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Dear Daniel

REGULATING BUY NOW PAY LATER (BNPL) IN AUSTRALIA OPTIONS PAPER

The Mortgage & Finance Association of Australia (**MFAA**) welcomes the opportunity to make a submission to Treasury's Regulating BNPL in Australia Options Paper (**the Options Paper**).

As context to this submission, the MFAA is Australia's peak industry body for the mortgage and finance broking industry, with over 14,500 members. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage and finance broking industry. Brokers play an important role in intermediated lending, providing access to credit and promoting choice in both consumer and business finance. Brokers now facilitate more than two thirds of all new residential home loans¹ and at least four in ten small business loans² in Australia. Further information about the MFAA can be found at **Attachment A**.

Our members want consumers to have the best possible chance of buying their first home, or the ability to refinancing to a new loan that better suits their needs. At the coalface of helping Australians into homes, our members have provided anecdotal feedback that BNPL can act as a barrier or cause delays when these consumers seek to purchase a home or to refinance. Fundamentally, the MFAA's position is that BNPL products are credit and should be regulated under the *National Consumer Credit Protection Act 2009* (**the Credit Act**).

¹ [MFAA Industry Intelligence Service Report 14th Edition](#) pg 4.

² Productivity Commission research paper [Small business access to finance: The evolving lending market](#) pg 44.

OUR SUBMISSION

The development of BNPL is evidence of Australia's innovation and competition in the financial services sector. Competition from the BNPL sector has provided consumers with increased choice and access to payment and credit options with unique features and benefits.³ However, on the other side of the coin, BNPL has raised issues for policy makers - whether Australia's consumer credit framework appropriately responds to new product innovation, particularly where there is a risk of consumer harm.

Interestingly, in consultation with our members to inform our submission to the Options Paper, the observations made correlated closely to the outcomes of the Woolward Review,⁴ particularly:

- the lack of requirements for BNPL providers to undertake creditworthiness assessments,
- the ease of taking out multiple agreements from different providers, and
- the lack of visibility on credit files which impacts on our members' ability to easily undertake suitability assessments in line with their own responsible lending obligations.

The MFAA is committed to credit regulation that mitigates consumer harm and that is scalable across all types of credit products and the channels through which those products are distributed. As such, we consider:

- BNPL is credit, therefore like other forms of consumer credit, these products should be regulated under the Credit Act,
- Australia's credit regulatory framework is fit for purpose to regulate BNPL, and
- there should be further education around BNPL for consumers as a credit product.

Therefore, to assist Treasury in its work, in our submission we make the following recommendations:

1. Option 3 should be adopted – that BNPL is regulated as credit under the Credit Act, including the requirement for BNPL providers to comply with the responsible lending obligations under the Credit Act and RG 209. By extension, RG 209 should therefore be updated to address BNPL as a specific subset of credit products.
2. As such, BNPL should be included in comprehensive credit reporting in the same way as other consumer credit products.
3. Financial literacy education must be prioritised to dispel any misunderstanding of BNPL as anything other than a credit product.

RECOMMENDATION 1: BNPL IS REGULATED IN ACCORDANCE WITH OPTION 3 AND RG 209 BE UPDATED TO INCLUDE BNPL

BNPL products are not regulated by the Credit Act either because they utilise certain exemptions within the Credit Act, or because they do not meet the definition of regulated credit. As a result, BNPL is not subject to responsible lending obligations and providers of BNPL products are not required to hold an Australian Credit Licence (**ACL**).

We note and agree with the statement within the Options Paper that the Credit Act exemptions have supported the growth of BNPL, but at the same time, these exemptions were not designed with that outcome in mind.

The Options Paper requests views on which of the three options set out in the paper is most appropriate. BNPL has been described as a facility where there is a pre-existing overarching agreement between a lender and a consumer under which the lender agrees to finance one or more transactions, and the consumer has an obligation to repay these (usually by equal instalments) for a set period. No interest or fees are charged, but there is a penalty for non-repayment. It would seem

³ ASIC Report 672 Buy Now Pay Later: An Industry Update November 2020

⁴ See page 8 of the UK Treasury response to the Woolward Review – A review of the change and innovation in the unsecured credit market 2 February 2021 (**the Woolward Review**).

the only tangible difference between this characterisation of BNPL and that of traditional credit is the lack of an interest charge or a fee, meaning that if consumers make all payments on time, there is no cost to the consumer of utilising BNPL. However, the obligation to repay is still there, and the failure to repay is considered a default. As noted above, our fundamental position is that BNPL is a credit product, usually offered to individuals for personal, domestic, or household purposes and as such should be regulated under the Credit Act. Given the Government's clear commitment to close the current unintended regulatory gap, we do not consider the proposal of a co-regulatory regime under Option 1 to be at all appropriate. On this note, we acknowledge the Australian Finance Industry Association's (AFIA) continued effort to effect self-regulation of the BNPL industry through the BNPL Code of Practice. Once BNPL is regulated under the Credit Code, AFIA should consider a revised code that complements the legislative framework and continues to embed best practise industry standards of conduct, particularly in the areas of customer vulnerability and hardship.

We are not entirely clear on the distinction between Options 2 and 3, however Option 2 seems to involve a bespoke and tailored model of regulation for BNPL. Regardless, given the premise that BNPL is credit, we consider Option 2 to be unnecessary because the responsible lending obligations set out in the Credit Act are not prescriptive and require credit providers and credit assistance providers to take 'reasonable steps' with respect to responsible lending. Furthermore, the concept of scalability is enshrined within RG 209, specifically noting that the range of inquiry and verification that is reasonable for a credit provider to undertake takes into consideration the level of complexity of the product itself, the benefits to the consumer of the product and the risk of harm to the consumer. Both the Credit Act and RG 209 work in tandem to create a flexible and scalable model for credit regulation in Australia.⁵ Once the Credit Act is amended to include regulation of BNPL, we would expect ASIC to update RG 209 to accommodate these products.

Further considerations

We expect Treasury will engage in consultation on any exposure draft legislation. In its design, we urge Treasury to consider:

1. **Amendment to the definition of credit and any unintended consequences:** A change in the definition of credit with the Credit Act, or a new definition specific to BNPL will likely be required to give effect to Option 3. Many (if not most) BNPL providers adopt a model whereby the BNPL provider does not charge the consumer for providing credit. Using this model means that the product is not regulated by virtue of s5(1)(c) of the Credit Code (i.e., no interest or fees payable by the consumer for the lender making the loan). As such, if no charge is made for providing credit (aside from late payment or default fees which are accepted as not being a charge for provision of credit, but rather a fee for late payment), then the loan will not be regulated by the Credit Act. In making laws regulating BNPL providers, Treasury will need to exercise caution to ensure that in capturing BNPL products, Treasury does not inadvertently cause other products not intended to be regulated (and which is not causing consumer harm) to become regulated.⁶
2. **Merchant surcharging rules:** We note the statement within the Options Paper stating '*BNPL providers typically have no-surcharge rules which prevent merchants passing on the cost of BNPL to consumers.*' To avoid being caught by s11 of the Credit Code, BNPL providers will usually include a clause in their agreements with merchants stating that the merchants cannot pass on to the consumer some or all of the fee charged by the BNPL provider to the merchant.⁷

⁵ We note page 6 of the EM which states "[t]he objectives of the Code remain the same as those when the UCCC was first enacted, namely, to ensure strong consumer protection through 'truth in lending', while recognising that competition and product innovation must be enhanced and encouraged by the development of non-prescriptive flexible laws

⁶ For example, vendor financing, invoicing for products and services, free credit provided for low-income earners and traditional layby.

⁷ Section 11 of the Credit Act states that the Credit Act will apply to a loan that would otherwise not be caught (due to there not being a 'charge' for the credit) if the price for paying for goods by instalment exceeds the price for paying for the goods

The effect of s11 of the Credit Code is that if a merchant charges a consumer a higher amount (including a surcharge relating to the fee payable by the merchant to the BNPL provider), the loan by the credit provider will be construed as regulated under the Credit Act. The intent of this section is to prohibit credit providers from avoiding Credit Act obligations by claiming to not charge for the credit, but instead building the cost of the credit into a purchase made by the consumer. Any change to the rules relating to surcharging with respect to BNPL providers should be considered in this context and to ensure no unintended consequences, for example leading to unscrupulous practices that may be detrimental to consumers.

3. **Unsolicited credit limit increases:** In 2017, the Credit Act was amended to prohibited credit card providers from offering unsolicited credit card limit increases. Part of some BNPL product features include automatically increasing the amount customers can spend through their BNPL facility based simply on repayment history but not any other circumstances of the customer.⁸ We note the Options Paper indicates that 19% of BNPL customers cut back on or went without essentials and consider there to be a risk of consumer harm without checks and balances in place through unsolicited increases. Therefore, we recommend Treasury consider similar prohibitions on automated increases to BNPL facilities as with unsolicited credit card limit increases.

We look forward to participating in Treasury's consultation on the exposure draft legislation.

RECOMMENDATION 2: INCLUDING BNPL IN COMPREHENSIVE CREDIT REPORTING AND THE CONSUMER DATA RIGHT

Fundamentally our view is that BNPL liabilities should be included in a consumer's credit reporting data. As Australian Credit Licensees, BNPL providers will be able to engage more meaningfully with the credit reporting regime, including to choose to provide repayment history information (**RHI**) and hardship information in accordance with the Principles of Reciprocity and Data Exchange. We also understand that the Australian Retail Credit Association (**ARCA**) is doing work to allow BNPL to be represented in a consumer's credit report in a clear way (i.e., by grouping multiple BNPL transactions).

1. Streamlining the credit assessment process leading to more accurate responsible lending assessments.

The inconsistency of BNPL provider participation within the credit reporting system is resulting in both confusion and friction within the credit assessment process, particularly in the identification and capture of consumer liabilities.

Our members report that the lack of visibility of BNPL on credit reports impacts on our members' ability to easily undertake suitability assessments in line with their own responsible lending obligations. Because only certain AFIA BNPL Code signatories are required to conduct credit checks, not all BNPL can be identified through a consumer's credit report.⁹ While those credit checks will provide some benefit in assessing the customer's existing financial situation, these will not show comprehensively all outstanding BNPL liabilities. Other BNPL facilities may be identified for example through bank or credit card statements. The outcome is a move back to single line assessments of transaction histories, with brokers having to manually request further information from their customers to meet responsible lending obligations. This in itself can be a challenge because, as

in cash. As such, if a merchant charges a higher cost, or applies a surcharge, to payments made by way of BNPL, the BNPL provider may inadvertently be offering regulated credit.

⁸ For example, Afterpay's [states](#) "If you're a new Afterpay user, the amount you can spend will be lower than if you've been responsibly using the platform for a long time. Typically, the longer you've been using your account—and have made payments on time—the more likely the amount you can spend will increase."

⁹ See section 11.4-11.5 of the AFIA BNPL Code of Practice.

many BNPL providers do not issue statements, our members report difficulty in determining the value and volume of BNPL commitments, as well as minimum ongoing repayments.

Lastly, from a responsible lending perspective, we note there is inconsistency amongst lenders on the treatment of BNPL products – with some lenders considering use of these products to be a sign of financial stress, others requiring borrowers to stop using the products in order to improve their credit worthiness and others treating these products similarly to a credit card. If these products are considered to be credit, assessed as credit and included in a consumer’s credit report in a consistent way, a consumer’s use of these products can be better understood leading to more accurate (and more efficient) responsible lending assessments.

2. Providing opportunities to BNPL users to demonstrate positive repayment history

Australia’s comprehensive credit reporting system allows the reporting of both ‘negative’ data (for example defaults) as well as ‘positive’ data, which includes, notably, repayment history information i.e. RHI. RHI allows consumers to demonstrate positive behaviour with their existing credit products, which can in turn help those consumers to access further credit and on better terms. For example, first home buyers will benefit from being able to demonstrate to their prospective home loan provider a strong repayment history with their existing credit.

By virtue of the operation of the Privacy Act, BNPL providers that do not hold an ACL are currently unable to report RHI, therefore consumers that utilise those products are precluded from the benefit of building a positive credit history. The extension of the Credit Act, and the licensing requirement affords BNPL providers and their customers the opportunity to holistically participate in and derive benefits from Australia’s comprehensive credit reporting system.

3. Inclusion of BNPL in Open Finance will provide significant benefits to the Consumer Data Right (CDR)

Earlier this year, the MFAA responded Treasury’s Sectoral Assessment for the Open Finance Sector – Non-Bank Lending. In our submission we noted that BNPL providers hold an increasing amount and depth of consumer information, specifically in relation to consumer spending habits, and their discretionary and non-discretionary expenditure, and as such BNPL should be included in Treasury’s expansion of CDR into Open Finance.

As CDR will allow consumers to share their financial information easily and quickly with their trusted advisors (for example mortgage brokers) for lending application purposes, we noted the CDR’s true value will only be realised when there are comprehensive datasets within the system that give a whole of finance view of the customer. As such, for the CDR to be truly inclusive and of use, particularly to streamline credit assessment, it needs to include BNPL.

We were pleased to see our recommendation adopted in Treasury’s Final Report¹⁰ and urge Government to consider inclusion of BNPL as a matter of priority.

RECOMMENDATION 3: FACILITATING GREATER CONSUMER UNDERSTANDING OF BNPL PRODUCTS AS CREDIT

The way BNPL has been marketed to date not as a credit product, but as a budgeting tool, has resulted in consumers who do not realise that they are getting into debt by taking out BNPL products.

¹⁰ See page 9 of the [Consumer data right: Non-bank lending sectoral assessment](#)

ATTACHMENT A – ABOUT THE MFAA

The MFAA's role, as an industry association, is to provide leadership and to represent its members' views. We do this through engagement with governments, financial regulators and other key stakeholders on issues that are important to our members and their customers. This includes advocating for balanced legislation, policy and regulation and encouraging policies that drive competition and improve access to credit products and credit assistance for all Australians.