

13 April 2024

Mr Robb Preston
Assistant Secretary
Banking, Credit and Insurance Branch
Financial System Division
Treasury
Langton Crescent
PARKES ACT 2600



By email: creditreforms@treasury.gov.au

Dear Mr Preston

BUY NOW PAY LATER REGULATORY REFORMS

1. The Law Council of Australia welcomes the opportunity to provide a submission in response to the Treasury's exposure draft legislative package for reform to the regulation of Buy Now, Pay Later (**BNPL**) arrangements. The package includes exposure drafts of the:
 - *Treasury Laws Amendment Bill 2024: Buy now pay later* (the **Draft Bill**) and accompanying Explanatory Memorandum; and
 - *National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024* (the **Draft Regulations**) and accompanying Explanatory Statement.
2. The following Committees of the Law Council have provided input into this submission:
 - (a) the Financial Services Committee of the Business Law Section (**FS Committee**); and
 - (b) the Australian Consumer Law Committee of the Legal Practice Section (**ACL Committee**).

General Comments

3. Subject to the comments below, the Law Council supports the legislative scheme proposed to be enacted by the Draft Bill. The proposed reforms are an important step in improving consumer protection from harmful practices in relation to the provision of financial and credit products and services. In particular, the Law Council notes its general support for the following reforms:
 - (a) requiring BNPL providers to hold an Australian credit licence (**ACL**) and to be a member of the Australian Financial Complaints Authority (**AFCA**);
 - (b) requiring BNPL providers to comply with hardship provisions of the National Credit Code (**NCC**);

- (c) under the proposed 'low cost credit contract' (**LCCC**) regime, increases in credit limits will need to be solicited in line with the requirements for other regulated credit;
 - (d) setting a cap on permitted default fees;
 - (e) extending anti-avoidance provisions to include BNPL arrangements;
 - (f) requiring BNPL providers to undertake unsuitability assessments;
 - (g) facilitating credit-related information sharing between lenders to avoid the risk of hardship arising from customers finding themselves overcommitted because of arrangements with different providers, leading them to accrue an unsustainable level of debt;
 - (h) allowing LCCC providers access to the credit reporting system by virtue of their status as credit providers holding ACLs; and
 - (i) requiring BNPL providers to request information from customers about whether they have entered into any other BNPL arrangements, payday loans or consumer leases.
4. The Law Council appreciates that the proposed reforms leverage existing regulatory arrangements and the existing enforcement regime to deliver policy outcomes that seek to address the issues identified in the Treasury's previous Options Paper and other work done in the area.¹

Scope of matters for consultation

5. The webpage for the Treasury's consultation includes the following statement:

Certain technical and operational provisions (including those dealing with the application, commencement and technological neutrality of the reforms) have been omitted for consultation.²

6. An explanation of the rationale for excluding such provisions from the consultation process is not provided. The Law Council considers that such matters ought to be subject to an appropriate level of public consultation and scrutiny, and, in this respect, suggests that there is room for improvement in the transparency of the consultation process.

Definition of 'low cost credit contract'

7. Proposed new section 13C of the NCC defines the meaning of an LCCC. Proposed subparagraph 13C(1)(b)(ii) includes 'a contract prescribed by the regulations for the purpose of this paragraph'.
8. The Law Council considers that the definition of an LCCC should be self-contained within the NCC. Having the definition potentially extended by regulations is not ideal

¹ The Treasury, [Regulating Buy Now, Pay Later in Australia](#) (Options Paper, November 2022).

² The Treasury, [Buy Now Pay Later regulatory reforms](#) (Web Page, 12 March 2024).

for transparency, navigability or simplicity. On this basis, the Law Council submits that:

- (a) in the absence of exceptional circumstances, the LCCC definition should only be altered by Parliament;
- (b) the proposed power to amend the definition by regulation should, therefore, only be used in the event that swift action is required to address an unforeseen risk of significant consumer harm; and
- (c) as part of the ongoing maintenance of Treasury portfolio laws, the LCCC definition should be reviewed on a regular basis.

Responsible Lending Conduct

New ACL authorisation

9. Proposed Part 3-2BA of the *National Consumer Credit Protection Act 2009* (Cth) provides for licensees that are to be LCCC providers to elect for that status, triggering modifications to responsible lending obligations that would otherwise apply.
10. The Law Council understands that applicants seeking an ACL will be able to elect at the application stage to opt into these modified responsible lending obligations if their licence application is granted. In the Law Council's view, further consideration is required to ensure that the implementation of this election procedure is as simple and easy for industry participants to navigate as possible, from a governance and compliance perspective. Relevant facets of the implementation include:
 - (a) the potential for corporate groups to hold multiple licences with different authorisations;
 - (b) the manner in which the authorisation is denoted on the register of ACLs maintained by the Australian Securities and Investments Commission (**ASIC**); and
 - (c) how the amended responsible lending obligations would apply in practice, given the incentives that the election procedure may create (as explained below).
11. It is apparent that, because the definition of LCCC is functionally no different from the concept of credit under a credit card arrangement, existing credit card issuers may choose to develop LCCC products and establish special purpose vehicles to hold an ACL with an LCCC election in order to capture the benefits of the lighter touch regulation. In any event, the potential complexity which this election mechanism may create should be considered carefully, particularly in light of the current focus on simplification of the financial services and consumer credit licensing framework.

Presumptions where credit limit of a contract is less than \$2,000

12. Proposed sections 133BXF and 133BXG outline a set of presumptions where the credit limit of a contract is less than \$2,000 including that:
 - (a) the contract will not be unsuitable due to not meeting the requirements and objectives of the consumer, if entered into during the relevant assessment period—proposed subsections 133BXF(2)–(3) and 133BXG(2); and
 - (b) the contract will not be unsuitable if the relevant increase to the credit limit occurs during the period covered by the assessment and the credit limit of the

contract after the increase will be less than \$2,000—proposed subsections 133BXF(4)–(5) and 133BXG(3).

13. In relation to these presumptions the Law Council has received alternative views from the committees contributing to this submission. The Law Council provides both views for consideration by the Treasury.
14. The FS Committee considers that the \$2,000 threshold proposed for traditional responsible lending obligations balances the commercial need for low cost and streamlined establishment arrangements for small amount credit contracts with recent research and commercial outcomes demonstrating the need for consumer protections in this area.
15. Conversely, the ACL Committee is of the view that the removal of consumer protections where the credit limit of a contract is less than \$2,000 is arbitrary and ignores the experiences of disadvantaged and vulnerable consumers using these arrangements for whom this amount can form a significant portion of their income. In the view of the ACL Committee, the presumptions should be reconsidered taking into account the risk to disadvantaged and vulnerable consumers, especially where this class of consumer forms a large part of the target market. In this regard, the ACL Committee suggests the following reforms:
 - (a) the presumption of compliance with the obligation that the arrangement meets the consumer’s requirements and objectives for amounts less than \$2,000 should be removed, especially where consideration of whether a matter is adequate must already take into account the nature, scale and complexity of the credit activities engaged in by the licensee; and
 - (b) in relation to proposed regulation 28HAD(2), the requirement to obtain a consumer’s credit liability information as part of the licensee’s obligation to make reasonable inquiries about a consumer’s financial situation should be applied equally across these arrangements, whether or not the amount of credit sought is less than \$2,000.
16. The ACL Committee also provides the following case studies, which indicate the hardship that can be caused—even where the credit limit is less than \$2,000.

Case Study 1

Amber is a young single mother to three children. She receives Centrelink payments and works part-time as her source of income. Her income is less than \$1900 per fortnight, and her expenses significantly exceed her income each fortnight. Amber entered into two BNPL arrangements within a one-year period. The loan amounts were between \$500 and \$1,000, totalling less than \$2,000. These contracts caused Amber significant financial hardship and stress, and she was not able to repay the amounts she had borrowed.

Case Study 2

Sam is an Aboriginal man. He lives in a regional area and receives a Job Seeker payment as his source of income. This payment is less than \$800 per fortnight. Sam’s fortnightly expenses sometimes exceed his income. Sam purchased some jewellery from a jewellery store for \$1,000 under a BNPL arrangement. He sought legal advice from a community legal centre when he started receiving calls from a debt collector. Sam didn’t understand that he had entered into a BNPL arrangement when he had purchased the jewellery, or that this debt had been assigned to a debt collector. Sam

thought that he had entered into a loan. Sam wasn't able to make many payments because the BNPL arrangement caused him financial hardship.

Transparency, clarity and consistency

17. The Law Council considers that there needs to be sufficient transparency, clarity and consistency in these reforms to ensure that:
 - (a) consumers and their representatives understand:
 - (i) the credit arrangements being entered into;
 - (ii) consumer rights in relation to those arrangements; and
 - (iii) how to enforce consumer rights in relation to those arrangements;
 - (b) ASIC has the information it requires for the purposes of guidance, regulation and enforcement;
 - (c) AFCA has the information required to resolve related consumer disputes consistently and fairly; and
 - (d) licensees understand how to comply with their obligations.
18. Specifically, the ACL Committee makes the following suggestions for reform to the Draft Bill (and related Explanatory Memorandum):
 - (a) *proposed section 133BXA*—any election made by a licensee that Part 3-2BA apply to the licensee in relation to some or all LCCCs should be published, registered and/or otherwise disclosed;
 - (b) *proposed sections 133BXH, 133BXD(3)(d) and 133BXD(6)(b)*—unsuitability assessment policies and other policies relied upon by licensees to assess the suitability of arrangements for consumers should be published, registered and/or otherwise disclosed;
 - (c) *proposed section 133BXD(3)*—the Draft Bill and Regulations ought to be more prescriptive about the general content of all licensees' unsuitability assessment policies to avoid inconsistencies in the factors used for suitability assessments by different licensees, including, for example, safe harbour steps for licensees in relation to meeting their obligations under Part 3-2BA;
 - (d) *proposed section 133BXD(6)(a)*—guidance should be published about licensees relying solely on information and documents provided by a consumer to comply with its obligation to make reasonable inquiries into a consumer's financial situation, including how this interacts with the licensee's obligation to take reasonable steps to verify a consumer's financial situation; and
 - (e) *Explanatory Memorandum paragraph [1.63]*—where a licensee relies upon data, including data on bad debt rates, arrears rates, hardship arrangements and complaints relating to unaffordability, when assessing its 'reasonable steps' requirements, this data should be published, registered with ASIC and/or disclosed to affected consumers such that consumers can access it for the purpose of determining and enforcing consumer protections and ASIC can access it for the purposes of regulation and enforcement;

19. The ACL Committee makes the following suggestions for reform to the Draft Regulations:
- (a) *proposed regulation 28HAF*—guidance should be published about the licensee’s reviews of its unsuitability assessment policy, including what constitutes ‘regular’ review, what is an ‘effective’ policy, what ‘information and evidence’ may be required for the purposes of the reviews, and when any changes identified in the review will be expected to be implemented; and
 - (b) *proposed regulation 28HAD(5)*—guidance should be published about the other information the licensee is required to collect to comply with its obligation to make reasonable inquiries into a consumer’s financial situation, including on the threshold of ‘substantially correct’.

Commencement date

20. The Law Council suggests that the commencement date should be determined in advance by reference to some logical or objective signposts, such as the first business day of a particular month, rather than commencing on a date that is 6 months after the date of Royal Assent.
21. In selecting a suitable commencement date, it will also be important to allow a sufficient period of time for ASIC to issue appropriate regulatory guidance on the subject and process applications for new ACLs and variations of ACLs from providers of LCCCs.

Contact

22. The Law Council would be pleased to discuss any aspect of this submission. Please contact [REDACTED] in the first instance.

Yours sincerely

Greg McIntyre SC
President