

10 March 2023

Mr Paul Stocks
Deputy Secretary – Building, Resources and Markets
The Ministry of Business, Innovation and Employment
15 Stout Street
Wellington 6011
Submitted via email to: consumer@mbie.govt.nz

Dear Mr Stocks,

Re: Exposure Draft of Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (NZ)

The Australian Finance Industry Association (AFIA) is the only peak body representing the entire finance industry in Australia.¹ We appreciate the opportunity to respond to the New Zealand (NZ) Ministry of Business, Innovation and Employment (MBIE)'s consultation on the Exposure Draft of Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (NZ) ('the draft regulations').²

AFIA represents over 150 providers of consumer, commercial and wholesale finance in Australia, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry, with our members who are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

AFIA also represents 90 per cent of the Australian Buy Now Pay Later (BNPL) market. Our BNPL members include: Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright, Plenti and Zip Co. Therefore, we have significant knowledge of the BNPL sector and take an interest in developments in New Zealand, given our two countries geographic proximity and regulatory interconnectedness.

¹ [Australian Finance Industry Association \(afia.asn.au\)](http://australianfinanceindustryassociation.com.au).

² MBIE, Exposure draft of Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022: <https://www.mbie.govt.nz/have-your-say/exposure-draft-of-credit-contracts-and-consumer-finance-buy-now-pay-later-amendment-regulations-2022/>

INTRODUCTORY COMMENTS

AFIA represents 90 per cent of all BNPL providers in Australia. Therefore, we have a deep interest in the topic of BNPL regulation, both domestically and abroad.

While AFIA understands there is a different regulatory context in NZ compared to Australia, the interconnected nature of our two markets and our detailed knowledge of many products also offered by our BNPL members in NZ compel us to contribute to this consultation.

Furthermore, we believe there are valuable lessons from the way Australia is approach these issues that could be useful to inform decisions in NZ. To that end we wish to provide:

1. our [submission](#) to the Australian Treasury’s consultation on regulating BNPL in Australia, made on **23 December 2022. (Appendix A)**
2. our supplementary submission to the Australian Treasury’s process on this matter, made on **9 January 2023. (Appendix B).**

It is our firm hope these documents may be useful in shedding light on the complex issues related to BNPL in Australia which may also pose challenges in NZ, notwithstanding variant legal frameworks in both countries.

We would like to make some general comments about BNPL related to the following topics: Firstly, the economic benefits of BNPL. Secondly, the need for right-sized regulation which is targeted, proportionate and scalable. Thirdly, some specific feedback on the NZ proposals.

1. The economic benefits of BNPL

In Australia, BNPL provides substantial economic benefits, including:

- Contributing A\$18.4 billion to Gross Domestic Product (GDP).³
- Supporting 120,200 jobs throughout the economy.⁴
- Small retailers reap the biggest benefits from using BNPL, with the retail sector seeing \$804 million in FY 2022 in cost efficiencies.⁵
- Consumers gain an estimated \$337 million in benefits from using BNPL in FY22, through saving on interest and fee costs (relative to other financial products) and surcharge savings.⁶

BNPL similarly provides economic benefits to NZ. It is estimated the BNPL market in NZ will grow from \$US1.9 billion in 2022 to \$US8.2 billion by 2028.⁷

³ BIS Oxford Economic – RFI Global, *The Economic Impact of Buy Now Pay Later in Australia – Updated* (January 2023), 17: [BNPL_report_short_WEB-0001.pdf \(afia.asn.au\)](#).

⁴ Ibid.

⁵ AFIA, *Buy Now Pay Later Injects \$18.4 Billion into the Australian Economy in FY22: Buy Now Pay Later Injects \$18.4 Billion into the Australian Economy in FY22* ([afia.asn.au](#)).

⁶ Ibid.

⁷ Global Newswire, *New Zealand Buy Now Pay Later Market and Investment Report 2022: A \$8.21 Billion Market by 2028 Featuring Key Players - Afterpay, Zippay, Humm, OpenPay, Payright* (7 December 2022): [New Zealand Buy Now Pay Later Market and Investment Report \(globenewswire.com\)](#).

This significant contribution to the NZ economy drives investment, supports jobs and signifies consumer benefits and satisfaction.

2. The need for right-sized regulation which is targeted, proportionate and scalable

Given the nature of BNPL transactions, it is appropriate they be regulated in a manner which is targeted, proportionate and scalable, noting they are generally lower value and lower risk than other transactions.

In Australia, as indicated in **Appendix A**, the average transaction value is around \$136.⁸ This low dollar amount is similar to the average transaction value in NZ of \$210.⁹

As the Assistant Treasurer of Australia and Minister for Financial Services, the Hon. Stephen Jones MP has said:¹⁰

*I think an important point to make here is for most of these buying now pay later operators, the transactions are **very small**. We're talking about \$50 to \$100, \$200, a pair of jeans, that sort of stuff, highly used in the fashion area and the clothing line. So, **the objective is to regulate to risks; small transactions, small account balances. It's not like you need the same sort of credit checks that you would if you were taking out a million dollar home mortgage.***

HM Treasury in the United Kingdom has affirmed that BNPL products are 'inherently lower risk than interest bearing credit products'.¹¹

Given the proven fact that BNPL products are usually low value and low risk, they should be regulated in a way which reflects those unique circumstances and is targeted, proportionate and scalable to the low level of risk involved.

The argument that BNPL products are inherently lower risk than other financial products is borne out by the evidence from the Australia experience. For example:

- In 2020-21 the Australian Financial Complaints Authority (AFCA) received 767 complaints about BNPL products, representing only 1.1 per cent of total complaints.¹²
- By comparison, in the same period, AFCA reported a significantly higher number of complaints for other financial products – with the top five financial products most commonly complained about totalling 29,974 complaints.¹³

⁸ AFIA, Submission to the Australian Treasury consultation on *Regulating BNPL in Australia* (23 December 2022), 9 and 22: <https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-afia.pdf>.

⁹ MBIE (NZ), Buy Now, Pay Later: Understanding the triggers of financial hardship and possible options to address them (Discussion Document November 2022): [Discussion document: Buy-Now, Pay-Later – Understanding the triggers of financial hardship and possible options to address them \(mbie.govt.nz\)](https://mbie.govt.nz/discussion-document-buy-now-pay-later-understanding-the-triggers-of-financial-hardship-and-possible-options-to-address-them).

¹⁰ The Hon. Stephen Jones MP (Assistant Treasurer of Australia and Minister for Financial Services), Interview with Ali Moore on *ABC Mornings* (17 February 2023): [Interview with Ali Moore, Mornings, ABC Melbourne | Treasury Ministers](https://www.abc.net.au/news/2023-02-17/stephen-jones-interview-ali-moore-abc-mornings/10544444).

¹¹ HM Treasury (UK), [Regulation of Buy-Now Pay-Later: Response to Consultation](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/10544444), 16[3.1] (June 2022).

¹² Australian Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](https://www.treasury.gov.au/consultations/2022/11/22/regulating-buy-now-pay-later-in-australia-options-paper), 4.

¹³ AFCA, [Top five products most commonly complained about](https://www.afca.org.au/consultations/2022/11/22/top-five-products-most-commonly-complained-about), (accessed 19 December 2022),

- Internal dispute resolution (IDR) complaints to BNPL providers directly have remained low at only 0.1-0.2 complaints per hundred active accounts.¹⁴
- External dispute resolution (EDR) complaints to AFCA have also remained low at just 0.005 complaints per those active accounts.¹⁵
- The percentage of active accounts receiving financial hardship assistance on 30 June 2022 was 0.39%.¹⁶

These extremely low rates of complaints and accounts receiving financial hardship assistance are indicative of the low value, low risk nature of BNPL products.

3. Specific feedback on the NZ proposals

There are two specific documents which are the subject of this MBIE consultation:

1. The Draft Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 ([“the draft regulations”](#))
2. The Consultation Paper on the draft regulations ([“the consultation paper”](#))

In summary, these documents propose the following changes to the regulation of BNPL in NZ:¹⁷

1. to apply the *Credit Contracts and Consumer Finance Act 2003* (NZ) (‘CCCFA’) to BNPL products
2. to exempt smaller BNPL products, under \$600, from CCCFA requirement to assess affordability
3. to mandate that, for BNPL credit below the threshold, BNPL lenders must carry out comprehensive credit checks with a credit reporting agency and provide information back to credit reporting agencies
4. to require that, for BNPL credit above the threshold, lenders must carry out a full affordability assessment under the CCCFA.

With respect to the proposals above AFIA recommends the following:

1. Overall, AFIA believes the draft regulations do not achieve the right public policy balance because they are not sufficiently tailored and proportionate. A sustainable and fit-for-purpose BNPL regulatory framework can be achieved if the appropriate time is taken to develop primary legislation rather than applying existing laws (in the CCCFA) that were designed with very different credit products in mind and do not contemplate and address the specific product features and design of BNPL.

¹⁴ AFIA, Submission to the Australian Treasury consultation on *Regulating BNPL in Australia* (23 December 2022), 9 and 22: <https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-afia.pdf>.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ MBIE, *Exposure draft of Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022*: <https://www.mbie.govt.nz/have-your-say/exposure-draft-of-credit-contracts-and-consumer-finance-buy-now-pay-later-amendment-regulations-2022/>.

2. The MBIE should carefully consider the definition of BNPL contracts under Clause 4 of the draft regulations, to ensure it is not too broad and applies to BNPL products in a manner which is consistent, clear and appropriate.¹⁸
3. AFIA members have indicated they believe the proposed \$600 threshold should be set higher.
4. AFIA notes the BNPL sector in NZ supports the Paywatch initiative.¹⁹
5. AFIA supports technology-neutral affordability assessments which can utilise Open Finance or proven repayment histories, not just traditional credit bureau checks.²⁰
6. AFIA does not support mandating either credit bureau checks or comprehensive credit reporting (CCR) for BNPL products.²¹ With respect to CCR, in Australia, mandatory participation in the CCR regime is limited to the Commonwealth Bank, ANZ, Westpac, NAB and Macquarie. These are the only financial institutions classified as 'large ADIs' under the [regulations](#) made pursuant to s 37G(3)(a) of the Banking Act 1959 (Cth). Only 'large ADIs', worth over \$107 billion, are mandated to participate in the CCR.²²
7. On the specific drafting language of proposed threshold in clauses 18I(1) and 18I(2) of the draft regulations, AFIA believes BNPL providers being mandated to carry out an affordability assessment under regulations 4AC-4AN would be disproportionate to the low value, low risk nature of BNPL products and not appropriate tailored to the unique circumstances of the sector.²³ A principles-based approach to affordability assessments is preferable to strict or prescriptive requirements which are not sufficiently flexible to account for different BNPL product types or business models.
8. AFIA believes a technology-neutral approach neutral to affordability assessments should be adopted, rather than the prescriptive requirements under regulations 4AC-4AN. Traditional credit checks could play a role in this approach. However, so too could analysis of proven repayment histories and Open Finance data.
9. AFIA members have expressed concern that clause 18I(3)(c) of the draft regulations is overly onerous and may exceed the delegated authority to make regulations under the CCCFA, insofar as the requirements under clause 18I(3)(c) go beyond the rule-making power that is intended to be granted under the primary legislation.²⁴
10. AFIA members remain uncertain about how the requirements of the draft regulations will work in practice. The MBIE should convene a working group, to give the sector greater understanding of the practical application of these regulatory changes and provide a forum for ongoing dialogue as implementation issues may arise which present as yet unforeseen challenges.

¹⁸ MBIE (NZ), Buy Now, Pay Later: Understanding the triggers of financial hardship and possible options to address them (Discussion Document November 2022), 8: [Discussion document: Buy-Now, Pay-Later – Understanding the triggers of financial hardship and possible options to address them \(mbie.govt.nz\)](#).

¹⁹ Ibid, 9.

²⁰ AFIA, Submission to the Australian Treasury consultation on *Regulating BNPL in Australia* (23 December 2022), 10-11 and 21-22: <https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-afia.pdf>.

²¹ AFIA, Submission to the Australian Treasury consultation on *Regulating BNPL in Australia* (23 December 2022), 10-11 and 21-22: <https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-afia.pdf>.

²² Via Part 3-2CA of the National Consumer Credit Protection Act 2009 (Cth), ss 133CN-133CQ.[3] (I am going to put the red text in a footnote, not body)

²³ MBIE (NZ), Buy Now, Pay Later: Understanding the triggers of financial hardship and possible options to address them (Discussion Document November 2022), 9: [Discussion document: Buy-Now, Pay-Later – Understanding the triggers of financial hardship and possible options to address them \(mbie.govt.nz\)](#).

²⁴ Ibid, 10.

11. Given the complexity involved in these regulations and the significant changes it will require to BNPL providers business models, systems and process, these regulations should not commence until 18 months after receiving Royal Assent.

CLOSING COMMENTS

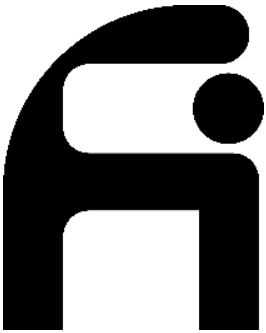
Thank you again for the opportunity to contribute to this consultation. We look forward to providing any further information which might be useful.

Should you wish to discuss our submission or require additional information, please contact AFIA Executive Director of Policy and Strategy, Roza Lozusic at roza.lozusic@afia.asn.au or me at diane.tate@afia.asn.au.

Yours sincerely

A handwritten signature in black ink that reads "Diane Tate". The signature is written in a cursive, flowing style.

Diane Tate
Chief Executive Officer



Australian
Finance
Industry
Association

22 December 2022

Mr Daniel McAuliffe
Director - Consumer Credit Unit
Financial Systems Division
Treasury
Langton Crescent
Parkes ACT 2600
Submitted via email to: CreditReforms@treasury.gov.au

Dear Mr McAuliffe,

Submission on *Regulating Buy Now, Pay Later in Australia - Options Paper*

The Australian Finance Industry Association (AFIA)²⁵ appreciates the opportunity to respond to the Treasury consultation on *Regulating Buy Now, Pay Later in Australia - Options Paper (Options Paper)*.

AFIA is the only peak body representing the entire finance industry in Australia. We represent over 150 providers of consumer, commercial and wholesale finance in Australia, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry, with our members who are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

²⁵ www.afia.asn.au

AFIA also represents 90 per cent of the Buy Now Pay Later (BNPL) market. Our BNPL members include: Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright, Plenti and Zip Co. Importantly there are several providers of BNPL products who are not members of AFIA or the BNPL Code. Therefore, this submission does not represent the full sector.

INTRODUCTORY COMMENTS

This submission will first outline the unique benefits BNPL products provide to the Australian economy. Secondly, **Attachment A** will explore the issues raised in the Options Paper regarding the current regulation of the BNPL sector and possible areas for improvement. Thirdly, **Attachment B** will discuss the three options for future BNPL regulation proposed in the Options Paper.

For the reasons which will be outlined in **Attachment B**, AFIA supports the adoption of Option 1, with aspects of Option 2, so long as they are, in Treasury's words, 'tailored' to the low level of risk involved in BNPL products.²⁶ AFIA will also make a supplementary submission on how the licensing regime and associated obligations could apply with the adoption of a 'tailored' approach that ensures regulation in proportionate, scalable and targeted.²⁷

BNPL products represent a small, but rapidly growing part of Australia's payments ecosystem. According to the Reserve Bank of Australia (RBA), BNPL transactions grew by approximately 37 per cent in 2021-22 to \$16 billion.²⁸ This is around two per cent the value of transactions across the Australian payments system.²⁹ AFIA code signatories administer approximately 6.32 million active BNPL accounts in Australia.³⁰

Importantly, BNPL products contribute \$18.4 billion to Australian Gross Domestic Product (GDP) and support approximately 120,000 Australian jobs.³¹ For every \$1 million of spending on BNPL products, there are approximately 8.3 jobs created and \$1.2 million is added to GDP.³²

The increasing popularity of BNPL products has seen a number of new market entrants, creating a notably diverse sector. BNPL emerged around a decade ago – the early BNPL providers were typically fintech start-ups for whom their BNPL offering was the centre of their business. More recently, banks have begun offering BNPL or BNPL-like products, reflecting interest in the sector across the Australian financial services industry.³³

BNPL products are not homogeneous and business models and products vary in structure throughout the sector. Some BNPL products allow consumers to repay a purchase of goods or

²⁶ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 21.

²⁷ Ibid.

²⁸ Reserve Bank of Australia (2022), [Payments System Board Annual Report 2022](#), 18.

²⁹ Ibid.

³⁰ Data reported for code compliance purposes.

³¹ Ibid.

³² Ibid.

³³ Commonwealth Bank of Australia, ['StepPay – a new way to buy now pay later'](#) (accessed 28 November 2022); National Australia Bank, ['NAB Now Pay Later | Buy now pay later in four instalments – NAB'](#) (accessed 28 November 2022); Westpac, ['Flex Credit Card with 0% Interest | Westpac'](#) (accessed 28 November 2022).

services in instalments over a short term. Consumers are informed by the BNPL provider of the repayment amounts and payment schedule. Other BNPL products are credit contracts for the purchase of goods or services. Some contracts require a minimum periodic repayment, whereas others involve a fixed repayment plan for each purchase. No interest is charged and fees are capped at \$200 in the first year and \$125 for any subsequent 12 month period, as noted in the Options Paper.³⁴

As the Options Paper acknowledges, BNPL products are unique in comparison to traditional credit products insofar as they are generally used for 'low value' purchases.³⁵ For example, recent industry data shows the average value of a BNPL transaction is just \$136.³⁶

The low value of the purchases made using BNPL products, and the safeguards built into BNPL products, are major reasons why full regulation under the *National Consumer Credit Protection Act 2009* (Cth) (the Credit Act) is not appropriate. BNPL products expose consumers to much lower risk than traditional credit products.³⁷ Indeed, HM Treasury in the United Kingdom (UK) has specifically noted BNPL products are 'inherently lower risk than interest bearing credit products'.³⁸

Under current law, it is important to note two of the three aspects of the responsible lending obligations (RLOs) apply differently depending on the risk of consumer harm. BNPL products being lower value, lower risk transactions would affect:³⁹

1. what inquiries a provider needs to make under s 130(1)(a) and (b) of the Credit Act, provided those inquiries are reasonable
2. what steps a provider will take to verify the consumer's financial situation under s 130(1)(c) of the Credit Act, provided that those inquiries are reasonable

The process of understanding the different kinds of inquiries and steps to be taken has been described as 'scalability'.⁴⁰

The third limb of the RLOs, regarding assessments as to whether the contract is 'not unsuitable' for the customer, is not scalable. However, courts have held that those bound by the RLOs can:⁴¹

[D]o what [they] want in the assessment process...what [they] cannot do is make unsuitable loans.

³⁴ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 7. NB – these fees are for purposes other than late payment, for example account establishment and maintenance fees. A Code Complaint Member is defined in the BNPL Code as being a BNPL provider accredited by the Code Compliance Committee as complying with the Code, otherwise called a code signatory. See too s 6(5) of the National Credit Code and Regulation 51 of the Credit Act Regulations.

³⁵ *Ibid*, 6.

³⁶ Data reported for code compliance purposes.

³⁷ HM Treasury (UK), *Regulation of Buy-Now Pay-Later: Response to Consultation*, 16[3.1].

³⁸ *Ibid*.

³⁹ *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111[141], (Gleeson J).

⁴⁰ ASIC, RG 209.79 and 81.

⁴¹ *Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 at [81]. Upheld on appeal in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 at [131], [141] and [171].

In the instances where BNPL is used for larger purchases, it can facilitate positive consumer behaviours, which have benefits for the community at-large. For example, BNPL code signatories financed the installation of 17.4 per cent of all Australian solar panels in the 2021-22 financial year and 20.8 per cent in June 2022. This helps Australians transition to renewable energy and lower their emissions.⁴² BNPL has helped power Australia's world-leading uptake of solar energy. As a nation, we rank first in the world for installed photovoltaic generation capacity per capita, around two thirds of which is 'distributed' (i.e., rooftop solar).⁴³

BNPL providers, while contributing \$18.4 billion to Australian GDP, are a relatively small segment of Australia's total finance market.⁴⁴ Given their unique nature, we consider they should not be regulated disproportionately, as it would stifle innovation, competition and consumer choice. This would limit customer access to these products and hinder financial inclusion.

BNPL products have extraordinarily low rates of complaints and hardship. For example, internal dispute resolution (IDR) complaints to BNPL providers directly have remained low at only 0.1-0.2 complaints per hundred active accounts.⁴⁵ External dispute resolution (EDR) complaints to AFCA have also remained low at just 0.005 complaints per those active accounts.⁴⁶ Furthermore, the percentage of active accounts in hardship on 30 June 2022 was 0.39%.⁴⁷

The Options Paper explicitly acknowledges the Australian Financial Complaints Authority (AFCA) receives 'relatively few complaints about BNPL'. Treasury cites the figure that in 2020-21 AFCA received 767 complaints about BNPL products, representing only 1.1 per cent of total complaints.⁴⁸ Recognising there will be a range of complaint categories, many of these complaints relate to consumers who are denied access to BNPL services because they are behind on existing payments, which is a product feature designed to assist consumers in controlling their spending. By comparison, in the same period, AFCA reported a significantly higher number of complaints for other financial products – with the top five financial products most commonly complained about totalling 29,974.⁴⁹

AFIA also notes the BNPL sector has introduced the world leading BNPL Code of Practice (the BNPL Code), effective since March 2021. The BNPL Code has nine signatories covering 90 per cent of the sector. Code signatories commit to going above and beyond the law, setting best practice standards for the sector and strengthening consumer protections. The BNPL Code does this while preserving customer choice to make purchases and payments in a way that suits their needs and preferences.

⁴² Brighte, [Finance your new solar power system](#) (accessed on 29 November 2022).

⁴³ International Energy Agency (2022), [Trends in Photovoltaic Applications 2022](#), p 10; Ibid, p 30.

⁴⁴ Data reported for code compliance purposes.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 4.

⁴⁹ AFCA, [Top five products most commonly complained about](#), (accessed 19 December 2022),

In summary:

- Despite making significant contributions to Australian GDP and jobs, BNPL providers are still a developing part of the finance sector and represent only a very small part of the overall Australian payments system
- BNPL products are overwhelmingly lower value and low risk
- BNPL providers do not charge consumers interest and their fees are capped
- BNPL Code signatories have low rates of complaints, disputes, and requests for hardship assistance.

For all these reasons, AFIA considers we must proceed with caution when deciding how best to regulate BNPL products.

We acknowledge there are a small cohort of customers that may find themselves over-extended. While this is not unique to BNPL, there is a need for us to think about targeted solutions for these customers.

However, this does not warrant a disproportionate response that imposes unnecessary costs or creates unnecessary and inefficient processes for all customers.

The BNPL sector has demonstrated it is willing and capable of voluntarily introducing new, and adjusting existing, features and service commitments to ensure BNPL responds to changing customer expectations and needs.

CLOSING COMMENTS

Thank you again for the opportunity to contribute to this consultation. We would appreciate the opportunity to discuss our recommendations further with the Treasury.

Should you wish to discuss our submission or require additional information, please do not hesitate to contact Roza Lozusic, Executive Director Policy and Strategy at roza.lozusic@afia.asn.au, or me at diane.tate@afia.asn.au.

Yours sincerely



Diane Tate
Chief Executive Officer

ATTACHMENT A – AFIA’s DISCUSSION OF CURRENT BNPL REGULATION AND REGULATORY ISSUES RAISED IN THE OPTIONS PAPER⁵⁰

1. The current regulation of BNPL

It is not accurate to suggest BNPL products are currently unregulated.

As the Options Paper notes, BNPL products are subject to a range of other regulatory requirements, including:⁵¹

1. the Design and Distribution Obligations (DDOs) under Pt 7.8 of the *Corporations Act 2001* (Cth) (the *Corporations Act*).⁵²
2. ASIC’s Product Intervention Powers (PIP) under Pt. 7.9A of the *Corporations Act* and Pt 6-7A of the *National Consumer Credit Protection Act 2009* (Cth)(the *Credit Act*).⁵³
3. The *Competition and Consumer Act 2010* (the Australian Consumer Law) covers conduct including provisions around false or misleading presentation, unsolicited supplies, pricing and information standards.⁵⁴ The Australian Consumer Law also regulates: consumer guarantees and warranties; unconscionable conduct; unfair contract terms; pricing requirements and harassment and coercion in sales.⁵⁵
4. The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), includes obligations to conduct customer identification and verification procedures, record keeping, reporting suspicious matters, and providing periodic compliance reports. The AML/CTF Act also requires reporting entities to have an AML/CTF framework in place covering money laundering and terrorism financial risk assessments.⁵⁶
5. The *ASIC Act 2001* and the *Privacy Act 1988*.

BNPL products are also regulated by AFIA’s, world first, [BNPL Code of Practice](#) (the BNPL Code), which took effect on 1 March 2021.⁵⁷ The nine code signatories represent 90 per cent of the BNPL market.⁵⁸

Code signatories commit to going above and beyond the law, setting best practice standards for the sector, and strengthening consumer protections. The BNPL Code does this while preserving customer choice to make purchases and payments in a way that suits their needs and preferences.

⁵⁰ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 11-18.

⁵¹ *Ibid*, 8.

⁵² See ASIC RG 274.227, [Product design and distribution obligations](#) (11 December 2020).

⁵³ See ASIC RG272.1, [Product intervention power](#) (17 June 2020).

⁵⁴ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 8.

⁵⁵ *Competition and Consumer Act 2010* (Cth).

⁵⁶ *Ibid*.

⁵⁷ AFIA, [Buy Now Pay Later Code of Practice Comes Into Effect](#) (1 March 2022); Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 9.

⁵⁸ [AFIA Buy Now Pay Later \(BNPL\) Code of Practice](#).

Signatories undertake to be bound by the nine core commitments summarised below:⁵⁹

1. to focus on customers, by providing high quality products which are inclusive, accessible and protect vulnerable customers
2. to be fair, honest and ethical in all dealings. This includes neither financing restricted products, like gambling or firearms, nor undertaking unsolicited marketing
3. to keep customers informed about their services. This includes being transparent about instalments, features and fees
4. to ensure BNPL products are suitable for the customers to whom they are provided
5. to undertake ongoing review of the suitability of products and services provided, including monitoring how customers are using BNPL products to inform best practice
6. to deal fairly with complaints via accessible and transparent complaints processes meeting Australian Securities and Investments Commission (ASIC) standards, to be members of AFCA and subject to AFIA's BNPL CCC⁶⁰
7. to offer hardship assistance, including responding clearly to hardship requests within 21 days and freezing late fees during consideration of hardship requests
8. to comply with legal and industry obligations, including in the collection and use of data, and follow laws related to unfair contract terms
9. to promote the Code, including through accessible promotion on member websites and training to ensure staff comprehension and compliance with Code obligations.

It is also important to note the BNPL Code includes tiered suitability assessments for BNPL purchases. Code signatories are always required to check for signs of vulnerability when providing customers products.⁶¹ For transactions under \$2,000, several criteria must be met as outlined in Clause 11.3 of the Code. For transactions above \$2,000, the Code requires providers to check either customer data or third-party sourced data, such as a credit check, as well as meeting the criteria in Clause 11.3. For amounts over \$15,000, a check of both customer data and third-party sourced data is required.⁶² There are also additional protections for existing customers seeking further BNPL products under Clause 11.12 of the Code.

Therefore, although BNPL providers are not subject to the credit provisions of the *Credit Act*, they are still regulated and must meet significant consumer protection standards.⁶³

AFIA notes the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP's previous comments indicating BNPL products 'are unique and any future

⁵⁹ AFIA, [BNPL Members' 9 Key Commitments](#).

⁶⁰ See for example ASIC RG271, *Advertising financial products and services (including credit): Good practice guidance* (15 November 2012).

⁶¹ Clauses 8.4 and 11.3(a).

⁶² Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 9.

⁶³ Relevant sections of the *Credit Act* include but are not limited to: ss 6-10 on the definitions of 'credit activity' and Chapter 3's obligations for 'responsible lending conduct'. The National Credit Code is also contained in Schedule 1 of the Act. Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 8.

regulatory framework needs to reflect that'.⁶⁴ The Minister has further indicated AFIA's BNPL Code would be the obvious starting point. Speaking to the Responsible Lending and Borrowing Summit on 12 July 2022, the Minister said:⁶⁵

*We will take a careful and deliberate approach that **balances** [emphasis added] the need to protect consumers with encouraging innovation in our financial services industry.*

AFIA agrees with the Minister that any changes in BNPL regulation must be carefully calibrated to ensure appropriate consumer protections without impeding innovation and competition. This is consistent with Treasury's guiding principles which recognise that a new regulatory framework for BNPL 'should be flexible enough to allow new BNPL providers into the market and for new and existing BNPL providers to bring new financial products onto the market'. This guiding principle acknowledges that emerging and evolving businesses require considerable investment. AFIA believes this means it is not necessary to impose all the obligations which are imposed on ACL licensees on BNPL providers.

2. Consideration of issues raised in the Options Paper

The Options Paper outlines several regulatory issues related to BNPL products.⁶⁶ These issues are addressed in the order they appear in the Options Paper in **Table 1** below.

The Options Paper explicitly references that each of these potential issues needs to be balanced against the economic benefits of BNPL. As the Options Paper notes:⁶⁷

*[T]hese issues should be understood in the context of the **benefits BNPL can bring to consumers** [emphasis added], such as income smoothing and bringing forward the consumption of goods. The BNPL industry is not homogenous, and different providers offer a range of diverse products. As a result, the nature and severity of the issues vary from product to product, and from provider to provider.*

⁶⁴ The Hon Stephen Jones, [Address to the Responsible Lending and Borrowing Summit](#) (12 July 2022).

⁶⁵ Ibid.

⁶⁶ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 11-18.

⁶⁷ Ibid, 11.

Table 1 – Regulatory Issues Related to BNPL

<p>Issue 1 – unaffordable lending practices⁶⁸</p>	<ul style="list-style-type: none"> • This issue must be viewed with the context that average value of BNPL transaction is ‘low’, as the Options Paper acknowledges.⁶⁹ As industry data indicates, the average transaction value is just \$136.⁷⁰ • Furthermore, BNPL purchases can also be expense-reducing in the long run, such as were BNPL is used to purchase energy efficient products. • Under clauses 11 and 12 of the BNPL Code, which covers 90 per cent of the BNPL sector, signatories are obliged to make a suitability assessment to ensure the product provided is suitable, including collecting appropriate data.⁷¹ More robust assessments are required for higher lending amounts. • Clause 11.3 requires Code signatories to be satisfied someone seeking BNPL products is not a ‘vulnerable customer’ before providing the product. • As the Options Paper outlines, BNPL customers experience similar, or in many cases lower levels of financial stress than customers using other products. These include: regulated car finance, personal loans above \$5,000, users of small amount credit contracts (SACCs) and consumer leases.⁷² 5 per cent more users of consumer leases experience indicators of financial stress and 11 per cent more of SACC customers experienced indicators of financial stress. 58 per cent of BNPL users experience no stress indicators whatsoever.⁷³ • The Options Paper indicates data on financial stress should be ‘applied with caution’ as this data ‘indicate[s] the financial situation of consumers of these products rather than financial stress these products may cause’. For example, the Australian Financial Security Authority (AFSA) found ‘BNPL debts only represented 0.3 per cent of all unsecured debt in personal insolvency cases’.⁷⁴
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⁶⁸ Commonwealth Treasury, *Regulating Buy Now, Pay Later in Australia: Options paper (November 2022)*, 11.

⁶⁹ Ibid, 6.

⁷⁰ Data reported for code compliance purposes.

⁷¹ See for example, BNPL Code, Clause 11.4. 95 per cent figure comes from [here](#).

⁷² Commonwealth Treasury, *Regulating Buy Now, Pay Later in Australia: Options paper (November 2022)*, 11.

⁷³ Ibid, 12.

⁷⁴ Ibid.

	<ul style="list-style-type: none"> • The Options Paper indicates that many BNPL providers only provide a maximum credit limit of \$2,000, which is lower than the lowest limit for most credit cards.⁷⁵ • The Options Paper indicates that some BNPL providers are managing risks of consumer harm using the following methods: conducting credit checks using external data sources, considering banking account information, providing low initial credit limits, reviewing credit scores and writing off bad debts. • Research by RFI Global, BIS Oxford and AFIA, found: <ul style="list-style-type: none"> • Australian consumers like using BNPL because it gives them more control over their money, with 54% saying it helps them manage their cashflow and 49% saying it helps them feel in control of their spending. • 54 per cent said they prefer BNPL over other finance products because it enables them to pay no interest on their purchases. • 0.39 per cent of active BNPL accounts were subject to financial hardship arrangements as at 30 June 2022.⁷⁶ • Afterpay has also provided feedback to AFIA from their own research that indicates 83 per cent of Afterpay customers use the service because of its product features, citing ‘it helps me manage my budget’, ‘I prefer paying in instalments’ and ‘I don’t want to incur interest costs’. • As indicated above, any discussion of unaffordable lending practices regarding BNPL must be viewed in light of: the lower cost of the products, the requirements under Clauses 11 and 12 of the Code to conduct suitability assessments and regarding vulnerable customers, the lower level of financial stress indicators compared to other products, the lower credit limits compared to other products and the methods already being used by providers to mitigate consumer harm. • Nevertheless, AFIA and our members would also be open to strengthening the Code to improve and better articulate the upfront affordability and ongoing suitability assessment processes: <ul style="list-style-type: none"> • One approach to strengthening affordability assessments might be committing to undertaking a credit assessment to
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⁷⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper\(November 2022\)](#), 13.

⁷⁶ Industry data reported for code compliance purposes.

	<p>assess affordability where more than \$800 is provided. This would be lowering the threshold from \$2001 to \$800 in the Code. However, we consider the method should be technology-neutral and not mandate a specific approach, as some may prefer to do a credit check using a credit bureau, adopt 'Open Banking/Finance' infrastructure, or use other technology-enabled or data-driven solution.</p> <ul style="list-style-type: none"> • If a customer does not have a credit file, they should not be excluded from opening a BNPL account. • Existing customers should not be required to re-do affordability assessments. • While soft credit checks have merit, any new regulatory regime should remain principles-based and not mandate these to the exclusion of other tools or technology-enabled and data-driven solutions.
<p>Issue 2 – complaints handling and hardship assistance.⁷⁷</p>	<ul style="list-style-type: none"> • As the Option Paper notes, the financial hardship policies contained in the Conduct are commensurate with those outlined in the Credit Act, which necessitate that BNPL providers respond sensitively, quickly and appropriately to customers experiencing financial difficulties. Code signatories are required to have their own hardship policy, ensuring customers can submit a hardship request that is fair and accessible. They must account for each customer’s specific circumstances particularly when it comes to the factors that could contribute to financial vulnerability. Furthermore, the Code ensures that information about hardship assistance is communicated to all customers and is easily accessible on provider websites, including information on how to request hardship and who to contact. • Code signatories must train staff to treat their vulnerable customers with sensitivity, respect and compassion, including the ability to identify signs of vulnerability, such as where the customer may be experiencing mental health issues or victims of domestic and family violence. Training must also be provided for staff who regularly assist customers from diverse cultural backgrounds.

⁷⁷ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 13-14.

	<ul style="list-style-type: none"> • While there have been some anecdotal concerns raised, the evidence clearly shows that the Code has proven to be highly effective in dealing with financial hardship, including through specific product features to restrict access if a customer is behind on existing payments. • This issue must be viewed in the context that, IDR complaints to BNPL providers directly have remained low at only 0.1-0.2 complaints per hundred active accounts.⁷⁸ EDR complaints to AFCA have also remained low at just 0.005 complaints per those active accounts.⁷⁹The percentage of active accounts in hardship on 30 June 2022 was 0.39%.⁸⁰ • The Options Paper explicitly acknowledges AFCA receives ‘relatively few complaints about BNPL’. Treasury cites the figure that in 2020-21 AFCA received 767 complaints about BNPL products, representing only 0.01 per cent of the 5.9 million active accounts during that period.⁸¹ Many of these complaints relate to consumers who are denied access to BNPL services because they are behind on existing payments. • By way of comparison, in the same period AFCA reported a significantly higher number of complaints for other financial products – with the top five financial products most commonly complained about totalling 29,974.⁸² • Under Clause 16 of the BNPL Code, signatories are required to promote the Code, including the existence of dispute resolution and hardship assistance procedures.⁸³ Clause 10.10 of the Code also requires signatories to put complaints handling information on their websites, and Clause 10.8 requires the same for hardship assistance information. • The Options Paper states that some consumer groups have suggested that the low levels of EDR complaints may indicate that customers are not aware of their rights to complain to AFCA. On the contrary, AFIA would posit that the low levels of IDR complaints, as well as low incidences of disputes to AFCA and high levels of resolution in early stages of dispute, presents evidence that BNPL providers are actively engaging
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⁷⁸ Data reported for code compliance purposes.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 4.

⁸² AFCA, [Top five products most commonly complained about](#), (accessed 19 December 2022),

⁸³ [Buy Now, Pay Later Code of Practice](#).

	<p>with their customers and where things go wrong resolving these matters expeditiously.⁸⁴</p> <ul style="list-style-type: none"> • AFIA notes, according to Treasury, 'only 3 per cent of BNPL users' indicated wanting to make a complaint. Therefore, low complaint rates are due to general satisfaction with BNPL products, not concerns regarding a lack of awareness of complaints mechanisms.⁸⁵ • The Options Paper expressed concern that BNPL providers may not always provide phone numbers to raise complaints or request hardship assistance, instead directing customers to a smartphone app or email. However, the Options Paper also indicates that the same concerns also apply to 'credit licencees and regulated credit products'.⁸⁶ Therefore, the issue is not unique to BNPL products and would not be solved by regulating them more heavily than credit providers. • BNPL products are designed specifically as digital-first products where the customers interact directly via the app and website. • Nevertheless, AFIA and our members are willing to commit to improving the BNPL Code's processes for complaints handling and requests for hardship assistance. • Additionally, AFIA and our members support uplifting provisions around customer vulnerability in the Code and to introducing AFIA guidance on supporting customers experiencing financial difficulty, and other customer vulnerabilities.
<p>Issue 3 – excessive consumer fees and charges, including default fees⁸⁷</p>	<ul style="list-style-type: none"> • This issue must be viewed in light of the fact that the AFIA BNPL Code, covering 90 per cent of the sector, expressly limits fees to \$200 in the first year and \$125 in any subsequent 12 months.⁸⁸ This accords with requirements under s 6(5) of the National Credit Code and Regulation 51 of the Credit Act Regulations. • AFIA strongly disputes the Curtin University research referred to in the Options Paper.⁸⁹ The assumptions used are incorrect.

⁸⁴ AFCA, [Top five products most commonly complained about](#), (accessed 19 December 2022),

⁸⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 14.

⁸⁶ Ibid, 13.

⁸⁷ Ibid, 14-15.

⁸⁸ Ibid, 14. NB – these fees are for purposes other than late payment, for example account establishment and maintenance fees.

⁸⁹ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 15.

	<p>If comparisons are to be used, AFIA would be happy to provide industry data to ensure all calculations and assumptions are accurate.</p> <ul style="list-style-type: none"> • This analysis that falling behind on the payment schedule for a \$40 purchase on 10 fortnightly repayments would result in an effective annual interest rate as high as 177.44 per cent for Humm – Little things.⁹⁰ The assumptions used in reaching these figures are incorrect. • The Curtin analysis erroneously assumed Humm charges Monthly Fees on payment plans with the characteristics above. If the calculations had taken this into account, the effective interest rate would instead be 16.13%. • This is also lower than the 19.94% average annual interest rate figure the Options Paper quotes for Australian credit cards.⁹¹ This remains the case even though the 19.94% interest figure above is acknowledged by Treasury to ‘not consider any annual fees’ which may be charged in addition to interest.⁹² • AFIA and our members are committed to ensuring fees and charges are reasonable, per clause 18.1(2) of the Code. We would ask Treasury to note that other products may in fact have higher overall charges.⁹³ • AFIA also welcome the Options Paper’s repeated acknowledgments that BNPL providers ‘readily’ write off bad debts, thereby foregoing future fees and charges, rather than selling debts to collections agencies.⁹⁴
<p>Issue 4 – non-participation in credit reporting⁹⁵</p>	<ul style="list-style-type: none"> • Concerns about BNPL providers not participating in the credit reporting regime should be viewed in the context that, as the Options Paper acknowledges, only large ADIs are compelled to provide their customers ‘positive and negative credit information’ to the regime.⁹⁶ Therefore, this situation is not unique to BNPL providers.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid, 13-14.

⁹⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 15-16.

⁹⁶ Ibid, 15. Mandatory participation in the comprehensive credit reporting (CCR) regime is limited to the Commonwealth Bank, ANZ, Westpac, NAB and Macquarie. These are the only financial institutions classified as ‘large ADIs’ under the [regulations](#) made pursuant to s 37G(3)(a) of the *Banking Act 1959* (Cth). Only ‘large ADIs’, worth over \$107 billion, are mandated to participate in the CCR, via Part 3-2CA of the *National Consumer Credit Protection Act 2009* (Cth), ss 133CN-133CQ.

	<ul style="list-style-type: none"> • As the Options Paper indicates, participation in the credit reporting framework is ‘voluntary for all other licenced lenders’ this includes ‘smaller banks, non-bank lenders, payday lenders, and consumer lessors’.⁹⁷ • AFIA recommends BNPL providers should not be mandated to participate in the credit reporting regime by legislation, particularly given the smaller value of average BNPL transactions compared to traditional credit products.⁹⁸ • AFIA would support improvements to Clauses 11 and 12 of the Code regarding upfront affordability assessment processes. • AFIA and our members will support the inclusion of strengthened obligations via the Code, as determined on the basis of empirical data. • However, AFIA believes any changes to the legislated requirements for BNPL providers regarding the credit reporting regime should wait until the review of the credit reporting framework is concluded on 1 October 2024.⁹⁹ This will allow decisions about next steps to be grounded in more thorough and rigorous analysis. • AFIA notes the Options Paper refers to a pilot initiative in New Zealand called <i>Paywatch</i>. If a similar initiative were to be implemented in Australia, we would want to better understand the problem such a solution is intended to solve, the technology implications and interoperability, and the legal frameworks within which such a solution would have to sit in Australia.
<p>Issue 5 - Unsolicited selling, advertising and using BNPL for essentials¹⁰⁰</p>	<ul style="list-style-type: none"> • Unsolicited selling and advertising for BNPL products is already regulated by legislation, as the Options Paper acknowledges.¹⁰¹ These practices are covered by restrictions in the Australian Consumer Law.¹⁰² • AFIA’s BNPL Code also requires signatories to ensure that their advertising is ‘clear’ and ‘not misleading and

⁹⁷ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 15.

⁹⁸ Data reported for code compliance purposes.

⁹⁹ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 16.

¹⁰⁰ *Ibid*, 17.

¹⁰¹ *Ibid*, 8. Australian Competition and Consumer Commission (ACCC), [Advertising and selling guide](#) (accessed on 29 November 2022).

¹⁰² *Ibid*.

	<p>deceptive'.¹⁰³ Code signatories also commit to meeting ASIC's best practice guide on advertising financial products and services.¹⁰⁴</p> <ul style="list-style-type: none"> • The Code also requires signatories not to engage in unlawful unsolicited marketing or sales of BNPL products.¹⁰⁵ • The Options Paper expresses concern about the fact that BNPL customers may use these products to pay for essentials, such as groceries and utilities.¹⁰⁶ • With regards to groceries, some have suggested consumers should not purchase groceries via BNPL. We believe that customers should have the ability to determine how best to manage their money and payment preferences. It is unclear why BNPL should be treated differently to other products, where consumers are able to use these products to purchase goods, such as groceries. • With regards to utilities, AFIA notes utilities providers are obligated under law to provide payment plans to customers experiencing financial hardship.¹⁰⁷ We support better promotion of hardship assistance from utilities providers. We believe that customers should have the ability to determine how best to manage their money and payment preferences, including using BNPL to pay for utilities. It is unclear why BNPL should be treated differently to other products, which consumers are able to use to make payments for utilities. • The Options Paper discusses the issue of BNPL customers purchasing gift cards that can then be used on goods, such as alcohol.¹⁰⁸ It is hard to quantify the regularity of this conduct or the extent of actual or potential consumer harm. AFIA members advise any prohibition on this would not be practically enforceable, due to technology limitations. • Furthermore, traditional credit products have been used to purchase groceries and other essentials for decades.
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¹⁰³ Clause 10.2.

¹⁰⁴ ASIC, [RG 234 Advertising financial products and services \(including credit\): Good practice guidance](#) (accessed on 29 November 2022)

¹⁰⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 10.

¹⁰⁶ *Ibid*, 17.

¹⁰⁷ *Ibid*.

¹⁰⁸ Options Paper, 17.

	<ul style="list-style-type: none"> • AFIA believes an outright prohibition may disadvantage customers seeking to purchase a gift card for the many reasons gift cards are attractive products. • For example, if gift cards are being used to purchase alcohol in certain stores or locations, this is likely to be a merchant-related issue.¹⁰⁹ • We need better detail on the problem and actual or potential consumer harms so appropriate response can be more fully designed.
<p>Issue 6 - Frictionless process, overselling, scams, and financial abuse¹¹⁰</p>	<ul style="list-style-type: none"> • Treasury notes there are suggestions that BNPL may lead customers to buy goods they do not ‘want’ or ‘need’.¹¹¹ • AFIA does not have a view on consumer purchasing appetites or preferences. • Simplicity is one of the positives of innovative BNPL products which provide ease of access to finance, while also providing technology-enabled tools and product features to assist consumers manage and maintain control of their spending. • Under the Australian Consumer Law and the Code, BNPL providers must take reasonable steps to avoid unlawful unsolicited marketing and sales.¹¹² • On scams, under Clause 10.5 of the BNPL Code, signatories commit to ‘tak[ing] appropriate account of online security risks’, consistent with ASIC’s best practice regulatory guidance.¹¹³ It is also important to note that the occurrence of scams is not unique to BNPL products. They can occur across the financial system. • On Treasury’s comments on the selling of solar panels in this section of the Options Paper, AFIA supports the <i>New Energy Technology Consumer Code</i>, commencing in February 2023.¹¹⁴ • AFIA notes Treasury’s acknowledgement an Australian Competition Tribunal ruling ‘rejected assertions BNPL financing of energy products has led to consumer harm’.¹¹⁵

¹⁰⁹ Ibid, 17.

¹¹⁰ Ibid, 17-18.

¹¹¹ Ibid, 17.

¹¹² See analysis on page 13 of this submission.

¹¹³ [Buy Now, Pay Later Code of Practice](#).

¹¹⁴ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 17.

¹¹⁵ Ibid. See too 3 Australian Competition Tribunal: Application by Flexigroup Limited (No 2) [2020] ACompT 2, File number ACT 1 of 2019, date of determination 15 September 2020. Accessed 16 November 2022.

	<ul style="list-style-type: none"> • AFIA reiterates our previous commentary that BNPL has helped power Australia's world-leading uptake of solar energy. Australia ranks first in the world for installed photovoltaic generation capacity per capita, around two thirds of which is 'distributed' (i.e., rooftop solar).¹¹⁶ • Code signatories financed the installation of 17.4 per cent of all Australian solar panels in the 2021-22 financial year and 20.8 per cent in June 2022. • The Options Paper raises concerns on 'coercive control and financial abuse'.¹¹⁷ • Code signatories note that BNPL products are subject to full identity verification and imposing RLOs on BNPL would not address any concerns related to coercive control or financial abuse as these are separate issues to responsible lending. • Code signatories assist vulnerable people, as outlined in the BNPL Code.¹¹⁸ Additionally, signatories are committed to training their staff to identify signs of vulnerability and appropriate address those with customers.¹¹⁹ • AFIA is looking at improvements to practices regarding supporting vulnerable customers in conjunction with the independent review of the BNPL Code and through preparing sector guidance for code signatories on vulnerable customers.
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¹¹⁶ International Energy Agency (2022), [Trends in Photovoltaic Applications 2022](#),10.

¹¹⁷ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 18.

¹¹⁸ See Clauses 8.4, 11.3(a) and 11.11(e).

¹¹⁹ See Clause 8.4-8.5 and Clause 14.2.

Issue 7 - Refunds, return of good and unauthorised transactions¹²⁰

- Code signatories have processes and procedures in place to facilitate refunds and return of goods where requested.
- On unauthorised transactions, signatories take a proactive approach through fraud monitoring processes. In the event that a customer contacts a BNPL provider to advise of fraudulent transactions, signatories conduct investigations, similarly to credit providers. If the customer is a victim of identification theft, signatories will recommend they report the matter to relevant authorities, including police, Scamwatch, the Australian Cyber Security Centre (ACSC) and Idcare.org.
- However, code signatories are willing to strengthen fraud aspects of the Code, as required, and more explicitly replicate standards with ePayments Code, where this bolsters consumer protections.
- When discussing return of goods, these issues may relate to customer dissatisfaction with the good itself, rather than dissatisfaction with the BNPL product provided. In such cases, the Australian Consumer Law may provide relief through provisions related to consumer guarantees.¹²¹
- It should be noted the chargeback protections which apply to credit cards also apply where BNPL product payments are facilitated by credit card providers.¹²²

¹²⁰ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 18

¹²¹ ACCC, [Consumer Rights and Guarantees](#) (accessed 29 November 2022).

¹²² AFCA, [Factsheet – Chargebacks](#), (accessed on 19 December 2022).

Issue 8 – Dynamic spending limits

- Both Option 2 and Option 3, as outlined in **Attachment B**, propose limiting the circumstances in which a BNPL customer's spending limit can be changed.
- Option 2 suggests 'prohibiting' BNPL providers from increasing a customer's spending limit without 'explicit instructions from the customer'.¹²³
- Option 3 suggests BNPL providers must let customers 'set their own spending limit' and be prohibited from increasing it 'without their permission'.¹²⁴
- These proposals overlook the way dynamic spending limits are effective ways to promote access and financial inclusion.
- These methods only increase spending limits where the customer in question has a proven history of repayment.
- Furthermore, spending limits being 'dynamic' means they go both 'up' and 'down' based off a customer's proven repayment history, carrying consumer benefits.
- Many BNPL providers start customers off with relatively small spending limits, such as \$600, and only increase these once they have a proven repayment history.
- Making it harder for BNPL providers to increase spending limits may have the unintended consequence of seeing higher initial spending limits set at the start of a customer relationship, because it is too difficult for BNPL providers to increase spending limits later. This will mean spending limits might be set artificially high, without the evidence of proven repayment histories which currently drive dynamic spending limit increases.

¹²³ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 21.

¹²⁴ Ibid.

ATTACHMENT B – TREASURY’S PROPOSED OPTIONS FOR FUTURE BNPL REGULATION¹²⁵

Treasury has proposed three options for future BNPL regulation, with varying levels of intervention on BNPL products.

The options for consideration are as outlined below:

1. Strengthening the BNPL Code plus including an affordability test¹²⁶
2. Limited BNPL regulation under the *Credit Act*, including licensing and a scalable unsuitability test¹²⁷
3. Full regulation of BNPL under the *Credit Act*.¹²⁸

AFIA supports option 1 and aspects of option 2. We do not support option 3, because this approach would be disproportionate and impose a raft of compliance obligations not suitable for BNPL providers. Furthermore, if Option 3 were implemented, customers would be pushed into higher cost credit options, which would increase rather than decrease consumer harm.

AFIA believes any approach to affordability assessments or RLOs should be cognisant of the role technology and data is playing in making financial services more accessible, affordable, and inclusive. Therefore, additional processes should be flexible and technology-neutral. For example, as outlined in our covering letter to this submission, courts have recognised credit providers are not obligated to use any specific method or system to meet their RLO requirements. Credit providers required to meet full RLOs may still:¹²⁹

[D]o what [they] want in the assessment process...what [they] cannot do is make unsuitable loans.

AFIA supports option 1 and aspects of option 2 for three main reasons. Firstly, we believe, as outlined in **Attachment A**, many of the issues raised in the Options Paper are dealt with already in legislation, which does in fact cover BNPL products, or in AFIA’s BNPL Code of Practice.¹³⁰ Secondly, where more could be done to address particular issues, signatories are committed to improving the Code.¹³¹ Thirdly, full regulation of BNPL providers under the Credit

¹²⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 19-22.

¹²⁶ *Ibid*, 20.

¹²⁷ *Ibid*, 21.

¹²⁸ *Ibid*, 22.

¹²⁹ Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 at [81]. Upheld on appeal in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 at [131], [141] and [171].

¹³⁰ See, for example, the provisions of the Australian Consumer Law related to misleading and deceptive conduct, fraud legislation related to unauthorised transactions and other overarching legislation referenced in Attachment A.

¹³¹ See discussion of code signatories positions in Option 4, 5 and 7 in Attachment A.

Act would fail to recognise the unique nature of the product and market, which have an average transaction value of just \$136 and comprise different business models, thus resulting in significant compliance burden on BNPL providers with the imposition of a raft of additional organisational obligations.¹³² Furthermore, adopting option 3 would contradict the Minister's previous stated position that indicating BNPL products 'are unique and any future regulatory framework needs to reflect that'.¹³³

Regulation, which is not proportionate, scalable, and targeted may jeopardise the economic benefits BNPL provides to Australian businesses and consumers. It would be undesirable to risk the \$18.4 billion in GDP and 120,000 Australian jobs the BNPL sector creates.¹³⁴ As Treasury acknowledges in their Options Paper:¹³⁵

*Australian **consumers have benefited** [emphasis added] from the rise of the BNPL industry, and it is important to ensure these benefits balance any changes to the BNPL regulatory framework [...]*

Affordability assessment

Code signatories would also be open to strengthening the Code to improve and better articulate the upfront affordability and ongoing suitability assessment processes.

One approach to strengthening affordability assessments might be committing to undertaking a credit assessment to assess affordability where more than \$800 is provided. This would be lowering the threshold from \$2001 to \$800 in the BNPL code. However, we consider the method should be technology neutral and not mandate an approach as some may prefer to use a credit bureau check, open banking or other.

If a customer does not have a credit file, they should not be excluded from opening a BNPL account.

Existing customers should not be required to re-do affordability assessments.

While soft credit checks have merit, any new regulatory regime should remain principles-based and not mandate these to the exclusion of other tools.

¹³² Data reported for code compliance purposes.

¹³³ The Hon Stephen Jones, [Address to the Responsible Lending and Borrowing Summit](#) (12 July 2022).

¹³⁴ Ibid.

¹³⁵ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper](#) (November 2022), 19.

Option 1: Strengthening the BNPL Code plus including an affordability test¹³⁶

This option proposes a ‘government-industry co-regulation regime’, utilising the current BNPL Code and strengthening it where necessary.¹³⁷

This proposal further includes what Treasury refers to as a ‘bespoke affordability test’ under the *Credit Act*, which is ‘tailored’ to the unique nature of BNPL products.¹³⁸ Under this bespoke test, BNPL providers would be mandated to:¹³⁹

- check a BNPL product is not unaffordable for a person before offering it to them
- provide for the scalable and efficient checking of a consumer’s ability to afford the BNPL credit related to the overall value of the credit being provided.

This option also requests BNPL providers work with the Government to strengthen aspects of the Code related the seven themes outlined in **Attachment A**.

Code signatories are committed to undertaking this process. We have indicated in **Attachment A** some specific areas for improvement. We will continue working collaboratively with the Government and other stakeholders to regularly identify areas where the BNPL Code can be strengthened and improved. We have bought forward the independent review of the BNPL Code to achieve this very outcome and to ensure the BNPL Code continues to foster best practices and address changing customer expectations and needs.

Option 1 suggests provisions of the BNPL Code could be enforceable by ASIC under section 1101A of the *Corporations Act*, subject to AFIA’s application for this process and ASIC’s approval.¹⁴⁰ We note that AFIA approached ASIC about seeking approval of the BNPL Code when it was originally developed. Under ASIC’s code approval powers, the BNPL Code was not eligible for approval. However, AFIA developed the BNPL Code to comply with ASIC’s regulatory guidance. AFIA supports changes being made so that the BNPL Code can be approved by ASIC.

Overall, AFIA supports option 1, as long as it is technology neutral and adopts a proportionate, scalable, and targeted approach to regulation, recognising this is a product consumers value and which supports our digital economy. Code signatories are committed to strengthening the BNPL Code where this is required, as indicated in **Attachment A**, to improve customer experiences.

¹³⁶ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 20.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ See too ASIC RG183.13, *Approval of financial services sector codes of conduct* (1 March 2013): <https://asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>.

AFIA believes that technology and data-driven decision-making should be embraced in our regulatory frameworks. We support bespoke affordability tests that appropriately recognise the unique features of the BNPL sector and do not mandate specific methods of conducting assessments or particular systems.¹⁴¹

Importantly, this approach is scalable and aligned with the Government’s previous recognition that BNPL products ‘are unique and any future regulatory framework needs to reflect that’.¹⁴² This approach reflects the size of the BNPL sector and the different business models across the market as well as ensuring the Government can mandate that a BNPL provider adheres to a code approved by ASIC.

Option 2: Limited BNPL regulation under the *Credit Act*, including licensing and a scalable unsuitability tests¹⁴³

AFIA believes that option 1 is the optimal approach to future BNPL regulation. However, we are open to considering aspects of option 2, so long as they are implemented in a proportionate, scalable, and targeted way, which recognises the distinguishing features of BNPL products and which is able to flex to the changing expectations of customers and the changing technology and data-driven practices in the sector.

Option 2 proposes that, alongside a strengthened Code, BNPL products would be brought within the *Credit Act* in a ‘tailored’ way.¹⁴⁴

This approach would amend the *Credit Act* to require BNPL providers to hold a bespoke ACL, or be a representative of a licensee. BNPL providers would be required to comply with the general obligations of a licensee, including:¹⁴⁵

- internal and external dispute resolution
- hardship provisions
- compensation arrangements
- fee caps, and
- marketing rules.

AFIA notes the BNPL Code already requires signatories to meet obligations regarding internal and external dispute resolution (Clause 10.10), fee caps (Clause 18.1), marketing (Clauses 9.5 and 10.2) and hardship (Clause 14). Furthermore, signatories are required to be AFCA

¹⁴¹ Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 at [81]. Upheld on appeal in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 at [131], [141] and [171].

¹⁴² The Hon Stephen Jones, [Address to the Responsible Lending and Borrowing Summit](#) (12 July 2022).

¹⁴³ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 21.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

members, which means where a dispute is found in the favour of a complainant, AFCA can award compensation under Clause 14.9 of the BNPL Code.

AFIA notes the Options Paper is rather vague as to whether the bespoke licensing proposals for BNPL providers may in turn affect merchants in practice.¹⁴⁶ AFIA seeks further information on this aspect of the licensing proposals. AFIA will make a supplementary submission on issues pertaining to licensing.

AFIA welcomes that, under this option, BNPL providers who are not one of the major banks would maintain the capacity to voluntarily opt into the comprehensive credit reporting framework, rather than being mandated to do so.¹⁴⁷

Under option 2, BNPL providers would be further required to:¹⁴⁸

1. assess that a BNPL credit is not unsuitable for a person, similar to the existing responsible lending obligations (RLOs) under Chapter 3 of the *Credit Act*
 - AFIA welcomes Treasury's recognition this should be 'scaled to the level of risk' of the BNPL products. AFIA agrees with Treasury on the need to remove 'prescriptive requirements' like the verification of financial documentation and interrogating the customers' 'needs and objectives'¹⁴⁹
2. not increase consumers' spending limits without explicit instructions
3. cap fees for charges relating to missed or late payments, combined with additional warning and disclosure requirements.

AFIA notes the BNPL Code already contains provisions related to:

1. scalable suitability assessments for customers (Clauses 11 and 12)
2. the Code also already places limitations on the circumstances in which spending limits can be increased, including prohibiting spending limit increases for customers behind on existing payments (Clauses 11.9-11.10)
3. the Code also caps certain fees and charges (Clause 18.1) and freezes them altogether for customers experiencing hardship (Clauses 14.10). It further requires signatories to be transparent and up front in all communications and advertising, including regarding warnings and disclosures related to fees and charges (Clauses 10.1 and 10.2).¹⁵⁰

¹⁴⁶ Ibid, 21

¹⁴⁷ Ibid, 21. Mandatory participation in the comprehensive credit reporting (CCR) regime is limited to the Commonwealth Bank, ANZ, Westpac, NAB and Macquarie. These are the only financial institutions classified as 'large ADIs' under the regulations made pursuant to s 37G(3)(a) of the *Banking Act 1959* (Cth). Only 'large ADIs', worth over \$107 billion, are mandated to participate in the CCR, via Part 3-2CA of the *National Consumer Credit Protection Act 2009* (Cth), ss 133CN-133CQ.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ BNPL providers would also be subject to provisions of the Australian Consumer Law related to misleading and deceptive conduct, under section 18 of the ACCA which would cover this conduct.

Any adoption of option 2 must recognise the BNPL sector is achieving good consumer outcomes and regulating it too heavily places the sector at risk, with most BNPL providers still emerging businesses. Furthermore, there are very low complaints, disputes, and hardship assistance:

- IDR complaints to BNPL providers directly have remained low at only 0.1-0.2 complaints per hundred active accounts.¹⁵¹
- EDR complaints to AFCA have also remained low at just 0.005 complaints per those active accounts.¹⁵²
- The percentage of active accounts in hardship on 30 June 2022 was 0.39%.¹⁵³
- In 2020-21 AFCA received 767 complaints about BNPL products, representing only 1.1 per cent of total complaints received by AFCA.¹⁵⁴ This compared to a significantly higher number of complaints for other financial products – with the top five financial products most commonly complained about totalling 29,974.¹⁵⁵

Therefore, while supporting aspects of the principles outlined in option 2, AFIA suggests that much of the areas outlined above are covered by legislation or the BNPL Code. Aspects of option 2 which are adopted should be calibrated in a proportionate, scalable, and targeted way which recognises the distinguishing features of BNPL.¹⁵⁶ AFIA seeks further advice from Treasury on how specifically option 2 will ‘tailor’ licensing and responsible lending obligations so they are bespoke for BNPL.¹⁵⁷

Option 3: Full regulation of BNPL under the *Credit Act*¹⁵⁸

AFIA does not support option 3, the full regulation of BNPL under the *Credit Act*.¹⁵⁹

Option 3, in treating BNPL like any other product regulated under the *Credit Act*, fails to recognise the unique characteristics of BNPL products, which the Government has already acknowledged. As Minister Jones has said, BNPL products ‘are unique and any future regulatory framework needs to reflect that’.¹⁶⁰

¹⁵¹ Ibid, 8.

¹⁵² Data reported for code compliance purposes.

¹⁵³ Ibid.

¹⁵⁴ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 14.

¹⁵⁵ AFCA, [Top five products most commonly complained about](#), (accessed 19 December 2022),

¹⁵⁶ The Hon Stephen Jones, *Address to the Responsible Lending and Borrowing Summit* (12 July 2022): [Address to the Responsible Lending and Borrowing Summit, Sydney | Treasury Ministers](#).

¹⁵⁷ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 21.

¹⁵⁸ Ibid, 22.

¹⁵⁹ Ibid.

¹⁶⁰ The Hon Stephen Jones, *Address to the Responsible Lending and Borrowing Summit* (12 July 2022): [Address to the Responsible Lending and Borrowing Summit, Sydney | Treasury Ministers](#).

Option 3 would be overly onerous because it mandates the following from BNPL providers:¹⁶¹

1. be subject to a full Australian Credit Licence, including full RLOs which in practice would not be practicable for the nature of the product and how consumers access and use BNPL
2. be required to comply with all licensee obligations, including full reporting obligations and organisational requirements. This is disproportionate, particularly given the relative size of many smaller BNPL providers
3. allow consumers to set their own spending limit and a prohibition from increasing a consumer's spending limit without their permission cap of fees relating to missed or late payments would be applied, combined and add disclosure requirements. This is contrary to product features introduced to limit overspending as well as enable BNPL providers to manage their portfolio within operational, risk and other parameters.

AFIA believes aspects (1) and (2) of option 3 are far too onerous for BNPL providers. This approach also fails to acknowledge the need for any application of RLOs to be 'scaled to the level of risk' of the BNPL products and not have unnecessarily 'prescriptive requirements', given the unique nature of BNPL.¹⁶²

In practice, to meet the full RLOs, a BNPL provider would need to determine whether a product was not unsuitable for relatively low value limits. Furthermore, in practice to meet the full reporting and organisational obligations, a BNPL provider would need to meet requirements designed for traditional credit providers.

Regarding aspect (3) of option 3, as outlined earlier, the BNPL Code already limits the circumstances in which spending limits can be increased and changing or prescribing conditions as proposed would fundamentally alter the structure of the BNPL product.¹⁶³

The BNPL Code also caps certain fees and charges and freezes them altogether for customers experiencing hardship.¹⁶⁴ The Code further requires signatories to be transparent and upfront in all communications and advertising, including warnings and disclosures related to fees and charges (as does the Australian Consumer Law).¹⁶⁵

Additionally, it is important that merchants dealing with BNPL providers not be required to be authorised credit representatives (noting that Treasury has indicated they 'do not expect' this to be the case).¹⁶⁶ AFIA notes it is rather vague as to whether the licensing proposals for BNPL

¹⁶¹ Ibid.

¹⁶² Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 21.

¹⁶³ Clauses 11.9-10.

¹⁶⁴ Clause 18.1 and Clause 14.10 respectively.

¹⁶⁵ Clauses 10.1 and 10.2. BNPL providers would also be subject to provisions of the Australian Consumer Law related to misleading and deceptive conduct, under section 18 of the ACCA which would cover this conduct.

¹⁶⁶ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 22.

providers may in turn affect merchants in practice. We encourage this aspect of the licensing proposals to also be considered.

Any adoption of option 3 must recognise the BNPL sector is achieving good consumer outcomes and regulating it too heavily places at risk \$18.4 billion to GDP and approximately 120,000 Australian jobs. For example, on low consumer harms:

- IDR complaints to BNPL providers directly have remained low at only 0.1-0.2 complaints per hundred active accounts.¹⁶⁷
- EDR complaints to AFCA have also remained low at just 0.005 complaints per those active accounts.¹⁶⁸
- The percentage of active accounts in hardship on 30 June 2022 was 0.39%.¹⁶⁹
- In 2020-21 AFCA received 767 complaints about BNPL products, representing only 1.1 per cent of total complaints made to AFCA.¹⁷⁰ This compared to a significantly higher number of complaints for other financial products – with the top five financial products most commonly complained about totalling 29,974.¹⁷¹

Concluding comments

AFIA and our members are committed to working with the Government and stakeholders, to implement option 1 and aspects of option 2.

This 'tailored' approach will mean the BNPL sector can continue to provide benefits to customers and businesses as well as create jobs, contribute to GDP, and support our digital economy. It also allows customers continued easy access to the BNPL products they wish to use. It also ensures the BNPL sector can continue to evolve and provide competitive and innovative products within the finance sector.

AFIA welcomes the Government acknowledging that proportionate, scalable and targeted regulation is appropriate here. We must recognise the distinguishing features of BNPL products and approach them in a way which is fit for the future, flexing to the changing expectations of customers and the changing technology and data-driven practices in the sector.

¹⁶⁷ Ibid, 8.

¹⁶⁸ Data reported for code compliance purposes.

¹⁶⁹ Ibid.

¹⁷⁰ Commonwealth Treasury, [Regulating Buy Now, Pay Later in Australia: Options paper \(November 2022\)](#), 14.

¹⁷¹ AFCA, [Top five products most commonly complained about](#), (accessed 19 December 2022),

**APPENDIX B: AFIA'S SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN TREASURY ON
REGULATING BNPL (9 JANUARY 2023)**



**Australian
Finance
Industry
Association**

9 February 2023

Mr Daniel McAuliffe
Director - Consumer Credit Unit
Financial Systems Division
Treasury
Langton Crescent
Parkes ACT 2600
Submitted via email to: CreditReforms@treasury.gov.au

Dear Mr McAuliffe,

Supplementary Submission on *Regulating Buy Now, Pay Later in Australia - Options Paper*

The Australian Finance Industry Association (AFIA)¹⁷² appreciates the opportunity to provide a supplementary submission to the Treasury consultation on *Regulating Buy Now, Pay Later in Australia - Options Paper* (**Options Paper**).

AFIA is the only peak body representing the entire finance industry in Australia. We represent over 150 providers of consumer, commercial and wholesale finance in Australia, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry, with our members who are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

¹⁷² www.afia.asn.au.

AFIA also represents 90 per cent of the Buy Now Pay Later (BNPL) market. Our BNPL members include: Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright, Plenti and Zip Co. Importantly there are several providers of BNPL products who are not members of AFIA or the BNPL Code. Therefore, this submission does not represent the full sector.

INTRODUCTORY COMMENTS TO AFIA'S SUPPLEMENTARY SUBMISSION

AFIA previously provided our submission the Options Paper for future regulation of BNPL in Australia on 22 December 2022.

In our original submission we said:¹⁷³

AFIA supports the adoption of Option 1, with aspects of Option 2, so long as they are, in Treasury's words, 'tailored' to the low level of risk involved in BNPL products. AFIA will also make a supplementary submission on how the licensing regime and associated obligations could apply with the adoption of a 'tailored' approach that ensures regulation in proportionate, scalable and targeted.

In this supplementary submission, AFIA indicates which specific aspects of the Australian Credit License (ACL) regime we believe should apply to BNPL products. In so doing, we give content to the term 'tailored' suggested by Treasury in Option 2 of the Options Paper, which AFIA supports.¹⁷⁴

It is AFIA's view the following aspects of the general conduct obligations of the ACL regime could reasonably apply in full to BNPL products:

- 1. Fit and proper person obligations** – the requirement to be a fit and proper person to engage in the credit activities covered by the ACL.¹⁷⁵
- 2. Compliance obligations** – the requirement to have processes in place to adequately monitor compliance with licence conditions, the *National Consumer Credit Protection Act 2009* (the Credit Act), the Credit Regulations and National Credit Code (NCC).¹⁷⁶
- 3. Obligations to supervise and train representatives** – the requirement to have adequate arrangements to supervise and monitor the activities of any representatives; ensure any breaches are identified and remedied; and ensure that any representatives are adequately trained and competent to engage in the credit activities covered by the licence.¹⁷⁷

¹⁷³ AFIA Submission on the *Regulating Buy Now, Pay Later in Australia - Options Paper*, 2.

¹⁷⁴ Commonwealth Treasury, Options Paper, 21.

¹⁷⁵ *National Consumer Credit Protection Act 2009* (Cth) (the Credit Act), s 37A(1).

¹⁷⁶ *Credit Act*, ss 47(1)(k) and 47(1)(m). See too ss 51C and 53.

¹⁷⁷ *Credit Act*, s 47(1)(g) and [RG 206](#).

4. **Obligations on resources** – the requirement to have adequate financial, human and information technology resources to engage in credit activities, and to carry out supervisory arrangements.¹⁷⁸
5. **Dispute resolution obligations** – the requirement for internal dispute resolution (IDR) processes which are compliant with Regulatory Guide 271 on Internal Disputes Resolution (RG271) and have a membership with the Australian Financial Complaints Authority (AFCA). Details about the applicant’s IDR systems should include the role of the person responsible for IDR, whether IDR procedures meet requirements under RG 271 and if procedures are available to clients.¹⁷⁹
6. **Risk management obligations** – the requirement to have adequate risk management systems through responding to a series of questions about matters including risk processes and training.¹⁸⁰
7. **Compensation obligations** – the requirement to have adequate professional indemnity insurance.¹⁸¹

It is AFIA’s view the suitability assessment aspects of licensing under an ACL must be appropriately ‘tailored’ to the particular context of BNPL.¹⁸²

The *Credit Act* imposes certain obligations on ACL licensees regarding their obligations to assess the suitability of loans under ss 128 to 132.

Specifically under s 130, licensees must ‘make reasonable inquiries’ about the consumer’s financial situation’ and ‘take reasonable steps to verify’ this information.

What must be done to meet assessment obligations is left open to licensees, making this area of law vague and unclear. As Gleeson J, then of the Federal Court and now of the High Court of Australia, found in *Westpac*:¹⁸³

The Act leaves it open to the licensee to decide:

(1) what inquiries it will make under s 130(1)(a) and (b), provided that those inquiries are reasonable;

¹⁷⁸ Section 47(1)(l)(i) as supplemented by [RG 207](#).

¹⁷⁹ *Credit Act*, s 47(1)(h) and 47(2) as supplemented by [RG 271](#) on IDR and [RG 267](#) on EDR and AFCA.

¹⁸⁰ *Credit Act*, s 47(1)(l)(ii).

¹⁸¹ *Credit Act*, s 47(1)(j) read with s 48.

¹⁸² Commonwealth Treasury, Options Paper on *Regulating BNPL in Australia*, 21.

¹⁸³ *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 (Westpac Appeal) per Gleeson J at [141].

(2) what steps it will take to verify the consumer's financial situation under s 130(1)(c), provided that those inquiries are reasonable....

The term reasonable is vague and subject to a myriad of interpretations which can be applied inconsistently.

The process of determining what constitutes 'reasonable' inquiries and verification has been described as 'scaleability' in ASIC's Regulatory Guide, RG 209.¹⁸⁴

RG 209, recognises a major factor in determining what level of inquiries are reasonable to meet the obligations of unsuitability assessments is 'The **risk [emphasis added]** or likelihood that a consumer will be harmed by taking on new financial obligations'.¹⁸⁵

ASIC specifically acknowledge such **risk [emphasis added]**:

*Will be higher where the amount of the new financial obligations would be a Proportionately significant part of the consumer's available income.*¹⁸⁶

Given this, the level of inquiries required to fulfill suitability assessments for BNPL should:

1. be less onerous than larger financial products;
2. be scaled to the inherently lower level of risk involved in BNPL products, and
3. be technology-neutral.

As discussed in AFIA's original submission, the average transaction value for BNPL code signatories is just \$136.¹⁸⁷ Furthermore, in the Options Paper, Treasury acknowledges 'the great majority' of BNPL products are 'low value'.¹⁸⁸ Additionally, HM Treasury in the United Kingdom has affirmed: BNPL products are 'inherently lower risk than interest bearing credit products'.¹⁸⁹

To avoid the regulatory uncertainty that remains even after the *Westpac Case* and ASIC's updated RG 209, AFIA recommends Treasury should make specific regulations regarding BNPL, as they are empowered to do under s 130(2) of the *Credit Act*.

These BNPL specific regulations should recognise that, as BNPL products are lower value and lower risk, fewer steps should have to be taken to meet the assessment obligations under the *Credit Act* for BNPL products.

¹⁸⁴ ASIC RG 209.79 and 209.81.

¹⁸⁵ ASIC RG 209.87.

¹⁸⁶ *Ibid.*

¹⁸⁷ AFIA's Original Submission to Treasury on the Options Paper, 22.

¹⁸⁸ Commonwealth Treasury, Options Paper on *Regulating BNPL in Australia*, 25.

¹⁸⁹ HM Treasury (UK), [Regulation of Buy-Now Pay-Later: Response to Consultation](#), 16[3.1] (June 2022).

This clarifies current Australian law. It also endorses the expert observations of Treasury, both here and in the United Kingdom, in acknowledging assessment obligations imposed upon BNPL products could reasonably be ‘tailored’ to reflect BNPL’s low risk, low value nature.

Treasury may also consider incorporating the concept of scalability into the *Credit Act* itself and/or providing further examples, either in an explanatory memorandum or regulations, on when scalability obligations may be scaled down in the context of low value, low risk products.

Tailoring these aspects of licensing accords with Treasury’s proposed approach in Option 2.¹⁹⁰

It also reflects the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP’s, previous publicly stated position that BNPL products ‘are unique and any future regulatory framework needs to reflect that’.¹⁹¹ As the Minister has said, the Government must:

*[T]ake a careful and deliberate approach that **balances** [emphasis added] the need to protect consumers with encouraging innovation in our financial services industry.*

AFIA believes the adoption of Option 1 with ‘tailored’ aspects of Option 2 achieves this objective in a proportionate, targeted and scalable way.¹⁹²

AFIA looks forward to working with the Government to consider other aspects of licensing under the *Credit Act* which may be inappropriate in the BNPL context.

The details of how precisely the ACL regime would be ‘tailored’ to the specific BNPL context should be announced publicly, via draft legislation, and be refined following ongoing consultation and engagement with industry regarding appropriate regulatory settings.¹⁹³

Additionally, it is essential for merchants and BNPL providers to have clarity that merchants (dealing with BNPL providers and BNPL customers) will not be required to be credit representatives of a BNPL provider.

AFIA notes the Options Paper is rather vague as to whether the licensing proposals for BNPL providers may in turn affect merchants in practice. Treasury indicates they ‘do not expect’ this to be the case.¹⁹⁴

¹⁹⁰ Commonwealth Treasury, Options Paper on *Regulating BNPL in Australia*, 21.

¹⁹¹ The Hon Stephen Jones, [Address to the Responsible Lending and Borrowing Summit](#) (12 July 2022).

¹⁹² *Ibid*, 21.

¹⁹³ Commonwealth Treasury, Options Paper on *Regulating BNPL in Australia*, 22.

¹⁹⁴ *Ibid*, 22.

Treasury should make it unequivocally clear merchants dealing with BNPL will not be covered by any changes flowing from the regulation of BNPL. We recommend Treasury carefully consider the differing aspects and interactions of merchants across the BNPL sector, to ensure merchants are appropriately excluded.

CLOSING COMMENTS

Thank you again for the opportunity to contribute to this consultation. We would appreciate the opportunity to discuss our recommendations further with the Treasury.

Should you wish to discuss our submission or require additional information, please do not hesitate to contact Roza Lozusic, AFIA Executive Director Policy and Strategy at roza.lozusic@afia.asn.au, or myself at diane.tate@afia.asn.au.

Yours sincerely

A handwritten signature in black ink that reads "Diane Tate". The signature is written in a cursive, flowing style.

Diane Tate
Chief Executive Officer