



28 June 2024

Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600

Dear Committee

Afterpay welcomes 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).

Afterpay has been closely engaged in the development of fit-for-purpose Buy Now Pay Later (BNPL) regulation in Australia and globally. We are a founding signatory of the world-first BNPL Code of Practice (BNPL Code), established in 2021 and overseen by the Australian Finance Industry Association (AFIA), which sets high standards for the sector and delivers positive consumer outcomes. We also worked closely with New Zealand policymakers over the past three years, resulting in the passing of BNPL regulations in September 2023 that will come into force in September 2024.

The principles of good and sustainable regulation are present in the bill. It acknowledges that BNPL is fundamentally different from the traditional revolving high-interest credit model. It incorporates the concepts of scalability and proportionality with the objective of maintaining financial access and inclusion and promoting competition and innovation in Australia's highly concentrated banking sector. And as more and more Australians – particularly younger generations – vote with their feet in favour of products like Afterpay, the bill ensures they have access to robust consumer protections.

However, as the Parliament, industry and other stakeholders approach the final stages of these reforms, **it is vital that we get the details right**; ensuring the regulatory requirements make practical sense and deliver meaningful outcomes for consumers, retailers, and BNPL providers. With considered amendments to the bill and the [draft BNPL regulations](#) (draft regulations), we are confident this can be achieved.

The bill and draft regulations must be examined together. The draft regulations, currently with Treasury, **contain critical and substantive obligations** in relation to the modified responsible lending obligations and fees. These complementary pieces of regulation will operate in concert and create a single regulatory regime. Our submission, therefore, outlines our proposed amendments to both. **We strongly support a more detailed consultation on a final version of the regulations**, to allow for appropriate industry feedback and refinement.

Overall, we continue to advocate for alignment between the Australian and New Zealand BNPL regulatory frameworks. The New Zealand regulatory framework for BNPL represents the world's first tailored and proportionate BNPL regime. Alignment is especially important in relation to the affordability and product suitability components of BNPL regulation. This would involve BNPL providers being required to conduct partial credit checks in Australia (rather than having to obtain certain information about the customer) and that the "requirements and objectives" limb of responsible lending be removed.



In relation to the bill, we highlight the following issues needing priority for amendment:

- **Product suitability requirements for BNPL arrangements are not proportionate to the nature of the product and should be removed.** In New Zealand, BNPL providers will be exempt from the product suitability requirements that apply to traditional credit products, in recognition of the low cost and low risk nature of BNPL products. At a minimum, BNPL products with spending limits under \$5,000 should not be required to undertake product suitability assessments. The current threshold of \$2,000 in the bill is too low, and will create unnecessary friction for customers and BNPL providers.
- **The definition of BNPL should capture all BNPL arrangements, including those provided by merchants directly without a third-party BNPL provider.** This will help future-proof the regulatory regime and create a level playing field, ensuring that merchants (particularly enterprise merchants and e-commerce retail platforms) offering their own BNPL products to customers are captured.

In relation to the regulations, we highlight the following issues needing priority for amendment:

- Afterpay supports the creation of modified Responsible Lending Obligations (mRLOs) designed to introduce scalability and tailoring to BNPL lending. In practice, however, the draft regime is not proportionate 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. 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) (which should be indexed to reflect inflation).

Underlying these recommendations for a fit for purpose BNPL regulatory regime, are important facts about the design of BNPL products, their impact on consumers and merchants, and the emerging consumer attitudes of Australians. This includes that:

- Afterpay supports **3.5 million Australians** who are connected with **more than 129,000 businesses** of all sizes across the country.
- Customers use Afterpay because it is a **no cost service** if instalment payments are made on time and are protected by guardrails that ensure they **never revolve in debt**. In circumstances where the customer does not pay their instalment payments on time, their service is suspended.
- While late payment fees can be applied, these **fees are fixed, capped** and do not accumulate or compound over time. 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.
- Afterpay starts customers on a **low initial spending limit**, which may increase or decrease depending on the customer's repayment performance. By only increasing a customer's spending limit after they have demonstrated strong repayment behaviour, Afterpay ensures that lending responsibly is built into our business model.



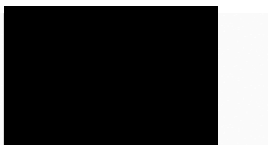
- Our product design generates strong consumer outcomes — in Q1 2024, **98% of purchases did not incur late fees and 95% of instalments were paid on time** across Afterpay globally. Our loss rate remains one of the lowest in the industry at less than 1%, which has remained consistently low despite changes in the macroeconomic environment.
- Afterpay is enhancing financial access and inclusion, generating **\$127 million in consumer savings** from credit card fees and interest in 2023 alone.¹ Importantly, vulnerable consumers gain the most from switching from credit cards to Afterpay, with the most vulnerable credit card users paying up to seven times more compared to Afterpay users.²
- According to AFIA's most recent BNPL research, **BNPL products continue to have exceptionally low rates of complaints**. Internal Dispute Resolution (IDR) complaints to BNPL providers represent between 0.1-0.2 complaints per hundred active accounts. External Dispute Resolution (EDR) complaints to AFCA are low at just 0.03 per of active accounts.
- The net merchant benefits of Afterpay exceeded **\$5 billion through increased sales and cost efficiencies in 2023**, which helped more than 123,000 small to medium sized businesses (SMBs) across the country last year.³ In broader economic terms, Afterpay contributed \$3.9 billion to Australian GDP and supported 39,000 local jobs in 2023.

Our submission, which was provided to Treasury on the draft bill, is attached at **Appendix A**. It outlines in detail our proposed amendments to the legislative package, including our support for BNPL providers to be members of the Australian Financial Complaints Authority (AFCA) and have an Australian Credit Licence. The bill currently with the committee is largely the same as the draft bill to which our submission relates.

As noted, we have not seen the updated draft regulations and request further industry consultation before they are finalised.

Thank you again for the opportunity to provide this submission. We welcome further engagement with the committee as it examines the bill and considers its recommendations.

Yours sincerely



Michael Saadat
International Head of Public Policy

¹ Mandala, [Afterpay's Economic Impact in Australia](#), June 2024.

² Accenture, The Economic Impact of Afterpay, 2020.

³ Mandala, [Afterpay's Economic Impact in Australia](#), June 2024.



Appendix A: Afterpay Submission to Treasury on BNPL Exposure Draft Legislative Package

Executive summary

Afterpay welcomes the opportunity to provide a submission in response to Treasury's release of the exposure draft legislative package (**the draft package**) to bring Buy Now Pay Later (**BNPL**) into the regulatory framework for credit products in a fit-for-purpose and tailored manner.

The exposure draft of the Treasury Laws Amendment Bill 2024: Buy Now, Pay Later (**the draft Bill**), National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024 (**the draft Regulations**), and accompanying draft explanatory materials represent substantial progress in the development of a proportionate framework for the BNPL sector in Australia.

As the explanatory materials observe, BNPL products "offer consumers a cheaper and easier way to access forms of credit when compared to traditional forms of credit such as credit cards, payday loans, and consumer leases" resulting in improved "financial inclusion." Products, like Afterpay, also "place competitive pressure on traditional forms of credit, reducing the cost of some products and triggering innovation in product design" while also generating "increased business for merchants."

Indeed, according to Mandala analysis conducted in 2024, Afterpay alone generated \$138 million in consumer surplus and \$127 million in consumer savings from credit card fees and interest in 2023. The net merchant benefits of Afterpay exceeded \$5 billion through increased sales and cost efficiencies, which helped more than 123,000 small to medium sized businesses (**SMBs**) across the country last year. In broader economic terms, Afterpay contributed \$3.9 billion to Australian GDP and supported 39,000 local jobs in 2023.

In terms of managing affordability, the spending limits that apply to many BNPL products, including Afterpay, are dynamic in nature by reflecting ongoing consumer behaviour (where customers start on low limits, new purchases are paused when repayments are not made when due, and limits are increased with proven, on-time repayment behaviour and tenure). Our approach has consistently delivered better consumer outcomes than traditional regulated credit products that are subject to responsible lending obligations.

These consumer, merchant and economic benefits are the result of genuine innovation in consumer credit. For Afterpay alone, this innovation is supporting 3.5 million Australians who are connected with more than 129,000 businesses of all sizes across the country. Support for innovation requires a forward-looking approach to regulation, and we welcome Treasury's efforts in designing bespoke obligations for BNPL products.

With New Zealand having finalised its BNPL regulations in September 2023 (with commencement in September 2024, a 12 month transition period), we strongly recommend that Treasury take all necessary steps to align Australia's BNPL regulatory framework with that of New Zealand's. The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law ([the MoU](#)) sets out principles to 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.

In particular, significant efficiencies can be achieved for BNPL providers operating trans-Tasman through alignment on the required affordability checks. In this submission, we propose that all BNPL providers be required to conduct partial credit checks in Australia (rather than having to obtain certain information about the customer) and that the “requirements and objectives” limb of responsible lending be removed.

Key recommendations

Our submission focuses on recommendations and amendments to the draft package to ensure that the right balance is struck between maintaining consumer and merchant benefits, reflecting the key design features of BNPL products that differentiate them from traditional credit, and ensuring appropriate and proportionate consumer protections.

Our key recommendations include the following:

1. **Definitions:** Ensure the definitions of Low Cost Credit Contract (**LCCC**), BNPL arrangement and BNPL contract create a level playing field for all providers, including merchants that offer their own BNPL products to customers.
2. **Modified Responsible Lending Obligations (mRLOs):** Create greater scalability and tailoring in the mRLOs to account for how BNPL products operate in practice and the actual risks and benefits generated by these products.
3. **Fees:** The proposed new cap on late fees should be removed or substantially amended given the lack of clear policy rationale and existing consumer protections under the law; the proposed cap on ongoing fees is from 2009 and should be indexed.
4. **Flexibility and diversity of BNPL product offerings:** Afterpay is concerned that the definition of fees and charges does not take into consideration how consumers use BNPL products and would damage the diversity and commercial viability of different BNPL products offered by the same provider.
5. **Suitability:** Remove the unsuitability requirements for all LCCCs or increase the rebuttable presumption to contracts of \$5,000 or less.

Detailed overview

1. Defining Low Cost Credit Contracts (LCCCs) and BNPL arrangements

Recommendations:

- Clarify the definitions of 'BNPL arrangement' and 'LCCC provider' so that merchants that offer a BNPL service are captured as LCCC providers.
- Further clarify that a 'BNPL contract' may be used by a consumer to enter more than one 'BNPL arrangement' and that references to credit that is, or may be, provided under a LCCC (that is a 'BNPL contract') are references to the credit that is, or may be, provided under all 'BNPL arrangements' entered into by the consumer under the BNPL contract.



Afterpay broadly supports the definitions of 'LCCC', 'BNPL arrangement' and 'BNPL contract'. However, as currently drafted, a number of amendments should be considered to ensure the definitions clearly describe the distinction between a 'BNPL arrangement' and a 'BNPL contract' and capture the full range of BNPL providers in the market while also ensuring that BNPL providers can service their customers using different products. This latter point is expanded on in the 'fees' section below.

The definition of 'BNPL arrangement' describes a BNPL provider as a 'third person' that indirectly or directly pays the merchant an amount that is some or all of the price for the supply of goods and services. Under this definition, merchants that provide a BNPL service directly to their customers appear to be exempt, and could continue to offer an unregulated BNPL product. While we are not aware of large merchant businesses that currently offer a BNPL product directly to their customers in Australia, there is a real risk of this arising under the new regulatory framework. This could include global e-commerce companies that sell goods directly to consumers, and technology companies whose primary market is the sale of hardware (i.e. phones, computers, tablets, etc). Some companies of this scale have already entered the consumer finance sector and offer BNPL products, and we are aware of large retailers in the United Kingdom (UK) seeking to introduce in-house BNPL offerings. **As such, we recommend including in the 'BNPL arrangement', those merchants that provide a BNPL service directly to their customers.** To ensure there is a level playing field for all BNPL providers, **merchants offering their own BNPL products should also be captured under the definitions of LCCC and BNPL arrangement.**

This could be achieved by amending paragraph 13D(1)(b) of the Bill to read as follows:

*"(b) under which a person (the **BNPL provider**):*

- (i) being a third party, directly or indirectly pays the merchant; or*
- (ii) being the merchant, who under a contract that satisfies paragraphs 13C(1)(c) and 13C(1)(d), defers payment of,*

an amount that is some or all of the price for the supply mentioned in paragraph (a); and"

If Treasury is concerned to exclude small merchants that may offer low scale vendor financing terms to their customers, the definition above could be amended to carve out merchants based on the number of customers that are provided with vendor financing, the size of the small business, or the total amount of financing provided in a year (or a combination of these criteria).

We understand that the intention of the draft package is to impose obligations on the overarching contract between a BNPL provider and a consumer as it relates to a BNPL facility, not on individual BNPL arrangements entered into between the consumer, the BNPL provider and a merchant (forming part of the overarching contract). That said, an explanatory note (in the legislation or the explanatory material) should make this intention explicitly clear. This note should also make it clear that the credit which "is, or may be provided under the contract" is the total credit that is provided under the overarching BNPL facility and not each individual BNPL arrangement. Absent such a note, it is unclear whether Treasury has the power to prescribe a maximum period for a BNPL contract or a BNPL arrangement.

A note under subsection 13C(1) of the Bill could read as follows:



"Note: For the avoidance of doubt, if the low cost credit contract is a buy now pay later contract, the contract can be included in one or more buy now pay later arrangements and a reference to credit that is or may be provided under the contract is to the total amount of credit that is, or may be provided under all of those buy now pay later arrangements."

2. Fees

Alternative fee proposal

Recommendations:

- Due to existing consumer protections, remove section 69E of the draft Regulations relating to the fees and charges of a LCCC.
- The existing dollar-based ongoing fee caps that have remained unchanged since their introduction in 2009 should be indexed for inflation.

Late fees

There is no clear policy rationale for introducing a new and prescriptive cap on LCCC late fees when existing consumer protection laws adequately constrain the ability of lenders to charge unfair late fees. BNPL contracts are already subject to the Unfair Contract Terms (**UCT**) regime in the Australian Securities and Investments Commission Act 2001 (**ASIC Act**) overseen by the Australian Securities and Investments Commission (**ASIC**) in relation to financial products and services. Late fees are subject to the UCT regime because they are not part of the upfront price – they are “contingent on the occurrence or non-occurrence of a particular event” (section 12BI of the ASIC Act). The Court also has the power to reopen a credit contract (in order to vary or set aside the contract) under the unjust transaction provisions of the National Credit Code (the **Credit Code**) if a late fee is not “reasonably necessary” for the protection of a legitimate interest. 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.

The cap on late fees is also unnecessary in the context of the separate cap proposed to (continue to) apply to ongoing fees for LCCCs. This means that BNPL products – as LCCCs – will continue to be low cost and safe products for consumers due to a combination of prescriptive dollar-based caps on ongoing fees, and regulation of late fees under the UCT regime.

The proposed approach to late fees is also problematic because it is disproportionately restrictive and unduly complex. It is too restrictive because it fails to account for the way in which consumers use the core Afterpay product 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.



The late fee proposal is also unduly complex because it is in addition to the existing caps on ongoing fees which will continue to apply on a yearly (not monthly) basis (noting that a higher cap applies in the first year of a BNPL arrangement).

Furthermore, the BNPL Code of Practice overseen by AFIA (**the BNPL Code**) currently mandates a range of actions from BNPL providers in relation to fees and charges. This includes that late fees are “fair, reasonable and capped.”⁴ The BNPL Code has proven to be successful in this regard, as millions of consumers across Australia choose to use Afterpay and other BNPL providers whose conduct is governed by the BNPL Code.

We also note that the National Consumer Credit Protection Act 2009 (**NCCP Act**) does not impose a cap on the late fees of other mainstream credit products. While BNPL products will be subject to less onerous responsible lending obligations compared with credit cards, this does not justify other credit products, like credit cards, being treated differently in relation to late fees. Credit cards are justifiably subject to the existing responsible lending obligations due to the very high rates of interest charged, and a product design construct that encourages consumers to make low minimum repayments and revolve in debt for long periods of time.

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.

Ongoing fees

We support caps on ongoing fees for BNPL arrangements. Since ongoing fees are not subject to the UCT regime, and the policy intent is for BNPL arrangements to remain as “low cost” credit contracts, an appropriately designed legislative cap is warranted.

The proposal will, however, continue to apply dollar-based caps that have remained unchanged since the introduction of the NCCP Act in 2009. Given the passage of time, and impact of inflation over the past 15 years, **Treasury should index the existing caps.** This will allow BNPL products to vigorously compete in the market for consumer credit, while continuing to offer consumers a simple and low cost alternative to traditional credit products.

Greater flexibility to reflect the diversity and use of BNPL business models

Recommendations:

Amend section 69E of the draft Regulations to allow for the following circumstances:

- If a customer has more than one LCCC with a provider, apply the fee caps at a customer-level rather than a product-level.

⁴ AFIA, [BNPL Code of Practice](#).



- Remove the exemption for authorised deposit-taking institutions (**ADIs**) - there is no policy rationale for this.

Afterpay is concerned that the proposed restriction on fees and charges does not take into consideration how consumers use BNPL products and would damage the diversity of BNPL products offered by the same provider. It would also make LCCCs subject to even more restrictions than other currently regulated credit products, which is inconsistent with the public policy objectives of these reforms as well as the low-value and low-cost nature of BNPL contracts.

The proposed restrictions in the draft Regulations will hinder the ability of BNPL providers to offer a range of products with different use cases that are beneficial to consumers, impacting the customer's ability to access affordable credit options.

The draft Regulations remove the ability of BNPL providers to impose fees and charges (within the proposed caps) on customers if:

- The customer is already, or was within the previous 12 months, a party to an LCCC with the credit provider or an associate (neither of which is an ADI).
- The customer closes an LCCC account and re-opens an LCCC account with the same BNPL provider within 12 months.

The draft Regulations create an outcome whereby a BNPL provider cannot offer two, very different, BNPL products to the same customer, because the provisions remove the economic viability of the second product. For example, a customer may use a BNPL product with a low spending limit (less than \$1500/month) and a \$10 monthly account fee. That same BNPL provider may also offer a high-value BNPL product for larger purchases (in the \$5,000 range) with repayment periods of 6-24 months and monthly account fees. However, the economic fundamentals of the second product are diminished because the same consumer could not be charged fees of any kind. At the same time, that same consumer may have a credit card and a home loan with a single ADI and be subject to substantial annual rates of compounding interest and no fee caps for either product under the NCCP Act.

Therefore, we recommend applying the amended fee cap at a customer-level rather than a product-level.

Consumers may also close and re-open their BNPL accounts for a range of reasons, including as a result of pressure from their bank or mortgage broker when applying for a home loan. Although, in reality, Afterpay should not impact a consumer's home loan borrowing capacity (as it is treated as a maximum line of credit of \$3,000 when calculating a consumer's existing liabilities), banks will typically encourage a consumer to close their BNPL account (and credit cards with other lenders) during the home loan application process. The bank will also generally cross-sell that consumer their own credit card offering. In Afterpay's experience, it is not uncommon for consumers to seek to re-open their Afterpay account after they have obtained their home loan.

The caps on ongoing fees for BNPL arrangements should allow a provider to charge ongoing fees in circumstances where a customer has closed and reopened their BNPL account.

We suggest that the draft Regulations be amended as follows to insert a standalone definition of "eligible contract" as Regulation 69E(1A):



"Eligible contract means the contract, or where there is more than one contract (unless a contract is of a fundamentally different nature and/or for a fundamentally different purpose) all contracts, to which the debtor is a party with the credit provider or an associate of the credit provider."

This would require amending Regulation 69E(2) to refer to "eligible contract" directly instead of "the contract (the eligible contract)".

Finally, the draft Regulations import existing fees and charges provisions from the National Consumer Credit Protection Regulations 2010 (**NCCP Regulations**), which provide a blanket exemption for ADIs. There is no policy rationale for this exemption and **we strongly support its removal**. The exemption is particularly concerning given that many of Australia's major banks offer BNPL products and would be handed a distinct and unjustifiable competitive advantage. To date, the non-ADI BNPL sector has been a bright spot of innovation and generated competitive tension in the consumer credit market, which has been previously dominated by a few major banks offering high interest credit cards. Assigning advantages to certain LCCC providers and not others was not the Government's intention and would have significant and deleterious impacts on Australia's FinTech sector.

3. Modified responsible lending framework

Recommendations:

- Remove section 28HAD(5) of the Regulations requiring LCCC providers to seek to obtain information that the provider reasonably believes to be substantially correct in relation to income, expenses and any low cost credit contracts, small amount credit contracts or consumer leases to which the consumer is currently a party.
- Replace this requirement (in section 28HAD(5)) with an obligation to conduct a 'partial' credit check (per section 28HAD(2)-(3)) on all BNPL contracts for amounts less than \$5,001. For amounts more than \$5,000, the existing draft of the modified responsible lending regime should apply.
- Amend section 28HAD(5) to allow LCCC providers to rely on a combination of reasonable consumer benchmarks (HEM) based on the customer's income, age and credit score, and any information provided by the customer regarding their expenses and income.

Afterpay supports the development of a modified responsible lending framework (**the modified framework**) that is scalable (including the ability for LCCC providers to elect whether to be subject to the modified framework in respect of their LCCCs) and focused on generating positive consumer outcomes rather than complying with prescribed processes. At a high-level, we are supportive that the modified framework takes into account:

- **Flexibility:** Giving providers the ability to take into account various risk factors (including product design and features) in determining reasonable enquiries and taking reasonable steps is an essential characteristic of the modified framework, as is the ability to apply general rules set by the provider. As demonstrated on the Afterpay platform, the most effective way to ensure good consumer outcomes is through product design. Afterpay generates consistently high consumer repayment rates and low loss rates regardless of macroeconomic conditions, delivering better consumer outcomes than traditional regulated credit products that are



subject to the responsible lending obligations. Afterpay's practice is to start consumers on low limits, require the first payment upfront for new customers, pause accounts when repayments are not made, and only allow limits to grow with demonstrated repayment behaviour. This allows for continual assessment of a product's suitability for a particular customer, instead of at a single point in time during sign up. The acknowledgement of these key design features and their critical role in both responsible lending decisions and consumer protection should remain a key tenant of the modified framework.

- **Proportionality:** Giving providers certainty that it is possible to meet the 'reasonable steps' outlined in the draft Regulations solely based on information provided by a consumer is important and fundamental to the concept of proportionality and to enabling financial inclusion and access.
- **Dynamic spending limits:** We support the modified framework allowing providers to conduct inquiries and an assessment for an amount of credit larger than that initially offered to the consumer, and that this assessment will also suffice for any subsequent credit limit increases up to that amount, up to a period of two years. We strongly support this as it will enable and incentivise BNPL providers to start consumers on lower limits rather than just providing the maximum limit upfront.

There are, however, aspects of the modified framework that can be simplified without any reduction in consumer protection, while generating a more consistent approach to responsible lending across all LCCC providers. Importantly, there are provisions within the modified framework that have been imported from the traditional responsible lending framework that, in practice, make little sense for LCCC providers, emerging consumer preferences, and resulting consumer outcomes.

The requirement for BNPL providers to make enquiries into customer income and expenses is unlikely to generate consistent or effective consumer outcomes or aid responsible lending decisions. For the purposes of low-value LCCCs that typically provide low initial credit limits (Afterpay customers start on \$600), this information is unlikely to provide meaningful inputs into our decision making framework.

Instead of requiring LCCC providers to obtain information about the customer's income and expenses, a partial credit check should be required to be performed on all customers for credit limits under \$5,001. This check gives providers access to a richer set of consumer data to assess creditworthiness, and the resulting reciprocity obligations ensure BNPL data is visible to other credit providers. This recommendation is aligned with recent research conducted for Afterpay by Mandala, where consumers were asked which type of affordability check would be most suitable for BNPL. Roughly 48% of consumers answered that they wanted to be assessed based on their actual performance on BNPL platforms (i.e. by their repayment history – in line with what Afterpay already does), while 37% indicated support for a rapid credit check. Notably, only 15% of BNPL users thought that having providers check their income and bank statements was a suitable assessment of BNPL access.⁵

We understand that Treasury is concerned that a partial credit check will potentially not reveal whether a consumer currently has payday loans or consumer leases with other providers, as these providers may not engage with the credit reporting system. The solution to this problem is not to require BNPL providers to ask a consumer whether they have payday loans or consumer leases, as the most vulnerable consumers are likely to conceal this information in order to obtain additional credit. Instead, payday lenders and consumer lease providers should be required to conduct partial credit checks.

⁵ Afterpay - Regulatory Cost of Option 3 - Research Report, Mandala, December 2022.



Although these lenders are required to obtain 90 days' worth of bank statements from consumers, this more onerous obligation should not obviate the need for them to also participate in the credit reporting system. This lack of participation means that traditional lenders and low-risk BNPL lenders cannot easily identify customers who are potentially the most vulnerable in the community.

Even requiring payday lenders and consumer lease providers to merely conduct negative credit checks will ensure there is visibility of their activities on consumers' credit reports.

Further, it is often difficult for consumers to accurately determine their income and expenses. Many younger consumers may be employed on a casual or part-time basis and will not have an annual salary that can be easily declared. Consumers also typically do not have an accurate grasp of their expenses on a weekly, monthly or yearly basis or understand the difference between discretionary and non-discretionary expenses. Asking for this information is likely to cause confusion and potentially lead to inaccurate information about the consumer and their financial situation.

By knowing a customer's age and performing a partial credit check, an LCCC provider will be in a strong position to make a credit assessment based on an estimate of what a reasonable level of expenses would be for that person.

The additional requirement that an LCCC provider have a 'reasonable belief' in the accuracy of this information is also a disproportionate requirement for low-value BNPL products. The case study in the Explanatory Statement outlines an extreme scenario in which a customer submits a very high annual income and low expenses, which the LCCC provider determines to be implausible given the consumer's credit report shows a credit score ranked 'low', multiple defaults on consumer leases and other credit products, and several recent inquiries from other credit providers. This suggests that a reasonable belief can only be determined according to the interplay between customer declared income, expenses and other debts, and the credit check required by the draft Regulations.

However, because the example in the Explanatory Statement is an extreme scenario, we are concerned that the obligation to reasonably believe the information provided by the customer will create significant regulatory uncertainty, without any incremental consumer protection benefits. Using that same scenario, it is highly unlikely that an LCCC provider would make a different lending decision in circumstances where it does not obtain information about the customer's income, expenses or other debts, and instead solely relies on the information in the customer's credit report.

Instead of requiring BNPL providers to obtain information about the customer which is likely to be unreliable, and introducing a new and uncertain obligation for BNPL providers to "reasonably believe" the information, we urge Treasury to align Australia's approach with that of New Zealand. In New Zealand, BNPL providers will be required (from September 2024) to have a credit policy which lays out how they take into account information from credit reports in lending decisions.

4. Unsuitability

Recommendations:

- Remove the unsuitability requirements (whether the credit product will meet the consumer's requirements or objectives) for all LCCCs.



- Alternatively, increase the rebuttable presumption for LCCCs with a credit limit of less than \$5,000 that the requirements or objectives limb of the unsuitability test is met, when granting credit or increasing a credit limit.

Afterpay supports removing the unsuitability requirement for all LCCCs given its lack of utility and contribution to meaningful consumer outcomes. **At a minimum, we urge Treasury to increase the threshold for the rebuttable presumption to amounts less than or equal to \$5,000.** This creates a more scalable obligation on larger-value LCCCs targeted at more specific high-value purchases, retail sectors or services.

Applying more scalable and proportionate suitability requirements aligns with recent BNPL regulations passed in New Zealand. The New Zealand Department of Business, Innovation and Employment (**MBIE**) recently considered the issue of suitability and its application to BNPL contracts as part of regulations passed by the Government in September 2023. The standard New Zealand suitability test requires lenders to make specific inquiries about the borrower's needs and objectives – comparable to Australia's framework. MBIE's 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."⁶ The Minister of Commerce and Consumer Affairs agreed, stating in his Cabinet Paper 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 term of the loan."⁷

The New Zealand Government reached its decision regarding suitability requirements despite there being no comparable product suitability framework to the Australian Design and Distributions Obligations (**DDO**) regime. Although the DDO regime does not require providers to assess product suitability at the individual level, it nonetheless represents a significant form of outcomes-based consumer protection that ensures that providers design products with consumers in mind, and ensure that products are distributed to an appropriate target market. ASIC [has already enforced](#) this regime against BNPL providers successfully.

Although the average transaction size with Afterpay is around \$150, our customers are increasingly using Afterpay for a wide array of purchases. Our customers can make individual purchases of up to \$2,000, and spending limits can dynamically increase to \$3,000 with a sustained and demonstrated history of on-time repayment behaviour. This month, we have also enabled long standing customers to apply for a \$4,000 spending limit, subject to them passing a credit check (consistent with the requirements of the BNPL Code).

Under the proposed approach, where a consumer moves from a sub-\$2,000 limit to a \$2,000-plus limit, the LCCC provider will be required to confirm that the LCCC the consumer has already been using meets their requirements and objectives. It is difficult to see what benefits this will bring, particularly

⁶ 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](#)'.

⁷ Minister of Commerce and Consumer Affairs, [Cabinet Paper: Fit for purpose regulation of consumer credit](#).



when all other aspects of the product (apart from the spending limit) remain unchanged. Consumers are likely to perceive the practical impact of this regulatory requirement as being equivalent to the pop-up messages that appear on websites in relation to whether cookies can be used – in other words, another box to be checked that does not deliver any benefits.

5. Credit limit increases

As noted above, **Afterpay supports the framework allowing providers to conduct inquiries and an assessment for an amount of credit larger than that initially offered to the consumer, and that this assessment will also suffice for any subsequent credit limit increases up to that amount, up to a period of two years.** This length of time will enable and incentivise BNPL providers to start consumers on lower limits rather than providing the maximum limits upfront, which is common in traditional consumer credit lending decisions.

6. Credit Act and LCCC obligations

Credit licence and AFCA membership

Afterpay is a member of the Australian Financial Complaints Authority (AFCA) and has an Australian Credit Licence. We support these requirements for all LCCC providers.

Credit representatives, sub-authorisations and credit guides

Recommendation:

- Insert an amendment to the draft Bill and Regulations or a new note in the explanatory material or Regulatory Guide 203 Do I need a credit licence? (RG 203) to clarify that a merchant is not 'acting as an intermediary' (and, as such, providing a 'credit service') if they advertise the availability of BNPL as a payment method or participate in promotional activities using material approved by a licensed BNPL provider.

In the ordinary course of an Afterpay BNPL arrangement, the merchant advertises Afterpay on its website (and sometimes external media), and through its checkout flow refers customers to Afterpay for the purpose of the customer obtaining credit (though Afterpay is not the only payment method presented by the merchant at checkout).

The draft legislative package is based on Option 2 in the Treasury Options Paper. That paper states that this option "would not require merchants who offer BNPL products to consumers to be an authorised credit representative of the BNPL provider". This recognises the fact that regulating merchants as credit service providers (particularly in circumstances where the BNPL provider is itself regulated) would place an unnecessary burden on such merchants without a clear benefit to the consumer.

We note that the financial services licensing regime explicitly exempts a merchant's conduct in advertising the availability of a payment method (which would constitute a regulated non-cash payment facility) from the definition of a 'financial service' (see regulation 7.6.01(1)(l) of Corporations Regulations 2001). We note that there is also an exemption in that regime for passing on 'prepared documents' prepared by a third party in certain circumstances (see regulation 7.1.31 of the Corporations



Regulations 2001). The inclusion of a similar exemption for merchants that introduce their customers to BNPL contracts has been proposed in the consultation on draft legislation for BNPL in the UK.⁸

We recommend an amendment to the draft legislative package, or a new note in the explanatory material or RG 203, to clarify that a merchant is not 'acting as an intermediary' (and, as such, providing a 'credit service') if they advertise the availability of BNPL as a payment method or participate in promotional activities using material approved by a licensed BNPL provider.

Removal of interest rates and charges disclosure requirements

Recommendation:

- Amend the Credit Code to remove the application section 17(10) to LCCC providers.

The draft Bill amends section 17 of the Credit Code to provide that if a credit contract is an LCCC and no interest charges are payable under the LCCC, then subsections 17(4) to (6) of the Credit Code do not apply to the LCCC. **This carve-out should extend also to the following provisions:**

- **Statements of Account:** Currently section 17(10) of the Credit Code does not apply to credit contracts where the annual percentage rate is fixed for the entire term and there is no provision for varying the rate. In our view, the obligation to provide statements of account for LCCCs should, then, not apply where there are no interest charges payable at all. This is consistent with the policy objective of this requirement, which is to enable customers to readily assess their positions by reviewing their account online. Alternatively, the maximum period for providing a statement of account should be 6 months, which is consistent with section 33 of the Credit Code applying to contracts that are not considered continuing credit contracts.
- **Disclosure documents and notices:** Certain notices required for current regulated credit under the Credit Code and the Privacy Act 1988 (**Privacy Act**) are not appropriate for BNPL arrangements. Adjustments should be made to these requirements to reflect the relative simplicity and transparency of BNPL contracts (particularly where no interest is charged). For example:
 - Section 36 of the Credit Code - statement of amount owing
 - Section 38 of the Credit Code - disputed accounts notice
 - Section 65 of the Credit Code - notice of repayment changes
 - Section 71(1) of the Credit Code - notice of agreed changes to the contract
 - Section 71(3) of the Credit Code - notice of increase in the amount of credit provided
 - Section 83 of the Credit Code - statement of payout figure
 - Section 21P of the Privacy Act - notice of decline, where a lender refuses an application due to credit reporting information

⁸ HM [Treasury Regulation of Buy-Now Pay Later Consultation on draft legislation](#).



Default notices

Recommendation:

- Amend the form requirements that apply to an electronic section 87 notice given by a LCCC provider. The requirements should allow for the provision of a simpler notice of payment failure by in-app notification.

The draft Bill makes a number of amendments to the Credit Code in relation to the obligations of a credit provider if a default in payment by direct debit occurs. It seeks to expand the first time default notice requirements in section 87 to apply beyond direct debits to cover a broader range of payment types, including creditor-initiated charges on a credit card and creditor-initiated charges via the New Payment Platform's PayTo service.

Under this proposal, the requirements in section 87 would apply to Afterpay, as we obtain authorisation to charge the customer's nominated payment method. In practice, if Afterpay's attempt to charge the customer's nominated payment method for a scheduled payment fails, Afterpay provides a message to the customer immediately, and they are charged a late fee.

We acknowledge that a requirement to give information in writing (such as a requirement to give a notice) under the Credit Code may be given under the Electronic Transactions Act 1999 (see section 188(2) of the Credit Code), unless an exemption applies under the Electronic Transactions Regulations 2020. We note that a section 87 notice is not subject to an exemption (as is, say a section 88 notice) and, as such, may be given electronically (such as using an in-app notification). That said, the notice would have to be given using the prescribed form, currently Form 11A in the NCCP Regulations. This form is very prescriptive and not suited for an electronic notification (such as in-app messaging). **The draft Regulations should amend the form requirements that apply to an electronic section 87 notice given by a LCCC provider.** They should ensure that the requirements that apply to such a notice allow for the provision of a simpler notice of payment failure by electronic (such as in-app messaging) notification.

7. Technical comments

Recommendation:

- Structure references to dollar amount thresholds so that LCCC providers can apply round numbered thresholds.

As a technical point, we recommend that references to dollar amount thresholds in the draft legislative package be structured so that LCCC providers can apply round numbered thresholds.

For example, the Regulations should refer to spending limits of "\$2,000 or less" or "\$5,000 or less" rather than "less than \$2,000" or "less than \$5,000". The former means that there is a category of consumers for whom a spending limit of up to \$2,000 or \$5,000 can be offered in a particular way, rather than a spending limit of up to \$1,999 or \$4,999.



8. Commencement

Recommendation:

- Commencement 12 months after Royal Assent.

Given the complexity and resources required to implement these reforms, we recommend a commencement date of 12 months after the legislative package receives Royal Assent.

The reforms will impact a range of BNPL providers, including smaller FinTechs and more established providers, which have varying capacities to quickly respond and adapt to regulatory change, including participation in partial credit checks and the associated reciprocity obligations. This diversity should be taken into consideration. Further, implementation will be partly dependent on resource constraints and the availability of software engineers and other technical roles to design and implement internal product changes and integrate external requirements, including affordability assessments. In addition to technical design work, providers will need ample time to conduct commercial due diligence processes for the procurement of a number of business-critical services.

Conclusion

Thank you for the opportunity to make this submission. We look forward to ongoing engagement with Treasury. Please do not hesitate to contact us if you require further information.