Consumer Credit Unit
The Treasury
Langton Cres
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12 April 2024

By email:

Dear

Buy Now Pay Later regulatory reforms

Thank you for the opportunity to comment on the draft legislation to give effect to the Buy Now Pay Later (BNPL) reforms.

As the significant policy positions underpinning the reforms are settled, our comments focus on the drafting of the proposed legislation and the new policy issues raised by that drafting. Given Arca's key role in relation to credit reporting, we have also made some general observations in relation to the credit reporting implications of proposed regulation 69E.

A. Initial observations

We have three initial high-level observations regarding the draft BNPL legislation (with relevant recommendations following):

- In bringing BNPL products within the NCCP/NCC framework, the reform package appears to do two things in relation to the standard responsible lending obligations:

  i. Clarify and confirm the nature of the 'scalable' approach that should apply to the provision of BNPL credit; and

  ii. In doing so, give explicit recognition of the value of a 'risk-based' approach to responsible lending (i.e. an approach similar to a lender's ordinary approach to credit risk).

  As we have previously observed, we do not object to the reforms doing those things in respect of BNPL credit. However, we consider that such recognition should apply to all forms of credit. Further, we are concerned that the allowances provided under (i) and (ii) could be interpreted as *only* applying to BNPL. That is, the fact that the reforms explicitly allow/don't require certain things to be done in relation to BNPL credit, an assumption is created that those things are not allowed/are required for other forms of credit.

- The reform package appears to be driven by a focus on the types of BNPL credit currently provided. There seems less focus on what product or service innovations may occur *because of* the reforms. That is, the reforms will legitimise the provision of regulated BNPL products by providing clarity and certainty about how they can be offered, so that more credit providers may choose to enter the BNPL segment. However, there are elements of the proposed laws that may act to limit competition in the newly regulated BNPL segment. For example, as discussed in relation to regulation 69E, the

application of the cost caps will limit a credit provider's ability to provide varied (non-competing) forms of BNPL or low cost credit contracts (LCCCs), and to provide 'white labeling' BNPL/LCCC services to third parties.

On the flip side, the reforms will reaffirm and provide clarity about when credit-related activities will *not* be regulated (e.g. because of the continued existence of the exemptions under s5 and 6 of the NCC, as well as the exclusion of much of the credit assistance framework). This clarity may encourage providers to innovate and develop new, beneficial products and services that are not regulated by the NCCP/NCC. However, it may also embolden service providers to develop products that skirt the NCCP/NCC regime. While there are anti-avoidance provisions in the legislation, and ASIC has product intervention powers, if there are product structures which should not be offered (either as a LCCC or on an unregulated basis) due to their risk to consumers, we consider that this should be specified in the legislation (see section C).

As an example of where industry may innovate in ways that may have not been considered, the reforms do not prevent a broker from charging a fee to a client for sourcing BNPL credit (and, potentially, sharing that fee with third parties such as the merchant). At this stage, we are unaware whether this type of arrangement happens in practice. Nor do we have a view as to whether it is a good or bad outcome. However, as was demonstrated by the development of the BNPL, innovation is often based on the prevailing legal framework.

- We are concerned that the drafting is overly complex. In some respects, the obligations may only make sense if the reader already understands the existing practices and processes of BNPL providers (which the reforms are seeking to refine and uplift).[1] A reader who is unfamiliar with current BNPL practices and processes may not appreciate the background to those obligations. As noted in section B, we are concerned that the drafting complexity may result in an inconsistent application of the proposed reforms and make it harder for ASIC to regulate the BNPL segment.

Given the above high-level observations, **we recommend that:**

- The Explanatory Memorandum and Explanatory Statement be expanded significantly to explain the background to, and nature of, the requirements. This should include a clear statement that the BNPL reforms do not affect the scalable approach that applies in relation to other forms of credit.

- The proposed framework be subject to a review after a reasonably short period from implementation (e.g. 12 months), including an assessment of:

    - How have BNPL providers incorporated credit reporting into their practices? How has the use of credit reporting by BNPL providers affected providers of other forms of credit?

    - Have providers of other forms of credit adopted elements of the proposed framework? Should the additional detailed description of 'scalability' in the draft legislation be extended to other forms of consumer credit?

    - To the extent that BNPL products currently provide a 'safer' source of low value credit to low income and other vulnerable customers,[2] have BNPL providers withdrawn from servicing that consumer segment due to the new reforms? If so, has the gap been filled by 'safe' alternatives (including Government funded alternatives)?

[1] We particularly refer to the drafting of section 133BXD(6), which we consider so complicated as to be almost indecipherable.
[2] Safer than, for example, small amount credit contracts.

B. Drafting issues

As an overall observation, the drafting of the provisions is complicated and difficult to follow. We appreciate that drafting approach taken is influenced by the nature of the policy positions, i.e. to provide clear rules while not being prescriptive. However, the complexity present in the drafting of the reforms may result in inconsistent application of the requirements by BNPL providers and make it harder for ASIC to regulate the industry segment.

Further, we question whether the drafting approach adopted is consistent with the good drafting and law design practice described in the Australian Law Reforms Commission's recent report on complexity in financial services legislation.[3] For example, the draft legislation includes multiple interconnected provisions, and also switches off certain requirements in a manner similar to notional modifications. The ALRC identified such practices as contributing to legislative complexity.

We recommend that the drafting of the reforms be simplified: see below for our observations on the more opaque provisions. In addition, the Explanatory Memorandum and Explanatory Statement should be significantly expanded to provide clarity on how the provisions are intended to operate (which will help ASIC when it updates RG209).

i. Use of '**fees and charges**' in s13C(c) (and elsewhere). The existing NCC makes regular use of the concept of 'credit fees and charges', where that term is commonly understood not to include interest charges. The use of the term 'fees and charges' (which includes interest charges) in the BNPL context is inherently confusing.[4] In addition, the way that draft legislation gives effect to the meaning of 'fees and charges' in s13C(c) is itself confusing (i.e. through complicated cross referencing to the definition 'credit fees and charges' in subsection 204(1)). **We recommend** that the concept of 'fees and charges' for BNPL credit be simplified. For example, could the reference to 'fees and charges' be changed to 'credit fees and charges, and interest charges'? Another option would be to define term such as 'LCCC fees and charges' which uses a straightforward definition of 'credit fees and charges' PLUS 'interest charges' (rather than cross-referencing s204(1)).

ii. We are unsure why there is a need to introduce the new concept of '**retail client**' in s13D, and the apparent move away from the well understood concepts of 'debtor' (who is a natural person or strata corporation) and 'personal, household or domestic' purposes. Does this show an intent to change the fundamental application of the NCC in respect of BNPL products? For example, does it suggest that BNPL credit for general investment purposes is regulated? In the drafting of s13B, will the application of the new provisions be limited to 'debtors' and 'personal, household or domestic' purposes? Additionally, we note that the term retail client has a particular, and especially complex, meaning in the financial services regime in the *Corporations Act 2001*, and importing that concept into this legislation will create confusion. Subject to the intended drafting of s13B, **we recommend** that the use of 'retail client' be reconsidered. If it is necessary to use the term retail client, there should be clear guidance in both the legislation and the Explanatory Memorandum as to its meaning and the implications of its use.

iii. The reason for s133BXC(b) is unclear, which makes it difficult to understand the effect of the modification. We note that the explanation provided in paragraph 1.58 of the Explanatory Memorandum does not provide much clarity, or explain why LCCC providers need to be subject to different timing. **We recommend** that the Explanatory Memorandum more clearly describe the reason for, and the effect of, s133BXC(b).

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[3] See page 252, Confronting complexity: Reforming corporations and financial services legislation, Final Report, ALRC

[4] By way of example, in discussing the draft legislation, one of our Members incorrectly assumed that the framework would prohibit the charging of interest because the concept of 'fees and charges' (in the context of 'credit fees and charges') is well understood to not include interest.

iv. Likewise, we are unsure why the term '**not affordable**' has been introduced in the context of s133BXD. Noting the cross reference from s133BXD(4) to s133, this seems to be a shorthand way of referring to the 'not unsuitable' test in s133. If that is the case, is it necessary to introduce a new concept of 'not affordable'? Further, are the circumstances listed in s133BXD(4) exhaustive (i.e. the credit is provided on terms that are "not affordable" if and only if the licensee contravenes section 133?)? **We recommend** that the use of the term 'not affordable' be reconsidered or, at minimum, further clarification be given in the Explanatory Memorandum.

v. The style of drafting of s133BXD(6) is such that we do not understand what it is purporting to require or permit. **We recommend** that s133BXD(6) be redrafted in plain English and that a detailed explanation be included in the Explanatory Memorandum.

vi. The explanation of the change to s133(4)(b) in paragraph 1.50 of the Explanatory Memorandum is confusing. It appears that the change to s133(4)(b) is a simple correction of an apparent drafting error. If this is the case, it should say that.

vii. The explanation of the modification of s133 made through s133BXG appears to be incorrect as it suggests that sub-$2000 LCCC are presumed not to be unsuitable (rather than the presumption applying to the requirements and objectives only).

C. Products regulated, including cost caps

The following comments relate to the products regulated as 'low cost credit contracts' (LCCC) and/or BNPL arrangements, including the impact of the relevant cost caps in regulation 69E:

i. The decision not to change ss5 and 6 of the NCC means that credit contracts that are currently caught by those exemptions – but do not satisfy the definition of a 'low cost credit contract' – will remain unregulated. This is the desired outcome for 'credit' such as that offered by a tradesperson who provide 14-day payments terms (where there is no intention to regulate that credit) and wage advance products (where there is an expectation that such products may be regulated in the future).

   However, it also means that products that (we believe) are intended to be 'regulated' but not have the benefit of the tailored LCCC regime will, instead, remain unregulated. For example:

   a. Products for the excluded purposes described in s13D(2) (where, we assume, a policy decision has been made that credit for those purposes are higher risk and/or not suitable to be considered a 'BNPL' product).

   b. Products that do not satisfy the cost caps in s69E, including (1) if the default fee is greater than $10 per month; and (2) in some circumstances, the product is the second account offered by the provider and the provider charges *any* fees or charges on that second account.[5]

   We consider that this is one of the key issues that needs to be addressed in the draft legislation. **We recommend** that the legislation be updated to provide those products described in the examples above are 'regulated' but do not have the benefit of the tailored LCCC regime (i.e. they will be subject to the ordinary responsible lending obligations). We note that care must be taken to ensure this provision does not unintentionally capture products that are not intended to be regulated.

[5] In the case of (1), the provider would completely avoid being regulated under the NCCP/NCC. In the case of (2), the issue would depend on the product mix and the relevant exemptions under ss5 and 6 (NCC). For example, if the first product was a fixed term contract (so not reliant on the existing cost caps in s6(5)) and the second product was a continuing credit contract (and reliant on s6(5) cost caps). In this case, the provider would be required to hold a licence in respect of the first product offered but the second product would not be regulated (provided it otherwise satisfied the cost caps in s6(5)), i.e. so that responsible lending obligations wouldn't apply.

ii. We consider that the description of the cost caps in reg 69E(2) is unworkable and needs to be redrafted. Subject to our comments below, **we recommend** that the cost caps be assessed across all LCCC products held by the customer with the lender. For example, if the customer had two accounts – each of which charged *half* the maximum amount – both products would meet the cost cap requirements.[6]

iii. Subject to the redrafting recommendation in (ii), we recognise the policy reason for assessing the cost caps across multiple products. This makes sense if the provider offers one standard product and there is no legitimate reason for the customer to hold multiple versions of that product.[7] However, there will be circumstances in which a provider may offer multiple forms of BNPL products (or, once the concept has been expanded, multiple forms of low-cost credit contracts[8]). For example, the certainty provided by the reforms could encourage some providers to offer 'white label' BNPL products for certain retail chains or other financial institutions. To the extent that those products are tied to separate (and competing) retail chains or financial institutions, it is not appropriate for the fee structure of one white-labelled product to be dependent on the fee structure of another. Another similar example is the provision of a fixed-term BNPL product for one purchase (e.g. solar panels) and a second fixed-term BNPL product for another, distinct purchase (e.g. an electric vehicle). **We recommend** that the redrafted cost caps only require calculation of the cap across multiple products if there is no valid reason for the provider to offer multiple products. Without this change, many BNPL providers will need to maintain two separate responsible lending programs to account for returning customers (who are seeking a second, separate product). The need for two programs in this situation will significantly undermine the benefits of the tailored LCCC responsible lending regime.

iv. We note that the current drafting of reg 69E does not address a situation in which some, but not all, the accounts are held jointly with another borrower. We note that it would be difficult, and potentially raise privacy issues, to assess the cost caps across products with different borrowers. For example, A holds Account 1; A & B hold Account 2. If the BNPL provider adjusts the cost of Account 2 in order to remain under the cost cap,[9] B could infer that A had another BNPL account with the provider. This could be particularly risky in the context of a domestic abuse situation in which A (as victim/victim-survivor) is trying to hide Account 1 from B (as perpetrator). **We recommend** that further consideration be given to how the cost caps should apply to jointly held accounts.

v. The definition of 'buy now pay later arrangement' in s13D(1) includes a requirement that there is a supply by a 'merchant' and payment by the credit provider to the merchant. Based on that requirement, it is not clear whether the definition would capture the following arrangements:

   a. under a continuing credit contract, credit is provided for purchase from a merchant and for cash advances;

   b. under a continuing credit contact, credit is provided for a purchase from an 'allowed' merchant and, separately/subsequently, a 'disallowed' merchant (as per 13D(2)); and

[6] As it is currently drafted, if the provider first offered a 'no fee or charge' product and then wanted to offer a product with a small monthly subscription fee, the second product would not satisfy the cost caps (even though together the products would, or they would if the subscription product was issued first).

[7] Although we also question whether this risk would already be addressed through the design and distribution obligations and/or the embedded anti-avoidance provisions.

[8] In which case, it should be assumed that there are valid reasons to hold multiple accounts with the credit provider.

[9] We are aware of credit contracts under which the pricing structure is 'dynamic'. For example, the basic fee structure could result in the total annual fees going over the limit (based on usage of the account). However, the lender does not charge fees if the account reaches the maximum allowed. In the context of the default fee caps, this could involve having a $10 default fee on all accounts but having an additional clause that provides it is only charged once per month across all accounts.

c. under a fixed term contract, credit is provided for a purchase from an 'allowed' merchant and a 'disallowed' merchant.

We recommend that the coverage of s13D(1) be clarified.

vi. Further to the above, we note that the definition of 'buy now pay later arrangement' in s13D(1) (BNPL arrangement) and, therefore 'buy now pay later contract' in s13D(4) (BNPL contract) is very broad. Many 'standard' credit products may meet the definition of BNPL arrangement, and therefore BNPL contract.[10] While these products are unlikely to meet the fees and charges requirements in section 13C, certain specific contracts might satisfy those conditions.[11] We understand that specific contracts being LCCCs won't affect the obligations that apply to those products unless the credit provider makes an election under s133BXA. However, paragraph 1.24 of the Explanatory Memorandum suggests that LCCC providers may "be required to apply for a variation of the authority under their licence to cover the provision of LCCCs under section 45 of the Credit Act". We consider that this requirement should not apply to credit providers who offer LCCC in incidental circumstances like those described above. **We recommend** that any requirement to obtain a licence condition be restricted to 'intentional' LCCC providers. For example, the requirement to obtain the authority could be linked to whether a provider makes an election under s133BXA.

D. Other issues

i. **Elections under s133BXA ('specified class'):** a credit provider may offer a LCCC product in conjunction with another product (e.g. a credit card or personal loan). That same type of LCCC product may also be offered by itself. When offered in conjunction with the other product, the credit provider may consider that the overall responsible lending process is sufficient to meet their obligations for both accounts (i.e. so that they do not need to make an election under s133BXA for the LCCC when sold with another product). However, when sold by itself, they will seek to rely on the tailored LCCC regime. It is not clear whether 'LCCC sold by itself' (compared to 'LCCC sold with another product') can be a 'specified class' of LCCC. **We recommend** that the Explanatory Memorandum provide additional clarity on the meaning of 'specified class'.

ii. **Elections under s133BXA (retention):** The retention period for the election under s133BXA is tied to when it is revoked or last relied upon. **We recommend** that the Explanatory Memorandum clarify the expectation if a customer makes an allegation of breach of responsible lending (including through AFCA) in relation an account opened pursuant to the election, but after the election has been destroyed. For example, should the court (or AFCA) be expected not to make a negative inference?

iii. **Removal of s128(aa) and (ba) (in s133BXC):** These provisions prohibit a credit provider from telling a customer that they are 'pre-approved' (before doing the assessment). It's not clear to Arca why the removal of these provisions is necessary or appropriate. This suggests that the LCCC provider can tell a customer that they 'are' eligible before undertaking the tailored LCCC process, which in turn suggests that the tailored LCCC process is form over substance and approval is a forgone matter, undermining faith in the new reforms. **We recommend** that the reasons for the removal of these provisions for LCCC be explained in the Explanatory Memorandum.

iv. **Application of the tailored RLOs by AFCA:** We note that the tailored LCCC responsible lending regime is largely based on an assessment of a provider's overall policies and procedures (rather than a straightforward assessment of the circumstances of the provision of the individual credit). While we recognise that AFCA is often required to look at policies and procedures, we consider that this is a

[10] Examples include car loans where the credit provider pays the car dealer, and standard credit card contracts.

[11] Examples that could satisfy the cost restrictions include a reduced rate refinance offered on a compassionate basis or a car loan offered under a subvention agreement (where the car dealer pays some or all the interests costs on behalf of the customer).

step beyond how they generally handle disputes. We query whether consideration been given to how AFCA is to assess responsible lending complaints under this regime.

v. **Default notices (s87(1A) NCC):** The standard requirement to provide a direct debit default notice applies to the first such default for that direct debit. Accordingly, the obligation will reset each time the customer changes their direct debit set-up, which makes sense as the new details may be incorrect. It appears that, while widening the circumstances in which the LCCC-related notice must be sent, it is only required to be sent once on the account, regardless of whether the payment method has changed. **We recommend** that this provision be reconsidered.

vi. **Financially vulnerable (s133BXD):** We recognise the concern that LCCCs may pose higher risks to certain segments of consumers who are financially vulnerable. Consumers who have low or uncertain income will be at higher risk of poor outcomes even if the LCCC product is less risky than other products. However, we have concerns about the requirement in s133BX(3)(c) to have processes to identify whether an individual belongs to a 'class of persons who members are likely to be financially vulnerable'. If the concept of 'financial vulnerability' related only to direct/clear issues of financially vulnerability resulting from such things as low income or the source of income, it would be reasonably straightforward for a credit provider to identify those vulnerabilities and take additional steps to ensure the appropriateness of the product.[12] However, if it is intended to be a broader concept – where indirect indications of potential vulnerabilities are relevant – it would pose significant challenges and risks to both the credit provider and the consumer. For example, consumers who are single parents, new migrants or experiencing domestic abuse are more likely to be 'financially vulnerable' compared to other groups. However, it cannot be assumed that a consumer within one of those groups is *likely* to be financially vulnerable, or that consumers not in those groups are *not likely* to be financially vulnerable. In many cases, it would not be appropriate to first ask whether the customer was in one of those groups (e.g. it would not be appropriate to ask if someone is a recent migrant). This leaves the credit provider to make assumptions based on indirect indications, which is itself inappropriate. **We recommend** that the requirements in s133BXD(3)(c) be subject to additional targeted consultation, with a view to focus their application to clear and direct indications of financial vulnerability (preferably in the legislation but, at a minimum, in the Explanatory Memorandum).

E. Modified RLOs - credit reporting

We welcome the recognition that the proposed framework gives to the importance of credit reporting in the responsible provision of credit to Australian consumers. However, our view remains that participation by BNPL providers at the comprehensive tier (i.e. with the sharing of both consumer credit liability information and repayment history information) would significantly improve providers' ability to lend responsible and efficiently, and provide additional consumer benefits to those consumers who do not otherwise have a detailed credit history.

Noting the settled policy decision to require participation only at the 'negative' level (for sub-$2000 accounts) and 'partial' level (for accounts $2000 and above), we make the following comments:

i. We consider the drafting of regulation 28HAD is appropriate and gives effect to the policy intent. That is, the description of the 'negative' credit check under subparagraph (2) and 'partial' credit check under subparagraph (3) are broadly appropriate.

ii. We note that the reference to "any information" in subparagraphs (2) and (3) implicitly means "any and all". A BNPL provider would not satisfy the requirements of regulation 28HAD by only obtaining 'some' of the relevant information (e.g. under subparagraph (3), it would not be appropriate to only ask for

[12] Although, noting that, it could also the mean those customers become more financially excluded as BNPL providers avoid servicing them due to the higher regulatory burden. As we have noted above, we consider that a post-implementation review should consider how the BNPL reforms have impacted the provision of credit to such customers.

consumer credit liability information in relation to other BNPL accounts; rather than all credit facilities). **We recommend** that this implication be made clear in the Explanatory Statement.

iii. On a similar basis, while it is common practice for a credit provider to obtain and use summarised data (including a credit score) from a CRB rather than the 'raw' data, the drafting of reg 28HAD would require the BNPL provider to also obtain that raw data. This is because the summary data would not otherwise meet relevant definitions of the 'credit information' in the Privacy Act.[13] **We recommend** that this be made clear in the Explanatory Statement.

iv. We note that the Explanatory Statement makes it clear that the BNPL provider must comply with the ordinary rules for accessing credit information, including (where relevant) becoming a signatory to the Principles of Reciprocity and Data Exchange (PRDE). As a signatory to the PRDE, the BNPL provider will agree to become subject to the reciprocity principle (that requires supply of all relevant data to the providers' credit reporting bodies) and compliance principle (that sets out the industry-led process for non-compliance). They will also agree to contribute information to those credit reporting bodies under the Australian Credit Reporting Data Standards (ACRDS).

v. Where a BNPL provider becomes a signatory (i.e. in order to comply with reg 28HAD(3) for accounts $2000 or more), the obligation to comply with the reciprocity principle will apply to *all* accounts held by that provider (i.e. not just to accounts of $2000 or more). If a BNPL provider anticipates that they will need to sign the PRDE to comply with the requirements of reg 28HAD, we suggest that they speak to Arca to discuss the process for doing so and how the PRDE operates.[14]

vi. Based on the nature of the obligations under the NCCP/NCC (e.g. each 'credit contract' will require separate disclosure and separate responsible lending assessments) we expect BNPL providers which currently use the 'transaction BNPL' account type[15] will adopt the 'facility BNPL' account type.[16] On that basis, we do not propose to continue the work Arca and credit reporting bodies have undertaken to allow for the 'consolidation' of transaction BNPL accounts on the credit report. If any BNPL providers intend to maintain the transaction BNPL account type, they should contact Arca. To confirm, the credit reporting system (as established under the PRDE/ACRDS) is capable of accommodating BNPL accounts. and currently does so for several BNPL providers.

vii. The value of the credit reporting system is fundamentally based on its reciprocal nature, i.e. a credit provider can only benefit from the system if they and other credit providers contribute relevant information. That reciprocal obligation is established under the bilateral agreements between credit reporting bodies and their credit provider clients. It is reinforced through the PRDE, although with two key exceptions relating to 'negative only' credit providers and 'credit enquiry' information.

viii. **Negative only credit providers:** A credit provider that participates at the negative only level (as established under reg 28HAD(3)) can choose not to sign the PRDE and still receive that negative only information (including from signatories and ADIs that are subject to the mandatory CCR regime). They will therefore not be subject to the compliance and dispute process under the PRDE. Nevertheless, to ensure the system remains as robust as possible, BNPL providers must be expected to contribute all their relevant data (i.e. they cannot simply take out the data they need from the system without contributing their data back in). While they may not be subject to the PRDE, 'negative only' BNPL providers will need to enter into service agreements with their credit reporting bodies, which will

[13] For example, the definition of 'default information' relates to an individual credit contract. A summary of those elements of credit information (e.g. a total of the number of defaults on the customer's credit report) or a credit score (that incorporates various form of credit information) does not meet the relevant statutory definition.

[14] The PRDE is managed by Arca's subsidiary, the Reciprocity and Data Exchange Administrator Ltd.

[15] As that term is used in the ACRDS where each transaction is a separate credit contract, so that a multitude of accounts could be recorded on the consumer's credit report.

[16] As that term is used in the ACRDS where the BNPL product acts as continuing credit contract, so that only one account is recorded on the consumer's credit report.

generally include contractual obligations to supply all relevant data. **We recommend** that the expectation to comply with the reciprocity obligations in their CRB service agreements be reflected in the Explanatory Statement (i.e. in the context of what "seeking to obtain information" involves).

ix. **Credit limit disclosed during enquiry:** When seeking to obtain credit reporting information from the credit reporting body (through an 'enquiry'), the credit provider should disclose the 'credit limit' (see paragraph 6.2(b) of the Privacy (Credit Reporting) Code 2014 (CR Code) for the rules about this disclosure). Where a BNPL provider intends to take advantage of the 'protected increase' process under section 133BXE, we consider that the disclosed limit should reflect that higher limit (i.e. as the 'maximum amount of credit available under the contract' for which the credit provider is assessing the customer). **We recommend** that the availability of the protected increase process be linked to the limit that is disclosed when obtaining credit reporting information under reg 28HAD, to ensure that it is visible to other users of the credit reporting system. To the extent that a credit provider cannot or does not disclose a limit, the protected increase process should not be available.[17]

x. Also, we note that the protected increase process will likely lead to more cases where the credit limit on the enquiry is higher than the consumer's initial credit limit. Providers relying on the process may need to explain this difference, to avoid confusion when the consumer accesses their credit report.[18] The risk of confusion is heightened by the fact that, unlike for other credit products, the consumer may not have been asked what credit limit they are seeking.

xi. **Soft enquiry process:** Arca has submitted an application for variation of the CR Code to the OAIC. That application includes a formalised process for undertaking 'soft enquiries'. In general terms, a soft enquiry occurs when a credit provider requests credit reporting information from a credit reporting body in respect of a proposed credit contract, without the request appearing on the individual's credit report as an enquiry. The requirement to obtain credit information under reg 69E would not be satisfied through the soft enquiry process Arca has proposed, irrespective of whether the BNPL provider is otherwise permitted to utilise the process. The proposed soft enquiry process does not give access to all the information required by reg 69E, particularly identification information about the individual. Further, the purposes for which a soft enquiry may be undertaken are limited, and do not extend to making a responsible lending assessment under the NCCP.

xii. From a practical perspective, the availability of a credit reporting body will (for providers that opt-in to the tailored regime) be a condition of offering new BNPL accounts and, subject to the protected increase allowance, for any credit limit increases. It is our experience that credit reporting bodies have robust availability. However, it is standard practice for all financial service providers to consider disaster recovery plans in case a key input to their processes is not available (although this is the first situation that we are aware of that access to credit reporting information is a legally enforceable precondition to providing credit). **We recommend** that additional guidance be given in relation to the potential for a credit reporting body engaged by a BNPL provider to be not available (and what is required of a BNPL provider in those circumstances).

xiii. As we have previously noted, the mandated participation in credit reporting (for providers which opt-in) at the negative only level (for sub-$2000 accounts) may raise issues for providers of other credit products. For example, if a customer applies for a credit card, and the credit card provider can see multiple BNPL 'enquiries' (with no consumer credit liability information), to what extent is the lender required to make further inquiries regarding the potential existence of those BNPL accounts? We note that the BNPL reforms establish an assumption that sub $2000 accounts are 'lower risk' (which influences the requirements placed on the providers of those products). It is a necessary flow-on from that assumption that other credit providers (when assessing other forms of credit) may treat those sub-

[17] This change should be made part of the NCCP framework. No changes are required to the credit reporting framework under the Privacy Act or the CR Code.

[18] Credit providers have obligations under section 21C of the Privacy Act and paragraph 4 of the CR Code to disclose certain matters to individuals before their information is disclosed to a credit reporting body.

$2000 as 'lower risk' (which will influence that credit provider's inquiries and verification steps in respect of those products). **We recommend** that the Explanatory Memorandum recognise that other credit providers will be responsible for how they treat BNPL enquiries on a credit report, and that there is no automatic need to undertake further inquiries and verification in all cases merely because of BNPL enquiries.

xiv. Further to the above point, the 'protected increase' process under s133BXE will create a disconnect between the 'credit limit' disclosed to a credit reporting body under 'consumer credit liability information', and the potential 'maximum credit limit' that may be offered by the BNPL provider (without a further credit assessment/credit enquiry). This will create a risk that a non-BNPL provider will offer credit ('subsequent credit') based on the customer's financial situation (verified through the credit reporting system) without understanding that the existing BNPL provider could increase the consumer's existing credit limit.[19] This means that the subsequent credit could 'become' unaffordable if the BNPL provider later offers a protected increase.[20] **We recommend** that the Explanatory Memorandum confirm that the provider of the subsequent credit is required to assess that credit based on the customer's current financial situation, rather than the higher limit that may subsequently offered by the BNPL provider. In the alternative, we note that the OAIC could advise on whether the relevant 'credit limit' disclosed for the purposes of credit reporting could reflect the maximum credit limit (however, further consideration would need to be given as to whether this approach is the more appropriate approach as it would mean a disconnect between the formal contractual 'credit limit' and the 'credit limit' shown on the credit report).

xv. The CR Code (at paragraph 16.1(a)) includes very strict rules on the on-use of credit eligibility information by a credit provider. The protected increase provisions and the CR Code use restrictions could be inconsistent, such that a credit provider may be in breach of the CR Code for misusing credit eligibility information if it seeks to rely on those NCCP. **We recommend** that Treasury seek the input of the OAIC in relation to this issue.

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

Yours sincerely,

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[19] Ordinarily, the risk would sit with the BNPL provider to undertake a further credit enquiry to support a limit increase and identify any new credit since the account was first opened.
[20] This issue is further complicated by the fact that the credit reporting system does not allow historic records of consumer credit liability information to be retained.