

16 December 2021

By email: buynowpaylater@mbie.govt.nz

Buy Now Pay Later Project Team
Consumer and Competition Policy Team
Building, Resources and Markets
Ministry of Business, Innovation and Employment
Wellington 6140 New Zealand

Dear Project Team

Buy-now, pay-later – response to Discussion Document

Thank you for the opportunity to comment on the issues raised in the Ministry of Business, Innovation and Employment's discussion document on buy-now, pay-later (**Discussion Document**).

Consumer Action is an Australian independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

We operate a free legal advice service for individuals and community workers, and a financial counselling advice service¹ for individuals in Victoria. Consumer credit debt is generally the predominant issue people seek our advice on via both these services, with the associated debts often the leading factor pushing people into, or towards, financial hardship.

Our submission is supported by Financial Counselling Australia, the peak body for financial counsellors (commonly known as financial mentors in New Zealand), who work with not-for-profit community organisations like Consumer Action to provide free and confidential advice and support to people experiencing financial stress.

This review comes at a critical time, as the use of BNPL has continued to grow significantly in Australia² and New Zealand³ over the last few years. This growth has flowed through to the case work of financial counsellors in Australia.

The legal status of buy-now, pay-later (**BNPL**) products in New Zealand, as described in the Discussion Document, is extremely similar to its current status in Australia – that is, it is essentially unregulated credit. We are responding to the Discussion Document because debts accrued from BNPL products are becoming an increasingly common form of debt that contributes to the hardship experienced by our clients in Australia. Further, our casework indicates that those debts are causing or exacerbating financial hardship in substantially the same manner as is

¹ Our financial counsellors receive calls to the National Debt Helpline, which is a free service available to any in Australia dealing with debts.

² '20-28oMR ASIC releases latest data on buy now pay later industry' <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-28oMR-ASIC-releases-latest-data-on-buy-now-pay-later-industry/>

³ 'Buy now pay later scheme use increased by 49%' <https://www.rnz.co.nz/news/business/445450/buy-now-pay-later-scheme-use-increased-by-49-percent-money-specialist>

described in the Discussion Document. Importantly, an industry code for BNPL in Australia has been ineffective at curbing the harm. We strongly encourage the Ministry and the New Zealand government to take steps to ensure there are genuine consumer safeguards and protections that apply to BNPL in New Zealand, unlike the current situation in Australia.

A summary of recommendations is available at **Appendix A**.

Legal status of BNPL in Australia is similar to New Zealand

Just as BNPL products fall outside the operation of the *Credit Contracts and Consumer Finance Act 2003 (CCCFA)* in New Zealand, they also avoid regulation by Australia's equivalent consumer credit legislation, the *National Consumer Credit Protection Act 2009 (NCCPA)*. The NCCPA contains similar consumer protections and obligations on creditors to those that exist in the CCCFA in New Zealand, and applies to arrangements that meet an extremely similar definition of 'credit' to that found at section 6 of the CCCFA.⁴

However, unlike in New Zealand, most BNPL providers in Australia do charge some fees with their products beyond default fees. They are able to do this without falling within the definition of credit as the NCCPA contains some limited exemptions to the definition of 'credit', which permit fees to be charged if they fall within certain limits.⁵ In many cases, the fees charged with BNPL products in Australia appear to be specifically structured to charge the most possible while staying within the boundaries of these exemptions. Despite these fees, Australian BNPL providers still make significant revenue via the fees they charge merchants, by which they often charge 4-6% of purchases made, significantly more than most other payment platforms.⁶

Australia's corporate regulator, the Australian Securities and Investments Commission (**ASIC**), has some limited oversight of BNPL because it falls under a definition of 'financial product' contained in ASIC's enabling legislation.⁷ However, the powers ASIC holds by virtue of BNPL falling within this definition are limited to more general laws, rather than those specifically designed for credit, like prohibitions on engaging in misleading or deceptive conduct or use of unfair contract terms, which the Discussion Document indicates also already apply to BNPL in New Zealand.⁸

One relevant difference between Australia and New Zealand is that we have no equivalent provision to s 137A of the CCCFA in Australia, that allows the Minister to recommend a product be subject to all or part of the CCCFA. For BNPL to be subject to existing consumer credit laws in Australia, it would require legislative amendment.

In short, this means that BNPL occupies a very similar position in relation to Australian law as it does within New Zealand law – that is, credit laws generally do not apply to it.⁹

The Australian BNPL Code doesn't prevent any financial hardship triggers

As set out in the Discussion Document, the BNPL industry in Australia has developed a Code of Practice (**Aus Code**) that is overseen by the Australian Finance Industry Association (**AFIA**) – an industry body of which some BNPL providers are members. The Code came into effect on 1 March 2021.

⁴ See s 3(1) of Schedule 1 to the NCCPA (Schedule 1 is also known as the National Credit Code).

⁵ See s 6(1) of Schedule 1 to the NCCPA.

⁶ In Australia, BNPL providers commonly prohibit merchants from passing on the fees charged by the BNPL provider on transactions, by use of 'no surcharge rules'. While these arrangements appear to benefit consumers, there are signs that retailers aim to make back the costs incurred to consumers by other means, such as by inflating the retail prices of goods across the board, or where the agreed price for a product or service is negotiable. See example 3 in ASIC's Report 600 on BNPL: <https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>.

⁷ *Australian Securities and Investments Commission Act 2001* (Cth), s 12BAA.

⁸ ASIC also has a product intervention power that it can use to intervene regarding a financial product if there is a real risk that product is causing 'significant consumer detriment', however this power is intended to be a timely response to market wide conduct, and has only been used in exceptional circumstances to date.

⁹ The Australian Government has recently announced its intention to undertake a consultation to assess whether BNPL should be regulated in mid-2022 which may change its legal status here, but the scope of this review is unclear and appears to be focused on BNPL as a payment platform, rather than as a credit product. For more information, see <https://joshfrydenberg.com.au/latest-news/transforming-australias-payments-system/>.

The Aus Code falls well short of what consumers should be able to expect in terms of safeguards and rights when dealing with BNPL, with its overall value being questionable at best. As described below, the Aus Code is very limited in any role aimed at improving consumer outcomes. While it is technically correct that the Aus Code goes above the law that applies to BNPL, this is an exceptionally low bar given that consumer credit laws do not apply to BNPL.

Consumer Action and other consumer advocate groups in Australia engaged with AFIA in the development of the Aus Code and provided feedback on draft versions,¹⁰ as we do with numerous industry codes. Unfortunately, most of our feedback was not taken on board.

The Discussion Document references the Aus Code under 'option two' of the three avenues contemplated for New Zealand to manage the BNPL sector going forward.¹¹ In reality, the development of the Aus Code far more closely mirrors the 'option one' (status quo) proposed in the Discussion Document. There were no formal requirements imposed on AFIA and the BNPL sector by any government source in developing the Aus Code. The BNPL sector may have been encouraged to develop a code by the Australian Government, but industry has complete discretion on what the Aus Code actually says and does. Additionally, it has not gone through any formal government approval process, unlike other Australian financial services industry codes.¹²

We point out the substantial holes in the Aus Code below as a warning of the likely outcome of industry self-regulation in New Zealand if the government does not intervene. Most relevantly to your current review, the Aus Code appears to be doing little to reduce the rate and severity at which BNPL debts contribute to financial hardship. We strongly recommend that the Minister of Commerce and Consumer Affairs uses s 137A of the CCCFA to recommend making regulations, as the best way to reduce the negative impact BNPL products have upon people in, or at risk of, financial hardship.

RECOMMENDATION 1. The Minister of Commerce and Consumer Affairs should use the power under s 137A of the CCCFA to recommend making regulations to declare BNPL products as a consumer credit contract, and make it subject to the majority of the CCCFA.

Not compulsory

Perhaps the most glaringly obvious hole in the Aus Code is that it is entirely optional. There are currently eight BNPL providers that are AFIA members and have signed up to the Code and publicly committed to be held to it. While they may represent a majority of sales in the market, this is only around half of the existing BNPL providers.¹³ The Code has no application whatsoever to BNPL providers that are not signatories.

This also means that if in future the Aus Code was improved and a member didn't agree with it, they could just leave AFIA and elect to no longer be bound by the Code. While there may be reputational consequences, we suspect this probably contributed to the final Code being written in a way that seemed to aim to avoid needing any of the founding members to significantly alter their existing business models to be compliant. It will also likely discourage any material enhancements to the Code being made that do not suit the business interests of members in future.

RECOMMENDATION 2. If intending to rely upon a BNPL industry code to play any substantial role in reducing the triggers of financial hardship caused by BNPL, it is essential that membership and compliance with the Code be compulsory to offer BNPL products in the marketplace.

¹⁰ See, for example: <http://consumersfederation.org.au/wp-content/uploads/2020/05/20200506-FINAL-Submission.pdf>.

¹¹ At page 28.

¹² For example, the Australian Banking Association submitted its Banking Code of Practice to ASIC for approval when it was last reviewed.

¹³ <https://www.ibisworld.com/au/industry/buy-now-pay-later/14769/> This report found that 17 BNPL providers were operational in Australia in April 2021.

Aus BNPL Code allows providers to provide credit without affordability assessments

The Aus Code's biggest shortcoming in terms of preventing financial hardship is the glaring absence of any kind of obligation on signatories, for the vast majority of BNPL products, to make any assessment as to whether the borrower can afford to repay the amount borrowed.

Clause 11 of the Aus Code's title refers to a commitment to make sure BNPL products are suitable for customers. Unfortunately, in substance, clause 11 is nothing more than an impressive exercise in taking over two pages to say that BNPL providers need not do anything substantial except verify the identity of a customer before approving them for a line of credit up to \$2000. If this relates to an existing customer of the BNPL provider, this limit is extended to \$3000. This covers the lion's share of BNPL product structures and users.

Clause 11.3 does contemplate BNPL providers undertaking an upfront assessment process and speaks about ensuring customers are not vulnerable and being satisfied with the information obtained about the customer. However, a close read indicates these requirements actually require no specific action of the BNPL provider. In terms of affordability, customers need only be capable of making an initial payment upfront, and they are deemed appropriate borrowers.

Many BNPL providers promote the absence of any affordability assessment or credit check whatsoever in their marketing campaigns, and it is part of what makes BNPL so easy to access. This only changes if the BNPL provider is lending over \$2000 (or \$3000 to an existing customer) – at which point the Aus Code can be satisfied simply by an external credit check – to approve any amount up to \$15,000.¹⁴ Only when approving BNPL transactions over \$15,000 are Code subscribers required to undertake any actual assessment of the finances of the customer.

This is in direct contrast to forms of equivalent regulated credit captured under the NCCPA – credit providers must assess and verify the income and expenses of any prospective borrower and ensure the credit product is 'not unsuitable' before advancing them the credit (known in Australia as 'responsible lending'). By contrast, the Aus Code seems to explicitly go to lengths to avoid establishing any obligation to lend responsibly.

This is a gaping hole in the Aus Code, and it is the main reason that it does little to nothing to reduce or prevent BNPL products sold under the Code contributing to financial hardship. We strongly urge the New Zealand government to address this significant issue in BNPL playing field there.

BNPL providers wilfully blind to financial hardship

We strongly agree with the Discussion Document's point at paragraph 46 and 53 that in many cases, financial hardship is unlikely to be visible to BNPL providers. This is primarily a direct result of not assessing whether BNPL is affordable prior to approval. Where the provision of regulated credit (at least if following the law) requires the creditor to identify the other income and expenses of a prospective borrower, BNPL providers are likely to be unaware of what is going on in the background for their customers. While BNPL providers generally consider people making their BNPL repayments to be appropriate users of their product, these people may still be experiencing significant financial hardship

The inadequacy of the BNPL's approach to identifying financial hardship is evidenced by the vast discrepancies in the rates of hardship the industry has reported in Australia compared with those identified from other sources. For example, in 2020 AFIA told an Australian parliamentary committee that the incidence of hardship requests across the industry was less than **one percent**.¹⁵ By comparison, a report by ASIC on the BNPL sector released in

¹⁴ The Aus BNPL Code also allows BNPL providers to determine suitability with an assessment of the income and expenses of the borrower for amounts between \$2001-\$15,000, but the credit check appears to be the more commonly used option in these circumstances: see clause 11.5 and 11.12.

¹⁵ Senate Select Committee on Financial Technology and Regulatory Technology, *First Interim Report*, September 2020, at 8.63. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024366/toc_pdf/SelectCommitteeonFinancialTechnologyandRegulatoryTechnology.pdf;fileType=application%2Fpdf.

November 2020 contained survey results indicating that **20%** of BNPL users surveyed reported that they had cut back or went without essentials (eg meals) in the last 12 months, in order to make their BNPL payments on time.¹⁶

More recent data indicates this has become a more widespread issue in Australia since the commencement of the Aus Code. Earlier this month, Financial Counselling Australia (FCA) released a report on a September survey of financial counsellors across Australia (FCA Report)¹⁷ The findings indicate that BNPL debt is growing rapidly in the case work of financial counsellors, often as an additional debt on top of other forms of credit like credit cards and personal loans. Financial counsellors reported that it is common for clients with BNPL debt to become overcommitted with repayments, often across multiple accounts. Where 12 months ago 31% of financial counsellors said that half, more or all of their clients had BNPL debts, this figure is now at 84% of their clients. While this also coincides with a significant increase in the prevalence of BNPL generally, people only reach out to financial counsellors when they are in, or at risk of, financial hardship. It suggests a clear majority of people in such a situation have BNPL debts. Another telling statistic from the survey responses months after the Aus Code came into effect (August and September 2021) was that 61% of financial counsellors reported most or all their clients with BNPL debts are struggling to pay other living expenses.¹⁸ Responses from financial counsellors also indicated that their clients were using BNPL to pay for essential items (such as groceries), and then got stuck in a cycle of debt. While some BNPL providers claim their products are not available for use on essentials, financial counsellors report that clients get around an inability to use BNPL at supermarkets by purchasing vouchers that can then be used there.¹⁹

Case Study – Donna’s story

Donna (name changed) is a single mother of three living in regional Victoria who works part time and receives a variable income. Donna contacted the National Debt Helpline in March this year 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 all with companies subject to the BNPL Code.

Donna told us 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, Donna indicated that she was comfortable with her remaining BNPL debts. In the following months while we were assisting Donna negotiate some of her debts, she informed us that she was struggling for money and had been using BNPL 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).

Donna had high credit limits for BNPL products. At one point she owed \$2000 to one major BNPL provider, nearly another \$2000 to another BNPL provider, and a similar amount owing to the same provider via regulated credit as well. She likely 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.

Donna is still paying off her BNPL debts, but has told us she cancelled one of her BNPL accounts. We have sought to assist her to negotiate the debt with the other BNPL provider, but this is 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’.

¹⁶ Buy now pay later: An industry update, ASIC, Report 672, p 15. <https://asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>

¹⁷ It’s Credit, It’s Causing Harm and It Needs Better Safeguards: What Financial Counsellors Say About Buy Now Pay Later, Financial Counselling Australia, December 2021. <https://www.financialcounsellingaustralia.org.au/docs/its-credit-its-causing-harm-and-it-needs-better-safeguards-what-financial-counsellors-say-about-buy-now-pay-later/>.

¹⁸ FCA Report, page 6.

¹⁹ FCA Report, page 9.

The BNPL model incentivises prioritising BNPL repayments

While the approach of BNPL providers to freeze the accounts of customers who have missed payments and increase the spending limits of customers only in response to good payment history is described by industry as a mechanism for reducing financial hardship, there is data that suggests it can also encourage consumer behaviour that leaves them worse off. This is consistent with the observation from financial mentors in New Zealand that some BNPL customers use credit cards to pay their BNPL instalments.²⁰

Last month, the Commonwealth Bank of Australia provided data to a Parliamentary committee that indicated their customers who use BNPL products were 50-100% more likely to overdraw their transaction account, or fall behind on repayments.²¹ Where 7.2% of customers with BNPL accounts had overdrawn their account, only 3.9% of similarly aged customers without BNPL accounts had done the same.

A similarly concerning trend was highlighted in the FCA Report, in that many financial counsellors had indicated that they had clients who had prioritised their BNPL repayments over other essential expenses. The BNPL model can create an additional incentive for consumers to make their BNPL repayments – it keeps their account open, and can lead to purchase limit increases. This is reminiscent of practices in the credit card industry, since banned, where banks provided unsolicited credit card limit increases.

Being more lenient to people who miss payments is not a good solution to this issue – it can only be prevented by reducing the number of people that get to this point. Introducing an obligation for BNPL providers to have an understanding of a person's financial situation before signing them up to their products, or increasing spending limits, is the obvious and best solution to these issues. BNPL providers are contributing to the debts of their customers, and it is essential that there is an obligation on BNPL providers to understand the financial situation of their customer before deciding to add BNPL repayments to their expenses.

Regulation also cannot wait for open banking to be in a position to facilitate real time affordability assessments. In Australia, the technology is already available for open banking, but take up has been slow by industry. To tie the reform of BNPL to this process would incentivise the BNPL industry to drag its feet on its uptake. Consumer protections need to come first.

RECOMMENDATION 3. All BNPL providers should be required to properly assess the financial situation of a prospective customer before agreeing to approve their access to use a BNPL product, or increasing their credit limit under a BNPL product. BNPL providers must only be permitted to allow people to use their platforms to make purchases for amounts the BNPL provider has reasonably assessed can be repaid by the customer.

No assessment of affordability makes late fees far more likely

As also set out in the Discussion Document, one other obvious way BNPL can contribute to financial hardship is via the fees charged for missed payments. The risk of this occurring is greatly exacerbated where BNPL providers do nothing to assess whether the customer has the capacity to repay the debt in the first place. If a person cannot afford the repayments in the first place, they are being set up to fail, and inevitably will incur late fees that mean they pay more for their purchases in the first place. What's worse, these fees are more likely to be incurred by precisely the people who shouldn't be signed up to additional credit in the first place.

This also relates to another shortcoming of the Aus Code. A consistent issue throughout the Aus Code is that the language used talks in extremely general terms. This makes interpreting the practical impact of the provisions a difficult task, and one that likely leaves BNPL providers with ample wriggle room.

²⁰ As per paragraph 47 of the Discussion Document.

²¹ <https://www.businessinsider.com.au/commonwealth-bank-bnpl-regulation>.

One clear example of this comes in clause 10.1(g) of the Aus Code, which that late fees will be fair, reasonable and capped. This is vague and doesn't offer a commitment of real value. In terms of fair and reasonable, there is no point of reference for what this means. By comparison, the Australian Customer Owned Banking Code of Practice clarifies that similar fees will be reasonable, *having regard to their costs*.²² While companies like Afterpay may claim that their flat \$10 fee is clearly reasonable, it seems far less reasonable when you consider that it is imposed regardless of the value of the payment missed.

Similar can be said for the commitment to cap late fees – what value is a high cap? In Australia Afterpay cap their late fees at 25% of the total value of the good being purchased²³ – still a substantial amount to pay on top of a good. Latitude, another Code signatory, doesn't seem to indicate what, if any, cap applies to their late fees.²⁴

RECOMMENDATION 4. Whether by regulation or an industry code, there needs to be clear and measurable limits imposed on the late fees that BNPL providers can charge New Zealanders.

No detailed approval process increases risk of vulnerabilities being missed

Under the NCCPA, regulated credit providers must ensure any credit product sold is appropriate to the requirements and objectives that have caused the consumer to seek credit. This process provides a valuable point at which credit providers can identify vulnerabilities of a consumer. When done correctly, making the necessary inquiries as to the purpose of the credit can help identify red flags that may give rise to financial abuse. Coerced debt is a common factor in the inability for victim survivors to leave a violent or abusive relationship and re-establish their lives. As noted above, the Aus Code effectively allows BNPL providers to lend up to \$15,000 while being completely blind to the reason for which their customer is using the funds. This makes it the easiest form of commonly available credit that can be used to perpetrate financial abuse.

Case Study – Sophia's story

Sophia called our financial counsellors in June 2021. Sophia told us that she is very overwhelmed and is a survivor of family violence. She has approximately \$30,000 in debts, including a car loan, BNPL debt and 3 credit cards all in her name but incurred by her ex-partner. The BNPL debt is approximately \$4,000 and she originally took it out for dental bills. However, Sophia's ex-partner has repeatedly used the account to buy things and does not make repayments. Sophia has now received a default notice from the BNPL provider.

Obviously, a product that almost exclusively involves remote transactions may have limits on the extent to which it can be used to proactively identify financial abuse. However, this distinction with BNPL from regulated credit is one clear situation where BNPL makes accessing credit, and loading someone else up with the debt, even easier.

RECOMMENDATION 5. Require BNPL providers to make reasonable inquiries about the purpose for which their customers are seeking a line of credit through their product.

Returning products

The Aus Code is completely silent on any procedure or forms of assistance BNPL providers need to provide if there are problems with an item or service purchased using a BNPL product, despite being the intermediary between purchaser and retailer. It also means that by using BNPL people can have fewer rights or options available to them than if they used an alternative payment method, such as a bank card that has a chargeback option.

²² <https://www.customerownedbanking.asn.au/storage/cobcop-jan-18-version-12-1634019447JaAF1.pdf>, clause 5.2

²³ <https://www.afterpay.com/en-AU/terms-of-service>, accessed 7 December 2021.

²⁴ <https://www.latitudepay.com/customer-terms-conditions/latitudepay-february-2021/> accessed 7 December 2021.

There is already one example of the impact this can have in a published decision by the Australian Financial Complaints Authority (AFCA), Australia's external dispute resolution service for financial services.²⁵ In that case, a customer used an Aus Code signatory's service to make a purchase, but within a week sought a refund as he found the product was faulty. The retailer apparently 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.²⁶

RECOMMENDATION 6. BNPL providers are an additional platform inserted in transactions between consumers and retailers/merchants. If they are going to profit off this, they must be required to guarantee certain consumer protections in these transactions.

Meaningful enforcement powers

One final, extremely important shortcoming of the Aus Code is that the incentive for BNPL providers to comply with the meagre consumer protections it contains is far lesser than under the consumer credit laws BNPL is designed to avoid. If found in external dispute resolution to have breached the Aus Code, BNPL providers are only going to be required to take the necessary action to fairly reinstate the consumer. The committee overseeing the Aus Code has sanction powers, but they are weak.²⁷ In terms of financial penalty, the powers are limited to requiring the BNPL provider to undertake a commercially reasonable rectification process. There may also be costs involved if directed to undertake a compliance review, but nothing beyond that necessary to identify the extent of their non-compliance. All other sanctions only pose reputational risk for BNPL providers, such as a notice of non-compliance being published. To date, we are not aware of any outcomes of inquiries, investigations or compliance activities of the committee overseeing the Aus Code.

Consumer credit laws have impact because they carry significant financial penalties if breached, and provide stronger protections that can be relied upon by consumers in external dispute resolution. BNPL services are capable of causing equivalent harm to individuals, and there is no reason their providers should not face the same penalties as other credit providers when they breach reasonable community expectations.

RECOMMENDATION 7. Regulations recommended to be made by the Minister of Commerce and Consumer Affairs should ensure that relevant parts of the CCCFA that carry financial penalties designed to protect consumers apply to the sale of BNPL products, where relevant.

Marketing and advertising

While the Aus Code does contain a commitment to ensure that advertising and promotional material used is clear and not misleading and deceptive, BNPL providers in Australia continue to effectively market themselves separately to credit, and in a way that appeals to young people in particular.

A recent report from Newcastle University found that young consumers in particular didn't initially recognise that using BNPL was using credit – with this realisation only coming after they struggled to make repayments.²⁸ Report findings also indicated that BNPL product websites and apps clearly indicated marketing campaigns aimed at associating their products with aspirational lifestyles that would not otherwise be available, and used technology to personalise the experiences for consumers. BNPL product app interfaces and tools also replicated the experiences of a digital game, giving people a sense of control and using rewards or positive reinforcement. We

²⁵ One of the few substantial benefits to the Aus BNPL Code is that it requires members to become members of AFCA – which is otherwise not compulsory for BNPL providers. However, as the Discussion Document already indicates that BNPL providers are required to make external dispute resolution available to customers, we assume it would provide little value in New Zealand.

²⁶ <https://service02.afca.org.au/CaseFiles/FOSSIC/711283.pdf>

²⁷ Aus Code, clause 10.9.

²⁸ Farrugia, D., Cook, J Senior, et al., *Young people, debt and consumer credit pilot study report*, 2021, University of Newcastle, <https://nova.newcastle.edu.au/vital/access/manager/Repository/uon:38627>

encourage the New Zealand government to consider that the current marketing of BNPL companies is helping foster an attitude to their products that encourages spending and plays down the risks associated with BNPL.

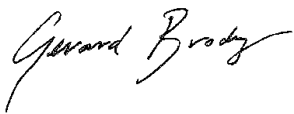
Conclusion

While it may escape legal definitions, BNPL is credit. It is used in the same way as other credit products by many consumers, and carries the same risks. Leaving it unregulated is placing the interests of businesses over consumers.

There is sufficient evidence from the last nine months in Australia to indicate that a BNPL industry code is not sufficient on its own as an alternative to regulation. It was obvious to consumer advocates from the start. The relationship between BNPL and financial hardship has only gotten worse. We understand that the drafts of industry codes for New Zealand closely mirror the Aus Code. We urge the New Zealand government to learn from the problems seen here and take steps to ensure that the industry is far better regulated, in a manner that puts consumers (and particularly vulnerable consumers) first.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on [REDACTED] if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. The Minister of Commerce and Consumer Affairs should use the power under s 137A of the CCCFA to recommend making regulations to declare BNPL products as a consumer credit contract, and make it subject to the majority of the CCCFA.

RECOMMENDATION 2. If intending to rely upon a BNPL industry code to play any substantial role in reducing the triggers of financial hardship caused by BNPL, it is essential that membership and compliance with the Code be compulsory to offer BNPL products in the marketplace.

RECOMMENDATION 3. All BNPL providers should be required to properly assess the financial situation of a prospective customer before agreeing to approve their access to use a BNPL product, or increasing their credit limit under a BNPL product. BNPL providers must only be permitted to allow people to use their platforms to make purchases for amounts the BNPL provider has reasonably assessed can be repaid by the customer.

RECOMMENDATION 4. Whether by regulation or an industry code, there needs to be clear and measurable limits imposed on the late fees that BNPL providers can charge New Zealanders.

RECOMMENDATION 5. Require BNPL providers to make reasonable inquiries about the purpose for which their customers are seeking a line of credit through their product.

RECOMMENDATION 6. BNPL providers are an additional platform inserted in transactions between consumers and retailers/merchants. If they are going to profit off this, they must be required to guarantee certain consumer protections in these transactions.

RECOMMENDATION 7. Regulations recommended to be made by the Minister of Commerce and Consumer Affairs should ensure that relevant parts of the CCCFA that carry financial penalties designed to protect consumers apply to the sale of BNPL products, where relevant.