



Law Council
OF AUSTRALIA

Regulating Buy Now, Pay Later in Australia: Options Paper

The Treasury

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council is grateful for the contributions of its Business Law Section's Financial Services Committee and its Legal Practice Section's Australian Consumer Law Committee in the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to provide this submission to the Treasury in response to its November 2022 Options Paper, *Regulating Buy Now, Pay Later in Australia* (**Options Paper**). It welcomes the opportunity to comment on the future regulatory framework for buy now, pay later (**BNPL**) arrangements under the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).
2. While the BNPL industry provides consumers with increased choice and access to credit, the Law Council is of the strong view that the BNPL sector is now too large and significant a force in the Australian retail market—exposing consumers to harm—for it to remain outside the consumer credit regulatory regime. As such, the Law Council commends the Government for seeking to take action to close the existing regulatory gaps, and supports the guiding principles for an approach to regulating BNPL, as proposed in the Options Paper.
3. The Law Council particularly notes the risk of significant detriment from financial overcommitment that arises when consumers, particularly vulnerable consumers and those experiencing financial hardship, utilise multiple BNPL providers to purchase goods and services without considering the cumulative commitments flowing from those transactions.
4. As such, the Law Council is supportive of reforms that balance the ability of the BNPL sector to provide consumers with low cost, low friction access to credit with the need for providers to ensure that, as is currently required when other forms of credit are provided, those products are suitable to the consumer’s needs and financial situation.
5. In relation to the three options proposed in the Options Paper, the Law Council does **not** recommend Option 1—Strengthening the Australian Finance Industry Association’s BNPL Code of Practice (**Industry Code**) plus an affordability test.
6. Regrettably, due to the limited consultation timeframe, the Law Council was unable to arrive at a consensus view on whether Option 2—Limited BNPL regulation under the Credit Act, including licensing and scalable unsuitability test—or Option 3—Regulation of BNPL under the Credit Act—is most appropriate. This submission will outline the advantages and limitations of both options, serving to highlight that, while the Australian legal profession supports enhanced consumer protections within the BNPL sector, there are differing views on the preferred degree of regulatory intervention required and the appropriate level of risk that ought to be borne by individuals who seek to use BNPL products.
7. The Law Council thanks the Treasury for its consideration of these issues to date, and is eager to continue to engage with both the Treasury and Government throughout 2023 to improve the regulation of BNPL credit in Australia.

Options for regulatory intervention

Guiding principles and other factors to be considered

8. The Law Council considers that the guiding principles set out in the Options Paper are appropriate and fit for purpose to inform the development of a BNPL regulatory framework.¹
9. In its 2020 consumer research, the Australian Securities and Investment Commission (**ASIC**) identified a class of borrowers using and relying on BNPL credit, particularly those with multiple BNPL and other 'short-term' or payday loan accounts, who would miss payments and otherwise go without or cut back on essentials to meet repayments.²
10. In the experience of members of the Australian Consumer Law Committee (**ACL Committee**) which forms part of the Law Council's Legal Practice Section, these consumers are likely to already suffer some level of financial disadvantage and/or have low levels of financial literacy. Indeed, BNPL arrangements can have a disproportionate impact on vulnerable consumers, leaving them and their families entrenched in the cycle of poverty.
11. The Law Council encourages the Government to consider the *G20/Organisation for Economic Co-operation and Development (OECD) High-Level Principles on Financial Consumer Protection (Principles)*, an updated version of which was endorsed by the G20 Leaders in November 2022.³ Of particular relevance is Principle 1: Legal, Regulatory and Supervisory Framework, which states:

*Regulation should reflect and be proportionate to the characteristics, types, risks and variety of the financial products and services, providers and consumers ... Strong and effective legal and judicial or supervisory mechanisms should exist to protect consumers from and sanction against misconduct, financial frauds, abuses and errors.*⁴
12. When considering what is 'proportionate', the Law Council suggests that Treasury takes into account the case studies provided by consumer advocates regarding the harm that can be caused by unregulated BNPL products. To this end, the Law Council is able to provide case studies should it assist Treasury in its deliberations.
13. The Law Council further suggests that the Government approach the new BNPL regulatory framework with 'consumer financial well-being' in mind. It is noted that one of the three new cross-cutting themes included in the 2022 update to the Principles is 'financial well-being'.⁵ That is, that regulation should have, as an underlying commitment, that 'financial consumer protection policies should contribute to the overall financial well-being and financial resilience of consumers'.⁶

¹ The Treasury, *Regulating Buy Now, Pay Later in Australia* (Options Paper, November 2022) 19.

² ASIC, *Buy now pay later: An industry update* (Report 672, November 2020) <<https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>> 4.

³ Organisation for Economic Co-operation and Development ('OECD'), *High-Level Principles on Financial Consumer Protection* (12 December 2022) <https://www.oecd.org/daf/fin/financial-education/G20_OECD%20FCP%20Principles.pdf>.

⁴ *Ibid* 5.

⁵ *Ibid* 4.

⁶ *Ibid*.

Option 1: Strengthening the BNPL Industry Code plus an affordability test

14. The Law Council does not recommend Option 1, as it would create a partially self-regulated model that places undue reliance on an industry code that was not developed with the intention of creating legally enforceable obligations. The Law Council considers that this option will do little to protect vulnerable consumers from financial harm.
15. The Law Council considers that the Industry Code is not drafted with sufficient clarity or structured in a way that would lend itself to the clear identification of enforceable versus unenforceable obligations, and would potentially require significant additional work to implement any enforceability regime.
16. Further, the establishment of a ‘bespoke affordability test’⁷ outside the existing consumer credit regime adds additional complexity to the regulation of consumer credit, compared to the alternative options which leverage the existing rules.
17. Consumer confidence and knowledge are imperative to the proper functioning of Australia’s financial system. The Law Council believes that the regulatory framework should encourage informed choice and empowers consumers through information and education. The Law Council submits that giving BNPL products a set of different rules from regulated credit would do the opposite by creating an information asymmetry which can only impair financial literacy.

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

Advantages

18. The Law Council acknowledges that Option 2 provides a ‘middle road’ which seeks to balance competing considerations in a scalable manner by bringing BNPL within the Credit Act’s application to apply a tailored version of the responsible lending obligations (**RLOs**) to BNPL products, which could be supplemented by a strengthened Industry Code. The Law Council particularly welcomes that this option would prohibit BNPL providers from increasing a consumer’s spending limit without explicit instructions from the consumer, noting this is consistent with the approach to other continuing credit contracts.
19. The Financial Services Committee (**FS Committee**) of the Law Council’s Business Law Section is of the view that Option 2 is preferable to Options 1 and 3 because it seeks to impose readily scalable lending obligations under existing regulatory arrangements and concepts, supported by enforcement mechanisms leveraging the existing regulatory regime to the extent necessary to deliver policy outcomes that address the consumer concerns identified in the Options Paper.

⁷ The Treasury, Regulating Buy Now, Pay Later in Australia (Options Paper, November 2022) 20.

20. The FS Committee further considers that this option would appropriately leverage the existing consumer credit regime to impose credit licence obligations on providers that are fit for purpose without burdening the industry with additional credit licence obligations that are less relevant to BNPL products. This is particularly important given that the nature of the BNPL model seeks to enable prospective consumers to sign up with a provider online and access credit through a merchant without undue delay or formalities.
21. The FS Committee is also supportive of the fact that this option does not require a merchant who offers BNPL products to consumers to be an authorised credit representative of the BNPL provider. The FS Committee considers that the practical difficulties and cost of appointing merchants as credit representatives are not outweighed by any benefit to consumers.

Limitations

22. The ACL Committee considers that, while scalability is an applicable principle for responsible lending, as anticipated by ASIC in Regulatory Guide 209,⁸ this does not mean that BNPL should be subject to different regulation than other forms of credit. The ACL Committee also notes that the potential consumer harm caused by BNPL products, like other credit products, extends beyond that resulting from an unauthorised increasing of the credit limit.
23. Chapter 3 of the Credit Act requires credit and credit assistance providers to make reasonable inquiries into a consumer's requirements, objectives and financial situation, and take reasonable steps to verify a consumer's financial situation. The ACL Committee therefore considers that the objective element—or the reasonability—built into the RLOs imports and supports the concept of scalability.
24. For example, the ACL Committee submits that it would not be unreasonable to ask about a consumer's expenses and debts (such as other BNPL commitments) in order to assess whether further BNPL repayment obligations are likely to cause substantial hardship to the consumer. This process may also assist in ensuring that BNPL products do, as they promise, provide 'short-term' and 'low-cost' options for consumers.
25. Should regulation fail to include under the Credit Act those representatives who, for any other form of credit, would be considered 'credit representatives', consumers would not be entitled to the same protections when using BNPL products.
26. The ACL Committee repeats the above concerns about the risks of reliance on an industry code for regulation, and that the segregation of BNPL and other forms of credit only add to an already complex governance system—increasing the exposure of vulnerable consumers to harm, and failing to offer opportunities for improved consumer financial participation and literacy.

⁸ ASIC, Credit licensing: Responsible lending conduct (Regulatory Guide 209, 9 December 2019) <<https://download.asic.gov.au/media/5403117/rg209-published-9-december-2019.pdf>>.

Option 3: Regulation of BNPL under the Credit Act

Advantages

27. The Law Council acknowledges that Option 3 seeks to achieve regulatory uniformity by treating BNPL products similarly to other credit products regulated under the Credit Act, and would require BNPL providers to comply with regulations, such as the RLOs. As similarly proposed under Option 2, the Law Council particularly welcomes regulation to prohibit BNPL providers increasing a consumer's credit limit without their permission.
28. The ACL Committee is of the view that Option 3 is preferable as it seeks to impose a consistent minimum standard of protection from potentially harmful credit products despite the form of credit, and will most effectively protect vulnerable consumers. It considers that the potential consumer harm caused by the BNPL industry, as identified by ASIC in its consumer research and consumer advocates in their day-to-day work, which is more than just that caused by increased credit limits, is not sufficiently avoided by a separate and partially self-regulated regime. Accordingly, consumers using BNPL products should be able to expect the same standard of supervisory and regulatory protection as that which currently exists throughout the regulated credit market.
29. Further, the ACL Committee notes that BNPL products do little to benefit financially vulnerable consumers, and that developing a separate regulatory regime for BNPL will continue to push these consumers into further hardship. The ACL Committee is of the view that, where unsuitability for credit is not assessed uniformly, consumers are able to access credit under BNPL schemes despite having high levels of debt elsewhere. Consequently, the 'affordability' and 'accessibility' of BNPL products actually works in reverse, where consumers who cannot afford repayments become reliant on BNPL products to purchase essential household items, such as food, while incurring further debt (including missed payment and other fees).
30. The ACL Committee also does not consider that regulation of the BNPL sector under the Credit Act would stifle competition, especially when one considers that regulated credit is widely available and competition in the regulated credit market is indeed apparent. In fact, standardising regulation will create a fairer marketplace where all those providing credit have the opportunity to compete.

Limitations

31. In contrast, the FS Committee is of the view that Option 3 would impose unnecessary regulatory burdens under the consumer credit laws beyond those required to address the consumer concerns noted in the Options Paper.
32. The FS Committee contends that, while uniformity and avoiding unnecessary complexity in the regulatory regime are vital, in the case of BNPL regulation there is an additional key consideration (for further consultation as necessary) to ensure that the ultimate regime enacted reflects the risk of consumer harm presented by BNPL products and providers. For instance, the risk of harm from an inappropriate \$1 million 30-year home loan to a home owner may be less than the risk from a \$200 four-month BNPL loan to a government housing tenant struggling to put food on the table: the regulatory regime ought to reflect this difference in risk.

33. The FS Committee argues that any such approach must also take into account the business model of BNPL providers of advancing small amounts of short-term credit that is easily accessed at low cost. There are benefits to this model (as the existing exemption recognises) which could be lost if BNPL providers are required to hold an Australian Credit Licence under this option.
34. An example of the way in which these obligations may be scaled and tailored to the particular circumstances of the BNPL industry is to consider the relevance of identifying the needs and objectives of the borrower under the RLOs of a full credit licensee in the light of the limited flexibility and purposes of BNPL products.

Comprehensive Credit Reporting (CCR) regime

35. The Law Council notes that all three options clarify that BNPL providers' participation in the CCR regime would continue to be voluntary, unless the provider is a big bank. However, it is noted that this regime is scheduled to extend beyond the big banks over time.
36. While the policy behind the mandatory credit reporting regime is that the quality of credit reporting data depends on as close to universal participation by lenders as possible, the administrative burden imposed on BNPL providers participating in this regime would need to be assessed in more detail against these benefits. Of particular note is that the ability to efficiently assess the affordability of the proposed financial commitment for the consumer in a given transaction is a key concern with the unregulated industry at present and the subject of differing views, as set out above, within the committees of the Law Council.
37. The Law Council notes that the CCR framework review is due to occur by 1 October 2024 and supports the review examining in greater detail how BNPL providers can better report the credit information of BNPL consumers.⁹ The Law Council would be concerned if, as foreshadowed by the Office of the Australian Information Commissioner in its recent review of the Credit Reporting Code,¹⁰ BNPL products introduced additional complexity into the credit reporting framework for some consumers.

⁹ The Treasury, Regulating Buy Now, Pay Later in Australia (Options Paper, November 2022) 23.

¹⁰ Office of the Australian Information Commissioner, 2021 Independent review of the Privacy (Credit Reporting) Code (Report, September 2022) <https://www.oaic.gov.au/__data/assets/pdf_file/0011/22142/oaic-2021-independent-review-cr-code.pdf>.