



20 January 2023

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## **SUBMISSION IN RESPONSE TO COMMONWEALTH TREASURY OPTIONS PAPER 'REGULATING BUY NOW, PAY LATER IN AUSTRALIA'**

The Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection) welcomes the opportunity to make a submission to the Commonwealth Treasury's option paper on *Regulating Buy Now, Pay Later in Australia*.

Consumer Protection is responsible for administering legislation within Western Australia to ensure a fair, safe and equitable market for consumers and businesses alike. This includes the Australian Consumer Law (ACL) as well as industry specific licensing regimes and trading standards in the real estate, settlement and automotive industries, amongst others.

In its role as regulator, Consumer Protection has identified areas where vulnerable consumers suffer detriment due to the lack of regulatory oversight of unique business models such as those developed by the Buy Now Pay Later (BNPL) providers. In particular, harm caused to consumers through the use of BNPL is disproportionately experienced by young consumers from lower socioeconomic areas who have limited financial literacy.<sup>1</sup>

### **Consumer Protection's advocacy for reform of BNPL**

Consumer Protection regularly receives complaints from consumers seeking assistance to resolve disputes or raising compliance issues in relation to a contract for goods or services purchased with a BNPL agreement. Consumer Protection is, however, limited in its ability to assist these consumers as it does not have jurisdiction to take regulatory or enforcement action.

In recent years, Consumer Protection has joined with consumer advocacy groups in highlighting the need for increased regulatory oversight in the provision of BNPL agreements and in advocating for BNPL to be recognised as a form of consumer credit so that it can be regulated under the *National Consumer Credit Protection Act 2009* (Cth) (National Credit Act).

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<sup>1</sup> <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>



For example, in 2021, Consumer Protection formed a working group to develop non-legislative strategies to try and reduce the level of detriment caused by short term loans (including BNPL) and debt management services. Members of the working group included non-government organisations such as Consumer Credit Legal Service WA (CCLSWA), the Financial Counsellors Association of WA (FCAWA) and the WA Council of Social Services (WACOSS).

Some of the strategies implemented as a result of collaboration by working group members included influencing change using cross-jurisdictional networks such as the Consumer Policy Network and Consumer Senior Officials Network and forming stronger partnerships with relevant organisations such as the Australian Financial Complaints Authority (AFCA) and Moneysmart.

### **Consumer Protection's concerns around the regulation of BNPL**

The options paper demonstrates varying degrees of consumer harm and poor industry behaviour not adequately addressed by the current regulatory framework. Consumer Protection would like to highlight three examples of consumer detriment that are emerging as a result of the proliferation of BNPL arrangements that should be addressed when considering the form of the regulations.

#### *1. 'Loan stacking' across BNPL providers and interaction with more traditional credit providers*

Consumer Protection remains concerned about the ease with which consumers can sign up to multiple BNPL agreements that have to be managed concurrently with more traditional forms of credit such as personal loans, credit cards or small amount credit contracts. According to research by the University of Sydney<sup>2</sup>, around 40 per cent of BNPL users have active accounts with more than one BNPL provider and these users spend 85 per cent more on average than single BNPL account holders.

It is noted that users with multiple accounts will typically make low value purchases in real terms which are likely to fall below the \$2,000 threshold provided for more stringent credit checks under the Australian Finance Industry Association's BNPL code of practice (the Code).<sup>3</sup> This can lead to consumers who are already experiencing financial stress 'flying under the radar' by accumulating additional debt that may not reflect their circumstances. It can also cause consumers to experience increasing difficulty with managing their increasingly complex personal finances.

In addition, limitations within the current credit reporting framework regarding lack of access to real time data and limited engagement from BNPL providers with the framework mean that traditional credit providers have limited information about a consumer's total liabilities across the different forms of credit. As a result, Consumer Protection understands that BNPL is being used to bypass traditional credit limits which allows consumers to spend more than they intended and exceed their capacity to meet their total debt obligations. An example of this practice referred to as 'loan stacking' is outlined in the case study below.

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<sup>2</sup> Boshoff, Elizabeth and Grafton, David and Grant, Andrew R. and Watkins, John, Buy Now Pay Later: Multiple Accounts and the Credit System in Australia (October 15, 2022). Available at SSRN: <https://ssrn.com/abstract=4216008>

<sup>3</sup>[https://afia.asn.au/files/galleries/AFIA\\_Code\\_of\\_Practice\\_for\\_Buy\\_Now\\_Pay\\_Later\\_Providers.pdf](https://afia.asn.au/files/galleries/AFIA_Code_of_Practice_for_Buy_Now_Pay_Later_Providers.pdf)



**Motor vehicle dealer using BNPL to bypass traditional credit limits**

*A consumer was in the market for a second-hand car from a dealership and had a \$50 per week budget for repayments. The dealership said it could provide finance for \$19,500 with a \$3,000 deposit, including a warranty.*

*The \$19,500 loan was later rejected, and the customer tried to cancel the contract. The dealership then suggested getting a loan for \$17,000 and using BNPL for the \$2,500 warranty.*

*The customer ended up paying the lender \$75 a week and the provider \$48 every two weeks, totalling \$99 per week which was almost double the amount they were comfortable spending initially.*

*The customer was also not informed that the warranty had a \$3,000 limit, and when the car's head gasket broke a few months later, they were not covered for the \$12,000 required for engine replacement.<sup>4</sup>*

**2. Availability of BNPL at the point of sale can amplify risk when combined with high pressure sales tactics**

The rapid growth of BNPL has seen an expansion of industries that promote, assist or facilitate access to credit products at the point of sale. The risk associated with this trend is likely to be minimal in standard retail settings. In some cases however, particularly in the case of high value contracts, consumers can be left with products and a BNPL debt that is not suitable for their circumstances.

In industries where there is information asymmetry in the form of limited price transparency or an imbalance in the level of subject matter expertise, businesses involved in both the selection of products as well as facilitating the credit application with the BNPL provider have an inherent conflict of interest. As they are incentivised to ensure the application is approved, businesses may provide an inaccurate representation of the terms and conditions of the loan to the consumer and of the consumer's financial circumstances to the BNPL provider.

The availability of BNPL provides businesses with the ability to avoid the hesitation a consumer may have about spending large amounts of money by delaying the time at which the payments are due, and thereby side step the controls associated with daily spend limits and standard invoicing practices. In these circumstances, consumers are more likely to accept the recommendations of the vendor introducer while failing to consider the risks associated with longer term financial stress. The below case study provides an example in the photography industry that was reported to Consumer Protection in 2021.

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<sup>4</sup> Example reported to Consumer Protection by CCLSWA and also reported by Choice - <https://www.choice.com.au/money/credit-cards-and-loans/personal-loans/articles/bnpl-car-loans>.



**Photography business using high pressure sales tactics facilitated by BNPL**

*A consumer won a competition providing gift vouchers valued at \$700 to use for a photography package. The consumer booked the package and paid a \$50 booking fee for hair and makeup.*

*After the studio photography session the consumer was asked to pick their 20 favourite photos and was advised the photography package would cost \$2,000. The consumer advised the photographer that this was much more than they anticipated and that they were unemployed so they did not have the money to pay for the photography package. The photographer offered to reduce the package to 10 photos and help the consumer apply for a BNPL account. The BNPL provider did not approve the personal loan.*

*Despite having knowledge of the consumer's situation and understanding that the initial loan was not approved, the photographer assisted the consumer apply for two other BNPL agreements of \$800 and \$500 respectively with the remaining \$700 settled by debit card at a later date.*

**3. Ability to use BNPL to pay for essential goods and services such as rent and utility bills**

Consumer Protection considers that the ability to use BNPL may not be appropriate to pay for essential goods and services including electricity, gas and water. According to a nationally representative CHOICE survey conducted in January 2022<sup>5</sup>, one in five consumers have used BNPL to pay for an essential service such as a supermarket or utility bill. As the cost of living increases and more consumers experience financial stress, an increasing number of consumers are likely to rely on BNPL to pay for their essential goods and services.

In WA, under the relevant codes for the supply of water, electricity and gas<sup>6</sup>, retailers that supply residential customers are required to have financial hardship policies and procedures in place which include interest and fee free payment arrangements to support their customers experiencing hardship. Providing the option to pay with BNPL undermines the obligations that already apply for utility providers to make these arrangements available to customers who experience financial hardship.

It is acknowledged that there may be practical limitations with restricting access to this evolving form of credit as newer BNPL business models link to traditional bank accounts and virtual debit cards can be created through mobile applications.

With this in mind, Consumer Protection intends to write to the Economic Regulation Authority WA and request that it consider updating the relevant industry code of conduct provisions to restrict access to BNPL for essential services. We would urge Treasury to consult with the Australian Energy Regulator to promote a similar approach across other jurisdictions and consider whether any other goods or services may be inappropriate for purchase with BNPL agreements.

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<sup>5</sup> <https://www.choice.com.au/about-us/media-releases/2022/march/global-alliance-calls-for-regulation-of-harmful-buy-now-pay-later-industry>

<sup>6</sup> The Code of Conduct for the Supply of Electricity to Small Use Customers (Electricity Code), the Water Services Code of Conduct (Customer Service Standards) 2018, and the Compendium of Gas Customer Licence Obligations (Gas Compendium).





## **Consumer Protection's position on the options**

It is acknowledged that the availability of credit can stimulate economic activity and that some consumers gain benefits from the structure and accessibility of BNPL agreements. However, Consumer Protection considers the risks associated with the ease of access to BNPL providers outweighs these benefits and that a proportionate response is required by the Commonwealth Government to reduce and address harms caused to some consumers by these products.

Consumer Protection strongly supports option 3 because it considers that BNPL, as a form of credit, should be subject to the same requirements as traditional credit providers to hold an Australian Credit License under the National Credit Act and comply with the associated regulations including Responsible Lending Obligations (RLOs). However, Consumer Protection acknowledges that the prescriptive requirements detailed in option 3 may be too onerous for some BNPL providers to remain viable.

Consumer Protection is also generally supportive of option 2 as the scalable risk based approach to credit checks may act to retain the accessibility of lower risk loans. It is also important to note BNPL's role in the market as a last line of available credit for those experiencing significant financial stress or exclusion from more traditional credit products.

### *Issues with option 1*

Consumer Protection does not support option 1 because it will not meaningfully improve consumer outcomes. The introduction of a bespoke scalability test which uses a credit score as a proxy is unlikely to give the BNPL provider a true indication of a consumer's financial position and their overall risk as a borrower to any greater extent than the current assessment processes provided by the Industry Code.

Without the addition of the licensing regime and some form of RLOs, it would remain voluntary for BNPL providers to engage in the credit reporting framework to consider a consumer's history of credit defaults, bankruptcies, court judgements and credit enquiries or to even be given access to the credit reporting framework to see a consumer's type and total number of open lines of credit, their associated credit limits and 24 months of their payment history.

BNPL providers would continue to lack the required knowledge to ensure that the loan is suitable for the consumer's financial circumstances and issues such as 'loan stacking' would continue to cause consumer detriment.

### *Suggestions to enhance the proposed options*

A BNPL specific database could also be considered as a means of addressing some of the issues detailed in the options paper and to balance the goals defined in the guiding principles. However to be successful such a measure would need to minimise complexity and allow for interaction between the different credit reporting frameworks.



If the database provided a comprehensive view of a consumer's total liabilities across BNPL providers it could be utilised by providers when conducting credit assessments while limiting the administrative burden placed on industry. The database could also promote financial literacy by providing consumers with a tool to view their total exposure to BNPL loans and ongoing repayment schedule tied into a whole of government digital identification platform or accessible through Moneysmart.

In addition to these regulatory initiatives, Consumer Protection urges the Commonwealth Government to consider introducing requirements for vendor introducers to be authorised credit representatives of BNPL providers where the value of their transactions exceeds a certain dollar threshold. Alternatively, standard on-boarding requirements for merchants could be developed to improve education for businesses facilitating BNPL transactions. These changes would be welcomed alongside proposed amendments to the *Australian Consumer Law (Cth)* which aim to further deter unfair trading practices.

### **Summary**

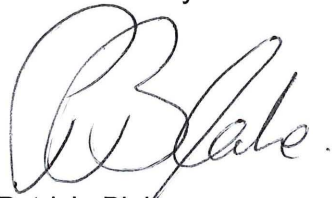
Consumer Protection is supportive of any Commonwealth Government proposals to take active steps to address the regulatory gaps created by the disruption of traditional consumer credit products by BNPL agreements. We appreciate the opportunity to provide comments and examples informed by our work in order to contribute to developing an effective regulatory framework.

We also take this opportunity to acknowledge those WA based consumer advocate organisations working closely with consumers experiencing financial hardship. We understand that they intend to lodge a joint submission to this consultation and consider they are well placed to provide further insight into the level of detriment caused by the widespread adoption of BNPL.

In the meantime, Consumer Protection will continue to progress our non-legislative strategies to support Western Australian consumers experiencing financial hardship related to the use of BNPL and other small amount credit contracts.

If you would like to discuss Consumer Protection's comments further, please contact Ms Penny Lipscombe, Director of Legislation and Policy, on (08) 6552 9394 or via email to [penny.lipscombe@dmirs.wa.gov.au](mailto:penny.lipscombe@dmirs.wa.gov.au).

Yours sincerely



Patricia Blake

**COMMISSIONER FOR CONSUMER PROTECTION**

