MFAA
MORTGAGE & FINANCE ASSOCIATION OF AUSTRALIA

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Treasury
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By email: creditreforms@treasury.gov.au

Dear Mr McAuliffe

BUY NOW PAY LATER (BNPL) REGULATORY REFORMS

The Mortgage and Finance Association of Australia (**MFAA**) welcomes the opportunity to make a submission to Treasury regarding the Treasury Laws Amendment Bill 2024: Buy Now, Pay Later and the Draft National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024 (**the proposed legislation**).

The MFAA is Australia's peak industry body for the mortgage and finance broking industry with circa 15,000 members. Brokers play a critical role in intermediated lending, providing access to credit and promoting choice in both consumer and business finance. Over time, consumers have increasingly sought the services of a mortgage and finance broker with the latest MFAA quarterly market share showing mortgage brokers are writing 71.8% of all new residential home loans[1] and approximately four out of ten small business loans[2] in Australia.

Further information about the MFAA can be found in **Attachment B**.

OUR SUBMISSION

The MFAA was pleased to participate in the Treasury's consultation process in 2022 which presented options for regulating Buy Now Pay Later (**BNPL**) arrangements.[3] We understand the proposed legislation aims to adopt a flexible, adaptable regulatory framework which preserves the benefits of consumer access to BNPL while ensuring there are proportionate protections against the risk of consumer harm.

Therefore, while our preference was for greater alignment with the existing principles-based and scalable regulatory regime for credit products set out in the National Consumer Credit Protection Act 2009 (**the Credit Act**) (which includes its strong consumer protections), we welcome and support the regulation of Low-Cost Consumer Credit (**LCCC**) products as credit.

As a result of increasing interest rates and the rise in cost of living, with reduced available income after essential expenses and housing costs, one avenue homeowners pursue to assist them is to seek a better deal for their biggest outgoing – their mortgage.

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[1] MFAA media release, *Mortgage brokers break market share record, again*, 3 April 2024.
[2] Productivity Commission research paper Small business access to finance: The evolving lending market pg 44
[3] See MFAA 22 December 2022 submission here.

Mortgage and finance brokers have stepped into the role of providing their customers with a better understanding of how BNPL facilities can impact approval of a home loan.[4]

Throughout 2023 our members were reaching out to their customers ahead of their fixed rate mortgages expiring to ensure their customers were in the best possible position to refinance to a lower rate (if this was the right option to pursue). This included customers closing down or consolidating BNPL accounts.

We noted in our previous submission that while the development of BNPL arrangements has brought innovation and competition into the financial services and payments sector, our members tell us that BNPL can act as a barrier to finance or cause delays when consumers seek to purchase a home or to refinance. Our members observe:

- The ease of taking out multiple BNPL facilities from different providers.
- The lack of consumer understanding as to the impact on a consumer's credit worthiness resulting from multiple BNPL facilities.
- The lack of visibility of BNPL facilities on credit files which impacts on our members' ability to easily undertake suitability assessments in line with their own responsible lending obligations.

A summary of our feedback on the proposed legislation includes:

- Implementing measures to address unsolicited credit limit increases within BNPL arrangements, akin to existing provisions for credit cards.
- Consideration of the treatment (or lack thereof) of credit intermediaries within the modified rules should credit intermediaries, in future, seek to recommend LCCC products.
- Consideration of the proposed removal of the point-of-sale exemption and the impact this will have on merchants utilising the exemption when BNPL products become regulated.

Our specific feedback on the proposed legislation is at **Attachment A**.

ADDITIONAL POINTS:

In addition to feedback on the proposed Bill, we highlight the importance of:

- Providing specific regulatory guidance with respect to LCCCs in ASIC RG 209.
- Collaborative efforts with industry associations such as the Australian Finance Industry Association to establish self-regulatory frameworks that complement legislative reforms.
- As noted in our previous submissions on these topics - including BNPL facilities in Comprehensive Credit Reporting and the Consumer Data Right.
- Enhancing consumer education on BNPL products as regulated credit contracts to empower informed decision making by consumers.

CLOSING REMARKS

The MFAA appreciates the opportunity to contribute to this consultation. We remain committed to working with Treasury and other stakeholders to achieve a balanced regulatory framework that promotes consumer protections while fostering innovation and competition in the financial services sector. If you wish to discuss this submission or require further information, please contact either me at [redacted] or [redacted]

Yours sincerely

[redacted]

Naveen Ahluwalia
Executive – Policy and Legal
Mortgage and Finance Association of Australia

[4] MFAA Opening Statement to Regional Bank Branch Closure Inquiry.

ATTACHMENT A

ITEM	DESCRIPTION	FEEDBACK
13C Definition of Low-Cost Credit Contract	Section 13C(1)(d) states that "*a contract is a low-cost credit contract if* [amongst other things] *the contract satisfies <u>any requirements prescribed by the regulations</u> for the purposes of this paragraph that relate to <u>fees or charges that are, or may be, payable</u> under the contract…."* (emphasis added)	We note that the Draft Regulations state fees and charges payable by the consumer to be 'nil' (including for default fees and charges). We understand that there are buy now pay later products that do charge fees and charges and therefore we question whether this definition adequately captures those products.
3D Meaning of buy now pay later arrangement and buy now pay later contract	Section 3D(1)(c) states that *"a buy now pay later arrangement is an arrangement or series of arrangements* [amongst other things] *that includes a contract between the BNPL provider and the retail client under which the BNPL provider provides credit to the retail client in connection with the supply mentioned in paragraph (a)."*	This provision should clarify what is a 'contract' and whether a contract must be in writing, verbal, or some other kind of informal arrangement in order to prevent an argument that there is no contract with the retail client if there is nothing signed in writing.
AFCA membership for credit representatives	Paragraphs 1.84 and 1.85 of the EM state that while low-cost credit contract providers will be required to hold a credit licence, it was considered unnecessarily burdensome for sub-authorised credit providers to hold AFCA membership as that the benefit did not outweigh the cost. Paragraph 1.90 states that '*LCCC providers are ultimately responsible for the conduct of their credit representatives, and the obligation for them to be AFCA members is maintained*.'	While we acknowledge the rationale behind exempting sub-authorised credit providers from AFCA membership, we propose amendments to safeguard consumer interests and ensure adequate recourse for complaints. With respect to AFCA membership, in accordance with current NCCP Regulation 16 and ASIC RG203.96, sub-authorised directors and employees of a corporate credit representative do not need to be members of AFCA because they are covered by the corporate credit representative's membership. This is not the case for sub-authorised credit representatives who are contractors. While it may be appropriate for sub-authorised directors and employees of a corporate credit representative to not hold separate

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		AFCA membership as they are covered by the AFCA membership of the corporate, it may not always be the case for sub-authorised credit representatives. There are many different lending structures used for licensing purposes under the NCCP Act. Not all lenders hold a licence – some operate as exempt entities – and such structures may be used for LCCC providers. In these models, there will be a licensed servicer with a servicing arrangement with the exempt lender (that is the exempt entity will outsource all of their activities to the servicer). Often the servicer will have a credit representative who undertakes some or all of this servicing. If an LCCC provider is operating as an exempt entity with a servicing arrangement that involves credit representatives, if any of those credit representatives are sub-authorised contractors without AFCA membership, there is a risk that a customer may not have recourse to that contractor for complaints. If this legislation will proceed in this manner, the legislation should be amended to state that a licensee must accept an AFCA complaint with respect to all their credit representatives regardless of whether or not that person is an independent contractor.
Credit representatives	The EM notes with respect to notifying ASIC about the sub-authorisation of credit representatives (at paragraph 1.87): *1.87 The Bill excludes credit representatives of LCCC providers from this requirement and the associated requirement of registering sub-authorised*	With respect to notification to ASIC of credit representatives, notification to ASIC means that: • ASIC has a record of who is operating in the industry, and

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	representatives' details with ASIC unless the sub-authorised representative is collecting repayments made by a debtor under an LCCC. The compliance cost and regulatory burden resulting from body corporates having to sub-authorise all of their employees would be high for many businesses, with marginal benefits for consumers. Hence, a simplified authorisation process is considered appropriate in the LCCC context.	• Consumers can verify that the people they are dealing with are appropriately authorised and legitimate. Similar to the point above regarding the use of different licensing structures, taking away this obligation may result in an increased risk of customer harm through people not appropriately authorised. In terms of the policy intent, we note it is unlikely that sub-authorisation of all employees is required – simply those who are engaging in credit activities directly with the consumer.
Credit representatives	None	At present the merchants offering to utilise buy now pay later products do not need to be authorised under the NCCP Act, or to operate under an exemption, due to these products not being regulated under the NCCP Act. Once BNPL products become regulated, it is assumed that merchants will utilise the point-of-sale exemption. However, we note there is no certainty that this exemption will remain in place for the long term. If this exemption is to be removed, consideration will need to be given to whether, if merchants become credit representatives, the lack of AFCA membership and notification to ASIC remains appropriate.
Credit intermediaries	None	A feature of the proposed legislation is that it would also capture other classes of LCCC in the future.

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		With respect to future product innovation, we note the proposed modified responsible lending assessment provisions apply only to providers of low-cost credit – that is, the modified requirements do not apply to credit assistance providers. While this may be suitable for at the moment as credit intermediaries do not currently recommend BNPL products, it could have an unintended consequence that if in future a credit intermediary (such as a broker) suggests a low-cost credit contract, they will need to undertake a responsible lending assessment in the usual way rather than using the modified rules.
Treatment of credit limit increases	*The EM (at paragraph 1.36) states that "The Credit Code is intended to apply to LCCCs and LCCC providers, with minor modifications. The requirements relating to interest rates and charges will only apply to LCCC providers that charge interest on the provision of credit. <u>LCCC providers will also be permitted to prompt consumers to increase their credit limit.</u>*	There is no other mention of prompts in relation to the increase in credit limits within the Draft Bill or Draft Regulations. If LCCC providers are permitted to prompt customers for credit limit increases, these should be treated in a similar manner to credit card limit increases, this is to mitigate the potential risks to consumers in the same way as unsolicited credit card limit increases.
Nomination in writing	Section 133BXA states that a licensee may elect 'in writing' which responsible lending regime it will adhere to.	We suggest there should be more clarity on how this election is made. For example, will this be by a notice to ASIC. This is to enable ASIC to perform its monitoring and enforcement role in relation to compliance with the new regulatory framework.
Verification	Section 133BXD(6) refers to reliance on information from the borrower for verification purposes.	RG 209 contemplates verification conducted by independent means, means independent from the

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		borrower or applicant for credit. We suggest that verification under proposed section 133BXD(6) is not in line with a common understanding of verification and is not in line with regulatory guidance and should be reconsidered.

Attachment B - About the MFAA

The MFAA's membership includes mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage and finance broking industry.

The MFAA's role, as an industry association, is to provide leadership and to represent its members' views. We do this through engagement with governments, financial regulators and other key stakeholders on issues that are important to our members and their customers. This includes advocating for balanced legislation, policy and regulation and encouraging policies that foster competition and improve access to credit products and credit assistance for all Australians.