



Commonwealth
Bank

Regulating Buy Now Pay Later in Australia

Response to Options Paper

December 2022

1. Introduction

CBA welcomes the opportunity to contribute to the Australian Government's *Regulating Buy Now, Pay Later (BNPL) in Australia* consultation.

We believe BNPL can meet consumer expectations for a safe and contemporary form of short term credit. However, a current lack of regulatory oversight is resulting in some consumers accessing credit in ways that are problematic for them.

We support the Government's approach to strengthening protections for BNPL consumers under the *National Consumer Credit Protection Act 2009* (the Credit Act) and have long considered BNPL a form of credit. As articulated in the options paper, regulatory intervention should strike a balance between ensuring Australian consumers continue to benefit from BNPL, while also addressing consumer harms. We acknowledge the evidence presented in the options paper as to the regulatory issues with BNPL.

CBA supports a model of regulation that resembles an enhanced version of Option 2, being the proposal to bring BNPL within the Credit Act and apply obligations to BNPL providers to assess suitability and affordability. On top of what is proposed for option 2 CBA advocates mandatory obligations around credit reporting and tighter restrictions on credit limit increases.

We note Government is consulting in parallel on the regulatory framework governing payments,¹ and we believe as part of this, BNPL should be required to adhere to the ePayments Code, which should be mandated for all payment service providers.

Given the evidence of consumer harm in relation to some business models in the BNPL sector is now well documented, CBA encourages the Government to prioritise this important set of reforms.

2. StepPay

CBA is an active participant in the Australian BNPL market with our StepPay product providing our customers with choice and flexibility in how they make their payments.

As of December 2022 we had more than 300,000 StepPay customers making over 1.5 million transactions per month.²

StepPay is a digital-only BNPL product that can be accessed through an existing CBA customer's CommBank app and added to the digital wallet on their smart phone.

CBA customers can use StepPay to pay in-store, using tap and pay, or online anywhere MasterCard is accepted, up to their credit limit, without needing a physical card. Purchases of \$100 or more are split into four equal, fortnightly repayments, with the first instalment due immediately. For purchases under \$100 the full amount comes out of a linked CommBank transactional account in one instalment.

There are no interest payments in relation to StepPay, no monthly or annual fees, and customers are able to access their repayment schedule anytime in the CommBank app. Late payment fees apply, but these are capped at \$10 per purchase, with further limits, including no more than \$120 per year, no more than two late fees per purchase, and controls around further purchases when the account has insufficient funds.³ To use StepPay, customers need to be a current CBA customer.

In the design and development of StepPay, CBA engaged with a number of consumer advocacy bodies to seek their views on appropriate controls. StepPay is designed with guardrails in place to minimise customers spending beyond their means. CBA looks for evidence of affordability and performs standard credit checks.

¹ treasury.gov.au/sites/default/files/2022-12/c2022-343663-final.pdf

² [CBA Full Year Results 2022 Investor briefing pack](#)

³ www.commbank.com.au/banking/buy-now-pay-later/steppay.html, other limits on late fees also apply

CBA has an investment in BNPL provider Klarna, which has over 730,000 active users in Australia. Klarna does an assessment of ability to meet repayments, to help protect customers from taking on credit that would be harmful.

3. Need for regulatory reform

CBA's observations align with those outlined in Treasury's paper. Prior to the launch of StepPay in 2021, CBA data on consumers using other BNPL providers highlighted that they were more likely to fall behind on repayments, to receive some form of unemployment support, or experience financial hardship, when compared to a group with similar demographic characteristics not using those products. This correlation highlights the importance of assessing the suitability of the product for prospective customers.

CBA favours an enhanced version of Option 2. We consider this a pragmatic approach that balances the benefits BNPL has brought consumers with the need to address inadequacies in the regulatory protections currently in place.

Specifically, CBA makes the following observations in relation to its preferred options.

3.1 Australian Credit and Payments Licences

CBA supports amending the Credit Act to require BNPL providers to hold an Australian Credit Licence, with the general obligations covering internal and external dispute resolution, hardship provisions, compensation arrangements, fee caps and marketing.

We note the Government is currently also consulting on the regulatory framework for payments.⁴ We believe BNPL providers should be licensed as payment service providers. As part of this, BNPL providers should be required to adhere to the ePayments Code, as mandated for all payment service providers. Extending coverage of the ePayments code to BNPL would result in enhanced compliance monitoring, data collection, and additional protections relating to mistaken internet payments and unauthorised transactions.

3.2 Mandatory comprehensive credit reporting

BNPL providers should take reasonable steps to assess whether a product is right for a consumer, including by performing credit checks.

A recent academic paper towards which CBA contributed data analysed evidence of customers with multiple accounts. Relative to consumers with a single BNPL account, the average BNPL customer with multiple accounts is more likely to be from a lower socioeconomic area, more likely to be receiving government benefits, have a higher credit card utilisation rate, and use more personal loans.⁵ We estimate that approximately 40 percent of those using BNPL operate more than one account. CBA analysis from 2021 also showed customers with multiple accounts presented higher risk.

Treasury notes that under Option 2 BNPL providers would be able to engage more meaningfully with the existing credit reporting regime under the Privacy Act 1988, including repayment history information and hardship information in accordance with the Principles of Reciprocity and Data Exchange (PRDE).

⁴ [treasury.gov.au/sites/default/files/2022-12/c2022-343663-final.pdf](https://www.treasury.gov.au/sites/default/files/2022-12/c2022-343663-final.pdf)

⁵ Boshoff, E; Grafton, D; Grant AR; Watkins, J: *Buy Now Pay Later: Multiple Accounts and the Credit System in Australia* (2022) Available at SSRN papers.ssrn.com/sol3/papers.cfm?abstract_id=4216008

CBA strongly believes that participating in the comprehensive credit reporting framework should be made mandatory for BNPL providers, including checking with credit bureaux at the time of application and ongoing reporting of facility and payment behaviour.

Currently, only major banks are explicitly required to submit data under comprehensive credit reporting. However, under the PRDE any party consuming credit data must also contribute its own. This has seen high levels of participation among traditional credit providers beyond the major banks, as credit obligations have driven consumption, which has then required them to provide data as well.⁶

Given the scope for consumer harm arising from a lack of transparency of multiple conflicting obligations, the need for all BNPL providers to check with the credit bureaux before extending credit should be made explicit and leave no room for doubt, thereby triggering a requirement to contribute data as well.

3.3 Scalable Responsible Lending Obligations

CBA supports an approach whereby BNPL providers should be required to make an assessment of whether the customer can afford the credit sought. These provisions should be calibrated to risk. CBA has outlined our proposal for requirements at Appendix 1.

CBA has previously observed that opportunities exist to evolve requirements around assessing eligibility for credit in the regulated market, so that inquiries align better with the most reliable forward indicators of affordability.⁷ Any future reform of these rules should ensure calibration relative to risk across all credit products, including BNPL once it has been added to the Act and credit licensing framework.

3.4 Spending limits

CBA supports the option 2 provision that BNPL providers would be prohibited from increasing a consumer's spending limit without explicit instructions from the consumer. As an additional measure, CBA believes customers should have the option to deploy self-placed spending caps or to reduce their limits.

3.5 Industry Code

We note that Treasury has proposed under Option 2 that a strengthened Industry Code would be mandated, as described under Option 1. CBA's position is that if the regulatory framework adequately covers the issues outlined above then we see no need for a mandatory Code.

We note that the Design and Distribution Obligations (DDO) now apply to BNPL products. We believe there is some ambiguity regarding the application of DDO in instances where the customer's first engagement with the BNPL offering is in-store and facilitated by the merchant – and specifically, whether or not this constitutes distribution. We would welcome further clarity from Government in this regard.

4. Consideration of alternate options

Option 1 proposes that the Code be bolstered by a bespoke affordability test for BNPL products, as a substitute for integrating them into the credit licensing framework. Yet the paper also notes that BNPL is credit operating in a regulatory loophole. To pursue Option 1 would perpetuate this distortion. This would mitigate against coordinated regulatory development relating to credit products generally.

⁶ arca.asn.au/news-events/arca-credit-data-fact-base

⁷ CBA submission to the Senate Economics Legislation Committee Inquiry into the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, 3 February 2020

Option 1 also relies on the AFIA Code as a primary means to improve outcomes for customers of BNPL. The Code has been in place since early 2021, yet evidence of shortcomings in consumer protection are still apparent, while some indicators outlined by Treasury suggest harms may have increased. CBA is not currently a signatory to the AFIA Code. We believe our product substantially meets its requirements, but have determined that protections should go further. For example, under the Code, the requirement to perform a credit check only applies to loans of over \$15,000.

We do not believe incremental improvements to the Code will be sufficient to deliver effective protections to customers. Where BNPL products relate to small amounts it is sensible that graduated protections should apply – but this should occur within the existing framework. To the extent that framework needs further refinement, this should be a discussion that takes into account evidence from all credit products.

CBA advocates an approach that an enhanced Option 2, bolstered with obligations like mandatory credit reporting. Our recommendation stops short of Option 3, in recognition that a portion of BNPL products are of lower value and so present less risk. This does not obviate the pressing need for BNPL to be brought into the framework of the Credit Act, in the interests of improving customer welfare.

5. Related reforms

This consultation focuses on the regulation of BNPL relating to the end customer. A parallel priority area for reform relates to merchants and their ability to surcharge. BNPL transactions are typically expensive for merchants to accept. Currently, we understand merchants are precluded from passing on the cost of some BNPL offerings, by contractual arrangements enforced by those providers (this does not apply to CBA's StepPay product). We understand in that instance merchants are only able to surcharge equivalent to the cost of acceptance for transactions using eftpos, Visa or Mastercard, even though the cost of acceptance is much higher.

Without the ability to surcharge, merchants must spread the cost of BNPL transactions across all their customers. This is economically inefficient and means that customers who receive no benefit from BNPL are paying to support those using that payment method.

Government should ensure merchants can pass on BNPL-related acceptance costs to those customers benefitting from them, should they choose to. We note the Reserve Bank has established the case for reform in this area.⁸ "The Board's long-standing view...supported by developments in merchant service fees over the past two decades – is the right of merchants to apply a payment surcharge plays an important role in promoting competition in the payments system and keeps downward pressure on payment costs for businesses. If a business chooses to apply a surcharge to recover the cost of accepting more expensive payment methods, it results in more transparent price signals and may encourage customers to use a cheaper payment option."⁹ We urge Government to progress this reform.

⁸ C. Fisher, C. Holland, T. West, "Bulletin – March 2021 Payments Developments in the Buy Now, Pay Later Market", Reserve Bank of Australia, 18 March 2021. See also [rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/conclusions-paper-202110/pdf/review-of-retail-payments-regulation-conclusions-paper-202110.pdf](https://www.rba.gov.au/payments-and-infrastructure/review-of-retail-payments-regulation/conclusions-paper-202110/pdf/review-of-retail-payments-regulation-conclusions-paper-202110.pdf)

⁹ Reserve Bank of Australia, *Review of Retail Payments Regulation Conclusions Paper*, October 2021

Appendix 1. Proposed obligations around lending

Obligation	Brief overview of relevant existing RLO obligations	CBA's proposed application to BNPL
1. Make reasonable inquiries about the consumer	<p>For all consumers, licensee's must:</p> <ul style="list-style-type: none"> • make reasonable inquiries about the consumer's financial situation; and • make reasonable inquiries about the consumer's requirements and objectives. 	<p>BNPL credit licensees should be required to make reasonable inquiries about the consumer's financial situation and objectives.</p>
2. Take reasonable steps to verify the information obtained	<p>For all consumers, licensee's must:</p> <ul style="list-style-type: none"> • Take reasonable steps to verify the consumer's financial situation. • Additional requirement for small amount credit contracts—lenders must obtain statements for accounts into which the consumer's income is paid to verify their financial situation. 	<p>For credit amounts/limits of all sizes, BNPL providers should be required to check with credit bureaux.</p> <p>For credit amounts/limits of all sizes, BNPL providers should be required to take reasonable steps to validate customers are likely to have payment capacity to service the facility on an ongoing basis</p> <p>For credit amounts/limits above \$2000, BNPL providers should be required to verify income.</p> <p>Verification of liabilities and expenses should not be required.</p>
3. Assess whether the credit product or credit limit increase is 'not unsuitable' for the consumer	<p>The credit product or credit limit increase will be (and must be assessed as) unsuitable if, at the time of the assessment, it is likely that:</p> <ul style="list-style-type: none"> • the consumer will be unable to comply with their financial obligations under the contract, or could only comply with substantial hardship; • the contract will not meet the consumer's requirements or objectives; or • circumstances prescribed in the regulations apply. <p>For the purpose of this prescribed test of unsuitability, only information that satisfies both of the following paragraphs is to be taken into account:</p> <ul style="list-style-type: none"> • the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations; • at the time of the assessment: <ul style="list-style-type: none"> ○ the licensee had reason to believe that the information was true; or ○ the licensee would have had reason to believe that the information was true if the licensee had made the required reasonable inquiries or verifications. 	<p>The BNPL provider should determine that the product is not unsuitable, based on the information gathered as outlined above (in this column).</p>

<p>4. As part of the assessment, apply the statutory presumptions</p>	<ul style="list-style-type: none"> • Licensees must assess the credit product or credit limit increase as unsuitable if a circumstance exists that triggers a statutory presumption, unless the licensee can prove that, for the particular consumer, that circumstance does not mean the consumer can only meet their financial obligations with substantial hardship. The presumption that applies for all credit products is that if the consumer’s principal place of residence would need to be sold to meet the financial obligations, the consumer would face substantial hardship. • For small amount credit contracts, the contract will be presumed to be unsuitable if: <ul style="list-style-type: none"> ○ at the time of the assessment, the consumer is a debtor under another small amount credit contract and is in default in payment of an amount under that contract; or ○ in the 90-day period before the assessment, the consumer has been a debtor under two or more small amount credit contracts; or ○ a required amount of credit is to be provided under multiple small amount credit contracts or medium amount credit contracts, and the cost to the consumer is higher than the maximum charge payable under a single credit contract. • For credit card contracts, the contract will be treated as unsuitable if the consumer could not comply with a requirement to repay an amount equal to the credit limit of the contract within a period of three years. 	<p>CBA considers the small amount credit contracts presumptions to be most relevant to small amount BNPL</p>
<p>5. Do not engage in regulated conduct if the credit product or credit limit increase is unsuitable</p>	<ul style="list-style-type: none"> • If the credit product, or an increase to the credit limit of an existing credit product, is unsuitable for the consumer, the licensee must not: <ul style="list-style-type: none"> ○ suggest the product or increase to the consumer (or that the consumer remain in the product); ○ assist the consumer to apply for the product or increase; ○ make an unconditional representation that the consumer is eligible for the product or increase; or ○ enter into the product with the consumer, or increase the credit limit on an existing contract 	<p>BNPL credit licensee should be required to not engage in regulated conduct if the credit product or credit limit increase is unsuitable.</p>
<p>6. If requested by the consumer, give the consumer a written copy of the assessment</p>	<ul style="list-style-type: none"> • If the consumer requests a copy of the assessment, the licensee must give the consumer a written copy within the prescribed timeframes and free of charge. 	<p>BNPL credit licensees should be required to provide the consumer a written copy of the assessment if requested</p>