



29 July 2024

Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600
Via email: Economics.Sen@aph.gov.au

Re: Response to questions on notice – Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

Dear Committee

Thank you for the opportunity to respond to Senator Bragg's questions on notice following Afterpay's appearance before the Committee on 24 July 2024.

1. In your submission you raised some potential approaches to managing late fee caps for BNPL products. Could you elaborate on this?

As noted in our submission, we have significant concerns with the proposed new cap on late fees in the Buy Now Pay Later (BNPL) regulations. These concerns have also been raised by the Australian Finance Industry Association, FinTech Australia, the Tech Council of Australia and others.

The proposed cap, as currently drafted, duplicates existing regulations and ignores existing consumer protections under the law, which constrain the ability of lenders to charge unfair late fees. This includes the Unfair Contract Terms (UCT) regime, the unjust transaction provisions of the National Credit Code, and the requirements of the BNPL Code for fees to be "fair, reasonable and capped." The cap on late fees is also unnecessary in the context of the separate cap proposed to (continue to) apply to ongoing fees for Low Cost Credit Contracts (LCCCs).

These regimes ensure that late fees are transparent to the consumer, do not cause a significant power imbalance between the consumer and the provider, are included for the protection of a provider's legitimate interest, and avoid causing financial or other detriment in cases when the late fee terms are relied upon.

These existing consumer protections are why **late fees on credit cards are not capped**, despite credit cards charging interest rates of 20% or more.

The proposed cap on late fees is also problematic because it is disproportionately restrictive, failing to account for the way in which consumers often use BNPL products on a repeated basis for different types of purchases. Under the proposal, a \$10 late fee on a \$20 purchase would be permissible (despite representing 50% of the purchase amount), whereas a \$20 late fee on a \$1,500 purchase would be impermissible (despite being 1.3% of the purchase amount). Afterpay ensures fairness in the application of its late fees by capping its fees at \$68 or 25% of the purchase price,

whichever is less. For a \$20 purchase, a customer cannot be charged more than \$5 in late fees, and for a \$1,500 purchase, no more than \$68 in late fees can be charged.

While Afterpay would support the enshrining of its existing cap on late fees in the law, we do not believe any additional restrictions on late fees are necessary given the longstanding application of the existing consumer protection regimes. There is no suggestion or evidence that the existing UCT regime, the BNPL Code or the NCCP Act have failed to appropriately protect consumers from excessive late fees.

2. You mentioned the New Zealand regulatory framework and opportunities for greater alignment. Can you outline their approach and how they relate to this Bill?

Aligning the Australian and New Zealand BNPL regulatory frameworks represents an important opportunity to create consistent consumer protections and more efficient processes for businesses operating across the Tasman.

New Zealand was the first country to regulate BNPL, designing a tailored and proportionate regime in September 2023 that will come into force in September 2024. The New Zealand Government, following several years of consultation with industry and consumer groups, determined that BNPL providers should participate in Comprehensive Credit Reporting but not be subject to the country's prescriptive affordability and suitability obligations. In fact, the Regulatory Impact Statement found that the requirement to assess suitability will have:

"...little impact on financial hardship as suitability requirements would likely be of little benefit to BNPL applicants... Unlike with other lending products, BNPL products are offered under varying terms, meaning that one BNPL product is unlikely to be more or less suitable than another."

The Minister of Commerce and Consumer Affairs added that "suitability inquiries are unlikely to be useful for BNPL products. There is a low risk these products will be unsuitable, given the simplicity of the product, a tendency to be explicitly marketed based on their key features (e.g. interest free, pay in four payments) and there is no choice of features such as the term of the loan."²

To align Australia's framework with New Zealand, we support removing the unsuitability requirements in the BNPL Bill given its lack of utility and contribution to meaningful consumer outcomes, or alternatively increasing the threshold for the rebuttable presumption to amounts less than or equal to \$5,000. This would create a more scalable obligation on larger-value LCCCs targeted at more specific high-value purchases, retail sectors or services. We also support removing the 'reasonable belief' test for BNPL contracts of less than \$5,001. For contracts under this threshold, providers should instead be required to conduct a 'partial' credit check (rather than having to obtain certain information about the customer, and noting that **a partial credit check is more comprehensive than a standard negative credit check**).

We note the Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law ([the MoU](#)), which sets out principles to

¹ Ministry of Business, Innovation and Employment, '[Regulatory Impact Statement: Applying the Credit Contracts and Consumer Finance Act in a proportionate way to buy now pay later lenders](#)'.

² Minister of Commerce and Consumer Affairs, '[Cabinet Paper: Fit for purpose regulation of consumer credit](#)'.

guide coordination efforts in relation to the advancement of a trans-Tasman single economic market. One of the principles outlined in the MoU is that measures should deliver substantively the same regulatory outcomes in both countries in the most efficient manner. Aligning regulatory approaches would promote transparency and consistency for consumers and merchants, and enable greater efficiencies for BNPL providers, many of which operate in both markets.

3. You've talked about the need for competition in financial services. Can you elaborate on the current competitive environment in Australia and what are the key blockers to improving it?

FinTech providers, like Afterpay, have been an important source of competition and innovation in Australia's financial services sector. The competitive tension we have created in the consumer credit market has generated meaningful and lasting benefits for consumers and merchants. Yet barriers continue to protect an incumbent financial services sector that remains extremely concentrated, generating higher costs, poorer outcomes and less choice for consumers.

We know, for example, that in credit card issuing, the big four banks hold 93% of the market. This is 50% higher than the UK and 58% more concentrated than the US. In merchant acquiring, the major banks' concentration sits above 73%. Limited competitive pressure has resulted in poor consumer outcomes for Australian credit card users. Interest rates have historically gone "[up like a rocket, down like a feather](#)". Since late 2011, the average interest rate on 'standard' credit cards monitored by the RBA remained around 20%, despite significant reductions to the official cash rate.³

In addition to maintaining consistently high interest rates, credit cards also operate regressively, with poorer consumers cross-subsidising wealthier consumers. Wealthier households use credit cards in a savvy way to earn reward points, while avoiding interest by repaying balances in full each month (these consumers are known as 'transactors'). These transactors are not profitable for the banks issuing credit cards. Banks instead rely on lower-income consumers who do not repay their balances in full each month and incur interest rates of 20% or more.

By comparison, Afterpay is interest free, customers can no longer make purchases when a payment is late and late fees are low and capped. Economic analysis by Mandala showed that in 2023, Afterpay's 3.5 million active Australian customers saved \$127 million in consumer fees and interest when compared to credit cards. The 129,000 merchants who partner with Afterpay across the country realised \$5 billion in net benefits from sales and cost efficiencies. Afterpay, and the broader BNPL market, is generating better consumer outcomes by offering customers free or very low-cost credit under business models that are not driven by consumer debt.

To enhance competition and allow innovative companies to serve their customers, policymakers should approach regulation in a targeted, tailored and flexible way while avoiding using old laws to regulate emerging sectors.

4. A lot of detail is left to delegated legislation. Do you think it would've been better had it been put in the primary legislation?

³ Source: APRA, RBA 2017, RBA 2023, IBIS 2023, IBIS 2023, Senator HON Katy Gallagher 2014, RBA 2021, Productivity Commission, Inquiry into the Financial System [2018](#).



As discussed in our submission, the BNPL delegated legislation (i.e. regulations) have only been consulted on once and contain critical and substantive obligations for BNPL providers. The revised draft of these regulations has not been released, and we have serious concerns in relation to provisions around late fees and the modified responsible lending obligations. As the Senate Committee heard during the public hearing, these concerns remain.

Moreover, the BNPL regulations operate in close concert with the BNPL bill. They create a single regulatory regime and should be examined together. This is why we strongly support a more detailed consultation on a final version of the regulations, to allow for appropriate industry feedback and refinement.

As outlined in our submission, we propose the following amendments to the BNPL regulations:

- The modified responsible lending obligations are not truly proportionate or scalable for low-value, low-risk BNPL products. Specifically, we support removing the 'reasonable belief' test for BNPL contracts of less than \$5,001. For contracts under this threshold, providers should instead be required to conduct a 'partial' credit check (noting that this is more comprehensive than a standard negative credit check).
- The proposed new cap on late fees should be removed given the lack of clear policy rationale and existing consumer protections under the law, which constrain the ability of lenders to charge unfair late fees.