

## Buy now, pay later - is the regulatory honeymoon going to end?

[Jan Etwell](#), [Scott Abel](#), [Rebecca Green](#), [Lara Wood](#), [Amman Bulchandani](#)

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Buy now, pay later (BNPL) schemes allow consumers to purchase and receive goods or services immediately and to pay off the purchase price in instalments over a specified period of time (usually between four and ten weeks). Provided the consumer pays on time, they pay no interest or fees.

BNPL schemes have exploded in popularity over the past five years throughout New Zealand and Australia. It is reported that as many as 3,000 New Zealand retailers (including popular retailers such as Glassons, Kmart and Trade Me) now offer BNPL options and that approximately 10% of the adult population in Australia have used at least one BNPL scheme.

Despite the growing popularity of BNPL schemes, they remain largely unregulated in both New Zealand and Australia. However, two recent Australian reports recommend further regulation of the BNPL industry in Australia. We suggest it is likely that New Zealand will follow suit and that the honeymoon period of light regulation will shortly end for BNPL schemes in New Zealand too.

### Current regulatory framework in New Zealand

In New Zealand, because BNPL schemes do not charge interest or fees (other than default or late payment fees) or take security, they do not need to comply with the requirements in the Credit Contracts and Consumer Finance Act 2003 (CCCFA), including not charging unreasonable fees, providing adequate disclosure and complying with the responsible lending obligations.

This means that BNPL providers are not required to assess the consumer's financial position or make an assessment as to whether the consumer is able to repay the credit without substantial hardship. It also means there is nothing stopping a consumer who has defaulted with one BNPL provider obtaining further credit from other BNPL providers. BNPL products also fall outside the definition of "layby sale agreements" in the Fair Trading Act 1986 (FTA) and therefore consumers do not have the same protections under the FTA as they would with layby agreements.

However, BNPL providers are not totally unregulated, as they are required to be registered on the Financial Service Providers Register and be a member of an approved dispute resolution scheme. They are also subject to the unfair contract term regime in the FTA and the general restrictions against engaging in misleading or deceptive conduct.

### Australian reports

Two recent Australian reports into the BNPL industry recommend further regulation in Australia. Currently, the regulatory oversight of BNPL schemes and products in Australia is largely equivalent to New Zealand, in that BNPL schemes are currently not captured by the National Consumer Credit Protection Act 2009 (NCCPA) (the Australian equivalent of the CCCFA).

The Australian Securities & Investments Commission (ASIC) issued a comprehensive report (available [here](#)) in November 2018. ASIC found a number of issues with the BNPL industry in Australia, including instances where the price of goods had been inflated to cover the cost of providing the service and BNPL providers including unfair terms in their contracts. In addition, ASIC found that the BNPL schemes increased the risk of consumers financially overcommitting themselves, resulting in missing repayments (and, therefore, default/late payment fees), not being able to afford essential goods and services and creating financial stress.

ASIC does not recommend that BNPL schemes be brought under the NCCPA at this stage but proposes that it is provided with product intervention powers in respect of BNPL schemes. ASIC considers these powers would allow it to quickly and effectively address the causes of any problems resulting in significant detriment to consumers.

Following on from the ASIC report, the Australian Senate Economics References Committee released a report (available [here](#)) on 22 February 2019 on its inquiry into credit and financial products targeted at Australians at risk of financial hardships. One of the key focuses of the inquiry was BNPL schemes.

The Senate Committee report goes further than the ASIC report and recommends that a regulatory framework (as well as an industry code of practice) is established for BNPL schemes to ensure:

- BNPL providers consider consumer's personal financial situations before providing credit

- Consumers have access to internal and external dispute resolution mechanisms
- BNPL providers offer hardship provisions
- BNPL products are affordable and offer value for money
- Consumers are properly informed, prior to entering into BNPL agreements, about their terms and conditions.

### **What does this mean for New Zealand?**

The Minister of Commerce and Consumer Affairs, Hon Kris Faafoi, notes (in the [2018 Cabinet Paper](#) setting out various recommendations for changes to the CCCFA) that there is limited evidence of harm arising from BNPL schemes in New Zealand and that he does not consider that the schemes need to be brought within the scope of the CCCFA at this time. However, he recommends a new regulation-making power be introduced which would allow regulations to be made to adjust the scope of the CCCFA to address harm that arises from new or unregulated products (such as BNPL schemes).

The Cabinet Paper was released prior to the ASIC and Senate reports, and the Minister has acknowledged that the position with respect to BNPL schemes could be reconsidered if they were shown to cause consumer harm.

There has not been any comprehensive investigation into the BNPL industry in New Zealand to date, but we suspect, following the recent publication of the ASIC and Senate reports in Australia, that New Zealand regulators may revisit the regulation of BNPL schemes in New Zealand. In particular, we consider it is likely that New Zealand regulators will use the proposed regulation-making power to introduce a regulatory framework for BNPL schemes dealing with key issues such as responsible lending requirements, reasonableness of default/late payment fees and dispute procedures.

*This article was written by [Jan Etwell](#) (partner), [Tim Hayward](#) (senior associate) and [Kate Bradley](#) (senior solicitor).*

#### **Auckland**

**188 Quay Street  
Auckland 1010**

**PO Box 1433  
Auckland 1140  
New Zealand**

**P: +64 9 358 2555  
F: +64 9 358 2055**

#### **Wellington**

**Aon Centre  
1 Willis Street  
Wellington 6011**

**PO Box 2694  
Wellington 6140  
New Zealand**

**P: +64 4 499 4242  
F: +64 4 499 4141**

#### **Christchurch**

**83 Victoria Street  
Christchurch 8013**

**PO Box 322  
Christchurch 8140  
New Zealand**

**P: +64 3 379 1747  
F: +64 3 379 5659**