

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

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**By email:**

### **Buy Now Pay Later regulatory reforms**

Thank you for the opportunity to comment on the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024. Our comments relate specifically to the provisions to regulate 'low cost credit contracts' – particularly 'buy now pay later' – under the National Consumer Credit Protection Act.

#### **About Arca**

Arca is an industry association focussed on the use of credit reporting and consumer data. We bring together Australia's leading credit providers and credit reporting bodies to improve data protection and use, and also to make credit more visible, accessible and easily understood. Our vision is to make credit work for all Australians.

Arca has over 50 Members, including Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, Arca's Members account for well over 95% of all regulated consumer lending in Australia. Several of Arca's Members currently offer BNPL products.

Arca has a role that is unique to credit and credit reporting in Australia. This includes:

- Acting as the appointed developer of the *Privacy (Credit Reporting) Code 2014* (CR Code). In this role, we are responsible for drafting (for the approval of the Information Commissioner) 'an essential part of the regulatory structure of the credit reporting system'.<sup>1</sup>
- Through its subsidiary, the Reciprocity and Data Exchange Administrator (RDEA), developing, managing and overseeing compliance with the business-to-business rules and data standards under which credit-related personal information is exchanged between credit providers and credit reporting bodies. Those rules are known as the **Principles of Reciprocity and Data Exchange** (PRDE). As LCCC/BNPL providers will be required to obtain 'partial' credit information (if they make an election under s133 BXA of the Bill and offer products over \$2000), it is likely that those providers will need to become signatories, and comply with, the PRDE.<sup>2</sup>
- Playing an instrumental role leading consumer education on credit reporting and broader issues relating to credit health, through its consumer-facing website, CreditSmart ([www.creditsmart.org.au](http://www.creditsmart.org.au)). Through development of the CreditSmart resources, Arca has gained significant exposure to consumers and their interactions with credit and the credit reporting system.<sup>3</sup> The understanding

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<sup>1</sup> See the [Explanatory Memorandum to the Privacy Amendment \(Enhancing Privacy Protection\) Bill 2012](#), especially pages 4 and 92.

<sup>2</sup> See section 28HAD of the exposure draft [National Consumer Credit Protection Amendment \(Low Cost Credit Regulations\) 2024](#). See also page 3 of the [Explanatory Statement](#) to those draft regulations, which confirms that 'seeking to obtain information' includes complying with the requirements of the PRDE.

<sup>3</sup> By way of example, Arca is currently developing standardised messaging and scripts for credit providers to use when explaining how a 'financial hardship arrangement' will appear on a consumer's credit report and how it impacts their ability to get credit in the future. That messaging and scripting is going through robust process involving a 'readability' review by a qualified expert and consumer testing. ASIC's recent report into hardship ([REP782](#)) has cited Arca's work as an example of the improvements to hardship policies, processes and practices currently underway (at REP782.23).



gained through that interaction informs all the work that Arca undertakes, including the commentary in this submission.

## Recommendations

As discussed in detail below, our specific recommendations are that:

- i. The implementation and operation of the Bill be subject to a review within a reasonably short timeframe (e.g. 12 months), including an assessment of the matters set out in the Summary, below.
- ii. Following that review, if LCCC/BNPL providers do not choose to participate in credit reporting at the 'comprehensive tier', consideration be given to expanding the requirements under the modified responsible lending obligations to require the provider to obtain information at the comprehensive tier.
- iii. The regulations (or, at a minimum, the relevant explanatory statement) clarify that the ability to rely on the 'protected increase' process under s133BXD is dependent on the LCCC/BNPL provider disclosing the 'maximum credit limit' (as defined in s133BXD(3)(a)(i)) to the credit reporting body when undertaking the relevant credit check.
- iv. ASIC provide clarification that non-LCCC/BNPL providers can apply a risk-based approach to their consumption of LCCC/BNPL information on the credit report.

## Summary

Arca supports the regulation of Buy Now Pay Later products under the National Consumer Credit Protection Act (NCCP) and National Credit Code (NCC). This is a commonsense acknowledgement that those products are 'credit' and should be regulated under the ordinary credit legislation.

We welcome the proposed regulatory framework's recognition of:

- The scalable nature of the existing responsible lending obligations under the NCCP, including the explicit recognition of the value of a 'risk-based' approach to responsible lending (i.e. an approach that is similar to a lender's ordinary approach to credit risk); however see our comments in Section C, below, in relation to the impact on other credit providers of the reforms.
- The importance of credit reporting in ensuring BNPL products can be issued in an efficient and responsible manner<sup>4</sup>; see also our comments below about the extent to which we consider LCCC/BNPL providers should be expected to participate in credit reporting.

We note, however, that the design of the regulatory framework, and the drafting of the Bill, has adopted a narrow focus on the specific provision of BNPL products (and, to a lesser extent, wage advance products). We consider that this creates potential problems for issuers of *other* credit products, e.g. do the modifications and allowances provided to LCCC/BNPL providers under the modified responsible lending framework mean that such things are not open to providers of other products? In doing so, this potentially creates a competitive distortion between the providers of BNPL products and other products (particularly credit cards and personal loan products). See Section C *Limited participation in credit reporting – impact on other CPs*, below, for our specific comments regarding the impacts of the limited participation by LCCC/BNPL providers in credit reporting on providers of other forms of credit.

Likewise, in seeking to create a regime that applies specifically to BNPL products (which, from a contractual basis, are hard to distinguish from other similar products), the Bill has created a complex regulatory framework that may cause implementation problems for both LCCC/BNPL providers and providers of 'standard' credit products. We are continuing to engage with Treasury regarding some of these concerns and hope to receive further clarity on how the relevant provisions are intended to operate.

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<sup>4</sup> Which, we understand, will be included in the yet-to-be released regulations (in similar terms that what was included in the exposure draft regulations previously released by Treasury).



Noting those observations, and subject to the detailed comments below, we support the proposed Bill on the basis that its operation (and that of the broader framework that will be set out in the regulations) is reviewed within a reasonably short timeframe (e.g. 12 months), including an assessment of:

- How have LCCC/BNPL providers incorporated credit reporting into their practices? How has the use of credit reporting by BNPL providers affected providers of other forms of credit?
- Have providers of other forms of credit adopted elements of the proposed framework? Should the additional detailed description of 'scalability' in the Bill be extended to other forms of consumer credit?
- How has AFCA and ASIC applied the new framework? Has it changed how AFCA and ASIC applies the existing framework to providers of *other* credit products?
- To the extent that BNPL products currently provide a 'safer' source of low value credit to low income and other vulnerable customers,<sup>5</sup> have BNPL providers withdrawn from servicing that consumer segment due to the new reforms? If so, has the gap been filled by 'safe' alternatives (including Government funded alternatives)?

### Credit reporting under the LCCC/BNPL regime

We understand that the regulations will require LCCC/BNPL providers (which elect to adopt the modified responsible lending framework) to undertake credit checks; at the 'negative' tier for accounts up to \$2,000 and the 'partial' tier for accounts more than \$2,000.

To provide clarity, undertaking credit checks at the 'negative' tier gives the LCCC/BNPL provider visibility of previous applications for credit (but not whether the account was approved and/or opened) and delinquency related information (e.g. defaults and court judgements). Importantly, making those credit checks at the negative tier means that:

- A record of the application having been made is recorded on a customer's credit report but no record of whether the account has been opened (or remains open) is shown. This appears to be inconsistent with the expectation under the modified responsible lending framework that LCCC/BNPL providers have regard to whether the customer has existing LCCC/BNPL products (see s28HAD(5) in the exposure draft regulations).
- The relevant LCCC/BNPL provider will not be required to become a signatory to the PRDE, which, amongst other things, requires credit providers to report when a customer has defaulted on a credit product. In the absence of being a signatory, we consider that it is highly likely that LCCC/BNPL providers will not report such defaults; meaning that a customer's credit report will not even show that the customer has taken out and subsequently defaulted on LCCC/BNPL products.

Credit checks at the 'partial' tier will provide LCCC/BNPL providers with additional visibility of the customer's current credit liabilities (and those closed within the previous two years). Importantly, to receive partial information through the credit reporting system, the LCCC/BNPL providers will be required to become signatories to the PRDE (and subject to its 'reciprocity' principle), which will mean that the provider will be required to contribute details of its opened accounts to the credit reporting body and if the customer subsequently defaults on the credit (which will then be visible to other credit providers). This is a significant improvement over 'negative' only data; for both the LCCC/BNPL providers and other users of the credit reporting system.

However, we consider that participation by LCCC/BNPL providers at the comprehensive tier (i.e. with the sharing of both consumer credit liability information and repayment history information) would significantly improve providers' ability to lend responsibly and efficiently, and provide additional consumer benefits to those consumers who do not otherwise have a detailed credit history (which is likely to include a significant number of BNPL customers).

Repayment history information is the single most powerful risk management data set within Australia's credit reporting system. Given the risk-based approach to responsible lending provided for under the modified

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<sup>5</sup> Safer than, for example, small amount credit contracts.



responsible lending framework, LCCC/BNPL providers should be expected to use all the tools that they are reasonably able to access. Notwithstanding the requirement to participate on a more limited basis (as per the exposure draft regulations), LCCC/BNPL providers should be subject to a 'if not, why not' approach to participating fully in credit reporting.

For example, when designing its unsuitability assessment policy under s133BXG(2), the LCCC/BNPL should be considering the additional benefits that access to repayment history information would bring. Likewise, when reviewing the operation of the policy (as per s28HAF(1) of the exposure draft regulations), a LCCC/BNPL which has chosen not to use comprehensive credit reporting information should be assessing whether access to such information would have helped reduce the risk of providing unsuitable credit.

Again, we welcome the recognition that the modified responsible lending framework has given to the importance of credit reporting when lending in a responsible and efficient manner. However, we consider that there should be a clear expectation that LCCC/BNPL providers move towards participating at the comprehensive tier and, if they do not move to that level of participation, consideration should be given to expanding the requirements under the modified responsible lending obligations (i.e. to require the provider to obtain information at the comprehensive tier).

#### *Disclosure of the relevant 'credit limit' when seeking credit information*

When seeking to obtain credit reporting information from the credit reporting body (through an 'enquiry'), the credit provider should disclose the 'credit limit'; see paragraph 6.2(b) of the [Privacy \(Credit Reporting\) Code 2014](#) (CR Code) for the rules about this disclosure.

In the case of a LCCC/BNPL provider that wishes to rely on the 'protected increase' process under s133BXD, the 'maximum credit limit' under s133BXD(3)(a)(i) would clearly be the relevant 'credit limit' (that is disclosed for the purposes of paragraph 6.2(b) of the CR Code). Accordingly, that maximum credit limit should be disclosed as part of the initial credit enquiry.

Nevertheless, we are aware that some credit providers may currently disclose 'no fixed limit' to the credit reporting body. While this is a valid response where there is no fixed limit, it is our experience that some providers may take liberties when assessing whether there is genuinely a 'limit' that could be disclosed.

The credit limit in a credit enquiry is a vital piece of information for other users of the credit reporting system; particularly given the credit enquiry may be the only reflection of the LCCC/BNPL account in the credit reporting system (i.e. for accounts up to \$2000).

Accordingly, we recommend that the availability of the protected increase process be linked to the limit that is disclosed when obtaining credit reporting information under the regulations, to ensure that it is visible to other users of the credit reporting system. To the extent that a credit provider cannot or does not disclose a limit, the protected increase process should not be available.<sup>6</sup>

#### *Limited participation in credit reporting – impact on other CPs*

Credit reporting is, primarily, a tool for a credit provider to assess the credit worthiness of a customer based on the customer's previous behaviour with other credit. However, it also plays an important role in verifying a customer's financial situation (as is required under the NCCP's responsible lending provisions).

Following the move to comprehensive credit reporting, many credit providers identified significant under-disclosure of existing credit, i.e. the customer's credit report disclosed 'consumer credit liability information' in respect of credit accounts that the customer had not reported on their application for credit. Clearly, from a responsible lending perspective, the credit provider would need to consider those undisclosed liabilities in their assessments.<sup>7</sup>

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<sup>6</sup> This change should be made part of the NCCP framework. No changes are required to the credit reporting framework under the Privacy Act or the CR Code.

<sup>7</sup> In some cases, the undisclosed liabilities reflected accounts that the customer themselves had not realised remained open (and could formally closed). Otherwise, the credit provider would need to include the liability in their capacity assessment.



However, it is much less clear how a credit provider should respond to a mere 'credit enquiry' on the prospective customer's credit report. This question becomes more significant given the proposed modified responsible regime will potentially result in many more 'enquiries' being recorded without the subsequent 'consumer credit liability information' that would confirm whether the account was actually opened and, if so, remains open.

For example, if a customer applies to a credit provider for a credit card, and the credit card provider can see multiple BNPL 'enquiries' (with no consumer credit liability information), to what extent is the lender required to make further inquiries regarding the potential existence and performance of those BNPL accounts?

We are concerned that AFCA and/or ASIC may form the view that a credit provider which sees LCCC/BNPL 'enquiries' on a credit report is always required to undertake additional verification steps to understand whether the relevant BNPL account was opened/remains open and, potentially, how the customer is performing on those accounts. If the relevant LCCC/BNPL provider does not participate in comprehensive credit reporting, that other credit provider would be forced to undertake those verification steps outside the credit reporting system (which is both difficult and inefficient).

Ironically, the risk-based approach open to LCCC/BNPL providers under the modified responsible lending regime ensures that those providers are not always required to take those extra verification steps even though they may voluntarily choose not to participate in comprehensive credit reporting (where, if they participated, this issue would not exist).

We consider that it is appropriate for ASIC's RG209 guidance to recognise that other credit provider's will be responsible for how they treat LCCC/BNPL enquiries on a credit report, and that there is no automatic need to undertake further enquiries and verification in all cases merely because of the existence of LCCC/BNPL enquiries. If this approach is not taken, the modified responsible lending regime will potentially undermine the effectiveness of the credit reporting system for providers of other credit products, and place them at a competitive disadvantage to LCCC/BNPL providers.

If you have any questions about this submission, please feel free to contact me

Yours sincerely,

**Michael Blyth**  
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