Law Council
OF AUSTRALIA

Legal Practice Section

14 February 2025

Mr Tim Baird
Assistant Secretary
Banking and Credit Branch
The Treasury
Langdon Crescent
PARKES ACT 2600

By email: CreditReforms@treasury.gov.au

Dear Mr Baird

Buy Now Pay Later Draft Regulations 2025

1. The Legal Practice Section of the Law Council of Australia appreciates the opportunity to provide feedback on the draft National Consumer Credit Protection Amendment (Low Cost Credit) **Regulations** 2025, in respect of Buy Now Pay Later (**BNPL**) products.

2. This submission is informed by the Legal Practice Section's Australian Consumer Law Committee (**ACLC**).

3. The Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 was introduced into the Parliament in June 2024. No material changes were made to that Bill before it passed the Parliament on 29 November 2024. We strongly encourage the Treasury to seek public feedback on draft regulations as early as possible, and have been disappointed with the current consultation period.

4. A one-week consultation timeframe (five business days) raises serious concerns about the integrity and transparency of the legislative development process. We understand that other experts within the Law Council's broader structure were interested in contributing to this submission, but they did not have a sufficient opportunity. It is unfortunate that this truncated consultation process has provided inadequate time for the Law Council's broader membership (and, no doubt, other stakeholders) to meaningfully engage with the draft materials.

Proposed regulation 28HAD: Inquiries about financial situation of consumer

5. Draft subregulation 28HAD(6) provides that:

> *The licensee must also seek to obtain information that the licensee reasonably believes to be substantially correct about the following:*
>
> *(i) the income of the consumer;*
>
> *(ii) the expenditure of the consumer;*
>
> *(iii) any low cost credit contracts, small amount credit contracts or consumer leases to which the consumer is currently a party.*

6. The draft Explanatory Statement explains that:[1]

> *For example, a benchmark could be considered by a credit provider to test whether the information could be reasonably believed to be substantially correct because it is within the range expected for a person in broadly similar circumstances to the consumer. Alternatively, the comparison may indicate that the information provided may not be true. A LCCC [low cost credit contract] licensee may need to regularly monitor and review benchmarks and how to use them to ensure the benchmarks remain appropriate—for example, by assessing data on defaults, complaints, and dispute resolution).*

7. The Australian Securities and Investments Commission (**ASIC**) provides guidance in Regulatory Guide 209 that:[2]

> *… income and expense benchmarks do not provide any information about the individual consumer, and do not confirm or verify that the information that has been obtained by the consumer is true.*

8. The ACLC recommends that the Treasury should ensure that licensees look to ASIC for guidance about the appropriate and adequate use of benchmarks.

Proposed regulation 28HAF: Reviewing and updating unsuitability assessment policies

9. It is difficult for a consumer to raise a complaint that the licensee did not comply with its unsuitability assessment policy if this policy is not made available to the consumer.

10. The ACLC recommends that draft regulation 28HAF be amended to require licensees to give a copy of their unsuitability assessment policy to consumers, including on request of the consumer or their advocate.

[1] Draft Explanatory Statement, National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2025, 9.
[2] Australian Securities and Investments Commission, *Regulatory Guide 209: Credit licensing: Responsible lending conduct* (December 2019) 209.134.

Proposed regulation 69G: Meaning of low cost credit contract*—fees or charges*

11. In an earlier iteration of the draft Regulations (released for consultation in March 2024),[3] proposed regulation 69E provided for:

    - a cap on permitted fees and charges under an LCCC ($200 in the first year, $125 in subsequent years); and
    - a proposed late fee cap of $10 per month.

12. These caps have been retained in the currently proposed regulation 69G for most existing BNPL models, although the late fees are now subject to an annual—rather than monthly—limit. However, for BNPL models that only charge consumers when they miss a repayment, the $200/$125 permitted fees and charges can now also be built into late fees.

13. According to the draft Explanatory Statement:[4]

> *The operation of the cap seeks to balance protecting consumers from high fees or charges and facilitating the maintenance of the commercial models that credit providers who currently provide credit that would be a LCCC currently use.*

14. The proposed change will allow a BNPL provider who uses the latter model to double (and almost triple in its first year) the maximum amount of late fees that it can charge individual account holders. This is the opposite of the policy intent of the fee caps and will directly and substantially harm consumers who are experiencing financial hardship.

15. The ACLC recommends that paragraph (b) of Item 2, Column 2, be removed in respect of subregulation 69G(3).

Proposed item 17: At the end of regulation 85

16. Item 17 of the draft Regulations provides for the following subregulation to be added to regulation 85:

> *(2) For subsection 87(3) of the Code, the information that a first default in payment notice given in the circumstances mentioned in subsection 87(1A) of the Code must contain is set out in the following paragraphs:*
>
> *a) that there has been a default in payment of an amount under the low cost credit contract;*
>
> *b) how to arrange for payment of the amount;*
>
> *c) the credit provider's internal dispute resolution procedures and financial hardship processes;*
>
> *d) the external dispute resolution procedures available with AFCA.*

[3] Exposure Draft, National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024.
[4] Draft Explanatory Statement, National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2025, 5.

17. This proposed subregulation mirrors the information that is required to be provided to consumers in default under subsection 88(3) of the National Credit Code.[5]

18. The Credit Form 11A—referenced in the draft Explanatory Statement[6]—includes the words, 'If you are having financial difficulties, you can also contact a financial counsellor on 1800 007 007 (free call)'.

19. The ACLC recommends that the payment notice should also include the period for remedying the default, and how to contact a financial counsellor, including the phone number for the credit and debt hotline.

Contact

20. The Legal Practice Sections appreciates the opportunity—while brief—to contribute to this consultation. If you require further information or clarification, please contact the ACLC Co-Chairs, Ms Ursula Noye and Mr Ben Slade, [redacted].

Yours sincerely



Greg McIntyre SC
Chair

[5] *National Consumer Credit Protection Act 2009* (Cth) sch 1.
[6] Draft Explanatory Statement, National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2025, 12; Australian Securities and Investments Commission, *Form 11A—Direct debit default notice*.