

28 June 2024

Senator Jess Walsh
Chair of the Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Walsh,

RE: TREASURY LAWS AMENDMENT (RESPONSIBLE BUY NOW PAY LATER AND OTHER MEASURES) BILL 2024 ('THE BILL')

The Australian Finance Industry Association (AFIA) is the only peak body representing the entire finance industry in Australia.¹ We appreciate the opportunity to respond to the Committee's inquiry into the provisions of the bill.²

We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia.

¹ [Australian Finance Industry Association \(afia.asn.au\)](https://afia.asn.au).

² https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABBuyNowPaylater.

Introductory Comments

The Australian Finance Industry Association (AFIA), represents 90 per cent of the Buy Now, Pay Later (BNPL) sector.³ Our members who offer BNPL products and services include: Afterpay, Brighte, Humm Group, Klarna, Payright, Plenti and Zip Co.⁴

We appreciate the opportunity to make a submission to the Senate Economics Legislation Committee ('the Committee'), regarding your [inquiry](#) into the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 (['the bill'](#)).

AFIA welcomes the Government's approach to regulating BNPL in a manner that is, in the Minister's words 'scalable', 'technologically neutral' and 'the right fit for the risk level' of BNPL products.⁵

We are committed to ensuring high standards across the BNPL sector. This is why we support the legislation which has been put forward. It also is why AFIA CEO, Diane Tate, has said publicly:⁶

AFIA will continue to work with the Government, industry and stakeholders as the new laws go through the Parliament. Proportionate regulation and self-regulatory practices are important tenants of our co-regulatory framework, enabling our BNPL members to meet community standards and legal obligations, strengthen trust in the finance industry, and improve customer outcomes.

AFIA has been on the front foot supporting high standards across the BNPL sector. We championed the introduction of the world-first BNPL Code of practice in March 2021, which articulated many requirements for Code signatories on which this legislation builds. These include:⁷

1. requirements that BNPL providers will have to be a member of the Australian Financial Complaints Authority ('AFCA').
2. the principle that BNPL providers must have reasonable caps on fees and charges.
3. the principle that BNPL providers will have to implement and clearly articulate their processes for dispute resolution and financial hardship arrangements.
4. the use of affordability checks for certain BNPL products and services.

³ AFIA's submission to Treasury on Regulating BNPL in Australia ([22 December 2022](#)), 1.

⁴ AFIA, *BNPL Code* ([June 2024](#)).

⁵ Hon Stephen Jones MP (Assistant Treasurer and Minister for Financial Services), *Address to the Responsible Lending & Borrowing Summit* ([22 May 2023](#)).

⁶ AFIA, *AFIA Welcomes BNPL Legislation: An Innovative, Competitive, and Sustainable Sector for the Future* ([5 June 2024](#)).

⁷ Ibid.

AFIA also supports the requirement for all BNPL providers to hold an Australian Credit Licence ('ACL').⁸

In short, we support regulation of the BNPL sector in a way that maintains competition and innovation, while also ensuring high standards of conduct from industry and appropriate consumer protections, especially for customers those doing it tough, including experiencing financial difficulties and customer vulnerability.⁹

The BNPL sector has worked hard, alongside AFIA, to ensure good consumer outcomes. When it comes to financial hardship and complaints, we note that as at 30 June 2023:¹⁰

- only 0.36 per cent of active BNPL accounts were subject to financial hardship arrangements
- this number is down 0.03 per cent from the preceding year.

Furthermore, between 1 July 2022 and 30 June 2023, we note that, according to AFCA data, among AFIA Code signatories:¹¹

- there were only 1,391 BNPL-related complaints
- only 0.3 per cent of BNPL accounts were subject to EDR complaints at AFCA
- AFCA received 96,987 complaints overall in this period, meaning only 1.43 per cent of all complaints heard by AFCA relate to BNPL.

These statistics demonstrate the rates of financial hardship and complaints directly related to BNPL are extraordinarily low as a percentage of the 5.2 million overall active accounts.¹²

Furthermore, the BNPL sector has consistently supported ensuring high standards and strong consumer protections, through supporting AFIA's BNPL Code of Practice and our Interim Guidance Supporting Customers Experiencing Vulnerability.¹³

While addressing legitimate concerns related to the BNPL sector, the Government must be careful not to stifle competition and innovation in a way could negatively impact jobs and economic growth.

⁸ AFIA, *AFIA Welcomes BNPL Legislation: An Innovative, Competitive, and Sustainable Sector for the Future* (5 June 2024).

⁹ Ibid.

¹⁰ BIS Oxford Economics, *The Economic Impact of Buy Now Pay Later in Australia* (June 2024), 30.

¹¹ Ibid.

¹² Ibid.

¹³ AFIA, *BNPL Sector Working to Support Vulnerable Customers* (23 December 2023).

In this regard, we welcome the Government’s recognition of previous research from BIS Oxford Economics showing that BNPL supported over 120,000 Australian jobs and added up to [\\$18.4 billion](#) to Australia’s Gross Domestic Product (‘GDP’) in 2021-22.¹⁴

In fact, updated research from BIS Oxford Economics shows that in 2022-23, BNPL supported 149,600 Australian jobs and added \$22.9 billion to Australian GDP.¹⁵ This shows that the innovative BNPL sector continues to play a pivotal role in supporting Australian jobs and economic growth.

It is also noteworthy that other economic benefits of BNPL include:¹⁶

- gross benefits to consumers of over \$422 million in 2022-23, through lower fees and charges in comparison to other financial products. This is up from \$337 million in 2021-22
- gross benefits to retailers of over \$4.3 billion in 2022-23, up from \$3.5 billion in 2021-22
- 148,000 retailers, including many small businesses, benefit from providing BNPL as an option to their customers
- there are over 5.2 million active BNPL accounts, showing that Australians want to use BNPL
- the average transaction value was just \$132 in 2022-23, this is down from \$136 in 2021-22 and \$151 in 2020-21.

Given, in Treasury’s own words, ‘the great majority of consumer usage’ is concentrated around ‘low value’ products, it is critical that regulation of the BNPL sector be handled in a way which is scalable, targeted, proportionate and commensurate with the risks involved in the product.

For these reasons, we support the Government’s proposed sensible approach. We agree with Minister Jones that:¹⁷

The new laws get the balance right between consumer protection, innovation and competition.

Notwithstanding our broad support of the package proposed, as outlined above, we attach for the Committee’s consideration our submission which was provided to Treasury of the draft legislation in **Appendix A**.

¹⁴ Hon Stephen Jones MP (Assistant Treasurer and Minister for Financial Services) *Government introduces consumer protections for Buy Now Pay Later* ([5 June 2024](#)).

¹⁵ BIS Oxford Economics, *The Economic Impact of Buy Now Pay Later in Australia* (April 2024), 18.

¹⁶ *Ibid*, 22-23.

¹⁷ Hon Stephen Jones MP (Assistant Treasurer and Minister for Financial Services) *Government introduces consumer protections for Buy Now Pay Later* ([5 June 2024](#)).

We separately attach our latest report on the Economic Impact of BNPL in Australia, conducted by BIS Oxford Economics, as **Appendix B**.

Given the minimal variation between the [draft](#) legislation and the [bill](#) as introduced, we wish to note the following specifically:

1. We support the modification power which has been inserted in clause [133BXF\(4\)](#) of the bill as introduced, which allows for the threshold distinguishing between higher and lower value BNPL products, currently \$2,000, to be changed by ministerial regulation. This allows for fluctuations over time in line with inflation and other macroeconomic considerations.
2. AFIA notes that while the draft package included [draft regulations](#), this bill has been released without any access to the final version of those regulations. Given much of the substance of the reforms is contained within the regulations, not the legislation, we ask that there be detailed consultation on a final version of the regulations, to allow for appropriate industry feedback. Some areas where this would be most helpful include in relation to the proposed fee caps, the nature of the Scalable Responsible Lending Obligations ('SRLOs') and the threshold distinguishing between lower value and higher value products.
3. In accordance with **Recommendations 14 and 16**, in **Appendix A**, from our previous submission to Treasury on the draft legislation, AFIA suggests the product suitability requirements, in relation to requirements and objectives, for BNPL arrangements are not proportionate to the nature of the product and should be removed. This would more closely align with the approach taken in New Zealand, where BNPL providers will be exempt from certain product suitability requirements that apply to traditional credit products, in recognition of their low cost and low risk nature. In this instance, we generally support the principle of alignment with the regime introduced by the NZ Labor Government, to facilitate compliance for entities operating in both jurisdictions.¹⁸
4. AFIA maintains our positions in **Appendix A on Recommendations 13 and 14**, from our earlier submission on the draft package. We maintain our view that the threshold should:
 - remain in the regulations and be indexed annually with the Consumer Price Index (CPI)
 - the regulation 28HAD requirements should be able to be satisfied using a combination of reasonable consumer benchmarks, including but not limited to: the Household Expenditure Measure (HEM), based on a customers income, age, credit score and any other information provided by the customer regarding income and expenses.¹⁹

¹⁸ Ministry of Business, Innovation and Employment ('MBIE')(NZ), *Buy Now, Pay Later* – notes the NZ regime was announced in October 2022, under the Former Labor Government of Prime Minister Jacinda Ardern GNZM.

¹⁹ University of Melbourne, Household Expenditure Measure ('HEM').

- the 'reasonable belief' test in regulation 28HAD(5) should be removed as it is disproportionate to the amount of credit being provided for the reasons outlined in **Appendix A**.
5. Regarding the forthcoming final version of the regulations, we reiterate that for the reasons provided in **Appendix A on Recommendation 17** of our last submission, the caps on fees and charges should be increased to the greater of:
- \$400 in the first year and \$250 in the second and subsequent years, OR²⁰
 - Half the annual equivalent rate currently permissible under the statutory formula in sections 32A and 32B of the National Credit Code (therefore 'Low Cost Credit' in relation to other products).
6. AFIA reiterates of position in **Recommendation 4 in Appendix A**, for the reasons provided in our earlier submission. We recommend clarifying in the definition of 'BNPL arrangement' and 'LCCC provider' that merchants offering a BNPL service are captured as 'LCCC providers'.

In general, apart from the specific suggestions outlined above, AFIA otherwise supports the bill.

AFIA welcomes regulation of BNPL in a way which will ensure Australia maintains 'an innovative, competitive, and sustainable' BNPL sector.²¹

Thank you again for the opportunity to contribute a submission to this important inquiry.

Should you wish to discuss our submission further, please feel free to contact me at [REDACTED] or [REDACTED], or AFIA Policy Director, Sebastian Reinehr, at [REDACTED] or [REDACTED].

Yours sincerely

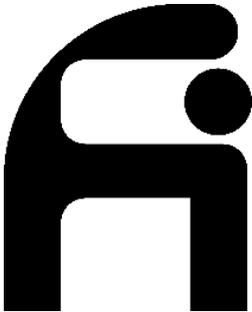
[REDACTED]

Diane Tate
Chief Executive Officer

²⁰ This is the currently proposed amounts with the values adjust for the inflation since 2010.

²¹ AFIA, *AFIA Welcomes BNPL Legislation: An Innovative, Competitive, and Sustainable Sector for the Future* ([5 June 2024](#)).

APPENDIX A – AFIA’S SUBMISSION TO TREASURY ON BNPL REGULATORY REFORMS (9
APRIL 2024)



Australian
Finance
Industry
Association

9 April 2024

Daniel McAuliffe
Director – Credit Law
The Treasury
Langton Crescent
Parkes, ACT 2600
Email: [REDACTED]

Dear Mr McAuliffe,

BNPL REGULATORY REFORMS

The Australian Finance Industry Association (AFIA) is the only peak body representing the entire finance industry in Australia. We appreciate the opportunity to respond to Treasury’s consultation on the BNPL Regulatory Reforms (“the consultation”).²²

We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia’s future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia.

²² [Buy Now Pay Later regulatory reforms | Treasury.gov.au](https://www.treasury.gov.au/consultations/bnpl-regulatory-reforms).

INTRODUCTORY COMMENTS

AFIA welcomes the opportunity to respond to this consultation on the Buy Now, Pay Later ('BNPL') regulatory reforms. We are proud to represent around 90 per cent of the BNPL market.

AFIA has been at the forefront of ensuring high standards across the BNPL sector. We introduced the world leading BNPL Code of Practice ('the BNPL Code'), effective since March 2021. Code signatories commit to going above and beyond the law, setting best practice standards for the sector and strengthening consumer protections. The BNPL Code does this while preserving customer choice to make purchases and payments in a way that suits their needs and preferences.²³

The Code has also been complemented with AFIA's release of interim guidance to support customers experiencing vulnerability.²⁴

Our previous submissions on this matter have outlined our support for a regime which regulates BNPL in a which is, in Treasury's words, 'tailored' to the unique nature of BNPL products.²⁵ We welcome the Government's adoption of this approach, with the Minister stating in his speech announcing BNPL regulation that:²⁶

*The responsible lending regime will be central to our approach. However, our legislation ensures that the obligations on BNPL providers are **scalable and technologically neutral**. We will make sure they are the **right fit for the risk level of their products**.*

Regulation of BNPL products should be done in a way that recognises the significant benefits of BNPL products, as indicated in the Explanatory Memorandum, which states:²⁷

New credit products, such as BNPL arrangements, can offer consumers a cheaper and easier way to access forms of credit when compared to most traditional forms of credit such as credit cards.... These new credit products have a range of benefits to both consumers and the economy. They also place competitive pressure on traditional forms of credit, reducing the cost of some products and triggering innovation in product design. BNPL has also generated increased business for merchants, as consumers have been able to access additional forms of credit to spend on goods and services.

²³ BNPL Code of Practice ('the Code').

²⁴ AFIA's Interim Guidance on Supporting Customer's Experiencing Vulnerability (29 December 2023)

²⁵ Commonwealth Treasury, *Regulating Buy Now, Pay Later in Australia: Options paper* (November 2022), 20.

²⁶ Hon Stephen Jones MP, Assistant of Treasurer and Minister for Financial Services, Speech to the Responsible Lending and Borrowing Summit (22 May 2023).

²⁷ Explanatory Memorandum, Treasury Laws Amendment Bill 2024: Buy Now, Pay Later, 4.

Research shows the following benefits with respect to BNPL products:²⁸

- They support over 140,800 Australian jobs
- They add over \$19 billion in economic activity each year
- They have helped over 148,000 retailers receive over \$3.4 billion in new revenue annually
- 5.2 million Australians actively choose to use BNPL accounts.

The following factors limiting BNPL risk should also be considered when determining regulation:

- The average value of a BNPL transaction is just \$132.²⁹
- Treasury has previously acknowledged that ‘the great majority of consumer usage’ is concentrated around ‘low value’ products.³⁰
- HM Treasury in the United Kingdom (UK) has also indicated BNPL products are ‘inherently lower risk than interest bearing credit products’.³¹
- BNPL products are ‘equivalent to around 2 per cent’ of all Australian card purchases, as defined by the Reserve Bank of Australia (RBA). This means they constitute a small percentage of total transactions.³²
- BNPL products have exceptionally low rates of complaints and financial hardship assistance.
 - Internal Dispute Resolution (IDR) complaints to BNPL providers directly are low at only 0.1-0.2 complaints per hundred active accounts.³³
 - External Dispute Resolution (EDR) complaints to AFCA are low at just 0.03 per of active accounts.³⁴
 - Financial hardship assistance rates are at just 0.36 per cent.³⁵

Given the substantial benefits flowing from BNPL products and the significant factors demonstrating risk mitigation, in principle we support the approach proposed by Treasury. We believe regulation should be proportionate, targeted and scalable to achieve an appropriate balance between consumer protection, choice, competition and innovation. We can see this is the general approach adopted in the legislative package.

In **Attachment A**, we make some specific technical recommendations as to how to improve the proposed scheme, which relate specifically to:

1. the definition of BNPL
2. the scalable/modified Responsible Lending Obligations (RLOs)

²⁸ Updated market research using industry and external research. Survey data is forthcoming.

²⁹ Ibid.

³⁰ Commonwealth Treasury, *Regulating Buy Now, Pay Later in Australia: Options paper* (November 2022), 25.

³¹ HM Treasury (UK), *Regulation of Buy-Now Pay-Later: Response to Consultation*, 16[3.1].

³² Payments System Board Annual Report (2023), Chapter 2 – The Evolving Retail Payments Landscape.

³³ Industry data.

³⁴ Ibid.

³⁵ Ibid.

3. reasonable inquiries for BNPL products under and over \$2,000
4. suitability assessments in relation to 'requirements and objectives'
5. the limitations on fees and charges
6. credit limit increases
7. suggested consequential amendments to the Credit Act.

For the avoidance of doubt, this submission is made with reference to the following materials:

- The Treasury Laws Amendment Bill 2024: Buy Now, Pay Later (['the bill'](#)) and the accompanying explanatory memorandum (['the explanatory memorandum'](#)).
- The National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024 (['the regulations'](#)) and the accompanying explanatory statement (['the explanatory statement'](#)).

CLOSING COMMENTS

I would appreciate the opportunity to discuss our recommendations with you further.

AFIA looks forward to continuing to work with the Government on the new regime for BNPL. Concurrently, we will continue to work with our members on updating AFIA's BNPL Code of Practice to adopt the recommendations of the independent review and ensure that it explains the legislation and continues to reflect best practices in the BNPL sector.³⁶

AFIA encourages all BNPL providers to become a code signatory, recognising the important role of industry codes in complementing laws and regulations and promoting good consumer and industry outcomes, especially due to the rapid changes taking place across the finance industry.

Should you wish to discuss our submission or require additional information, please contact me at [REDACTED] or AFIA Policy Director, Sebastian Reinehr, at [REDACTED]

Yours sincerely

[REDACTED]

Roza Lozusic
Executive Director, Policy and Public Affairs

³⁶ [BNPL Code — AFIA](#)
Australian Finance Industry Association
ABN 13 000 493 907

CONTENTS

INTRODUCTORY COMMENTS	8
CLOSING COMMENTS	10
ATTACHMENT A: AFIA's Detailed Recommendations	12
Contents.....	11
1. The definition of BNPL	12
2. The scalable/modified RLO regime	14
3. Inquiries required for BNPL products under and over \$2,000	16
4. Suitability assessments – ‘requirements and objectives’	19
5. Limitations on fees and charges	20
6. Credit limit increases.....	22
7. Suggested consequential amendments to the Credit Act	23
8. Transitional arrangements.....	24

AFIA'S DETAILED RECOMMENDATIONS

1. The definition of BNPL

The sections relevant to the definition of BNPL in the bill are sections 13C and 13D.

Relevantly, section 13C provides that a Low Cost Credit Contract ('LCCC') is either:

- A BNPL contract, as defined in section 13D, or
- A 'contract prescribed by regulation...'
- To meet the definition of LCCC, a BNPL contract must satisfy the proposed requirements in regulation 69E, on fees and charges³⁷
- The bill delegates to the regulations the power to set either:
 - Time period limitations on the definition of an LCCC³⁸
 - Additional criteria which must be met for the contract to qualify as an LCCC.³⁹

The term terms 'BNPL contract' and 'BNPL arrangement' are separately defined in section 13D.

No time limitations referred to above are currently stipulated in the regulations.

AFIA recognises the bill allows for other products to be designated a 'LCCC' in the future. We understand this provides the Government flexibility to add other, emerging and new products, which is important as the market continues to evolve as customer preferences direct the development of new products, services and technologies. However, we believe that it is important to ensure that a 'BNPL arrangement' should be clearly designated in the legislation. In practice, this means that BNPL involves an arrangement to facilitate the payment for a good or service, and not for generally accessing cash.

Recommendations:

Recommendation 1 - AFIA seeks clarity as to whether it is the Government's intention to introduce a time period limitation for LCCCs.⁴⁰ If such a time period limitation were to be subsequently introduced, we would request a further consultation on these requirements as they could fundamentally affect which products are and are not included, both within the scalable/modified

³⁷ Section 13C(1)(d).

³⁸ Section 13C(1)(c).

³⁹ Section 13C(1)(e).

⁴⁰ As contemplated by s 13C(1)(c).

RLOs and within the *National Consumer Credit Protection Act 2009* (Cth) ('the Credit Act') more generally.

Recommendation 2 - AFIA recommends that, where new products are included in the definition of LCCC by ministerial designation, there should be a separate consultation held each time.⁴¹ It should also be clear that such designations are subject to parliamentary scrutiny and disallowance, per the usual process.⁴²

Recommendation 3 - AFIA recommends that, as much as possible, the definitions of both LCCC and BNPL arrangement/contract should align with the existing definition of BNPL in the BNPL Code, which has been in operation for over 3 years, to allow for consistent application.⁴³

Recommendation 4 - AFIA recommends clarifying in the definition of 'BNPL arrangement' and 'LCCC provider' that merchants offering a BNPL service are captured as 'LCCC providers'. This is necessary because:

- 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.⁴⁴
- This definition would inadvertently permit retailers to provide BNPL directly to their customers in an unregulated way, contrary to the intention of the legislation.

Recommendation 5 - Clarification is needed for contracts that do not meet the definition of a LCCC but are still otherwise capable of coming under the short-term credit exemption and continuing credit contract exemption of the *National Consumer Credit Protection Act* (NCCP) Act.

- It is possible for some BNPL providers to have multiple arrangements with customers, some of which fall within the definition of LCCC and some that do not meet the definition. For example, because there is no payment to the merchant. These arrangements may otherwise fall within the existing short-term credit exemption or continuing credit exemption.
- In such circumstances, it would be beneficial to confirm that a BNPL provider can continue to have both arrangements and that the fee caps and late fee caps will continue to operate independently.

⁴¹ Section 13C(b)(ii).

⁴² *Legislation Act 2003* (Cth). See too Parliament of Australia, *Guides to Senate Procedure: Disallowance* ([July 2022](#)), 1.

⁴³ [BNPL Code of Practice](#), 19.

⁴⁴ Section 13D(1).

Recommendation 6 - AFIA recommends that the term 'retail client' in the bill be amended to refer to 'consumer(s)'. We believe a traditional distinction between retail and wholesale client is not appropriate. All 'consumers' should have the same protections under the new regime. This is content with AFIA's BNPL Code of Practice.⁴⁵

Recommendation 7 - AFIA wishes to clarify that third parties providing brokerage services in relation to 'BNPL arrangements and contracts' under clause 13D(2) are not themselves regulated as BNPL providers.

Instead, brokerage providers in the context of BNPL should continue to be regulated under the existing provisions of the Credit Act which relate to 'credit assistance' under both [section 8](#) and [Part 3-1](#) of the existing Credit Act.

Further, regulation 69E should be amended to clarify that where third parties charge fees in relation to a BNPL arrangement, those fees should be included in the regulations' definition of fees 'payable under the BNPL contract'.

This recommendation is intended to clarify that brokers cannot be used to circumvent the scheme established by the bill.

Instead, brokers continue to be regulated under the existing Credit Act obligations for third parties providing credit assistance, as outlined above.

2. The scalable/modified RLO regime

The scalable/modified RLO regime is outlined in Part 3-2BA of the bill.

It is explained in section 133BXA, which outlines that:⁴⁶

- A licensee may elect that this Part applies in relation to 'some or all' LCCCs they provide
- A licensee must keep a written copy of such an election from the time which it is made until six years after the election is revoked.

Under the scalable/modified RLOs, it is 'presumed' that BNPL contracts valued at less than \$2,000 are 'not unsuitable', with reference to s 131(2)(b) of the Credit Act.⁴⁷

⁴⁵ Sections 13C and 13D.

⁴⁶ Specific election must be made under s 133BXA.

⁴⁷ Section 133BXF(2) of the bill.

If BNPL providers do not choose to apply the scalable/modified regime, then the traditional RLOs outlined in ss 128-131 of the Credit Act would apply.⁴⁸

Recommendations:

Recommendation 8 -AFIA supports the optional application of the scalable/modified RLOs and the concept of a rebuttable presumption in s 133BXF(2) of the bill.

Recommendation 9 -AFIA seeks further clarity on the form which the written election declaration in 133BXA must take. The final report of the independent review of the BNPL Code of Practice recommended changes be made to the provisions relating to suitability assessments, and we would envisage that as part of updating the Code we would develop an example declaration or template. Further clarity is also required as to how this declaration must be stored and whether it needs to be provided to any external regulator.

Recommendation 10 - AFIA seeks further examples in the explanatory memorandum of when a lower scalable RLO is acceptable and when a more robust analysis would be required under the scalable RLOs. The example currently provided falls at the more outlier end of the spectrum and more granular and real-life examples of when the information received suggests further steps are required would be useful.⁴⁹

Recommendation 11 - AFIA recommends all references to the term providing credit which is 'not affordable' to the consumer in the draft legislation should be replaced with references to providing credit where the consumer could not comply with their obligations without facing 'substantial hardship'.⁵⁰ This is preferable because the term 'not affordable' is currently undefined. By contrast, the term 'substantial hardship' is a well-established legal term, which carries with it a substantial body of existing case law and therefore provides greater certainty.

Recommendation 12 -Section 133BXD(3)(c), would require that BNPL providers make reasonable inquiries into: 'whether the consumer belongs to a **class of persons** whose members are **likely to be financially vulnerable**'.

⁴⁸ See too *Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 at [81]. Upheld on appeal in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 at [131], [141] and [171].

⁴⁹ Explanatory Statement, 4.

⁵⁰ See for example the draft bill's s 133BXD(3)(d)-(e).

The term ‘**financially vulnerable**’ is not defined and therefore will cause significant uncertainty in comprehending the precise nature of what is required by the regime.

This confusion is significantly exacerbated by the vague qualified ‘**likely to be**’, which broadens the class out to not only those who are known to be financially vulnerable, but any number of customers who could conceivably possibly meet the undefined criterion of being ‘**financially vulnerable**’.

Finally, the focus on belonging to a ‘**class of persons**’ deviates from the individual-based assessment which is required under the Credit Act as a whole.⁵¹ This is undesirable, inconsistent with existing law and risks inviting improper discrimination against certain classes of people.

For these reasons the proposed section 133BXD(3)(c) should be removed entirely, as it is inconsistent with the need to form reasonable beliefs based on a consumer’s individual circumstances.⁵²

3. Inquiries required for BNPL products under and over \$2,000

Under the regulation 28HAD, there are different requirements regarding the inquiries that need to be made for BNPL products depending on if they are valued over or under \$2,000.

Regardless of the value of the BNPL product, consumers must ‘seek to obtain’ information about:⁵³

- the consumer’s income
- the consumer’s expenditure
- details on other LCCCs, small amount credit contracts or consumer leases of the consumer.

In relation to these categories of information, the explanatory statement indicates:⁵⁴

It is open to the LCCC licensee to determine how, from where, and in what form to obtain this information. The Regulations do not prescribe any particular source, means or format.

*However, these things may influence the licensee’s **belief in the accuracy** of the information.*

The explanatory statement further indicates that, in assessing these categories of information, the BNPL provider must: ‘*reasonably believe that the information it has regard to is accurate*’.⁵⁵

⁵¹ Sections 130(1)(a)-(e) of the Credit Act.

⁵² Sections 128-132 of the Credit Act.

⁵³ Explanatory Statement, 5. See too Regulation 28HAD(5).

⁵⁴ Explanatory Statement, 5.

⁵⁵ Explanatory Statement, 4.

In addition to the requirements above, BNPL providers must 'seek to obtain' the following:

- For products **under** \$2,000, a **negative credit check**, as defined by regulation 28HAD(2).
- For products **over** \$2,000, a **partial credit check**, as defined by regulation 28HAD(3), which includes Consumer Credit and Liability Information ('CCLI') within the meaning of the *Privacy Act 1988* (Cth) ('the Privacy Act').

As noted above, for products under \$2,000, there is also a presumption that the BNPL product will be suitable, unless the contrary is proven.⁵⁶

Recommendations:

Recommendation 13 - AFIA recommends that regulation 28HAD of the scalable/modified RLOs as outlined above, should be amended so that:

- the threshold distinguishing between lower value and higher value BNPL products should be increased.
- the threshold should remain in the regulations, not the legislation, and be indexed annually to increase in line with the Consumer Price Index (CPI) in order to futureproof the regime.
- the requirements in relation to regulation 28HAD(5) should only apply to BNPL amounts over the threshold, not amounts under the threshold.
- the 28HAD(5) requirements should be able to be satisfied using a combination of reasonable consumer benchmarks, including but not limited to: the Household Expenditure Measure (HEM), based on a customer's income, age, credit score and any other information provided by the customer regarding income and expenses.⁵⁷
 - AFIA notes It is often difficult for consumers to accurately determine their **income and expenses**, and even such a determination only represents a point in time assessment which could be highly variable. For these reasons, the alternative criteria proposed are preferable to the current draft.

AFIA notes BNPL providers may choose to do more than what is outlined above, such as seeking partial credit checks on a wider range of products. In this respect we note the following:

- There is an ongoing review of the Credit Reporting Framework being conducted by the Attorney General's Department (AGD's).⁵⁸
- AFIA recommends further consideration of the use of credit checks should be undertaken holistically within that context.

⁵⁶ Section 133BXF(2) of the bill.

⁵⁷ University of Melbourne, Household Expenditure Measure ('HEM').

⁵⁸ AGD, Review of Australia's Credit Reporting Framework ([accessed 1 April 2024](#)).

- Any broader consideration of the wholistic use of credit checks conducted in the context of AGD’s Credit Reporting Review should recognise that other credit products, such as payday loans and consumer leases, are not currently required to provide information to the credit reporting system via credit checks.
- The Minister has described these other products as potentially ‘riskier’ than BNPL.⁵⁹
- The proposals for BNPL exceed traditional RLOs applied to other credit products by mandating credit checks.⁶⁰
- It is unclear why BNPL products should be singled out for more stringent and prescriptive requirements in Australia, especially when less onerous assessment approaches are being adopted in other comparable jurisdictions like New Zealand and the United Kingdom.⁶¹
- Furthermore, the proposals would not achieve their intended objective of providing a comprehensive insight into consumer liabilities. This is because the only financial institutions currently mandated to comprehensively participate in the credit reporting regime are the five entities defined as ‘large ADIs’ under the *Banking Act 1959 (Cth)* (‘the Banking Act’).⁶²
- Therefore, these proposals do not provide a comprehensive dataset.
- For these reasons, AFIA strongly recommends that the use of credit checks be considered more wholistically in the context of AGD’s Credit Reporting Review.

Recommendation 14 – the requirement for BNPL providers to have a ‘reasonable belief’ in the accuracy of the information should be removed and replaced.

- The current ‘reasonable belief’ test is a disproportionate requirement for what Treasury acknowledges are overwhelmingly ‘low value’ BNPL products.⁶³
- The example in the explanatory statement of a scenario, in which a customer provides an LCCC provider with a very high income and very low expenses, provides an extreme outlier case which is of minimal utility in determining what would and would not be ‘reasonable’ in more complex (and regularly occurring) scenarios.⁶⁴

⁵⁹ Hon Stephen Jones MP, Assistant of Treasurer and Minister for Financial Services, Speech to the Responsible Lending and Borrowing Summit ([22 May 2023](#)).

⁶⁰ Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial) [2019] FCA 1244 at [81]. Upheld on appeal in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 at [131], [141] and [171]. See too AFIA’s submission on the Treasury Options Paper on regulating BNPL in Australia ([22 December 2022](#)) at 3.

⁶¹ Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023. See too Norton Rose Fullbright, BNPL Regulation Around the World ([January 2023](#))

⁶² Mandatory participation in the comprehensive credit reporting (CCR) regime is limited to the Commonwealth Bank, ANZ, Westpac, NAB and Macquarie. These are the only financial institutions classified as ‘large ADIs’ under the [regulations](#) made pursuant to s 37G(3)(a) of the *Banking Act 1959 (Cth)*. Only ‘large ADIs’, worth over \$107 billion, are mandated to participate in the CCR, via Part 3-2CA of the *National Consumer Credit Protection Act 2009 (Cth)*, ss 133CN-133CQ. See too AFIA’s submission on the Treasury Options Paper on regulating BNPL in Australia ([22 December 2022](#)) at 14.

⁶³ Commonwealth Treasury, *Regulating Buy Now, Pay Later in Australia: Options paper* ([November 2022](#)), 25.

⁶⁴ Explanatory Statement, 4.

- Instead of requiring BNPL providers to obtain information that may or may not be reliable Treasury should instead align its approach with the BNPL regulations passed in New Zealand in September 2023. This requires BNPL providers (from September 2024) to have a credit policy which outlines how they account for information from credit reports in lending decisions.⁶⁵

Recommendation 15 – if the threshold distinguishing between lower value and higher value BNPL products is not increased, AFIA recommends that the scalable/modified RLOs should be amended to differentiate between categories which are ‘\$2,000 or less’ instead of the current ‘less than \$2,000’. This would allow for the inclusion of rounded credit limits in this category.⁶⁶

4. Suitability assessments – ‘requirements and objectives’

AFIA recommends the need to meet the consumers ‘needs and requirements’ should either be:⁶⁷

- removed for all LCCC contracts, or
- have the threshold for the rebuttable presumption increased, like recommendation 13.

This better aligns with the approach taken to these issues in comparable jurisdictions like New Zealand (NZ), as part of the regulations passed there in 2023. The NZ Ministry of Business, Innovation and Employment (MBIE), found that this requirement:⁶⁸

[Would 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.

Supporting this position, the Minister for Commerce and Consumer Affairs added:

[S]uitability 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.

⁶⁵ Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023 ss 18K(1) and 18K(4)(b).

⁶⁶ Section 133BXF.

⁶⁷ Section 133BXD(2)(a) and section 133BXD(6)(c).

⁶⁸ 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’ (9 August 2023).

Australian Finance Industry Association

ABN 13 000 493 907

There is an even stronger argument for this approach in Australia, given our Design and Distribution Obligations (DDOs), which are not in place in NZ, represent a significant form of outcomes-based consumer product that seeks to ensure products are distributed to an appropriate target market.

AFIA further recommends that the requirement to re-assess the 'requirements and objectives' test should be removed when a customer moves from a sub-\$2,000 product to a \$2,000-plus product. This seems unnecessary, given all other features of the product will remain identical.⁶⁹

Recommendation:

Recommendation 16 - In relation to the 'requirements and objectives' limb of suitability assessments, AFIA recommends the following:⁷⁰

- that this requirement should be removed for all LCCC contracts, or
- the threshold for the rebuttable presumption should increase, consistent with a higher overall threshold distinguishing between smaller and larger value BNPL products,
- at the very least, there should be no need for a further assessment of 'requirements and objectives' solely because a pre-existing credit limit is increased from below to above \$2,000.

5. Limitations on fees and charges

Regulation 69E adopts the fee caps from regulation 51 of the *National Consumer Credit Regulations 2010* (Cth) ('the Credit Regulations').

Under the proposed scheme, fees other than default fees are capped at:

- \$200 in the first year
- \$125 in each subsequent year
- Nil, where a consumer has more than one account with the same BNPL provider.

Default fees are capped at \$10 a month for each month the contract is in force.

These fee caps have not been changed in at least 10 years and are not adjusted based on inflation or the CPI.

⁶⁹ Section 133BXE.

⁷⁰ Section 133BXD(2)(a) and section 133BXD(6)(c).

This current fee structure also does not account for the situation where one BNPL provider may offer multiple different products, which have fundamentally different offerings.

The fixed nature of the present fee caps also does not account for the variable product structures of different BNPL offerings, which cover a wide range of values. It is difficult to limit a fee at a fixed price, given the changing economics and the range of different business models in the BNPL sector.

AFIA further notes that Unfair Contract Terms ('UCT') provisions already regulate appropriate levels of late fees.⁷¹

Recommendations:

Recommendation 17 - To account for the variable product offerings of BNPL providers, fee structures should have the option of being on a percentage of the overall purchase value.

Fee amounts should also be increased to keep pace with inflation, given the values in the Credit Regulations have not been updated since 2010.

Therefore, AFIA recommends BNPL providers should be able to charge the following amounts for fees other than default fees.

The **higher** of either:

- \$400 in the first year and \$250 in the second and subsequent years, **OR**⁷²
- Half the annual equivalent rate currently permissible under the statutory formula in sections 32A and 32B of the National Credit Code (therefore 'Low Cost Credit' in relation to other products).

The second limb of this test being an annual equivalent rate, would be able to be averaged over the life of the product, allowing for establishment costs.

AFIA also notes in this context that currently other traditional credit products do not face statutory caps on fees and charges under the Credit Act.⁷³

AFIA understands the importance of ensuring transparency regarding fees and charges for all finance products. However, imposing a flat fee cap does not recognise the different business models or customer usage preferences across the BNPL sector.

⁷¹ ASIC, *Unfair Contract Terms reforms commence* (9 November 2023).

⁷² This is the currently proposed amounts with the values adjust for the inflation since 2010.

⁷³ ASIC, *Loans and Credit Cards* (26 July 2022).

AFIA has previously published additional information regarding fees in the BNPL sector to provide consumers with clear information about the different fees and business models. We would continue to ensure these additional industry-level disclosures are made available and accompany the updated BNPL Code of Practice.

Recommendation 18 – In relation to default fees, the current proposal should be amended so the \$10 monthly limit on default fees (separate to all other fees and charges) is both:

- increased to a higher value, and
- amended to be indexed to CPI annually, to allow for price variations over time.

Recommendation 19 - Any fee caps which are imposed should be imposed at a per annum and customer level, not an account level.

AFIA believes that to help with transparency and simplicity, the test should be whether the cumulative amount of fees across all products offered by one BNPL provider exceeds the relevant fee cap in any 12-month period. This allows for consumers to use multiple different product types from the same BNPL provider, without the unintended consequence of nil fees being able to be charged on the second and subsequent products.

This would also avoid the unintended consequence where a customer may close their account temporarily, then re-open it. Under the current drafting, the second account (if opened within 12 months) would not be able to charge any fees whatsoever.

6. Credit limit increases

AFIA supports section 133BXE(6)'s definition of a 'protected period', which allows suitability assessments for certain BNPL products to remain valid for 2 years.

AFIA also supports the bill allowing BNPL providers to prompt customers to request an increase in their credit limit.⁷⁴ If this were not permitted, then BNPL providers might otherwise offer larger amounts in initial assessments.

Recommendation:

Recommendation 20 - AFIA supports the provisions related to credit limit increases that relate to the definition of 'protected period' and the allowance to prompt credit limit increases.

⁷⁴ Explanatory Memorandum, 7[1.36].
Australian Finance Industry Association
ABN 13 000 493 907

7. Suggested consequential amendments to the Credit Act

The bill amends section 17 of the National Credit Code (NCC), to provide that if a credit contract is an LCCC and no interest charges are payable, then subsections 17(4)-(6) of the NCC do not apply.

This carveout should also apply to the following provisions:

Statements of Account - currently section 17(10) of the NCC does not apply to credit contracts if the annual percentage rate is fixed for the entire term and there is no provision for varying the rate.

- The obligation to provide statements of account for LCCC should, then, not apply if there are no interest charges payable. This is consistent with the policy objective of this requirement, which enables 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 - all notices required for current regulated credit under the Credit Code are not appropriate for BNPL arrangements.

- Appropriate adjustments should be made given the relative simplicity and transparency of BNPL contracts (including where no interest charges are given). For example:
 - section 71(1) notices - agreed changes to the contract
 - section 71(3) notices - increase in the amount of credit deferred
 - disputed accounts notices
 - section 65 - notices of repayment changes
 - section 83 - statement of Payout Figure
 - section 21P of the Privacy Act - notice of Decline.

Recommendation:

Recommendation 21 - AFIA recommends the exclusions from the requirements in section 17 of the Credit Act already in the bill be extended to exclude the operation of section 17(10), as well as the requirements related to statements of account and disclosure documents and notices.

8. Transitional arrangements

AFIA notes that the bill indicates an intention to commence 6 months after Royal Assent.⁷⁵

A period of 12 months after receiving Royal Assent would better allow providers to update their systems and processes to comply with the new obligations.

The timing of license applications and variation also creates significant compliance risks. For example, what happens if a BNPL provider has validly lodged an application to vary their existing ACL with the Australian Securities and Investments Commission ('ASIC'), but this has not yet been processed prior to the legislated commencement date?

Recommendations:

Recommendation 22 - the legislation should not commence until 12 after receiving Royal Assent.

Recommendation 23 - a relief provision should be included in the legislation so that ASIC is able to provide individual or class relief in certain circumstances, including but not limited to licensing.

Specifically, we believe that ASIC should be able to issue relief so that licensees will not be in breach of the legislation:

- If they already have an ACL and any necessary variation applications are **received** by ASIC prior to the legislated commencement date.
- If they do not already have an ACL and any necessary applications to be granted an ACL are **received** by ASIC prior to the legislated commencement date.

In practice, this would mean where an application or variation has been made and for some reason, for example, administrative, there is a delay, that ASIC will be able to provide relief for a period.

The absence of relief provisions in other legislation has caused problems for ASIC and industry participants.

⁷⁵ Commencement provisions on page 1.
Australian Finance Industry Association
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