



**ASIC**  
Australian Securities &  
Investments Commission

Daniel McAuliffe  
Financial System Division  
Treasury  
Langton Cres  
Parkes ACT 2600

**Australian Securities  
and Investments Commission**

Office address (incl courier  
deliveries):  
Level 5, 100 Market Street,  
Sydney NSW 2000

Mail address for Sydney office:  
GPO Box 9827,  
Melbourne VIC 3001

Tel: +61 1300 935 075

[www.asic.gov.au/](http://www.asic.gov.au/)

By email:

[creditreforms@treasury.gov.au](mailto:creditreforms@treasury.gov.au)

10 April 2024

**Buy Now Pay Later (BNPL) regulatory reforms – ASIC’s submission on the exposure  
draft legislative package**

Dear Mr McAuliffe

ASIC supports the regulation of BNPL arrangements under the *National Consumer Credit Protection Act 2009* (National Credit Act). We note the Government’s intention to apply modified responsible lending obligations (RLOs) to BNPL arrangements and welcome the opportunity to comment on the exposure draft legislation. This submission suggests a small number of changes to the exposure draft that would improve ASIC’s ability to take regulatory action to protect consumers from harm within the proposed framework.

**Emphasis on the BNPL provider’s ability to rely on information provided by the consumer, general policies and presumptions**

Under s130(1)(a), (b) and (c) of the National Credit Act, a licensee must make reasonable inquiries about a consumer’s requirements and objectives and undertake reasonable inquiries and take reasonable steps to verify the consumer’s financial situation. Under proposed s133BXD(6)(a)–(c), a BNPL provider will not fail to meet these obligations if they rely on information provided by the consumer, follow a general policy about the inquiries to be made or rely on any presumptions about the consumer’s requirements, objectives or financial situation.

It is not clear why s133BXD(6)(a)–(c) is required, noting that it in determining whether the provider has complied with s130, regard already must be given to a number of factors at proposed s133BXD(3). The provision places excessive emphasis on the BNPL provider’s ability to rely on information provided by the consumer, general policies and presumptions. In particular, the reference to policies exacerbates the concern below regarding the reliance on the existence of policies within the framework overall.

In order to create more clearly enforceable obligations, ASIC suggests that s133BXD(6)(a)–(c) be removed. If, however, this provision is retained, ASIC suggests that:

- changes be made to proposed s133BXD(6)(a)–(c) to impose a ‘reasonableness’ standard for each practice, or to limit the circumstances in which these practices can be adopted, for example, to circumstances where there is an absence of other available information; and
- changes be made to the provision so that it states that ‘nothing in this Act has the effect that the licensee cannot satisfy the requirements in paragraphs 130(1)(a), (b) and (c), as they apply in relation to the low cost credit contract and the consumer, merely because the licensee’ adopts the practices at s133BXD(6)(a)–(c). The reference to the ‘mere’ adoption of these practices would make it clearer that adopting these practices does not mean that the licensee will be taken to have complied with s130 (but that adoption of these practices means that they have not necessarily contravened s130)<sup>1</sup>.

Of the issues listed in this submission, we consider this to be the most critical to improving ASIC’s ability to take regulatory action to protect consumers from harm.

### **Reliance on the mere existence of policies**

Under proposed s133BXD(3)(d)–(e), in determining whether the BNPL provider has met their obligation to make reasonable inquiries about the consumer under s130 of the National Credit Act, consideration must be given to, among other things, whether the BNPL provider has ‘any policies in place’ that reduce the risk of it providing unaffordable credit or reduce harms if the licensee provides credit on terms that are not affordable for the consumer.

The mere existence of such policies, regardless of their quality or effectiveness, should not be considered when assessing whether a BNPL provider has made reasonable inquiries. We suggest that changes be made to s133BXD(3)(d)–(e) to:

- impose an ‘adequacy’ standard to the policies; and

---

<sup>1</sup> This suggestion is consistent with the Explanatory memorandum (EM) which states at paragraph 1.71 ‘A licensee will not be presumed to have failed to satisfy section 130 of the Credit Act merely on the basis of having relied on information or documents provided by the consumer, or having followed a general policy about the inquiries to be made or the steps to be taken, in certain kinds of cases, or having relied on certain presumptions about the consumer’.

- require consideration be given to the degree to which the BNPL provider is consistently applying the policy.

Like the issue above, we consider this issue is critical to improving ASIC's ability to take regulatory action to protect consumers from harm.

### **Consideration of the impact of existing debts on the consumer**

Under proposed r28HAD(5)(c), BNPL providers will be required to ask consumers about the existence of some debts, being small amount credit contracts (SACCs), BNPL arrangements and consumer leases.

As part of this requirement, ASIC suggests that BNPL providers be expressly required to make inquiries into the size of those debts, or any defaults associated with them. Without these additional inquiries, there is a risk of increased financial stress for vulnerable consumers where they continually cycle through a range of credit products, with some consumers using high-cost credit to repay their BNPL arrangements.

### **Consideration of the consumer's requirements and objectives**

Under proposed s133BXF and s133BXG, contracts and credit limit increases of less than \$2,000 are presumed to meet the requirements and objectives of the consumer for the purpose of s131(2)(b) and s133(2)(b) of the National Credit Act respectively, unless the contrary is proved.

The purpose of inquiries into requirements and objectives is to understand why a credit product is sought by a consumer and to determine whether the type, length, rate, terms, credit limit, special conditions, charges and other aspects of the proposed contract meet that purpose (see para 3.68 of the EM to the National Consumer Credit Protection Bill 2009).

It is important that the BNPL provider considers whether, for example, the repayment size and frequency meets the requirements and objectives of the consumer when assessing the suitability of the contract. This is because differences in the amount and frequency of the repayments could create financial stress or otherwise not be consistent with the consumer's requirements and objectives.

ASIC suggests that:

- changes be made to the provision to add potential grounds on which the presumption could be rebutted. These grounds could include where the BNPL provider is aware (through inquiries), or should be aware, of information that shows that the product's characteristics would not meet the requirements and objectives of the consumer; and
- the \$2,000 threshold be lowered. As stated at paragraph 1.10 of the EM, 'BNPL products that provide spending limits of less than \$2,000 are most popular in Australia'. Therefore, it is likely that a \$2,000 threshold means that the requirement for the BNPL provider to consider the requirements and

objectives of the consumer when assessing suitability of the contract would only apply to a small proportion of BNPL contracts.

### **Practicalities around the election to comply with the modified RLOs**

Under proposed s133BXA, BNPL providers can elect for the modified RLOs to apply to all or a 'class' of their BNPL arrangements, or otherwise the existing RLOs under the National Credit Act would apply. This election can be revoked at any point.

It would not be clear to ASIC if a BNPL provider has made an election unless ASIC sought this information directly from a licensee using its information gathering powers. This may also create complexity for AFCA when considering complaints and for consumer advocates assisting consumers with BNPL arrangements.

ASIC suggests that the election should be published within a short period of time after it is made, so that it is clear to ASIC and other stakeholders within the consumer protection system which RLOs apply to a particular BNPL contract.

### **Ability of BNPL providers to prompt credit limit increases**

BNPL providers will be able to invite consumers to increase their credit limits. Such invitations are prohibited for credit card contracts and SACCs under s133BE and s133CF of the National Credit Act respectively. These reforms were introduced based on evidence about the harm of unsolicited credit limit increases to consumers. ASIC suggests that the same prohibition be applied to BNPL arrangements.

### **Assessments in relation to larger contracts**

Under proposed s133BXE, a BNPL provider can satisfy their obligations to assess unsuitability of a contract under s128 of the National Credit Act by conducting initial inquiries and an assessment for amounts higher than the initial credit limit provided, which will cover credit limit increases up to that amount within 2 years.

ASIC suggests that the period within which this is permitted be less than 2 years. This is because the requirements, objectives and financial situation of a consumer can change significantly in a period of 2 years. As a result, there may be circumstances where the initial assessment is no longer relevant.

Yours sincerely

A solid black rectangular box redacting the signature of Alan Kirkland.

Alan Kirkland  
Commissioner