



National Legal Aid

# Treasury Consultation Buy Now Pay Later Legislation

Submission by National Legal Aid

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**National Legal Aid Secretariat**

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## Introduction

National Legal Aid (NLA), representing the Directors of the eight Australian State and Territory Legal Aid Commissions (LACs), welcomes the opportunity to make a submission to the Treasury Consultation on the draft Buy Now Pay Later legislation.

## About National Legal Aid and Legal Aid Commissions

LACs are independent, statutory bodies established under respective State or Territory legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

NLA brings together the practice experience of Australia's eight LACs. Each LAC provides a wide range of services to people experiencing circumstances of disadvantage. Services include legal advice, legal task assistance, ongoing legal representation and advocacy, information, legal and non-legal referrals, community legal education, and social support services.

NLA always seeks to offer policy input that is constructive and is based on the extensive experience of LAC lawyers in the day-to-day application of the law in courts, tribunals, and Ombudsman schemes. We believe that this experience provides valuable knowledge and insights into the operation of the justice system and can contribute to government policy development. NLA also endeavours to suggest policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAC lawyers who work in consumer law have extensive experience providing specialist advice and representation to vulnerable clients with multiple Buy Now Pay Later contracts. They also provide advice to clients as well as lawyers and financial counsellors in relation to mortgage stress, housing repossession, debt, contracts, loans, insurance, telecommunications, and unsolicited consumer agreements.

## Overview of consumer law experience

LACs working in consumer law have extensive experience:

- (a) Assisting clients who are in financial hardship as a result of one or multiple Buy Now Pay Later (BNPL) Products. It is not uncommon to see a consumer with up to 10 different BNPL products.
- (b) Supporting financial counsellors who are assisting their clients who are in financial trouble as a result of BNPL products.

Increasingly, LACs are seeing more and more consumers making use of BNPL products for day to day living expenses. LAC lawyers commonly see BNPL products used by our clients to:

- (a) Purchase household groceries.
- (b) Purchase essential services such as dental, school supply and veterinary services.

We see BNPL products specifically marketed as a way of being able to afford to buy food (e.g. Afterpay is prominently advertised in some supermarkets).

**Case study 1:** *Sam is an Aboriginal man. He lives in a remote area and receives a Job Seeker payment as his source of income. Sam finds it hard to buy everything he needs to live comfortably, such as food, petrol, and electricity. Sam relies on borrowing a few hundred dollars from a buy now pay later provider each month to pay for these essential expenses.*

**Case study 2:** *Amber is a young mother to three children. She receives Centrelink payments and works part-time as her source of income. Amber entered into multiple BNPL arrangements within a period of one year to purchase essential goods, like a fridge and mobile phone. The loan amounts were \$500 - \$1000, totaling over \$8,000. When Amber saw the amount owing on her credit file, she did not think it could be hers as she felt she had never borrowed that much money.*

More and more consumers are using BNPL products in a similar way to payday lending and small amount loan products. This includes using BNPL products as means to be able to afford essential household expenses. As a result, these clients are placed in significant financial hardship.

As a result of the significant and increasing financial harm that BNPL products are causing consumers, NLA welcomes the draft legislation which will see BNPL products regulated under the National Consumer Credit Protection Act (NCCP) and National Credit Code (NCC). Most significantly, it will mean that all BNPL providers will require AFCA membership to continue to operate.

This is a good first step towards properly regulating the harm which is being caused to consumers by BNPL products.

NLA notes that the draft legislation creates a separate category of Low-Cost Credit Contracts (LCCC) to regulate BNPL products. Different rules will apply to LCCC products. However, these products cause similar harms, in that consumers experience similar if not the same outcomes from being placed into financial hardship, as a result of either BNPL products or other credit products currently regulated under the NCCP and NCC. As a result, NLA sees no basis for drawing a distinction between BNPL products and other credit products. NLA suggests there are better outcomes for consumers if there is consistency in the regulation of all credit products under the NCCP and NCC.

### Specific Comments in relation to the legislation

(a) 1.47 of Explanatory Memorandum states *“Licensees that are LCCC providers will, when the Bill takes effect, be required to choose between:*

- *the current ‘full’ version of the RLOs in Divisions 1 to 4 of Part 3-2 of the Credit Act; and*
- *the new RLOs for LCCCs, which allow the requirements to expressly scale according to certain risk factors.”*

1.53 goes on to state that “elections must be in writing, and the licensee making the election must keep a written copy for the specified period (approximately 6 years, depending on stated circumstances). Where a licensee does not elect to be subject to the modified regime (or elects for only certain LCCC products to be subject to the regime), the existing RLO regime will apply to the extent relevant.”

Further, the table on p.9 of the Explanatory Memorandum states that “LCCC providers must have and review a written policy (unsuitability assessment policy) that sets out how the provider will assess whether the contract is unsuitable.”

To ensure transparency for consumers and especially if there is a dispute about the LCCC provider, NLA recommends that LCCC providers should be required to publish if they elect to comply with the existing laws or the modified RLO regime. This information should be readily available to relevant stakeholders, including consumers, their representatives, the regulators and AFCA. Further, if electing to comply with the modified RLO regime, the company’s Unsuitability Assessment Policy should be published in plain English and made easily accessible to consumers, their representatives, the regulators and AFCA.

(b) Regulation 28HAD sets out the requirements on a company to inquire about a consumer’s financial situation. If a LCCC provider is providing an amount of credit to a consumer less than \$2,000, then the LCCC does not need to obtain the consumer’s consumer credit liability information as part of their suitability assessment.

For LAC clients, even small amounts of debt can cause significant distress. We recommend that consumer credit liability information be obtained and considered by LCCC providers as part of their suitability assessment. There should not be a distinction between processes for assessing suitability regardless of the amount of the credit being sought.

This approach will have the further benefit of simplifying the regime for consumers and industry.

(c) 1.32 of the Explanatory Memorandum provides that the intensity of the suitability assessment that is required “will be influenced by consideration of a range of factors relating to the risks of unaffordable lending occurring and expected harm mitigation if unaffordable lending does occur. These factors primarily relate to the risks arising from the product and target market, and non-responsible lending processes to mitigate these risks and harms. Broadly speaking, the factors are expected to operate to effect a reduction in what is reasonably required in conducting reasonable lending assessments”.

In NLA’s view, the proposed laws are not proscriptive enough about the factors that need to be considered in developing and applying suitability assessments to ensure that ASIC has the necessary framework to take appropriate regulatory action.

The proposed laws should equip ASIC to provide relevant guidance to industry and consumers, especially regarding minimum standards for Unsuitability Assessment Policies, and to take appropriate enforcement action where LCCC providers are not complying with the intention of the law.

### **Additional protection for door-to-door sales**

Some LACs have assisted a number of clients who have fallen victim to targeted door-to-door sales practices involving the sale of solar panels. Clients have included Aboriginal people and older Australians with limited literacy. Some clients report being told by sales representatives that the solar panels are *free* or are talked out of attempting to exercise cooling off rights by sales representatives.

Many clients are unaware that they have signed up to BNPL contracts until they receive letters of demand or statements of claim. In some cases, the solar panels are faulty or are not installed correctly meaning that clients are liable to pay ongoing BNPL instalments for goods that don't work. We recommend banning door-to-door sales of LCCC in response to this conduct. (Please refer to case study 3 below as an illustration of this point.) This could be easily achieved by amending section 156 of the National Credit Code to make it clear that LCCCs fall within the prohibition on canvassing credit at home.

### **156 Canvassing of credit at home**

#### *Prohibition on canvassing credit at home*

- (1) A credit provider must not visit (personally or in the person of an employee or agent) a place of residence for the purpose of inducing a person who resides there to apply for or obtain credit, except by prior arrangement by the credit provider with a person who resides there.

Civil penalty: 5,000 penalty units.

#### *Offence*

- (1A) A person commits an offence if:
  - (a) the person is subject to a requirement under subsection (1); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units.

- (2) A person who visits another's residence for the purpose of offering goods or services for sale and who offers to provide or arrange for the provision of credit to finance the sale will not be taken to have called for the purpose of inducing a person to apply for or obtain credit **unless the credit applied for is a LCCC product.**

**Case study 3:** *Our client is a First Nations woman from a remote area of NSW. She was at her home when a solar panel vendor knocked on her door on a day of about 38 degrees wanting her to sign up to a solar panel contract. Our client was in financial hardship and was still going through grief (following the passing of her mother) at the time that the solar panel vendor approached her. Our client offered the solar panel vendor a glass of water because of the extreme heat but told him that she wasn't interested because she didn't have enough money. The solar panel vendor left her property but returned a further three occasions over the coming months until finally she relented and agreed to enter the contract with the solar panel vendor with the financing for the panels to be provided by a third party under a Buy Now Pay Later agreement. The client defaulted on the BNPL agreement within a period of months which resulted in the entire cost of the \$15,000 becoming due and payable. This caused extreme stress to our client.*

## Conclusion

Thank you for the opportunity to provide a submission to the Review.

Should you require any further information please do not hesitate to be in touch.

Yours sincerely,



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