction

At the outset, we recognise that Government supports the ongoing viability of BNPL and that the proposed reforms are undertaken to support the BNPL industry while introducing long-overdue consumer protection measures. The proposed reforms establish a very light-touch regime which strongly favours the credit provider. This is very different to other sectors impacted by the NCCP legislation which effectively bear the burden of proof of demonstrating suitability for a consumer.

FBAA members have seen first-hand the significant damage done to consumers' credit files through excessive use of BNPL products. Most consumers are unaware of the consequences of utilising BNPL arrangements.

BNPL may be seen to offer easy, low cost access to defer payment on goods and services the consumer cannot otherwise afford. The reality is that for every BNPL application:

a) it hits the consumer's credit file and lowers their credit score;
b) it consumes disposable cashflow which other lenders take into account when performing serviceability assessments for more significant credit contracts such as mortgages and asset finance; and
c) the late payment fees represent a significant credit cost relative to the small amounts being accessed.

Both ASIC and ACCC have repeatedly warned on this issue.

We note some providers do not charge late fees and that ASIC observed a reduction in late fee revenue derived from BNPL providers during the covid period, however this was attributed to stimulus payments and other causative attributes that were unique to the covid period and which has since passed. Consumers are facing record levels of cost of living pressure.

Legislating a light-touch BNPL regime serves to endorse BNPL as a legitimate option to consumers. By reducing BNPL providers' NCCP Act obligations this may create a risk that consumers gravitate towards more BNPL use to manage their cashflow. Consumers are oblivious to the other harms it can cause.

We have seen regular situations of consumers using BNPL to pay for essential goods and services and then using pay advance services to access their wages early to meet their BNPL obligations. They overcommit on expenditure because they can defer repayments and then pull forward their wages (also paying fees for this service) to repay the purchases they could not afford to make. This creates a spiral of dependency. It strangles free cashflow and leaves consumers with no safety net.

It is also common for consumers to make hardship applications to credit providers and then use the additional cashflow gained from hardship variations to enter into further BNPL contracts. Consumers making hardship applications now have an expectation the credit provider will automatically offer some form of variation. The cause of a consumer's hardship has become almost irrelevant. Where it was once an expectation that credit providers should offer support for temporary hardship caused by unforeseen circumstances, many credit providers are forced into long-term arrangements and offering concessions to consumers that have caused their own cashflow shortages by prioritising other expenditure over meeting their secured commitments.

In the current climate, this is understandable since if a credit provider does not offer any hardship variation, the decision is subject to review by AFCA. In most cases AFCA will order the credit provider to make some hardship variation whether it is warranted or not. Consumers are also seeking to extend hardship variations citing lack of available income to resume making payments on credit contracts while during the period of their hardship variation they continue to access BNPL.

BNPL contracts are not incapable of harming consumers.

To properly protect consumers, measures must result in consumers having greater awareness of the impact that even a single BNPL application can have on their eligibility for other credit and the impact it has on their credit file which can affect their cost of credit. Measures must also protect consumers from "stacking" where consumers are lulled into a false sense of safety around entering into BNPL arrangements with numerous providers on the thinking that each is only a small, short-term commitment that will be quickly cleared. If BNPL providers are not required to take into account the number of other arrangements a consumer has in place then they are able to operate unfettered to make their own offer regardless of how many other contracts a consumer has in place. This is inconsistent with previous regulation of products such as small amount credit contracts where providers are required to inquire about the number of other contracts in place.

Specific matters

Regarding the proposed section 133BXC, we do not agree that BNPL providers should be excluded from the prohibition against making unconditional representations to a consumer that they are

eligible to enter into a credit contract with the licensee. This is currently a prohibition under s128(aa) and (ba) of the Act.

A BNPL provider is still required to undertake a modified form of assessment of unsuitability. The purpose of the prohibition under s128 is to discourage credit providers from making misrepresentations to consumers about their eligibility for credit.

Unqualified promises to offer credit have the greatest impact on vulnerable consumers and those with significant credit impairment that prevents them from obtaining credit elsewhere.

Exempting BNPL providers effectively tells them they can make unconditional representations to consumers about their eligibility for credit. If they are able to make such representations, then the assessment of unsuitability in whatever form it takes is a mere formality since the credit provider has already determined it will offer credit to the consumer. BNPL providers (and their representatives) should not be exempt from s128(aa) and (ba) and should still be required to qualify any statements to consumers about their eligibility for credit.

S133BXD

We agree that BNPL providers should be able to identify the consumer's requirements and objectives from the transaction itself. We support the presumption in s133BXF that a contract would be not unsuitable if for an amount of $2,000 or less. We have long supported this approach for many other forms of credit contract also.

We can see that s133BXD (6)(a) and (c) are open to abuse. These provisions allow a BNPL provider to rely on information provided by the consumer or to rely on presumptions to meet their responsible lending obligations. Consumers frequently provide incomplete or misleading information in credit applications. This is why ASIC has historically placed heavy emphasis on verification as a licensee obligation. If a licensee can rely on predetermined presumptions, then it will simply presume everyone is eligible. Both of these provisions will be exploited by BNPL providers. s133BXD(6)(b) permits a licensee to apply a general policy about the nature of inquiries necessary. This is less open to exploitation because a licensee will still need to develop a policy that meets the NCCP obligations. It could not, for example, develop a policy that it will make no inquiry.

In relation to the target market determinations, it will be important for product issuers to identify that their products are aimed at vulnerable sectors. Vulnerable and credit impaired clients would be a significant percentage of any BNPL operator's portfolio. Anyone capable of paying for items without deferring it through BNPL would not trouble themselves with BNPL and would not damage their credit file for it. It is likely most Ministers considering this Bill would never have availed themselves of BNPL. They should have regard to this while deliberating the Bill. The BNPL target market is predominantly those with restricted cashflow, existing heavy liabilities, limited income and no savings.

Representatives

As it is presently written, s64 permits a licensee to authorise a credit rep where certain conditions are met. The appointment is invalid (of no effect) pursuant to subsection 64(4) where s64(5) elements are present. S64(5)(c) invalidates the appointment where a proposed representative is not a member of the AFCA scheme. Because of this provision, all credit reps of a licensee must hold individual membership of AFCA.

The Exposure Draft seeks to carve out BNPL representatives from the requirement to hold AFCA membership (albeit in a convoluted language style that has been chided by the ALRC). **This is the perfect opportunity for Government to deliver on a recommendation from the 2021 review of AFCA to remove the requirement for ALL credit representatives to hold AFCA membership.**

Recommendation 14 from the report from the review of AFCA in 2021 was that "the National Consumer Credit Protection Act 2009 should be amended to no longer require authorised credit representatives to be members of AFCA". Government accepted this recommendation [1].

The Bill should be amended to give effect to this recommendation so that the requirement to hold AFCA membership for ANY credit representative is removed.

This would benefit not only BNPL but all of industry. It is an amendment that is long overdue.

Multiple Contracts

The Bill does not appear to deal with multiple contracts. The Bill uses the term "*initial contract*" in multiple places and there is no definition of *initial contract* (other than in the body of certain sections). The term *initial contract* appears to be used for contracts both above and below $2,000.

At a minimum we believe this term needs to be better defined. We also suggest that an *initial contract* could be the first contract a BNPL provider enters into with a particular consumer. If a BNPL provider enters into subsequent contracts, then it could not rely on the presumption of suitability and would need to conduct an assessment of capacity. This would prevent a single BNPL provider from entering into multiple contracts with a single consumer without undertaking any additional inquiry for multiple contracts. On our reading of the Bill, every new contract is an initial contract regardless of whether it is the consumer's first contract with that particular BNPL provider or their tenth.

It is also important the subsequent BNPL providers take into account how many other BNPL contracts a consumer has. Government should give consideration to a limit beyond which any new BNPL provider must undertake further inquiries. For example, the Bill could provide that where a consumer already has 3 BNPL contracts in place, the BNPL provider must fully comply with the responsible lending obligations in Chapter 3 of the Act. Similar requirements were made of SACC providers.

[1] Government response to the Review of The Australian Financial Complaints Authority Nov 2021

Conclusion

While we recognise Government's desire to support the BNPL industry, we can see the proposed legislation has been heavily influenced by lobbying from the largest financial institutions that continually seek to have consumer protection legislation obligations watered-down. Government is truly beholden to the large financial institutions of this country.

Already exempt from acting in the consumer's best interests, large financial institutions now lobby to offer lightly-regulated access to credit for vulnerable consumers who are so uninformed or so desperate that they would load themselves up with BNPL obligations believing such contracts are cheap and harmless. They are often anything but.

BNPL has the potential to perpetuate the debt cycle as much as any other credit product. Quite often , BNPL consumes the very last of a consumer's disposable income because they have exhausted all other recourse to finance and no other credit provider can offer them credit because they do not pass serviceability requirements under the responsible lending obligations. Government is considering exempting BNPL providers from the obligation to inquire about a consumer's capacity to service the credit contract so that financial institutions can continue to offer finance to consumers who have no more capacity to service.

Small amount credit providers and consumer lessors have been all but extinguished by heavy-handed regulation. Mortgage brokers are subjected to higher obligations than banks through the imposition of a best interests duty, conflicted remuneration and clawback provisions and their income and businesses are interfered with by large financial institutions on a regular basis. Against this, Government continues to pave the way for large financial institutions to do what they wish.

We recognise that not offering our support for these reforms will have no impact on the outcome. We cannot, in good conscience, support reforms such as these when our broker communities are hurting.

There is an opportunity for Government to review the framework holistically and make meaningful changes that benefit more than just BNPL providers, however the rush to appease the real masters, being the large financial institutions in this country will result in longer legislation, more carve outs, more regulations and more instruments.

By making further modifications and carve outs in the NCCP, Government is repeating the mistakes of the past such as with the Corporations Act which the ALRC has identified as an unworkable mess. The NCCP Act is heading in the same direction as the Corporations Act. This is a very poor outcome for all but those who seek to profit from offering BNPL to vulnerable consumers.

Yours faithfully

[redacted]

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