

INNOVATION, DISRUPTION AND CONSUMER HARM IN THE BUY NOW PAY LATER INDUSTRY: AN EMPIRICAL STUDY

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'Buy now pay later' ('BNPL') has been described as 'an Australian fintech growth story', an innovative and disruptive financial product that has fundamentally changed the global market for consumer credit. Providers assert that BNPL promotes financial inclusion, allowing consumers to avoid the fees and interest associated with other, more expensive financial products. Yet critics maintain that BNPL is too readily accessible and that it can cause serious hardship, particularly for low income earners. This article is the first scholarly empirical study to focus on low income earners' use of BNPL. It draws on a series of focus groups with consumer advocates and an online survey of consumers who have used BNPL, either alone or in conjunction with payday loans or pawn loans. Drawing on this data, the authors evaluate the Commonwealth Government's current proposal to regulate BNPL more stringently, under the National Consumer Credit Protection Act 2009 (Cth).

I INTRODUCTION

'Buy now pay later' ('BNPL') has been described as 'one of Australia's fintech growth stories',¹ an innovative and disruptive financial product that has fundamentally changed the global market for consumer credit.² BNPL allows

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1 Senate Economic References Committee, Parliament of Australia, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (Report, February 2019) 10 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/~media/Committees/economics_ctte/Creditfinancialservices/report.pdf> ('*Credit and Hardship Report*').

2 James Frost, 'Buy Now, Pay Later Risks One Hell of a Hangover', *Australian Financial Review* (online, 16 September 2019) <<https://www.afc.com/companies/financial-services/buy-now-pay-later-risks-one-hell-of-a-hangover-20190916-p52rur>>.

consumers to buy and receive goods or services immediately and pay for them over time, usually in four equal instalments. The product emerged in Australia in 2014³ and has witnessed extremely rapid growth, not only domestically but in many international markets including the United States ('US'), United Kingdom ('UK') and the European Union ('EU'). Providers of BNPL assert that they are helping consumers to 'take control' of their finances by spreading their expenditure more evenly over time.⁴ They argue that their customers save money by using BNPL, since they avoid the high interest and fees associated with credit cards⁵ and other credit products, such as small amount short term loans ('payday loans').⁶ Yet, critics argue that BNPL can be harmful, particularly for low income earners. They point out that providers have little incentive to assess consumers' financial circumstances before allowing them to use the product. This means that low income consumers find it easy to incur large debts within a short time, leading to 'significant financial hardship ... and distress'.⁷ Although BNPL is subject to the consumer protections set out in the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), it is not currently subject to the more stringent requirements of the *National Consumer Credit Protection Act 2009* (Cth) ('NCCPA'), the legislation governing consumer credit. This will soon change, however. In May 2023, the Government confirmed its intention to bring BNPL within the ambit of the NCCPA.⁸

3 Jonathan Shapiro and James Eysers, *Buy Now, Pay Later: The Extraordinary Story of Afterpay* (Allen & Unwin, 2021) 53, 79.

4 'How Afterpay Works', *Afterpay* (Web Page) <<https://web.archive.org/web/20230306022407/https://www.afterpay.com/en-AU/how-it-works>>.

5 Anthony Eisen and Nick Molnar, 'Buy Now, Pay Later Needs a Level Playing Field', *Australian Financial Review* (online, 30 November 2022) <<https://www.afr.com/companies/financial-services/buy-now-pay-later-needs-a-level-playing-field-20221129-p5c26y>>; Accenture, *Afterpay Economic Impact: Australia 2020* (Report, 2021) 37–8 <<https://web.archive.org/web/20231028114308/https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/04/Afterpay-Economic-Impact-report-2020-Accenture.pdf>>.

6 'Small amount credit contract' is the legal name for a payday loan. These loans are defined by section 5 of the *National Consumer Credit Protection Act 2009* (Cth) ('NCCPA') as 'loans to consumers, where the credit provider is not an Authorised Deposit-Taking Institution ('ADI'), of up to \$2,000 where the term of the contract is between 16 days and 12 months': Treasury (Cth), *Review of the Small Amount Credit Contract Laws* (Final Report, March 2016) 1 n 1 <https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf>.

7 Anglicare Australia et al, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (December 2022) 12 <https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-joint_consumer_group.pdf>.

8 Stephen Jones, 'Address to the Responsible Lending and Borrowing Summit' (Speech, 22 May 2023) <<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit>> ('2023 Address'); 'Jones Sizes Up Buy Now, Pay Later Regulation', *Australian Financial Review* (online, 22 May 2023) <<https://www.afr.com/companies/energy/jones-sizes-up-buy-now-pay-later-regulation-20230522-p5da5c>>. See also Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (Options Paper, November 2022) 21–2 ('Options Paper'). Other jurisdictions, including the UK and New Zealand ('NZ'), are also in the process of legislating stronger consumer protections for users of BNPL. In February 2023, the UK Government released draft legislation which will bring BNPL transactions within the ambit of the *Consumer Credit Act 1974* (UK): see Financial Conduct Authority (UK), *The Woolard Review: A Review of Change and Innovation in the Unsecured Credit Market* (Report, 2 February 2021) <<https://www.fca.org.uk/publication/corporate/woolard-review-report>>.

This article is the first academic empirical study of BNPL to focus specifically on the experiences of low income consumers, drawing on the expertise of consumer advocates. It presents qualitative data gathered in a series of focus groups conducted by the authors in 2022. These focus groups involved consumer solicitors, financial counsellors, and other advocates with expertise in assisting consumers in financial hardship. The participants described the impact of BNPL on their clients and explained why they viewed it as a harmful, high-risk product. This article also draws on quantitative data gathered from the authors' online survey of 1,128 BNPL users, within a larger sample of 1,472 consumers who had used either BNPL, a payday loan or a pawn loan. It is the first empirical study to compare the impact of these three products. The survey, conducted in 2020, asked respondents to describe the impact of BNPL, payday loans and pawn loans on their finances and general wellbeing. This article discusses this empirical data in the context of current Australian policy debates

pdf>; HM Treasury, *Regulation of Buy-Now Pay-Later: Consultation* (October 2021) <https://assets.publishing.service.gov.uk/media/6171294d8fa8f529777ffc7d/210923_-_BNPL_condoc_-_Cleared.pdf>; HM Treasury, *Regulation of Buy-Now Pay-Later: Response to Consultation* (June 2022) <https://assets.publishing.service.gov.uk/media/62ab50d58fa8f535763df206/BNPL_consultation_response_Formatted_.pdf>; HM Treasury, *Regulation of Buy-Now Pay-Later: Consultation on Draft Legislation* (February 2023) <https://assets.publishing.service.gov.uk/media/63ea41a9e90e077bbb30a4fc/BNPL_consultation_on_draft_legislation.pdf>. A recent report suggested that these reforms may be delayed, or abandoned altogether, due to concerns that they may cause some BNPL providers to withdraw from the UK market: Mark Kleinman, 'Treasury Poised to Shelve Crackdown on "Buy Now Pay Later" Sector', *Sky News* (online, 15 July 2023) <<https://news.sky.com/story/treasury-poised-to-shelve-crackdown-on-buy-now-pay-later-sector-12921319>>. In October 2022, the NZ Government announced that it would apply the *Credit Contracts and Consumer Finance Act 2003* (NZ) to the BNPL industry, so that users of BNPL could enjoy 'many of the same protections as borrowers in other consumer credit contracts – like credit cards and personal loans': Ministry of Business, Innovation and Employment, *Draft Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022* (Consultation Paper, 19 December 2022) 7 <<https://www.mbie.govt.nz/dmsdocument/25849-consultation-paper-on-the-proposed-credit-contracts-and-consumer-finance-buy-now-pay-later-amendment-regulations-2022>> ('NZ Consultation Paper'). The *Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023* (NZ) will come into effect on 2 September 2024. See also Aaron Gilbert and Ayesha Scott, 'If It Looks like Debt, Let's Treat It like Debt: "Buy Now, Pay Later" Schemes Need Firmer Regulation in NZ', *The Conversation* (online, 6 September 2023) <<https://theconversation.com/if-it-looks-like-debt-lets-treat-it-like-debt-buy-now-pay-later-schemes-need-firmer-regulation-in-nz-211820>> ('If It Looks like Debt'). In the US, the Consumer Financial Protection Bureau ('CFPB') has also undertaken a review of BNPL products: see Ashwin Vasan, 'Our Public Inquiry on Buy-Now-Pay-Later', *Consumer Financial Protection Bureau* (Blog Post, 12 January 2022) <<https://www.consumerfinance.gov/about-us/blog/our-public-inquiry-buy-now-pay-later/>>; *Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later (BNPL) Providers*, 87 Fed Reg 3511 (24 January 2022); Consumer Financial Protection Bureau, *Buy Now, Pay Later: Market Trends and Consumer Impacts* (Report, September 2022) <https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf>. It released a further report, based on a survey of consumers, in March 2023: Cortnie Shupe, Greta Li and Scott Fulford, Consumer Financial Protection Bureau, *Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey* (Report No 2023–1, 2 March 2023) <https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf>. See also Consumer Financial Protection Bureau, 'Director Chopra's Prepared Remarks on the Release of the CFPB's Buy Now, Pay Later Report' (Media Release, 15 September 2022) <<https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later-report/>>; Sahil Sahoni, 'Regulating Buy Now, Pay Later: Consumer Financial Protection in the Era of FinTech' (2023) 123(7) *Columbia Law Review* 2035 <<https://doi.org/10.2139/ssrn.4359956>>.

regarding the regulation of BNPL. It contributes to the emerging academic literature⁹ on BNPL by identifying the harms and benefits associated with the product, from the point of view of low income earners with limited access to alternative forms of credit. This article evaluates the various reform options recently proposed by the Government and its more recent decision to subject BNPL providers to ‘modified’ responsible lending obligations (‘RLOs’) under the *NCCPA*.¹⁰ It outlines the benefits and risks associated with these proposals.

Part II describes the BNPL industry, its current legal and regulatory context, and the voluntary industry code overseen by the Australian Finance Industry Association (‘AFIA’). Part III summarises recent policy debates over BNPL, outlining the arguments advanced by its proponents in the BNPL industry and its critics in the consumer movement. Part IV reports and discusses the findings of the authors’ survey of consumers and focus groups with consumer advocates.

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- 9 See, eg, Di Johnson, John Rodwell and Thomas Hendry, ‘Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing’ (2021) 13(4) *Sustainability* 1992:1–19 <<https://doi.org/10.3390/su13041992>> (arguing that the regulation of BNPL in Australia ‘[demonstrates] multiple forms of regulatory failure’); Jacob Rizk, ‘Use Now, Regulate Later? The Competing Regulatory Approaches of the Buy-Now, Pay-Later Sector and Consumer Protection in Australia’ (2021) 10(1) *Victoria University Law and Justice Journal* 77 <<https://doi.org/10.15209/vulj.v10i1.1224>> (examining the regulation of BNPL and recommending reforms to improve consumer protections); Paul Gerrans, Dirk G Baur and Shane Lavagna-Slater, ‘Fintech and Responsibility: Buy-Now-Pay-Later Arrangements’ (2022) 47(3) *Australian Journal of Management* 474 <<https://doi.org/10.1177/03128962211032448>> (reporting the results of a survey of 865 undergraduate students, regarding their attitudes towards BNPL and credit cards); Melissa Camp, ‘Inquire Now, Regulate Later: Australia’s Light-Touch Approach to Regulating Buy-Now-Pay-Later Products’ (2022) 30(2) *Australian Journal of Competition and Consumer Law* 121 (providing ‘a comprehensive overview of the current regulatory landscape for BNPL products in Australia’, focusing on the Australian Finance Industry Association’s *Buy Now Pay Later (BNPL) Code of Practice*); Benedict Guttman-Kenney, Chris Firth and John Gathergood, ‘Buy Now, Pay Later (BNPL) ... on Your Credit Card’ (2023) 37 *Journal of Behavioral and Experimental Finance* 100788:1–7 <<https://doi.org/10.1016/j.jbef.2023.100788>> (describing the use of credit cards to repay BNPL debts, based on anonymised UK credit card transactions data); Elizabeth Boshoff et al, ‘Buy Now Pay Later: Multiple Accounts and the Credit System in Australia’ (Research Paper, University of Sydney Business School, 15 October 2022) <<https://doi.org/10.2139/ssrn.4216008>> (discussing individuals’ use of multiple BNPL accounts, based on the transactions data of a major Australian financial institution); Marco Di Maggio, Emily Williams and Justin Katz, ‘Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns’ (Working Paper No 30508, National Bureau of Economic Research, September 2022) <<https://doi.org/10.3386/w30508>> (using US transaction data to ‘[track] expenditures across credit card, debit card, and bank accounts within the same user over time ... to study broader effects of BNPL on expenditure patterns’); Aaron Gilbert and Ayesha Scott, Auckland Centre for Financial Research, *Problem Debt, Buy Now Pay Later (BNPL) and Young Adults in Aotearoa New Zealand* (Report, August 2023) <https://acfr.aut.ac.nz/_data/assets/pdf_file/0009/817803/FINAL-YA-Debt-Study-Industry-Report-v250823.pdf> (describing the use of BNPL by young adults in NZ and reporting the results of a survey of 705 New Zealanders aged 18 to 34 years); Daniel Beratis, ‘Regulating Buy-Now, Pay-Later Products under the *National Consumer Credit Protection Act 2009* (Cth)’ (2023) 33(3) *Journal of Banking and Finance Law and Practice* 107 (arguing that the risks posed to consumers by BNPL warrant stricter regulation of the industry, under consumer credit laws).
- 10 Jones, ‘2023 Address’ (n 8). See also James Evers, ‘BNPL Regulation Perfect Opportunity to Clean Up Credit Law Mess’, *Australian Financial Review* (online, 21 February 2023) <<https://www.afr.com/companies/financial-services/bnpl-regulation-perfect-opportunity-to-clean-up-credit-law-mess-20230213-p5ck48>>; James Evers, ‘Big Banks Split on Buy Now Pay Later Regulation Plan’, *Australian Financial Review* (online, 30 January 2023) <<https://www.afr.com/companies/financial-services/afterpay-banks-consumer-groups-disagree-on-bnpl-regulation-plan-20230126-p5cfm9>> (‘Big Banks Split’).

Part V analyses these findings, in the context of the Commonwealth Government's proposal to introduce stricter regulation of BNPL. It evaluates the various reform options put forward by the Government, including its preferred option, being a modified application of the RLOs. It concludes that the application of the *NCCPA* to BNPL will have significant advantages for vulnerable consumers, and that a modified application of the RLOs, along with full application of the general conduct obligations under the *NCCPA*, is the most appropriate model. Part VI concludes.

II WHAT IS BNPL?

A A Regulatory 'Grey Zone'

At present, BNPL is not defined under Australian law. Australia's corporate regulator, the Australian Securities and Investments Commission ('ASIC'), defines a 'buy now pay later arrangement' as an 'arrangement that allows consumers to buy and receive goods and services immediately from a merchant, and repay a buy now pay later provider over time'.¹¹ While consumers may pay fees to BNPL providers, they do not pay interest on these purchases. Instead, providers are funded by merchants' fees, charged as a percentage of the total price of each transaction.¹² The typical price of a BNPL purchase varies widely among providers. One large provider, Afterpay, estimates that its 'average order size' is 'around \$150'.¹³ Another, Brighte, funds solar panel installations costing up to \$30,000.¹⁴ BNPL has been available to Australian consumers since the launch of Afterpay, a company founded in Sydney in 2014.¹⁵ Afterpay was the first provider to offer BNPL in the form of a four-part payment plan,¹⁶ with no formal credit assessment and, originally, no up-front payment.¹⁷ Introduced to the market in 2015, Afterpay has become an extremely popular and widely used product in Australia. It has since expanded into

11 Australian Securities and Investments Commission, *Buy Now Pay Later: An Industry Update* (Report No 672, 16 November 2020) 29 <<https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>> ('BNPL Industry Update').

12 Chay Fisher, Cara Holland and Tim West, *Developments in the Buy Now, Pay Later Market* (Bulletin, March 2021) 60, 62, 65 <<https://www.rba.gov.au/publications/bulletin/2021/mar/pdf/bulletin-2021-03.pdf>>.

13 Afterpay, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (23 December 2022) 13 ('2022 Submission').

14 'Homeowners: 0% Interest Payment Plan', *Brighte* (Web Page) <<https://brighte.com.au/homeowners/interest-free/>>.

15 'Our Story', *Afterpay* (Web Page) <<https://web.archive.org/web/20231203002228/https://corporate.afterpay.com/our-story>>.

16 Swedish firm Klarna began to offer a slightly different model, based on an 'invoice and part payments' system, in 2005: 'Klarna's History: A Disruptive Force Coming of Age', *Klarna* (Web Page) <<https://www.klarna.com/international/klarna-history/>>. This model allowed consumers to purchase a product online and pay for it later, upon receipt of a paper invoice by post. In 2012, it began to offer 'digital versions of traditional finance products', and in 2018, it adopted Afterpay's online 'Pay in 4' instalment model: Shapiro and Eysers (n 3) 190.

17 New Afterpay customers are now required to pay the first of four instalments at the time of purchase. Established customers can defer their first instalment until two weeks after purchase: 'Afterpay Terms of Service: Australia', *Afterpay* (Web Page, 1 February 2024) <<https://www.afterpay.com/en-AU/terms-of-service>>.

the US, Canada, the UK, New Zealand ('NZ') and the EU.¹⁸ By mid-2021, it had 3.6 million active customers in the Asia Pacific¹⁹ and 16.2 million active customers worldwide.²⁰ Since the launch of Afterpay, many other companies have begun to offer similar services in the Australian market, including Brighte, Humm Group, Klarna, Payright and Zip Co.²¹ Several major banks have launched their own BNPL products for existing customers, adopting the four-part payment model.²² AFIA states that there were approximately seven million 'active' accounts in Australia on 30 June 2022.²³ The industry continues to expand rapidly. In the financial year ending in June 2022, the value of Australian BNPL transactions increased by 37% to \$16 billion, according to data published by the Reserve Bank. This figure is equivalent to 2% of the value of all Australian credit and debit card purchases.²⁴

The rapid growth of the BNPL is attributable, at least in part, to its operation in a regulatory 'grey zone'²⁵ outside the ambit of consumer credit laws.²⁶ Providers of

18 'Our Story' (n 15).

19 This includes Australia, NZ and Asia: Afterpay, *Unlock: Afterpay Limited FY21 Annual Report* (Report, 2021) 27 <<https://web.archive.org/web/20231028114248/https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/08/APT-FY21-Annual-Report.pdf>>.

20 Ibid 30. Afterpay defines an 'active' customer as one who has completed at least one transaction using its platform in the last 12 months. On 31 January 2022, Afterpay was acquired by a US company, Block, however previous annual reports and other 'historical' documents are still available on its website: 'Block (NYSE: SQ) Acquisition of Afterpay', *Afterpay* (Web Page) <<https://web.archive.org/web/20231214231256/https://corporate.afterpay.com/investors/asx-announcements>>.

21 These companies are all signatories to the AFIA Code of Practice: Australian Finance Industry Association, 'Buy Now Pay Later Code of Practice' (Code, 1 March 2021) <https://afiawebsitefiles.blob.core.windows.net/websitecontent/Code_PDFs/BNPL%20Code/BNPL%20Code%20-%20FINAL%20PDF%20-%202012723.pdf> ('BNPL Code'). In February 2022, one provider, Openpay, went into receivership: Ayesha de Kretser, 'Receivers Call Time as Openpay Closes', *Australian Financial Review* (online, 6 February 2023) <<https://www.afr.com/companies/financial-services/receivers-call-time-as-openpay-closes-20230206-p5ci6g>>. Another, LatitudePay, announced its intention to cease trading in Australia, effective 11 April 2023: 'Another Buy Now, Pay Later Provider Will End Services in Australia', *News.com.au* (online, 24 February 2023) <<https://www.news.com.au/finance/business/another-buy-now-pay-later-provider-will-end-services-in-australia/news-story/2ad3cc8e247211de07c0bf3e34995de1>>.

22 Alex Druce, "'No Late Fees, No Interest, and No Account Fees": NAB Launches New Buy Now, Pay Later Product', *The Australian* (online 26 May 2022) <<https://www.theaustralian.com.au/breaking-news/no-late-fees-no-interest-and-no-account-fees-nab-launches-new-buy-now-pay-later-product/news-story/499b8505dd1788dae209ad225274c14e>>.

23 Australian Finance Industry Association, *The Economic Impact of Buy Now Pay Later in Australia: Updated* (Report, January 2023) 6 <<https://afiawebsitefiles.blob.core.windows.net/websitecontent/8%20February%202023%20-%20BNPL%20Research%20Report.pdf>> ('*Updated BNPL Economic Impact Report*'). Like Afterpay, AFIA defines an 'active' account as one in which the customer has made at least one transaction over the past 12 months. Some consumers use more than one BNPL product at a time, so the number of unique users may be significantly lower than the total number of active accounts: Australian Finance Industry Association, *The Economic Impact of Buy Now Pay Later in Australia* (Report, June 2022) 7 n 3, 12 <https://www.oxfordeconomics.com/wp-content/uploads/2022/10/AFIA_BNPL_Research_Report-1.pdf> ('*2022 BNPL Economic Impact Report*').

24 Fisher, Holland and West (n 12) 18, cited in *Updated BNPL Economic Impact Report* (n 23) 6.

25 'Buy Now ... How Can Organisations Help Customers Pay Later?', *Deloitte* (Blog Post, 3 February 2023) <<https://www.deloitte.com/au/en/Industries/financial-services/perspectives/buy-now-how-can-organisations-help-customers-pay-later.html>> ('How Can Organisations Help Customers').

26 Lucy Battersby, 'Buy Now Pay Later Firms Operate in "Fuzzy" Legal Area, Investor Says', *The Sydney Morning Herald* (online, 25 October 2019) <<https://www.smh.com.au/money/investing/buy-now-pay-later-firms-operate-in-fuzzy-legal-area-investor-says-20191025-p534ap.html>>.

traditional consumer credit products, such as credit cards and payday loans, have long complained that the industry's exemption from these laws provides it with an unwarranted competitive advantage.²⁷ Under the *NCCPA*, providers of consumer credit are required to hold an Australian Credit Licence ('ACL').²⁸ Licensees must comply with 'general conduct obligations', including a duty to 'do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly'.²⁹ They must also comply with the RLOs when considering an application for credit. To comply with these obligations, lenders must not enter into a credit contract until they have made certain prescribed inquiries into the borrower's circumstances.³⁰ They must make 'reasonable inquiries' regarding consumers' 'requirements and objectives' in relation to the credit sought, as well as their financial situation more generally.³¹ They must also verify the accuracy of any information provided by applicants for credit,³² usually by requesting bank statements or payslips, or by contacting the applicants' employers. The RLOs provide that lenders may not enter into a credit contract, or increase a credit limit, if the contract is 'unsuitable'.³³ A credit contract must be deemed to be unsuitable if it does not meet the consumer's 'requirements or objectives'; if 'it is likely that the consumer will be unable to comply with [his or her] financial obligations under the contract'; or if the consumer could only do so by suffering 'substantial hardship'.³⁴ The RLOs allow lenders to use their own judgment to determine the extent of enquiries that are necessary, when assessing an application for credit. This feature of the regulatory regime – described as 'scalability' – is intended to allow lenders to 'tailor their responsible lending processes in a way that is appropriate for their business and consumers'.³⁵ Even so, it has been claimed that the RLOs impose unwarranted compliance costs on lenders.³⁶ Critics also argue

27 Finance Industry Delegation, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* 2 ('Submission to Treasury'); Australia and New Zealand Banking Group Ltd, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (23 December 2022). See also Eyers, 'Big Banks Split' (n 10); Joyce Moullakis, 'Afterpay Hits Out at Banks over BNPL Regulation, Hindering Competition', *The Australian* (online, 30 January 2023) <<https://www.theaustralian.com.au/business/financial-services/afterpay-hits-out-at-banks-over-bnpl-regulation-hindering-competition/news-story/26d9ad5730cb1be86134bcd516ee2dce>>.

28 *NCCPA* (n 6) s 29.

29 *Ibid* s 47(1)(a).

30 *Ibid* ss 128–32.

31 *Ibid* ss 130(1)(a)–(b).

32 *Ibid* s 130(1)(c).

33 *Ibid* s 133.

34 *Ibid* ss 133(2)(a)–(b). Section 133(3) specifically provides that 'if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved'.

35 Australian Securities and Investments Commission, 'Update to RG 209: Credit Licensing: Responsible Lending Conduct' (Consultation Paper No 309, 14 February 2019) 9 [12] <<https://download.asic.gov.au/media/5008524/cp309-published-14-february-2019.pdf>>; Australian Securities and Investments Commission, *Credit Licensing: Responsible Lending Conduct* (Regulatory Guide No 209, 9 December 2019) 28.

36 In 2020, the Commonwealth Government proposed sweeping changes to the *NCCPA* (n 6) and introduced them to federal Parliament in the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth). These changes would have considerably scaled back

that compliance with the RLOs is ‘onerous’, ‘intrusive’ and unnecessarily time-consuming for consumers.³⁷ By avoiding this process, and relying instead on their own algorithms and internal data to assess applications, BNPL providers currently offer ‘frictionless’ and instantaneous access to credit.³⁸ For many commentators, the flexibility, convenience and ‘instant gratification’ offered by BNPL are central to its growing popularity.³⁹

B Current Regulation

BNPL is a ‘financial product’ regulated by the *ASIC Act*.⁴⁰ This is because it constitutes a ‘credit facility’, for the purposes of the Act: a very broad category that includes credit cards, mortgages, guarantees, pawn loans, consumer leases and hire purchase arrangements.⁴¹ By virtue of the application of the *ASIC Act*, BNPL providers are subject to the *ASIC Act*’s general consumer protection provisions. These provisions replicate the consumer guarantees set out in schedule 2 of the *Competition and Consumer Act 2010* (Cth)⁴² and prohibit any provider of BNPL products from engaging in misleading or deceptive⁴³ or ‘unconscionable’ conduct⁴⁴ or making ‘false or misleading representations’.⁴⁵ The *ASIC Act* also requires

the RLOs. At the time, the Commonwealth Government argued that the changes were necessary to reduce the compliance costs associated with the RLOs. It described the RLOs as a “one-size-fits-all” regime, where the burden of obligations is high because they are aligned with vulnerable, high-risk consumers who represent a small proportion of the overall consumers seeking to access credit’. It noted that lenders must ‘undertake extensive inquiry and verification processes to satisfy the current RLOs, irrespective of whether they consider this information is necessary to inform the lending application before them’: Treasury (Cth), ‘Responsible Lending Obligations: Consumer Credit Reforms (Regulation Impact Statement, 10 December 2020) 19 <<https://treasury.gov.au/sites/default/files/2021-01/foi2839documentforrelease.pdf>> (‘Responsible Lending Obligations’). For a discussion of these proposed reforms, which were never implemented, see Lucinda O’Brien et al, ‘One-Stop Shop: Consumer Credit Issued at the Point of Sale’ (2021) 32(1) *Journal of Banking and Finance Law and Practice* 3, 20–3.

37 Australian Banking Association, Submission to Treasury (Cth), *Consultation on Consumer Credit Reforms* (23 November 2020) <https://www.ausbanking.org.au/wp-content/uploads/2020/11/201123_ABA_response_Tsy.pdf>. See also ‘Responsible Lending Obligations’ (n 36) 9–10.

38 James Thompson, ‘CBA’s Afterpay Attack about More than BNPL’, *Australian Financial Review* (online, 18 March 2021) <<https://www.afr.com/chanticleer/cba-s-afterpay-attack-about-more-than-bnpl-20210318-p57bv8>>; Anglicare Australia et al (n 7) 14; ‘How Can Organisations Help Customers’ (n 25). See also Colin Kruger, ‘How Our Primal Instincts Fuel Afterpay’s Buy Now, Pay Later Juggernaut’, *The Sydney Morning Herald* (online, 2 April 2021) <<https://www.smh.com.au/business/the-economy/how-our-primal-instincts-fuel-afterpay-s-buy-now-pay-later-juggernaut-20210325-p57dvx.html>>.

39 Kruger (n 38).

40 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7) (‘*ASIC Act*’).

41 A ‘credit facility’ is defined by regulation 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth). See also Hal Bolitho, Nicola Howell and Jeannie Paterson, *Duggan and Lanyon’s Consumer Credit Law* (LexisNexis Butterworths, 2nd ed, 2020) 971, 979.

42 *Competition and Consumer Act 2010* (Cth) sch 2 ch 3 pt 3-2 div 1. Note that the consumer guarantees under this statute do not apply to financial products and services: at s 131A; Bolitho, Howell and Paterson (n 41) 24.

43 *ASIC Act* (n 40) s 12DA.

44 Ibid ss 12CA–12CC.

45 Ibid s 12DB. The *ASIC Act* (n 40) also prohibits harassment and coercion (section 12DJ), bait advertising (section 12DG), referral selling (section 12DH), pyramid selling (section 12DK) and the unsolicited issuing of credit or debit cards (section 12DL), among other things.

providers of BNPL to act ‘with due care and skill’.⁴⁶ Where a consumer discloses his or her purpose for using the product, either ‘expressly or by implication’, the BNPL product must be ‘reasonably fit’ for this purpose.⁴⁷ Since 5 October 2021, some BNPL providers have been bound by ASIC’s *Regulatory Guide 271: Internal Dispute Resolution*, which sets out minimum standards for complaints-handling.⁴⁸ Since 2021, BNPL providers have also been subject to ‘design and distribution requirements’ introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) (*‘DADO and PIP Act’*).⁴⁹ These obligations require all issuers and distributors of financial products to test their products, prior to releasing them to market, to ensure that they do not cause consumer harm. Issuers and distributors must also ‘monitor consumer outcomes’ and review their products regularly ‘to ensure that consumers are receiving products that are likely to be consistent with their ... objectives, financial situation and needs’.⁵⁰

As noted above, BNPL providers currently operate outside the scope of the *NCCPA*, benefitting from several exemptions contained in the *National Credit Code* (*‘NCC’*).⁵¹ The first exemption applies where consumers are charged no interest or fees, provided that they make their scheduled payments on time. Such

46 Ibid s 12ED(1)(a).

47 Ibid s 12ED(2).

48 Australian Securities and Investments Commission, *Internal Dispute Resolution* (Regulatory Guide No 271, 2 September 2021) (*‘RG 271’*). Adherence to it is required by clause 13.2 of AFIA’s BNPL Code of Practice: ‘BNPL Code’ (n 21). BNPL providers are also bound by it if they hold a license issued by ASIC: *RG 271* (n 48) 5–6. See also Australian Financial Complaints Authority, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (December 2022) 12.

49 *Corporations Act 2001* (Cth) pt 7.8A (*‘Corporations Act’*). These provisions were introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) (*‘DADO and PIP Act’*) and were initially to come into effect on 5 April 2021. Due to the impact of the COVID-19 pandemic, this date was deferred until 5 October 2021: Australian Securities and Investments Commission, *ASIC Corporations (Deferral of Design and Distribution Obligations)* (Instrument 2020/486, 27 May 2020); Australian Securities and Investments Commission, *Product Design and Distribution Obligations* (Regulatory Guide No 274, 11 December 2020) <<https://download.asic.gov.au/media/dlpccdof/rg274-published-11-december-2020-20220628.pdf>> (*‘RG 274’*). See also Revised Explanatory Memorandum, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* (Cth) ch 1.

50 *Corporations Act* (n 49) pt 7.8A; *RG 274* (n 49) 4. The *DADO and PIP Act* (n 49) also endowed ASIC with a new capacity to intervene directly in the market for financial products to address consumer harm or avert the risk of future harm. The product intervention power (*‘PIP’*) allows ASIC to make a product intervention order if it is ‘satisfied’ that a financial product or a ‘class of financial products’ has ‘resulted in, or will or is likely to result in, significant detriment to retail clients’: *Corporations Act* (n 49) s 1023D; *NCCPA* (n 6) s 301D. To date, however, ASIC has demonstrated little inclination to deploy the PIP against providers of BNPL products. In 2020, when making an order in relation to ‘continuing credit contracts’, it explicitly stated that the order would not apply to BNPL products, since the risks it had identified ‘[did] not, on the evidence currently available, arise’ from BNPL products: Australian Securities and Investments Commission, ‘Addendum to Consultation Paper 330: Using the Product Intervention Power: Continuing Credit Contracts’ (Attachment No 1 to Media Release 20-274MR, 10 November 2020) 2 <<https://download.asic.gov.au/media/5848117/attachment-1-to-20-274mr-addendum-to-consultation-paper-330.pdf>>. See also Lucinda O’Brien, Ian Ramsay and Paul Ali, ‘Australia’s Product Intervention Power and Protection from Consumer Harm: An Evaluation’ (2022) 29(1) *Competition and Consumer Law Journal* 32 <<https://doi.org/10.2139/ssrn.4174026>>.

51 *NCCPA* (n 6) sch 1 (*‘NCC’*).

arrangements do not constitute ‘credit’ for the purposes of the *NCCPA*.⁵² The second is known as the ‘continuing credit contract’ exemption. This applies to credit contracts that do not charge interest, only fees. These fees cannot exceed \$200 in the first year and \$125 in each subsequent year.⁵³ A third form of BNPL is exempt from the *NCC* under special provisions for ‘short term credit’. To qualify for this exemption, a credit contract cannot last for more than 62 days,⁵⁴ cannot charge fees exceeding 5% of the amount borrowed and cannot charge interest higher than an effective annual rate of 24%. In June 2022, in response to sustained lobbying from consumer advocates, the Minister for Financial Services announced the Commonwealth Government’s intention to bring BNPL within the ambit of *NCCPA*.⁵⁵ In November 2022, the Government released an Options Paper titled *Regulating Buy Now, Pay Later in Australia* (‘Options Paper’). The *Options Paper* outlined three potential models for regulating BNPL, including two that would require compliance with the RLOs, either in full or in modified form.⁵⁶ In May 2023, it announced its intention to bring BNPL providers within the ambit of the *NCCPA*, with ‘scalable’ responsible lending requirements tailored to the ‘risk level’ of their products.⁵⁷ These reform proposals are discussed in Part V(B).

C Voluntary Code

The BNPL industry introduced its voluntary industry code in March 2021. According to AFIA, signatories to this code represent 90% of the Australian market, based on the number of accounts active on 30 June 2022.⁵⁸ The AFIA Buy Now Pay Later Code of Practice (‘BNPL Code’) nominates a number of specific objectives and ‘key commitments’ to consumers of BNPL. Its objectives are to ‘[p]romote a customer-centric approach to the design, marketing and distribution’ of BNPL; to ‘[p]romote high industry standards of service for customers and build best practices across the BNPL Industry’; and to ‘[s]upport compliance with legal and industry obligations’.⁵⁹ Its first ‘key [commitment]’, on behalf of signatories, is to ‘focus on customers’ by

52 The *NCC* (n 51) only applies to credit if ‘a charge is or may be made for providing the credit’: at s 5(1) (c). See Australian Securities and Investments Commission, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (January 2023) 7 (‘2023 Submission’).

53 Ibid s 6(5); *National Consumer Credit Protection Regulations 2010* (Cth) reg 51; Australian Securities and Investments Commission, ‘2023 Submission’ (n 52) 7.

54 *NCC* (n 51) s 6(1); Australian Securities and Investments Commission, ‘2023 Submission’ (n 52) 7.

55 See Ben Butler, ‘Embattled Buy Now, Pay Later Sector to Be Regulated under Credit Laws’, *The Guardian* (online, 8 June 2022) <<https://www.theguardian.com/business/2022/jun/08/embattled-buy-now-pay-later-sector-to-be-regulated-under-credit-card-laws>>. See also Stephen Jones, ‘Address to the Responsible Lending and Borrowing Summit, Sydney’ (Speech, 12 July 2022) <<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-and-borrowing-summit-sydney>>; Ronald Mizen and Ayesha de Kretser, ‘Buy Now, Pay Later Regulation Inches Closer’, *Australian Financial Review* (online, 12 July 2022) <<https://www.afr.com/politics/federal/buy-now-pay-later-regulation-inches-closer-20220712-p5b0vy>>.

56 *Options Paper* (n 8).

57 Jones, ‘2023 Address’ (n 8).

58 ‘Buy Now Pay Later Code’, *Australian Finance Industry Association* (Web Page) <<https://www.afia.asn.au/bnpl-code>>.

59 ‘BNPL Code’ (n 21) cl 1.1.

providing ‘high quality’ services that are ‘inclusive and accessible’.⁶⁰ As part of this commitment, the BNPL Code requires signatories to ‘take extra care’ in relation to consumers who ‘have a vulnerability’.⁶¹ It refers specifically to several ‘vulnerability factors’, including being ‘targeted’ inappropriately by a provider; experiencing specific ‘life events or temporary difficulties,’ such as ‘an accident or sudden illness, relationship breakdown, family violence, job loss, having a baby or the death of a family member’; and possessing certain ‘[p]ersonal or social characteristics’, such as ‘speaking a language other than English, having different cultural assumptions or attitudes about money, or experiencing cognitive or behavioural impairments due to intellectual disability, mental illness, chronic health problems or age’.⁶² The BNPL Code requires signatories to adopt ‘best industry practice’ when dealing with such vulnerabilities.⁶³ Other ‘key commitments’ set out in the BNPL Code include commitments to ‘be fair, honest and ethical’;⁶⁴ to keep consumers ‘properly informed’ about their products and services;⁶⁵ and to ensure that products and services offered are ‘suitable’ to consumers.⁶⁶ The BNPL Code prescribes a preliminary assessment of new customers,⁶⁷ ongoing assessment of existing customers⁶⁸ and ‘escalating tiers of assessment criteria’ for specific transactions.⁶⁹ These criteria vary in proportion to the transaction amount, but in most cases, purchases below \$2,000 do not require any formal verification of consumers’ income, liabilities or credit history.⁷⁰

In late 2022, AFIA commissioned an independent review of the BNPL Code.⁷¹ The resulting report was released in March 2023. It found that there was scope to improve several aspects of the BNPL Code, particularly with regard to vulnerable consumers.⁷² The report noted that the Code ‘places onus on the customer to self-identify as vulnerable’.⁷³ It criticised this approach, observing that consumers may be reluctant to identify themselves as vulnerable, due to perceptions of social stigma or fear of losing access to their BNPL products.⁷⁴ The report found that the BNPL Code should include more specific commitments relating to vulnerable

60 Ibid cls 8.1–8.2.

61 Ibid cl 8.3. AFIA’s BNPL Code of Practice adopts ASIC’s formulation of ‘vulnerability’: Australian Securities and Investments Commission, *ASIC Corporate Plan 2019–23: Focus 2019–20* (Report, August 2019) 12.

62 ‘BNPL Code’ (n 21) cl 8.4.

63 Ibid cl 8.6. See also ‘AFCA Approach Documents’, *Australian Financial Complaints Authority* (Web Page) <<https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>>.

64 ‘BNPL Code’ (n 21) cl 9.

65 Ibid cl 10.

66 Ibid cl 11.

67 Ibid cls 11.1, 11.3.

68 Ibid cl 11.9.

69 Camp (n 9) 123.

70 Beratis (n 9) 124; ‘BNPL Code’ (n 21) cls 11.3–11.5, 11.12.

71 Australian Finance Industry Association, ‘AFIA Commissions Independent Review of the BNPL Code of Practice’ (Media Release, 14 October 2022) <https://www.afia.asn.au/s/AFIA_BNPL_Code_review_announcement-0001.pdf>.

72 Promontory, *Review of the Buy Now Pay Later Code of Practice* (Report, March 2023) 7 <https://www.afia.asn.au/s/20230309_BNPL-Code-Review_Final-Report.pdf>.

73 Ibid 23.

74 Ibid.

consumers, in place of the current commitment ‘to take extra care’ with such consumers. It suggested that the BNPL Code include specific examples of measures that providers should adopt in relation to vulnerable consumers, such as the provision of free interpreting services for non-native English speakers.⁷⁵ The report noted ‘evidence of inconsistencies and deficiencies in how some of the key BNPL Code provisions [were] being applied in practice’, gathered in consultations with consumer advocates.⁷⁶ This consultation yielded numerous reports of poor or inconsistent compliance with key provisions, such as those relating to hardship assistance.⁷⁷ The report concluded that the BNPL industry must make greater efforts to comply with the BNPL Code, ‘to ensure that the promises ... made to customers are consistently delivered’.⁷⁸ It also recommended that the BNPL Code Compliance Committee undertake more detailed monitoring of the BNPL Code and publish more extensive data about signatories’ compliance.⁷⁹

III RECENT POLICY DEBATES

A Public Inquiries into BNPL

ASIC has published two reports on the BNPL industry, the first in 2018 and the second in 2020.⁸⁰ In the first report, ASIC drew on a survey of 600 consumers who had used BNPL, as well as original data supplied by six of the most prominent BNPL providers operating at that time. It concluded that there was a ‘real risk that some buy now pay later arrangements can increase the amount of debt held by consumers and contribute to financial over-commitment’.⁸¹ In its second report, ASIC outlined the results of a further survey of 1,655 consumers who had used BNPL. It found that 21% of those consumers had defaulted on a payment in the 12 months prior to the survey.⁸² Of these consumers, 47% were aged between 18 and 29; 39% also held a payday loan and/or a ‘medium amount credit contract’;⁸³ 34% had made at least six BNPL purchases in the preceding six months; and 55% had used at least two different BNPL arrangements in the same period.⁸⁴ The report

75 Ibid 24. It also suggested that the BNPL Code of Practice introduce specific measures for assisting victims of fraud or financial abuse, including better privacy measures, better staff training to enhance detection of such abuse and specific remedies such as debt waivers and the removal of adverse information from credit reports: at 25, 45.

76 Ibid 6.

77 Ibid 31, 42–3.

78 Ibid 6.

79 Ibid 61–2.

80 Australian Securities and Investments Commission, *Review of Buy Now Pay Later Arrangements* (Report No 600, November 2018) <<https://download.asic.gov.au/media/3iyh2qki/rep600-published-07-dec-2018-20230524.pdf>> (‘BNPL Arrangements Review’); *BNPL Industry Update* (n 11).

81 *BNPL Arrangements Review* (n 80) 12.

82 *BNPL Industry Update* (n 11) 4.

83 A ‘medium amount credit contract’ is defined by the NCC (n 51) as a credit contract that is not continuing, not provided by an ADI, and for an amount between \$2,001 and \$5,000, for a period ranging from 16 days to 2 years: at s 204.

84 *BNPL Industry Update* (n 11) 12.

also found that 20% of those surveyed said that they had ‘cut back’ on or foregone ‘essentials’ such as meals in order to make their BNPL payments on time.⁸⁵ Fifteen per cent said they had taken out additional loans in order to meet their BNPL repayment obligations.⁸⁶

In 2018, the Senate Economic References Committee conducted an Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship, tabling its final report in February 2019.⁸⁷ The Committee appeared to accept the industry’s contention that BNPL was *not* a product that ‘targeted’ low income earners. It stated that BNPL was ‘plainly different’ from products such as payday loans and consumer leases, which ‘seem ... designed to take advantage’ of such consumers.⁸⁸ Compared with these products, it observed, BNPL was used by ‘a much broader range of Australians’.⁸⁹ The Committee acknowledged that consumer advocates wanted BNPL to be regulated as a form of credit under the *NCCPA*. It agreed that there was ‘a clear role for regulators’ in ensuring that BNPL was subject to ‘proper regulation’, affording ‘the same protections [consumers] would enjoy with respect to products with a similar risk profile’.⁹⁰ It noted that BNPL products were, at that time, excluded from the ambit of the proposed product intervention powers and design and distribution obligations,⁹¹ and recommended that they be included.⁹² It also recommended that the industry develop a voluntary code of practice.⁹³ Yet it did not recommend the expansion of the *NCCPA*’s scope to include BNPL. Instead, the Committee urged the Commonwealth Government to ‘consider ... what regulatory framework would be appropriate for the buy now pay later sector’. It suggested that this ‘framework’ should ensure that consumers had access to hardship policies, internal and external dispute resolution; that providers ‘appropriately consider[ed] consumers’ personal financial situations’; and that BNPL products were ‘affordable and offer[ed] value for money’.⁹⁴

B Calls for Stricter Regulation

Since the emergence of the BNPL industry, consumer advocates have consistently expressed concern about the risks posed by these products, particularly to vulnerable and low income consumers. In its submission to the Senate Inquiry in 2018, the Consumer Action Law Centre (‘CALC’) stated that many consumers with unmanageable BNPL debts were ‘juggling other debts such as credit cards, overdue utility bills or payday loans’. It argued that the use of BNPL could increase financial hardship for those already in trouble, leading to debt collection activity

85 Ibid 15.

86 Ibid.

87 *Credit and Hardship Report* (n 1).

88 Ibid 1, 4.

89 Ibid 1.

90 Ibid 11.

91 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 October 2018, 11005 (Clare O’Neil, Shadow Minister for Financial Services).

92 *Credit and Hardship Report* (n 1) 12.

93 Ibid.

94 Ibid 11–12.

and even, in some cases, bankruptcy.⁹⁵ Financial Counselling Australia ('FCA') pointed out that in the absence of a legal obligation to assess consumers' capacity to pay, BNPL providers were lending comparatively large amounts to people on extremely low incomes. After making their repayments, some were left with insufficient funds for basic necessities such as food, housing and utilities.⁹⁶ The Financial Rights Legal Centre ('FRLC') observed that the apparent safeguards imposed by BNPL providers could easily be circumvented.⁹⁷ Consumers could easily take out multiple BNPL accounts with different providers, or even with the same provider if they used different email addresses. This allowed them to accrue new debts 'beyond the ostensible limits placed on the accounts', even if they were already missing repayments.⁹⁸ The FRLC also criticised the use of BNPL to sell expensive products, such as solar panels, to low income earners, including disability pensioners.⁹⁹ It argued that access to BNPL increased the risk that 'financially vulnerable people' would fall victim to 'exploitative ... sales tactics', leaving them with debts they could never repay.¹⁰⁰

Consumer advocates have conducted their own research to assess the impact of BNPL on consumers. In 2021, FCA surveyed 248 financial counsellors, asking them about their clients' experiences using BNPL. These financial counsellors said that the proportion of their clients presenting with BNPL debts was rising sharply.¹⁰¹ Many said that their clients were using BNPL to pay for daily, essential expenses, including to buy 'food vouchers' from supermarkets.¹⁰² They expressed concern at the ease with which consumers could create multiple BNPL accounts, leading to unsustainable levels of debt.¹⁰³ Many respondents felt that BNPL providers were insufficiently responsive to consumers in hardship, and that when they did respond, they were often 'judgmental' and unwilling to offer assistance.¹⁰⁴ FCA concluded that while BNPL 'can be a useful product for a cohort of consumers ... it can

95 Consumer Action Law Centre, Submission No 37 to Senate Economic References Committee, Parliament of Australia, *Inquiry into Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (9 November 2018) 16.

96 Financial Counselling Australia, Submission No 57 to Senate Economic References Committee, Parliament of Australia, *Inquiry into Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (November 2018) 47.

97 Financial Rights Legal Centre, Submission No 31 to Senate Economic References Committee, Parliament of Australia, *Inquiry into Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (November 2018) 26.

98 Ibid.

99 Ibid 24, 29.

100 Ibid 29.

101 Of the financial counsellors surveyed, 84% said that half, most or all of their clients presented with BNPL debt. A year earlier, only 31% had said that half, most or all their clients had BNPL debt: Financial Counselling Australia, *It's Credit, It's Causing Harm and It Needs Better Safeguards* (Report, December 2021) 2 <<https://www.financialcounsellingaustralia.org.au/fca-content/uploads/2021/12/FCA-Buy-Now-Pay-Later-Survey-Dec-2021-Final.pdf>>.

102 Ibid 9.

103 Ibid 9–10.

104 Ibid 7, 27.

too easily cause harm to others'.¹⁰⁵ In November 2022, Good Shepherd Australia New Zealand released its own report, drawing on the experiences of financial counsellors and caseworkers.¹⁰⁶ This report found that young women¹⁰⁷ and women with dependent children were among the most prolific users of BNPL.¹⁰⁸ It reported that these consumers were using BNPL to fund everyday items such as groceries, as well as larger essential costs such as dental care, car repairs, Christmas presents, baby products and school uniforms.¹⁰⁹ While acknowledging that BNPL allowed consumers with low and irregular incomes 'to portion large, important expenses into smaller payments',¹¹⁰ it argued that a lack of appropriate safeguards made BNPL a risky choice for many users. It noted that some women were using BNPL as a source of emergency funds when fleeing family violence.¹¹¹ Yet it also pointed out that perpetrators of family violence could use BNPL to inflict economic abuse, either by forcing their partners to make purchases on their behalf using BNPL, or fraudulently incurring BNPL debts in their partners' names.¹¹²

In their submissions to the Commonwealth Government's consultation, following the release of its 2022 *Options Paper*, consumer advocates insisted that only full regulation under the *NCCPA* would address the risks posed by BNPL. They strongly criticised the industry's previous efforts at self-regulation, citing 'widespread evidence of BNPL providers signing people up to debts they cannot afford' under the BNPL Code.¹¹³ They rejected the industry's contention that credit checks could 'substitute for a responsible lending assessment'.¹¹⁴ They noted that credit checks only track consumers' credit history and provide very little insight into their risk of future hardship. They argued that if credit checks are used as the sole test of a loan's affordability, already heavily indebted consumers can be approved for further credit, provided that they have not yet defaulted on any existing debts.

105 Ibid 11. In July 2022, FCA released another research report, produced by a team of economists, analysing 'the actual costs of the most popular BNPL products for smaller purchases of up to \$2,000'. This research argued that 'the fee structure of BNPL companies [was] highly regressive', such that consumers who borrowed the least paid the highest effective interest rates. It found that consumers who incurred the maximum possible late fees could pay higher effective interest rates than those applicable to credit cards: Lien Duong, Grantley Taylor and Baban Eulaiwi, Financial Counselling Australia, *Comparative Analysis of Credit Card Interest Rates vs BNPL Fees in the Consumer Credit Market* (Report, July 2022) 3 <<https://www.financialcounsellingaustralia.org.au/fca-content/uploads/2022/07/Comparative-Interest-Rates-BNPL-v-Credit-Cards-1.pdf>>.

106 Good Shepherd Australia New Zealand, *Safety Net for Sale: The Role of Buy Now Pay Later in Exploiting Financial Vulnerability* (Report, November 2022) <https://goodshep.org.au/wp-content/uploads/2022/11/Good-Shepherd-Report_The-Role-of-Buy-Now-Pay-Later-in-Exploiting-Financial-Vulnerability_November-2022-Full-Report.pdf> ('*Exploiting Financial Vulnerability Report*').

107 See also Way Forward, *Balancing Act: Exploring How Financially Vulnerable People Juggle Their Debt, BNPL and Household Finances* (Report, 2022) 38 <<https://wayforward.org.au/wp-content/uploads/2022/08/BNPL-White-Paper-Way-Forward-2022.pdf>>.

108 *Exploiting Financial Vulnerability Report* (n 106) 9.

109 Ibid 2, 9.

110 Ibid 8.

111 Ibid 2; 'Safety Programs', *Department of Social Services* (Web Page, 15 September 2023) <<https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/safety-programs>>.

112 *Exploiting Financial Vulnerability Report* (n 106) 12.

113 Anglicare Australia et al (n 7) 4.

114 Ibid 51.

Consumers on extremely low incomes can also be approved, simply because they have no credit history at all.¹¹⁵ The advocates maintained that ‘it is not possible for a lender to determine whether someone can afford a credit product without some understanding of the borrower’s income and expenses’.¹¹⁶ They argued that only a full application of the RLOs would prevent fraud, including the misuse of BNPL by perpetrators of family violence, since these laws would require BNPL providers to ensure that the credit was directly beneficial to the applicant.¹¹⁷

C Industry Resistance to Stricter Regulation

The BNPL industry argues that it provides a valuable alternative to other, more costly and potentially harmful forms of credit. Afterpay, the first company to offer BNPL, has promoted its model as being socially responsible and financially ‘empower[ing]’ for consumers.¹¹⁸ Afterpay contends that it is ‘completely different to traditional credit products, which can push customers into long-term debt at high interest rates’.¹¹⁹ It points out that its customers pay no interest and that fees imposed for late payments are ‘low and capped so they can’t ever go higher than 25% of [the consumer’s] order value’.¹²⁰ It sets out the ‘core consumer protections’ it has implemented to prevent consumers from becoming financially overcommitted.¹²¹ These include low initial spending limits for new customers; automatic suspension of consumers’ accounts if a payment is missed; a hardship policy; and flexible repayment arrangements.¹²² Afterpay contends that ‘79% of [its] global community have never incurred a late fee and 95% of purchases are paid for on time’.¹²³ Another large provider, Zip Co, also markets itself as a safe and affordable product, claiming that it is ‘[d]isrupting the broken credit card model’ by offering consumers ‘fair, transparent and flexible credit’.¹²⁴

AFIA has commissioned independent research setting out the benefits of BNPL, both to individual consumers and to the wider economy. In a report published in June 2022, it contended that ‘BNPL is an example of Australian innovation’.¹²⁵ The

115 Ibid.

116 Ibid 49.

117 Ibid 26, 28, 50; Economic Abuse Reference Group, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (16 December 2022) 7.

118 ‘Our Story’ (n 15).

119 ‘Is Afterpay Just Another Form of Debt?’, *Afterpay* (Web Page, 25 March 2024) <<https://help.afterpay.com/hc/en-au/articles/360016053012-Is-Afterpay-just-another-form-of-debt>> (‘Another Form of Debt?’).

120 Ibid.

121 Afterpay, ‘How Afterpay Enables Responsible Consumer Spending during Inflationary Times’ (Web Page, 24 June 2022) <<https://newsroom.afterpay.com/updates/how-afterpay-enables-responsible-consumer-spending-during-inflationary-times>>.

122 Afterpay also states that it carries out ‘soft credit checks’ for some US customers: *ibid*. By contrast, on its Australian site, Afterpay states that it does not perform credit checks on customers because ‘external credit checks may impact your credit score or rating’ and ‘[f]inancial freedom shouldn’t cost you or your future’: ‘Better Money Mindset’, *Afterpay* (Web Page) <<https://www.afterpay.com/en-AU/financial-wellness>>.

123 ‘Another Form of Debt?’ (n 119).

124 ‘Get to Know Us a Little Better’, *Zip* (Web Page, 2023) <<https://zip.co/about-us>>.

125 2022 *BNPL Economic Impact Report* (n 23) 11.

report produced independent economic modelling indicating that BNPL contributed \$14.3 billion to Australia's Gross Domestic Product in the financial year ending in 2021.¹²⁶ It also drew on the results of an independent survey, involving more than 2,750 consumers of BNPL, carried out between December 2021 and February 2022.¹²⁷ This survey found that 54% of users said BNPL helped them 'manage their cashflow'; 49% said it helped them to 'feel in control of their spending'; and 54% used BNPL 'to avoid interest charges'.¹²⁸ The report maintained that consumers accrue 'benefits in many areas' from using BNPL, including greater 'control' over their money, avoidance of interest charges, speed, convenience, flexibility and choice as to how they pay for goods and services.¹²⁹ It conceded that some of these benefits 'may not always be the experience at an individual level'.¹³⁰ Yet it pointed out that only a very small fraction of BNPL users sought financial hardship assistance or lodged complaints with the Australian Financial Complaints Authority ('AFCA').¹³¹ It noted that only 0.34% of active accounts were subject to hardship arrangements on 30 June 2021, while only 0.01% gave rise to complaints to AFCA in the 2020–21 financial year. On this basis, it concluded that '[t]he level of financial hardship relative to the BNPL user base is low'.¹³²

BNPL providers have engaged actively in policy debates concerning the regulation of BNPL. They have maintained that it would be inappropriate and potentially counterproductive to regulate BNPL as credit under the *NCCPA*. In a 2018 submission to the Senate Inquiry, Afterpay strongly rejected the suggestion that its product 'target[ed] Australians at risk of financial hardship'.¹³³ It drew a sharp distinction between BNPL and other financial products within the scope of the Inquiry, such as payday loans and consumer leases.¹³⁴ Denying that its product was 'a source of credit',¹³⁵ Afterpay pointed to various 'design features and safeguards ... purposefully put in place to ensure [that] customers do not fall into debt traps'.¹³⁶ It maintained that to impose 'the full range of [*NCCPA*]

126 Ibid 6.

127 Ibid 7.

128 Ibid 29.

129 Ibid 26–7.

130 Ibid 4.

131 Ibid 31. The AFCA noted that, in the financial year ending in 2021, only 0.34% of 'active' BNPL accounts were in hardship, while only 0.01% 'were the subject of [External Dispute Resolution] complaints' to it: at 8.

132 Ibid 31.

133 Afterpay, Submission No 26 to Senate Economics Reference Committee, Parliament of Australia, *Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (November 2018) 2 ('Submission No 26'). Zip has also argued that 'BNPL is an improvement on traditional, point of sale retail finance and credit card offerings that is low cost and used widely by customers across all demographics': Zip, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* 4.

134 Afterpay, 'Submission No 26' (n 133) 2.

135 Ibid.

136 Ibid. AFIA has also made submissions to international bodies such as the CFPB, setting out the benefits of self-regulation and asserting that the Code 'sets the highest standards' in 'proportionate, scalable, and targeted' consumer protection: Australian Finance Industry Association, Submission to the Consumer Financial Protection Bureau, *Notice and Request for Comment Regarding the Consumer Financial Protection Bureau's Inquiry into Buy Now Pay Later (BNPL) Providers* (29 March 2022) 1–2 <<https://>

regulation on Afterpay would have a number of disproportionate effects', since the costs of complying 'would potentially exceed the value of the goods being purchased'.¹³⁷ It reiterated this claim in a December 2022 submission responding to the Commonwealth Government's proposed law reforms. While expressing support for some measures foreshadowed in the Government's *Options Paper*, it stated that 'a blanket application of the [NCCPA] ... would inevitably increase the costs of compliance', making it no longer viable for BNPL providers to offer 'low-limit ... low-risk ... products' to consumers.¹³⁸ AFIA voiced similar concerns, warning policymakers that to regulate BNPL providers 'disproportionately' could potentially 'limit customer access ... and hinder financial inclusion'.¹³⁹

IV EMPIRICAL DATA

This section presents and discusses the empirical data gathered by the authors. Part IV(A) sets out the findings from the authors' online survey of consumers, including 1,128 users of BNPL. Part IV(B) outlines the findings of a series of focus groups conducted by the authors, involving advocates with professional experience assisting consumers with BNPL debts. Part IV(C) synthesises the data derived from the survey and focus groups. It sets out the harms and benefits associated with BNPL as identified by the data.

A Survey

1 Aims and Methodology

In 2019, the authors obtained ethics approval to conduct an anonymous online survey of Australian consumers regarding their experiences using BNPL, payday loans and pawn loans.¹⁴⁰ The authors chose to focus on these three products as they all provide access to small amounts of credit, over relatively short periods. All are regulated differently from 'mainstream' credit products offered by major banks, such as credit cards and personal loans.¹⁴¹ To varying extents, all three products are

afiawebsitefiles.blob.core.windows.net/websitecontent/Submission/Submission_to_Consumer_Financial_Protection_Bureau_BNPL_Inquiry_March_2021.pdf>.

137 Afterpay, 'Submission No 26' (n 133) 20.

138 Afterpay, '2022 Submission' (n 13) 20.

139 Australian Finance Industry Association, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (22 December 2022) 4.

140 Ethics approval was granted by the Law Human Ethics Advisory Group at Melbourne Law School on 7 June 2019 (Project ID: 1852516.1).

141 As discussed above, BNPL is currently exempt from regulation under the *NCCPA* (n 6), though it is regulated under the *ASIC Act* (n 40). Payday loans are subject to the general responsible lending obligations contained in the *NCCPA* (n 6) but are also subject to additional, specific rules under the *NCC* (n 51) (eg, section 31A, which imposes caps on the fees charged under a payday loan contract): see Bolitho, Howell and Paterson (n 41) 460, 452–3. Pawn loans are largely exempt from the *NCCPA* (n 6), with the exception of sections 76–81 of the *NCC* (n 51), relating to unjust transactions: see also *NCC* (n 51) s 6(9); Bolitho, Howell and Paterson (n 41) 109. Pawnbroking is largely governed by state

designed to appeal to low income consumers.¹⁴² By conducting a survey of people who had used these products, the authors sought to gather evidence regarding the ways in which consumers used the products (for example, the amounts borrowed and the frequency of borrowing); the extent to which they used multiple products simultaneously; and the extent to which the products caused harm.

The researchers conducted the survey in collaboration with a Sydney-based independent market research company, Pureprofile. The survey contained 71 questions. The first sought to establish which of the three products the respondent had used, within the preceding three years.¹⁴³ The next 14 questions addressed respondents' demographic characteristics, such as gender and age; their financial circumstances; and their financial literacy.¹⁴⁴ The remaining 41 questions were divided into three sections, relating to BNPL, payday loans and pawn loans, respectively. Respondents could answer the questions in one, two or all three sections, depending on how many of these products they had used in the preceding three years. They were asked the same or similar questions about each product, to allow the researchers to compare the impact of the three products. Pureprofile recruited the survey participants from its 'panel' of consumers, who register for the express purpose of participating in research studies.¹⁴⁵ The research team requested 500 unique completed surveys from users of each product. Pureprofile imposed quotas for gender, age and state or territory of residence, to ensure that the samples collected were broadly representative of the Australian population. The survey launched on 12 December 2019 and closed on 21 February 2020, having gathered

legislation: see, eg, *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic). The provision of credit by a pawnbroker is also a financial product for the purposes of the *ASIC Act* (n 40): see *Australian Securities and Investments Regulations 2001* (Cth) reg 2B(1)(c).

142 See *BNPL Arrangements Review* (n 80) 22–3, 26; Paul Ali, Cosima McRae and Ian Ramsay, 'Payday Lending Regulation and Borrower Vulnerability in the United Kingdom and Australia' [2015] (3) *Journal of Business Law* 223, 230–1; Lucinda O'Brien, Ian Ramsay and Paul Ali, 'Lending on the Edge: Pawnbroking in Australia' (2024) 43(1) *University of Queensland Law Journal* 1 <<https://doi.org/10.38127/uqlj.v43i1.8113>>.

143 To be eligible to complete the survey, respondents were required to have used at least one of the three within the previous three years. If they had used more than one, they were invited to answer questions about each.

144 The survey questions used to gauge respondents' financial literacy were as follows:

- Suppose you had \$100 in a savings account and the interest rate was 2% per year. After 5 years, how much do you think you would have in the account if you left the money to grow? (Available responses: More than \$102; Exactly \$102; Less than \$102; Don't know/unsure);
- Suppose the interest rate on your savings account was 1% per year and inflation was 2% per year. After 1 year, how much would you be able to buy with the money in this account? (Available responses: More than today; Exactly the same; Less than today; Don't know/unsure); and
- Is this statement true or false?: 'Buying shares in a single company usually provides a safer return than buying units in a managed share fund.' (Available responses: True; False; Don't know/unsure).

These questions were closely modelled on those devised by US economists Annamaria Lusardi and Olivia S Mitchell: Annamaria Lusardi and Olivia S Mitchell, 'The Economic Importance of Financial Literacy: Theory and Evidence' (2014) 52(1) *Journal of Economic Literature* 5, 10 <<https://doi.org/10.1257/jel.52.1.5>>.

145 Pureprofile pays these individuals a nominal amount to complete surveys on a wide range of topics. Payments are calculated according to the amount of time taken to complete a survey.

1,472 complete responses.¹⁴⁶ In collaboration with a consultant statistician, the authors employed statistical tests to analyse the survey data.¹⁴⁷

2 Data and Findings

This section sets out key findings from the survey. These findings are discussed in Part IV(C).

(a) Product Use

Several respondents had used more than one of the products included in the survey. 49% of respondents had used one of the three products. 31% had used two, while 20% had used all three. This is set out in Table 1.

Table 1: Incidence of multiple product use

	Proportion of sample (%)	Number of respondents
One product	49	721
Two products	31	459
Three products	20	292
Total sample	100	1,472

Note: Percentages have been rounded to the nearest whole number.

Overall, 77% of respondents (1,128 individuals) answered the questions about BNPL,¹⁴⁸ 55% (805 individuals) answered those about payday loans,¹⁴⁹ and 40% (582 individuals) answered those about pawn loans.¹⁵⁰ Table 2 sets out the percentage and number of respondents who had used each product, either alone or in conjunction with one or two other products (the ‘total’ groups).

¹⁴⁶ This does not include a small number of responses excluded due to their questionable authenticity or reliability. These responses were identified based on the respondents’ answers to certain questions, as well as their internet protocol addresses (with duplicate responses from the same address being excluded).

¹⁴⁷ Tables 1 to 4 contain purely demographic information. They report the basic characteristics of the survey sample. The data in Tables 5, 6, 7 and 8 was analysed using the Chi-squared test of independence. This test allowed the authors to compare the responses of various sub-groups to a single proposition. The data in Tables 9 and 10 was analysed using McNemar’s test. McNemar’s test allowed the authors to analyse the answers of a single group, in response to a series of different but broadly comparable propositions.

¹⁴⁸ This is the sum of the ‘BNPL only’, ‘BNPL and payday’, ‘BNPL and pawn’ and ‘BNPL, payday and pawn’ groups.

¹⁴⁹ This is the sum of the ‘Payday loans only’, ‘BNPL and payday’, ‘Payday and pawn’ and ‘BNPL, payday and pawn’ groups.

¹⁵⁰ This is the sum of the ‘Pawn loans only’, ‘BNPL and payday’, ‘Payday and pawn’ and ‘BNPL, payday and pawn’ groups.

Table 2: Usage of each product (total)

	Proportion of sample (%)	Number of respondents
BNPL total	77	1,128
Payday loans total	55	805
Pawn loans total	40	582

Those respondents who had used just one product (721 individuals in total) constituted the three ‘unique’ user groups. Of those respondents, 31% (458 individuals) had only used BNPL, 10% (152 individuals) had only used payday loans and 8% (111 individuals) had only used pawn loans. These ‘unique’ groups are set out in Table 3.

Table 3: Exclusive use of each product (unique groups)

	Proportion of whole sample (%)	Number of respondents
BNPL only	31	458
Payday loans only	10	152
Pawn loans only	8	111
Total	49	721

Of the respondents who had used multiple products (751 individuals in total), 31% of the total sample (459 individuals) had used two products. These results are shown in the first three rows of Table 4. Approximately 20% (292 individuals) had used all three products. This is shown in Table 4.

Table 4: Users of multiple products

	Proportion of whole sample (%)	Number of respondents
BNPL and payday	19	280
BNPL and pawn	7	98
Payday and pawn	6	81
BNPL, payday and pawn	20	292
Total	51	751

Note: As percentages have been rounded to the nearest whole number, the ‘total’ figure varies slightly from the sum of the rounded figures.

(b) *Characteristics of Users*

There were some notable differences between the demographic and financial characteristics of the three ‘unique’ user groups. These results were statistically significant.¹⁵¹ This means that it is likely that the same attributes would be observed among BNPL users in the sample, if the sample size were larger (that is, if a larger sample were selected from the Pureprofile database). To the extent that the Pureprofile database represents the general population, it can be inferred that these attributes would be shared among BNPL users in the general population.

Table 5: Responses to demographic and financial questions (unique groups)

	BNPL only (%) (n = 458)	Payday only (%) (n = 152)	Pawn only (%) (n = 111)
Home owner	43	36	26
Refused credit by a bank in the last three years	12	30	25
Low financial literacy*	38	63	50
Working full time	39	50	37
Not in the labour force**	35	20	35
Income less than \$25,000 per year	28	30	41

* Respondents were deemed to have ‘low financial literacy’ if they gave incorrect answers to two or three of the financial literacy questions¹⁵² contained in the survey.

** Respondents ‘not in the labour force’ were those who were neither working, nor looking for work (for example, students, people receiving the Age Pension and those engaged full time in-home duties).

151 For each of the demographic and financial attributes listed in Table 5, the Chi-squared test of independence indicated a statistically significant difference between *at least one* group and the other two groups (or between all three groups), with a p-value of 0.05 or less (indicating a high degree of statistical significance). These results allowed the authors to conclude with reasonable certainty that, for each question, there was a statistically significant difference between the *highest* and the *lowest* result.

152 See above n 144.

(c) *Reported impacts of product use*

Respondents in each ‘unique’ group described the impact of the product they had used, as set out in the tables below. All respondents were asked to describe the impact the product had had upon their capacity to ‘manage their money and spending habits’. Respondents could choose from three options, saying that the product helped them to manage their money, did not affect how they managed their money, or made it harder for them to manage their money. All results were statistically significant.¹⁵³ These results are outlined in Table 6.

Table 6: Impact of product use on capacity to manage money and spending habits (unique groups)

	BNPL only (%) (n = 458)	Payday only (%) (n = 152)	Pawn only (%) (n = 111)
Helped	48	35	32
Didn't affect	40	27	38
Made it harder	13	38	31

Respondents were also asked whether or not they had experienced financial hardship, or other more specific adverse impacts, due to their use of BNPL, payday loans or pawn loans. Their responses are outlined in Table 7. Analysis revealed statistically significant differences in all rows,¹⁵⁴ with the exception of the second-last row, ‘Paying a BNPL debt using a credit card’ (since this response was only available to those respondents who had used BNPL).¹⁵⁵

¹⁵³ In each row, the Chi-squared test of independence identified a statistically significant difference between one group and at least one other group, with a p-value of 0.01 or less, indicating a very high degree of statistical significance. It is reasonably likely that the difference between the highest and lowest percentage is statistically significant.

¹⁵⁴ In each row but the second-last, the Chi-squared test of independence identified a statistically significant difference between at least one group and at least one other group, with a p-value of 0.01 or less. This indicates a very high degree of statistical significance.

¹⁵⁵ Respondents were also offered the following options: ‘Borrowing money from a payday lender’; ‘Pawning a possession’; and ‘Buying an essential item using BNPL’. The purpose of these questions was to gauge the extent to which respondents used multiple products simultaneously and the extent to which use of one product triggered use of a different product (eg, excessive BNPL commitments leading to an application for a payday loan). Since the data in Table 7 refers only to the respondents in ‘unique’ groups (ie, those who said they had only used *one* of the three products), these values are not shown.

Table 7: Financial hardship and other adverse impacts (unique groups)

	BNPL only (%) (n = 458)	Payday only (%) (n = 152)	Pawn only (%) (n = 111)
Financial hardship	4	42	24
Falling behind with rent or mortgage payments or being late paying a bill	2	18	10
Requesting more time to pay a bill	8	21	27
Borrowing money from friends or family	8	24	30
Going without or cutting back on essential household items	13	21	25
Applying for a Centrelink advance payment	3	15	14
Withdrawing cash using a credit card (a cash advance)	4	16	14
Selling a possession	6	13	21
Paying a BNPL debt using a credit card	10	N/A	N/A
None of the above	69	29	27

Note: As respondents could select one impact, multiple impacts or 'None of the above', these columns do not add up to 100%. Where respondents were not permitted to select an option, this is indicated with 'N/A.'

Respondents were asked to describe their feelings about the product they had used. They were invited to select from six possible responses, 'Happy', 'Satisfied', 'Relieved', 'Regretful', 'Angry' or 'Embarrassed',¹⁵⁶ ranking them in order. Table 8 shows the percentage of respondents who ranked each emotion *first*, in relation to each product. The researchers elected to make this question non-compulsory, due to its potential sensitivity. Even so, 93% of BNPL users, 89% of payday loan users and 87% of pawn loan users responded. Analysis revealed statistically significant differences in all but one row.¹⁵⁷

¹⁵⁶ The order of these options was randomly altered for each respondent, to prevent any bias being introduced into the data by the order in which the options were presented.

¹⁵⁷ The Chi-squared test of independence identified statistically significant differences at the 0.01 level (indicating a very high degree of statistical significance) for almost all rows, with the exception of the fourth row ('Regretful': significant at the 0.05 level, indicating a high degree of statistical significance) and the third row ('Relieved': no statistical significance).

Table 8: Emotions relating to the products (first-ranked emotion, by unique product user group)

	BNPL (%) (n = 427)	Payday (%) (n = 136)	Pawn (%) (n = 97)
Happy	28	16	13
Satisfied	46	12	21
Relieved	12	18	16
Regretful	8	15	11
Angry	3	14	14
Embarrassed	3	25	24

Note: As this question was not compulsory, some respondents did not answer, resulting in a slightly smaller sample size in each group.

Table 9 shows the impacts of BNPL and payday loans on consumers' ability to manage their money, as reported by those who used *both* products (280 respondents in total). The authors used statistical tests to compare the views of each individual regarding the extent to which the two products, BNPL and payday loans, 'helped [them] to manage [their] money'. Results in the first and third rows are statistically significant.¹⁵⁸ This means that, to the extent that the database approximates the general population, it can be inferred that these findings would be replicated in the wider population of BNPL users.

Table 9: Impacts reported by respondents who used BNPL and payday loans (n = 280)

Impact	BNPL (%)	Payday (%)
Helped to manage money	45	32
Didn't affect	32	30
Made it harder to manage money	23	38

Table 10 shows the impacts of BNPL and pawn loans on consumers' ability to manage their money, as reported by those who used *both* products (98 respondents in total). As above, the authors tested the attitudes of each individual respondent, regarding the impact of each product on his or her money management. All results were statistically significant.¹⁵⁹

¹⁵⁸ Employing McNemar's Binomial two-tailed tests, these results are statistically significant to the 0.01 level, indicating a very high degree of statistical significance.

¹⁵⁹ Employing McNemar's Binomial two-tailed tests, the results in the first row ('helped to manage money') are statistically significant to the 0.01 level, indicating a very high degree of statistical significance. The other results shown in Table 10 are statistically significant to the 0.05 level (indicating a high degree of statistical significance).

Table 10: Impacts reported by respondents who used BNPL and pawn loans (n = 98)

	BNPL (%)	Pawn (%)
Helped to manage money	56	26
Didn't affect	20	38
Made it harder to manage money	24	37

B Focus Groups

1 Aims and Methodology

The authors elected to conduct a series of online focus groups with solicitors, financial counsellors and other consumer advocates, focussing exclusively on BNPL. By conducting these focus groups, the researchers sought to complement the survey data, and other more recent quantitative empirical studies published in Australia, all of which addressed the impact of BNPL across the general population. By contrast, these focus groups sought to gather rich qualitative data regarding the specific experiences of low income earners who used BNPL. They also aimed to examine BNPL providers' responsiveness to consumers experiencing hardship, drawing on participants' professional experience as advocates for these consumers. It is important to acknowledge that the views of focus group participants were informed by their work assisting consumers in acute financial hardship. It is likely that, in this context, they were disproportionately exposed to the negative impacts of BNPL and were therefore more likely to adopt a critical stance towards BNPL than other members of the community. At the same time, the professional experiences of these advocates gave them a uniquely vivid insight into the impact of BNPL upon vulnerable consumers. For this reason, their perspectives offered a valuable supplement to the data gathered in the survey.

The focus group participants were drawn from a wide range of organisations with expertise in assisting low income consumers.¹⁶⁰ They included community legal centres specialising in consumer law; an inner-city generalist community legal centre; a multidisciplinary service providing legal advice, financial counselling and family violence services in a remote regional city; the national peak body representing Australia's free financial counselling services; a national organisation providing emergency support, including material aid, to people in immediate hardship or crisis; and another organisation dedicated to providing holistic support to women and girls, including financial counselling, microfinance and assistance with housing, employment, parenting and recovery from family violence. Participants included solicitors, financial counsellors, social workers

¹⁶⁰ The organisations were the CALC; FCA; Good Shepherd Australia New Zealand ('GSANZ'); West Justice; Mallee Family Care; Consumer Credit Legal Service (WA); Anglicare Australia; Anglicare Victoria; Anglicare South Australia; Anglicare Riverina; St Vincent de Paul Society (Western Australia); Financial Abuse Service New South Wales; Financial Rights Legal Centre; Child and Family Services (Ballarat); Connect Health & Community; Brotherhood of St Lawrence; ac.care; Lifeline Central West; and CatholicCare Wilcannia-Forbes.

and policy workers. To recruit participants, the researchers initially drew on their formal research partnerships with several non-profit organisations.¹⁶¹ These organisations nominated staff members to participate in the focus groups. The researchers subsequently employed snowball sampling techniques to recruit additional participants from other organisations, drawing on the professional networks of those they had already recruited.

Having obtained ethics approval,¹⁶² the authors conducted the focus groups online, using Zoom, in August and September 2022. The authors conducted six focus groups involving a total of 36 participants.¹⁶³ The number of participants in each focus group ranged from five to seven. One focus group involved participants from a single organisation, but most were composed of staff from various organisations. Each focus group lasted for approximately 60 minutes. Each was recorded and professionally transcribed. In each focus group, the facilitator led participants through a series of questions regarding their clients' experiences using BNPL. Participants were asked whether or not they believed BNPL was causing harm and whether or not particular groups of consumers (for example, young people or single parents) were more likely to suffer harm as a result of using BNPL. Participants were asked about the advice and assistance they typically provided to clients with unmanageable BNPL debts. They were also asked to describe the hardship assistance and dispute resolution offered by BNPL providers. They were asked about the products and services their clients typically purchased using BNPL, the typical size of their BNPL debts and the other kinds of debt they reported when seeking assistance.

2 Data

(a) *The Appeal of BNPL*

The advocates said that their clients typically used BNPL¹⁶⁴ to pay for essentials, such as groceries, medication and children's educational expenses,¹⁶⁵ as well as car repairs, servicing or fuel.¹⁶⁶ They noted that BNPL was attractive to people with urgent needs because it offered 'instantaneous' access to funds, unlike government emergency payments and the no-interest loans ('NILS loans') offered by community organisations.¹⁶⁷ Several said their clients viewed BNPL as

161 The researchers' formal research partners were CALC; FCA; WEstjustice; Mallee Family Care; and GSAZ.

162 Ethics approval was granted by the University of Melbourne's Human Research Ethics Committee (Low and Negligible Risk stream) on 12 July 2022 (Project ID: 2056186).

163 The focus groups were held on 29 August ('Focus group 1'), 5 September ('Focus group 2'), 6 September ('Focus group 3'), 7 September ('Focus group 4'), 8 September ('Focus group 5') and 20 September 2022 ('Focus group 6').

164 The authors have removed references to specific BNPL providers when presenting the focus group data.

165 'They're using it to buy their groceries and their chemist expenses ... Or the kids' school shoes': Focus group 1.

166 'You've got the clients that are using it for those daily expenses of groceries and chemist and getting the car serviced': Focus group 1.

167 Participants commented 'Rather than going to St Vinnies ... [or] doing the old processes which involved some paperwork and some thinking and some planning, it's instantaneous': Focus group 1; 'I applied for

a valuable ‘safety net’¹⁶⁸ for use in emergencies: ‘A mum said to me ... “That’s the only way I can put food on the table for my child in an emergency situation. So I’m keeping my [BNPL] as a sort of ... an emergency fund.”’¹⁶⁹ Apart from its value as a fallback in emergencies, some advocates pointed out that BNPL allowed their clients to take advantage of short-term deals and special offers: ‘People with money can afford to go and buy something when it’s on special and save more money ... You use a buy now, pay later product to do that, that actually can help you financially’.¹⁷⁰

Others said their clients valued the anonymous, fully automated nature of BNPL, because it meant that they did not have to answer intrusive or embarrassing questions about their finances or their personal lives:

We apply responsible lending principles in our [NLS] loans. If you have a quick and easy buy now pay later product, where you don’t have to go through that process ... buy now pay later isn’t stigmatised. I don’t have to go along and share the details of my low income and my life with someone to try and get a loan. It’s very attractive.¹⁷¹

You don’t need to look at anyone, you don’t need to interact with anyone ... If you can’t afford something or you are putting it on credit, there’s not that shame factor barrier or, ‘This is going to be so embarrassing,’ ... because it’s completely faceless.¹⁷²

(b) *The Risk of Harm*

The advocates were unanimous in expressing their concern at the ease with which their clients could access BNPL debt for non-essential purposes.¹⁷³ One described several clients ‘with mental health issues ... buying all sorts of products that they definitely can’t afford and probably don’t really need.’¹⁷⁴ The advocates said they regularly assisted clients who had accumulated unmanageable BNPL debts, leaving them with insufficient funds for essential expenses. Several spoke of clients who had become caught in a ‘debt spiral’, relying on BNPL to purchase groceries:

I’ve got a client at the moment who is a dad with five kids. He has used [BNPL] so extensively that ... he’s paying between \$350 to \$500 a week on [BNPL]. He then

a [no-interest] loan myself a couple of years ago and it was so hard. All the paperwork ... and the receipts and all the checks they do. Plus, you have to have an income, you have to be able to afford the payment ... My clients often don’t have that extra and that’s why they’re getting [BNPL product]: Focus group 5; ‘If you are escaping violence, there’s the Escaping Violence Payment but that could take you three or four months to get’: Focus group 1.

168 Focus group 3.

169 Focus group 4.

170 Focus group 6.

171 Focus group 2.

172 Focus group 5.

173 ‘When you sign up for these things, it’s ... so quick. There’s no information about fees, about extra charges, about if you don’t pay this you’re going to get charged. So there’s no education at all around it when you sign up. There’s no contract to sign’: Focus group 4.

174 Focus group 5.

has no money for food, has to re-use [BNPL] to buy his groceries, get him through the week. They just get stuck in this terrible spiral that they can't get out of.¹⁷⁵

One advocate recounted a case in which her clients were evicted from their rental property, after incurring so much BNPL debt that they were unable to pay their rent.¹⁷⁶

The advocates strongly believed that providers of BNPL should be made to conduct more rigorous assessments of consumers' finances, prior to offering the product and prior to increasing a consumer's spending limit.¹⁷⁷ They noted that within the current self-regulatory framework, BNPL providers were free to increase consumers' credit limits at any time, and frequently did so, if consumers complied with their repayment obligations.¹⁷⁸ The advocates also identified BNPL late fees and penalties as a source of particular hardship for clients who relied on social security incomes. They said that clients on extremely low incomes often made several small purchases within a short period. When they fell into arrears, they incurred late fees for each separate purchase. These fees could add up to sizeable amounts, relative to their incomes.¹⁷⁹ They pointed out that BNPL debts could lead to adverse listings on clients' credit reports, making it more difficult for them to access credit in the future.¹⁸⁰

The potential for fraud made BNPL a potent weapon of economic abuse, according to several advocates: 'As long you know someone's basic identity, which most spouses will, it's pretty easy to plug that information in and be approved. So yeah, the potential for economic abuse ... is huge.'¹⁸¹

Some said that BNPL made it easier for abusers to coerce their partners into buying goods and services on their behalf: 'The vulnerable people are more vulnerable when they've got a partner saying, "You can go and get me that

175 Focus group 4. An advocate from Focus group 2 said:

I can give you an example of a client. She's a single mum with a young child who has some medical issues. She just struggles to make payment. She got herself – when I spoke to her, she had 22 [BNPL purchases]. They were all [with the same BNPL provider], but there [were] 22 going at once. She got Centrelink income only. She wasn't working. When she got her payment, it took 75% of her Centrelink payment in repayments to [BNPL provider]. Then she would go back to [BNPL provider] and get gift cards so she could buy food. She was in an absolute spiral of debt.

176 'I had clients who ... had too many direct debits coming out of their account from their buy now pay later and their payday loans and they were unable to pay rent. They got served with a notice to vacate and left their property': Focus group 1.

177 'A few years ago, we brought in protections banning unsolicited limit increases on credit cards and we need something like that in this situation as well ... There's no real assessment of whether or not people can actually afford a higher limit': Focus group 5.

178 'If people are good at paying, so their direct debits don't bounce, the amounts bump up to what they're eligible for without credit checks': Focus group 5; '[W]hen you start out with [BNPL provider] and [BNPL provider] and many of the others you start with something like a \$500 or \$600 limit with no questions asked, but then if you keep making your repayments on time ... your credit limit automatically increases as well': Focus group 5.

179 'A lot of those fees are set and so when you're talking about small amounts being borrowed, some of those fees can add up': Focus group 5.

180 Focus group 2.

181 Focus group 5.

motorbike” ... Before, if you didn’t have the money, you just couldn’t get it ... Now, the partner can force that person into getting into that debt.’¹⁸²

(c) Providers’ Responses to Hardship

The advocates were generally critical of the hardship assistance offered by BNPL providers to consumers. Some highlighted the difficulty of communicating with BNPL providers and obtaining information on clients’ behalf.¹⁸³ Many said that BNPL providers tended to be highly inflexible when negotiating hardship arrangements:

If you can’t afford any payments, there’s no benefit to their hardship arrangements because it’s usually just, ‘Well, how much can you pay us?’ If the answer is, ‘Nothing’, then there’s no point starting the conversation.¹⁸⁴

They push very heavily for them to commit to a payment amount before that person can even sit down with a financial counsellor ... which is not any experience we have with those under the National Credit Code.¹⁸⁵

Some said the industry was inconsistent in its responses to hardship:

Sometimes we get the debts waived, sometimes we get ignored for long periods of time and sometimes they say, ‘No, we’re not going to waive the debt and we have to work with you to find another solution,’ like some other type of payment plan or whatever else they want to offer ... you’re really at their mercy.¹⁸⁶

Several felt that the industry needed to be more responsive to consumers’ needs and circumstances, particularly in relation to First Nations consumers, those from non-English speaking backgrounds and those who had experienced trauma.¹⁸⁷ They singled out providers’ responses to family violence as an area needing improvement:

So many of them just have forms to fill out. There are no details of a number that you can call or an email or anything ... Why would a victim survivor fill in a form and just wait for a phone call if that’s going to put their safety at risk? They might want to call at a particular time of day when they know that they can explain their situation openly and have that conversation when the perpetrator might be at work or something like that ... and some of them don’t even mention the word family violence as a ground of hardship.¹⁸⁸

182 Focus group 6.

183 ‘Because these are online entities, just getting through to the hardship and assistance teams can be really difficult’: Focus group 2. An advocate from Focus group 1 stated:

[They’ll] give some information but not all the information that’s listed in the code ... When we’ve raised it, they’ve said, ‘Well, go to AFCA and make a complaint.’ That’s a long drawn out process. We don’t want to have to go to AFCA to get basic information just so we can explain to clients, ‘This is what accounts are open in your name ...’ So that’s one of the big issues that we’ve seen for our clients. Just getting basic information is really difficult.

184 Focus group 1.

185 Ibid.

186 Focus group 5.

187 ‘[There] should be a more culturally appropriate for First Nations or other people, [culturally and linguistically diverse] and that. There should be a better safeguard around not retraumatizing and not extending trauma’: Focus group 1.

188 Focus group 5.

Some advocates said that the true extent of hardship being caused by BNPL was going undetected by the industry:

Often ... people will prioritise their buy now pay later payments over other forms of payments and so it can very much hide financial hardship.¹⁸⁹

What we tend to find with the family violence is that although we could potentially get a waiver or something along those lines, because they're smaller amounts, the person just prefers to pay it, suck it up and deal with the bigger debts ... The statistics aren't necessarily representing exactly what's happening.¹⁹⁰

One advocate pointed out that access to BNPL could also make hardship less visible to other providers:

I believe [BNPL provider] does ... energy bills as well now ... so we'll sit here and say, 'Oh, we don't have many clients with energy debts' ... but we have them with buy now pay later debts [instead] ... It's meant that ... ombudsmen and ... the energy provider [don't] see that person is in hardship and can't put those protections in place.¹⁹¹

The advocates pointed out that when their client sought hardship assistance, their BNPL accounts were automatically 'frozen' or 'blocked'.¹⁹² Some clients found it difficult to regain access to the product, even after they repaid their debts.¹⁹³ This meant that clients were often unwilling to seek hardship assistance from BNPL providers, as they did not wish to lose access to the product.¹⁹⁴

(d) Interaction with Other Forms of Credit

Some advocates said that their clients had begun to use BNPL as a cheaper alternative to products such as payday loans and credit cards: 'I think the incidence now of garden variety payday lending is much lower than it was ... and I think that's because buy now pay later has taken a huge market share'.¹⁹⁵

Others, however, saw clients who used BNPL in conjunction with other forms of credit, including credit cards¹⁹⁶ and payday loans:

I had a client who had about \$2,000 on [BNPL], and the fortnightly payments were \$400 a fortnight, and that was getting too hard to handle, so she went to [payday

189 Ibid.

190 Ibid.

191 Focus group 1.

192 '[There] is no option if your hardship arrangement is placed [not to] have that ban on. They will always put the ban on for the length of the hardship arrangement': Focus group 4.

193 'When we've applied for hardship for a client ... the account is automatically locked ... The financial counsellor then has to contact ... that service provider, to unlock that account, even if it's gone to a zero balance': Focus group 3.

194 'In cases where we will say to them, we could potentially get this waived for you, they'll say no, I need to keep it open because I don't want to lose access to it if I need it ... They know that if they get the debt waived then they're going to lose access to [BNPL] so they don't want to give it up': Focus group 5. One advocate from Focus group 3 noted:

We might offer the option of contacting a service provider ... and look at hardship arrangements. ... [Once] we do that ... they cannot access that product at all ... [Often] they're reluctant ... Or we might find they ... have multiple products ... and elect to do hardship on say, three out of the four of them, so that they've still got access to at least one of them.

195 Focus group 1.

196 'It's [a] chain of debt. People having to use credit cards to pay for buy now pay later. It's kind of credit on credit': Focus group 2.

lender] and got a \$2,000 cash loan, paid that out, so now she's got an ongoing loan with [payday lender].¹⁹⁷

Some advocates expressed the view that BNPL was less harmful than payday loans or credit cards:

If you miss a payment, the accounts are locked. There's caps on default fees. It's otherwise a vendor-pays model ... These are an inherently less risky product ... than credit cards.¹⁹⁸

Many of our clients ... don't have ... any access to credit at all ... If you take away this from the equation ... the only thing they will be left with is the payday loans ... and their charges are far ... worse.¹⁹⁹

C Discussion

1 *Harms Associated with BNPL*

The focus group participants were adamant that BNPL carries unacceptable risks for some consumers, particularly low income earners. These risks arise primarily due to the ease with which consumers can access BNPL, without the need to show evidence of their incomes or existing debts. The accessibility of BNPL made it easy for consumers to incur debts, either through a combination of BNPL and other forms of debt, or by using multiple BNPL products simultaneously. Participants also expressed concern that BNPL providers were not restrained from making unsolicited offers of credit, as is the case for credit card providers regulated under the *NCCPA*.²⁰⁰ As such, BNPL users were frequently offered higher spending limits, without any formal assessment of their finances, provided that they made their repayments on time. All these factors created a very high risk that vulnerable consumers could incur excessive and unmanageable debts using BNPL, leading to severe hardship. The advocates relayed numerous examples of clients whose BNPL repayments consumed a very high proportion of their incomes, leaving them without enough money to pay for food, rent or other essentials.

The focus group data also indicated that the BNPL industry has not developed adequate safeguards to protect consumers from harm. Participants observed that the accessibility of BNPL left consumers vulnerable to fraud, including economic abuse. Such abuse could take the form of coercion, with victims agreeing to purchase goods or services on behalf of their partners. It could also take the form of another person using BNPL to purchase goods in the victim's name. Several advocates recounted instances in which their clients had been left with significant BNPL debts, incurred by or on behalf of a current or former partner. Participants were critical of BNPL providers' hardship policies, which they said were poorly adapted to the needs of many consumers, including those affected by family violence. They said that providers took months to resolve a request for assistance, refused to communicate with advocates or resisted providing basic information about their clients' debts. They stressed the need for more accessible hardship

197 Focus group 6.

198 Focus group 1.

199 Focus group 4.

200 *NCCPA* (n 6) s 133BE.

processes, particularly for consumers experiencing family violence, or those with culturally specific needs; for a more flexible approach to consumers in hardship; and more appropriate solutions, such as debt waiver, for people who had no realistic prospect of repaying their debts.

Reinforcing these findings, the survey data indicated that a sizeable minority of BNPL users in the sample were financially vulnerable. Twelve per cent had been refused credit in the previous three years; 38% obtained low scores for financial literacy; and 28% earned less than \$25,000 per year, meaning that they lived below the poverty line.²⁰¹ Thirty-five per cent were not in the workforce. These results were statistically significant. The survey data also indicated that some consumers experience negative effects from using BNPL. Of the 458 'unique' users of BNPL, 13% said that the product had 'made it harder' for them to manage their money. Thirteen per cent said they had 'gone without or cut back' on essential items due to their BNPL debts while 10% said they had used a credit card to make a BNPL repayment. Adverse outcomes were more common among survey respondents who had used BNPL in combination with either a payday loans or a pawn loan. Among those who had used BNPL in conjunction with a payday loan, 23% said that BNPL had made it harder for them to manage their money. Among those who had used BNPL in conjunction with pawn loans, 24% said that using BNPL had made it harder to manage their money.

2 Benefits of BNPL

Counterbalancing these findings, the focus group participants identified certain tangible benefits associated with BNPL. They acknowledged that some of their clients saved money by using BNPL in preference to other, more costly forms of credit, such as payday loans or credit cards. They noted that BNPL could allow low income earners to take advantage of sales or specials. They also conceded that for low income earners, BNPL could serve as a useful resource when funds were urgently needed to meet sudden, unexpected expenses such as car repairs, or in crisis situations. Several pointed out that the anonymous, automated nature of BNPL allowed their clients to avoid stressful or intrusive questions about their finances or personal lives. In these respects, they felt that BNPL had some advantages over the NILs loans offered by community organisations, which involved a lengthy application process and detailed documentation. Participants observed that their clients were often extremely reluctant to relinquish their BNPL accounts, even when they fell into hardship. Several said that their clients were willing to forgo hardship assistance, such as waivers or payment plans, in order to maintain access to their BNPL accounts.

201 The Henderson poverty lines are updated four times per year. In the quarter ending March 2020 (the period in which the survey data was gathered), the Henderson poverty line for a single person in the workforce was \$549.30 per week (including housing), or \$28,563.60 per year: see Melbourne Institute Applied Economic & Social Research, 'March Quarter 2020' (March 2020) *Poverty Lines: Australia 1* <https://melbourneinstitute.unimelb.edu.au/_data/assets/pdf_file/0019/3450025/Poverty-Lines-Australia-March-2020.pdf>. See also Gareth Hutchens, 'Why Are Millions of Australians Still Living in Poverty? Experts Say It's Solvable', *ABC News* (online, 20 October 2022) <<https://www.abc.net.au/news/2022-10-20/why-are-millions-of-australians-still-living-in-poverty/101553340>>.

The advantages of BNPL, at least in comparison with other forms of credit, emerged more clearly from the survey data. Of the BNPL users in the 'unique' group, 48% said that access to BNPL helped them to manage their finances. Only 4% said that using BNPL caused them financial hardship. By way of comparison, 42% of payday loan users said that their loans had caused them hardship. Of the pawn loan users, 24% said their pawn loans had caused hardship. Users of pawn loans and payday loans were much more likely than BNPL users to say that as a result of using the product, they had fallen behind with rent or a bill, requested more time to pay a bill, borrowed money from friends or family, gone without or cut back on essentials, applied for a Centrelink advance payment or withdrawn cash using a credit card.²⁰² Of the 'unique' BNPL users, 69% said that they had done none of these things as a consequence of using BNPL. Only 29% of payday loan users and 27% of pawn loan users said they had experienced none of these adverse impacts. Of the BNPL users, 46% said that they were 'satisfied' by the product while a further 28% said that they were 'happy' with it. The proportions of payday and pawn loan users who were 'satisfied' or 'happy' were much smaller.²⁰³ The most common emotion reported by payday and pawn loan users was embarrassment.

A similar pattern emerged from the data relating to those who had used BNPL in conjunction with either a payday loan or a pawn loan. In both cases, respondents were more likely to say BNPL helped them to manage their money, while the other product made it harder. Among respondents who used both BNPL and pawn loans, 56% said that BNPL helped them to manage their money. By contrast, only 26% said that their pawn loans helped them to manage their money, while 37% said that their pawn loans made it harder.²⁰⁴ Among those who had used BNPL and payday loans, 45% said that that BNPL helped them to manage their money. By contrast, 32% said that their payday loans helped them to manage their money while 38% said that their payday loans made it harder.²⁰⁵ These results were statistically significant.

V ANALYSIS AND LAW REFORM RECOMMENDATIONS

Part V(A) sets out the implications of the empirical data, in the context of current public policy debates regarding the most effective and proportionate way in which to regulate BNPL, to reduce the risk of harm to vulnerable consumers. Part V(B) evaluates the Commonwealth Government's current law reform proposals, drawing on these findings.

202 Of the payday loan and pawn loan users, 24% and 30% respectively said that they had borrowed money from friends or family, due to their repayment obligations. Only 8% of BNPL users reported that they had borrowed from friends or family due to their use of the product.

203 As shown in Table 8, 12% of payday loan users were 'satisfied' while 16% were 'happy'. Among pawn loan users, 21% were 'satisfied' and 13% were 'happy'.

204 See Table 10.

205 See Table 9.

A Implications of the Empirical Data for the Regulation of BNPL

The focus group data and, to a lesser extent, the survey data offer evidence that BNPL requires more stringent regulation. The focus group and survey data indicates strongly that the assessments carried out by BNPL providers, as required by the BNPL Code, are not sufficient to ensure that BNPL purchases are affordable for all consumers. The survey data showed that a significant minority of BNPL users earn very low incomes and that a portion of BNPL users experience financial hardship as a consequence of using the product – cutting back on essentials, or incurring other forms of debt to make their BNPL payments. It showed how easily the current laws governing BNPL facilitate the use of ‘credit on credit’: that is, the payment of a BNPL debt using a credit card or another loan, such as a payday loan or pawn loan.²⁰⁶ Similarly, focus group participants described the ease with which consumers can open multiple BNPL accounts, operating independently of each other. The use of multiple accounts significantly undermines the effectiveness of safeguards imposed by individual BNPL providers, such as spending limits or account suspensions when repayments are missed. The focus groups also illustrated ways in which the accessible nature of BNPL can make it an instrument of economic abuse, compounding the hardship suffered by victims of family violence. Participants said that, when such abuse occurs, consumers are unlikely to be offered support and remedies tailored to their circumstances. More generally, the focus groups indicated that consumers who are vulnerable or experiencing hardship find it difficult to access meaningful assistance from BNPL providers. This is often true even when consumers are represented by a consumer advocate.

At the same time, the data gathered from the survey and focus groups indicates that BNPL may be less harmful than some other forms of credit. This finding emerged, in part, from the survey responses of consumers who had used BNPL in conjunction with either a pawn loan or a payday loan. In both groups, consumers were more likely to identify BNPL as helpful and the other product as detrimental to their financial management. Similarly, some participants in the focus groups expressed the view that BNPL was less harmful than payday loans. While conceding that BNPL could encourage some consumers to buy things they did not need, the focus group participants said most of their low income clients used BNPL to meet urgent, unavoidable expenses. These could be large, one-off costs such as car repairs or more regular costs such as groceries and fuel. Some expressed concern that if their clients could not access BNPL they would be forced to rely on other, more expensive forms of credit, particularly payday loans, to meet these costs. The survey data confirms that there is already considerable overlap between the markets for BNPL and payday loans.²⁰⁷ The payday lending industry is a vocal advocate for stricter regulation of the BNPL industry, which it regards as ‘a significant competitor’.²⁰⁸ This suggests that over-regulation of BNPL may,

206 See above n 196.

207 280 respondents to the survey had used both products, representing 19% of the overall sample and 25% all BNPL users who completed the survey. See Table 4.

208 Finance Industry Delegation, ‘Submission to Treasury’ (n 27) 2.

inadvertently, drive up demand for payday loans and other more expensive and potentially harmful forms of credit.²⁰⁹

B The Government's Law Reform Proposals and Preferred Option

As noted above, the Commonwealth Government has recently announced its intention to bring BNPL within the ambit of the *NCCPA*, including a 'proportionate' application of the RLOs.²¹⁰ This approach is one of three originally outlined in the Government's *Options Paper* published in November 2022. The first and most conservative of these proposals was an enhanced form of self-regulation, with an updated industry code supplemented by a new 'bespoke affordability test', which would have been legislated under the *NCCPA*.²¹¹ According to the *Options Paper*, this would have allowed providers to use 'a credit score check ... as a proxy of a consumer's credit risk', 'when lending below certain thresholds'. The *Options Paper* hypothesised that under this model, 'income and expenses information would only need to be considered ... where a person is identified as a risky borrower'.²¹² The third proposal outlined in the *Options Paper* was to require full compliance with the *NCCPA*, including the RLOs.²¹³ To comply with these obligations, BNPL providers would have been required to assess consumers' financial status, prior to approving every purchase, and to verify the accuracy of any information provided by consumers, with regard to their incomes, assets and existing debts.²¹⁴ They would have been required to make 'reasonable inquiries' regarding each consumer's needs and objectives, to ensure that the BNPL product was 'not unsuitable'.²¹⁵ The second proposal, ultimately favoured by the Government, was a 'limited' or 'tailored' application of the *NCCPA*. This option will require all BNPL providers to obtain an ACL, but will entail modified RLOs 'calibrated to the level of risk of BNPL products and services'.²¹⁶ It will exempt BNPL providers from some 'prescriptive'

209 There is also a risk that if BNPL is subject to more stringent regulation, requiring a more rigorous assessments of consumers' capacity to pay, the industry will pass on the costs of compliance in the form of higher merchant fees. Merchants already pay significantly higher fees to BNPL providers than they do to credit card providers. Because merchants are not currently permitted to recover these fees through surcharges, they inevitably pass them on to consumers in the form of higher prices. This means that, in effect, the cost of BNPL is borne by all consumers, not just by those who use the product: see Fisher, Holland and West (n 12) 60, 65. Alternatively, higher transaction fees could lead to some merchants withdrawing BNPL as a payment option. This would disproportionately affect low income consumers, since they are less likely to have ready cash or access to alternative payment options, such as credit cards.

210 Jones, '2023 Address' (n 8).

211 *Options Paper* (n 8) 20.

212 *Ibid.*

213 *Ibid* 22. The RLOs impose two distinct obligations. First, issuers of credit must not enter into a credit contract until they have made certain prescribed inquiries into the borrower's circumstances, and verified information provided by the borrower. Second, they may not enter into a credit contract, or increase a credit limit, if the contract is unsuitable. A credit contract must be deemed unsuitable if 'it is likely that the consumer [would] be unable to comply with [his or her] financial obligations under the contract, or could only comply with substantial hardship'; or if the contract does not meet the consumer's 'requirements or objectives': *NCCPA* (n 6) ss 128–32.

214 *NCCPA* (n 6) s 130(1)(c).

215 *Options Paper* (n 8) 21. See also *ibid* ss 130(1)(a)–(b).

216 *Options Paper* (n 8) 21.

aspects of the *NCCPA* regime, such as the requirement to verify financial documents and to check that their product ‘aligns with the ... needs and objectives’ of each individual consumer.²¹⁷ This option will involve a strengthened industry code and a ban on unsolicited offers of credit.²¹⁸ The most significant features of the proposals set out in the *Options Paper* are evaluated below.

1 Enhanced Self-Regulation

Under the Commonwealth Government’s first option, the BNPL industry would have continued to operate under a self-regulatory model, with additional ‘bespoke affordability checks’ mandated by the *NCCPA*.²¹⁹ By creating safeguards to limit the creation of multiple BNPL accounts, this model may have reduced some of the harm that is currently occurring as a consequence of easy, instant access to BNPL debt.²²⁰ Increased use of credit checks would have helped BNPL providers to identify consumers in financial hardship, or at risk of hardship, prior to offering them access to the product. Yet, these measures alone would not be sufficient to address the risk of harm posed by BNPL. As consumer groups noted in their submission to the Government’s consultation, credit checks are an unreliable means of assessing consumers’ risk of hardship.²²¹ Consumers may be heavily indebted and be suffering significant deprivation, including reduced expenditure on food and other essentials, yet still be meeting their repayment obligations under their existing loans. Such consumers would not be identified by a credit check, or by a ‘bespoke’ industry reporting system.²²² Such a system would also fail to identify consumers living on extremely low incomes, if they had no formal credit history.²²³ A self-regulatory system based on mandatory credit checks would also be constrained by limitations on the data produced by credit reporting agencies. Whereas a BNPL account can be created instantly, it may take as long as a month for this information to appear on a consumer’s credit file.²²⁴ A credit check would therefore fail to prevent consumers from incurring significant debts, using multiple BNPL accounts, within a short period.²²⁵ As family violence practitioners noted,

217 Ibid.

218 Ibid.

219 Ibid 20.

220 Commonwealth Bank of Australia, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (December 2022) 3–4. Requiring BNPL providers to participate in the credit reporting system would potentially benefit some consumers who are currently ‘invisible’ within the system, by providing them with an opportunity to demonstrate positive repayment behaviour and thus increase their likelihood of obtaining other forms of credit in the future: Australian Retail Credit Association, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (20 January 2023) 28.

221 Anglicare Australia et al (n 7) 51.

222 See the Paywatch system introduced in NZ: Afterpay, ‘2022 Submission’ (n 13) 6, 8.

223 Anglicare Australia et al (n 7) 51.

224 Most Australian credit reporting agencies state that their credit reports are updated monthly, with the proviso that more frequent updates may occur when consumers apply for credit: see, eg, ‘How Often Does Your Credit Score Update?’, *Equifax* (Web Page) <<https://www.equifax.com/personal/education/credit-scores/how-often-does-your-credit-score-update/>>.

225 In NZ, the BNPL industry has attempted to address this by creating Paywatch, an industry-specific credit reporting system: see ‘Centrix and “Buy Now Pay Later” Providers Launch World-First PayWatch Initiative to Deepen Customer Protections’, *Centrix Credit Bureau of New Zealand* (Web Page) <<https://www.centrix.co.nz/news/centrix-launches-paywatch>>.

such a system would also fail to detect many instances of economic abuse and fraud, since it would not require BNPL providers to verify consumers' identities or ensure that the product was beneficial to them.²²⁶

2 The Requirement to Hold an ACL

A requirement that all BNPL providers obtain and maintain an ACL is common to Options 2 and 3 in the *Options Paper*. As noted in Part II, licensees are subject to 'general conduct obligations' under the *NCCPA*.²²⁷ These include an obligation to conduct their credit activities 'efficiently, honestly and fairly'.²²⁸ Licensees must comply with the credit legislation and 'take reasonable steps' to ensure that their representatives also comply.²²⁹ They must 'ensure that [their] representatives are adequately trained, and are competent, to engage in ... credit activities' and must maintain an effective internal dispute resolution scheme.²³⁰ Licensees must also be members of AFCA,²³¹ an external dispute resolution scheme described by consumer advocates as a 'world class' alternative to the court system.²³² Consumers may apply to AFCA for review if they are unsatisfied with a licensee's response to their request for financial hardship assistance.²³³ Since 1 October 2021, licensees have also been required to report certain matters to ASIC, including actual or likely significant breaches of 'core obligations' under the *NCCPA*, gross negligence or fraud.²³⁴ Even in combination with the current 'suitability' assessments required by the BNPL Code, or the enhanced test contemplated by Option 1, the application of these general conduct obligations would have led to significant improvement in the BNPL industry. It would have improved the quality of communication between providers and consumers (or their advocates); the training provided to staff relating to consumer vulnerability; and the effectiveness of the support

www.centrix.co.nz/centrix-paywatch-initiative-to-deepen-bnpl-customer-protections/>. Operated by the industry in conjunction with the NZ credit bureau, Centrix, this indicator is updated daily with data regarding overdue BNPL accounts. Providers may draw upon this data when conducting their own 'upfront affordability assessments', though they are not bound by it. During consultations in NZ, regarding the proposal to bring BNPL within the scope of the *Credit Contracts and Consumer Finance Act 2003* (NZ), the industry contended that this 'bespoke' model obviated the need for stronger consumer protections, including compulsory credit reporting: Afterpay, '2022 Submission' (n 13) 6, 8. See also Afterpay et al, Submission to Ministry of Business, Innovation and Employment, New Zealand Government, *Buy-Now, Pay-Later* (16 December 2021) 3 <<https://www.mbie.govt.nz/dmsdocument/18975-bnpl-industry-buy-now-pay-later-submission-pdf>>.

226 Economic Abuse Reference Group (n 117) 7.

227 See Australian Securities and Investments Commission, *Credit Licensing: General Conduct Obligations* (Regulatory Guide No 205, April 2020) <<https://download.asic.gov.au/media/z3mjxexc/rg205-published-20-july-2021.pdf>>.

228 *NCCPA* (n 6) s 47(1)(a).

229 *Ibid* ss 47(1)(d)–(e).

230 *Ibid* ss 47(1)(g)–(h).

231 *Ibid* s 47(1)(i).

232 Consumer Action Law Centre et al, Submission to Treasury (Cth), *Review of the Australian Financial Complaints Authority* (April 2021) 10 <<https://treasury.gov.au/sites/default/files/2021-11/c2021-147524-cag.pdf>>.

233 'Make a Complaint', *Australian Financial Complaints Authority* (Web Page) <<https://www.afca.org.au/make-a-complaint>>.

234 *NCCPA* (n 6) ss 50A–50C; Australian Securities and Investments Commission, '2023 Submission' (n 52) 23.

provided to consumers in hardship. The Commonwealth Government's proposal to require BNPL providers to hold an ACL, under Option 2, will introduce new and extremely valuable safeguards for consumers. It will create a strong incentive for providers to increase their service standards, by investing ASIC with significant enforcement powers, including compulsory information-gathering powers and a capacity to suspend or cancel an ACL, to ban individuals from participating in the industry and to commence civil and criminal proceedings for breaches of the general conduct obligations.²³⁵ The requirement to report breaches of these obligations will dramatically increase transparency in the industry and will enable ASIC to intervene quickly to detect and address consumer harm.

3 The Application of the RLOs

The impact of subjecting BNPL providers to the RLOs, as contemplated by Options 2 and 3, is less clear. The *Options Paper* published in November 2022 did not set out in detail how the RLOs would apply to the industry, either fully or in modified form. Several submissions responding to the *Options Paper* pointed out that there appeared to be some overlap between the second and third reform options, with regard to the RLOs. One submission argued that the second and third options were 'in fact quite similar', since 'under the full RLO requirements ... there already exists provision for a "scalable" approach based on materiality and risk'.²³⁶ The Australian Banking Association called for 'additional clarity on the approach to the RLOs', noting that the 'current RLO arrangements are already intended to be scalable based on the risk of consumer harm and the kind of credit product sought, amongst other factors'.²³⁷ The Customer Owned Banking Association also observed that '[m]any components of Options 2 and 3 are similar, but there remains some ambiguity as to what the tailored [RLOs] proposed in Option 2 would specifically look like'.²³⁸ ASIC expressed strong support for the full application of the RLOs to BNPL, but pointed out that '[f]lexibility is provided under the current [RLOs]' and that these 'can ... be modified through the law where appropriate'.²³⁹ It observed that the *NCCPA* already makes special provision for certain products deemed to carry higher risk, including reverse mortgages, payday loans, consumer leases and credit cards.²⁴⁰ It suggested that similar special provisions could be introduced when incorporating BNPL into the existing *NCCPA* framework.²⁴¹ In this respect,

235 Australian Securities and Investments Commission, '2023 Submission' (n 52) 23.

236 John Watkins, Andrew Grant and David Grafton, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (23 December 2022) 9–10.

237 Australian Banking Association, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (23 December 2022) 1–2.

238 Customer Owned Banking Association, Submission to Treasury (Cth), *Regulating Buy Now, Pay Later in Australia* (22 December 2022) 1. The Customer Owned Banking Association warned that the proposal to introduce '[w]atered down RLOs' for BNPL, as proposed by the second option, 'risks muddling requirements, creating inefficiencies in delivery of credit products to customers': at 2.

239 Australian Securities and Investments Commission, '2023 Submission' (n 52) 4.

240 Ibid 20–1.

241 Ibid 27.

despite endorsing Option 3, ASIC appeared to envisage a ‘tailored’ and ‘modified’ application of the RLOs, as articulated under Option 2.

Following the Minister’s announcement of May 2023, it is now apparent that the Commonwealth Government will subject BNPL to a modified form of the RLOs, ‘tailored’ to the product’s unique characteristics and risk profile.²⁴² In adopting this course, the Government has acknowledged concerns, put forward by BNPL providers, that the cost of full compliance with the RLOs would make it no longer viable for them to fund very small transactions.²⁴³ These concerns were to some degree endorsed by ASIC, when it suggested that certain ‘existing arrangements’ might be ‘difficult to maintain’ if special rules were not introduced.²⁴⁴ By selecting Option 2 as its preferred model, the Government appears to have accepted the industry’s contentions that BNPL products are helpful to ‘prudent’ consumers, particularly those who have little or no access to other forms of credit. Noting that BNPL can help to ‘smooth the impact of large expenses’, the Government has also endorsed the view that BNPL places ‘competitive pressure on traditional credit products, such as credit cards or payday loans’.²⁴⁵ At the same time, the Government has rejected arguments, put forward by some in the BNPL industry, that a ban on unsolicited credit increases will encourage providers to offer ‘higher [initial] loan limits’.²⁴⁶ It has acknowledged the risks posed by BNPL, including the specific risks associated with unsolicited credit increases and the use of multiple accounts simultaneously. It has also acknowledged that, due to the absence of appropriate safeguards, ‘some people may be weaponising BNPL products in abusive relationships’ as a form of economic abuse.²⁴⁷

The findings from this study support the ‘tailored’ or ‘modified’ approach set out as Option 2 in the *Options Paper* and now adopted by the Commonwealth Government. The survey data bears out the Government’s conclusion that many consumers benefit from access to BNPL, as an alternative to other forms of credit. This was also supported by some focus group participants, who agreed that many low income consumers use BNPL to meet unexpected expenses, spread large expenses over time or take advantage of sales and special offers. These findings support the Government’s conclusion that reducing access to BNPL may in fact ‘make life harder’ for some consumers.²⁴⁸ At the same time, the study offers strong support for the Government’s proposal to require all BNPL providers to obtain an ACL. The focus group data offered ample evidence of poor or inconsistent practice in the industry, under the current self-regulatory model, particularly with regard to vulnerable consumers and those experiencing hardship. Requiring providers to hold an ACL will afford greater protection to such consumers, by expanding ASIC’s

242 *Options Paper* (n 8) 21; Jones, ‘2023 Address’ (n 8).

243 Afterpay, ‘2022 Submission’ (n 13) 20. See also Afterpay, ‘Submission No 26’ (n 133) 20.

244 ASIC suggested that some ‘modifications’ within the ‘existing regulatory regime’ could help to ‘accommodate’ some of these ‘existing arrangements’: Australian Securities and Investments Commission, ‘2023 Submission’ (n 52) 29. See also Australian Retail Credit Association (n 219) 23.

245 Jones, ‘2023 Address’ (n 8).

246 Afterpay, ‘2022 Submission’ (n 13) 20.

247 Jones, ‘2023 Address’ (n 8).

248 *Ibid.*

powers and subjecting providers to the *NCCPA*'s general conduct obligations. The proposed application of 'modified' RLOs to BNPL products will also reduce the risk of overcommitment, hardship or economic abuse associated with BNPL.²⁴⁹

This study also offers evidence that by selecting Option 2, rather than Option 3, the Commonwealth Government has avoided some significant risks to consumers. Specifically, the study suggests that if some low income consumers were unable to access BNPL, due to a strict application of the RLOs, these consumers would increase their reliance on other, more expensive and harmful products such as payday loans. The survey data indicates that a significant minority of BNPL users have also used payday loans, either concurrently or at other times in recent years.²⁵⁰ These individuals were more likely to state that their BNPL products had helped them to manage their money and that their payday loans had made this more difficult.²⁵¹ This finding was consistent with some focus group participants' view that payday loan use has declined since the emergence of BNPL (though others said they had clients who continued to use both products). Importantly, the focus group data offered strong evidence that many low income consumers currently use BNPL to meet essential expenses, including car repairs, school uniforms and medical costs. Taken together, this data suggests that if regulatory reform led to a significant reduction in access to BNPL, among low income earners, some current users of BNPL would be forced to resort to payday loans instead. The Government has recently enacted new amendments to the *NCCPA* to tighten the regulation of payday loans²⁵² and affirmed its desire to prevent 'vulnerable consumers' from falling into 'debt spirals' through this form of lending.²⁵³ This study suggests that the Government's adoption of Option 2 will complement its payday lending reforms,

249 To implement this proposal, the Commonwealth Government could explore the feasibility of a threshold amount, above which all BNPL transactions would be subject to some form of affordability assessment. In 2022, the NZ Government consulted on a proposal to require affordability assessments for all BNPL transactions of \$600 or more: see David Clark, 'Better Protections for Kiwis Using Buy Now, Pay Later' (Media Release, 2 November 2022) <<https://www.beehive.govt.nz/release/better-protections-kiwis-using-buy-now-pay-later>>; *NZ Consultation Paper* (n 8) 8–9. This proposal was criticised by some consumer advocates as offering too little protection for vulnerable consumers. It was also criticised by some BNPL providers, and was ultimately abandoned by the NZ Government, on the basis that any requirement to conduct affordability checks would be too 'onerous' for members of the industry: Duncan Webb, 'Government Acts on Consumer Credit Protection' (Media Release, 8 August 2023) <<https://www.beehive.govt.nz/release/government-acts-consumer-credit-protection>>; *Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023* (NZ) SR 2023/221. Some commentators viewed the proposed threshold as a 'pragmatic' compromise between consumer protection and increased compliance costs for BNPL providers: 'Buy Now, Pay Later Rules to Be Tightened', *Chapman Tripp* (Web Page, 5 May 2023) <<https://chapmantripp.com/trends-insights/buy-now-pay-later-rules-to-be-tightened/>>. It has been suggested that the new regime, which relies heavily on credit checks to ensure affordability, may not be sufficient to counter the harms associated with BNPL: Gilbert and Scott, 'If It Looks like Debt' (n 8); Claire Dale, 'Buy Now, Pay More for It Later', *Newsroom* (online, 5 September 2023) <<https://www.newsroom.co.nz/ideasroom/buy-now-pay-more-for-it-later/>>.

250 See above Tables 1–4.

251 See above Table 9.

252 *Financial Sector Reform Act 2022* (Cth).

253 Jones, '2023 Address' (n 8).

by ensuring that BNPL remains available as a cheaper, less harmful alternative to payday loans for low income earners.²⁵⁴

VI CONCLUSION

This study provides new empirical evidence that BNPL causes harm to some vulnerable consumers. Since the emergence of the industry, advocates have consistently expressed concern that low income consumers are at risk of experiencing severe hardship due to their use of BNPL. These advocates point out that by offering fast and ‘frictionless’ access to credit,²⁵⁵ the industry encourages consumers to incur debts they cannot repay, particularly when they use multiple BNPL products simultaneously. By failing to verify consumers’ identities, circumstances or financial needs, it also creates new avenues for fraud and financial abuse. It is vital to address these risks through regulatory reform. At the same time, it is important to recognise that if providers’ compliance costs increased significantly, they would be likely to reduce access to BNPL for low cost transactions. Excessively rigorous assessment requirements may also prevent some low income consumers from accessing BNPL at all. This may fuel demand for other, demonstrably more harmful sources of credit. The authors’ empirical study indicates that, despite the risks associated with BNPL, it is less harmful than some other widely available credit products, such as payday loans. It shows that BNPL is valued by many low income consumers, particularly as a way of meeting large, unexpected and unavoidable expenses. It also suggests that, even under current regulatory settings, there is considerable overlap between users of BNPL and users of payday loans. Based on these findings, it seems likely that if low income earners could not access BNPL, some would be compelled to increase their use of payday loans or other similar products. On this basis, this study offers support for the Commonwealth Government’s proposal to apply a modified form of the RLOs to BNPL, in conjunction with the *NCCPA*’s general conduct obligations. This approach will significantly enhance consumer protections in the industry, and increase the regulator’s powers, while preserving access to a source of credit that has some comparative advantages for low income earners.

VII POSTSCRIPT

On 12 March 2024, the Treasury released exposure draft legislation and explanatory materials for consultation.²⁵⁶ Submissions closed on 9 April 2024.²⁵⁷

254 Ibid.

255 Anglicare Australia et al (n 7) 14.

256 Treasury (Cth), *Buy Now Pay Later Regulatory Reforms* (Web Page) <<https://treasury.gov.au/consultation/c2024-504798>>.

257 Stephen Jones, ‘Buy Now, Pay Later: Release of Exposure Draft Legislation’ (Media Release, 12 March 2024) <<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/buy-now-pay-later-release-exposure-draft-legislation>>.