The Treasury
Langton Cres
Parkes ACT 2600

12 February 2025

By online submission

Dear Adam

Buy Now Pay Later exposure draft regulations (February 2025)

Thank you for the opportunity to comment on the February 2025 exposure draft of the National Consumer Credit Protection Amendment (Low Cost Credit) Regulations.

Noting the short consultation period, we have kept our feedback concise. For further background to some of the issues below, please refer to our **April 2024 submission** on the earlier drafts of the regulations.

1. **Aggregation of multiple LCCC will stifle innovation:** both section 28HAD(2)(ii), which sets out the requirements to obtain the supply of credit reporting information, and section s69G(3)(b), which sets out the fee caps relevant to the definition of a low cost credit contract, are based on consideration of all low cost credit contacts between the credit provider and the debtor. We understand and agree with this in principle as it will avoid a provider offering multiple, similar (or identical) products to the customer to avoid the relevant fee caps.

   However, it will stifle innovation in the following ways:

   - A provider would not be able to provide an effective 'white label' BNPL service to third parties, as the two separate product types will interfere with each other. For example, a BNPL provider may wish to offer a white label BNPL service to Myer group of retailers ('Myer BNPL') and a separate white label service to David Jones ('David Jones BNPL'). In terms of the commercial relationships between the BNPL provider and their retailer partner, it is not appropriate that the two products interfere with how the BNPL provider implements the white label product for its two retail partners (particularly where the products can be only used to purchase items in a specific retailer).
   - A provider would be restricted in providing two different types of BNPL product; for example, an 'everyday purchasing BNPL product' (e.g. Afterpay, ZipPay, Klarna etc) and a 'low cost personal loan' (e.g. for larger purchases, like solar panels). In practice, those two products are not of the same nature and are not interchangeable, and therefore there would be no suggestion that the provider is trying to take advantage of the cost caps. We note that this would potentially force the provider to offer those products through different entities. However, that approach is inefficient and would potentially raise concerns under the anti-avoidance provisions.

   We recognise that a similar issue exists under the section 5 and 6 cost caps that BNPL providers currently operate (although a key difference is that there are no relevant anti-avoidance provisions). Nevertheless, given the time and effort that have been put into developing this regulatory framework, it is unfortunate that the regulations will stifle innovation in this way.

At a minimum, we recommend that:

- ASIC be directed to develop class order relief in respect of section 28HAD(2)(ii) and s69G(3)(b) to limit their inappropriate operation (i.e. that they should not apply where the products offered by the provider are not similar or identical and there are valid reasons why a consumer may hold more than one product with that provider).
- ASIC be directed to develop a standardised process to consider relief applications from individual providers who may need tailored relief from the operation of section 28HAD(2)(ii) and s69G(3)(b).
- The explanatory statement should make it clear that structuring different, non-competing products into different entities does not constitute anti-avoidance activity.

2. **Definition of 'BNPL' may unintentionally capture some credit contracts:** a low rate credit card with a low limit may, at first glance, come within the definition of BNPL, i.e. as the total 'ordinary' interest and fees will be below the cost caps (even though, in practice, the CP does not intend treat the account as a 'BNPL' product or make an election under s133BXA). This would be problematic as the LCCC-specific precontractual disclosure, contractual disclosure, statements and 'first default' notice would be required for that credit card (while the ordinary non-LCCC notices would be required for other accounts within the same card portfolio, based on the credit limit of the individual card). This is unworkable. To the extent that a credit provider would be forced to use conditional language in their disclosure (i.e. "If this product is regulated as a low cost credit contract, then…"), this goes against good consumer communication principles.

   In practice, such a low rate card may have certain fees that are not capped. For example, cash advance fees and overseas transaction fees are based on the value of the transactions which, theoretically, are unlimited (i.e. if the customer continually made payments to the card to keep it within the available credit limit).

   Nevertheless, we consider that to be a lucky coincidence for such credit cards (which happen to have such theoretically uncapped fees) and does not address our fundamental concern.

   At a minimum, we recommend that:

   - Confirmation be given that a credit card, in the circumstances described above, is <u>not</u> a BNPL contract given the nature of those cash advance fees and overseas transaction fees.
   - ASIC be directed to develop a standardised process to consider relief applications from individual providers who intend for their product not to be regulated as a 'buy now pay later contract'.

3. **Definition of 'BNPL' is dynamic and may change after acquisition:** due to s69G(3)(b), an account – that was originated as a buy now pay later contract – would cease being so based on another LCCC subsequently being opened by the debtor. This is unworkable. It would require the BNPL provider to switch the customer to the non-BNPL notice process (as listed above) and would instantly remove the ability to rely on the protected increase process under section 133BXD (again, as noted above, even though the products are completely different and the service offered to the customer in no way overlaps).

   We recommend that:

   - The regulations clarify that the operation of the cost caps apply at account acquisition, and the treatment of the first-opened account does not change based on a subsequent contract being opened (unless the provider chooses to increase the cost of the first-opened account).

4. **Reporting of 'buy now pay later contracts' in the credit reporting system:** Arca (through its subsidiary, the RDEA, which is the PRDE Administrator), is considering how 'buy now pay later contracts' should be reported in the credit reporting system. Our preliminary view that only 'everyday purchasing BNPL products' should be reported as 'BNPL'. That is, products that are generally used for lower value, everyday purchases, where each payment is subject to its own payment schedule (which results in the purchase

being paid off in short period; often over 4 fortnightly payments) should be reported as BNPL. Such products have features that should be clearly visible and understandable to other credit providers (particularly the unique payment schedule).

In contrast, higher value loans that are paid off over an extended period (such as those used to pay for things like solar panels), should not be reported as 'BNPL', despite satisfying the NCCP/NCC criteria. Instead, as they have the features of an ordinary personal loan (other than being low cost), we consider they should be reported using the relevant 'personal loan' account type.

We are about to consult with PRDE signatories and other stakeholders regarding this guidance. However, we wish to draw it to your attention as it will be relevant to the modified RLOs; particularly section 28HAD(6)(c).

That is, if the guidance is adopted, the credit reporting system will highlight those 'everyday purchase BNPL accounts' (such as those offered by Afterpay, ZipPay, Klarna) but will report 'low cost personal loans' (e.g. from Brighte, Plenti etc) as 'ordinary' personal loans. Those low cost personal loans will still be visible in the credit reporting system but not specifically identified as BNPL (and therefore LCCC).

We understand that section 28HAD(6)(c) is intended to ensure that a customer is not overloaded with those 'everyday purchasing BNPL accounts'. On that basis, we consider the proposed approach to be consistent with the policy intent of the law.

We will be engaging with ASIC on this issue in respect of the BNPL-related responsible lending guidance. However, if this approach is of concern, we ask that you advise us as soon as possible. There is a significant amount of work for the entire credit industry to undertake to prepare for the influx of BNPL-related information in the credit reporting system prior to 11 June, and any changes to the reporting approach need to be understood now.

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

Yours sincerely,

Michael Blyth
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