CHOICE

Financial Rights LEGAL CENTRE

Redfern Legal Centre

consumer action law centre

EARG ECONOMIC ABUSE REFERENCE GROUP

CCLS Consumer Credit LEGAL SERVICE

FCVic Financial Counselling Victoria Inc.

LawRight Access | Justice

financial counselling australia

THE SALVATION ARMY

Submission to Senate Economics Legislation Committee

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

June 2024

EXECUTIVE SUMMARY

Thank you for the opportunity to comment on the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024* (**The Bill**). This submission only addresses Schedule 2 of the Bill, relating to buy now pay later (**BNPL**). This submission is made on behalf of the following organisations:

- CHOICE
- Consumer Credit Legal Service
- Financial Rights Legal Centre
- Economic Abuse Reference Group
- Consumer Action Law Centre
- Redfern Legal Centre
- The Salvation Army
- Financial Counselling Victoria
- LawRight
- Financial Counselling Australia.

If passed, Schedule 2 of the Bill would regulate BNPL as a low cost credit product (**LCCC**) under the *National Consumer Credit Protection Act 2009* (**NCCPA**). Our organisations have long advocated for BNPL to be regulated as credit, and so we welcome the Bill's introduction to Parliament.

BNPL functions in largely the same way as other forms of credit, and carries the same risks. In recent years, BNPL has increasingly appeared in the debt mixes of people in financial hardship who seek assistance from financial counsellors, community legal centres,and other community services. As of mid-2023, financial counsellors reported that a majority of their clients had BNPL debts - and those clients that do had an average of three separate BNPL debts.[1] The fact BNPL is not regulated as credit means these people in financial hardship currently do not have the same consumer protections as they would for other forms of credit.

Passing the Bill would apply key protections to BNPL that are fundamental to safe access to credit, and bring these protections closer to what is mandated across the regulated credit industry. Crucially, it would oblige BNPL providers to:

[1] Small loans, big problems (2023) *Financial Counselling Australia*, available at: https://www.financialcounsellingaustralia.org.au/docs/small-loans-big-problems-buy-now-pay-later/

- obtain a credit licence from the Australian Securities and Investments Commission (**ASIC**), reducing the risk of unlawful, harmful conduct in the market;
- be members of the Australian Financial Complaints Authority (**AFCA**), ensuring consumers have access to free dispute resolution;
- give reasonable and timely consideration to hardship requests by customers;
- introduce caps on the maximum permitted default fees; and
- undertake a form of unsuitability assessment that would reduce the risk of consumers being provided with BNPL products that are unaffordable and harmful to them.

None of these obligations exist for BNPL under the current law, so the Bill plainly represents a dramatic improvement in consumer rights and protections that apply. We accordingly urge the Committee to **recommend that Parliament pass the Bill**.

The Bill however proposes to allow BNPL providers to follow a modified version of the responsible lending obligations (**Modified RLOs**) compared to the laws that apply to other regulated credit products. The same Modified RLOs would also apply to any other future credit product designated by regulation as a LCCC.

The Modified RLOs are still an improvement in protections for BNPL users on the status quo (of no responsible lending laws), but they also pose some risks compared with the existing responsible lending obligations for other credit products (**Full RLOs**). We draw the Committee's attention to these in the submission, and make some recommendations about how to reduce the following specific risks:

- BNPL remaining easier to obtain by perpetrators of financial abuse than other forms of credit;
- overindebtedness caused by multiple BNPL accounts, and associated fees; or
- high value BNPL products that inherently carry more risk to borrowers.

The recommendations offer meaningful but discrete changes that would make BNPL safer without needing to amend the bulk of the Bill.

RECOMMENDATIONS

Implement the new BNPL regime

1. **The Committee should recommend that Parliament pass the Bill and regulate BNPL as credit.**

2. The Committee should recommend that ASIC be empowered to undertake a review of the new Modified RLO regime 18 months after it has commenced. The review should be focused on consumer outcomes and specifically consider how BNPL is used in First Nations communities.
3. The Committee should recommend that additional funding be provided to resource ASIC to oversee the implementation of the new laws applying to BNPL, including specific funding to undertake a review of the effectiveness of the regime.

Possible improvements to the Bill

4. The Committee should consider recommending that verification obligations are strengthened under the Modified RLO regime.
5. The Committee should recommend that the Bill be amended by adding an additional subsection to section 133BXC(3) of the NCCPA requiring LCCC providers to have regard to any signs that a consumer may be at risk of financial abuse.
6. The Committee should recommend that guidance be provided to clarify what is meant by financially vulnerable at section 133BXC(3)(c) of the Bill, either in the Explanatory Memorandum, or Regulations.
7. The Committee should recommend that the proposed sections 133BXE and 133BXF of the NCCPA in the Bill be deleted, so all LCCC/BNPL providers must inquire about the requirements and objectives of prospective borrowers, regardless of the size of the loan.
8. The Committee should recommend that the Bill is amended to introduce an upper limit of $5,000 on the value or credit limit of LCCCs (BNPL or otherwise) entered into via the Modified RLOs.
9. The Committee should recommend that the Bill is amended to introduce a prohibition on LCCCs (BNPL or otherwise) entered into via the Modified RLOs being secured over assets such as homes or cars.
10. The Committee should recommend that section 133BXD of the Bill is deleted.

Regulations

11. The Committee should recommend that fee caps for LCCCs proposed in Exposure Draft Regulations should not be increased in any way.
12. The Committee should recommend that the Regulations to support the Bill include a further restriction on the permissible default fees that can be charged for BNPL accounts that exist before the legislation comes into effect, unless an unsuitability assessment is subsequently completed based on the account holder's current finances.

Consumer credit safeguards are vital for BNPL

BNPL allows people to buy goods or services and pay for them in future. This is the commonly understood definition of credit, like that found in any dictionary.[2] It is only because of intentional use of complex legal loopholes that BNPL is not considered consumer credit under the NCCPA. Passing Schedule 2 of this Bill would correct this outdated and inappropriate legal fiction.

As the BNPL industry has expanded without consumer credit safeguards, it has left a significant portion of its users worse off. Reports have regularly indicated that around 20% of BNPL users in Australia struggle with repayments and are in, or at risk of, financial hardship.[3] This still equates to millions of people in Australia.[4] For these people, BNPL leaves them worse off in the long run. We made a joint submission in response to Treasury's 2022 options paper on regulating BNPL, in which we provided a range of evidence of the harm BNPL causes for some users.[5]

Financial counsellors and community lawyers regularly speak to people struggling to make ends meet that are using BNPL products to pay for everyday essentials. Using credit to pay for essentials is a recipe for disaster - it invariably means that less money is available when the same expenses come around again, but past essentials are not paid off. Use of multiple BNPL products like this can push people into debt spirals.

As it is currently one of the easiest forms of credit to obtain, BNPL also routinely features in the debt mix of victims/survivors of family violence and is attractive to perpetrators of financial abuse. Borrowers, financial counsellors and lawyers also all continue to report difficulties in getting proper hardship responses from BNPL providers, which exacerbates the financial and emotional toll that being in debt has on a person.

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[2] See for example, Oxford reference dictionary, entry 1: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095646827

[3] See for example, ASIC Report 672 - Buy now pay later: An industry update, November 2020, https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-672-buy-now-pay-later-an-industry-update/

[4] Even in 2022/23, the RBA indicated that there were over 7 million active Australian BNPL accounts: see https://www.rba.gov.au/publications/annual-reports/psb/2023/the-evolving-retail-payments-landscape.html

[5] Available at: https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2022/december/joint-submission-bnpl

For example, below is a de-identified excerpt from an email sent by a large BNPL company representative in response to a waiver request on compassionate grounds by a financial counsellor on behalf of a client experiencing homelessness, ill health, and financial coercion/abuse from an ex-partner.

> *"Your comments about all financial counsellors being professionals and having a high level of integrity and ethical values is laughable. And if you honestly believe that you might want to have a closer look at the industry."*

The financial counsellor noted that "this is not an unusual kind of response from them".

Passing the Bill would significantly reduce the risk of these harms occurring. The Bill will not fix all the issues community workers see involving BNPL, but it will ensure there is a meaningful legal framework that reduces the risk of people being left worse off by BNPL. It would enshrine a right to request hardship assistance, and have those requests genuinely considered. The Bill will also enable ASIC to examine the market more closely like it does for other credit products, and better identify practices that cause consumers harm. The ability to escalate a dispute to AFCA (and giving AFCA meaningful laws to apply) will also improve the consumer experience of BNPL and lead to fairer and more appropriate outcomes.

We welcome the Government's move to bring BNPL within the remit of the NCCPA. We also welcome the design of the framework in the Bill to be such that similar emerging credit products can also be designated as LCCCs in future, and subject to the same laws as BNPL.

Recommendation 1

> *The Committee should recommend that Parliament pass the Bill and regulate BNPL as credit.*

Improving the Bill to address known risks with BNPL

If the Bill passes as drafted, the major difference between the law applying to BNPL from other regulated credit products would be the form of unsuitability assessment (or responsible lending assessment) required of credit providers. Responsible lending obligations in general are supposed to oblige credit providers to reasonably ensure they are not signing people up to unaffordable or unsuitable credit.

The Bill allows BNPL providers to opt-in to use a Modified RLO framework, rather than follow the Full RLOs that apply to other forms of credit.[6] The Government has included this in the Bill because it considers BNPL to be less risky and costly than other forms of regulated credit.[7]

Under the Full RLOs, before issuing credit contracts, regulated credit providers must:

- make reasonable inquiries about the consumer's financial situation;
- reasonably verify this information;
- (based on the information obtained) ensure that the consumer will be able to afford the repayments without substantial hardship; and
- confirm the product will meet the requirements and objectives of the consumer.

The main differences between what would be required under Modified RLOs compared with Full RLOs are set out below:

1. **Weaker verification obligations.** The verification obligation can be satisfied for BNPL by ensuring a credit check turns up no red flags.[8] Otherwise, consumer stated income and expenses can be accepted without inquiry. Under Full RLOs, lenders would generally need to obtain documentation (like bank statements) that confirm stated income and expenses figures
2. **Exemptions for loans under $2,000.** The obligation to check the product meets the requirements and objectives of a prospective borrower does not apply for BNPL loans under $2,000.[9]

Verification of income is a very important part of Full RLOs. It ensures assessments of the financial situation of a borrower are based on correct information. There can be many nuances to a person's income, and many people have trouble estimating their expenses. Verification of income is not only a key factor in determining capacity to pay, but also makes it more difficult for perpetrators of fraud and financial abuse to set up accounts in another person's name. Perpetrators of financial abuse frequently disclose incorrect financial information on BNPL applications in the victim survivor's name in order to obtain credit and leave the victim survivor with the liability. Income verification allows credit providers to detect and prevent fraudulent applications, as the income and expenses nominated by the 'customer' (that is, the perpetrator

[6] Per Schedule 2, Item 14 of the Bill (the proposed section 133BXA of the NCCPA)
[7] See 5 June 2024 comments by the Assistant Treasurer and Minister for Financial Services: https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/government-introduces-consumer-protections-buy-now-pay
[8] This is based on the assumption that Regulation 28HAD in the Exposure Draft Regulations consulted on by Treasury remains substantially the same
[9] Per Schedule 2, Item 14 of the Bill (the proposed s 133BXE of the NCCPA)

using the customer's personal details) typically do not match the customer's payslips and bank account statements.

Not requiring verification of finances by any credit provider creates more risk that people will be sold unaffordable credit, and credit products will be used as a tool of financial abuse. A credit check will not alleviate this risk in many cases.[10]

Recommendation 2

The Committee should consider recommending that verification obligations are strengthened under the Modified RLO regime.

Addressing the risk of BNPL being used for financial abuse

Fraudulent BNPL can be used for financial abuse. The Modified RLOs will make it harder for perpetrators of financial abuse to take out BNPL in their victim's name than it is currently. However, it will still be easier for perpetrators to obtain BNPL loans in their victim's name (including unaffordable BNPL loans) than other forms of regulated credit.

Under Full RLOs credit providers, at a minimum, need to have some form of documentary evidence that a credit applicant is receiving an income that could enable them to repay a credit product. The Modified RLOs would allow BNPL providers to lend without the same obligation (a credit check instead being sufficient). Credit checks do not contain any information about a person's income.

Under the Modified RLOs, an applicant with access to their victim's identification information could make an application under their name and make any unverified claim about their financial situation. The perpetrator would not have to prove the victim has an income, or has money in their bank account. It also makes it less likely other loans taken out in the victim's name will be identified, particularly as many debts do not currently show up at all on Australia's credit reporting system.

Even under Full RLOs, signs of financial abuse can be challenging to identify and opportunities to do so are limited. However, compliance with the Full RLOs does sometimes result in financial abuse being detected and credit applications being appropriately denied, as evidenced by

[10] Our previous submission to Treasury's BNPL Exposure Draft Materials elaborate on this: https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2024/april/regulate-buy-now-pay-later, see pages 9-11

fraudulent credit enquiries on victim survivors' credit reports. This is not an area where any safeguards should be reduced, without steps being taken to address this risk.

Under the Modified RLOs, the proposed section 133BXC of the NCCPA[11] provides guidance on how credit providers can satisfy the obligation to make reasonable inquiries about the borrower's situation. One listed consideration is whether the consumer is 'financially vulnerable' (section 133BXC(3)(c)), a term which would benefit from further guidance and examples.

Section 133BXC(3) should also include an obligation for lenders to consider whether a prospective borrower is at risk of financial abuse. At a minimum, this would ensure that BNPL providers need to account for the risk of financial abuse in their processes in *some* way, and cannot turn a wilful blind eye to the issue.

Recommendation 3

The Committee should recommend that the Bill be amended by adding an additional subsection to section 133BXC(3) of the NCCPA requiring LCCC providers to have regard to any signs that a consumer may be at risk of financial abuse.

Recommendation 4

The Committee should recommend that guidance be provided to clarify what is meant by financially vulnerable at section 133BXC(3)(c) of the Bill, either in the Explanatory Memorandum, or Regulations.

Under the proposed sections 133BXE and 133BXF of the NCCPA in the Draft Bill, the Modified RLOs would allow LCCC/BNPL providers to assume (unless contrary evidence is known) that a loan under $2,000 will meet the requirements and objectives of a prospective borrower. These provisions should also be deleted.

The requirements and objectives limb of RLOs can help identify applications for credit where the named borrower is unlikely to receive any benefit from the use. These records can also help unpick situations after the fact where fraudulent use of credit by a perpetrator of abuse clearly does not match up with stated plans on applications.

Reinstating questions about requirements and objectives would also help identify some situations where credit is not a good solution to financial hardship. For example, if a person

[11] Item 14 of Schedule 2 of the Bill

indicates they will use BNPL to pay for essentials (like food or energy bills), doing so will often leave them worse off than if they used their rights to hardship or sought other assistance.

If Recommendation 5 is not adopted, the Committee should at least recommend that the Explanatory Memorandum is amended to include more examples of situations that would rebut the assumed suitability for the requirements and objectives of prospective borrowers. Examples of situations where the assumption should be rebutted include where the use may indicate a risk of hardship, such as using it to:

- purchase essentials such as food;
- purchase gift cards that can be used at supermarkets; and
- pay a utility bill.

Recommendation 5

The Committee should recommend that the proposed sections 133BXE and 133BXF of the NCCPA in the Bill be deleted, so all LCCC/BNPL providers must inquire about the requirements and objectives of prospective borrowers, regardless of the size of the loan.

Addressing the risk of high value BNPL loans

High value credit inherently presents higher risks as defaults may be enforced via the courts and could lead to consequences like the seizure of assets, or bankruptcy. For this reason, loans of $5,000 or more are not low risk and not in line with community expectations of what would be covered by a lighter touch credit regime. We are concerned the Government's policy position that BNPL is a less risky product than other forms of credit downplays the risks that come with BNPL contracts for large amounts.

Currently, BNPL is commonly available for amounts up to $30,000.[12] For most people, simply repaying the principal on a $10,000+ loan represents a significant financial commitment that will dramatically change their financial situation. There should be an upper limit on the value of BNPL loans that can be sold under the Modified RLOs included in the Bill.

Financial counsellors and community lawyers currently commonly see people signed up to high value BNPL loans to finance a solar panel purchase, by a door-to-door seller. In the worst of these cases, clients report having no idea they were even signed up to BNPL. In other

[12] See for example, https://www.shophumm.com/au/how-it-works/

concerning cases, clients present in financial hardship with legitimate concerns about the risk their BNPL contract poses to retaining their home.[13]

Fee caps on BNPL products do not resolve the risks that high value credit products pose. Recommendations 6 and 7 below propose safeguards to actually ensure that loans sold via the Modified RLOs are not going to put people at risk of losing their home or other assets fundamental to their wellbeing.

Recommendation 6

> *The Committee should recommend that the Bill is amended to introduce an upper limit of $5,000 on the value or credit limit of LCCCs (BNPL or otherwise) entered into via the Modified RLOs.*

Recommendation 7

> *The Committee should recommend that the Bill is amended to introduce a prohibition on LCCCs (BNPL or otherwise) entered into via the Modified RLOs being secured over assets such as homes or cars.*

Addressing the risk of multiple and existing BNPL accounts

In 2023, the RBA found that there were over 7 million active BNPL accounts in Australia, with almost one third of people having used BNPL in the last 12 months.[14] As noted above, many of the people seeking help from financial counsellors already have multiple BNPL accounts.

Nothing in the Bill (or Draft Regulations) addresses the affordability of accounts that exist before these laws come into effect. This is because RLOs (Full or Modified) are only a point of sale protection. Recommendations 8-10 propose improvements to the Bill that would help address the risks of financial harm for consumers with pre-existing BNPL accounts, and anyone using multiple accounts in future.

The Government has confirmed that fee caps will apply to LCCCs/BNPL via the Regulations supporting the Bill. The Draft Regulations released for consultation by Treasury proposed

[13] Our submission to Tresaury's consultation on the BNPL Exposure Draft Materials expands upon this: see pages 19-23 https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2024/april/regulate-buy-now-pay-later

[14] See: https://www.rba.gov.au/publications/annual-reports/psb/2023/the-evolving-retail-payments-landscape.html

retaining an existing fee cap that applies to the loophole in the NCCPA most BNPL currently fall under,[15] and then introducing a new fee cap for default/late fees, at $10 per month.[16]

These fee caps are absolutely vital to any conclusion that BNPL poses a lower risk to consumers than other forms of regulated credit. As many people have multiple BNPL accounts, any increase can be felt many times over by consumers. The Committee should clarify that these caps should not be increased in the Regulations.

Recommendation 8

> *The Committee should recommend that fee caps for LCCCs proposed in Exposure Draft Regulations should not be increased in any way.*

These fee caps are also the best mechanism available to encourage RLOs to have any impact on existing BNPL accounts. There is a real risk that the upcoming regulation of BNPL will create a major incentive for all BNPL providers to sign up as many new customers as possible (or increase the credit limits of existing customers) before the laws come into effect. For anyone in this situation, there is no realistic avenue for complaint if they later fall into hardship.

Our casework demonstrates that there are already many people (likely millions) struggling with multiple BNPL debts, and late fees disproportionately impact people in this situation. These people should not be left behind by the new laws. To address this, we recommend that late fee caps should be further reduced on accounts where no RLO assessment has ever been made.

Recommendation 9

> *The Committee should recommend that the Regulations to support the Bill include a further restriction on the permissible default fees that can be charged for BNPL accounts that exist before the legislation comes into effect, unless an unsuitability assessment is subsequently completed based on the account holder's current finances.*

Section 133BXD of the Draft Bill should also be deleted. This section is designed to allow the existing BNPL practice of providing people with unsolicited credit limit increases on their accounts over time. BNPL providers like Afterpay and Zip currently start new users on a lower

[15] See Treasury Exposure Draft *National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024*, reg 69E - this would be set at $200 in the first year of the contract, and $125 in subsequent years (available at: https://treasury.gov.au/consultation/c2024-504798)
[16] Ibid.

credit limit, then automatically increase it over time. Section 133BXD would allow this practice to continue, provided that the lender initially assesses the borrower's ability to repay the higher amount when entering the contract. It would allow BNPL/LCCC providers to start a contract on a lower credit limit, but increase the limit at their discretion, over a period of two years.

A similar practice of making unsolicited offers to increase limits on credit cards was explicitly banned in 2018 as significant evidence indicated that this practice led to people taking on more debt than they needed, or could afford.[17] Similar bad outcomes are likely to occur by allowing BNPL providers to increase the credit limits of their customers at their discretion, for two years. It creates a conflict that incentivises lenders to time these increases at the point when they consider it most likely to influence the customer to use their product for more, or larger, purchases.

Recommendation 10

The Committee should recommend that section 133BXD of the Bill is deleted.

Future review of the Modified RLOs

The development of the new Modified RLOs for BNPL is novel and untested. As a safeguard, we urge the Committee to recommend that ASIC is empowered to undertake a review of the regulatory regime 18 months after it commences. The review should focus on consumer outcomes, with a particular focus on the experiences of First Nations people and communities using BNPL. Use of BNPL in First Nations communities has not been well documented to date. The Government should ensure ASIC has adequate data collection powers for this, particularly considering the regime may apply to other types of LCCCs in future.

As will be required for ASIC to enforce the new laws applying to BNPL, there will need to be specific funding for ASIC to ensure it is adequately resourced to undertake this review.

Recommendation 11

The Committee should recommend that ASIC be empowered to undertake a review of the new Modified RLO regime 18 months after it has commenced. The review should be focused on consumer outcomes and specifically consider how BNPL is used in First Nations communities.

[17] This prohibition is contained in section 133BE of the NCCPA

Recommendation 12

The Committee should recommend that additional funding be provided to resource ASIC to oversee the implementation of the new laws applying to BNPL, including specific funding to undertake a review of the effectiveness of the regime.