Close Lending Loopholes

JOINT CONSUMER SUBMISSION TO TREASURY

RE: Regulating Buy Now, Pay Later in Australia, Options paper

DECEMBER 2022

This submission is signed by 22 organisations as part of the Close Lending Loopholes alliance:

Contents

Introduction

Thank you for the opportunity to comment on the Treasury's options paper *Regulating Buy Now, Pay Later in Australia*.

This is a joint submission on behalf of 22 consumer organisations who make up the *Close Lending Loopholes Coalition* including Australia's leading consumer advocates, charities, community groups, legal centres, family violence organisations, and financial counselling practitioners. A full list of signatories are available at **Appendix A**.

Buy now, pay later (**BNPL**) credit products exploit loopholes in Australia's credit law to sell people into unaffordable debt. This unregulated credit industry is causing serious economic and social harm to people, families and households across the country. At present, these harms far outweigh the benefits BNPL brings to the economy.

We recommend Option 3 be implemented to apply full regulation of BNPL under the *National Consumer Credit Protection Act 2009* (***the Credit Act***), and the *National Credit Code* (***the Credit Code***). We also support applying additional consumer protections beyond what is outlined in Option 3.

Options 1 and 2 would fail to protect consumers from the harms they face today, as detailed in the options paper and this submission. Option 1 relies heavily on industry self-regulation through a modified version of the current industry code. The widespread evidence of BNPL providers signing people up to debts they cannot afford to repay demonstrates why the industry cannot be trusted to protect consumers through self-regulation.

Both options 1 and 2 would create a bespoke form of regulation for BNPL. Not only would this increase regulatory complexity; it would leave in place a number of the very legal loopholes that have allowed BNPL products to emerge. In all likelihood, the government would find itself within a few years having to develop further regulation to rein in a new wave of credit products that have been designed to exploit these loopholes. That would be a perverse outcome that must be avoided.

BNPL is a credit product and should be regulated in the same way as other credit products, including credit cards and personal loans. Option 3 is the only way to ensure that people sold BNPL products have access to essential consumer protections, BNPL providers will still be free to operate, but crucially will be prevented from selling people into unaffordable debt and the regulator will have a consistent regulatory regime upon which to monitor and oversee the credit market.

Consumer research on Australia's Buy Now, Pay Later industry

Nationally representative research shows that the Australian community expects full regulation of the BNPL products under the *Credit Act*, and that people have access to strong consumer protections. CHOICE found that 88% of Australians agree that BNPL loans should have similar protections as credit cards.[1] Further, 87% of Australians agree that BNPL providers should have to check someone's capacity to repay a loan as part of the application process, as credit card providers are required to do.[2]

In December 2022, CHOICE asked over 6,000 people about their experiences with BNPL products, and their views on this industry.[3] Here is a sample of consumer sentiment:

> *"It is simple, people are getting into more and more debt with this new method of buying items. It is still purchasing on credit and accordingly should be covered by the same legislation as credit cards."*
>
> *"Buy Now Pay Later operators must be obligated to ensure that approved customers have the financial ability to make the proposed loan repayments when due. I strongly believe that current regulations pertaining to providers of personal loans, credit cards, etc. should also be in place for Buy Now Pay Later merchants."*
>
> *"Buy Now Pay Later targets and exploits the most vulnerable people in our community. It's purely a business exercise for the companies involved. There is no reason why they should not be compelled by the same rules as banks, in order to protect vulnerable people."*

CHOICE's nationally representative surveys conducted in June and in September 2022 found that a significant number of people are being sold into unaffordable BNPL debt:

- 1 in 7 BNPL users were sold more than 20 BNPL loans in the past year.[4]
- 1 in 5 BNPL users missed or had been late with a payment for a BNPL service.[5]
- Of those users with late payments, 2 in 5 have taken out another loan to pay for BNPL fees or debts.[6]
- 1 in 4 BNPL users used this credit product to pay for essential products or services.[7]

The ability to buy essentials in the first place is also being affected: 1 in 4 BNPL users who have missed or been late with payment had to cut back on essentials to pay for BNPL fees or debts.[8]

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[1] CHOICE Consumer Pulse January 2022 is based on a survey of 1,078 Australian households. Quotas were applied for representations in each age group as well as genders and location to ensure coverage in each state and territory across metropolitan and regional areas. Fieldwork was conducted from 17th to 31st of January 2022.

[2] CHOICE Consumer Pulse January 2022.

[3] In December 2022, CHOICE asked 6015 supporters and members about experiences of themselves and people they know.

[4] CHOICE Consumer Pulse June 2022 is based on a survey of 1,083 Australian households. Quotas were applied for representations in each age group as well as genders and location to ensure coverage in each state and territory across metropolitan and regional areas. Fieldwork was conducted from 13th to 28th of June 2022.

[5] CHOICE Consumer Pulse September 2022 is based on a survey of 1,090 Australian households. Quotas were applied for representations in each age group as well as genders and location to ensure coverage in each state and territory across metropolitan and regional areas. Fieldwork was conducted from 6th to 26th of June 2022.

[6] CHOICE Consumer Pulse September 2022.

[7] CHOICE Consumer Pulse September 2022.

[8] CHOICE Consumer Pulse September 2022.

Many of these consumers would likely be better served by accessing financial hardship through their service providers, no interest loans, or seeking independent financial counselling.

Many more would have their financial situations improved if income and emergency support measures and the social safety net were adequate enough to reduce their reliance on BNPL credit - a situation only deteriorating with current inflationary pressures.

But until the Federal Government fully regulates the BNPL industry, BNPL providers will be able to keep exploiting the loopholes in the *Credit Act* and sell more people into unaffordable debt.

Overview of submission

This submission is broken up into 4 sections.

The first section is a **summary of our position, directly answering the questions posed** in the options paper.

The second section details the **extensive consumer harms caused by BNPL products** supported by quantitative and qualitative evidence from our work with people who were sold BNPL loans.

The third section provides a more detailed explanation of why **BNPL should be regulated in the same way as other consumer credit products,** including credit cards and personal loans, and why we support Option 3 with additional protections.

The fourth section provides a brief explanation why **Options 1 and 2 don't stack up**.

Appendix A provides a list of signatories to this submission.

Appendix B provides further explanation of our proposed method for implementing Option 3.

Appendix C is a glossary of terms used in the submission.

1. Summary and answers to questions posed in the options paper

Can you provide examples of other areas of consumer harm or industry behaviour this paper has not discussed?

Drawn from our organisations' extensive work with consumer using BNPL products, this submission provides further evidence of harm and industry behaviours in addition to those identified in the options paper. The additional areas of consumer harm identified in this submission include:

- BNPL makes it harder for people to manage their money, disempowering those experiencing financial difficulties;
- BNPL impacts upon First Nations communities in specific ways;
- BNPL providers collect data well beyond what is needed, increasing risks of financial harm to consumers; and
- Wage advance products and other poorly regulated forms of credit are leading to harms similar to BNPL.

What are the main contributors of consumer harm? What evidence supports this view?

BNPL is credit and can cause consumer harm just like all forms of credit. There are however a number of unique characteristics to BNPL that make it likely that its use will increase a consumer's overall debt levels and contribute to financial over-commitment. These characteristics variously include:

- the way it is structured over varying payment periods or instalments;
- the ease of on-boarding and general lack of "friction";
- the minimum amount of information required to open and use an account;
- its reliance on digital channels for distribution and ongoing engagement with customers;
- the ease of obtaining and running multiple BNPL accounts at once, and/or multiple purchases running concurrently on one BNPL account; and
- the promoted availability of BNPL to pay for essentials.

The fact that the BNPL industry is not regulated like other forms of credit also is a key contributor to the harms allowing BNPL to:

- impose a variety of excessive consumer fees and charges, including default fees;
- hide the full picture of a prospective borrower's credit worthiness;
- conceal the true costs of using BNPL;
- engage in inappropriate and exploitative advertising, marketing, and sales tactics;
- provide poor hardship assistance and complaints handling;
- complicate refunds, returns and rectifying unauthorised transactions; and
- proliferate regulatory avoidant business models.

Are the guiding principles appropriate and fit for purpose to inform the development of a BNPL regulatory framework? What other factors should be considered?

We support the guiding principles identified by the Treasury to inform the development of a new regulatory framework for BNPL providers. We also recommend that the principles developed to regulate credit under the *Credit Act*[9] needs to also inform the development of the BNPL regulatory framework. That is, regulation of BNPL needs to:

- improve the conduct of the industry over time;
- address consumer harms;
- support the development of a market environment in which all credit providers act honestly, fairly and act with competence to carry on their businesses;
- empower BNPL users who suffer a loss because of poor behaviour to obtain redress and compensation;
- prevent dishonest or incompetent providers from continuing to operate;
- encourage prudent lending;
- impose sanctions in relation to irresponsible BNPL lending; and
- introduce accountability on all parties to a credit transaction, borrower, credit assistant and lender alike to conduct themselves honestly and transparently.

Of the three options, which option do you think is most appropriate? Would you change any aspects of that option?

Consumer groups support Option 3 as most appropriate with a number of changes. BNPL providers are causing significant harm and full regulation of BNPL in line with Option 3 is the only way to effectively address those harms.

BNPL is credit and, as credit, it needs to be regulated in the same way as other credit products. BNPL must therefore be subject to the provisions of both the *Credit Act*, and the *Credit Code*. The reasons for this are to ensure:

- identical baseline protections for consumers of credit regardless of business model, with some nuances to reflect the particular risks of various products;
- a level playing field for industry competitors;
- identical powers and tools for the regulator to effectively monitor the industry and enforce the law; and
- a sufficiently robust regulatory framework to address *all* the harms currently being caused by BNPL.

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[9] See Paras 2.14, 3.16 and 3.17 of the *National Consumer Credit Protection Bill 2009 Explanatory Memorandum*

This can be implemented in a number of ways but the easiest and recommended way would be to close regulatory loopholes by:

- removing the exemption for interest-free continuing credit contracts at section 6(5) of the *Credit Code* (Schedule 1 to *the Credit Act*);
- amending section 5(1) of the *Credit Code* so that the definition of credit does not require that a charge is made for providing the credit;
- removing the short-term credit exemption at section 6(1) of the *Credit Code*, which is currently relied on to escape regulation by some BNPL models, wage advance products and a range of other credit products;[10] and
- if exemptions are required for other forms of credit,[11] then these should be separately reviewed, considered and narrowly defined.

Regulating BNPL under the existing credit law would ensure that BNPL providers hold, and meet the requirements of, an Australian Credit Licence (**ACL**) including:

- full responsible lending obligations (**RLOs**) including verifying financial information and the requirements and objectives test;
- the requirement to do all things necessary to ensure that services are engaged in efficiently, honestly and fairly;[12]
- the reportable situations regime, to allow the Australian Securities and Investments Commission (**ASIC**) to detect significant non-compliant behaviours early and take action where appropriate;[13]
- internal and external dispute resolution to promote fairness, honesty and professionalism in the BNPL industry;[14]
- compensation arrangements to reduce the risk that losses sustained by consumers cannot be compensated by a credit licensee; and
- competence and training requirements to further promote professionalism.

Further, relevant sections of the credit law that currently apply to other equivalent parts of the credit market should also be applied to BNPL, including:

- prohibiting BNPL providers from making unsolicited limit increase offers and entitling consumers to decrease limits to ensure BNPL is free from misleading, manipulative or abusive conduct;

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[10] Treasury has indicated it intends to consult on other forms of unregulated credit and particularly wage advance in the new year. We will provide further detailed commentary on the basis for removing the section 6(1) Credit Code exemption in response to that consultation.

[11] Such as the No Interest Loan Scheme (**NILS**) run by Good Shepherd.

[12] S47(1)(a) of the *Credit Act*

[13] See: ASIC, Regulatory Guide RG 78 Breach reporting by AFS licensees and credit licensees

[14] s47(1)(h) and (i) of the *Credit Act*

- subjecting BNPL to the Protected Earnings Amount (**PEA**) provisions of the Small Amount Credit Contract (**SACC**) regime to ensure equivalent protections are provided for very low income consumers; and
- mandating BNPL participation in the credit reporting regime to provide a more complete picture of a consumer's debts and liabilities to lenders.

Finally, the following additional consumer protections should be introduced to address unique elements of BNPL including:

- introducing a cap on late fees and charges, given their centrality to the model and harms that can arise;
- removing no-surcharge rules and prohibit vendors promoting BNPL by inflating the price of goods and services to hide the cost of credit;
- prohibiting BNPL debt being paid from a credit card that can lead to a debt spiral; and
- removing the Point of Sale Exemption to ensure credit in the form of BNPL is not inappropriately promoted through aggressive sales tactics and interventions.

What do you think are the issues with the other two options?

Options 1 and 2 do not stack up. They propose a framework that would be wholly inadequate to address the causes of harm outlined in the options paper. Both seek to make too many concessions to the BNPL industry at the expense of meaningful consumer protections for whom there are no adequate and effective alternatives. They maintain an unequal playing field, which is distorting the market. They also contradict the recommendations of the Financial Services Royal Commission (**FSRC**) and proposals of the Australian Law Reform Commission (**ALRC**) to simplify the law and remove exceptions and loopholes.

Further problems with Options 1 and 2 are that:

- a self-regulatory code would enshrine little to no regulatory oversight over BNPL providers;
- codes should not do the work more properly the role of legislation;
- maintaining exemptions the BNPL would perpetuate distortion in the credit market;
- introducing scaled down RLOs or a weak affordability test is inappropriate given consumers are suffering harm as a result of becoming financially overcommitted to these products;
- verification is essential to substantiate information being provided and ensure accountability on all parties to a credit transaction;
- they would not include the requirements and objectives test, which helps ensure that the credit provided is suitable;
- all unsolicited limit increase offers including those with informed consent should be prohibited to prevent further debt;
- self-regulation is inappropriate and full regulation is essential to ensure clear oversight;

- scaled down participation in the credit reporting regime would obscure the full extent of consumers' liabilities.

2. Consumer harms caused by BNPL products

The consumer harms arising from the poorly-regulated BNPL industry are broad-reaching and extend beyond those outlined in the options paper. Unaffordable lending practices, consumer behaviour and harms

There are a number of unique characteristics to the BNPL industry that make it likely that its use will increase a consumer's overall debt levels and contribute to financial over-commitment. As outlined in the introduction, these characteristics include:

- the way it is structured over varying payment periods or instalments;
- the ease of on-boarding and general lack of "friction";
- the minimum amount of information required to open and use an account;
- its reliance on digital-only character channels for distribution and ongoing engagement with customers;
- the fact that it is easy to have numerous BNPL accounts at one time and/or to have multiple purchases running concurrently on one BNPL account;
- the promoted availability of BNPL to pay for essentials.

What this has led to is significant financial hardship, stress and distress. In September 2022, CHOICE's nationally representative survey found that close to 1 in 3 (32%) of BNPL users struggled to pay BNPL fees or debts.[15]

The impact of this is not only limited to causing or worsening financial hardship. A range of studies indicate that financial stress is linked to poor mental health, particularly amongst young people that make up a sizeable portion of the BNPL market.[16]

The options paper has identified some of the unaffordable lending practices, subsequent behaviours and consumer harms. We provide further evidence to support those factors and of the broader impact of BNPL products on consumers.

BNPL encourages overconsumption and over-commitment

BNPL providers sell people into loans they cannot afford, increasing the risks of overselling, overconsumption and over-commitment.

The US Consumer Financial Protection Bureau found that the sales practices of BNPL providers influence the purchasing decisions of consumers.[17] BNPL providers promote their value to retailers as increasing 'incremental sales'; that is revenue generated because of their platforms

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[15] CHOICE Consumer Pulse September 2022

[16] Young people's financial strategies: insights from the 2022 Australian youth barometer, Monash Centre for Youth Policy and Education Practice, October 2022

[17] US Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Buy Now, Pay Later: Market trends and consumer impacts, September 2022

that would not have occurred without them and repeat usage.[18] Incremental sales are also promoted to retailers in Australia, both by individual BNPL providers,[19] and the industry association.[20] This points to the fact that many BNPL don't simply shift their existing purchases to BNPL credit; they are spending (and borrowing) more than they otherwise would.

The lack of friction in obtaining BNPL credit including the speed and ease of on-boarding makes it easier for lenders to sell poorly regulated loans to consumers that in turn encourage them to act on impulse and discount the future in favour of the 'now'.[21]

CCSLWA found BNPL credit is being used by some predatory car dealers to circumvent lending limits set by traditional lenders and spend more. In these cases, some of the purchase price is being split off the main price and put on BNPL transactions to get higher car loan amounts over the line.

Case study 1 – Steve's story

Steve[22] was 19 years old when he purchased a secondhand car in November 2020. He told the dealership he could only afford repayments of $50 a week as he was working casually at the time. He was told that with his $3000 deposit, the onsite lender would provide finance for a total of $19,500, inclusive of a warranty.

The $19,500 loan was rejected, and so Steve told the dealership that he wanted to cancel the contract. However, the dealership suggested a workaround. The amount of $17,000 would be obtained through the loan application, and the further $2500 to cover the car's warranty would be obtained through buy now, pay later provider Humm.

Steve now needed to pay the lender $75 a week for the car loan, and Humm a further $48 a fortnight, leaving him out of pocket by almost double the amount he had initially said he was comfortable paying.

He also wasn't told that the 'extended warranty' had a $3000 limit on it, so when the car's head gasket blew some three months after its purchase, he was left uncovered for the $12,000 the mechanics said it would cost to replace the entire engine.

The young man is now left without the money to fix his broken car, with a warranty that doesn't cover him and with large sums owing to both the car dealership and to Humm.

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[18] Page 64, US Consumer Financial Protection Bureau

[19] For example, "The analysis in this study breaks down this substantial economic activity to identify a total of $3.1 billion in net benefit to Australian merchants and consumers in 2020. This includes $6 billion in incremental merchant sales through higher customer conversion rates online, larger basket sizes, and an increase in repeat purchasing. On average, merchants experienced a 7.7 per cent increase in sales by partnering with Afterpay." Afterpay Economic Impact, Australia 2020, April 2020

[20] "The gross merchant benefits from accepting BNPL, comprising incremental sales and cost efficiencies, total approximately $2.75 billion. Incremental sales represent the 'new revenue' that BNPL has helped accepting merchants generate, over and above their sales through non-BNPL channels." AFIA, The Economic Impact of Buy Now Pay Later in Australia, June 2022

[21] We note too that these qualities can have a greater impact on particular cohorts such as neurodiverse community members including those with ADHD for whom impulsive spending may be an issue they are more prone to experience: see ABC, ADHD can make it harder to manage your money. Here's some tips to help, 31 May 2019. The Bravery Trust too reports that the clients that they work with (including those with trauma related diagnoses, such as PTSD, and those disconnected from their previous social support networks), are vulnerable to using BNPL to support impulse purchases of material goods in response to their mental health needs and longing for return to a lifestyle they can no longer afford.

[22] The names used throughout the case studies in this submission have been changed for privacy reasons.

Source: CCLSWA and CHOICE[23]

BNPL loans in this form are likely to be invisible to the regulated lender's responsible lending assessments if they occurred after the main purchase. The government should ensure BNPL providers are subject to RLOs including the requirements and objectives test, and participation in the credit reporting regime to help address the harms around such behaviour.

Once people have a BNPL account or multiple accounts they also find themselves subjected to automated limit increases that can increase the pressure on already indebted people.

Case study 2 – Antony's story

Antony is a teenager living in the outer suburbs of Melbourne. He contacted us earlier this year and told us he was overwhelmed by his BNPL debts. He said he had lost his job a few months prior and was due to start a new job soon.

Antony said he had at least three BNPL accounts (with AFIA BNPL Code signatories) that he had opened when he was employed and he owed an estimated $5000 across them. He said he used BNPL to buy some big ticket items, but had also paid for groceries when his mother couldn't afford them. Antony told Consumer Action that over time the BNPL providers had automatically increased his spending limits, but he had stopped paying them since he lost his job.

Source: Consumer Action Law Centre

See also **Olivia's story**, below in *There is a lack of transparency – Product disclosure and warning requirements*

The nature of the BNPL frictionless business model means that increased incremental sales and repeat purchases are only delivered by some people taking on unsustainable debts that threaten their ability to meet non-BNPL financial obligations.

Lending of this nature also calls into question the economic benefits of BNPL. While hailed as an innovation that has helped the economy, any economic benefit necessarily relies on viewing increases in consumption and spending as inherently good. This is only true if the increased economic activity is based on affordable credit that can be comfortably repaid. The impact of BNPL also contradicts to the current goal of the Reserve Bank of Australia (**RBA**) to reduce inflation by raising interest rates. If Australians turn to BNPL to counteract the costs incurred via increased interest rates, the RBA's efforts to reduce demand may be less effective than desired. Further, retail associations publicly acknowledge that some members cover the costs of BNPL transactions by increasing their prices across the board, an inflationary pressure in itself.

[23] CHOICE, Car dealers using buy now, pay later to get around responsible lending limits, 6 April 2022

Requiring BNPL providers to meet RLOs, participate in credit reporting, and be prohibited from providing unsolicited limit increases are essential tools to address these harms.

BNPL providers promote loan stacking and multiple accounts

Loan stacking – that is, the use of multiple BNPL accounts across multiple concurrent lenders - is commonplace.

Case study 3 – Patricia's story

Patricia is an almost 70-year old Aboriginal Elder. Her sole income is Centrelink's Aged Pension and after her rent and other expenses are taken into account, she has almost no surplus income each fortnight.

Patricia rang the Mob Strong Debt Helpline seeking our assistance. She had multiple debts with multiple BNPL providers, the aggregate total of which is just under $13,000.

Financial Rights were able to obtain Patricia's bank statements which showed the following levels of BNPL usage and complexities:

05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,129.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,124.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,119.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,114.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,109.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,104.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,099.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	1,094.17
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.90	1,088.27
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	6.00	1,082.27
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	6.00	1,076.27
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	7.50	1,068.77
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	7.50	1,061.27
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	7.50	1,053.77
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	7.50	1,046.27
05/07/22	Debit Card Purchase Openpay St Kilda Aus	8.00	1,038.27
05/07/22	Debit Card Purchase Openpay St Kilda Aus	8.00	1,030.27
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	8.00	1,022.27
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	9.50	1,012.77
05/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	10.00	1,002.77
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	10.50	992.27
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	10.50	981.77
05/07/22	Debit Card Purchase Afterpay Melbourne Aus	13.75	968.02

08/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	690.25
08/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	685.25
08/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	5.00	680.25
08/07/22	Debit Card Purchase Afterpay Melbourne Aus	7.50	672.75
08/07/22	Debit Card Purchase Afterpay Melbourne Aus	7.50	665.25
08/07/22	Debit Card Purchase Super Petz Tuggerah Aus	7.99	657.26
08/07/22	Debit Card Purchase Openpay St Kilda Aus	8.00	649.26
08/07/22	Debit Card Purchase Afterpay Melbourne Aus	9.50	639.76
08/07/22	Debit Card Purchase Afterpay Melbourne Aus	9.50	630.26
08/07/22	Debit Card Purchase Afterpay Melbourne Aus	13.75	616.51
08/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	18.74	597.77
08/07/22	Debit Card Purchase Humm Bnpl Adelaide Aus	27.12	570.65

Source: Mob Strong Debt Help C231132

Examples of loan stacking are rife and can be seen in **Scott's story**, the **Omenuko family's story** and **Rowena's story** below.

Loan stacking is reflected in the workload of financial counselling and capability practitioners. The 2022 Good Shepherd practitioner survey found that 84% of financial counselling and capability practitioners reported having clients with BNPL debts who have tried to manage the debt by opening additional accounts.[24]

A key finding of Financial Counselling Australia's survey of financial counsellors was the ease of access to BNPL which sold people into multiple debts:

> *"Most of my clients have at least one or two different BNPL running which severely impacts their ability to cover essentials."*[25]

Case study 4 – Experience of veterans

Veterans supported by Bravery Trust have often transitioned from a military wage, and military subsidies for living costs, to a pension based on their level of incapacity. The incomes of clients are typically above the low-income threshold (i.e. above Centrelink level incomes) but are well below their previous incomes, and often are below that of a 'comfortable' or middle-income level compared to the wider community.

Due to their income level, these clients often feel overly confident in their ability to manage BNPL. Once patterns of consumption using BNPL are established by using one account with lower credit limits, Bravery Trust clients have reported increases to the credit limits and becoming more inclined to use additional accounts simultaneously. Taking out multiple accounts becomes particularly prevalent when the client is at the point of requiring the additional BNPL credit to secure necessities like groceries due to the automatic payments on their already existing accounts leaving them less than needed for daily goods.

[24] Good Shepherd Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability report, November 2022

[25] Page 10, FCA, It's Credit, It's Causing Harm and It Needs Better Safeguards: What Financial Counsellors Say About Buy Now Pay Later, December 2021

Once multiple accounts are taken out and the total BNPL amount owing has increased, the debt quickly becomes unsustainable and outstrips the ability of clients to maintain repayments and still support their daily costs of living.

Source: Bravery Trust

Sydney University analysis of four BNPL provider transactions on credit cards and debit cards at a major Australian financial institution found that 40% of BNPL users have multiple active BNPL accounts, and that those who do hold multiple accounts have 85% more BNPL spending on average than single BNPL account holders.[26] The research concluded that multiple BNPL holders are riskier. Relative to consumers with a single BNPL account, the average multiple BNPL account holder is more likely to be from a lower socioeconomic area, more likely to be receiving government benefits, has a higher credit card utilisation rate, and uses more personal loans.

Over half of Good Shepherd practitioners see clients with BNPL debt who have to use credit cards or loans to make repayments, or require loans from family or friends.

Loan stacking and the use of multiple accounts – particularly on top of other loans, can, and often does, lead to a debt spiral.[27]

Case study 5 – Scott's story

"I started off with small personal loans and when that amount was exhausted, I got one credit card and then another credit card to pay off that credit card and so forth."

"What accelerated the personal and psychological pressure was signing up for BNPL schemes. It seemed a very good idea at that time: we could pay for groceries or put everyday expenses on gift cards, and then pay them off in regular payments fortnightly or monthly over a short period of time."

"But once there was a number of BNPL payments running on top of all the other expenses and credit cards, there was no way I could keep up. It all snowballed quickly to a stage where I had no idea how I was going to make the payments just on the credit cards and still pay school fees and other family expenses."

Source: Way Forward

Preventing multiple concurrent accounts is key to addressing many of the harms that arise from the use of BNPL credit.

[26] Boshoff, Elizabeth and Grafton, David and Grant, Andrew R. and Watkins, John, Buy Now Pay Later: Multiple Accounts and the Credit System in Australia (October 15, 2022). Available at SSRN: https://ssrn.com/abstract=4216008 or http://dx.doi.org/10.2139/ssrn.4216008

[27] There are many people who are in financial difficulty because they were sold into a BNPL loan on top of their existing debts. 80% of Way Forward clients experiencing long-term financial difficulty with a debt repayment plan, have used at least one BNPL arrangement in the last 12 months. Way Forward Balancing Act Exploring how financially vulnerable people juggle their debt, BNPL and household finances Client Survey 2022

People are cutting back on essentials to pay BNPL fees and debts

People are prioritising payments for BNPL fees and debts over essential goods like groceries, and services, like electricity bills. [28] Many people are led to believe that a BNPL loan is their last chance to access credit.

BNPL payments are also usually the first debt to be paid, since these are scheduled to be automatically paid from a customer's account meaning consumers have less control over repayments compared with other essential items like utilities or rent.

Good Shepherd found that 73% of their financial counselling and capability practitioners have clients who have missed essential payments or cut back on essential items just to make repayments to BNPL providers.

In September 2022, CHOICE found that 1 in 4 BNPL users who have missed or been late with a payment had to cut back on essentials to pay for BNPL fees or debts. In many cases, it would be likely that a BNPL loan is not appropriate for the individual's circumstances. Many consumers would likely be better served by accessing financial hardship assistance through their service providers, no interest loans, or seeking independent financial counselling.

BNPL is being used for essentials

Not only do people reduce their spending on essential products and services due to unaffordable BNPL debts, we see BNPL credit is being used to purchase essential goods and services – a use promoted to people by BNPL providers.

According to CHOICE, 1 in 6 BNPL users have used a loan to pay for a supermarket bill, while 14% have used BNPL to pay for a power bill.[29]

The strongest theme from the qualitative data captured by Financial Counselling Australia in its BNPL survey was that BNPL credit is being used to pay for day-to-day living costs.[30] Financial counsellors in this survey reported that clients using BNPL to pay for groceries, other living expenses such as utility bills and medication. Financial counsellors shared:

> *"I have clients using BNPL products to purchase food vouchers from Coles/ Woolworths."*
>
> *"Some of my clients have utilised BNPL providers for essential items such as food and electricity payments when low on income or they have other expenses that are more pressing."*
>
> *"Many of my clients are using BNPL as a means to pay for living expenses. They explain incidents of utilising BNPL products to purchase vouchers to purchase food at major food shopping outlets, unaware of the pitfalls."*[31]

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[28] According to the Consumer Financial Protection Bureau 'sustained usage' is endemic to BNPL use. Sustained usage is the risk that frequent BNPL usage may threaten borrowers' ability to meet non-BNPL financial obligations, a risk borne not by those who don't repay their BNPL debts but on those who do Pages 66-69, US Consumer Financial Protection Bureau, 2022

[29] CHOICE Consumer Pulse. June,2022

[30] FCA, 2021

[31] Page 9, FCA, 2022

Case study 6 – Alana's story

Alana is only 18, but she is already thousands of dollars in debt. In the past year, she joined up to about seven different BNPL providers and owes more than $8,000.

"It was so easy to sign up - they just asked for my name, date of birth and ID," said Alana, who did not want to use her surname. They kept charging me different hidden fees I had no idea about.

"I was in a very bad domestic violence situation. I had a job at the time and then I ended up having to leave that job because the partner I was with said 'no you're not going to work'. He controlled all my money. It resulted in using Afterpay to put food on the table for myself."

Alana has now moved states and is receiving Youth Allowance payments. After paying her rent, her phone bill and buying food, she has no money left over. With no ability to pay the debt back, debt collectors harass her frequently.

"Being the age I am and being on such a low income, I have been so scared I'm not going to get anywhere in future years ... because I'll have so much debt behind me," she said.

Source: National Debt Helpline[32]

[32] Emily Stewart, Charities, consumer groups launch campaign for better regulation of buy now, pay later services, ABC, 12 May 2022

Case study 7 – John's story

John, a military veteran with a decade of service resulting in serious injuries approached the Bravery Trust with debt problems. The household fortnightly income was $2,830 with minimum debt payments of $461 a fortnight, due to $4,360 of debt across three BNPL accounts. The household income was sufficient to cover rent and living necessities until debt repayments were factored in.

The BNPL debt was accrued whilst already holding $22,944 in credit card debt and a small personal loan against total assets of approximately $18,000 (car and furniture).

Despite accounting for 16% of total debt, the payments to BNPL accounted for almost 35% of total debt repayments. The automatic deductions of debt were increasingly forcing the family to purchase essentials on BNPL accounts creating an unsustainable cycle.

Source: The Bravery Trust

Good Shepherd found that three quarters of the practitioners they surveyed reported seeing BNPL credit being used for children's needs such as clothing and baby products, 68% for furniture and household appliances, and 66% for food/groceries, 44% for utilities and 34% for transport and petrol.[33]

[33] Good Shepherd, 2022

Case study 8 – The Omenuko family

A young family with two children attended Gosnells Community Legal Centre to address their financial situation. The family has been struggling financially with the current pressures of the increased cost of living. The family's main stable income was Centrelink payments and the parenting pension. Their other income was inconsistent due to the nature of the industry worked in and employees at the company currently being sick due to Covid-19.

The family had a number of Afterpay loans to buy food and clothes for their children. They would also go without dinner at times in order to only feed their children. Their transactions towards Afterpay displayed 35 transactions on the one day, meaning 35 concurrent Afterpay facilities.

22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 18/11/2022	-$21.29
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 18/11/2022	-$17.50
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 18/11/2022	-$22.50
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 18/11/2022	-$15.00
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 18/11/2022	-$15.28
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$30.00
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$48.81
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$35.00
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$69.88
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$36.75
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$8.80
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$14.96
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$11.14
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$37.50
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$25.00
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$16.01
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$7.75
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$2.70
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$2.50
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$9.46
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$3.90
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$2.21
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$26.24
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$12.62
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$5.18
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$15.91
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$8.54
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$9.75
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$6.09
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$62.50
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$7.70
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$20.33
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$6.15
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$9.03
22 Nov	0 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$4.01
22 Nov	3 Days	Afterpay afterpay.com AU AUS Card xx6733 Value Date: 19/11/2022	-$7.44

The financial counsellor was concerned that there were at least 35 different opportunities for the family to be charged with late fees, putting additional financial strain on their situation. The family was unaware of how many facilities they currently have, and the repayments that come with those facilities.

Source: FCAWA and Gosnells Community Legal Centre

The Omenuko family above chose to not address their Afterpay usage as they believed they needed the product to be able to afford their living expenses and did not want to jeopardise access to BNPL credit. This is a common issue for those consumers using BNPL products as their main tool to be able to afford their daily living expenses. The relief this brings is short-lived but continues the debt spiral.

The Public Interest Advocacy Centre's (**PIAC**) research found that 31% of respondents indicated they were likely to use BNPL to pay for their energy bills in the future. PIAC also found that people are using BNPL credit to pay for other essentials (including groceries) freeing up money for their energy bills.

People should not have to resort to using BNPL loans to pay for energy or for other essentials to free up money for energy bills. Energy retailers are required to offer payment plans and hardship programs. Taking out BNPL loans can obscure payment difficulties, limiting the ability of energy providers proactively offering payment assistance to consumers.

BNPL providers makes it harder for people to manage their money, disempowering those experiencing financial difficulties

One of the claimed key benefits of BNPL is that it is a way to budget and manage your money effectively.[34]

However, this claim is belied by the reality. One day of a quarterly bank statement of a heavy user of a BNPL product demonstrates the obfuscation, lack of transparency and significant complexity borne of BNPL expenditures: see the **Omenuko family's story** and **Patricia's story** above. This complexity is exacerbated when such spending and repayments are spread and staggered across days, weeks and months.

BNPL usage in this way is not uncommon. CHOICE found that 1 in 7 BNPL users had more than twenty BNPL loans in the past year.[35] People find it hard to manage multiple debts.

> *"[I have] PayPal and Zip as well as Afterpay to try and pay for essential food and groceries."*
>
> *"I thought BNPL would be easy but it was very stressful to manage more than one."*
>
> *"Desperation. Were refused credit by other lenders as they lacked the capacity to repay. Signed up due to family pressure to assist others. Cannot manage multiple debts even though they [someone I know] are employed. Have 4 BNPL products and a car loan of over 20k. Not paying rent (public housing)"*
>
> *"Yes, they [someone I know] have multiple debt streams and struggle to pay so are constantly picking different streams of credit each month. They are also at the same time about to get another BNPL loan, there are no limits and this will break them."*
>
> *"They [someone I know] used multiple sites because that was the only way they could purchase the items they wanted. They were already experiencing financial stress due to poor financial management. The buy now, pay later [provider] did not check whether they had the means to repay. They ended up in further financial stress."*[36]

It is unclear to the consumer which payment is for what expenditure. There is no reference number, no identifying mark for the consumer to use to manage their expenditure with. The

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[34] See for example, Humm How to introduce BNPL into your budget, 29 October 2021

[35] CHOICE Consumer Pulse, June, 2022

[36] In December 2022, CHOICE asked 6015 supporters and members about experiences of themselves and people they know.

repayments are also staggered over different days, such that money is taken out of the account at different points of time. This makes it very difficult for an individual to develop or manage a budget.

Case study 9 – Rowena's story

Rowena is a single mother of three living in regional Victoria who works part time and receives a variable income. Rowena contacted the National Debt Helpline in 2021 because she was struggling to manage debts accrued from utility bills, a car loan, a credit card, insurance and multiple BNPL debts. The BNPL debts were with companies subject to the BNPL Code.

Rowena reported that she had recently obtained a loan from a third tier lender to pay off the credit card and some of her BNPL debts, because she was struggling to meet the repayments. Initially, Rowena indicated that she was comfortable with her remaining BNPL debts. In the following months while we were assisting Rowena negotiate some of her debts, she informed us that she was struggling for money and had been using a BNPL provider to pay for food, and had to take out other short term credit to pay for her daughter's living expenses (which was likely provided in breach of credit laws).

Rowena had high credit limits for BNPL products. At one point she owed $2000 to one BNPL provider, nearly another $2000 to another BNPL provider, and a similar amount owing to the same provider via regulated credit as well. She had high BNPL credit limits because she had consistently made her repayments, which disguised her financial hardship.

The reality was that she couldn't afford the repayments with her other debts, and was using these services to pay for essentials. Rather than being a useful budgeting tool, using BNPL in this way meant that so many direct debits were made by BNPL providers that a financial counsellor had trouble confirming how much repayments were costing her. In a five week stretch in 2021, unregulated credit providers made 77 deductions from her bank account, totaling over $2958. The vast majority of these were made by one BNPL provider. Rowena was in severe financial hardship at this time.

Rowena is still paying off her BNPL debts. Consumer Action assisted her to negotiate the debt with the other BNPL provider, but this was difficult because so few laws apply to BNPL. Initially, the BNPL provider refused to provide us any documents regarding the BNPL debt (a likely breach of the BNPL Code). The BNPL provider described the BNPL facility as 'not regulated'.

Source: Consumer Action Law Centre

The lack of reference number and the multiple purchases with varying and sometimes the same amount it would be a lot of work, if possible at all, to get on top of identifying and understanding one's expenditure.

Multiple BNPL credit entries in bank statements would also complicate matters for a lender in a loan assessment process. Lengthy lists of poorly described transactions make it more cumbersome to make reasonable inquiries about the prospective borrower's expenses, entrenching the use of benchmarks such as HEM to determine expenses instead. Moreover, if a bank statement lists "Debit Card Purchase Humm Bnpl Adelaide Aus" over and over, and not the underlying transaction, this limits the value that the Consumer Data Right and Open Banking can provide to support innovation, financial management and responsible lending.

It is highly unlikely that heavy users of BNPL can ever get a handle on where their money goes.

Rather than financial empowerment, those experiencing financial stress or distress reliant on BNPL to make ends meet, have significant hurdles placed before them to obtain a better understanding of their financial situation. This reduces any sense of control and undermines their ability to effectively manage their money.

BNPL users are increasingly subjected to scams

People who are sold BNPL loans are increasingly being targeted by scammers. The product design and distribution of BNPL credit facilitates fraudulent behaviour, including the way it is structured,[37] the ease of on-boarding, minimal identification requirements and digital-only character. Identity theft complaints to IDCare in Australia involving BNPL finance doubled to a record in 2020.[38] There are three forms of fraud that consumer groups commonly see:

- identity fraud where scammers use stolen identity information to create BNPL accounts;[39]
- account takeover fraud, where a perpetrator obtains a BNPL user's login, either through a phishing scam, or by buying it on the Dark Web;[40] and
- romance scams, where rather than bank transfers, scammers convince people to purchase gift cards for them.

Case study 10 – Mary's story

Mary is a 79 year old widowed Aboriginal Elder with physical and mental health issues. Her sole source of income is the Age Pension. She lives in Department of Housing accommodation.

Since 2019 Mary has suffered multiple traumas including a stroke, and loss of a close friend. She had to undertake rehabilitation to regain her ability to speak. Mary has been getting counselling for suicidality for about 12 months and is being supported by a social worker.

Mary disclosed to us with great shame and embarrassment that she has been a victim of a romance scam by a 'Commander [Redacted]' over the last two years until recently when she received confirmation from the FBI that he was not a member of the US Military and that she should stop writing to him.

[37] Given many BNPL providers don't require the first installment to be paid for a month, a scammer can make as many purchases as possible during that time with no intention of paying. By the time the BNPL provider requests the first payment, the scammer is unable to be found.

[38] Byrone Kaye, Australia's BNPL boom pushes identity theft to record, data shows, Reuters, 9 February 2021

[39] "[B]itter personal experience has opened my eyes to what a financial bonanza [BNPL] are for the criminal community." Karen Maley, Caught up in the great buy now, pay later scam, AFR, 31 January 2022

[40] 7news, Buy now, pay later services AfterPay and LatitudePay hit by scam texts, 3 August 2022

Mary told us this scam involved her sending him money which accrued debts including with a BNPL. She would purchase iTunes vouchers with the BNPL provider. As a result of the scam Mary had sold jewellery, furniture, taken on odd jobs and gone without essentials to meet the debts created as a result of the scam.

Source: Mob Strong Debt Help - C220170

Case study 11 – Ursula's story

Ursula is a family violence survivor and attended WestJustice with a letter from a BNPL service. Ursula is a newly arrived refugee with limited knowledge about what the letter of demand was in relation to or what BNPL was. It appears that someone had used her personal information without her knowledge to open a BNPL account whilst in-store at a large furniture retailer – one that Ursula has never attended. The BNPL provider is pursuing Ursula for this debt that she has no knowledge of. She had not been notified at any stage that her information was used to open the BNPL account until the provider started debt collecting. To date, she still does not know who used her information to open the BNPL account.

Source: WestJustice

The susceptibility of BNPL to identity theft is a particular threat to those consumers who are subject to financial abuse and domestic violence: see the following section.

People experiencing financial hardship arising from BNPL credit are also susceptible to scam offers of assistance.

Case study 12– Steph's story

Steph is a single mother of four living in regional Victoria. Her only source of income is Centrelink. Steph told us she has been struggling with BNPL debts for years, from at least four providers that are signatories to the AFIA BNPL code.

In June this year, Steph contacted the National Debt Helpline after being told by a private debt management firm (or a debt vulture) to enter into a Part IX debt agreement to deal with her BNPL debts. Steph told us she had been using BNPL regularly for years, often to pay for essentials such as bills or for food (by buying gift vouchers). Her good repayment history meant that her credit limits had been increased a number of times on the platforms. At that time, she told us she had around $4500 in BNPL debt, and the repayments for these along with the costs of other essentials for her family clearly left the household budget in a deficit.

Consumer Action spoke with Steph again recently. She had continued to rely on BNPL for essentials, and now her accounts were all maxed out. She recognised that the BNPL were contributing to her financial hardship, but she felt stuck in a cycle where she relied on access to the products. She said the repayments were costing her $1000 a fortnight, so she had tried to enter into a debt consolidation loan to pay off the BNPL debts altogether.

Steph said that she recently got approved for a $10,000 consolidation loan that would have reduced her fortnightly repayments. However, she was told before receiving the money she had to pay insurance for the credit product. After transferring the money, Steph said she realised it was a scam when she couldn't get a hold of the 'lender'. Steph told us that this had left her in a really difficult position, and she didn't know how she was going to pay the rent or buy Christmas presents for her children.

Based on the way Steph described her payment history to us and her unwillingness to seek hardship assistance, it is likely that her BNPL providers would have assumed Steph was not in financial hardship.

Source: Consumer Action Law Centre

While responsible lending laws are not designed with the primary intention of preventing identity theft, we consider that proper application of these laws, particularly full verification of all financial information and inquiring about the requirements and objectives of lending, are more likely to identify fraudulent use of personal identity documents or information to obtain a benefit.

We further note that ACL holders have substantive obligations to ensure they operate with enough technological resources to maintain client records and data integrity, and protect confidential and other information.[41] BNPL providers being brought under the credit regime will create a stronger incentive to avoid data breaches or information misuse. It will also require BNPL providers are resourced adequately to respond appropriately to enquiries or complaints where BNPL products have been fraudulently obtained.

BNPL lending practices are linked to increased financial abuse

BNPL and wage advance products disproportionately appear in cases where there is some form of coercive control, where perpetrators use abusive behaviours to create and maintain power and dominance over someone else.[42]

According to Good Shepherd, one in four of their Financial Counselling and Capability practitioners see coercive debt in at least half of their clients using BNPL. 69% see it in at least one client using BNPL.[43] 53% of Good Shepherd practitioners report seeing BNPL used for coercive control more than the year previous to the survey.

The Economic Abuse Reference Group – a network of organisations working with victim survivors of financial abuse – have identified a range of harms and concerns arising of the nature of BNPL and lack of regulation.

Similar to scams, the unique nature of BNPL makes it more vulnerable to be abused by perpetrators. Minimal identification requirements combined with the frictionless nature of on-

[41] RG205.115 – Technological Obligations in ASIC RG 205 Credit licensing: General conduct obligations, April 2020

[42] "24 months ago, buy now, pay later was barely an issue …Now it's not uncommon for [WestJustice] to see victim survivors of family violence and economic abuse present each week with buy now, pay later debts and issues. Some of which will be debts incurred in their name by their ex-partners, and some are applications made by the victim-survivor themselves because they have otherwise been left in poverty after leaving the violent relationship."

[43] Good Shepherd, 2022

boarding and maintaining of a BNPL product online or on a phone, means that perpetrators can conduct financial abuse using a small amount of personal information without the victim's knowledge, with few if any enquiries conducted about loan suitability to substantiate the true nature of the account.

Many victims of the abuse only find out they have a BNPL debt or debts in their name much later, usually when they are being pursued by a debt collector and their credit score has been negatively impacted.

Other victim survivors are abused through coercion, where a victim survivor may obtain BNPL for the benefit of their partner, which is clearly not for the victim survivor's benefit.

Victims then become laden with debt that leads to a debt spiral.[44]

Case study 13 – Erin's story

Erin was referred to Financial Rights by her domestic violence support worker. She had incurred debts in her name where the credit had been for the benefit of her ex-partner, and as a result of the abuse (financial, emotional, verbal and physical) she experienced at his hands.

Erin's partner had used Erin's two BNPL accounts for his own purchases by simply taking her phone, locking her in the house, and using the BNPL apps to pay for things on her account.

Erin had left the relationship with the support of her domestic violence worker and police. She could not afford to repay these debts without significant financial hardship; attempting to pay them had put her in a position where she could not afford to attend essential medical appointments.

Source: Financial Rights Legal Centre - – C216206

Case study 14 –Gavin's story

Gavin was contacted by his BNPL provider about two accounts with them with close to $5000 owing in total. He didn't recall opening them and believed that his ex-girlfriend had used his ID to open the accounts.

He had referred the matter to fraud team, however the BNPL provider decided there was insufficient evidence corroborating his story and continued to hold him liable.

Financial Rights helped Gavin write to the BNPL provider requesting information and documents and again raised his concerns that the accounts were fraudulently created.

Following this intervention, the BNPL provider reversed their decision and decided to release Gavin from liability under the accounts

[44] For further examples of financial abuse through identity theft, see EARG's separate submission to this consultation.

Source: Financial Rights Legal Centre - S265401

Secondly, it is common for victim survivors to be abused through coercion, where a victim survivor may obtain BNPL credit for the benefit of their partner, which is clearly not for the victim survivor's benefit. Perpetrators of family violence may promise to repay these debts, only to cancel the direct debit and leave the victim survivor with the liability, sometimes as retaliation after an argument or after separation. Victims then become laden with debt that leads to a debt spiral.

Thirdly, victim survivors who are in financial hardship may use BNPL credit to pay for necessities when escaping an abusive relationship. However, the automated payments via direct debit often result in the victim survivor prioritising BNPL repayments ahead of rent, food or basic living expenses, or taking out payday loans and other lines of credit to repay their BNPL debts. This spiral can delay victim survivors seeking help from financial counselling services or accessing more appropriate financial assistance available to them, including No Interest Loan Schemes and Centrelink entitlements.

Placing greater requirements on BNPL providers to conduct responsible lending checks would make these products safer and increase the potential to effectively combat financial abuse. RLOs require lenders to make reasonable inquiries into a consumer's financial situation, as well as inquire into the objectives and suitability of a loan. These protections would increase the potential to identify any red flags in a loan application and prevent BNPL products being used to perpetrate financial abuse. This should be combined with improved commitments under an independent and enforceable BNPL Code to maintain consistent family violence policies, similar to other codes of practice, and to proactively identify customer vulnerability.

The Economic Abuse Reference Group also highlights the following poor practices:

- inconsistent responses to financial hardship and the impacts of family violence on borrowers, and lack of dispute resolution options;
- refusal to provide consumers and their advocates with critical documents to uncover financial abuse;
- lack of family violence training and policies;
- BNPL providers making inappropriate requests for evidence of family violence and re-traumatising victim survivors; and
- BNPL credit masking victim survivors' financial hardship and delaying their seeking help from free services or obtaining government assistance.

BNPL impacts upon First Nations communities in specific ways

Consumer groups recognise the harm that poorly-regulated BNPL products have on First Nations communities. While we don't see evidence that emerging unregulated credit providers are specifically targeting First Nations consumers, BNPL products are very popular with Aboriginal and Torres Strait Islanders and are almost universally held by First Nations people assisted by services such as Mob Strong Debt Help.

In our experience working with First Nations consumers, BNPL is rarely the presenting issue when seeking help. It is usually something else – a debt collector chasing an unpaid bill, or an inability to pay a utility bill.

Case study 15 –Donna's story

Donna was a client of Victorian Aboriginal Legal Service in a tenancy arrears matter, when in June 2020 she mentioned to her lawyer that she had several outstanding BNPL loans. Donna had 14 loans with a BNPL provider between October 2019 and December 2019 and she 'borrowed' a total of $920 for a range of goods including purchases from the chemist and a pet store. Payments on all the loans were broken up into 4 fortnightly payments. This meant that Donna was making multiple payments each week for most of the loans. The financial burden of making the payments soon added up and Donna was unable to maintain the payments and her other living expenses (which she was already struggling with). Donna then defaulted on the loans and the BNPL provider sent the debt to their debt collector. VALS contacted the BNPL provider and they agreed not to charge Donna any late fees because of her circumstances. Donna is now trying to make small payments towards the balance of her BNPL loans.

Source: Victorian Aboriginal Legal Service and Consumer Action [45]

Most First Nations clients do not recognise BNPL as debt and given its ease of access, BNPL ends up buffering and obscuring existing debt. Mob Strong Debt Help, for example, regularly sees Aboriginal and Torres Strait Islander consumers already struggling with debts, sign up to these services hoping they will help make ends meet only to prolong and deepen their hardship. Many have multiple purchases with multiple providers, often combined with other credit facilities and debts. Providers such as Afterpay, Zip Pay, Humm, Bundl, Brighte, MyPayNow, BeforePay, Advance Pay regularly appear in advice and casework.

[45] Consumer Action, Consumer issues in Victorian Aboriginal communities during 2020, June 2021

Case study 16 –Kylie's story – S268439

Kylie is currently unemployed, but she is trying to focus on getting her debts under control. She wants to focus on saving to start a new business. From age 18 Kylie was in unstable living arrangements and began taking on unaffordable debts. She is in a more stable living arrangement now, but her debts are really getting in the way of her finding her feet. She reached out to Mob Strong for some information about getting her debts under control. The key debt that she wanted help dealing with was a $23,000 car loan debt. However, in addition to these Kylie has debts to four BNPL providers, a telco, an internet provider, an energy provider, two pay day lenders and an avoidant pay day lender. In total she owes about $30,000.

Source: Mob Strong Debt Help

Case study 17 –Alira's story – S269204

A single Aboriginal mother of two children had been working at the same job for 6 years but had to take an extended, unpaid leave of absence due to her family's health.

She had been struggling with her own physical and mental health and was a victim of family violence. Her three-year-old son has been diagnosed with a disability and her teenager is not coping with the lockdowns and home-schooling.

She was under a great deal of stress and feels overwhelmed. Unable to make ends meet, Alira was very vulnerable to offers of credit, digging a deeper and deeper hole. Alira initially tried to communicate with her various creditors that she was in hardship but as things escalated, she had to focus on rent and staying in a hardship payment arrangement with her energy provider. Alira is under a great deal of stress and feels overwhelmed. She was struggling with the following debts:

- two loans with a payday lender totaling $3000
- a second payday lender which is a subsidiary of a debt collector loan for $2200 which has gone to debt collectors
- a third payday lender loan for $800 (she got this after being turned down for a NILS loan)
- a BNPL $500 debt now with a debt collector
- a Wage Advance debt of $350
- a different Wage Advance debt of $400
- an energy debt of $4000
- SDRO driving fines $450

Source: Mob Strong Debt Help

See also **Warren's story** below under *Poor hardship assistance process and complaints handling.*

When services such as Mob Strong Debt Help contact these businesses to discuss the unique vulnerabilities of its clients or to see what hardship options might be available for them, advocates rarely find culturally trained staff or specialist assistance for First Nations consumers. Despite a frictionless sign-up process, dealing with BNPL credit providers involves a number of hurdles. For example:

- they can be difficult to contact by phone or email;
- hardship policies and disputes resolution are often inadequate compared to regulated credit providers; and
- it is difficult to obtain information from them.

Other BNPL practices that lead to or compound consumer harm

Excessive consumer fees and charges, including default fees

Consumer groups are concerned about the impact of excessive BNPL fees and charges on people. Central to the BNPL business model is the inclusion of late, missed payment or default fees rather than interest.

Good Shepherd found that missed payments are common with more than 3 in 4 practitioners (78%) reporting that clients with BNPL debt struggle to make payments on time. ASIC has noted the increase in missed payment fees[46] finding that 21% of BNPL users missed a payment in the 12 months prior to the research. The options paper references Curtin University research commissioned by Financial Counselling Australia to demonstrate the equivalent effective annual interest rate of BNPL products.[47]

Consumer groups have found the number of fee types applied that can hide the true cost of BNPL debts. These can include:

- establishment and redraw fees;
- account keeping or administration fees;
- payment processing fees; and
- account closure fees.

These different types of fees make it very difficult for consumers to understand the full cost of a product and makes comparing BNPL products with other forms of credit like credit cards a challenge.

CHOICE awarded a Shonky Award to Humm due, in part, to the large number of fees. CHOICE analysis found that if you had a 60-month payment plan, you would spend $480 in monthly fees alone. It found that Humm charges an $8 monthly fee when using it to pay bills with Bpay.[48] As

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[46] "In the 2018–19 financial year, missed payment fee revenue for all buy now pay later providers in our review totaled over $43 million, a growth of 38% compared to the previous financial year" ASIC REP 672 Buy now pay later: An industry update, November 2020

[47] Comparative Analysis Of credit card interest rates vs BNPL fees In The Consumer Credit Market July 2022 Dr Lien Duong, Professor Grantley Taylor, Dr Baban Eulaiwi School Of Accounting, Economics And Finance

[48] CHOICE, Humm buy now, pay later, The Shonky Award for... unaffordable debt, 2021

an example, if a consumer pays an $80 bill off over five months with Bpay, they could spend $40 in fees. This highlights that low-amount BNPL loans can be extremely expensive for people.

Furthermore, consumers can be charged fees by other facilities as a result of BNPL including dishonour fees for non-sufficient funds or overdraft fees that arise due to BNPL payments on borrowers' current accounts.

Case study 18 – Joe's story

59-year-old Joe came into access financial counselling after taking out a small loan to pay for food, which quickly blew out into a significant debt.

"I was desperate for food. This was my only way to secure food for a couple of weeks," Joe explains.

Living in shared accommodation at the time and with multiple health issues, Joe was already in financial hardship when he was granted a BNPL loan to the amount of $250.

For the first few months, Joe was unable to pay anything back. When he was able to make small repayments, the disproportionate late payment fees of $101 a month had already built up. Even after the principal amount was paid, Joe was still left facing a bill that totaled $1244.60.

Source: Financial Counselling Australia and Moneycare (Salvation Army Australia)

Non-participation in credit reporting exacerbates consumer harm

Consumer groups are concerned by the lack of participation of BNPL providers in the credit reporting regime. The majority of Australian Finance Industry Association (**AFIA**) BNPL Code of Practice signatories are not engaged in the credit reporting system. This means that other licensed lenders are not obtaining an accurate assessment of a prospective borrower's credit worthiness

Currently, BNPL providers that participate in the credit reporting regime are only able to share repayment history information (**RHI**) and consumer credit liability information (**CCLI**) but not financial hardship information (**FHI**). This is because BNPL is not a regulated product under the credit reporting regime and FHI can only be listed and seen on licensed regulated products.[49] Lenders that examine credit reporting data of consumers who use BNPL products are not being provided the full picture in fulfilling their RLOs.

Since many BNPL providers do not use or engage with the credit reporting system, consumers of these services often think that as a result, it won't affect their creditworthiness. The reality is that many credit providers do view BNPL use negatively, particularly excessive use, and while it may not always show up on a credit report, it does show up in bank statements or in banking records. This can lead to people being denied credit, including mortgages.

[49] See Section 6QA of the *Privacy Act 1988*

Financial counsellors with Financial Rights, for example, now advise clients to close all their BNPLs and wage advance products as far as possible in advance of a home loan application.

Finally, the options paper notes that some BNPL providers use a consumer's credit score as a proxy for the person's creditworthiness. Reliance on credit scoring is neither appropriate nor effective, as it likely results in people in financial hardship being approved for BNPL loans and would probably see people with sufficient funds but bad payment history being denied.

As we detail in Section 3, we do not support an independent BNPL credit reporting database.

There is a lack of transparency – Product disclosure and warning requirements

Consumer groups are sceptical about the benefits of disclosure as a consumer protection. However, many BNPL providers fail to provide enough disclosure and documentation about the true cost of their products. BNPL are complex and difficult to understand for consumers, including the variety of BNPL models, cancellation, termination and suspension terms, direct debiting, and various fee structures. It is understandable that even sophisticated consumers have limited understanding of these products.

Case study 19 – Olivia's story

Olivia lives in regional NSW with her husband and 5 dependent children. She has 8 children in total and is currently pregnant with her 9th child. In 2017 she opened an account with one BNPL provider and was approved for a limit of $1,500. She also opened an account with a second BNPL provider for $250. About a year later in 2018, she applied for a line of credit with the second provider and was approved for $1,000, which was increased to $3,000 in 2019.

Olivia opened the accounts to purchase essential items for her children and to buy tools for her job. She was in financial hardship at the time and was financially supporting her two elderly parents, in addition to her own large family. Olivia didn't understand the terms of either of the BNPL contracts (such as that she may be liable for enforcement fees if she defaults and that it could be listed on her credit report). She didn't understand that the two accounts with the second provider were separate and that she would be charged interest on the line of credit.

Source: Financial Rights - S239007

Good Shepherd practitioners reported that many of their clients with BNPL debt did not understand the BNPL contracts they had signed, and did not know that missing repayments may impact their credit record. The complexity of BNPL contracts was also a significant theme in the Financial Counselling Australia survey results.[50]

[50] For example, "Most of my clients using BNPL products do not understand the terms and are shocked at the repayments" and "Clients not understanding the consequences of not paying on time and the possible outcome is not explained clearly," in FCA, 2021

In the UK, unclear terms and disclosure were identified as key concerns, with the Financial Conduct Authority recently introducing guidance for UK BNPL providers to change their terms to make it fairer and easier for consumers to understand.[51]

The Consumer Financial Protection Bureau US too identified the lack of standardised disclosure in their market, which obscures the true nature of the product as credit and makes important information about loan terms less accessible, including when and how fees are assessed, and when payments are due.[52]

It is clear that there needs to be improvements to the disclosure provided, particularly around key terms such as fees and repayment timeframes. However, warnings and disclosure on credit products are often not effective [53] and need to be complemented by other regulatory interventions.

Advertising and marketing

In June 2022, CHOICE found that 1 in 5 BNPL users chose this as a payment method in their last purchase because of an advertised discount.[54] In December 2022, people shared with CHOICE the role that advertising played in the decision-making to take out a BNPL loan:[55]

> *"I have become acutely aware of the promotion of Buy Now Pay Later schemes. I think that the last straw from my perspective was the advertising of Dan Murphy BNPL options. Truly, if you can't afford alcohol, you should not be encouraged to buy it on credit."*
>
> *"Purchasing of flat furniture and white goods from store's advertising. They [someone I know] couldn't meet repayments and eventually rescheduled payments resulting in interest higher than the original value of the purchased goods. The event caused considerable family distress and dysfunctional relation[ship]."*

As noted earlier, BNPL credit providers are advertising their loans to pay for essential products and services. In 2020, CHOICE found that more than one in 10 Australians used BNPL credit just to get by.[56] Two years later that number had increased dramatically: 1 in 6 BNPL users have used a BNPL loan to pay for groceries, while 14% have used BNPL to pay for a power bill.

Some of the many examples of BNPL credit providers advertising their loans to pay for essentials are included below:[57]

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[51] Financial Conduct Authority UK, Making Buy Now Pay Later terms clearer and fairer, 19 July 2022

[52] Page 72-73, US Consumer Financial Protection Bureau

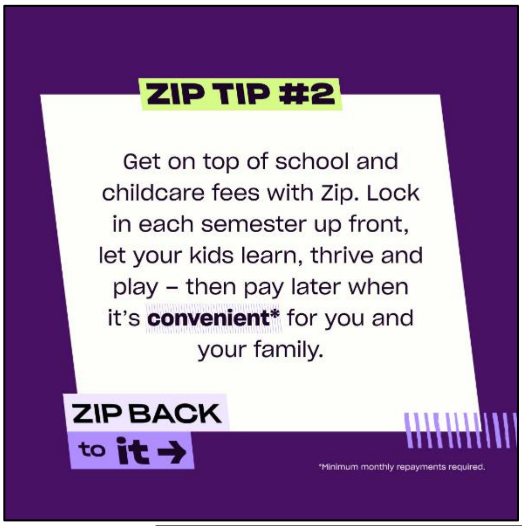
[53] ASIC Report REP 632 Disclosure: Why it shouldn't be the default, October 2019

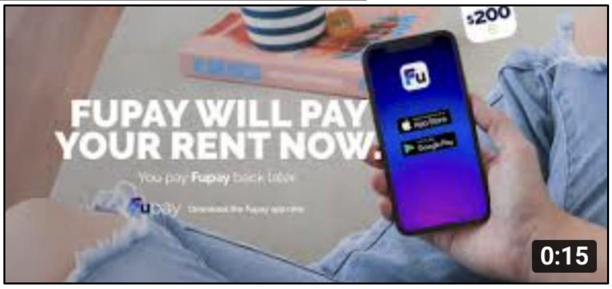
[54] CHOICE Consumer Pulse Survey June 2022

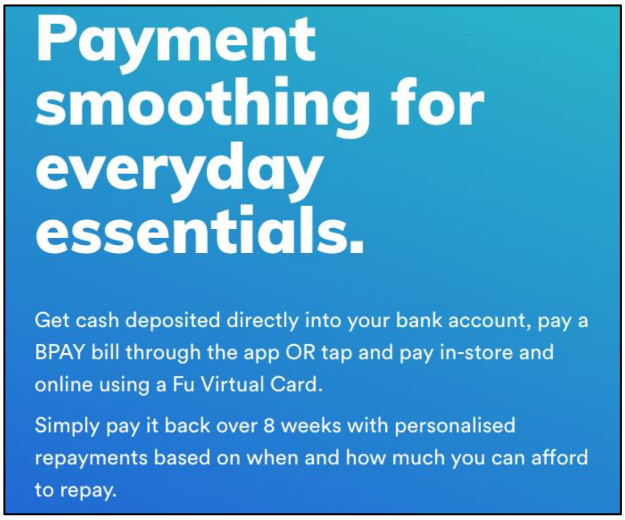
[55] In December 2022, CHOICE asked 6015 supporters and members about their experiences with the BNPL industry, or someone they know.

[56] Kollmorgen, A 2022, More than one in 10 Australians using buy now, pay later, just to get by, CHOICE,5 November 2020

[57] CHOICE Consumer Pulse June 2022







Consumer groups regularly see BNPL providers:

- promote the absence of any affordability assessment or credit check in their marketing campaigns;
- minimise the risks of using BNPL products;[58]

[58] FCA, Call for Afterpay Rebel Wilson advertisement to be discontinued, July 2021

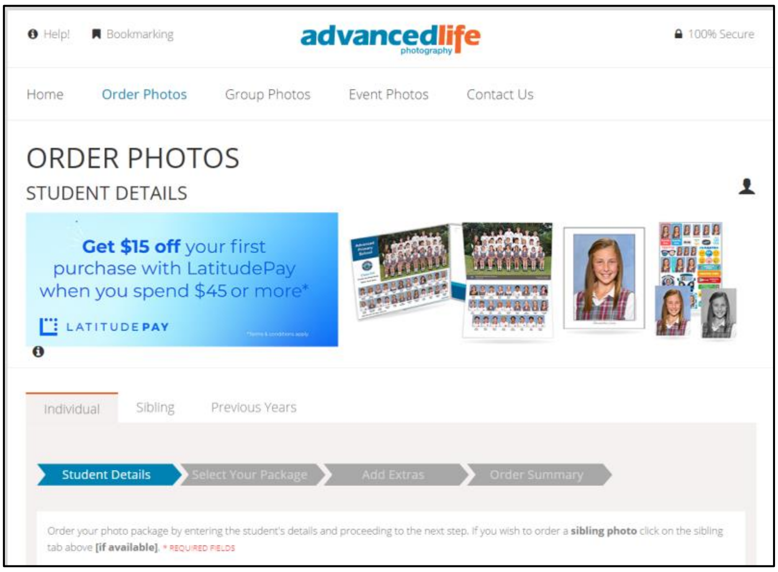
- claim to offer a 'way to pay' that is suited to the consumption habits of young people and make appeals to young people's identities in their marketing;[59] and
- encourage reckless spending.

Academic research has found that BNPL product app interfaces and tools replicate the experiences of a digital game.[60] This gives people a sense of control and using rewards or positive reinforcement. This design obscures BNPL properties of a high-risk and poorly regulated financial product.[61]

Consumer groups regularly observe that discounts to use BNPL are promoted at the point of sale.

Case study 20 – Alisa's story

In May 2022, Alisa, a Canberra-based parent was ordering school photos for their two children who attend a public school. Throughout their online customer journey, from selecting their photo package through to the online checkout, they were marketed a $15 discount on their final basket of goods if they chose to pay using a BNPL provider. They were again prompted to decide whether they would pay using traditional debit or credit card, or to pay using the BNPL provider with the $15 discount applied. The combination of both the marketing and the final calculation with the discount applied was a clear attempt to nudge the customer into signing up for a BNPL account.



Source: Financial Counselling Australia

[59] Farrugia, University of Newcastle, Cook, et al. Young people, debt and consumer credit pilot study report. University of Newcastle, 2021

[60] Farrugia, 2021

[61] For example, Afterpay's Pulse Rewards program has three tiers of membership – Gold, Platinum and Mint – providing escalating privileges as customers accumulate points from buying goods with Afterpay. These additional privileges can incentivise customers to use Afterpay for day-to-day spending.

Many signatories to this submission have represented clients subject to heavy handed door-to-door sales tactics for solar panels using a BNPL service. It is common for the consumer to have no idea that they have been signed up to a BNPL loan and report having had nothing to do with the application.

Case study 21 – Gary's story

Gary is close to 70 and receives the Disability Support Pension. In August 2020 he was approached by a door-to-door salesperson from a solar panel company. The salesperson said that installing additional panels to his existing system meant he didn't have to pay electricity bills and he would receive a government grant to cover most of the cost of the panels. He didn't tell Gary the price of the panels but said it would only be small and he could pay by instalments of $70 per month.

Gary agreed to buy the panels on this basis. He told the salesperson he did not have email and gave his wife's mobile number. He did not sign any documents and did not receive any paperwork. He gave his bank account details on the understanding that he would only be charged by the solar company if there was any difference between the cost of the panels and the government grant. The panels were installed 6 weeks later.

A few weeks later $90 was debited from his bank account by a BNPL provider. He had never heard of the BNPL provider and cancelled the direct debit. He contacted the BNPL provider and said he had never entered into a contract with them. The BNPL provider responded that he had allegedly entered into a contract to purchase the solar panels and he is liable for $12,000.

The BNPL provider provided copies of emails sent to an email address that does not belong to Gary and contains an incorrect spelling of his name, and copies of text messages sent to his wife's phone however neither of them recall receiving the text messages.

Source: Financial Rights Legal Centre - S274093

We have also outlined above, the predatory approach taken by some motor vehicle dealers to sell BNPL products to get higher car loan amounts over the line.

Similar to the direct interventions in the application and on-boarding process in these venues, this also occurs in the shop front retail arena.

Case study 22 – Tom and Sarah's story

A husband and wife (Tom and Sarah) approached CCLSWA for advice regarding a photoshoot where Sarah was pressured into purchasing expensive photographs. The purchase was subject to high pressure sale tactics and was also facilitated through a BNPL agreement entered into in Tom's name without his knowledge or consent, as the merchant considered that Sarah would not have been successful in applying herself.

Sarah had booked in a free photoshoot for her, Tom and their young children after she had won a competition over social media.

After the photoshoot, Tom had to return to work, leaving Sarah to select the photographs and arrange payment. At this point, Sarah was provided with a price list for the first time. Sarah was shocked and concerned with the excessive cost of the photos. These costs were significantly higher than similar photographs Tom and Sarah had previously purchased from other merchants, and Sarah wanted to leave so she could discuss it with Tom.

However, the merchant used high pressure sale tactics to convince her to proceed with the purchase, part of which included offering payment through BNPL. Sarah felt that the merchant offered BNPL to obtain the sale to mask the purchase price and make it more palatable to her by presenting the smaller monthly repayments rather than one lump sum.

The merchant had control of the BNPL application process, and got Sarah to make the application in Tom's name rather than hers, as the merchant considered an application by Sarah would be rejected. Due to the pressure that Sarah was subjected to, she felt like she had no choice except to enter into the BNPL on behalf of Tom in order to leave. When later Tom discovered what had happened, he was alarmed that the merchant had entered him into a BNPL arrangement without his consent.

Source: CCLSWA

We are also aware of cold approach campaigns at department stores suggesting people sign up to Afterpay.

Case study 23 – Spruiking at Big W

On Saturday 8 July 2022, Afterpay representatives were present at Big W Brown Plains as part of an annual toy sale. The representatives were observed approaching customers at the checkout asking if they knew about Afterpay. They were signing customers up on the spot using the Afterpay app.

Source: Financial Counselling Australia

Similar to what we see in Australia, Citizen's Advice UK found that BNPL's 'fun' branding and marketing facilitate an aspirational lifestyle without dwelling on affordability.[62]

> *BNPL is framed to feel like a 'safer' alternative to traditional forms of credit. This draws consumers in to satisfy their present-biased needs by purchasing the goods they want now whilst shifting the costs to the future, even if they cannot afford the repayments in the long-run.*

Poor hardship assistance process and complaints handling

Hardship Assistance

Many BNPL providers are falling short in their handling and support of customers in hardship.

Accessing BNPL credit is often frictionless at the start of the customer journey. However, consumer groups note they face significant challenges when trying to negotiate hardship arrangements.

As a part of Financial Counselling Australia's report into the BNPL industry,[63] financial counsellors were asked to rate the hardship practices of the major BNPL providers who are part of the industry self-regulatory code on a scale of 1 – 10, where 1 was the lowest rating and 10 the highest. For the four largest companies, the ratings were: Afterpay 5.9, Zip 5.5, LatitudePay 5.2 and Humm 4.7. These ratings overall indicate the industry has a long way to go to be better attuned to the needs of their customers in hardship.

Examples of responses to hardship requests we have submitted to BNPL providers that are AFIA members include:

- a request for documents and a stay of fees being 'declined' on the basis that the BNPL product is 'not regulated' (in this case the financial counsellor had to inform the BNPL provider of relevant provisions of the AFIA BNPL Code, and the provision of all documents took months);
- receiving a number of transaction statements but no copies of any contracts in response to a request for documents; and
- being told that the BNPL product is a digital shopping tool (and not a loan), that all that is required to use the account is a registration form, so there is no application form and statements of account are only accessible via the app. The same representative suggested a financial counsellor simply tell their client to return some/all their purchases.

Clients also regularly report that hardship teams are difficult to get a response from.

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[62] Citizen's Advice, UK, Tricks of the trade How online customer journeys create consumer harm and what to do about it, December 2022

[63] FCA, 2021

Case study 24 – Tiana's story

Tiana's daughter needed orthodontic work and she took up the option offered by the orthodontist to pay for the work using a BNPL product from an external provider. [Note the provider was not a Code Complaint Member nor signatory to the BNPL Code]. Almost a year later Tiana relocated to escape her abusive ex-partner. As a result, her daughter was not able to complete the orthodontist treatment.

Tiana contacted the orthodontist practice to let them know of her change in circumstances. They agreed to an alternative repayment plan for less than half the original fee. This fee covered the partial treatment her daughter had received.

This agreement was either not communicated to the BNPL provider or not processed by them. They engaged lawyers and a debt collector to pursue Tiana for the full amount of the agreement, despite her efforts to negotiate with both the BNPL provider and the debt collector. The debt collector also listed a default on Tiana's credit file at which point she contacted CCLSWA.

Our research showed that the BNPL provider was part of a complicated corporate structure, and it would have been very difficult for a layperson to work out how and where to make a successful complaint. Tiana could not rely on the BNPL code as they were not a code complaint member.

The BNPL provider's website also incorrectly claimed that a particular entity in their business held an Australian Financial Services Licence and that complaints could be escalated to AFCA. These references were removed from the website after CCLSWA became involved in the case.

Source: CCLSWA

Case study 25 – Tess's story

Tess lives in regional Victoria with her partner and baby. She had been doing contract work earlier this year but had to stop when she had a baby. Tess says she had been told she was unable to fall pregnant, so her pregnancy was a (very welcome) surprise, but not one they had a chance to financially plan for.

Tess told us that she is eligible to receive only $150 from Centrelink because her partner works full time, and this along with cost of living pressures means they are currently struggling to afford essentials such as food and petrol. She told us she had a range of debts made up of a range of utilities, regulated credit products and unregulated credit products.

Prior to becoming pregnant, Tess said she had used buy now pay later products irregularly for special purchases she could afford, but since having a baby and with the cost of living pressures, she started using it for essentials. She said that she discovered she could buy gift cards and petrol cards with Afterpay and Zip to use at the supermarket, and so began doing this from time to time. Before long, she had fallen into significant debt and was experiencing financial hardship, made worse by buy now pay later debts.

Since falling into financial hardship, to get by Tess says she has also opened up Humm, Openpay and Klarna buy now pay later accounts and used them for similar purposes, however this just caused her to fall further into debt. Tess said she had gone multiple days where she hardly ate at all at times.

Tess told us that she sought hardship assistance from Afterpay and Zip when her baby was airlifted to hospital and she had no money for accommodation. Tess said that the absence of a contact number for Afterpay and their rigid online portal meant she had to write a detailed email explaining her circumstances despite being in acute distress, just to initiate the process. She also said once or twice Afterpay had tried to debit her account contrary to agreements to delay repayments. Tess also recounted that Zip had repeatedly attempted to debit her account and applied hefty late fees despite knowing about her hardship. She said this happened again with Zip even after they acknowledged a written hardship request from a financial counsellor on her behalf.

Source: Consumer Action Law Centre

Complaints handling

Minimum standards for complaints processes are committed to by subscribers to the BNPL Code. In our experience subscriber's response to complaints have been poor and have fallen below the standards imposed on credit providers subject to ASIC RG 271.[64] This is concerning given the Code claims to go beyond legal requirements, when in fact it frequently barely even meets them.

Our caseworkers are regularly instructed to raise complaints to BNPL providers that loans provided are unaffordable and contributing to our clients' ongoing financial hardship. When these complaints are raised, BNPL providers fail to engage on the issues, refuse to accept responsibility and then frequently as a response waive the debt. While this is a great outcome for the individual client who has had the benefit of legal advice and representation, this is only a fraction of the people impacted by the irresponsible lending practices of BNPL providers.

Case study 26 – Warren's story

Warren is a single 49-year-old First Nations man living in a regional town. He has two school aged children, for whom he shares caring responsibility, and is currently unemployed. He sought support from a financial counsellor after struggling with debts totaling $64,000. He found himself in this situation after a change in his personal circumstances, including that his business failed. He had inadequate income and was also having challenges with his mental health, which in turn put pressure on his relationship. Winter didn't help, with exorbitant utility bills coming in. His mortgage payments were in arrears, and he was not able to afford repayments towards multiple credit card debts. He had a solar system installed, financed through a BNPL provider, that he believed had been sold without any checks on his ability to repay. He struggled to pay it off from the beginning. When he approached them to complain, they did not offer a resolution. He sought the help of a financial counsellor who requested the following documents:

- loan application form
- statement showing all transactions, including interest and fees charged

[64] See the Consumer Federation of Australia's joint submission to the Buy Now Pay Later Code Review, December 2022

- documents that were used to verify income/expenses. If there are no documents available, please explain why such a large amount of credit was lent without verifying suitability
- credit assessments including suitability calculation

The BNPL provider did not provide a copy of these documents. The financial counsellor referred the matter to AFCA for external dispute resolution. The BNPL provider then agreed to waive $3000 from the $8000 debt, which still left Warren struggling to meet repayments.

Source: Financial Counselling Australia

We also find that BNPL consumers that our organisations speak with are very reluctant to raise any issues with their BNPL providers or make a complaint for fear of no longer being able to access the service.

Poor rights in relation to refunds, return of good and unauthorised transactions

The interaction of consumer rights under the Australian Consumer Law and BNPL products is unclear and can produce poor outcomes. By using BNPL, it is more challenging for people to assert their rights than if they used an alternative payment method, such as a credit card that has a chargeback option.

There is already one example of the impact this can have in a published decision by the Australian Financial Complaints Authority (**AFCA**).[65] In that case, a customer used BNPL service to make a purchase, but within a week sought a refund as he found the product was faulty. The retailer initially agreed to refund him, then reneged. Despite the BNPL provider having a relationship with the retailer, they indicated they could not help and continued to seek payment. The customer disputed the payment at AFCA and was unsuccessful, eventually being charged an additional 23% of the purchase price in late fees, as well.

The resolution of Tom and Sarah's case study (above, under *Advertising and Marketing*) was complicated by the fact that the BNPL provider had paid the merchant rather than Tom or Sarah, and any refunds needed to be organised through that BNPL provider (which the merchant did not initially understand and did not want to do).

While the options to regulate BNPL proposed will not address this issue directly, licensing, internal dispute resolution (**IDR**) and external dispute resolution (**EDR**) will provide some assistance by improving accountability and complaint options.

[65] Determination Case Number 711283, Afterpay Australia Pty Ltd

BNPL providers collect data well beyond what is needed, increasing risks of financial harm to consumers

BNPL services use highly sophisticated data analytics systems to profile users and their spending habits for the purposes of targeted marketing and increased sales.

In a recent investigation, CHOICE found that BNPL providers collect data well beyond what is needed,[66] including, collecting location data and call history, to gain insights into who is using their platform, and can include:

- tracking spending habits;
- identifying trends;
- assessing the success of ad campaigns; and
- analysing customer behaviour.

The main purpose is to use this information to boost revenue and profit through the development of new products, customisation and personalised ad content. For example, Afterpay introduced its new analytics platform for merchants – Afterpay iQ[67]. iQ is offered free to merchants as a "better way to understand their customers" where they have access to real-time data such as sales, and use the platform to target specific customer groups with marketing. From a privacy perspective it's not clear how customer data is used by iQ, how that data is protected, or if there are any additional protections in place to prevent financially vulnerable people from being targeted.

Personal data is used to manipulate sales – which exacerbates problems of overspending and has the potential to push people experiencing financial hardship into greater debt.

The US Consumer Financial Protection Bureau similarly identified data harvesting as a discrete risk to consumers. They found that:

> *[s]imilar to many other large tech platforms, BNPL lenders often collect consumer data—and deploy models, product features, and marketing campaigns based on that data—to increase the likelihood of incremental sales and maximize the lifetime value it can extract from each current, past, or potential borrower. These practices (which may become even more prevalent and profitable as third-party data tracking becomes more difficult on iOS6 and Android7 operating systems) may compromise consumers' privacy and autonomy and contribute to … overextension risks … by engendering repeat usage. [It can also] contribute to market concentration by rewarding a small number of firms who achieve the largest quantity of consumer data.*[68]

[66] CHOICE, Buy now, pay later providers move into the data business, March 2022

[67] Afterpay Unveils New Analytics Platform for Merchants, 19 August 2021

[68] Page 4 and76, US Consumer Financial Protection Bureau, 2022

As with the harms regarding refunds and returns, the options to regulate BNPL proposed will not address the issue of data collection directly, but licensing[69], IDR and EDR will provide some assistance through improving accountability and complaint options.

Fringe credit and BNPL-adjacent products

There are a number of other unregulated credit products that are also operating on the regulatory perimeter. While currently less popular than BNPL, they carry the same kind of risks but claim to operate via similar regulatory loopholes and assert themselves as innovative fintech. These are indicative of a major problem that exists at the regulatory perimeter of credit.

Wage advance products

Wage advance products, also called Pay on Demand, are becoming more prevalent, with financial counsellors also raising concerns about their use.[70]

Wage advance is a harmful financial product that takes advantage of people in financial hardship. Wage advance allows consumers to take out a loan for a proportion of their next pay (for example, up to a third in the case of Beforepay). A common business model is to charge 5% of the amount advanced. The loan is repaid over subsequent pay cycles.

Wage advance is closer to a payday loan, but it operates by exploiting similar gaps in the law as BNPL. Therefore, it is not regulated by the *Credit Code*.

Case study 27 – Enid's story

Mary is a 45-year-old First Nations woman who has been working full-time for the last three years. Her adult children assumed she had a lot of money, and she has felt pressured to provide money to help them. In addition to this, she manages ongoing physical and mental health issues which means she often needs to take sick leave. This leave is without pay once her annual sick leave allocation is exhausted, placing more pressure to make up the shortfall with other options. Unable to access lower cost forms of credit due to her credit rating, she is has found herself in a debt spiral with 11 wage advance and payday lending accounts.

- Beforepay $290.00
- Bundll $445.17
- Cash Converters $2854.76
- Cigno $228.00
- Fair Go Finance $2059.98
- Fundo Loans $228.38

[69] Such as requirements to make sure technological resources are adequate to protect confidential and other information. See RG205.115-118, ASIC Regulatory Guide 205 Credit licensing: General conduct obligations

[70] FCA, 2021

- My pay Now $160.30
- Nifty $1857.26
- Quick Cash $1140.00
- Wallet Wizard/Credit Corp $788.31
- Cash'n'go $1,572.00
- Total Outstanding $11,624.16

Source: Financial Counselling Australia

Other fringe credit products

We intend to provide further detail on the issues and risks of these products in response to Treasury's flagged future consultation, but examples include:

- Futurerent: a company that provides residential property investors up to $100,000 upfront, from rental payments they have a right to receive in future. The model charges 6% of the amount borrowed (comparable to a mortgage), but this does not decline with repayments, so the true equivalent annual interest rate is closer to 11%.
- MyBond: a company that offers to pay a rental bond upfront but charges a week's rent for doing so (likely amounting to around 25% of the bond). MyBond claim to avoid credit law by simply buying the right to receive the bond upon vacating, however they also impose additional fees if the tenant stays longer than 12 months and the tenant indemnifies them for the bond if it not all refunded.
- Elepay: another company offering credit linked to property ownership – offering up to $500,000 in 'short term funding' and $50,000 loans 'within the hour' with repayment options of up to 120 days.

All of these products involve fees (sometimes substantial ones) for the advancement of funds (i.e. credit), yet purport not to be credit regulated by the *Credit Act*.

Telecommunications services sold under similar arrangements, with similar harms

Consumer groups also flag that while not seen as BNPL, many telecommunications providers sign people up to payment arrangements that are extremely similar to BNPL. We routinely see these arrangements causing the same problems as BNPL, particularly around financial hardship and affordability.

For years, telecommunications providers have offered (most commonly) two year plans that include ownership of a device and mobile phone usage, but which oblige the customer to pay a minimum per month. It is not uncommon for these arrangements to charge well over $100 a month – a significant amount for many people. These payment arrangements can also be paid for via credit cards.

Much like BNPL, the telecommunication industry is able to do this without making any inquiries into whether the customer can afford it, due to an absence of regulation. Like the AFIA BNPL

Code, the Telecommunications Consumer Protections Code provides no meaningful protections in this regard. While these arrangements are similar to invoicing (and distinguishable from BNPL as they do not involve a third party creditor), they are often a far more expensive way of obtaining the same phone and a similar plan, if paid up-front. We urge the government to address this extremely similar problem specifically for the telecommunications industry as well.

Question: Of the three options, which option do you think is most appropriate? Would you change any aspects of that option?

3. Regulate BNPL in the same way as other consumer credit products

Consumer groups support Option 3 but recommend a number of additional measure to protect consumers from unaffordable debt. BNPL providers are causing significant harm as outlined in the options paper and further articulated in Section 2 of this submission. Option 3 is the only way to effectively address those harms.

BNPL is credit that allows a consumer to split a transaction into smaller, interest-free instalments to repay the amount borrowed over time, with feed if repayments are not met. And while there are a number of different BNPL models used in the industry, which vary in the size of the loan, the basis for fees charged, and timeframes for repayments, the fact remains, BNPL is credit, as the Minister for Financial Services has acknowledged in repeated public comments.[71]

As credit, BNPL should therefore be regulated in the same way as other credit products under the *Credit Act* and *Credit Code*. As articulated in the first section, the reasons for this are to ensure:

- identical baseline protections for consumers of credit regardless of business model, with some nuances to reflect the particular risks of various products;
- a level playing field for industry competitors;
- identical powers and tools for the regulator to effectively monitor the industry and enforce the law; and
- a sufficiently robust regulatory framework to address *all* the harms currently being caused by BNPL.

Regulate BNPL by closing regulatory loopholes

Consumer groups recommend closing the regulatory loopholes allowing the BNPL industry to sell unregulated credit by:

- removing the exemption for interest-free continuing credit contracts at section 6(5) of the *Credit Code* (Schedule 1 to *the Credit Act*);
- amending section 5(1) of the *Credit Code* so that the definition of credit does not require that a charge is made for providing the credit, where the credit is provided by a third party;

[71] For example, Assistant Treasurer and Minister for Financial Services, Address to the Responsible Lending and Borrowing Summit, Sydney, 12 July 2022

- removing the short-term credit exemption at section 6(1) of the *Credit Code*, which is currently relied on to escape regulation by some BNPL models, wage advance products and a range of other credit products;[72] and
- if exemptions are required for other forms of credit impacted by these changes,[73] then these should be separately considered and narrowly defined.

We provide a full discussion of this proposal at **Appendix B.** This approach would address other harmful models of unregulated credit provision already operating in the market, reduce the need for business-model specific regulation, lessen the potential for regulatory arbitrage and future-proof the legislation against harmful activity on the perimeter yet to emerge.

Regulating BNPL would ensure that the following requirements would apply to BNPL providers:

Hold, and meet the requirements of, an Australian Credit Licence

BNPL providers should comply with licensee obligations[74] including:

- RLOs (the full 'not unsuitable' test);
- the reportable situations regime: to allow ASIC to detect significant non-compliant behaviours early and take action where appropriate;[75]
- doing all things necessary to ensure BNPL credit activities are engaged in efficiently, honestly, fairly and fairly;
- internal and external dispute resolution set by ASIC, to empower BNPL users who suffer a loss because of poor behaviour to obtain redress and compensation;[76]
- compensation arrangements to reduce the risk that losses sustained by consumers cannot be compensated by a credit licensee;[77]
- competence and training requirements to promote professionalism; and
- other *Credit Act* requirements etc.

Credit licensing is a vital regulation ensuring a level playing field, including equivalent consumer protection, standards and compliance for industry and regulatory tools for monitoring and enforcement by the regulator.

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[72] Treasury has indicated it intends to consult on other forms of unregulated credit and particularly wage advance in 2023. We will provide further detailed commentary on the basis for removing the section 6(1) *Credit Code* exemption in response to that consultation.

[73] We support, for example, a narrowly defined exemption being included for the No Interest Loans Scheme provided by Good Shepherd and potentially other similar no interest loan schemes administered by other not for profit entities.

[74] s47 of the *Credit Act*

[75] See ASIC, Regulatory Guide RG 78 Breach reporting by AFS licensees and credit licensees

[76] s47(h) and (i) of the *Credit Act*

[77] S48 of the *Credit Act*

Apply responsible lending obligations in full

The specific terms of the affordability tests contemplated under Options 1 and 2 in the options paper are not set out. However, at the very least, both contemplate a reduced version of the 'not unsuitable' test that currently applies to all other forms of regulated credit. We strongly oppose this approach.

BNPL providers should be required to check and satisfy themselves that a BNPL loan is not unsuitable for a person in accordance with RLOs. As referenced in the options paper and throughout this submission, a large group of consumers are suffering harm as a result of being sold into unaffordable BNPL debt.

That BNPL contracts can involve smaller amounts and spending limits[78] does not obviate the need to ascertain that the borrower can afford to meet their commitments. Small amounts can be proportionately significant for those on lower incomes. Recognition of this principle is at the core of similar small amount credit contract legislation.[79] Ascertaining the financial position of the borrower is important to determine a reasonable understanding of the consumer's ability to meet all the repayments, fees, charges and transaction costs of a contract.

Considering many BNPL models impose substantial late fees, there should be an upfront obligation to ensure they are not setting borrowers up to fail. Further, while an individual spending limit may be low, accumulated across multiple BNPL providers this can add up to significantly higher debts. BNPL providers should be required to ensure that a consumer is able to repay a BNPL loan, without cutting on essentials or failing to fulfil their other financial obligations.

The responsible lending regime is already non-prescriptive, based on what is reasonable in the circumstances, and scalable according to risk. It allows for reasonable fast tracking, but also takes note of the reality that it is not possible for a lender to determine whether someone can afford a credit product without some understanding of the borrower's income and expenses.

Verification is an essential part of the RLO process

BNPL providers must be required to verify financial information, similar to all other consumer credit providers.

Verification of the information being provided is a basic responsibility and essential to confirm and substantiate that the credit provided is suitable. Verification of financial information can now be done faster than ever via the very technological improvements in data exchange and analysis that BNPL providers have capitalised on to develop their credit products.

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[78] Although not always given BNPL models included spending limits up to $20,000 at Payright, and $30,000 with Brighte and Humm

[79] See para 4.8 *Financial Sector Reform Bill 2022, Explanatory Memorandum*

Doing so aligns with the *Credit Act* principle that seeks to ensure accountability on all parties to a credit transaction.[80]

Application of responsible lending laws, including full verification of all financial information and the requirements and objectives test, are more likely to identify the fraudulent use of personal identity documents or information to obtain a benefit. This includes fraud perpetrated in the context of family violence and financial abuse.

The requirement to verify documents, (and the application of the RLOs more generally) also allows consumers and their representatives to request and examine the documents that detail the grounds upon which a decision to lend was made. These are critical tools to understand and test the assumptions made, benchmarks used, as well as to identify errors that may have occurred.

The requirements and objectives test helps protect consumer from a range of harms

Ascertaining requirements and objectives is important. Like other forms of credit, the specificity of this requirement for BNPL providers will vary according to the nature of the facility. The regime already accommodates credit card facilities that provide a line of credit for future purchases rather than facilitate a particular purchase. Within this context there are important suitability factors which depend on the borrower's requirements and objectives. For example, a high-interest facility attracting rewards for frequent purchases may be suitable for a person who uses the card frequently and pays off their balance regularly, but completely unsuitable for a person who makes a small number of larger purchases and pays them off over time. Similarly, a credit limit of $20,000 may be completely unsuitable if the person's objective is to purchase furniture valued at $8,000. BNPL facilities vary in the same way, with some being intended to spread the expense of a particular product or service, and others being for general retail use.

BNPL may also be unsuitable where people are using it to pay for utility bills, noting that many utility bill providers have legislated hardship obligations. If the customer's objective is to pay for utility bills over a period, it is safer for them to do this directly with the provider than via a BNPL facility given the risk of additional late fees.

What is reasonable will depend on the circumstances, and flexibility embedded into the *Credit Act*. The explanatory memorandum already includes examples of credit involving small amounts, unclear purposes[81] and is addressed by ASIC RG 209.[82]

Checking the requirements and objectives can also help identify red flags for economic abuse or coercive control – an issue increasingly common to BNPL: see *BNPL lending practices are linked to increased financial abuse* in Section 2.

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[80] Para 3.17, *National Consumer Credit Protection Bill 2009 Explanatory Memorandum*

[81] See for e.g. Examples 3.4, 3.5 and 3.6 *National Consumer Credit Protection Bill 2009 Explanatory Memorandum*

[82] ASIC, Regulatory Guide RG 209 Credit licensing: Responsible lending conduct, December 2019

Credit checks are insufficient and not designed for responsible lending

All three options in the options paper propose a lower suitability test for low credit limits, possibly involving credit checks.

We strongly oppose this compromise. Participating in the credit reporting system is important for the reasons covered in the section on mandatory credit reporting below, but it is no substitute for a responsible lending assessment.

Reliance on credit reports alone or credit scoring is neither appropriate nor effective in ensuring responsible lending outcomes. Credit reports and credit scores are not designed to assess whether loan repayments will cause hardship. Credit reporting is designed to give creditors an indication of the likelihood of a person repaying a debt (that is, to help assess the lender's credit risk).

Crucially, credit reports and scores fail to identify both people in financial hardship who do not hold other credit products, and those who have other credit products but have not defaulted on them.

Regardless of where a credit score threshold was set, such an approach would result in some people in financial hardship being approved and people with sufficient funds but bad payment history being denied. It is simply not fit for purpose.

A small minority of BNPL providers are already using the credit reporting system. It is evident from the high levels of over-commitment reported above, that credit checks alone are insufficient to prevent this harm.

Prohibit unsolicited limit increase offers and entitle consumers to decrease limits

Options 2 and 3 propose that BNPL providers should be prohibited from increasing a consumer's spending limit without explicit instructions from the consumer. This would allow BNPL to increase limits by actively soliciting a consumer's consent to future increases as used to happen with credit cards. Those practices were outlawed in relation to credit cards given the persistent evidence about the harms to consumers of unsolicited offers of credit limit increases.

We do not support this approach proposed in the options paper. BNPL providers must:

- be prohibited from sending unsolicited limit increase offers to their customer or increasing the limit unilaterally;[83]
- enable BNPL users to reduce their limits;[84]
- provide online capacity to request reduction of credit limits;[85] and

[83] Section 133BF of the *Credit Act*

[84] Sections 133BFA and 133BFC of the *Credit Act*

[85] Section 133BFC of the *Credit Act*

- be prohibited from suggesting the consumer not reduce the credit limit.[86]

In line with 2019 amendments to the *Credit Act* that apply to credit cards, informed consent to unsolicited offers should not be a defence. This will ensure that BNPL users are treated fairly and the credit market is free from misleading, manipulative or abusive conduct. While this is a common feature of many BNPL providers, it took years of negative consumer outcomes before this harmful conduct was banned for credit cards. We are already witnessing harmful behavioural outcomes due to this aspect of the BNPL model – as outlined in Section 2.

We understand that BNPL providers have argued that prohibiting limit increase offers would introduce an incentive to offer higher spending limits in the first place.

If this were to occur it would be an acceptable outcome because a consumer would only be granted a higher limit if the amount of the limit satisfied a suitability test. This would involve a lower risk of harm to consumers than allowing repeated unsolicited offers of credit limit increases. In reality, however, we doubt that this would be the outcome. BNPL providers offer smaller limits initially for their own risk management purposes. With a significant level of bad debt already[87] it is unlikely they will automatically offer higher limits to all potential customers.

Apply the Protected Earnings Amount provisions from the SACC and consumer lease regime to BNPL

The PEA provisions of the *Credit Act*, as will be amended as part of implementation of the *Financial Sector Reform Act 2022* for SACCs and consumer leases should be applied to BNPL contracts. While BNPL may not have the same risk profile SACCs and consumer leases, there is a significant overlap in financially vulnerable customer cohorts and harm.[88] The amounts loaned by BNPL providers are also similar to SACC amounts for most BNPL products and similarly contribute to a debt spiral.

The 2015 SACC inquiry clearly established that the limited PEA provisions in the regulations in force had been more effective from a compliance perspective than either the generally applicable RLOs, or the additional presumptions applied in the regulations to SACCs alone.[89] This 'bright line' approach recognises that the regulator can face a range of barriers in enforcing the principles based-RLOs. Barriers can include the need to rely on individual evidence, where borrowers are in vulnerable circumstances and are unable to be easily involved in compliance action.

The planned amendments to those regulations will extend the more effective PEA rules to all consumers (rather than only people who are largely dependent on Centrelink) and reduce the percentage of income that can be committed to SACC and consumer lease contracts. Replicating these provisions with the same 10% cap for BNPL providers would ensure that equivalent

[86] Section 133BFB of the *Credit Act*

[87] Rhiana Whitson, Buy now, pay later companies on the brink as bad debts and interest rates rise, ABC, 21 June 2022

[88] As seen in Chart 1 of the Option Paper showing BNPL users experiencing stress indicators similar to those with car finance, just behind those with SACCs and consumer leases.

[89] Treasury, Review of small amount credit contract laws, Interim Report, December 2015

protections are provided for very low income consumers, while having a minimal impact on higher income earners who use BNPL loans.

Mandatory participation in the credit reporting regime

While consumer groups do not see credit checks as an alternative to the responsible lending provisions, as credit, BNPL providers should participate in the credit reporting regime. The harms identified in using multiple BNPL accounts can in part be addressed by increasing the visibility of all accounts that a potential borrower holds to other BNPL providers and other credit providers alike. The risks associated with multiple accounts are outlined in the harms section below under *Loan Stacking* and are apparent throughout the case studies above.

While RLOs compel a lender to review a person's financial situation, credit reporting provides an independent snapshot of their overall credit commitments. This allows a credit provider to be alerted to credit accounts that may not have been disclosed on an application (intentionally or inadvertently) and are not apparent from reviewing a bank statement. This can be as a result of no repayments being required in the period reviewed, for example, a credit card with a $25,000 limit but a nil balance or a hardship arrangement involving a moratorium on payments. It may also be the result of a person having more than one transaction account. Cross-referencing transaction statements with a credit report, rather than simply looking at a credit score, provides a lender with a highly reliable picture of their credit liabilities.

Participation by BNPL in credit reporting will further the aims of the comprehensive credit reporting regime.[90]

We note that the options paper references the development of a standalone credit reporting-like BNPL database in New Zealand. We oppose the development of a siloed credit reporting database solely for BNPL providers because:

- BNPL is credit and it should be reported as such, in line with all other forms of credit, including credit cards and personal loans;
- to be robust, responsible lending requires a complete picture of a consumer's debts, liabilities and continuing to treat it separately undermines this objective;
- a consumer's BNPL debts do not exist in a vacuum outside of other debts;
- it would be duplicative to build a totally new regime;
- it would create further cost and complexity for industry and consumers; and
- the current credit reporting regime has a significant number of consumer protections built in that could be lost if BNPL is treated distinctly.

[90] The aims are to "give credit providers access to additional personal information to assist them in establishing an individual's credit worthiness; allow credit providers to make a more robust assessment of credit risk and assist credit providers to meet their responsible lending obligations; help lead to decreased levels of over-indebtedness and lower credit default rates; and improve competition and efficiency in the credit market, which may result in reductions to the cost of credit for individuals" see Page 3, Explanatory memorandum to the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*

The comprehensive credit reporting system already accommodates all payment frequencies and payment types.[91] Some amendment to *Part IIIA of the Privacy Act 1988* may be required to address the business models which treat every purchase as a separate contract to ensure efficient reporting and to avoid cluttering individual's credit reports with large amounts of confusing and unnecessary data.

Inclusion in the credit law will make it lawful for BNPL to participate in all aspects of comprehensive credit reporting, but it will not compel them to do so. We submit that participation in the credit reporting regime should be mandatory, in line with *Part 3-2CA of the Credit Act* as it applies to banks. This is justified based on the current low levels of participation by BNPL providers,[92] and the relatively high levels of voluntary participation by other credit providers, not currently subject to the mandatory regime.[93]

It could be argued that the application of the RLO provisions of the *Credit Act* will have the effect of increasing the levels of participation by BNPL providers, but this has not occurred with small amount credit providers, many of whom do not participate in the credit reporting regime, despite being subject to the RLO provisions. Further, the AFIA BNPL Code, which recommends credit checks as one of the key methods of determining the suitability of a facility for a particular customer,[94] has been unsuccessful in bringing about participation in the credit reporting system by all but a small minority of BNPL providers.

Apply additional consumer protections

In addition to licensing, and the application of relevant sections of the credit law that currently apply to other equivalent parts of the credit markets, other consumer protections are vital to prevent harms identified in the options paper and in Section 2 of this submission. They include:

Introduce a cap on late fees and charges

By capturing BNPL as regulated credit, the regular 48% annual cost rate cap or cost caps that apply to small and medium credit contracts would apply. However, late fees fall outside this and make up a significant portion of the BNPL fee structure.

The only caps on late fees found in the *Credit Act* are in the *Credit Code* relating to consumer leases[95] and interest rate caps applying to SACCs.[96]

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[91] "… an individual will be taken to have not met an obligation to make a monthly payment that is due and payable in relation to consumer credit if the individual misses any or all repayments due in a month, irrespective of the actual payment cycle for that obligation." Section 12, *Privacy Regulation 2013*

[92] We understand the majority of AFIA BNPL Code signatories are not engaged in credit reporting system

[93] Over 23 million accounts representing 94% of regulated credit accounts are being reported. ARCA Credit Data Fact Base, Volume 10, September 2022

[94] Clauses 11.4 and 11.5 of the AFIA BNPL Code

[95] Section 179GA enables regulations to be set to cap consumer lease default fees (to come into effect 6 months after the *Financial Sector Reform Bill 2022* receives royal assent).

[96] Section 23A

As suggested in both Option 2 and 3 of the options paper, fee caps should be applied for charges relating to missed or late payments and other contingency fees that are reasonable relative to the costs incurred by the BNPL providers and the amount borrowed. At the very least, the fee caps applied to SACCs should also apply to BNPL – late fees matching the original cost of a purchase are just as harmful a SACC or a BNPL product.[97] Ideally fees should be capped at a percentage of any late instalment.

The primary reasoning behind the Government's consideration of whether BNPL should be subject to reduced credit regulation appears to be that BNPL fees are lower than other forms of credit – a premise that is debatable.[98] If BNPL is to have any kind of preferential treatment compared to other forms of credit as a result of the reforms developed from this consultation, it should be conditional upon a meaningful cap on late fees being imposed.

Remove no-surcharge rules and prohibit vendors promoting BNPL by inflating the price of goods and services to hide the cost of credit

While not within the scope of this consultation, the no-surcharge rules currently commonplace in BNPL contracts with merchants should be removed in line with the RBA's recommendation to improve competition and efficiency in the Australian consumer credit market and create a more level playing field for consumer credit.[99]

The BNPL merchant fees and costs are indirectly passed on to consumers through the higher pricing of goods and services. Currently merchants are prevented from passing on costs they incur onto consumers who pay using BNPL, which distorts the true cost of the loan and the market. Consumers sold BNPL loans are unaware of the high cost of this payment method which leads to cross subsidisation by other payment methods. Broader consequences associated with the wide-spread practice of merchants inflating the cost of goods to hide the cost of BNPL credit was set out in submissions by Consumer Action Law Centre to the Australian Competition Tribunal.[100]

We urge the Government to follow the RBA's recommendation (or enable the RBA to do so) by making changes to payments regulation to enable merchants to pass on surcharges they incur for payment methods such as BNPL. This approach is fair as it signals to customers the costs of using different payment options and encourages customers to choose cheaper payment methods. It also prevents other customers from cross-subsidising other more expensive forms of payments. This means that businesses do not inflate the cost of goods and services to cover costs they incur but cannot recoup through surcharges.

[97] Section 39B of the *Credit Code*

[98] See Dr Lien Duong, Professor Grantley Taylor, Dr Baban Eulaiwi, 2022

[99] Reserve Bank of Australia, Review of Retail Payments Regulation Conclusions, October 2021

[100] Consumer Action Law Centre, Outline of submissions, ACT app 1 of 2019

Prohibit BNPL debt being paid from a credit card

Research in the UK found that 19.5% of active credit cards in December 2021 have at least one transaction by a BNPL firm on their credit card during 2021.[101]

Charging BNPL debt to credit cards is a clear indicator of a consumers' inability to pay for BNPL and helps hasten the debt spiral. It does so by converting an ostensible 0% interest BNPL debt into a credit card debt that incurs closer to 20% credit card interest rates and can contribute to lengthy repayment periods if the minimum payment only is made.

ASIC has also confirmed worse financial outcomes for people who pay BNPL via credit card—between 66 - 73% of credit card holders who regularly repaid BNPL incurred interest charges on credit cards, while only 42 - 46% of other card holders regularly incurred interest. People should not be paying for credit, with credit.

Remove the Point of Sale Exemption

The Point of Sale Exemption[102] should be removed in line with FSRC recommendation 1.7 and should apply to retailers who act in any way to promote, assist or sell BNPL options to consumers.

While we understand that BNPL take-up is largely self-initiated and app-driven, casework organisations have found that vendors have inappropriately promoted and intervened in the sales process of BNPL products, as outlined above under *Advertising and Marketing* in Section 2.

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[101] Guttman-Kenney, Benedict and Firth, Chris and Gathergood, John, Buy Now, Pay Later (BNPL)...On Your Credit Card (March 10, 2022). Available at SSRN: https://ssrn.com/abstract=4001909 or http://dx.doi.org/10.2139/ssrn.4001909

[102] *National Consumer Credit Protection Regulations* 2010 (Cth) Regs 23 and 23A

Question: What do you think are the issues with the other two options?

4. Why Options 1 and 2 don't stack up

Options 1 and 2 would fail to adequately address the causes of harm referenced in the options paper and evidenced in this submission. Both options would provide too many concessions to the BNPL industry at the expense of meaningful consumer protections.

Options 1 and 2 introduce unwarranted complexity

The FSRC found that industry, community groups and regulators all agree that the current financial services law is too complex and recommended that work be undertaken to simplify it by eliminating, as far as possible, the number of exceptions to otherwise generally applicable norms of conduct.[103] The Government supported this recommendation and the ALRC is currently conducting a review into the simplification process as we write.

Option 1 would require the introduction of a new complex regime, or significant regulatory exemptions or inclusions to deliver.

Option 2 runs counter to the FSCR recommendation. Option 2 is predicated on an assumption that BNPL's model is so different that generally applicable principles either could not or should not apply. This is not the case.

Regulatory oversight is essential

The proposal in Option 1 that BNPL providers could continue to self-regulate and not be required to obtain an ACL is misguided and would be complex to implement.

No other form of credit is allowed to wholly or partly self-regulate in the form described in this option.

While there are characteristics to BNPL that are unique to the model, these differences demonstrate that the harms of credit are found not just in the direct cost of credit but in the behaviours credit models can incentivise and drive that lead to harm. BNPL, credit has the potential to cost nothing yet still lead to the harms outlined above. That said, the vast majority of current BNPL models do involve traditional fees, as well. A repayment obligation that causes a person to go without essentials is harmful regardless of whether it includes any component of interest or fees.

These characteristics – far from justifying an exception to the general regulation of credit - instead require the regulation of BNPL as credit.

The AFIA BNPL Code contains provisions that are largely similar to the hardship obligations contained in the *Credit Act*. Despite this, in our experience and experience of our clients, the level

[103] Pages 494-496, Recommendations 7.3 and 7.4, Final Report Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Vol. 1, 2019

of compliance with these provisions has been noticeably worse than other (even third-tier) credit providers.

Despite virtually the same rules existing in the Industry Code, it seems apparent that the absence of a regulator with meaningful powers has led to poor standards in the BNPL industry already.

A regulator with meaningful powers and appropriate resources is essential for consumer protection.

A code of practice would ensure little to no regulatory oversight over BNPL

If the Government provides ASIC with the regulatory ability to develop and approve a mandatory code for BNPL, this would still not mean ASIC has equivalent power to oversee and monitor BNPL as compared with regulated credit products.

Placing key consumer protections normally found in the *Credit Act* in a self-regulatory code would give ASIC no power to require critical data via its information-gathering powers, the reportable situations regime and other oversight functions. Any power would be limited to a sub-set of information arising out of any voluntarily identified enforceable code commitments.

This would hobble ASIC's ability to regulate and monitor financial services, consumer credit, and authorised financial markets operating in Australia as a whole, since it restricts ASIC's ability to understand and oversee the impact of an important part of the credit market.

Additionally, the operation of the AFIA BNPL Code to date does not inspire confidence that it would deliver good consumer outcomes. The AFIA BNPL Code provides very few material incentives to comply (versus statutory penalties), and the code compliance committee is a non-independent industry body with no real motivation to proactively monitor compliance.

Codes should not do the work more properly the role of legislation

The work of codes should be directed at elaborating on legislation to deliver additional benefits to consumers and clarifying legislated requirements and protections from the perspective of a particular industry, practice or product.

Self-regulatory codes should not replace the primary work of legislation to regulate industry conduct and protect consumers from harm, as well as all the other objects of the *Credit Act* as outlined above.

As Treasury submitted to the FSRC and was subsequently quoted in its Final Report

> *Industry codes of practice are offered as a form of 'self-regulation' … by which industry participants "set standards on how to comply with, and exceed, various aspects of the law."*

They are not meant to replace the law, or set the basic pillars of how an industry operates.[104]

[104] Page 105, Financial Services Royal Commission, 2019

Rather, BNPL regulation under the *Credit Act* should be supplemented by an enforceable, independently monitored, BNPL Code that elaborates on its legislative requirements to deliver additional benefits to consumers and clarifies legislated requirements and protections from the perspective of a particular industry, practice or product.[105]

Maintaining exemptions for BNPL would perpetuate distortion in the credit market

It is apparent that the rapid growth of the BNPL sector has been fuelled at least in part by the regulatory loopholes that have enabled it to avoid compliance costs associated with other products and/or imposed on other providers. If the Government creates an entirely different credit regime for BNPL, this option will perpetuate those distortions and create opportunities for regulatory arbitrage that are difficult to predict and will be complex to analyse and respond to. The Government would in all likelihood find itself needing within a few years to consider further bespoke regulation to address a new range of credit products that have been designed to exploit a new set of loopholes. The Government's key objective should be to create a level playing field for all products and participants to promote fair competition and equivalent consumer protection.

Further reasons Options 1 and 2 don't address the harms

In supporting Option 3, this submission has already outlined reasons why Options 1 and 2 are inappropriate. These are:

- introducing scaled down RLOs or a weak affordability test is inappropriate given consumers are suffering harm as a result of being sold into unaffordable debt and becoming financially over-committed to these products;
- verification is essential to substantiate information being provided and ensure accountability on all parties to a credit transaction;
- requirements and objectives test help protect from people being sold unsuitable loans that they cannot afford;
- all unsolicited limit increase offers including those with informed consent need to be prohibited to prevent further debt;
- full regulation is essential to ensure the regulator has oversight of an increasingly important segment of the credit market;
- credit checks are insufficient and not designed for responsible lending; and
- scaled down participation in the credit reporting regime obscures liabilities.

[105] See RG183.5, ASIC RG183 Approval of financial services sector codes of conduct, March 2013

Appendix A: List of joint consumer submission signatories

1. Anglicare Australia
2. Bravery Trust
3. Brotherhood of St. Laurence
4. CHOICE
5. Consumer Action Law Centre
6. Consumer Action Koori Help
7. Consumer Credit Legal Service WA
8. Consumers' Federation of Australia
9. Financial Counselling Australia
10. Financial Counsellors' Association of NSW inc.
11. Financial Counsellors' Association of Western Australia
12. Financial Rights Legal Centre
13. Good Shepherd Australia and New Zealand
14. Indigenous Consumer Assistance Network
15. LawRight
16. Mob Strong Debt Help
17. Redfern Legal Centre
18. South Australian Financial Counsellors Association
19. Shelter Housing Action Cairns
20. St Vincent de Paul Society National Council of Australia
21. Uniting Communities Consumer Credit Law Centre SA
22. WestJustice

Appendix B: Regulating BNPL as credit

As outlined in this submission, BNPL is credit and it needs to be regulated as other forms of credit, including credit cards and personal loans, under the *Credit Act* and *Credit Code*.

For the vast majority of BNPL products, this can be done by removing the exemption for interest-free continuing credit contracts at section 6(5) of the *Credit Code* (Schedule 1 to the *Credit Act*).

However, to capture certain BNPL models (including a model use by Afterpay), there would also need to be an amendment to section 5(1) of the *Credit Code* so that the definition of credit does not require that a charge is made for providing credit.

Furthermore, section 6(1) of the *Credit Code* would have to be removed in order to capture Afterpay, and wage advance products and other avoidant products described above. We are not aware of any legitimate products that operate under this section that are legitimately worthy of a carve-out from credit regulation.

Remove the requirement that credit involve "charges"

The definition of 'charge' as it is used throughout the *Credit Act* has been narrowly construed to only apply to fees that are 'certain', or unavoidable. Fees such as late fees – which are only imposed if a condition occurs, such as missing a payment – are not considered a 'charge'.

Some BNPL providers including the largest one, Afterpay, do not impose charges in this sense. However, their service is still a credit product, and for Afterpay, late fees can add up to amounts extremely similar to those charged under credit cards (discussed further above at *Excessive consumer fees and charges, including default fees*). These products should still be regulated as credit, as this reflects the way they are being used by consumers.

The essential scope of 'credit' that the *Credit Act* applies to is set out at section 5(1) of the *Credit Code*. Specifically section 5(1)(c) requires that "a charge is or may be made for providing the credit".

These requirements must be removed to ensure BNPL is treated as credit.

We recognise that removing this requirement may risk capturing other arrangements such as invoicing. To address this, the removal of this requirement should be limited to those circumstances where a third-party is involved in the provision of credit. This would allow merchants, retailers and other service providers to continue invoicing as normal.

However, if a third-party credit provider (such as BNPL provider or credit card provider) becomes involved, this is where the credit law should step in.

Credit providers involved in these arrangements are operating for a profit. A transaction exists between two parties – the merchant and the customer, and the third party is only there for finance purposes. Credit providers are being paid by either a merchant or a consumer (and in the case of BNPL providers, both) and this should be recognised by regulating this transaction as credit.

If Treasury deems it necessary, there should also be a limited and specific carve out for charities (such as the no interest loan scheme run by Good Shepherd) that provide loans on a not-for-profit basis, and do not charge fees of any kind, under any circumstances. This is plainly a different set of circumstances that (like invoicing) would not benefit from being captured by the *Credit Act*.

Remove the exemption for interest-free continuing credit contracts

While a small number of BNPL models do not involve 'charges', the vast majority of others do. As noted above, rather than avoiding the scope of section 5(1) of the *Credit Code*, these companies exploit the exemption to the definition of credit under section 6(5) of the *Credit Code* to avoid regulation.

This exemption has allowed BNPL providers to offer a credit product and have consumers pay for this credit through establishment fees and monthly account keeping fees. Late fees are also charged by these companies but are not 'charges' as per the *Credit Code* and therefore not capped.

BNPL models operating on the scale that they do, with these fee structures, do not reflect the legislative intent of this exemption.

Removing the exemption would be:

- fair, ensuring there is a level playing field for all credit providers;
- simple and efficient, by avoiding further regulatory complexity;
- effective, by ensuring consumers are protected from harm, and lending is prudent and responsible; and
- flexible enough to accommodate any characteristics unique to BNPL.

The exemption is out of date and was designed at time prior to the development and popularity of proliferating BNPL credit models.

The original justification[106] for the exemption was that continuing credit contracts:

> *"provide benefits to the debtor (that Code credit does not) and their availability is restricted so that they do not affect competition."*

Neither arm of this justification could be said to apply to BNPL. Outside of its ease of access facilitated by the exemption, BNPL does not provide benefits to a debtor that other forms of credit do not provide. Nor is its availability restricted. While the amount of the charges imposed by BNPL providers is not impacted by the level of debt on the account, they are still fees that are far more reminiscent of traditional forms of credit. The loophole is simply too broad and is being exploited. It should be noted that Cigno and their lending partners also purported to provide loans on extremely harmful terms via this exemption.

If exemptions are required for other forms of continuing credit, then these should be separately reviewed, considered and narrowly defined.

[106] Para 8.37 of the *Explanatory Memorandum to National Consumer Credit Protection Bill 2009*

Some BNPL products and an even broader range of recently developed credit products are operating in the short term credit exemption at section 6(1) of the *Credit Code*. For similar reasons, this exemption should also be removed from the *Credit Act*. We understand that Treasury intends to consult on the operation of wage advance and other products in the near future. We provide some details below on the issues we see in this space, and will provide more detail on the need for this exemption to be removed in response to that consultation.

Other provisions of the *Credit Act* and *Credit Code* may also need to be clarified to ensure BNPL does not fall within existing gaps. For example, while sections 11 and 12 of the *Credit Code* do ensure some forms of 'payment by instalment' of goods regulated, these provisions do not capture sales of goods by instalments where the supplier of goods and the financier are not related body corporates, nor do they capture the sale of services by instalments in any circumstance.[107]

Define BNPL

Given all three options proposed by Treasury contemplate different regulatory obligations for BNPL credit compared to those of credit products currently captured by the *Credit Act*, it is likely it will be necessary to establish a definition of BNPL.

We understand that Treasury is considering the definition of 'buy now pay later arrangement' used in ASIC Product Intervention Order regarding Continuing Credit Contracts.[108] We consider this an appropriate starting point. However, we urge Treasury to closely consider the risk of this definition being susceptible to avoidant conduct. One example of a risk worth exploring is the requirement under subsection (c) that the BNPL arrangement must be a continuing credit contract. Could BNPL arrangements be designed to artificially avoid this requirement by treating each purchase as a separate contract?

Another way to regulate BNPL would be to leave section 5 and 6 of the *Credit Code* as is, but specify that despite those sections, anything that meets the definition of BNPL is also credit, or is otherwise subject to a separate regime Treasury may develop. Taking this approach would be a huge error that would invite further regulatory arbitrage.

Even if the definition of BNPL is comprehensive and captures all existing models, addressing the issues raised regarding sections 5 and 6 of the *Credit Code* is vital. This is because if a current or future BNPL product falls outside the definition, the consequence *must not* be that the product escapes regulation altogether. Rather, it should be still deemed credit.

[107] Sections 11 and 12 of the *Credit Code* provide that a contract for the sale of goods will be a regulated credit contract if the amount payable to purchase the goods: is payable by instalments; and exceeds the cash price of the goods. Section 11 applies where there are only two parties to the transaction, the consumer and the provider of the goods (who accepts payments by instalments). Section 12 applies where: There are two contracts, one for the sale of goods and one for the finance contract (for payment by instalments by the consumer). The credit provider under the finance contract is either: (a) the supplier of goods; or (b) a related body corporate. There is therefore no provision capturing sales of goods by instalments where the supplier of goods and the financier are not related body corporates. There are no provisions capturing the sale of services by instalments in any circumstances.

[108] Section 4, *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648*

The financial services sector has been plagued for decades with products that have been designed to specifically fall outside of regulation, within exemptions, or outside of definitions. These products at the regulatory perimeter have consistently caused substantial harm to consumers and taken up more resources of regulators than their market share.

No matter how strong a definition of BNPL is, the following need to be kept in mind:

- BNPL has been developed to avoid existing definitions and new models are likely to be developed to avoid any definition developed; and
- the significant variety of BNPL models makes defining BNPL difficult. No matter how broad BNPL is defined, there will always be a boundary.

Appendix C: Glossary

ACL: Australian Credit Licence

AFCA: Australian Financial Complaints Authority

AFIA: Australian Finance Industry Association

ALRC: Australian Law Reform Commission

ASIC: Australian Securities and Investments Commission

BNPL: Buy now, pay later

CCLI: Consumer credit liability information

The Credit Act: *National Consumer Credit Protection Act 2009*

The Credit Code: *Schedule 1 of the National Consumer Credit Protection Act 2009*

EDR; external dispute resolution

FHI: Financial hardship information

FSRC: Financial Services Royal Commission

IDR: internal dispute resolution

NILS: No Interest Loan Scheme

PEA: Protected Earnings Amount

SACC: Small Amount Credit Contract

RBA: Reserve Bank of Australia

RLOs: Responsible Lending Obligations

RHI: Repayment history information