

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

Tech Council of Australia Submission

June 2024





1. Introduction

Thank you for the opportunity to make a submission to the Senate Economics Legislation Committee (**the Committee**) regarding its inquiry into the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 (**the Bill**).

The TCA is Australia's peak industry body for the tech sector. The tech sector is a key pillar of the Australian economy, with the tech sector Australia's third largest industry behind mining and banking, and Australia's seventh largest employing sector. The TCA represents a diverse cross-section of Australia's tech sector, including fintech startups and scale-ups, and global tech companies.

Australia is home to a range of globally successful fintech companies, including Afterpay, Airwallex, and Tyro. Payment technology in particular has emerged as one of the top tech segments where Australia has a comparative advantage, helping to drive improved competition and consumer outcomes while also creating new sources of economic growth and jobs. Australia's financial regulatory environment has helped to foster innovation in areas like Buy Now Pay Later (**BNPL**) and create an environment for fintech startups to thrive and has in turn attracted global fintech companies to Australia.

In this context, it is critical that BNPL legislation both protects consumers and continues to foster innovation in Australia's fintech ecosystem. We support the approach to designing bespoke regulation for the BNPL sector, which achieves important and appropriate consumer protections while maintaining the real and significant benefits the sector generates for consumers and businesses.

However, we consider that there are some changes that should be considered to the Bill to ensure that the BNPL regulatory environment fosters innovation, enhances competition in emerging and incumbent industries, and solidifies Australia's position as a global leader in fintech both now and in the future.

We consider that the Bill and the draft regulations must be considered by the Committee together, given that they will operate as a single regulatory regime. The draft regulations contain critical and substantive obligations on BNPL providers. As a result, we make the following recommendations, some of which apply to the draft regulations, and some directly to the Bill:

- **Recommendation 1:** update and simplify the regulation of fees and charges, including amending draft regulations to apply the fee caps at a customer-level rather than at a product-level.
- **Recommendation 2:** amend the proposed affordability requirements to require BNPL providers to conduct a partial credit check rather than obtaining self-declared information about the customer's income, expenses and other debts.
- **Recommendation 3:** remove the requirement for BNPL providers to understand the requirements and objectives of the consumer, better aligning with the regulatory approach taken in New Zealand.

2. Updating and simplifying the regulation of fees and charges

As part of the draft regulations, we consider that there are several ways that the regulation of fees and charges could be simplified. We consider that these changes would continue to safeguard consumers and their welfare, while continuing to incentivise the growth and innovation from BNPL providers.

Caps on fees should be amended

We consider that the caps on ongoing and late fees proposed in the exposure legislation should be amended to: i) account for changes in the market; and ii) to avoid duplication and overlap with existing regulatory arrangements that already apply.

On the first point, the cap on ongoing fees is from 2009 and has not been adjusted for inflation. In these circumstances, it is appropriate that the cap on ongoing fees be indexed to inflation since 2009.

On the second point, the proposed new cap on late fees should be amended or removed, given the operation of a range of existing consumer protections that already exist that apply to late fees. In particular, BNPL contracts are subject to consumer protection legislation (for example, the unfair contract terms regime in the ASIC Act), the unjust transaction provisions of the National Credit Code and the BNPL Code of Practice, overseen by AFIA, which requires late fees to be ‘fair, reasonable and capped’. We consider that any intervention in relation to late fees should be justified on the basis of addressing a particular consumer harm. There is not sufficient evidence to show that, with these existing consumer protections in place, late fees are causing consumer harm currently or require regulatory intervention.

The proposed regime to cap late fees, as set out in the exposure legislation, could also lead to perverse outcomes, where the fees are not proportionate to the size of the original purchase that was made.

Where there is a separate cap that is proposed to (and will continue to) apply to ongoing fees for BNPL products, BNPL products will continue to be low cost and safe products for consumers due to the combination of prescriptive caps on ongoing fees and the additional regulation of fees under the consumer protection instruments noted above.

Fee caps should be applied on a customer-level rather than a product-level

The draft regulations remove the ability of a BNPL provider to impose fees and charges on customers if the customer is already a party to an LCCC with the credit provider, or if the customer closes an LCCC account and reopens a LCCC account with the same BNPL provider within 12 months.

We consider that this should be amended. There are a variety of reasons why consumers may have multiple BNPL accounts (for example, where different BNPL



accounts may have different credit ceilings and be used for different purposes), and consumers often close and open BNPL accounts within a 12 month period (for example, when they are applying for a home loan). Fee caps applying on a product-level rather than a customer-level ignores the way in which consumers practically use BNPL products and removes an important avenue for consumer choice, limiting their ability to access affordable credit options and restricting BNPL providers from offering a range of products with different use cases. These restrictions would impact the viability of BNPL providers offering consumers a second BNPL account.

In these circumstances, we consider that the fee cap should be at a customer-level rather than set at a product-level, which would provide clarity to both businesses and consumers by being clearer and simpler, and is a proportionate response to any consumers harms that are identified.

3. Proposed affordability requirements

The proposed affordability requirements in the draft regulations that support the Bill should be amended to require a BNPL provider to conduct a partial credit check rather than relying on information that has been self-declared by a consumer about their income, expenses and other debts.

Many BNPL consumers are young consumers who are more likely to have casual or part-time employment with inconsistent salaries and expenses and have difficulty reliably self-declaring information about their income, expenses and other debts. Further, consumers are more likely to conceal information when asked to report it voluntarily, meaning that BNPL providers cannot meaningfully rely on self-reported information by consumers that would not be part of a credit check.

The proposed affordability requirements should instead be achieved through partial credit checking. Partial credit checking provides richer consumer data to assess the creditworthiness of the consumer to the BNPL provider and is also an important consumer protection measure to ensure that consumers can meet the necessary repayments. Partial credit checking will also create efficiencies for both BNPL and other credit providers.

We support a modified responsible lending framework which is adaptable and flexible to the circumstances, proportionate to the level of risk involved, and allows for dynamic spending limits. We consider that partial credit checking is a more robust way of measuring credit worthiness and should be required instead of relying on self-declared information.

4. Proposed obligation to understand the requirements and objectives of the consumer

We consider that the unsuitability requirements in the Bill, that is, the requirement for BNPL providers to understand the requirements and objectives of the consumer, should be removed. This proposed requirement will not meaningfully improve consumer outcomes, and instead introduces an element of subjectivity and uncertainty to the requirements on BNPL providers.

This is also inconsistent with the approach taken by other jurisdictions such as New Zealand. In 2023, New Zealand introduced obligations on BNPL providers following nearly two years of consultation. New Zealand has removed the affordability and suitability requirements on BNPL providers, if they participate in Comprehensive Credit Reporting on new customers and have a credit policy explaining their approach. Aligning regulatory approaches with New Zealand in this respect will promote transparency and consistency for consumers and merchants, while creating efficiencies for providers. It will also reduce the regulatory burden on BNPL providers who are operating in both countries, or intend to in the future.

5. Recommendations

In summary, we make three recommendations in response to the Bill and the draft regulations:

- **Recommendation 1:** update and simplify the regulation of fees and charges, including amending draft regulations to apply the fee caps at a customer-level rather than at a product-level.
- **Recommendation 2:** amend the proposed affordability requirements to require BNPL providers to conduct a partial credit check rather than obtaining information about the customer's income, expenses and other debts.
- **Recommendation 3:** remove the requirement for BNPL providers to understand the requirements and objectives of the consumer.

We appreciate the opportunity to contribute feedback to these reforms and look forward to an ongoing consultation on them.