CHOICE

Financial Rights LEGAL CENTRE

consumer action law centre

ican

financial counselling australia

Redfern Legal Centre

CCLS Consumer Credit LEGAL SERVICE

THE SALVATION ARMY

Brotherhood of St Laurence

LawRight Access | Justice

FCVic Financial Counselling Victoria Inc.

Submission to Treasury

Buy now pay later exposure draft materials

April 2024

CHOICE

Contents

INTRODUCTION

We welcome the opportunity to provide feedback on the Exposure Draft materials proposing to regulate buy now, pay later products (**BNPL**) as credit. This is a joint submission made on behalf of the following organisations:

- CHOICE
- Financial Rights Legal Centre
- Consumer Action Law Centre
- Indigenous Consumer Assistance Network
- Brotherhood of St Laurence
- The Salvation Army
- Financial Counselling Australia
- Financial Counselling Victoria
- Consumer Credit Legal Service
- Redfern Legal Centre
- LawRight

Our organisations have long advocated for BNPL to be regulated as a credit product under the *National Consumer Credit Protection Act 2009* (**NCCPA**), and so we welcome the major step towards achieving this outcome that the Exposure Draft materials (**ED Materials**) represent. We urge the Government to finalise this legislation as a matter of priority to ensure that the framework is passed this year.

We continue to hear from people who have been pushed towards, or deeper into, financial hardship, by unaffordable BNPL debts. For example, as it is currently one of the easiest forms of credit to obtain, BNPL routinely features in the debt mix of victims/survivors of family violence. Borrowers, financial counsellors and lawyers continue to report difficulties in getting proper hardship responses from even major BNPL companies, which exacerbates the financial and emotional toll that being in debt has on a person. BNPL is causing the same harms as other forms of credit products and needs regulation that provides the same consumer protections.

We welcome the requirement for BNPL providers to hold an Australian Credit Licence, be members of the Australian Financial Complaints Authority (**AFCA**), comply with hardship obligations and caps on permissible default fees and enabling the extension of the regime to capture other unregulated credit models, such as wage advance products, in the future.

Requiring BNPL providers to undertake unsuitability assessments in some form is also a vital step. However, we have significant concerns about the modified unsuitability assessment regime (**Modified RLOs**) proposed in the ED Materials. The Modified RLOs would not deliver the same assurances for BNPL lending as the current safe lending laws do for other credit products. As drafted, there are obvious and concerning flaws in the modified safeguards.

The Modified RLOs and the approach taken to bringing BNPL within the credit law is also very complex and we are concerned that in practice, aspects of the regime will not do what is intended. The ED Materials leave too much discretion to the BNPL industry which to date has not provided good outcomes for many consumers in financial difficulty. We are not convinced that the intention of proportionate regulation[1] that introduces meaningful safeguards has been achieved. To remedy this, the ED Materials must be amended so that BNPL products present less risk for consumers. If BNPL is going to be sold with only partial safe lending laws applying, the laws need to do more to ensure BNPL products are actually safer.

This submission provides a number of recommendations aimed at improving the ED Materials so they will better achieve their stated objectives.

RECOMMENDATIONS

1. Finalise the ED Materials as a matter of priority, and introduce legislation to Parliament to regulate BNPL as credit.
2. Mandate the verification of income and expenses as part of the unsuitability assessment process for all BNPL products.
3. Introduce safeguards to reduce the risk that verification documents not being obtained under the Modified RLOs will make it easier to commit financial abuse or identity theft.
4. Specifically require Low Cost Credit Contract (**LCCC**) providers to obtain information about the source (and not just amount) of a prospective borrower's income.
5. Provide more examples in the Explanatory Memorandum or Explanatory Statement about when a BNPL provider should not rely on stated income and expense figures without undertaking further verification.

[1] https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit

6. Amend regulation 28HAD(5) to require that LCCC providers obtain information they reasonably believe to be substantially correct about any MACCs to which a potential borrower is a party.
7. Mandate comprehensive credit reporting for all forms of regulated credit, including LCCCs and BNPL.
8. Amend regulation 28HAD of the Draft Regulations to require a partial credit check for LCCC/BNPL loans under $2,000.
9. Remove the presumption under section 133BXF of the Draft Bill that a LCCC with a credit limit of under $2,000 will not be unsuitable for consumers. All BNPL lending needs to meet the requirements and objectives of consumers.
   If this recommendation is not accepted, the Explanatory Memorandum should be updated to provide specific examples where presumption should not be relied upon.
10. Clarify in section 133BXA of the Draft Bill that licensees that make an election under section 133BXA(1) must disclose that fact publicly, including via inclusion in contracts and other disclosure documentation.
11. Clarify in the Draft Bill that licensees must provide any unsuitability assessment policies established in compliance with section 133BXH to complainants in relevant disputes.
12. Ban the unsolicited selling of BNPL products, at least where the BNPL provider has elected to comply with the Modified RLOs. Require BNPL providers to release consumers from contracts entered into via unsolicited sales.
13. Impose an upper limit of $5,000 on the value of LCCCs/BNPL contracts that can be sold under the Modified RLO regime. Ensure multiple contracts cannot be entered into to avoid this cap.
14. Prohibit LCCCs entered into under the Modified RLO regime from being secured over assets in any circumstance.
15. Require credit representatives engaging in credit activity relating to LCCCs to be members of AFCA.
16. As a matter of priority, the Government should take steps toward removing the point of sale exemption, in line with recommendation 1.7 of the Financial Services Royal Commission.
17. Amend the Draft Bill so BNPL providers are required to take meaningful steps to reduce the risk of their products being used to perpetrate financial abuse, including by ensuring the risk of financial abuse is a matter to be considered under section 133BXD(3).
18. Amend the Draft Bill so it does not exempt LCCCs from the 48% annual cost rate cap at section 32A of the NCC.

19. Amend the Draft Bill so it does not exempt LCCCs from the comparison rate obligations contained in Part 10 of the NCC.
20. Prohibit the advertising and promotion of BNPL to purchase essential goods or pay essential bills. This should include groceries, medicine, fuel, utilities and any health services that Medicare or health insurance may cover.
21. Mandate that LCCCs provide consumers with a credit limit reduction entitlement, consistent with the requirement for credit cards under section 133BF of the NCCPA.
22. Further restrict the permissible default fees on BNPL accounts that exist before the legislation comes into effect, unless an unsuitability assessment is completed based on the account holder's finances.
23. Provide more guidance in the Draft Bill to ensure that section 133BXD actually mandates LCCC providers using the Modified RLOs to take genuine steps to make their products safer.
24. Revise section 133BXD(6) so it does not give a green light to LCCC providers to undertake minimal verification as standard practice.
25. Amend the Explanatory Statement to require LCCC providers to undertake annual random checks of a sample of applications to determine if any assumptions in their lending model are accurate and appropriate.
26. Ensure ASIC is resourced and suitably empowered to review and undertake enforcement for deficient reviews of unsuitability assessment policies.
27. Delete section 133BXE of the Draft Bill. Failing this, introduce meaningful safeguards for the extent to which LCCC providers can make 'protected increases', such as by:
    - Imposing a $2,000 upper limit on the maximum credit limit that may be reached via protected increases;
    - Reducing the period for which protected increases are permitted, to six months; and
    - Prohibiting protected increases on accounts where defaults have occurred during the protected period.
28. Review all of the provisions in the ED Materials relating to the definition of LCCC and BNPL, to ensure that there are no inadvertent loopholes that will allow rogue lenders to avoid the operation of the legislation.
29. Include a provision in the ED Materials requiring ASIC to undertake a review of the new LCCC regime 18 months after it has commenced. The review should be focused on consumer outcomes.
30. The Government should provide additional funding to resource ASIC to oversee the implementation of the new laws applying to BNPL, including specific funding for a

recurrent data collection right for ASIC to undertake reviews to ensure the effectiveness of the regime.

Aspects of the ED Materials we strongly support

We strongly support treating BNPL as credit and regulating it as such under the NCCPA. Passing the framework contained in the ED Materials represents a dramatic improvement in the oversight of BNPL. Subjecting BNPL providers to a form of responsible lending obligations and empowering ASIC to regulate BNPL as credit is a necessary step that will reduce consumer harms currently being caused by BNPL.

Specifically, we particularly support the following aspects of the ED Materials:

- requiring BNPL providers to hold an Australian Credit Licence and be members of the Australian Financial Complaints Authority (**AFCA**). These are fundamental obligations that ensure ASIC has the appropriate kind of oversight powers of BNPL, and that consumers have a free and accessible path for dispute resolution - this is vital to good consumer outcomes
- requiring BNPL providers to comply with the hardship obligations in the National Credit Code (**NCC**). This will require BNPL providers to give fair consideration to hardship requests, and respond promptly and transparently to requests for hardship. It should reduce the prevalence of inadequate and inconsistent hardship responses reported by consumers and consumer representatives.
- setting a cap on permissible default fees. BNPL providers can set borrowers up to fail by providing them with too much credit, and default/late fees disproportionately impact people who are already in financial hardship. This is an important safeguard particularly while the industry continues to claim that it is a low cost option.
- applying anti-avoidance provisions to BNPL. BNPL is designed to fall within loopholes to avoid being treated as credit under the NCCPA. It should be expected that the industry will consider ways to avoid the regime, so the anti-avoidance provisions are an important safeguard.
- Establishing the low cost credit contract (**LCCC**) regime in such a way that will allow the Government to extend its application to other unregulated credit models in future. We particularly urge the Government to consider extending the regime to capture wage advance products as a matter of priority.
- Subjecting BNPL providers to the responsible lending obligations (albeit in a modified form) and requiring BNPL providers to undertake unsuitability assessments. While much of the remainder of the submission below addresses concerns we have with the Modified RLO regime proposed, it is vital that there is some form of assessment of whether a

borrower can afford the repayments on BNPL products as part of the approval process. In particular, we consider obliging BNPL providers to seek information about whether prospective borrowers have any current payday loans, consumer leases or other BNPL products to be very important.

Recommendation 1

Finalise the ED Materials as a matter of priority, and introduce legislation to Parliament to regulate BNPL as credit.

Improve unsuitability assessments

The bulk of our concerns with the ED Materials relate to the Modified RLO process that LCCC/BNPL providers can make an election to comply with under section 133BXA of the Draft Bill. The assessment BNPL providers would be required to make before lending to someone under the Modified RLOs as drafted would not ensure responsible lending occurs.

In the ED materials it appears that the key difference between the current safe lending laws and the Modified RLOs is that generally the latter reduces the steps required to verify financial information provided to BNPL providers by a prospective borrower about their financial situation. We understand that BNPL providers will be obliged to enquire about a person's income and expenses and reasonably believe that information to be correct,[2] but the regime will not necessarily require any steps be taken to verify this information beyond minimum mandated credit checks, unless discrepancies are identified. This is confirmed at 1.57 of the EM that states that "it is possible to meet these reasonable steps solely based on the information provided by a consumer, if the circumstances support it." This risks many assessments being made on incomplete and/or incorrect information, with few checks in place which will weaken the value of the unsuitability assessment as a consumer protection.

Income and expenses verification underpins responsible lending

The most important part of the unsuitability assessment is having the credit provider take steps to ensure the cost of the product will not cause the borrower substantial hardship. The best way

[2] Per Draft Regulation 28HAD(5)

to ensure that an unsuitability assessment achieves this is to base it on accurate income and expenses figures.

Existing responsible lending laws require credit providers to obtain documentation to reasonably verify the income and expenses of prospective borrowers. Verification of income in particular is not onerous. Obtaining a pay slip or bank statements can make this a simple process, and at least confirms if it is conceivable that a borrower could afford loan repayments.

The Modified RLOs allow BNPL providers in some circumstances to accept a self-declared income figure without necessarily making further inquiry, unless the lender has a reason to believe it is not correct. Since lenders will have few (if any) points of reference to check the stated income and expenses figures against, only very extreme answers would ever justify further inquiry.

Obtaining a correct income figure is crucial to the integrity of the assessment process. The risks of relying on self-declarations of income include:

- it gives no certainty about the borrower's terms of employment (and whether the income can be relied on in future);
- missing fluctuations in income, e.g. with casual or gig-economy workers;
- overestimates of income due to cognitive biases such as optimism bias and imperfect self-control;
- the risk that consumers do not understand their own income;
- misrepresentations by people perpetrating fraud including financial abusers;
- mistakes due to mental illness or intellectual disabilities;
- overstatements of income by people in desperate circumstances; and
- other well-established behavioural distortions.

Asking consumers to provide expense information in a LCCC application without checking that information also removes a responsibility that traditionally sits with the expert credit provider, and places all of the burden on the consumer. This will not necessarily lead to improved lending outcomes. People are generally poor at estimating their own expenses. They will be even less accurate if they are doing this 'on the run' in order to complete a relatively small purchase and will be more focused on getting over the hurdle than providing the most accurate information. Those experiencing financial hardship already will be those most motivated to pass the assessment regardless of the risk, and therefore prone to a low estimation bias.

The proposed regime also has no effective mechanism to identify errors in self-declared income or expenses. Credit checks do not offer any information about a person's income or expenses beyond liabilities, so creditors may instead assume stated income and expenses are substantially correct. The only example offered in the Explanatory Statement of where a creditor could not reasonably accept a stated income is an extreme one involving very rare circumstances and obvious red flags.

People who are most likely to get their stated income and expenses wrong are also likely to be those most harmed by unaffordable credit - such as people on variable incomes or people with low financial literacy. The absence of income verification in the Modified RLOs is a major concession to industry's complaints about friction that may dramatically undermine the intended effect of the RLO regime. We urge the Government to reconsider this approach.

Recommendation 2

> Mandate the verification of income and expenses as part of the unsuitability assessment process for all BNPL products.

Increased risk of fraud or financial abuse without verification

The framework allowing credit approval with minimal, if any, verification documentation in certain circumstances will make it easier for credit products to be taken out fraudulently.

BNPL is likely to remain an easier form of credit for perpetrators of financial abuse to take out in a victim's name. This is because the proposed regime will not require steps to verify a borrower's financial situation. It means a perpetrator does not have to prove the victim has an income, or has money in their bank account. It also makes it less likely other loans taken out in the victim's name will be identified, particularly as many debts do not show up at all on Australia's credit reporting system.

It will also make LCCC/BNPL products easier to obtain for perpetrators of identity theft. Identity documents may be required for lenders to conduct credit checks, but these documents have been compromised for many Australians, by way of numerous large-scale recent data breaches. Requiring recent documentary evidence of income and expenses also makes it far more likely that the borrower is actually who they say they are. The Modified RLOs do nothing to address this existing susceptibility in BNPL industry practices, when compared to other forms of credit.

Recommendation 3

Introduce safeguards to reduce the risk that verification documents not being obtained under the Modified RLOs will make it easier to commit financial abuse or identity theft.

Require inquiries about the source of income

In recent legislative reform aimed at reducing the harm of small amount credit contracts and consumer leases,[3] the Government introduced a specific requirement for relevant credit licensees to confirm whether credit applicants were receiving social security payments. This was in recognition that people who predominantly receive their income from Centrelink or a similar source are generally on limited budgets, and that credit fees can have a significant impact on their financial wellbeing.

The ED Materials contain no recognition of this increased risk, and the reforms appear to give LCCC/BNPL providers a broad latitude to only find out the bare minimum about the source or nature of someone's income. The ED Materials should be amended to make clear that inquiry about the source of a prospective borrower's income is required under regulation 28HAD(5) of the Draft Regulations.

Recommendation 4

Specifically require LCCC providers to obtain information about the source (and not just amount) of a prospective borrower's income.

Include more examples of situations where further verification is required

We would welcome more guidance in the Explanatory Statement or Explanatory Memorandum about when LCCC providers should not accept information provided by a prospective borrower at face value without taking additional steps to verify their financial situation.

More specific examples should be included in the Explanatory Statement to help clarify when LCCC/BNPL providers will not have a reasonable basis to accept financial information stated, such as:

- if an applicant has an application for a BNPL refused, then reapplies within a short time but provides different income and expense figures;

[3] *Financial Sector Reform Act 2022* and supporting regulations

- where an applicant denies that they have any existing payday loans, consumer leases or BNPL products, but a credit check shows records of two recent inquiries made by lenders that operate in these markets;
- if an applicant has told a lender they need BNPL to pay for household essentials, [4] but they are on a low fixed (for example, Centrelink) income. Further inquiry should be expected to understand how the applicant plans on paying the loan off, and why a loan with extra fees would not just leave them worse off over time.

Recommendation 5

Provide more examples in the Explanatory Memorandum or Explanatory Statement about when a BNPL provider should not rely on stated income and expense figures without undertaking further verification.

Require inquiries about MACCs as well as SACCs

Regulation 28HAD(5) should also be amended to specifically require that licensees also obtain reasonably reliable information about any medium amount credit contracts (**MACCs**) to which a consumer is currently a party, as it does for SACCs. MACCs are also a form of extremely high cost credit and all the same justifications for inquiries about SACCs exist for MACCs. Their use can indicate a person is at risk of financial hardship. Frontline caseworkers have reported a risk in the uptake of MACCs in recent years, and particularly since the *Financial Sector Reform Act 2022* came into effect and increased regulation of SACC lending. These lenders are also unlikely to appear in any form of credit check, as many do not engage with the credit reporting system.

Recommendation 6

Amend regulation 28HAD(5) to require that LCCC providers obtain information they reasonably believe to be substantially correct about any MACCs to which a potential borrower is a party.

Relying on credit reporting in unsuitability assessments

Our understanding of the structure of the Modified RLOs is that the obligation to reasonably verify the expenses of a prospective borrower will generally be satisfied by undertaking a credit check - a negative credit check for LCCC/BNPL loans under $2,000, and a partial credit check for loans above $2,000.

[4] Although this information generally would not be provided in applications for LCCCs under $2,000 due to the rebuttable presumption that it will meet the requirements and objectives of the applicant - see recommendation 9.

As set out in the submission by the Close Lending Loopholes alliance to Treasury's options paper in 2022 (**Options Paper**),[5] using credit checks (regardless of the level of inquiry) for unsuitability assessments is a process with obvious flaws. Reliance on credit reports alone or credit scoring is neither appropriate nor effective in ensuring responsible lending outcomes. Credit reports and credit scores are not designed to assess whether loan repayments will cause hardship. Credit reporting is designed to give creditors an indication of the likelihood of a person repaying a debt (that is, to help assess the lender's credit risk).

A system reliant on credit checks as a safeguard to identify consumer expenses will always be limited. However, if this aspect of the policy behind the Modified RLOs has been decided, we urge the Government to consider the following issues it creates, in particular.

Mandate comprehensive credit reporting for all forms of credit

Only a small number of credit providers are required to participate in credit reporting and a limited number voluntarily participate. This means that many credit products are not visible via any kind of credit check, and this includes high cost credit like payday loans and consumer leases.

Participation in credit reporting needs to be mandated for all forms of regulated credit for responsible lending (including the Modified RLOs) to work as intended. This should be done through the Government process that follows from the independent review of Australia's credit reporting framework that is currently underway. Incomplete credit reporting paints only a partial picture of someone's credit history and situation, and this can unfairly harm the terms on which consumers access credit. A more complete credit reporting system would be fairer and would make reliance on partial credit checks to verify expenses more possible.

Recommendation 7

Mandate comprehensive credit reporting for all forms of regulated credit, including LCCCs.

Mandate partial credit checks for all BNPL loans

Even if comprehensive credit reporting is mandated across the credit market in future, the negative credit check the ED Materials mandate for LCCCs under $2,000 will still not be an effective safeguard because of the significant limits on the information it provides.

A negative credit check will only inform a credit provider about inquiries made by other creditors and listed defaults. Crucially, it will never confirm:

[5] See https://treasury.gov.au/sites/default/files/2023-02/c2022-338372-joint_consumer_group.pdf, page 51

- whether enquiries made (including by other LCCC/BNPL providers) have actually resulted in an account being opened; or
- The value or limit of any existing credit products.

These are vital pieces of information necessary for verification to have any material value at all. This approach suggests that credit under $2,000 is immaterial - a position that makes little sense considering the extra safeguards deemed necessary to reduce the harm small amount credit contracts can cause.

By comparison, BNPL providers issuing loans above $2,000 and obtaining consumer credit liability information via partial credit checks will be able to see any information on the system about the subject's liabilities. Due to current reciprocity obligations in credit reporting, these BNPL providers would also be required to list the value/limit of any existing BNPL (or other credit) products issued by them as well, so others can also see the outcome of those BNPL applications. Having all BNPL loans report this level of detail would make credit reports provide a clearer picture of a person's true liabilities - which is a vital part of making an unsuitability assessment reliable.

Another major problem is that negative credit checks are not currently reported across credit bureaus. If one credit provider undertakes a negative credit check on one credit bureau (eg Equifax), it will only be visible to providers undertaking future checks on the same bureau, and not on others (eg Illion or Experian). This is a huge flaw that means for loans under $2,000, BNPL providers will not necessarily even be aware of where another BNPL provider has undertaken a check. It presents the real possibility that a person can take out multiple BNPL loans which quickly add up and cause the harms we have been seeing on our frontline services for years. It also presents an obvious incentive for BNPL providers to avoid the intended goal of the credit check (identifying other potential BNPL loans) by trying to use the credit bureau used the least by other BNPL providers.

Considering these issues with negative credit checks, mandating them achieves little in terms of meaningful verification or safeguards. The partial credit check standard that applies to BNPL loans over $2,000 should be the requirement for all LCCCs.

Recommendation 8

Amend regulation 28HAD of the Draft Regulations to require a partial credit check for LCCC/BNPL loans under $2,000.

Requirements and objectives presumption for loans under $2,000

Section 133BXF of the Draft Bill introduces a rebuttable presumption that BNPL loans under $2,000 are not unsuitable in meeting the requirements and objectives of the borrower.

Retaining the obligation to make reasonable inquiries about the requirements and objectives for BNPL loans under $2,000 could help stop situations where advertised uses of BNPL can actively cause people harm. For example, if a person is obtaining a BNPL product to pay for a utility bill they cannot afford, there is a strong argument to suggest that this would:

1. Put the lender on notice that the person may be at greater risk of financial hardship (and therefore trigger a need to make further inquiry); and
2. Be a sign that the product may leave the person worse off. For example, a person struggling to pay an energy bill should always reach out to their energy provider in the first instance - this industry has strong hardship obligations. Turning instead to pay a bill on time using BNPL means the person is not availing themselves of the utility provider's hardship processes, but will also wind up with more fees to pay in the long term.

The requirements and objectives limb of responsible lending also provides an opportunity to identify a risk of financial abuse, if a borrower's stated reason for getting the loan suggests they may not be receiving any benefit from it. We urge the Government to rethink its policy position on this issue.

If this is not accepted, at a minimum the Explanatory Memorandum should be updated to include explicit examples of information or situations that would rebut the presumption at the time of the application for credit. This should include situations where the BNPL provider should be able to identify that the BNPL would be used for purchases that may indicate the borrower is at risk of hardship, such as using it to:

- purchase essentials such as food;
- purchase gift cards that can be used at supermarkets; and
- pay a utility bill.

Recommendation 9

Remove the presumption under section 133BXF of the Draft Bill that a LCCC with a credit limit of under $2,000 will not be unsuitable for consumers. All BNPL lending needs to meet the requirements and objectives of consumers.

If this recommendation is not accepted, the Explanatory Memorandum should be updated to provide specific examples where presumption should not be relied upon.

Addressing foreseeable problems in dispute resolution

Elections to comply with the Modified RLOs need to be disclosed

One major issue with the ED Materials that must (and can easily) be addressed is improving transparency around what law actually applies to LCCCs/BNPL unsuitability assessments. Section 133BXA of the Draft Bill allows credit providers to elect to comply with the modified responsible lending regime for particular types of LCCCs. Whether or not a licensee makes such an election results in a significant change in the consumer protections that will apply by law to the contract.

There must be a requirement to ensure these elections are made public. Without them, borrowers (and their advocates) will not know which part of the NCCPA applies to a contract. It would mean borrowers would not be capable of properly understanding their rights under the contract, and is likely to lead to all kinds of problems through the dispute resolution process. For example, if the election is not disclosed this may elongate disputes by having to argue both RLO scenarios, and it could make outcomes opaque, even through AFCA. There is also no reasonable basis for claims that such an election should be kept commercially confidential - the elections do not involve any kind of trade secrets or strategy.

Recommendation 10

> Clarify in section 133BXA of the Draft Bill that licensees that make an election under section 133BXA(1) must disclose that fact publicly, including via inclusion in contracts and other disclosure documentation.

Unsuitability assessment policies need to be accessible

The Draft Bill should also be amended to specify that written unsuitability assessment policies (**UAPs**) developed under section 133BXH must also be made available to consumers and their representatives in disputes about whether a relevant credit product was unsuitable.

These policies will directly impact the question of whether a LCCC provider has met their obligations under the Modified RLOs. The following scenario is likely to arise for consumers who have sought out assistance from one of our organisations:

- Firstly consumer representatives will collect evidence we believe should have been identified by an LCCC licensee and should be addressed in a UAP - although we do not know what is in their UAP
- The consumer is rejected at IDR and subsequently takes their complaint to AFCA

- AFCA then request the LCCC licensee for the UAP
- AFCA receives the UAP, then shares it with the consumer and subsequently their representative.
- The consumer then needs to assert that the original argument is addressed by the UAP and the LCCC licensee didn't meet their own requirements – or it wasn't considered in the UAP at all but should have been.
- AFCA makes its decision.

This is an unwieldy process that can simply be made easier by requiring UAPs to be public in the first place. Delays in resolving complaints can also benefit lenders as additional fees can accrue while a complaint is on foot.

At a minimum, these policies should be made available to borrowers that raise a dispute or complaint with the credit provider that relates to the suitability of a product through the IDR process.

Recommendation 11

Clarify in the Draft Bill that licensees must provide any unsuitability assessment policies established in compliance with section 133BXH to complainants in relevant disputes.

Steps to ensure BNPL products are lower risk

The ED Materials should also be further strengthened to include safeguards that actually ensure BNPL products pose a lower risk to consumers than other credit products. Beyond the fee caps that apply to LCCCs, the ED Materials contain few, if any, clear safeguards to this effect.

Safeguards for high value BNPL products

BNPL is increasingly being promoted to finance a range of high cost goods and services. This is resulting in great harm by encouraging people on low incomes to acquire unaffordable or unsustainable BNPL debt. It also creates the risk of enticing people in highly emotional situations to purchase more products who wouldn't normally if they were required to pay for the cost upfront, such as for funeral services where BNPL is being offered for amounts up to $10,000.[6]

[6] For example, see: https://mccartneyfunerals.com.au/funeral-finance/

Door-to-door selling of solar panels financed by BNPL

Consumer representatives are seeing concerning door-to-door sales practices employed by solar companies leading to vulnerable and low-income households being signed up to large, unaffordable BNPL loans to pay for solar products. There has been a significant increase in these cases across the country within the last two years, with contracts typically ranging from $5,000 to $15,000. Consumer Action Law Centre has a systemic regulator complaint on foot against solar company National Solar and BNPL provider Payright in circumstances like this.

The harm associated with door-to-door and other forms of unsolicited selling[7] has been well documented and has already been addressed for financial products and consumer leases.[8] In casework involving BNPL funded solar panel sales the harms include:

- clients report being pressured into buying solar panels financed with BNPL;
- clients are often misled (including about the cost, loan, rebates and cooling off rights) or do not understand the terms of the BNPL arrangement;
- many of the consumers reporting problems with solar panels and BNPL arrangements to our services live regionally, are elderly, or receive an age or disability pension. First Nations clients have also been reporting that they are being harmed by the conduct of BNPL/solar panel providers;
- the products are often of poor quality - consumers have reported being sold unsuitable solar panels for their home, panels that are faulty or not installed properly, or which do not feed back into the energy grid; and
- even where the solar panels are successfully installed, the substantial BNPL repayments far exceed any reduction in the consumer's energy bills.

Consumer Action Law Centre is currently providing legal and financial counselling assistance to 11 solar sales cases with linked BNPL financing.

- In 9 of these 11 cases, the client is living in regional or remote Victoria
- In 7 of the 11 cases, the client has a physical, intellectual and or mental disability
- In 9 of the 11 cases, the client is dependent on some type of Centrelink payment
- In 10 of 11 cases, the client is not employed.

[7] For example, see: https://consumeraction.org.au/telemarketing-and-doorknocking-ban-under-the-victorian-energy-upgrades-program/

[8] See for example the anti-hawking ban in s 992A and 992AA Corporations Act and the bans on unsolicited communications regarding SACCs (section 133CF NCCPA), and canvassing of consumer leases (section 179VA NCC)

If the consumer cannot pay the instalments as they fall due, lawyers and financial counsellors have observed BNPL providers using aggressive debt collection practices including the on-selling of debt to collection agencies that initiate legal proceedings to recover outstanding costs and fees quickly. Misconduct by door-to-door sellers is also difficult to prove due to the absence of call recordings or documents.

After testing the proposed draft legislation against the cases we are seeing, for people in this situation, the ED Materials:

- do little to deter the systemic use of BNPL through the unsolicited selling of solar panels to vulnerable customers;
- fail to provide an effective means of redress for consumers, as BNPL providers are not directly involved in the initial unsolicited sale and the customer has no option to take the solar company to an external dispute resolution scheme such as AFCA; and
- do not contain safeguards to reduce the risk of these arrangements ending in serious consequences, such as putting borrowers at risk of losing the home the panels are installed on.

Better safeguards are needed in the ED Materials to ensure the risks BNPL poses in these situations is reduced, rather than leaving it largely to industry to decide their own risk appetite. Door-to-door selling of BNPL should be banned altogether and particularly for lenders that elect to rely on the Modified RLOs. Nobody should be making a decision to sign up to finance for any product on the spot in circumstances where pressure selling is known to be an issue, and particularly if no verification of their finances is guaranteed.

The ban should be supported by a presumption that the BNPL provider will release a consumer from their credit contract and be jointly liable with the retailer to compensate consumers where sales have been conducted through unsolicited approaches such as door-to-door sales.

There should also be an upper cap on the value of LCCCs that can be entered into under the Modified RLO. We recommend a $5,000 cap, reflecting the lower range of loans related to solar panels. Credit at or above this value is not low risk in any sense. LCCCs above $5,000 are particularly high risk for people who could lose their home or other assets. This would also align with the cap on MACCs.

The Government should also prohibit BNPL loans from being secured over property or other assets, where the Modified RLOs are applied by the lender. Not doing so leaves consumers at risk of losing their home (or car) due to a genuine underestimation of their finances. Consequences of this nature should be limited to situations where lenders have performed genuinely responsible lending assessments in compliance with the safe lending regime.

The amendment to section 65 of the NCCPA in the Draft Bill excluding credit representatives from the obligation to be members of AFCA when engaging in credit activity regarding LCCCs

should also be reconsidered for high value LCCCs in particular. The impact high value LCCCs can have on a person's finances and the active role sellers can play in signing people up to credit, contradicts the conclusion in the Explanatory Memorandum that the costs of this registration obligation outweigh the benefits. We also urge the Government to take steps toward removing the point of sale exemption for retail dealers from the NCCPA, which remains an outstanding recommendation of the Financial Services Royal Commission,[9] and also leads to poor consumer outcomes.

Consumer Action Law Centre case study 1

Naomi* is a retired woman living regionally, relying on the Age Pension as her only income. A solar panel sales representative visited her home three times trying to sell her solar panels. She turned them down twice, but on the last visit in late 2022 Naomi signed a contract. Tradies attended Naomi's house and installed the panels two days later, without any prior notice. This was within the cooling off termination period of 3 days provided in the contract – which is less than the 10 days required for unsolicited sales contracts.

Naomi tells us that the salesperson made representations that she would save significantly on her electricity bill and would receive a government rebate against the cost of the panels. It is not clear that a rebate was applied to the purchase price, and Naomi wasn't eligible for the Victorian Solar rebate. She found that the panels, while feeding back into the grid, did not reduce her bills as much as represented when the repayments were taken into account.

Naomi also says she wasn't aware she would be signed up to a BNPL provider to finance the panels. She later discovered the cost of the solar panels through the BNPL contract was $9,900 with fortnightly repayments of $80. The BNPL provider says that Naomi received a text message with a link, and when she opened the link she confirmed she was applying for the finance with them.

Following a complaint, the BNPL provider maintained that Naomi was aware of the purchase price and that no representations as to savings on her energy bill were made.

In late 2023, they eventually offered a financial hardship arrangement to reduce her payments to $50.

This wasn't an acceptable resolution for Naomi and she rejected the offer.

The BNPL provider eventually agreed to refund Naomi's payments and waive the remaining debt. It took two different community organisations and more than a year for Naomi's dispute to be resolved.

**name changed.*

[9] Recommendation 1.7: https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf, see page 88

Consumer Action Law Centre case study 2

Our First Nations client Steven* lives in regional Victoria and his only income is the Disability Support Pension. Early last year he was visited by a solar panel company sales representative at his home. Steven says he tried to tell him he was busy and did not have time to speak to him, but the representative persisted. Steven says he told the representative he couldn't afford the initial offers provided to purchase solar panels for $15,000 and then $9,000.

The representative then told Steven he could purchase the panels for $95.95 per fortnight over 60 months. Steven signed the paper on the understanding that it was a quote.

A week later, trades attended Steven's house and installed the panels. Steven says he asked them to stop, but they didn't speak English and couldn't understand him. Steven then discovered he had been entered into a contract with a BNPL provider without his knowledge. He also found that his energy bill was only decreasing by 30 cents a week.

The payments put Steven in financial hardship and he doesn't want the panels – he didn't agree to the installation and they're not suitable for his energy use. The solar panel company also isn't a part of the government Solar Victoria scheme, which means Steven can't get rebates for the purchase.

Steven sought assistance from Consumer Action, who helped him write to the BNPL provider to terminate the contract as an unsolicited consumer agreement. The provider continued to seek payments from Steven until Consumer Action wrote to them on his behalf.

We understand that the BNPL provider has agreed to cancel the contract and refund the debt some weeks after we first raised our concerns with them.

**name changed.*

Recommendation 12

Ban the unsolicited selling of BNPL products, at least where the BNPL provider has elected to comply with the Modified RLO. Require BNPL providers to release consumers from contracts entered into via unsolicited sales.

Recommendation 13

Impose an upper limit of $5,000 on the value of LCCCs/BNPL contracts that can be sold under the Modified RLO regime. Ensure multiple contracts cannot be entered into with different providers to avoid this cap.

Recommendation 14

Prohibit LCCCs entered into under the Modified RLO regime from being secured over assets in any circumstance.

Recommendation 15

Require credit representatives engaging in credit activity relating to LCCCs to be members of AFCA.

Recommendation 16

As a matter of priority, the Government should take steps toward removing the point of sale exemption, in line with recommendation 1.7 of the Financial Services Royal Commission.

Safeguards for all BNPL products

Additional protections to address risk of financial abuse

Consumer groups have provided extensive evidence to Treasury over the last two years around the risks of use of BNPL as a tool to perpetrate financial abuse. We are disappointed that we do not see any specific references to the issue, particularly considering the Modified RLOs reduce the barriers that may prevent this conduct.

Consumer Action Law Centre case study 3

Casey* is a single woman with full time employment. She recently escaped a long term abusive relationship. After she escaped, she discovered her ex-partner had taken out loans in her name without her knowledge. These included numerous BNPL loans, with some over $10,000.

She contacted the BNPL companies to inform them of her financial hardship and how her ex-partner had used the BNPL loans to abuse her economically. Despite receiving this information, they arranged payment plans for these loans, even though they were a result of economic abuse. When she contacted Consumer Action she was considering bankruptcy, due to being unable to meet these payment plans and debts amounting to over $30,000.

**name changed.*

We urge the Government to give consideration to how the legislation could be amended to ensure BNPL providers must take steps to reduce the risk of their products being used to perpetrate financial abuse and family violence. One way to do this may be to add the

consideration of the risk of financial abuse to the matters LCCC providers are required to have regard to at s 133BXD(3) of the Draft Bill.

One way to address this would be to add a new subsection to 133BXD to refer to "vulnerability" as a broad category, with reference made in the Explanatory Memorandum to family violence and economic abuse, in a list of types of vulnerability that should be taken into account under the reasonable inquiries process. This list should be non-exhaustive but provide a wide range of examples - many similar lists exist elsewhere (eg the Banking Code of Practice).

Recommendation 17

> Amend the Draft Bill so BNPL providers are required to take meaningful steps to reduce the risk of their products being used to perpetrate financial abuse, including by ensuring the risk of financial abuse is a matter to be considered under section 133BXD(3).

Remove exemption from 48% annual cost cap

We also strongly urge the Government to reconsider the need for particular exemptions from cost-related protections in the NCCPA that are proposed to be provided to LCCCs in the ED Materials.

Section 32A of the NCC applies a cost cap on nearly all forms of regulated credit. Set at 48% per year of the amount borrowed, this cost cap does not ensure anyone gets a ‘good deal’ on a credit product, even in times of high inflation. For the most part, the only products it has an impact on are extremely high cost credit products such as payday loans, where borrowers perceive themselves to have no other options or negotiating power in determining the terms of a contract. The Draft Bill proposes to exempt LCCCs from this cap.

The Explanatory Memorandum offers no explanation for this exclusion, and it is difficult to understand how BNPL can be simultaneously described as ‘low cost’ while also being excluded from the already very high 48% annual cost cap for credit products. Any credit product that comes with fees anywhere near the 48% cap is categorically not low cost. It does not matter what time period the contract is repaid over, or whether fees are calculated using an interest rate. This exclusion must be removed as a matter of priority.

Recommendation 18

> Amend the Draft Bill so it does not exempt LCCCs from the 48% annual cost rate cap at section 32A of the NCC.

Remove exemption from comparison rate disclosure obligations

Similarly, we urge the Government to reassess its decision to exclude LCCCs from the obligations in the NCCPA around disclosing comparison rates. Comparison rates are intended to assist consumers make comparisons in a complex market.

The justification in the Explanatory Memorandum for this exclusion is that comparison rates are only likely to confuse consumers if provided for a product that does not charge interest. The NCC only mandates that a comparison rate is displayed where an annual interest rate is used in advertising. If BNPL providers are using or advertising an interest rate to explain their fee structure, a comparison rate is an entirely appropriate safeguard and is not likely to mislead consumers - it is the use of an interest rate without comparison rates that would confuse them. BNPL providers can very easily avoid this issue by not referring to interest rates in their marketing material.

Recommendation 19

> Amend the Draft Bill so it does not exempt LCCCs from the comparison rate obligations contained in Part 10 of the NCC.

Banning the advertisement and promotion of BNPL for food and essential items

Financial counsellors report an increasing number of clients in financial difficulty who have used BNPL to cover essential items. The ease of access to BNPL is diverting consumers from accessing cost-free support services provided by government and charities that may be harder to access or simply out of mind. BNPL is also widely accessed by consumers who find themselves in extreme or emergency circumstances, with BNPL often marketed or promoted by businesses as a quick fix instead of more appropriate support or financial hardship assistance.

The promotion of BNPL to purchase essentials[10] is a worsening trend that allows private industry to profit from the most financially vulnerable in our society. This includes BNPL products being relied upon or used as a tool to perpetrate financial abuse, which is a common form of domestic and family violence.

[10] For example, see: https://au.finance.yahoo.com/news/afterpay-lifeline-offered-to-aussies-in-disgraceful-supermarket-move-045902081.html

A recent Consumer Action Law Centre interview analysis of First Nations clients also found that almost half of those interviewed (45%) were regularly relying on BNPL for everyday essentials such as petrol and groceries. Most also reported that when they had attempted to access hardship arrangements or change their payment schedules with BNPL providers due to extenuating circumstances, their requests had either been denied; they were unable to make contact with the appropriate person to process the request; or the request was misunderstood and the full account balance was made due at the next payment date. This left clients suddenly no longer able to purchase their everyday essentials, with their BNPL accounts adding to their overall and unmanageable debts. One client stated:

> *"I was really good with my Afterpay payments, I would pay off everything I could, about $200 a fortnight or a week on the purchases I had made because I would rely on this for like food shopping and stuff, I could go out and buy gift cards with it. So this was my main stability thing of going 'ok cool, I can get this thing and then pay that back later'.*
> *(When my wallet was stolen) I asked them to move all of my payments back a fortnight. They agreed but when that fortnight came around it was for the whole balance. I can't pay $2,000 in one hit like that because I did not have money to pay that..."*

Consumer Action Law Centre case study 4

Lisa* is a single woman living on the Youth Allowance payment, who had been living in a rental with her partner. She had to move out of the home to escape from her partner, who was perpetrating family violence against her. While they were living together, all the utility bills were in her name.

Since escaping her now ex-partner, Lisa moved in with a friend to recover from the family violence and economic abuse she had experienced. She struggled to meet essential costs. She resorted to using BNPL, because it was easy to access despite it being unaffordable, and pawned her belongings to buy food.

**name changed.*

Recommendation 20

Prohibit the advertising and promotion of BNPL to purchase essential goods or pay essential bills. This should include groceries, medicine, fuel, utilities, and any health services that Medicare or health insurance may cover.

Mandate ability for consumers to voluntarily reduce credit limit

Under section 133BF of the NCCPA, credit cards are required to come with the ability for a consumer to choose to reduce their balance (including to nil). As most BNPL products are most

similar to credit cards, the same obligation should apply to LCCCs (or at least BNPL contracts). If consumers wish to reduce their credit limit, they should be able to do so.

Recommendation 21

Mandate that LCCCs provide consumers with a credit limit reduction entitlement, consistent with the requirement for credit cards under section 133BF of the NCCPA.

Addressing increased risks of existing accounts

One limitation of the ED Materials is that affordability safeguards will not apply to any existing BNPL accounts, unless and until credit limits are increased. We appreciate that there are logistical challenges to applying these laws to existing accounts, but considering the millions of accounts this includes, there should be some regulatory incentive built in to try to address this issue. Without any such incentive, the onset of regulation will also likely create a major motivator for BNPL providers to sign as many new customers in the months prior to the regulation coming into effect.

A fix that would be somewhat targeted at existing account holders likely to be at greater risk of financial difficulty would be to impose obligations or restrictions on default fees where payments are missed on existing accounts. For accounts that exist prior to the new laws coming into effect and have not been subject to any form of unsuitability assessment, we urge the Government to consider:

- reducing maximum default fees; and
- mandating that a missed payment triggers an obligation to conduct an unsuitability assessment before any future default fees are charged.

Without any protection of this kind, pre-existing customers of BNPL providers will be largely left behind by this legislation and stuck in revolving debt, with late fees making their circumstances worse. While the $10 default fee cap may be reasonably low for one product, if a person on a low income is in revolving debt with multiple BNPL products, these fees could eat up a significant portion of their income. This is an issue that financial counsellors regularly see, and it is unacceptable for the legislation to simply leave these people behind.

Recommendation 22

Further restrict the permissible default fees on BNPL accounts that exist before the legislation comes into effect, unless an unsuitability assessment is completed based on the account holder's finances.

Other concerns with aspects of the ED Materials

A number of the issues in this section largely stem from the decision to regulate high level processes, rather than focusing on outcomes. We are concerned that this approach leaves loopholes and makes it difficult for misconduct to be identified by ASIC.

Section 133BXD

The intent behind the process prescribed for considering a range of factors under the Modified RLOs in section 133BXD(2)-(3) needs to be made more explicit. We believe the goal of this provision is that the matters listed at section 133BXD(3) should be collectively considered by the LCCC provider and the result should be that the LCCC poses a reduced risk of harm to the consumer. However, the law does not explicitly clarify anywhere that safer products, or approaches to lending, are the goal.

This aspect of the Modified RLOs is novel and it asks LCCC providers to make different considerations to unsuitability assessments for existing RLOs. For example:

- subsection 133BXD(3)(c) prescribing consideration of financial vulnerability is important, [11] but under the Modified RLOs, this assessment is likely to be made based on less actual information about the consumer than is normally obtained under RLOs; and
- considering high level policies under subsection 133BXD(3)(d) and (e) in individual lending decisions is a new concept, particularly for policies that relate to downstream consequences of lending decisions (like hardship). It is not clear how this would operate in practice. The provision also doesn't appear to require consideration of whether these policies are complied with.

Section 133BXD needs to clearly impose more direction to BNPL providers about how these factors must be considered if a reduced approach to financial verification is to be applied. The Draft Bill needs to contain an explicit requirement to clarify the effect of this section is that LCCC providers must have a reasonable basis for concluding that its LCCC product overall is safer than other forms of regulated credit, or pose a lower risk, to consumers.

We are also concerned that the effect of subsection 133BXD(6) is to effectively give the green light to LCCC providers complying with the Modified RLOs regime to adopt an approach where

[11] Noting we recommend this be expanded to consider additional types of vulnerabilities, as per Recommendation # above.

the status quo is that no financial verification (apart from a credit check) is undertaken unless obvious inconsistencies arise. This would not be a good outcome for consumers and should be revised.

Recommendation 23

Provide more guidance in the Draft Bill to ensure that section 133BXD actually mandates LCCC providers using the Modified RLOs to take genuine steps to make their products safer.

Recommendation 24

Revise section 133BXD(6) so it does not give a green light to LCCC providers to undertake minimal verification as standard practice.

Unsuitability assessment policy framework and review process

The obligation to have an unsuitability assessment policy under section 133BXH and the obligation to review the policy under regulation 28HAF should also be strengthened in consultation with ASIC, to ensure the regulator is able to set clear expectations and exercise its enforcement powers in this space if necessary to reduce harmful LCCC lending behaviour. Further, in addition to the minimum data expectations relating to reviews listed at Page 8-9 of the Explanatory Statement, this review process should require LCCC providers to undertake annual random checks of a sample of applications where further verification information is obtained to determine if assumptions made are actually correct.

Additionally, where unsuitability assessment policies are found to be deficient, there should be a process where ASIC can direct licensees to review its records and remediate customers who have been impacted by the deficiency - such as by refunding any fees charged where the loan would not have been written under a competent policy.

Recommendation 25

Amend the Explanatory Statement to require LCCC providers to undertake annual random checks of a sample of applications to determine if any assumptions in their lending model are accurate and appropriate.

Recommendation 26

Ensure ASIC is resourced and suitably empowered to review and undertake enforcement for deficient reviews of unsuitability assessment policies.

Unsolicited credit limit increase exemption for BNPL

For the same reasons set out in our submission responding to the Options Paper, we maintain our opposition to permitting BNPL providers to make unsolicited offers of credit limit increases to customers. We urge the Government to give further consideration in particular to the harm identified by this practice in the credit card market over the years, and delete section 133BXE from the Draft Bill. However, if the Government does not revise its policy position on this as a whole, at the very least it needs some fundamental guardrails.

The major problems we see with section 133BXE as drafted include:

- The absence of any upper limit on credit limit increases. At the absolute most, this regime should only operate for small increases, such as up to $2,000. As drafted, section 133BXE creates a perverse incentive for BNPL providers to approve a potential user for as much credit as they can when they apply.
- Far too much discretion is left to the licensee about how these increases would be provided. For example, a consumer could be started on a very low amount, then the bulk of an increase could be provided on the final day the borrower is eligible for it. This makes little sense. It leaves it open for lenders to treat the provision as an effective extension of the lifespan for unsuitability assessments to two years, for LCCCs.
- Considering the above point in particular, the two year 'protected period' during which LCCC can increase a credit limit is far too long. A two year protected period is more than **eight times** the length of a regular unsuitability assessment. This would leave it open for effective credit limits of borrowers to be increased based upon extremely unreliable information. At the most, this window should be open for six months.
- The provision allows lenders to completely ignore more recent signs that the borrower may be in debt, in favour of the older unsuitability assessment. Protected increases should not be permitted when the borrower has missed payments, sought hardship assistance, or the lender should otherwise be aware the borrower may be struggling to afford repayments.

Recommendation 27

Delete section 133BXE of the Draft Bill. Failing this, introduce meaningful safeguards for the extent to which LCCC providers can make 'protected increases', such as by:

- Imposing a $2,000 upper limit on the maximum credit limit that may be reached via protected increases;
- Reducing the period for which protected increases are permitted, to six months; and

- Prohibiting protected increases on accounts where defaults have occurred during the protected period.

Issues with definitions

We also flag a number of possible unintended issues with the definitions used in the ED Materials but appear to us to create potential problems with implementation.

Definition of LCCC

The definition of LCCC appears to only capture credit products that meet all the requirements under section 13C(1) of the NCC in the Draft Bill. Our concern is that absent any provision otherwise banning BNPL or other forms of LCCC, any contract that does not meet *all* these criteria will fall outside the regime's scope and effectively continue unregulated. For example, if a BNPL contract imposed default fees beyond the $10 cap proposed in the Draft Regulations, it would simply be an unregulated continuing credit contract, as it is today.

Definition of BNPL arrangement and contract

Regarding the definition of BNPL contract at section 13D(4), we query whether restricting this definition to BNPL arrangements involving a retail client, a BNPL provider and a merchant in this subsection is necessary. We are concerned this may exclude some BNPL arrangements not involving all three parties (eg Afterpay Plus). It appears that this issue may be resolved by either:

- Deleting all the words after 'arrangement' in subsection 13D(4)(a); or
- Replacing the second 'and' that appears in subsection 13D(4)(a) with 'or'.

We also urge the Government to consider whether the exclusion under section 13D(2) is necessary - it is not clear to us what it is intended for, and we are concerned it reads to exclude similar conduct to the way past rogue lenders like Cigno described its business.

Excluding ADIs from multiple account fee caps

We also query whether it is appropriate for authorised deposit taking institutions to be excluded from the fee caps on second accounts, as set out in Item 2(b) of both the tables in regulation 69E. This exclusion seems inappropriate and it is not clear why it would be provided.

Excluding LCCCs from the rules around unconditional representations

It is also not clear why LCCC providers would be excluded from the operation of section 128(aa) and (ba), regarding unconditional credit representations. Why is this permitted if there is an unsuitability assessment that has to be undertaken to confirm it?

Recommendation 28

Review all of the provisions in the ED Materials relating to the definition of LCCC and BNPL, to ensure that there are no inadvertent loopholes that will allow rogue lenders to avoid the operation of the legislation.

ASIC should review this regime in 18 months

The development of a proposed new unsuitability assessment regime for LCCCs means this regime is novel and untested. As a safeguard, we urge the Government to ensure that ASIC is resourced to undertake a review of the regulatory regime 18 months after it commences. The review should be focused on consumer outcomes and should involve collecting any data from LCCC providers ASIC deems necessary.

As will be required for ASIC to enforce the new laws applying to BNPL, there will need to be specific funding for ASIC to ensure it is adequately resourced to undertake this review. This includes funding and a clear mandate to facilitate a recurrent data collection right for ASIC. This will not only provide both ongoing and contemporary transparency of consumer outcomes, but is needed to ensure any review can be completed in a cost and time effective manner. The absence of such a right would be costly and hamper and slow down ASIC's ability to conduct any review, inefficiently requiring the issuance of many legal notices to individual entities. Such a right would also allow ASIC to frame the data points required in a way to ensure they are useful and relevant to consumer outcomes, and enable the tracking of outcomes over time.

Recommendation 29

Include a provision in the ED Materials empowering ASIC to undertake a review of the new LCCC regime 18 months after it has commenced. The review should be focused on consumer outcomes.

Recommendation 30

The Government needs to provide additional funding to resource ASIC to oversee the implementation of the new laws applying to BNPL, including specific funding for recurrent data collection to undertake reviews to ensure the effectiveness of the regime.