Submission to Treasury

Buy Now Pay Later (BNPL) – Draft Regulations 2025

February 2025

12 February 2025

Director, Banking and Credit
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

By email: CreditReforms@treasury.gov.au

Dear Director

RE: Buy Now Pay Later (BNPL) – Draft Regulations 2025

We refer to the above consultation seeking feedback on the draft National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2025 (**Draft Regulations**). This is a joint submission made on behalf of:

- CHOICE
- Financial Rights Legal Centre
- Financial Counselling Australia
- Consumer Action Law Centre
- Consumer Credit Legal Service
- Redfern Legal Centre
- Economic Abuse Reference Group
- Financial Counselling Victoria
- Financial Counsellors' Association of NSW Inc.
- Care ACT
- Mob Strong Debt Help.

Our organisations have been advocating for the regulation of BNPL products for years, and keenly await the implementation of the new legislative regime, which will reduce the risk of people being signed up to unaffordable BNPL debts that leave them worse off.

However, we are extremely disappointed to see the changes made in the Draft Regulations to the cap on default (late) fees. For certain BNPL models (notably, the model used by Afterpay)[1], the permitted annual cap on late fees has more than doubled the previous proposal.

[1] Afterpay Terms and Conditions, https://www.afterpay.com/en-au/terms-of-service, accessed 11 February 2025

Increased late fees will reduce the extent to which these laws protect BNPL users in financial hardship. The proposed change allows the costs of providing credit to financially stable people to be financed by those on low incomes struggling to make repayments. It is a 'poverty premium' - an example of people living on low incomes paying more for goods and services than people on higher incomes. Beyond this significant objection, we support the Draft Regulations.

We urge the government to retain the $120 annual fee cap for all BNPL products.

The change in this fee cap is novel and had not previously been proposed at any stage of this long legislative process. It also obviously benefits one existing BNPL model in the market - Afterpay. We are disappointed that the timing of this consultation also means there is limited opportunity for consumer advocates to put forward an alternate perspective.

Recommendation

Remove paragraph (b) from Item 2, Column 2 in regulation 69G(3) of the Draft Regulations. BNPL models should not be permitted to finance their product by charging additional late fees to people in financial hardship.

The late fee change

In the previous draft regulations consulted on in 2024,[2] reg 69G contained:

- a cap on permitted fees and charges under a low cost credit contract (**LCCC**) ($200 in the first year, $125 in subsequent years); and
- a proposed late fee cap of $10 per month.

These caps have been retained in the current Draft Regulations for most existing BNPL models (though the late fees are now subject to an annual limit, rather than a monthly one). However, for LCCCs whose models only charge consumers when they miss a repayment, the $200/125 permitted fees and charges can now also be built into late fees, so for such models the effective annual fee late caps are now $320 in the first year, and $245 in future years.

In our submission to the Senate Economics Committee on the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024*, we urged the Committee to recommend that no increases to the fee caps in the regulations were made.[3] It is extremely disappointing to see this change, and even more disappointing to see this process described as a 'technical consultation' - seemingly the decision has been finalised without seeking the views of consumer representatives on this issue.[4]

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[2] https://treasury.gov.au/consultation/c2024-504798

[3] Available at: https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2024/june/responsible-bnpl-measures

[4] https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/buy-now-pay-later-regulations-set-be-finalised, accessed 11 February 2025

In substance, the only existing model we are aware of that will be impacted by this change is the model used by Afterpay.[5] As the biggest player in the industry, we are concerned that the government is making this change to accommodate Afterpay.

The change will allow providers using a model such as that used by Afterpay to double (and nearly triple in its first year) the maximum amount of late fees it can charge individual account holders. This is a dramatic change that will directly harm consumers in financial hardship the most. We set out the many reasons why this is a poor policy decision below.

Extra late fees are a poverty premium

BNPL repayments are generally debited from accounts on the day they are due. If there is sufficient money in an account, the repayment will be made and no fee is charged. It follows that the people who are predominantly incurring late fees are those who do not have the money to meet their repayments - that is, people in financial hardship.

The change to the late fee cap will most directly impact repeat users of BNPL that are in financial hardship and revolving debt. This is precisely the primary group of people that the regulation of BNPL was intended to assist.

The Explanatory Statement states that the cap is intended to balance protecting consumers with existing commercial BNPL models. We would hope that Afterpay is not currently regularly charging clients over $120 per year in default fees and if it is then this is a cause for concern, not something to be enshrined in law. Under Afterpay's current fee model, a user would have to miss over 12 payments within 12 months (at least) to breach the $120 late fee cap - an obvious sign of financial hardship.

The amended fee schedule ultimately prioritises the interests of business, rather than the impact on consumers - which is the reason our *National Consumer Credit Protection Act 2009* exists. These fees will function as an additional charge on those who struggle to make ends meet and are using Afterpay (or similar products). These are the people already struggling the most during a cost of living crisis - it is not the place that businesses should be looking to improve profitability.

Afterpay will cross-subsidise wealthy users by charging poorer users

The additional late fee caps also bake-in a form of harmful cross-subsidisation. The only way that Afterpay can be free for users who pay on time is by making its money elsewhere. By increasing late fees, the portion of the Afterpay model being financed by people on low incomes is increased.

[5] The only other existing BNPL model we are aware of that would meet the criteria to benefit from this exemption is PayPal's Pay in 4 product. However, PayPal currently do not charge any late fees at all

Cross-subsidisation is always a reality of credit products, but cross subsidisation should not be tolerated when it is inequitable. That is, when the benefit of the cross subsidy flows to the wealthiest in society, at the expense of people who are less well off. Increasing late fees to make a lending model profitable is a particularly harmful form of cross-subsidisation because it involves people in hardship financing the use of credit for wealthier people less likely to incur fees. No matter how popular Afterpay is, this is not a desirable policy outcome.

Afterpay has at times attempted to distinguish itself from the credit card market precisely because it does not rely on a cross-subsidisation model.[6] Credit card issuers can offer points and rewards to users who pay off their balances regularly by charging high interest rates to those in revolving debt. If Afterpay intends to rely on this amendment, it is hard to see how Afterpay could claim its model is substantially different in this respect anymore.

BNPL is supposed to be a 'low cost credit product'

BNPL is subject to a bespoke lending regime because it has been considered lower risk and less costly than other credit products. A higher late fee cap makes this conclusion questionable.

In 2022, Financial Counselling Australia published a report that compared credit card interest rates against BNPL fees. This comparative analysis was undertaken by Curtin University. The report demonstrated that if people do incur late fees on BNPL (even Afterpay), the fees can quickly amount to an equivalent annual interest rate of over 20%, depending on the value of the purchase.[7]

A $320 (or $200) a year late fee cap must be considered with regard to how Afterpay is used. In general Afterpay starts users on a $600 credit limit. Further, the BNPL industry reports the average BNPL transaction value in 2023 was $132.[8] Any user being charged $320 a year in late fees is very unlikely to be using the product in a manner which is 'low cost', and if it did happen, it should have long ago triggered a reassessment of whether the customer can afford the product. These are not purchases that should lead to hundreds of dollars in late fees.

Late fees should not be penalties

Finally, it is very concerning that the Draft Regulations propose to seemingly give BNPL models free reign to charge late fees up to a cap without question. Our national credit laws generally do

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[6] See for example, Afterpay, above n 1, page 6;
Mandala, "Afterpay's economic impact in Australia", June 2024, page 24 (commissioned by Block, Inc.): https://afterpay-newsroom.yourcreative.com.au/wp-content/uploads/2024/06/AP0437-Mandala-Economic-Impact-Report_Final-3.6.2024.pdf

[7], Duong, L.; Taylor, G.; Eulaiwi, B; "Comparative analysis of credit card interest rates vs BNPL fees", July 2022, *Financial Counselling Australia,* https://www.financialcounsellingaustralia.org.au/docs/comparative-analysis-of-credit-card-interest-rates-vs-bnpl-fees/

[8] The economic impact of buy now pay later in Australia, *AFIA*, June 2024: https://static1.squarespace.com/static/63b7ac2f8485d929e7851d13/t/667e58fc9a95d71c9bd8a168/1719556360683/BNPL+Economic+Impact+2024.pdf

not have specific caps on late fees, because the courts have established rules which apply to calculating late fees already.

While a cap is welcomed and appropriate for a 'low cost credit product', late fees are supposed to be linked to the genuine costs incurred by the finance provider, and not be a penalty used to generate revenue.[9] This has been a well-established principle in contract law. The effect of this policy change - that no upfront fee BNPL models will be able to recoup fees that it elects not to charge upfront, via late fees - flies directly in the face of this concept. If a no upfront fee model is not economical without charging additional late fees, a multinational company should not be given the option to finance it by charging people on low incomes greater late fees.

Further information

Until this consultation, the government has taken a fair, even handed process toward regulating BNPL that had found a middle ground which has given consideration to the risks and benefits to both users and providers. We are disappointed to see a promising regime compromised by this last minute proposal.

Thank you for considering our submission. To discuss this further, please contact Tom Abourizk, Head of Policy at CHOICE, at tabourizk@choice.com.au.

Yours sincerely,

- **CHOICE**
- **Financial Rights Legal Centre**
- **Financial Counselling Australia**
- **Consumer Action Law Centre**
- **Consumer Credit Legal Service**
- **Redfern Legal Centre**
- **Economic Abuse Reference Group**
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- **Financial Counsellors' Association of NSW Inc.**
- **Care ACT**
- **Mob Strong Debt Help**

[9] see e.g. Paciocco v Australia and New Zealand Banking Group Limited [2016] HCA 28 - Kiefel J identified at [57] the question as whether "whether the sum is 'out of all proportion' to the interests said to be damaged in the event of default"; Gageler J said at [167] "The customers' claim that that additional contractual liability was unenforceable as a penalty triggered an inquiry whether, within the totality of the circumstances within which ANZ contracted with its consumer credit card account holders, the stipulation for the payment of the late payment fee was properly characterised as: having no purpose other than to punish an account holder in the event of late payment; or conversely serving the purpose of protecting ANZ's interests in ensuring that consumer credit card account holders made the minimum monthly payment by the due date. The customers bore the evidentiary and persuasive onus throughout that inquiry."