

Regulating Buy Now Pay Later in Australia

AFCA submission to Treasury consultation

December 2022

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1 Overview

AFCA¹ is the independent external dispute resolution (EDR) scheme for the financial services sector. This submission² responds to the Treasury Options Paper dated November 2022 *Regulating Buy Now, Pay Later in Australia*.

AFCA welcomes this initiative to enhance the regulation of buy now pay later (BNPL). We recognise that BNPL is a popular product that can benefit consumers. To assist the development of regulatory reforms, our submission provides information and discusses complaint resolution arrangements and issues observed through our work.

Our feedback at this stage is in broad terms. We would be happy to provide any further input that may be required and intend to participate in any consultation that may be conducted when reform proposals are formulated in more specific terms.

This submission draws on the experience of AFCA and its predecessor organisations, which have handled financial services complaints for more than 30 years.

Key points

Information about BNPL complaints

The main focus of this submission is to provide information and observations on BNPL complaints. Part 3 sets out complaint statistics, with comments, and explains the limitations of our statistics. Additional complaint data is provided in discussions of particular issues such as scams.

Highlighted matters

The submission highlights matters that in our view should be taken into account when options for BNPL regulation are assessed, including:

- Complaint resolution arrangements

As part 5.1 explains, we believe all Australian BNPL providers should be required to maintain AFCA membership and have internal dispute resolution (IDR) processes meeting the standards set by ASIC. Tailored arrangements may be needed for complaints about disputed transactions.

- Issues observed through complaint resolution

Part 5.2 outlines issues we have observed from our work in handling certain categories of BNPL complaints, namely:

¹ The Appendix provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

- complaints relating to credit reporting
- complaints by small business consumers
- complaints about losses due to scams.

2 AFCA's perspective

AFCA does not create policy or develop the law or standards. We apply the law as it stands at the time of the conduct about which consumers complain.

An important objective of AFCA is to work with our members to resolve issues that give rise to complaints and to reduce the number of complaints submitted to AFCA.

To advance the resolution of financial services complaints, this submission provides information and feedback on certain points addressed in the Options Paper. We are not recommending that a particular approach should be taken to regulating BNPL. We do note licensing is likely to address a number of the issues raised in this consultation which relate to AFCA's purpose and role.

AFCA is part of the framework providing consumer protection under Australia's financial services law, in which licensing is a key element. We regard licensing as an effective mechanism to regulate conduct and clarify expected standards.

An important element of consumer protection in the financial services framework is the right to make a complaint against a financial firm and, if necessary, pursue the complaint through EDR. We believe all retail clients with complaints about financial services should have access to IDR processes that operate in accordance with regulatory standards set by ASIC³ and EDR services provided by AFCA.

If a licensing framework is established for BNPL products to provide customers access to EDR, AFCA understands it is likely that framework will be established through the National Consumer Credit Protection Act. If the Government pursues this option, we note this would not extend to financial firms who provide BNPL products that are otherwise excluded from the National Credit Code through other exemptions, for example because they only provide products to businesses rather than natural persons.

3 Complaints

The Options Paper says on page 14 that AFCA receives relatively few complaints about BNPL. Parts 3.1 and 3.2 below discuss complaint data in some detail. Before opening that discussion, however, we would like to clarify an important point. AFCA expects BNPL complaint numbers to be low (compared with complaint numbers for

³ See [ASIC's Regulatory Guide 271, Internal Dispute Resolution](#), released in September 2021.

comparable financial services) because BNPL is regulated more lightly and because of a number of factors discussed below.

Currently, BNPL providers are subject to less onerous obligations, meaning there is less scope for the breaches of obligations that may give rise to complaints, and fewer requirements around the collection and reporting of complaints. In this context, low complaint numbers should not be treated as reliable evidence that the current regulatory settings for BNPL are satisfactory.

We observe that BNPL complaint numbers may be low due to a combination of factors, including that the amounts in dispute are often small, lack of awareness around obligations and since some BNPL providers are not members of AFCA because they are not currently required to be licensed.

In more detail:

- consumers who decide to make a complaint are less certain about the obligations the BNPL provider had in the transaction, and there is less incentive to go through the complaints process where there is anticipated difficulty in demonstrating a breach
- demonstrating financial loss may be more challenging in BNPL disputes compared to other credit products due to the BNPL product structure. No fees or charges are disclosed to the consumer and the merchant fee is only known between the BNPL provider and the merchant. If AFCA were to award a remedy of reducing the consumer's liability to the principal amount, this would not lead to a reduction in the amount payable to the BNPL provider because the merchant fee – the cost of the BNPL service - is packaged into the upfront price the consumer paid for the goods, and
- compensation is therefore likely to be limited to stress and inconvenience caused by financial hardship as a result of the BNPL product, even if AFCA found the BNPL provider breached its obligations. Non-financial loss is harder for consumers to gauge and understand before they lodge their complaint.

We note this may be reflected in the fact that most BNPL complaints AFCA receives relate to service quality rather than lending conduct.

3.1 BNPL complaint statistics

Part 3.1 sets out statistics of complaints from 1 November 2018 (when AFCA started operating) to 30 November 2022.⁴ The approach we are taking is:

- we have set out statistics for complaints made against a specific group of AFCA members (the BNPL Group). Each member in the BNPL Group provides products that are only, or predominantly, BNPL
- we highlight that the statistics likely understate BNPL complaints because they do not cover any complaint relating to BNPL made against an AFCA member not in the BNPL Group⁵ and
- there are AFCA members outside the BNPL Group that provide BNPL products but complaints against those financial firms **are not included** in the statistics in this submission.

AFCA's complaint statistics refer to stages in our complaint resolution process⁶ including:

- 'Closure', which occurs when a complaint is finalised, and
- 'Registration and Referral' and 'Case Management', which are outlined in our [detailed process map](#).

3.1.1 Key statistics – aggregated from 1/11/18 to 30/11/22

Complaints received: **3,387**

Complaints accepted: **1,081**

Resolution rate at Registration: **67%**

Non-response rate at Registration⁷: **22%**

Complaints closed: **3,170**

Average days to close: **44 days**

⁴ Material published on AFCA's website, such as our [Annual Reviews](#) and [Datacube](#), also provides BNPL statistics.

⁵ Our records cannot necessarily identify all complaints relating to BNPL not covered (as identification would rely on information supplied by complainants).

⁶ Our website explains our [complaint resolution process](#).

⁷ The non-response rate is the percentage of accepted complaints for which an IDR or EDR response was not received at Registration by the due date, or the response received was insufficient.

3.1.2 Key statistics – by years, or parts of years, from 1/11/18 to 30/11/22

Measure	18-19 ⁸ part year	19-20	20-21	21-22	22-23 ⁹ part year
Received	258	711	762	1,067	589
Accepted	132	188	183	354	224
Resolution rate at Registration	45%	73%	75%	65%	59% ¹⁰
Non-response rate	31%	37%	9%	13%	27%
Closed	192	683	744	1,029	522
Average days to close	48	49	43	42	43

When considering the increase in complaint numbers, it should be noted that, during the period covered:

- there was an increase in the number of BNPL providers included in the statistics (because several providers joined AFCA and one ceased to be a member), and
- the use of BNPL increased greatly, as described in the Options Paper.

The most recent non-response rate shown above is of concern. Issues discussed in parts 3.2 and 5.1.2 of this submission may help to explain this rate.

3.1.3 Top five issues in complaints

This table lists the five issues most commonly raised in BNPL complaints over the period from 1 November 2018 to 30 November 2022. It shows numbers of complaints

⁸ Statistics here and below for the 2018-19 financial year are for the 8-month period from 1 November 2018 to 30 June 2019.

⁹ Statistics here and below for the 2022-23 financial year are for the 5-month period from 1 July 2022 to 30 November 2022.

¹⁰ Resolution rate data for the 2022-23 financial year to 31 October 2022 is provided, as reliable data for November 2022 is not yet available.

that raised the five issue categories and the percentages of BNPL complaints the numbers represent.¹¹

Issue	No.	%
Service quality	439	13%
Unauthorised transactions	372	11%
Credit enquiry	274	10%
Incorrect fees / costs	250	8%
Financial firm failure to respond to request for hardship assistance	212	7%

Service quality has been the most prevalent issue in BNPL complaints. This issue category can encompass a wide range of matters.

AFCA is concerned that failure to respond to requests for financial assistance has featured as one of the top issues in BNPL complaints in recent years. Consumers making these requests generally require prompt responses.

3.1.4 Closure stage

For BNPL complaints closed from 1 November 2018 to 30 November 2022, this table indicates the stage at which they were closed in numbers and percentages.

Stage	No.	%
Before Referral	24	0.76%
Registration & Referral	2158	68.08%

¹¹ A complaint may raise more than one issue.

Stage	No.	%
Rules Review	284	8.96%
Case Management Level 1	563	17.77%
Case Management Level 2	59	1.86%
Preliminary View	50	1.58%
Decision	32	1.01%

The table shows the vast majority of BNPL complaints are closed at the Registration and Referral stage, which is a positive feature in the data. Our processes are designed to promote early resolution of complaints, which benefits complainants and industry participants.

Due to early closure, BNPL complaints give AFCA limited information about issues giving rise to the complaints.¹² Few BNPL complaints have reached the stage of a full investigation or a decision.

3.1.5 Outcomes of complaints

'Resolution by the financial firm' has been the most common outcome of BNPL complaints consistently in recent years. In 2021-22, 735 BNPL complaints (71%) were resolved by the financial firm. Only nine complaints that year (about 1%) proceeded to a formal decision by AFCA.

3.2 Limitations of statistics

We do not believe AFCA's complaint statistics provide a complete picture of complaints about BNPL products. The main reasons for this are:

- AFCA only considers complaints against AFCA members

At present, a firm could provide BNPL in Australia without being a member of AFCA. A BNPL provider is required to maintain AFCA membership if it:

¹² Information enabling AFCA to identify any trends is also limited.

- subscribes to [AFIA's Buy Now Pay Later Code of Practice](#) (BNPL Code)¹³, which is a voluntary code, or
 - is licensed by ASIC¹⁴.
- AFCA does not see all complaints

If a complaint is resolved by a BNPL provider's IDR processes, and not escalated to EDR, AFCA does not see the complaint. Our statistics do not reflect such complaints.

- Certain claims may not be pursued as complaints through IDR

The Options Paper notes on pages 13 and 14 that there could be factors deterring BNPL consumers from making complaints. For example:

- consumers might fear if they make complaints, they may lose access to their BNPL accounts
 - in many BNPL dispute scenarios, the consumer's compensable loss is small, meaning there is little incentive to make a complaint
 - BNPL providers may not have adequate procedures for handling complaints or responding to requests for financial hardship assistance, so may not provide timely, satisfactory responses in these matters. Specific issues raised in consultations are whether BNPL providers permit:
 - consumer organisations and financial counsellors to act as representatives of complainants, and
 - consumers to raise complaints or request financial hardship assistance by telephone.
- Access to EDR may be limited

One of AFCA's priorities is to make EDR as accessible as possible. We have an ongoing program of work to raise awareness of AFCA and make our services easy to use for people who want to make complaints, including people with special needs.

We recognise that consumers attracted to BNPL by its simplicity may find it difficult to access AFCA or to engage in complaint resolution processes.

¹³ Clause 13.9 of the BNPL Code requires subscribers to maintain AFCA membership. The nine current code subscribers are all AFCA members.

¹⁴ Licence conditions include a requirement for AFCA membership. Some licensees conduct a range of business including BNPL.

Comments reported on page 14 of the Options Paper suggest that BNPL providers may not give complainants sufficient information about their EDR rights to enable them to escalate complaints to AFCA.

- Issues take time to emerge in EDR

A complaint will be made after an issue arises, possibly long after the conduct or transaction in question. Complaints are generally escalated to AFCA after IDR is completed or an IDR time limit expires. IDR processes can be lengthy. Given time lags inherent in complaint resolution, EDR may not provide timely insight into emerging issues as they arise.

4 Systemic issues

As well as handling complaints, AFCA plays a role in the broader consumer protection framework by identifying, investigating and reporting systemic issues. Our role in relation to systemic issues is explained fully on our website and summarised in our publications.¹⁵

We use the term ‘systemic issue’ to refer to an issue likely to have an effect on consumers in addition to any person who has submitted a complaint to AFCA. A systemic issue may be raised in several complaints, a single complaint or otherwise be identified by information obtained by or provided to us.

AFCA’s systemic issues work covers BNPL. To date, we have found two BNPL matters to be systemic issues. In these cases, the BNPL providers breached the AFCA Rules by proceeding with debt collection while AFCA was considering complaints relating to the debts.

Factors to note in this context include:

- as shown in part 3 above, AFCA has not considered a large number of BNPL complaints to date. We identify systemic issues from complaints, and
- systemic issues that we identify, investigate and report to the relevant regulator often reflect failure by a financial firm to meet regulatory obligations. Our ability to identify systemic issues is therefore likely to have some proportionality to the level of regulation in place. Where BNPL providers are subject to a lower level of regulation, we would not expect to have identified many systemic issues.

¹⁵ See the [Operational Guidelines](#) to Rule A.17 of the AFCA Rules and pages 102 to 106 of our [2021-22 Annual Review](#).

5 Approach to BNPL regulation

When designing the approach to BNPL regulation, it will be important to ensure complaint resolution arrangements are adequate. This section highlights key points relating to complaint resolution. It also notes issues observed through our complaint resolution and systemic issues work that, in AFCA's view, should be taken into account when assessing regulatory options.

5.1 Complaint resolution arrangements

5.1.1 AFCA membership

AFCA believes all Australian BNPL providers should be required to maintain AFCA membership. Access to EDR is a crucial element of consumer protection.¹⁶

Options 2 and 3, which involve licensing, would require AFCA membership. Option 1 states that the BNPL Code **could** be mandated for all BNPL providers. Unless the code is made mandatory, Option 1 would allow BNPL providers to operate without providing access to EDR.¹⁷

5.1.2 IDR

[ASIC's Regulatory Guide 271 *Internal Dispute Resolution*](#) (RG 271) sets out IDR standards that include requirements to ensure, among other things, that:

- complainants have adequate access to IDR and, if necessary, EDR
- IDR is conducted in a fair, effective and timely manner, and
- complaints are adequately recorded, monitored and reported, to facilitate continuous improvement.

BNPL providers may be required to comply with RG 271:

- for BNPL Code subscribers, clause 13.2 of the code requires compliance, and
- for BNPL providers licensed by ASIC, RG 271 applies directly.

As noted in part 3.2 above, the Options Paper raises questions about whether the complaint resolution processes of BNPL providers meet the IDR standards in RG 271. AFCA is currently investigating whether there have been failures to meet the standards amounting to systemic issues. Some of the matters raised in complaints, which are now being investigated, include:

- Access to assistance and complaint channels

Consumers report problems where a BNPL provider does not allow complaints or enquiries to be made by phone and limits communication to digital channels.

¹⁶ This point is explained more fully in part 2 above.

¹⁷ A requirement for AFCA membership could be imposed directly through legislation.

Consumers may not be able to use these channels easily and, when they are used, they may provide slow or inadequate responses.

- Proactive identification of complaints

RG 271 requires any expression of dissatisfaction within the definition of 'complaint' in RG 271.27 to be handled in accordance with IDR processes. The BNPL Code imposes a similar requirement on subscribers.¹⁸

Some matters that have reached AFCA suggest certain complaints may be treated as enquiries or not recorded as complaints.

- Timeframes for IDR responses

Complaint handling timeframes are specified, in different terms, in RG 271 and the BNPL Code. Some complaints submitted to AFCA say these timeframes have been breached.

- Quality of responses

Consumers claim they received responses to complaints or enquiries that did not address or relate to issues raised, or did not take into account the consumer's circumstances. These responses may have been automatically generated or in standard form.

To assist in consideration of options for the regulation of BNPL, we note the issues above have arisen even though the BNPL Code currently requires compliance with RG 271.

5.1.3 Disputed transactions

The IDR standards in RG 271 do not apply to certain categories of complaint¹⁹ including:

- reports of unauthorised transactions under the [ePayments Code](#) (which are dealt with through special arrangements provided for in that code)
- transactions that may be charged back under card scheme rules.²⁰

Most BNPL providers do not subscribe to the ePayments Code. Nor are payments made to merchants in BNPL transactions covered by card scheme charge back rules.

AFCA understands that agreements between BNPL providers and merchants make the merchants responsible for resolving disputed transactions. As we understand it,

¹⁸ The requirements are similar, but not equivalent, because the definition of complaint in the code has not yet been updated to align with RG 271.

¹⁹ See RG 271.33.

²⁰ However, complaints in these areas may be covered by RG 271 if the complainant expresses dissatisfaction with the outcome or handling of the unauthorised or disputed transaction.

providers do not generally handle complaints about disputed transactions through their own IDR processes.

Part C of the BNPL Code specifies minimum standards to be met by merchants and requires BNPL providers to oversee compliance with the standards. Information available through recent AFCA complaints suggests Part C does not ensure consumers receive satisfactory service or fair, timely outcomes in dispute processes. AFCA has observed:

- many complaints where the consumer has not received a satisfactory response, or any response, from the merchant and the BNPL provider fails to manage the dispute, and
- reports from consumers indicating it can take months to deal with a disputed transaction.

To assist in the consideration of options for regulation of BNPL, AFCA notes the above issues in relation to the protection for consumers involved in disputed transactions, including fraudulent transactions performed on their BNPL account without their consent.

5.2 Issues observed through complaint resolution

5.2.1 Credit reporting

Non-participation in credit reporting

On page 15, the Options Paper notes problems that arise due to non-reporting of BNPL debts. AFCA's complaint resolution experience suggests that non-reporting can contribute to financial over-commitment. When considering complaints about provision of unsuitable loans²¹, AFCA has received complaints where the borrowers had BNPL debts that were not reported and not taken into account by lenders.

Options 2 and 3 include measures to close this reporting gap. Option 1 would not alter credit reporting arrangements, so would not address the issue outlined above.

Standards for BNPL providers to meet in credit reporting

BNPL providers may at present need to conduct credit checks to meet requirements in the BNPL Code.²² The code does not provide guidance on the obligations of BNPL providers in regard to the credit reporting regime, however.

²¹ The complaints related to conventional lending – not BNPL.

²² See clause 11 of the BNPL Code.

Listing of credit enquiries has given rise to a number of complaints against BNPL providers. Claims made in the complaints include:

- the enquiry listed was not authorised
- the enquiry was listed where the BNPL application did not proceed, or
- the complainant was not aware they had consented to the enquiry.

In addition to handling individual complaints, AFCA has recently opened an investigation into whether there is a systemic issue in the credit reporting processes of a BNPL provider.

In September 2022, the Office of the Australian Information Commissioner released its [report](#) on the 2021 Independent Review of the Privacy (Credit Reporting) Code. The report indicates that BNPL credit reporting should be considered in reviews of privacy and credit legislation as well as the present consultation on BNPL regulation. To assist with consideration of options for the regulation of BNPL, AFCA notes the above issues in relation to BNPL and the credit reporting regime.

5.2.2 Protecting small business consumers of BNPL

From year to year, complaints by small business consumers represent a small percentage of the total complaints received by AFCA – normally about 5%.²³ This submission does not set out separate statistics of BNPL complaints made by small business consumers because the sample size would make it difficult to draw any conclusions from the figures. Many firms who provide BNPL products to small businesses are not currently members of AFCA so their customers cannot make complaints to AFCA.

Complaints submitted to AFCA provide anecdotal evidence that small businesses use BNPL to purchase expensive items such as stock feed, machinery or vehicles. We note consumer protection issues arise in these complaints in relation to small business as well as individuals.

Each of the three options for regulatory reform in the Options Paper includes an affordability test to be imposed through the credit legislation. The test would be:

- under Option 1 – a bespoke affordability test
- under Option 2 – a tailored version of the responsible lending obligations (RLOs)
- under Option 3 – the RLOs.

We note that while these new tests would increase protection for individuals, no equivalent measures for small business consumers of BNPL are proposed.

²³ In 2021-22, the complainants in about 4.8% of the complaints received by AFCA were small businesses. More detail can be found in our [Annual Reviews](#).

5.2.3 Addressing scams

Complaints submitted to AFCA

From our experience in resolving complaints across the financial sector, we see that scams are a major concern. We expect this concern to grow in future in the BNPL area as an increasing number of products and services are being purchased using BNPL. Scams, hacks and other cybercrimes continue to increase rapidly.

AFCA's systems enable us to flag complaints considered to be linked to scams. At present, our key observations on flagged BNPL complaints are as follows:

- the vast majority of the complaints are resolved by the financial firm in the initial stage of complaint resolution, Registration and Referral. The complaints are generally resolved by the firm:
 - waiving the amount in dispute, or
 - removing or amending credit enquiries or listings made as a result of the scam or unauthorised transaction or BNPL application.
- examples of scams or unauthorised transactions seen in BNPL complaints include:
 - A scammer steals a consumer's identity and uses it to open a BNPL account. The scammer then uses the account.
 - A scammer hacks into a BNPL customer's phone or computer then takes money using their BNPL account.
 - A scammer contacts a BNPL customer and arranges for them to send money through their BNPL account (or otherwise gains access to funds using the account).
 - Using a consumer's identity, a scammer applies for BNPL, causing a credit enquiry to be listed on the consumer's credit report.

Some complaints about loss due to scams may fall outside our jurisdiction. For example, where a scammer fraudulently opened a BNPL account, making a credit card holder liable for payments, we may not have jurisdiction to consider a complaint against the BNPL provider if the victim was not a customer of the provider²⁴.

Regulatory options

The Options Paper mentions on page 18 that scammers may take advantage of 'frictionless' BNPL sign up processes. It is noted the process is expedited by not imposing affordability assessment requirements. In the absence of information collection and affordability assessments, it may be easier for scammers to impersonate consumers in application processes.

²⁴ In this example, there could be an alternative basis for a complaint within our jurisdiction, such as a breach of privacy.

Whatever regulatory approach is taken, AFCA notes its increasing general scam complaint numbers and broader industry efforts required to prevent or respond to scams.

Appendix – About AFCA

AFCA is the independent EDR scheme for the financial sector. It replaced the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA provides fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services free to consumers, but also by working with its members to improve their processes and drive up industry standards of service, thereby minimising complaints.

More broadly, AFCA plays a key role in restoring trust in the financial services sector. In addition to providing solutions for financial complaints, AFCA has responsibilities²⁵ to identify, resolve and report on systemic issues and to notify ASIC, and other regulators, of serious contraventions of the law. A separately operated and funded team within AFCA provides services to support independent committees that monitor compliance with several financial services industry codes.

AFCA's service is offered as an alternative to tribunals and courts to resolve complaints about financial firms made by individual and small business consumers. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent.

If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered or substituting the trustee's decision in the case of a superannuation complaint.

²⁵ See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.