

Options for Regulatory Intervention

“Regulating Buy Now, Pay Later in Australia” – The Treasury Options Paper

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This memorandum is to inform The Treasury (Australian Government) on the future regulatory framework for buy now, pay later (BNPL) arrangements under the *National Consumer Credit Protection Act 2009* (the Credit Act). Our team includes academics from Curtin University in School of Accounting, Economics and Finance (Dr Lien Duong, Professor Grantley Taylor and Dr Baban Eulaiwi), and School of Electrical Engineering, Computing, and Mathematical Sciences (Dr Duc-Son Pham). We specially address the last two questions on page 19 of the Treasury Options Paper “Regulating Buy Now, Pay Later in Australia”.

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

In our opinion, Option 3 (Regulation of BNPL under the Credit Act) would be the most appropriate regulation for the BNPL industry. Under this option, it will bring the BNPL products under the regulation of the Credit Act with full compliance to the Responsible Lending Obligations. That option would ensure that all forms of consumer credit are treated similarly. Under Option 3, consumers will be allowed to set their own spending limit and BNPL providers will be prohibited from increasing a consumer’s spending limit without their permission. This is a significant step for consumer protection since there are a number of BNPL providers that market their BNPL products of between \$15,000 and \$30,000 for purchasing items such as roof top solar panels, batteries and home renovations.²

We would like to change the mandatory Comprehensive Credit Reporting regime aspect of Option 3. It is currently mentioned that “*BNPL providers would not be captured under the mandatory Comprehensive Credit Reporting regime unless the BNPL provider is a big bank*”. It is evident that the BNPL sector can cover a significant number of customers and many of

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² Examples are from: Brighte (www.brighte.com.au), Openpay (www.opy.com.au), Payright (www.payright.com.au)

them are paying late fees on their accounts. For example, Afterpay, for the financial year 2021, has 16.2 million customers around the world (an increase of 63% compared to financial year 2020),³ of which 3.6 million are from Australia and New Zealand,⁴ and late fee income of \$87.3 million (accounting for approximately 10.62% of their total income) is generated. Therefore, we would like to strengthen disclosure requirements to include other big players in the BNPL sector. The criteria can be based on the number of active customers, and/or late fees income and revenue.

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

In our opinion, there are a couple of issues with Option 1 and Option 2

Option 1: Strengthen the NBPL Industry Code plus an affordability test

The BNPL Industry Code is currently not legally enforceable and BNPL providers can voluntarily commit themselves to the Code. There are currently no imposed penalties for non-compliance of BNPL providers.

Although the BNPL Industry Code would become mandated for all players in the BNPL sector under Option 1, its enforceability by ASIC is only applicable for certain provisions. It is not clear in the Options Paper which provisions in the improved Industry Code could be enforceable by AISC.

In addition, there is no requirement for BNPL providers to obtain and maintain an Australian Credit Licence, implying that they do not have to comply with the Responsible Lending Obligations. Option 1 does require BNPL providers to check for consumers' affordability. However, the Options Paper does not specify how the affordability check would be different (if any) from the current "unsuitability" test in the Credit Act. It seems that the affordability test in Option 1 is less stringent since it "*would not include requirements to verify a customer's financial situation or check if the provision of credit aligns with a person's needs and objectives*". It does not also give any clear indication how a BNPL product would not be affordable for a consumer, suggesting the ambiguity of the affordability test.

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

Under Option 2, BNPL products have limited regulation under the Credit Act with a modified version of the Responsible Lending Obligations. It is a welcome move that the Credit Act will be amended to require BNPL providers to hold an Australian Credit Licence. Although BNPL

³ Afterpay 2021 annual report <https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/08/APT-FY21-Annual-Report.pdf>

⁴ <https://www.statista.com/statistics/1226957/afterpay-active-customers-australia-new-zealand/>

providers are required to comply with most general obligations of a licensee, there are few exemptions mentioned in the Options Paper. They include “*exemptions from reference checking, and other obligations that do not relate to issues identified in the BNPL business practices*” and “*verifying a person’s financial documentation and checking that the BNPL credit aligns with the person’s needs and objectives*”.

In our opinion, checking on reference and credit to ensure the alignment with a consumer’s needs and objectives are extremely important. The currently easy access to BNPL credit has seen a rapid growth in BNPL debt, which may be causing or exacerbating financial hardship for some Australian consumers (Financial Counselling Australia report, 2021)⁵. Around 84% of financial counsellors said that half or more of their clients had BNPL debt in December 2021 while this figure was 31% in a year ago. In addition, 61% of financial counsellors reported that most of their clients with BNPL debts have been struggling to pay for other essential living expenses.

⁵ It’s Credit, It’s Causing Harm and It Needs Better Safeguards: What Financial Counsellors Say About Buy Now Pay Later, Financial Counselling Australia, December 2021.
<https://www.financialcounselingaustralia.org.au/docs/its-credit-its-causing-harm-and-it-needs-better-safeguards-what-financial-counsellors-say-about-buy-now-pay-later/>