

20 January 2023

Manager
Media and Speeches Unit
The Treasury
Langton Cres
Parkes ACT 2600

By email: _____

Dear Sir or Madam

Regulating Buy Now, Pay Later in Australia Options Paper

Thank you for the opportunity to provide a submission in response to Treasury's *Regulating Buy Now, Pay Later in Australia Options Paper* ('Options Paper').

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all regulated consumer lending in Australia.

ARCA has significant experience in relation to BNPL products that has been gained through engaging with Members, including those who are BNPL providers or who are looking to develop such products, those who are looking to accommodate BNPL credit in their services (i.e. credit reporting bodies), and those who need to understand the impact of BNPL credit within their own credit assessment processes. Importantly, ARCA through its key role in developing and improving the credit reporting system has been working with credit providers, credit reporting bodies and other stakeholders to ensure that the credit reporting system can readily facilitate the reporting of BNPL products.

Overall, we have received broad Member support for the proposal to regulate BNPL credit under the existing National Consumer Credit Protection Act (NCCP) and National Credit Code (NCC) framework, including from those Members who already offer BNPL credit. Our Members want to ensure that the application of responsible lending obligations to BNPL

credit does not inhibit the efficient and responsible provision of credit to Australian consumers. For that reason, we have noted that there may be an opportunity to ‘fine-tune’ those obligations in respect of ‘small BNPL accounts’¹ and other ‘low limit’/‘lower risk’ credit² products through regulations made under section 130(2) of the NCCP.

In our following detailed submission, we have provided our general comments on BNPL credit and how we consider it should be regulated (**Section 1**), and detailed feedback in relation to the three regulatory options identified in the Options Paper (**Section 2**).

Noting the significance of the credit reporting system in improving consumer outcomes in relation to BNPL credit, we have provided a detailed discussion (**Section 3**) of what the information currently in the credit reporting system shows about consumers’ use of BNPL credit and how the credit reporting system can be used to improve consumer outcomes. In **Appendix A** we have set out the practical considerations for how BNPL providers can participate in the comprehensive credit reporting system.

In **Appendix B**, we have summarised our understanding of the impact on the provision of BNPL credit of adopting Option 3 based on the two general contractual forms of BNPL credit (i.e. ‘BNPL transaction account’ and ‘BNPL facility account’; see Section 1, (d) *Understanding the types of BNPL credit*).

Summary:

1. BNPL credit is credit and should be regulated in the same way as other forms of credit under the regulatory frameworks set out in the NCCP and NCC.
2. Those frameworks are designed to be comprehensive and flexible and are appropriate for the regulation of BNPL credit. Where necessary (and which already occurs for other forms of credit), the frameworks should be fine-tuned to address any issues that are specific to BNPL credit, whether in relation to the responsible lending obligations or other regulatory obligations that will apply to the BNPL credit.
3. The existing scalable responsible lending framework should apply to BNPL credit.
4. It may be appropriate to make regulations under section 130(2) of the NCCP to provide clarity on what inquiries and verification steps are required for some BNPL accounts (i.e. ‘small BNPL accounts’). However, that clarity should apply to all ‘low limit/lower risk’ credit products, rather than just small BNPL accounts. Larger BNPL accounts should be treated in the same way as other equivalent products (e.g. higher-limit unsecured credit).
5. Any regulations under section 130(2) should still require the BNPL provider (as a credit provider under the NCCP) to take steps to understand whether the small BNPL account is affordable to the customer (i.e. basic inquiries), and otherwise require the credit provider to take steps to understand the consumer’s existing liabilities and behaviour with their existing credit.
6. Option 3 is the most appropriate approach for regulating BNPL credit.
7. The comprehensive credit reporting system plays a key role in ensuring better consumer outcomes and all BNPL providers should be participating in that system. The system is currently able to receive information reported by BNPL providers (and some

¹ See our description of ‘small BNPL accounts’ (compared to ‘larger BNPL accounts’) in Section 1, (d) *Understanding the Types of BNPL credit*.

² See our discussion of what types of products could be described as ‘low value’/‘lower risk’ credit in Section 1, (g) *Fine-tuning of existing responsible lending obligations*.

providers are currently participating in the system and reporting information for BNPL credit, including consumer credit liability information and repayment history information).

As with any material regulatory change, we note that an appropriate transitional period will need to be applied.

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

Yours sincerely,

Michael Blyth

General Manager, Policy & Advocacy

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Section 1 - General comments on BNPL and how it should be regulated

a) Considering the context of BNPL reform beyond credit regulation

While this review is looking at the appropriate regulatory framework to apply to BNPL credit to reduce potential overcommitment and other consumer harm, we also encourage Government and Treasury to consider the operation of the BNPL sector – and the overall credit market – in light of the broader issues identified in Good Shepherd’s *Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability*.³

That report explored the use of BNPL credit among Good Shepherd’s clients and found that, contrary to the characterisation of BNPL as a discretionary spending tool, BNPL credit was being used by people on lower incomes for essentials and that BNPL is taking the place of adequate social security payments to plug income gaps.

We consider that our recommendations in this submission will help reduce the harms identified in Good Shepherd’s report. However, we consider that steps should also be taken to ensure that lower income consumers who have an appropriate need for, and can afford, BNPL credit are not excluded from obtaining it simply because it is ‘too hard’ to assess their credit applications. If this were to occur, those customers may be driven towards higher cost, higher risk products such as payday loans.

Separate to that, we support Good Shepherd’s recommendation that addressing the harms from BNPL credit requires a comprehensive Government response. In addition to improving the provision of BNPL credit, such a response should include addressing the reasons why people on low and insecure incomes use BNPL credit, and strengthening debt-free financial support for family domestic abuse victim-survivors and maximising alternatives to BNPL.

b) The BNPL reforms should not address broader issues in isolation

We note that there is some suggestion (particularly in relation to Option 1 in the Options Paper) that the introduction of regulation in respect of BNPL credit could address broader issues, such as scams, domestic violence, coercive control and financial abuse. We disagree with this approach. While such matters absolutely need to be addressed, this should be done in a consistent way across the credit industry. It is not appropriate to address these broad concerns on a product-specific basis. We consider this a further reason why Option 1 is not an appropriate way to regulate BNPL.

³ https://goodshep.org.au/wp-content/uploads/2022/11/Good-Shepherd-Report_The-Role-of-Buy-Now-Pay-Later-in-Exploiting-Financial-Vulnerability_November-2022-Full-Report.pdf

c) CreditSmart research provides insights into BNPL customers' behaviour, attitudes and understanding

CreditSmart is an information website (www.creditsmart.org.au) created by ARCA, with the support of its Members, to provide consistent and relevant consumer messaging on key industry topics relevant to the use of credit. For the last four years, as part of the CreditSmart program, we have conducted research (using YouGov) into Australian consumers attitudes and behaviour towards credit. Through that research, ARCA has identified the following insights into consumers behaviour, attitudes and understanding of BNPL credit (based on our August 2022 survey):

- Almost half (49%) of Australians have used BNPL credit.
- Over one in six (13%) Australians who have used BNPL schemes use the service several times a week while 16% are using it weekly, 21% using it monthly, 30% using it a few times a year, and 20% using it less than once a year.
- Over a third (34%) of Australians who have used BNPL credit have been late on their payments.
- On average, Australians who have used BNPL services/ products are more likely to have more than one (1.64) BNPL accounts.
- In response to the question, “Being honest, how would you rate your credit health?”, those who have used BNPL credit are more likely than those who have not to say they feel like they are struggling to maintain their credit health (10% compared to 3%) or feel like they have lost control of their credit health (4% compared to 1%)
- Those who have used BNPL credit are more than five times as likely as those that have not to say they have received assistance in relation not their financial situation in the last 18 months (36% compared to 7%)
- Consumers who have any form of ‘credit’ are almost twice as likely as those that don't to say they are concerned about their ability to access credit in the future (32% compared to 17%). However, that figure increases significantly for consumers who have used BNPL credit specifically compared to those that haven't (42% compared to 16%).
- In response to the question, “Do you think that BNPL products should be regulated the same as other types of loans or credit products (i.e. credit cards)?” over two thirds (68%) of Australians think BNPL credit should be regulated the same as other types of loans or credit products, while 14% don't think they should be and another 18% are unsure.
- Those with credit are more likely than those without to think BNPL credit should be regulated the same as other types of loans or credit products (71% compared to 57%). However, those who have used BNPL are more likely than those who have not to say they don't think it should be (18% compared to 11%).
- In terms of how BNPL credit is used: food and leisure – 56%; specifically gifts, (i.e. Christmas, birthdays) - 28%; groceries and household goods - 19%; games and toys - 17%; food and entertainment - 17%; travel and entertainment - 16%.
- On average, the overall cost of their most recent item/ service purchased using BNPL credit is close to \$900 (\$873.21).
- Two thirds (66%) say their most recent purchase was up to \$500, while the remainder (34%) were purchases between \$500 and \$10,000.

- Those with multiple BNPL accounts are more likely to report a higher overall cost of their most recent purchase compared to those with only one account (\$963.76 compared to \$715.03)

In relation to BNPL users' relationship with other forms of credit, our research from December 2021 found that:

- BNPL account holders also use other credit products – in total using an average of 2.4 credit product types. This is significantly higher than the customer bases for many other products (including credit cards).
- Nearly half of BNPL account holders also use credit cards, one-third use personal loans, and around 20% use home loans and payday loans.
- Over 40% of payday loan users also use BNPL credit, whereas less than 20% of credit card users also use BNPL credit.

d) Understanding the types of BNPL credit

While BNPL credit is often referred to as a single form of consumer credit, products offered by credit providers may differ in key ways. Throughout this submission we have used the following terms when discussing how BNPL credit should be regulated, the impact of that regulation under the credit legislation and how BNPL providers may take part in comprehensive credit reporting.

BNPL types (size):

- **Small BNPL account:** a BNPL account under which the total credit the customer can take out is small. The current rule of thumb reflected in the AFIA BNPL Code of Conduct is that such accounts have a limit of no more than \$2000 (whether that is a formal credit limit or an informal 'spend limit').
- **Larger BNPL account:** a BNPL account that is not a small BNPL account and will often have longer payment terms compared to small BNPL accounts (potentially up to 5 years). They are often used to purchase larger items such as solar panels.

To be clear, we consider that both small and larger BNPL accounts are credit and should be regulated in the same way as other consumer credit (and subject to affordability tests which consider the customer's financial capacity). However, to the extent that 'fine-tuning' of certain NCCP and NCC obligations are necessary for BNPL accounts (as discussed below in (g) *Fine-tuning of existing responsible lending obligations*), these should generally apply only to small BNPL accounts (with larger BNPL accounts being treated in the same way as other larger unsecured credit accounts).

BNPL types (contractual status):

- **BNPL transaction account:** each purchase by the customer is ostensibly a separate credit contract.⁴ The customer may be advised of an indicative/ non-contractual

⁴ As established by the provider of the BNPL transaction account (through the relevant terms and conditions) and for the purposes of credit reporting under Part IIIA of the Privacy Act. The definition of

‘spend limit’, however there is no contractual ‘credit limit’ associated with the account. There may be an overall ‘facility’ agreement that relates to the technology used to access credit.

- **BNPL facility account:** the customer is given a contractual credit limit and may spend up to that limit. Additional credit becomes available as purchases are paid off (i.e. a ‘continuing credit contract’ under the NCC). Each payment may be subject to its own payment schedule but there is one credit contract.

These terms describing the contractual status of the BNPL credit are used in the Australian Retail Credit Data Standard (ARCDS).⁵

Appendix B includes a summary of how the credit reporting system currently applies to BNPL credit based on their contractual status and how the NCCP/NCC would apply if the concept of ‘credit’ under the NCC were extended to cover BNPL credit.

e) BNPL is ‘credit’ and should be regulated as credit

As a fundamental principle, we consider that BNPL products are credit and, as with other consumer credit, should be regulated under the existing credit legislation.

We note that the Options Paper observes that the NCC exemptions under which BNPL providers operate were not designed with those products in mind, and that the “unintended regulatory gap creates the potential for consumer harm due to the absence of key protections” (page 4).

We strongly agree with Treasury’s observation.

Nevertheless, we note that the Options Paper also suggests that BNPL products have some degree of exceptionalism when compared to traditional credit products (which could, presumably, warrant a bespoke or limited form of regulation); see, for example, the commentary under *Credit provision and the role of BNPL* (page 4).

We disagree with that view. The risk profiles of all consumer credit products exist on a scale that is determined by the amount, cost and other terms of the consumer credit. While a ‘low cost’ and low limit BNPL product may have an overall lower risk profile than, for example, a credit card, it does not mean that it poses no harm to a specific consumer, or even necessarily a lesser risk of harm than, for example, a credit card (especially where the provider takes no steps to understand the consumer’s exposure to other BNPL products).

For example, the potential for BNPL products to ‘smooth the up-front-cost of purchasing a good or service’ over a short term (e.g. 4 fortnightly payments) may be unsuitable for a consumer who needs the extended payment terms that would, for example, be available under a credit card to pay off the item. In this instance, the shorter payment terms under the

‘contract’ in section 204 of the NCC may be relevant (if the NCC is extended to cover BNPL credit), i.e. whether the ‘series or combination of contracts, or contracts and arrangements’ between the BNPL provider and consumer would constitute a single ‘contract’ for the purposes of section 204.

⁵ Signatories to the Principles of Reciprocity and Data Exchange agree to use the ARCDS when contributing credit information to a credit reporting body.

BNPL credit are likely to result in a high effective cost of credit through default fees, meaning that consumer harm or risk may not be appropriately managed.

In terms of larger BNPL accounts, any ‘low cost’ feature is of little relevance to the potential for consumer harm arising from those products, i.e. an unaffordable loan of \$10,000, \$20,000, \$30,000 etc to a consumer is going to cause significant harm – regardless of whether there are direct interest or other charges associated with the loan.

In relation to the specific ‘benefits’ of BNPL identified by Treasury (on page 4) that appear to suggest that such products are unique or exceptional, we note:

- **‘Cheaper’**: while the Options Paper at some points suggests that BNPL credit is ‘cheaper’, the paper also questions this assumption and points to the analysis of the Curtin University that finds that this is not always the case (at page 15). We note that the question of whether BNPL credit is ‘cheaper’ for a consumer is affected by both the direct costs considered in the Curtin University research (i.e. credit fees and charges and potential default costs) and, potentially indirect costs (i.e. either higher prices charged to the specific consumer or consumers overall by the supplier)⁶. It is not a simple matter of saying that BNPL credit is always cheaper than other available products (particularly credit cards and personal loans). In any case, we do not consider that ‘cost’ is a singular reason to treat BNPL credit as exceptional when compared to traditional forms of credit. All forms of credit will have different pricing structures and, while it may impact how the principles-based regulation applies to the product, it should not mean the product should be subject to a different regulatory framework.
- **‘Easier-to-access’/ ‘more convenient’**: to the extent that BNPL credit is somehow ‘easier-to-access’, we consider that this is the direct result of the unequal regulatory treatment of BNPL products and traditional credit. The regulatory framework is there for a reason – to minimise the risk of consumer harm. If it is considered that the existing regulatory framework creates too high a degree of friction in relation to the provision of credit, this should be addressed for all forms of credit.⁷
- **‘Driving increased competitive pressure’**: again, we consider that any such competitive pressure should not result from a regulatory arbitrage situation.
- **‘Improving financial inclusion’**: we agree that the responsible provision of suitable credit is vital to improving financial inclusion of Australian consumers. If used appropriately, BNPL products can, in some circumstances, assist with that aim. For example, it could help a consumer smooth the purchase of essential items (such as a washing machine or fridge) over a period of 4 fortnightly payments. However, as noted above, seeking to smooth the purchase over such a short period of time would be dangerous for many consumers; particularly those who are less ‘financially included’ because of their personal circumstances (and who require a much longer period for such a purchase).

⁶ We note that there is a separate question (beyond whether BNPL credit should be regulated under the NCCP) of whether rules should be made that force BNPL providers to allow merchants to apply surcharging to BNPL products. We note that consideration of such rules should be done as part of a review of the surcharging framework as a whole.

⁷ As noted below, we consider that the existing responsible lending framework is sufficiently scalable and flexible to allow for the efficient provision of BNPL credit (potentially subject to minor clarifications and adjustments that should apply to all equivalent forms of credit).

We also note that ‘financial inclusion’ is not simply a matter of providing ‘convenient’ credit. A holistic view of a consumer’s experience with credit must be taken. In this context, we consider that the current practices of many BNPL providers undermine the potential for BNPL products to promote financial inclusion; for example, the lack of participation in the comprehensive credit reporting system by many BNPL providers means that their customers – many of whom have ‘thin’ credit files – are not given the benefit of their good usage history with their BNPL products (see Section C for further discussion). Even the practice of readily writing off bad debts and not reporting defaults to credit providers (page 13) undermines the need to improve the financial literacy of consumers, i.e. by removing the consequences of non-payment, consumers are not taught about the need to maintain good credit behaviours in the future.

f) Existing regulatory framework should apply to BNPL credit

The National Consumer Credit Protection Act (NCCP), including the National Credit Code (NCC) establishes a wide-ranging – but flexible – regulatory framework for the provision of consumer credit. We consider that the existing regulatory framework, including the responsible lending obligations in Part 3-2 of the NCCP, are sufficiently flexible to apply to the provision of BNPL credit. Importantly, through the application of both the NCCP and NCC, they establish an appropriate licensing/responsible lending framework (NCCP) and ‘truth in lending’ framework (NCC)⁸.

To the extent that the operation of that framework to BNPL credit needs to be clarified or adjusted – or ‘fine-tuned’ - such fine-tuning should be done in the context of that existing framework. For example, this could involve clarifying or adjusting the application of the existing responsible lending obligations to relevant BNPL products through the provision of additional guidance under RG 209 or, where appropriate, regulations made under section 130(2) (i.e. as to the particular inquiries or verification steps that may not be required for certain BNPL products).

However, as discussed in relation to the responsible lending obligations (below), any such fine-tuning should be based on the overall risk profile of the credit product, rather than be specific to ‘BNPL’. For example, the fine tuning could apply to all products that meet relevant low limit and low risk criteria (which could include small BNPL accounts, credit cards and personal loans, while excluding higher cost payday loans and larger BNPL accounts).

i. How would the NCCP be applied to BNPL credit?

Based on our reading of the options in the Options Paper, we understand that Treasury is considering the three following ways to apply the NCCP to BNPL credit. Consistent with our comments above, we consider that the first method (i.e. changing the definition of ‘credit’ under section 5 and 6 of the NCC) is the most appropriate means of regulating BNPL under the existing credit framework.

⁸ As described in the Revised Explanatory Memorandum to the *National Consumer Credit Protection Bill* (page 6).

- **Change the definition of ‘credit’ under sections 5 and 6 of the NCC**

While not stated explicitly, this appears to be the approach proposed under Option 3.

Appendix B includes a table of the features of the various forms of BNPL and a summary of how those forms operate under the current credit reporting system and, if the definition of credit is extended to cover BNPL credit, how the NCCP/NCC would apply to that credit.

This approach would automatically apply all relevant elements of the licensing and principles-based responsible lending frameworks to BNPL. The detailed oversight, sanctions and remedies framework would apply to BNPL credit consistently with other regulated credit.

The ‘truth in lending’ provisions of the NCC would also automatically apply to BNPL credit, including:

- Upfront and ongoing disclosure
- Changes to the credit contract
- Advertising and marketing
- Termination and enforcement of the credit contract
- Hardship processes

While the NCCP and NCC frameworks have been designed to be flexible and applicable to all forms of credit, it may be appropriate to fine-tune some of the obligations for application to BNPL accounts, particularly small BNPL accounts. This is consistent with the existing approach to other forms of credit the NCCP/NCC, where there are already limited product-specific adjustments.⁹

The ‘truth in lending’ NCC regulatory framework is generally relevant and appropriate for BNPL – and would improve the provision of BNPL credit by consistently applying the existing disclosure, enforcement and hardship frameworks to BNPL credit. However, we note that it may be necessary to fine-tune some of the other NCC obligations for BNPL (again, as is done with other forms of credit).

Based on our review of the NCC obligations we consider that it may be appropriate to review the account statement requirements in section 32 to ensure that they allow credit providers to provide accounts to customers that are consistent with the customer’s understanding of how the BNPL account works (i.e. where each purchase under a BNPL facility account is subject to its own payment schedule; rather than having one overall payment schedule for the balance of the account).¹⁰

⁹ For example in relation to small amount credit contracts, home loans and credit cards.

¹⁰ We understand that some stakeholders have noted concerns with the potential for large number of BNPL purchases to result in very large numbers of transactions being recorded on the statements for the linked transaction account or credit card (so that it is difficult to understand the customer’s financial position). If the NCC is applied to BNPL credit, the review of section 32 would provide a good opportunity to identify whether further, targeted transaction disclosure is required in relation to BNPL credit to ensure consumers are able to better manage their accounts.

We also consider that the electronic communications provisions under the NCC should be reviewed to reflect the 'online-only' nature of many BNPL products (although such review should apply to all forms of credit regulated under the NCC).

The approach of expanding the definition of 'credit' in the NCC to include BNPL credit may cause additional complexity for BNPL providers that offer BNPL transaction accounts as each purchase is its own 'credit contract', and the provider would need to comply with the requirements of the NCC (e.g. separate pre-contractual disclosure/credit contracts; any required notices etc) and NCCP (e.g. responsible lending) for each purchase.¹¹

Nevertheless, we consider that this issue could be readily resolved, if need be, through changes to the NCC and NCCP to provide for a series of contracts to be treated as one contract for the purposes of the relevant provisions within the NCC and NCCP.

However, before making any changes to the NCCP/NCC to accommodate the BNPL transaction account-type, we suggest that Treasury:

- (i) first understand how many BNPL providers currently utilise the BNPL transaction account-type (noting that all BNPL providers that currently participate in comprehensive credit reporting utilise the BNPL facility account-type for small BNPL accounts);
- (ii) ask those providers who offer the BNPL transaction account-type whether they would look to adopt the BNPL facility account-type if the product became regulated under the NCCP/NCC¹²; and
- (iii) consider how the current definition of 'contract' within s204 of the NCC¹³ would apply to this situation and, from a policy perspective, whether it is appropriate to treat BNPL transaction accounts as separate contracts¹⁴.

Given the comprehensive regulatory framework set out in the NCCP/NCC there would be no need for an industry code of conduct to set out the 'basics' of providing BNPL credit (such as disclosure and enforcement practices). However, it would be open to industry participants to agree to a voluntary code of conduct that goes

¹¹ To confirm, each purchase would also constitute a separate credit contract for the purposes of credit reporting. This does not create any material problems when contributing credit information into the credit reporting system regarding BNPL transaction accounts. As discussed in Appendix A, ARCA is working with credit reporting bodies and other stakeholders to improve how that data is subsequently consumed (whether by the consumer or other credit providers).

¹² Based on our understanding of the operation of BNPL transaction accounts, we consider that it would not require a significant change to those providers' policies or procedures to adopt the BNPL facility account-type. We understand that a reason to treat each purchase as a separate contract is so that the provider has greater control over the credit provided to the customer at any one time. However, we consider that such a practice can still be maintained under a BNPL facility account-type as the provider would maintain the discretion as to whether to authorise any particular transaction requested within the credit limit.

¹³ The definition of 'contract' under the NCC already recognises that a 'series or combination of contracts, or contracts and arrangements' will constitute a 'contract'.

¹⁴ i.e. Whether the substance of the relationship is more akin to a revolving line of credit rather than distinct and unrelated credit contracts, and that requiring the disclosure of a formal 'credit limit' provides transparency and certainty to the customer.

beyond the base-line obligations in the legislations (as is done through the existing Banking Code of Practice and Customer Owned Banking Code of Practice).

- **Apply NCCP licensing obligations to BNPL (without changing ‘credit’ meaning)**

While it is not explicitly stated in the Options Paper, we understand this is the approach proposed under Option 2.

(If, instead, Option 2 is intended to involve changing the NCC definition of ‘credit’ to cover BNPL credit, we note that there is, in practice, little difference between Options 2 and 3; see our discussion of Option 2, below).

The NCCP generally applies to lending if the product meets the definition of ‘credit’ in the NCC. This approach would bypass that standard approach and directly apply the NCCP to ‘BNPL’ (presumably by providing that the provision of ‘BNPL’ is a credit activity under section 6 of the NCCP).

This would mean that the provider of the ‘BNPL’ would need to hold a licence and be subject to the general conduct obligations under section 47.¹⁵ Any other relevant provisions of the NCCP that are dependent on the product being ‘credit’ under the NCC would need to be recreated in relation to BNPL credit. This includes the responsible lending obligations, i.e. rather than using the existing the responsible lending framework, the amendments would have to create a new framework.

The truth in lending provisions of the NCC would not apply to BNPL credit. We presume that this is the reason why Option 2 suggests the Industry Code would be strengthened and made mandatory. We consider that this is inappropriate, unnecessarily duplicates regulatory requirements, and reinforces regulatory inconsistency between BNPL credit and other forms of credit.

- **Create bespoke affordability tests under NCCP (without any licensing requirement)**

This is the approach proposed under Option 1.

This option disregards the existing NCCP and NCC frameworks by creating a bespoke regulatory framework split between a ‘mandatory’ Industry Code and a BNPL-specific affordability test. That affordability test would sit within the NCCP but would otherwise have no connection to the standard regulatory framework applying to credit.

We consider that this is inconsistent with both the fundamental proposition that BNPL is ‘credit’ and should be regulated as ‘credit’, and the guiding principles for regulating BNPL set out on page 19 of the Options Paper.

¹⁵ The explanation of Option 2 suggests that this approach would apply the ‘hardship provisions’ to BNPL credit. This is not correct as the hardship provisions sit within the NCC (and depend on the BNPL credit meeting the definition of NCC ‘credit’). We also note that this approach would mean that the new financial hardship reporting framework under the Privacy Act would not apply to BNPL credit (as those provisions rely upon the NCC applying to the credit).

g) Fine-tuning of existing responsible lending obligations

While the existing responsible lending provisions are principles-based and scalable, we consider that there may be benefits in fine-tuning the application of those requirements to ensure that providers are able to confidently issue BNPL credit in an efficient and compliant manner (assuming the existing responsible lending provisions are applied to BNPL credit, i.e. through Option 3).

We consider that this is particularly important given that most BNPL assessment practices involving ‘straight through processing’ with little, if any, manual intervention in the assessment processes (where some ARCA Members have noted concern that the current RG 209 doesn’t adequately deal with such practices).

However, that fine-tuning should apply to all forms of credit. That is, some credit providers are concerned that the way in which the responsible lending obligations are applied (whether through RG209 or in practice by AFCA) does not support ‘straight through processing’ as there is always the question of ‘what else’ the credit provider could have done to better understand a specific customer’s financial situation (even though the steps undertaken by the credit provider should objectively be considered ‘reasonable’).

As part of the process to implement the regulation of BNPL credit, we suggest that further targeted consultation be held in relation to the specific elements of the current responsible lending framework that could cause concerns for issuers of BNPL credit. Subject to that feedback, steps could be taken to either clarify the high-level principles relating to those obligations (e.g. through RG 209), or fine-tune the inquiries and verifications steps required using the regulation power in section 130(2) of the NCCP.

To the extent that the fine-tuning relates to clarifying the application of high-level principles (e.g. in RG209), it should apply to all credit (as described below).

i. Using s130(2) to establish inquiries and verification steps for BNPL

If the fine-tuning involves clarifying the inquiries and verifications steps that are (or are not) required for small BNPL accounts through regulations made under s130(2), those adjustments should apply to all forms of credit that are similar in nature, i.e. based on the risk profile of the product as determined by size, cost and other relevant terms.

For example, it could be possible to clarify, under section 130(2), the inquiries and verification steps that are applicable to the issue of all low limit/lower risk products (‘adjusted inquiries/verification’) in the following way:

- i) If the:*
 - a. maximum of credit available to a consumer under the product is less than \$XXX;*
 - b. customer’s total outstanding credit facilities of a similar nature are less than \$YYY;*
 - c. terms and conditions, including costs, of the credit include (or don’t include) ABC;*
 - d. customer has a minimum income of \$ZZZ per year; and*
 - e. customer has a good credit score; then*

- ii) *the credit provider is not required to make further inquiries or undertake further verification steps.*

To be clear, we have included the above formulation simply to demonstrate how we consider the inquiries/verification process could be tailored for 'low limit/lower risk' products. We expect that any such tailored process would be developed after sufficient consultation and consideration of the risks that apply to such products.

In terms of our formulation of the potential adjusted inquiries/verification under section 130(2), we note that any such regulation should:

- apply to small BNPL accounts and equivalent low limit/lower risk accounts. Larger BNPL accounts should be treated in the same way as other larger unsecured credit facilities and be subject to the already scalable responsible lending obligations under the NCCP.
- reflect the potential harm that can result if a customer has multiple low limit/lower risk products and require the provider to consider those other liabilities.
- require at least a basic level of inquiries in relation to the affordability of the product for the consumer, including inquiries relating to their income. We disagree with the proposal in Option 1 that the use of credit scoring can completely replace income and expenditure inquiries (see our discussion of Option 1 in Section 2).

ii. *Use of credit scoring as part of the RLOs*

Our formulation for the adjusted inquiries/verification process includes the use of a 'credit score' as part of the pre-conditions for when the adjusted inquiries/verification process would be available under regulations made pursuant to section 130(2).

A credit score is a numerical representation of a customer's likelihood of defaulting on credit that is based on an analysis of their prior credit behaviour. We consider that the use of credit scores can play an important role in establishing how the inquiries/verification can be scaled for a particular customer. Importantly, as it is based on the customer's behaviour with their existing credit, a good credit score provides comfort that the customer's pattern of behaviour with their existing credit demonstrates that they are capable of meeting the obligations under that existing credit (while, conversely, a poor credit score indicates that they have not been managing the existing credit well, which could prompt trigger further inquiries and verification).

While the use of the credit score is included in our suggestion for a regulation under section 130(2), the use of credit scoring as a tool to establish 'scalability' is relevant to all products. We consider that the discussion of the use of 'credit risk' factors in RG209 (see RG209.99 – 101) is unhelpful in establishing this position and should be revised.

Any use of credit scoring in regulations made under section 130(2) – or through principles established under RG209 – cannot be based on nominating an arbitrary score above which the credit provider is not required to undertake specified actions (or vice versa). Credit scoring models are unique to the provider of that score (e.g. a credit reporting body) and can mean completely different things about a consumer's credit worthiness. For example, it is not possible to say that a score of '600' is a 'good' score under the credit scoring tools provided by all different credit reporting bodies (even if they use the same numerical scale).

For that reason, we consider that guidance be created to establish the pre-conditions for when a credit score can be used to determine scalability for a customer and, if included in regulations made under s130(2), when a customer would be deemed to have a 'good' credit score. Such guidance could not be prescriptive on how a credit score algorithm must be created; however it should set out necessary aspects of the creation and use of credit scores such as:

- using all data reasonably available (e.g. repayment history information and consumer credit liability information);
- being regularly reviewed, tested and updated; and
- what the score should indicate about the individual's likely behaviour (e.g. what 'probability of default' the score should indicate).

h) The role of the Industry Code

We note that this process is being conducted at the same time as the AFIA BNPL Code of Conduct is being independently reviewed. While we recognise there is room for a voluntary code of conduct to establish rules of conduct that go beyond the legal requirements¹⁶, we do not consider that it is appropriate for regulation of such a significant industry sector as BNPL to be left to the Industry Code.

As set out above, we consider that BNPL credit is credit, and should be regulated in the same way as other consumer credit. Importantly, we do not consider that the existing AFIA Code delivers comparable consumer outcomes to the relevant provisions in the NCCP.

Further, in both the design and – for the majority of signatories – in operation, the current Code's approach to credit reporting does not give full effect to the code's key commitments of 'We will focus on customers' and 'We will make sure our BNPL product or service is suitable to you'.

This is because the Industry Code does not require the use of comprehensive credit reporting – rather it is an 'option' in some circumstances. In practice, the majority of signatories do not participate in comprehensive credit reporting (and are not signatories to the PRDE). This means that those Code signatories are not using the credit reporting system to understand the existing debts and liabilities for *any* customers (as this would require the signatory to be a signatory to the PRDE).

As a result, those providers are not giving to their customers the benefits of having a strong credit history through good credit management of their BNPL products and they are not using the credit reporting system to have visibility of a customer's existing liabilities; which significantly undermines the ability of BNPL providers to "limit potential consumer harms by restricting further use of the BNPL services following missed payments"¹⁷ as the customer can simply take-out further credit with another BNPL provider.

¹⁶ For example, in setting minimum standards for merchant and retail partners (where relevant; noting that BNPL products that rely on the MasterCard/Visa networks do not have the same relationships with merchants as those which have direct relationships).

¹⁷ Which the Option Paper at page 13 notes is relied upon by some BNPL providers as a key method of reducing consumer harm and as a reason not to undertake more detailed affordability assessments.

As noted above, we consider that applying an appropriate regulatory framework to BNPL credit is not simply a matter of ‘strengthening’ the existing Industry Code as this ignores the fact that there already exists a comprehensive regulatory framework for consumer credit and creates a duplicity of regulatory regimes.

In response to the Independent Review of the AFIA Code, we have recommended that the code strengthen the expectations on signatories to participate in comprehensive credit reporting (in order to give better effect to the two key commitments referred to above). This is in contrast with our views described in Section 3 that the law should not mandate the participation of BNPL providers in comprehensive credit reporting. It is important to distinguish between a set of obligations voluntarily adopted by a BNPL provider (i.e. which includes an expectation of participation in the credit reporting system) and a mandated legal obligation. Our fundamental view is that credit providers should not be mandated to participate in comprehensive credit reporting (which is a further reason we would be concerned with the proposal in Options 1 and 2 to mandate the Industry Code as this would clash with our recommendation to the Independent Review).

i) Comments on New Zealand proposal

We note that the New Zealand Government has agreed to apply the Credit Contract and Consumer Finance Act (CCCFA) to BNPL credit, and the New Zealand Ministry of Business, Innovation and Employment (MBIE) has been consulting on the details of the regulation. This means that the key protections of the CCCFA will apply to BNPL credit. The ordinary requirement to assess affordability, however, will not apply to accounts below a threshold established under regulations (proposed to be \$NZ600) subject to the credit provider participating in credit reporting in relation to the account (although the BNPL credit will still otherwise be ‘credit’ for the purposes of the CCCFA). For BNPL credit above \$600, the MBIE is consulting on whether the ordinary affordability assessment requirement should apply, or if it should be more limited.

Essentially, this approach appears to be similar to Option 3 in the Treasury Options Paper. That is, the BNPL product is deemed as ‘credit’ and is subject to the same obligations as other forms of regulated credit; however, the regulations will adjust the overall obligations in respect of ‘low value’ BNPL. As noted above and in our discussion of Option 3 in Section 2, this approach could be followed under the NCCP (i.e. regulations could be made under s130(2) to clarify the inquiries and verification steps that are required for BNPL credit).

Nevertheless, we consider the proposal to remove any form of affordability assessment requirement for BNPL credit of \$600 or less goes too far and is not appropriate. Importantly, those adjustments fail to recognise the significant and long-lasting damage to a consumer’s financial health if they are unable to make the payments on the credit – even for a ‘small’ loan of \$600. Further, while the BNPL provider must participate in credit reporting (so that they will have visibility of the customer’s other BNPL accounts), in the absence of any requirement to assess affordability, the provider can simply disregard this information.

Section 2 - Options for regulatory intervention: response to questions

We have set out our general observations in Section 1 on how BNPL credit should be regulated under the NCCP (i.e. by changing the definition of ‘credit’ under sections 5 and 6 of the NCC). In this section, we provide our views on the guiding principles for regulatory intervention listed in the Options Paper, and our detailed comments in relation to each of the three identified options.

In doing so, we are addressing the following questions in the Options Paper:

- *Are the guiding principles appropriate and fit for purpose to inform the development of a BNPL regulatory framework? What other factors should be considered?*
- *Of the three options below, which option do you think is most appropriate? Would you change any aspects of that option?*
- *What do you think are the issues with the other two options?*

i. We consider that the guidance principles are appropriate

Overall, we agree with the principles as stated. We note, however, that those principles represent good regulatory principles that should apply to the regulation of all forms of consumer credit. To the extent that a ‘bespoke’ framework is considered necessary or appropriate for BNPL credit, this would suggest that the current credit framework in the NCCP/NCC doesn’t give effect to those principles for other types of credit.

We consider that the application of those principles necessarily rules out Option 1 and – subject to its intended operation – Option 2. As noted above, the existing regulatory framework is both comprehensive and flexible. While we have identified areas in which the existing framework could be fine-tuned, this is consistent with the approach taken to other forms of credit, i.e. a consistent, base-line set of obligations that may be adjusted as necessary for particular forms of credit.

Applying requirements to BNPL credit that are not built upon the existing framework (as is suggested under Option 1 and 2) is not consistent with the guiding principles as:

- it would require multi-product providers (i.e. who provide BNPL and other forms of credit) to maintain distinct processes and practices;
- competitive neutrality is not achieved by allowing some BNPL providers to not hold a licence, while multi-product providers are required to hold a licence and be subject to the relevant licensee obligations;
- multiple frameworks are not consistent with the cost-effective and efficient regulatory oversight and enforceability by ASIC.

ii. Option 1 – not appropriate

Further to our comments in Section 1:

- Multiple regulatory frameworks – including where key obligations are split between a ‘mandatory’ Industry Code and the NCCP – is confusing for consumers. This was a

key concern of many stakeholders when the previous government proposed to change the responsible lending obligations (so that authorised-deposit taking institutions would be subject to different obligations than other lenders). This concern relates to the duplication of obligations that are otherwise covered in relation to both the responsible lending obligations under the NCCP and the truth in lending obligations under the NCC. In terms of the NCC, it is more appropriate for the customer to experience the same disclosure, enforcement and hardship processes (as provided for under the NCC) for all their credit products as those matters are directly visible to the customer through the contractual documentation they see, the default notices that they may receive and the explanation of their rights to request hardship assistance.

- Having a bespoke 'affordability test' for BNPL credit is not appropriate. The responsible lending obligations under the NCCP are intended to be flexible and scalable. Creating specific obligations for BNPL credit suggests that the existing framework is not working.
- Having a bespoke 'affordability test' for BNPL credit is not necessary. As discussed above, the existing responsible lending obligations are already designed to be scalable and flexible. To the extent that fine-tuning is required to, for example, the required inquiries and verifications steps, this can be done through the existing section 130(2).
- While it may be appropriate to refine the inquiries and verification steps required for small BNPL accounts, larger BNPL accounts should be subject to the same scalable obligations as any other credit.
- It is unclear what the nature of the affordability assessment would involve. Will it maintain the existing framework of allowing a lower standard for accounts of less than \$2000? As noted above, while credit scoring can play an important role under the responsible lending obligations, we do not consider that a 'good' credit score should be used as a complete replacement for inquiries as to whether the product is affordable. An unaffordable small BNPL account (i.e. \$2000 or less) can still cause harm to a significant portion of the population (particularly if the provider does not have adequate processes to understand the customer's other liabilities).
- It is unclear how ASIC would either approve or mandate the Industry Code. BNPL providers would not be required to hold a Australian credit licence (ACL) which, we understand, is a precondition for ASIC's role in approving/mandating Industry Codes. As such Option 1 would require even further stretching of the existing regulatory framework to accommodate BNPL products (which should be subject to the same requirements as all other credit).
- In the absence of changing the Privacy Act, the fact that BNPL providers are not required to hold an ACL will mean that most providers will have no access to repayment history information (which is the most powerful way to understand the customer's performance in relation to their existing credit; see Section 3). This will also further embed the competitive distortion under the Privacy Act where a multi-line licensed credit provider can access repayment history information (even for an unregulated account), while a monoline BNPL provider is not permitted.
- Mandating being a signatory to the Industry Code could be seen as effectively mandating membership of AFIA, which we consider to be inappropriate. At a minimum, exclusive responsibility for the Industry Code could not sit with the single

industry association.¹⁸ For example, it could be managed by a coalition of industry associations (which a clear requirement to consult outside their own membership groups).

- Further, mandating the Industry Code would therefore mean that providers of BNPL credit that are also subscribers to other relevant industry codes (such as the Banking Code of Practice and Customer Owned Banking Code of Practice) would then be subject to multiple, overlapping obligations under those codes.

iii. *Option 2 – not appropriate (subject to clarification of the intended approach)*

Further to our comments in Section 1:

- The Options Paper does not explicitly state how Option 2 will be given effect. The option focuses on applying a “tailored version of the RLOs to BNPL products” and notes that BNPL providers would be required to hold a licence. Holding the licence would require the provider to “comply with most general obligations of a licensee, including... internal and external dispute resolution, hardship provisions, compensation arrangement, fee caps and marketing rules”.
- The option makes no reference to the truth in lending obligations within the NCC. Rather, it refers to a ‘strengthened’ industry code (which we assume would replace the truth in lending obligations under the NCC).
- On that basis, we understand that this Option does not involve expanding the definition of credit in sections 5 and 6 of the NCC, and the truth in lending provisions of the NCC would not apply.
- As noted above, it is unclear on what basis the ‘hardship provisions’ would apply as a ‘general obligation of a licensee’ as the hardship provisions sit within the NCC. Likewise, we are unclear as to which ‘marketing rules’ would apply under the general conduct obligations within the NCC.
- On the basis that the option does not involve applying the NCC’s truth in lending obligations (and, instead, involves recreating a similar regime in the Industry Code), we have the same concerns as set out in respect of Option 1 (noting that the complexity for both consumers and providers would be exacerbated by the addition of the licensing regime under the NCCP).
- Importantly, merely holding an ACL will not enable BNPL providers to participate in the new financial hardship regime under the Privacy Act as the NCC would not apply to the provision of the credit (see s6QA(1)(b) of the Privacy Act).
- We are unclear why a BNPL provider would be permitted to be a representative of a licensee. ASIC’s RG 203 *Do I need a credit licence?* makes it clear that the provider of credit is engaging in credit activities as a principal and not as a representative (see RG203.88) and must therefore, hold its own licence. (If a BNPL provider was to act as a representative of a licensee despite RG203.88 they would, in contrast to the suggestion included as part of Option 2, not be permitted to access repayment

¹⁸ We note that the PRDE is managed by a separate company (Reciprocity and Data Exchange Administrator Pty Ltd, ‘RDEA’) to the industry association (Australian Retail Credit Association Pty Ltd) and clear processes are maintained to ensure that the RDEA consults with all relevant stakeholders, rather than just ARCA Members.

history information as the Privacy Act requires the credit provider to hold its own licence and does not contemplate a credit representative situation.)

- We are also unclear as to why the option specifically refers to removing reference checking and not requiring merchants to be an authorised representative of the BNPL provider. It is our understanding that this would already be the case even if the full NCCP/NCC applied to BNPL credit (save that the point-of-sale exemption under regulation 23 of the NCCP Regulations would not apply if the sale were the result of unsolicited contact with the consumer; which we consider to be an appropriate limitation on that exemption).
- If our understanding is incorrect, and Option 2 involves changing the definition of credit in section 5 and 6 (so that the NCC truth in lending provisions apply), we note that Option 2 is essentially the same as Option 3 save that there continues to be a suggestion that the relevant ‘tailored version’ of the responsible lending obligations would not sit under the current responsible lending framework; which would (i) require the amendments to first remove the application of the current obligations from BNPL credit (i.e. as they would automatically apply if BNPL credit is ‘credit’ within the NCC); and (ii) require a separate framework to then be recreated only for BNPL credit. We consider this to be an unnecessary complication as it is already possible under the existing responsible lending framework to apply tailored inquiries and verifications steps to BNPL credit (under section 130(2)).
- In terms of ‘tailoring’ the responsible lending obligations to BNPL credit, we question why it is necessary to remove “some prescriptive elements”. The NCCP responsible lending obligations are scalable and flexible; the inquiry and verification requirements are in all cases what is ‘reasonable’, without any prescription. While we agree that it may be appropriate to fine-tune the obligations as they apply to low limit/lower risk products, this does not involve removing ‘prescription’.¹⁹
- Likewise, we do not agree with the proposal to remove the need to consider the customer’s requirements and objectives for the credit. A BNPL product (particularly a small BNPL account) has many similarities with credit cards (which are subject to those requirements and objectives obligations). In many respects, BNPL products are less flexible than a credit card due to rigid short term instalment payments required under many BNPL products (compared to the more flexible payments structures under credit cards). As noted in Section 1, there will certainly be situations in which a BNPL product will be clearly unsuitable based on the consumer’s requirements and objectives. As with all the elements of responsible lending, the requirement to understand the customer’s requirements and objectives is scalable. If it is necessary, the regulations could establish guidelines for what inquiries and verifications steps are required to understand the customer’s requirements and objectives in relation to low limit/lower risk credit, including small BNPL accounts.

iv. Option 3 – most appropriate

¹⁹ We are also concerned that removing any specific form of verification in relation to BNPL products then creates an expectation that such a step is *required* in respect of all other credit and regardless of the risk of harm to the consumer. That is, it has the implicit effect of ‘prescribing’ that step for all non-BNPL products, which is inconsistent with the fundamental principles-based nature of the existing responsible lending obligations.

Further to our comments in Section 1:

- Subject to our next comments, we consider that Option 3 is the most appropriate option.
- It is not explicitly stated in the Option Paper, however we understand that Option 3 involves expanding the definition of ‘credit’ under section 5 and 6 of the NCC, so that the NCC and NCCP regulatory frameworks would apply to the credit and to the providers of the credit.
- Care would need to be taken to ensure that the expanded definition of ‘credit’ does not capture all deferred payments arrangements (e.g. post-paid utility bills), while also not allowing loopholes to be exploited by regulatory avoiders. Nevertheless, we consider that this is readily achievable subject to an adequate consultation process.
- Expanding the NCC to BNPL credit should not cause significant problems in terms of applying the NCC truth in lending obligations and will ensure an appropriate degree of transparency in the provision of BNPL credit (that is the same as for other forms of consumer credit).
- As discussed in Section 1, (i) some fine-tuning may be required to, for example, the statement requirements under section 32 and the electronic communications provision; and (ii) consideration should be given to how the obligations would apply to BNPL facility accounts.
- Importantly, the requirements of section 67 of the NCC would automatically apply to BNPL facility accounts, so that credit limits could only be increased at the request of the debtor or with their written consent (and which would also require compliance with the responsible lending obligations). The issue of restricting unilateral credit limit increases is not relevant for BNPL transaction accounts as each purchase is a separate credit contract and is subject to separate disclosure/responsible lending etc, i.e. it is not necessary to restrict how the ‘credit limit’ is increased as there is no such ‘credit limit’ applicable to the product (where the informal ‘spend limit’ has no contractual relevance).
- Further consideration should be given to whether the credit card-specific responsible lending obligations in Part 3-2B should be extended to BNPL facility accounts.²⁰ As a starting point, we consider that the obligations relating to giving greater control to the customer to reduce their limit or close their account are likely to be appropriate for BNPL facility accounts. However, we note it may be appropriate to relax the rules relating to credit limit increases on the basis that the initial limits offered to customers are often very low (<\$500) but with the expectation that they may be increased at a later stage (i.e. once the customer has demonstrated their credit worthiness). Applying the same outright prohibitions on inviting the customer to apply for a credit limit increase (as applies to credit cards under 133BE) may put pressure on credit providers to approve the highest possible limit upfront (in order to ensure the long-term viability of that account). To confirm, (i) we are not suggesting any relaxation of the fundamental responsible lending obligation to assess the suitability of the credit limit increase; and (ii) such relaxation would only apply while the account continued

²⁰ Noting that those obligations are not necessary or appropriate in relation to BNPL transaction accounts as there is no revolving line of credit. BNPL providers who allow access to BNPL facility accounts using a ‘card’ would need to consider whether the account would be a ‘credit card’ within the meaning of section 133BA of the NCCP. This issue may require clarification in the legislation.

to be a 'small BNPL account' (i.e. based on the current rule of thumb, no more than \$2000).²¹

- As discussed in detail in Section 1, we consider that the existing principles-based responsible lending framework should apply to all BNPL credit. To the extent that fine-tuning is necessary for small BNPL accounts, this can be done through regulations under section 130(2) of the NCCP to create an adjusted inquiries/verification process for all low limit/lower risk credit products.
- A consequence of allowing for an adjusted inquiries/verification process that is conditional on the customer having a minimum income is that BNPL credit may become less available to lower income consumers. That is, as the BNPL provider would be required to undertake more extensive inquiries and verification steps, they may simply refuse credit to those customers. As noted in Section 1, the regulation of BNPL credit needs to consider the broader issues which were identified in the Good Shepherd report. This includes ensuring that appropriate low-cost credit is available to vulnerable consumers to avoid such consumers being pushed towards very high-cost predatory lending, such as payday loans. While BNPL credit has the potential to cause significant harm to such consumers if used improperly, we consider that BNPL credit from existing providers can play a part in assisting *some* lower-income customers to smooth the purchase of essential goods or services, i.e. where a consumer on a low income needs access to a relatively small amount of credit for a few weeks or months (which would not be available through mainstream lenders as a personal loan, and which would only otherwise be available through a payday lender). On that basis, if an adjusted inquiries/verification process is created under section 130(2), ASIC should be tasked with monitoring how that process is utilised in practice, including whether it is resulting in some consumer segments being inappropriately excluded from access to BNPL credit and other low limit/lower risk credit.

²¹ For the avoidance of doubt, we consider that other credit card-specific obligations such as key fact sheets and minimum payment warnings should not apply to BNPL credit as they are (i) not relevant; and/or (ii) not effective in reducing consumer detriment.

Section 3 - Credit reporting: What it shows about BNPL users and how it can improve consumer outcomes

Benefits from the consistent use of the comprehensive credit reporting system by unregulated credit providers

BNPL credit is a form of credit under the Privacy Act and BNPL providers can participate in the credit reporting system. Several substantial BNPL providers already participate and we understand that a not insignificant number (i.e. more than 5 but less than 10) undertake credit enquiries with at least one credit reporting body.²²

Whilst BNPL contracts are considered credit under the Privacy Act, as they are currently exempt under the NCC, BNPL providers face some restrictions in how they are able to use the credit reporting system (although, importantly, all BNPL providers are currently able to participate in comprehensive credit reporting at least at the ‘partial’ tier level, as explained below).

Currently, if a BNPL provider does not hold an Australian Credit Licence (ACL) then the provider is unable to access and share Repayment History Information (RHI). They may, however, access and share credit information including, consumer credit liability information (CCLI), credit enquiries, default information and other limited data sets.

If a BNPL provider does hold an ACL, they may share RHI. However, as the NCC does not “apply” to the credit contract, they are restricted in reporting FHI (which means that recently introduced hardship reporting regime under the Privacy Act is not available for BNPL products regardless of the provider’s ACL status).²³

Taking into account ARCA’s role and experience within the credit reporting system, we consider that it is important that BNPL providers have access to RHI (and FHI). This could be achieved either by removing the restriction under the Privacy Act that makes RHI available only to ACL holders or – noting the Options Paper has suggested that this process will not involve changes to the Privacy Act – BNPL providers must be required to hold an ACL. This is because the use of the comprehensive credit reporting (CCR) system provides an important tool for all credit providers to assess suitability and better manage credit.

CCR information refers to information which includes both “negative” types of data, such as credit enquiries, default information and other limited data sets, as well as “positive” types of data, such as Consumer Credit Liability Information (CCLI) and RHI. CCLI is information about the consumer’s credit account (or accounts closed in the previous 2 years) including open and close dates, type of account, credit limit and relevant terms and conditions. RHI is

²²Five BNPL providers are signatories to the PRDE, and therefore able to access the existing CCR data pool. This includes only three signatories to the Industry Code (which means that none of the other signatories are utilising the credit reporting system to obtain information about the “existing debts and liabilities” for any prospective or existing customers).

²³ Under the PRDE, this issue has been addressed by allowing signatory credit provider to ‘suppress’ RHI during a financial hardship arrangement so that the customer’s credit report will not show the payments that are missed during the arrangement. Nevertheless, we consider that this is a suboptimal outcome as the customer is not given the benefit of maintaining their good payment history during the hardship arrangement.

a monthly dataset which reflects whether or not payment obligations for the credit have been met, and if they've not been met, how overdue the payment is.

The consistent and standardised use of CCR information by BNPL providers has the potential to bring about a number of significant benefits to consumers, to credit providers and to the wider community, which include:

- Reducing the potential for consumer harm. The ability for CCR information to prevent lending decisions which could lead to consumer harm will be particularly relevant where the consumer is already experiencing difficulties in meeting their repayment obligations under existing BNPL or other types of credit accounts
- Enabling credit providers to make better credit decisions. CCR information provides credit providers with improved quality and more complete data, reducing information asymmetries and supporting better lending decisions. If a customer had some negative information on their credit report, but also a history of positive payment behaviour, the positive payment behaviour can provide better context to understanding the customer's overall position, and support the customer's ability to service new credit
- Enabling consumers to access products on more favourable terms than might otherwise have been the case
- Encouraging competition and innovation amongst BNPL and other credit providers

Accordingly, we strongly encourage Treasury to include within its consideration of how to regulate BNPL credit the positive benefits that would come from BNPL providers being able to participate fully in the CCR system (i.e. by being able to share all forms of credit information, including RHI and FHI). Given Treasury's position that the Privacy Act will not be amended as part of the BNPL reforms, this can only be achieved through Option 3 (i.e. expanding the definition of credit within sections 5 and 6 of the NCC).

While ARCA does not support imposing a mandatory requirement on BNPL providers to participate in CCR, we note that it would be appropriate for ASIC to revise the guidance in RG209 regarding the use of credit reporting as a verification tool. RG209 currently refers to CCR as a 'source of information' that can be used to verify the customers financial situation (see Table 2). RG209.23 also notes that:

(d) the obligations are not static—what is 'reasonable' will be affected by the broader professional and regulatory environment in which you operate. For example, legislative developments (e.g. open banking and comprehensive credit reporting) and other developments and innovations adopted by the credit industry will affect the measures you could reasonably be expected to undertake.

Given the maturation of the CCR system since RG209 was updated in 2019, we consider that ASIC's guidance should include a stronger statement regarding the use of CCR data. This would be consistent to the feedback that ASIC gave to the ACCC as part of the authorisation process for the PRDE in 2016²⁴:

If a credit provider chooses not to use such a tool, ASIC would expect the credit provider to be able to explain why the use of the tool was not appropriate or what other steps the credit provider has taken to verify the consumer's financial situation.

²⁴ See <https://www.accc.gov.au/system/files/public-registers/documents/D15%2B69467.pdf>

BNPL users - potential for increased risk of consumer harm

In relation to BNPL users we note that there is the potential for a segment of these consumers to be particularly vulnerable to financial harm arising from poor or inappropriate lending practices. As such, the potential benefits which flow from informed and fully considered assessments of credit suitability are even more pronounced.

Credit reporting data from both Australia and overseas jurisdictions suggests that a significant portion of BNPL users show traits that suggest they are vulnerable, including lower credit scores and higher numbers of credit enquiries for a range of credit products, i.e. not just BNPL credit (where a high level of enquiries has been linked to payment difficulties).

Other data from multiple credit reporting bodies shows that the likelihood of an individual going into arrears after opening a BNPL facility is significantly greater than that of customers who apply for traditional credit products, such as a credit card. Of course, this does not necessarily suggest that the BNPL credit *caused* the individual to go into default; rather, it may suggest that customers who seek out BNPL are already vulnerable to experiencing difficulty managing their credit.

Negative-only data provides a limited insight; CCR data is preferable

We understand that it has previously been proposed that use of the credit reporting system to support BNPL providers ought to be limited to the reporting and consumption of BNPL default information only. We consider this approach to be extremely problematic and are concerned that it will fail to support appropriate and safe BNPL lending practices.

Whilst default information is an important piece of data when considered alongside other types of credit reporting information, on its own default information only provides a limited and narrow understanding of a consumer's creditworthiness.

This view is supported by data provided by credit reporting bodies, which has found that there is increased predictive power in being able to see the consumer's payment behaviour. In particular, since critical mass of CCR data was attained in September 2018, analysis clearly demonstrates that the predictive attributes which help to identify those customers who will repay credit, compared to those who will fall into default are predominantly based on the CCR data set. 'Negative' only data has now far more limited value when it comes to providing this insight on behaviour.

This shift in the use of data reflects the fact that default information only provides a partial picture of the consumer's previous conduct in relation to their credit product(s). It is also important to note that default information must be for an unmet payment obligation over \$150 and there can be a delay before it is reported (that is, it is only reported following the satisfaction of a number of legal and regulatory requirements (including the provision of prescribed notices and the expiration of notice periods)). This reduces the potential for default information to provide up to date information about a consumer's payment conduct.

This can be contrasted with RHI, which provides a month-by-month record of whether a consumer has met their monthly payment obligation, thereby providing a far more

contemporaneous indication of potential payment difficulties.²⁵ RHI reflects any unmet payment obligation; there is no monetary threshold. RHI will also, in certain circumstances, inform a potential lender of the fact that a consumer has entered into a Financial Hardship Arrangement (FHA) with one of their lender(s) (noting that the FHA must also be reported as Financial Hardship Information on the consumer's credit file for this notification to occur).

Relevantly to the proposal for an information sharing system based purely upon BNPL default information, we note that various analysis has been undertaken which indicates that most BNPL applicants already have an open CCR account (any account/product), i.e. so that segregating and limiting the individual's BNPL credit history into a separate BNPL-only system will mean that both the BNPL provider and the provider of the CCR account will not have a complete picture of the individual's total outstanding liabilities and current credit behaviour.

As noted above, this finding is supported by research conducted by ARCA through CreditSmart, which demonstrates that BNPL users do use other types of credit products apart from BNPL.

By including both CCLI and RHI within the credit reporting information used by BNPL providers in their lending decisions, BNPL providers will have visibility (where the information has been reported) in relation to the following;

- all credit products held by the consumer²⁶
- whether or not that customer has met (or not met) their payment obligations under those products, and
- (if the information is available) whether or not that customer has recently entered into an FHA with another lender

Having access to all of this information will mean that a BNPL provider can minimise the risk of assessing a product application with only a partial or limited understanding of the consumer's true credit position, thereby reducing the risk of harm to the consumer and the provider as a result of the inappropriate extension of credit.

A separate BNPL exchange will be ineffectual

Credit reporting information is used and contributed in Australia within the one single national credit reporting framework, which is facilitated by the Privacy Act. In order to maximise its effectiveness, all participants within the system access and share credit

²⁵ We note that some stakeholders may suggest that there is little value in RHI because it is not 'real time' (i.e. it may take a few weeks for a missed payment to be recorded on the individual's credit report). We do not consider the criticism to hold much weight as it assumes that an individual will, essentially, go from 'good' to 'bad' overnight. This is unlikely to happen in practice; signs of financial stress – whether that it a developing pattern of missed payments or an increasing appetite for credit (as shown by enquiries) – will be evident through a 'pattern' of behaviour well before the customer goes 'bad'. The RHI is a vital data element to identify those prospective customers who are seeking further credit in response to their developing financial difficulty.

²⁶ Further to footnote 25, we understand that some stakeholders also have a concern that CCLI (which records the credit products held by the consumer) may only be done on a monthly basis and is not sufficiently 'timely'. To be clear, under the Privacy Act and the ACRDS, CCLI may be updated more regularly. If BNPL providers consider that it is important to have a more 'real-time' view of the BNPL credit held by consumers, they may choose to report on a weekly or even daily basis.

information on a consistent basis (which is provided for by the industry agreement, i.e. the Principles of Reciprocity and Data Exchange (PRDE)).

By enabling and supporting the accessing and sharing of credit information amongst credit providers and credit reporting bodies, the Australian credit reporting system helps ensure that credit providers are able to comply with their responsible lending obligations under the NCCP.

Any attempts to create a system which exists outside of the credit reporting system and in which only BNPL credit information is shared and accessed would in our view, be of little to no value and raise a number of significant issues including the following:

- BNPL customers are often credit active, with ARCA research (referred to above) supporting the view that these consumers often obtain other types of credit products apart from BNPL. As such, any information which is accessed or shared from a system which incorporates only BNPL data will be of limited value when it comes to providing a lender with an understanding of the consumer's true credit position
- Credit assessments and lending decisions which are based exclusively upon a consumer's BNPL default history will be potentially made on an incomplete and/or inaccurate appreciation of the consumer's true credit position, thereby increasing the potential for inappropriate lending which gives rise to the risk of consumer harm
- It is extremely important that credit information contributed by BNPL providers is reported into the credit reporting system, so that both BNPL and non BNPL credit providers, are able to access and utilise important BNPL account credit information when conducting individual assessments of overall credit worthiness. Credit reporting information is highly relevant to the assessment of a consumer's overall credit worthiness and as such, this information should be accessible by both BNPL and non BNPL providers
- BNPL users can include 'thin file' consumers, being consumers who have limited credit information reported in relation to their credit activities. By having 'thin files' these consumers are unable to demonstrate good payment behaviour or provide potential lenders with a clear picture of their credit status. Of these thin file consumers, a significant portion are young customers, with analysis by one credit reporting body showing that the proportion of BNPL accounts opened for consumers under 25 grew significantly over the past 2 years.

Increasing the reporting of credit information in relation to BNPL accounts within the national credit reporting system has the potential to promote financial inclusion. That is, it provides 'credit invisible' consumers (many of whom are younger consumers) with a fulsome and complete record of their credit history, thereby improving their ability to meaningfully participate within the credit system as well as secure other types of credit in the future. The establishment of a separate BNPL information exchange system will further cement the barriers which stand in the way of these 'thin file' consumers being able to meaningfully participate within the national credit ecosystem.

Additionally, analysis undertaken by one credit reporting body points to a hierarchy involved in which debt a consumer pays off first. Whilst a BNPL account may be tracking reasonably and therefore no default or negative information is shared, there may be hidden consequences for different products.

It has been observed that over time there have been shifts in the payment hierarchy with more traditional consumers paying off their mortgage first. In certain segments it has been the credit card that is paid off as it is used for day-to-day transactions as the individual is financially stressed to the point of living day by day. From the analysis undertaken by the credit reporting body, it was seen that that credit cards are most likely to show signs of financial stress (missed payments). BNPL is most likened to credit cards and would expect to see a similar trend that these were overlooked first.

Once an unsecured product has started to go into arrears this can have a number of effects including:

- The consumer will seek extra credit and the 'easiest' to obtain option may be preferred
- Over-extension of a consumer's capacity to meet their payment obligations
- Missed payments on other products by utilising payments intended for other products
- A possible slippery slope into the sub-prime market for which the consumer may never recover
- Defaults, bankruptcies

By not sharing BNPL data within the national credit reporting system and amongst all credit providers, there are potentially more consumers that could fall into these pitfalls.

BNPL participation in CCR will lead to consumer benefit, not detriment

As noted above, in our view BNPL providers who are able to access and utilise CCR information are far more likely to form credit decisions and undertake individual assessments with a complete and meaningful understanding of a consumer's true credit position.

By having visibility in relation to all credit products held by a consumer, alongside information about the consumer's payment behaviour, the ability for BNPL providers to make better lending decisions is strengthened, with numerous benefits flowing to consumers.

These benefits include:

- minimising the potential for consumer harm as a result of inappropriate lending decisions and thereby reducing the risk of consumer's overextending themselves financially
- enabling those consumers with 'good' payment behaviour to become more likely to obtain credit where it is appropriate, particularly where the 'good' payment behaviour can be considered against negative data
- providing consumers with the opportunity to access low cost credit, where 'good' payment behaviour can be observed
- providing a complete picture of all of the consumer's credit products in one credit report
- promoting the financial inclusion of new to credit consumers, by enabling these consumers to build a healthy credit report based upon small value and prompt payment facilities, which could allow consumers to gain access to appropriate credit later in their lives (i.e., mortgages)

ARCA has observed the following benefits flowing to consumers, industry and the community with the introduction and use of CCR:

- Supporting responsible lending. For many credit providers, access to information about an individual's current credit accounts had an immediate and positive impact on the credit provider's ability to verify an individual's financial position and helped improve the existing information asymmetry which exists between credit providers and potential customers
- Credit providers noted a 'swap in' factor impacting on decisioning. That is, using RHI data to support lending money to a customer who (in the absence of RHI data) would have been rejected. For instance, if a customer had some negative information on their credit report, but also a history of positive payment behaviour, the positive payment behaviour can provide better context to understanding the customer's overall position, and support the customer's ability to service new credit
- Increasing the ability for credit providers to automate decision making processes. Previously, the available credit data was limited to credit enquiries, defaults and other negative data sets. Automation was therefore limited to not approving applications based on a default or other negative information. With the introduction of CCR data, credit providers were able to automate decisions to approve a customer for credit based on positive payment behaviour and the number and size of existing liabilities
- Smaller, mutual credit providers observed improvements in decisioning. This was observed through smaller mutual credit providers accessing CRB scorecards, which incorporates CCR data

System changes can enable participation for BNPL transaction accounts

BNPL products are a relatively new form of credit, which give rise to potential complexities when seeking to 'fit' the reporting of BNPL products within the reporting regime established by the Privacy Act (although those complexities have already been addressed or are in the process of being addressed).

ARCA, together with credit reporting bodies and credit providers, has already undertaken work in relation to how BNPL account information is reported and presented, including amending the Australian Credit Reporting Data Standard (ACRDS) to reflect the reporting of BNPL account information (see Appendix A).

We are also currently working with credit reporting bodies and credit providers to explore ways by which BNPL transaction accounts can be presented in a consolidated way by credit reporting bodies to other credit providers and to consumers. This is particularly relevant in relation to the reporting of RHI and default information in circumstances where information is reported by a BNPL provider on a per transaction basis (as opposed to reporting this information against a single, overarching credit account) which could result in a high volume of individual transactions being reported.

Further details of this work is set out in Appendix A.

Costs will not provide a barrier to participation for BNPL providers

Whilst any increased participation by BNPL providers within the credit reporting system (by both accessing and sharing data) will lead to costs we do not consider that these costs will be so significant as to provide a barrier to participation for BNPL providers. For instance, in order to utilise CCR information a BNPL provider will be required to implement or upgrade its internal processes and procedures. This could include replacing its scorecards, and credit rules, policies and processes, online assessment tools. Supplying data may also impose a

cost upon BNPL providers as these providers will need to develop processes which can capture and extract CCR data.

In relation to being able to share data with credit reporting bodies, industry rules and standards such as the ACRDS will assist to reduce the complexity and potential technical issues which might arise when implementing the systems and infrastructure necessary to share BNPL account information.

As part of the ACCC authorisation of the PRDE, ARCA has previously considered the extent to which data supply provides a barrier to entry and the conclusion reached is that such costs, when weighed against the benefit of participation, do not impose a barrier.

Whilst BNPL providers will need to ensure sufficient time and costs are allocated to the system and infrastructure measures needed to enable participation within the credit reporting system, we consider that the benefits which flow as a result of the sharing and use of credit reporting information may help offset the costs to BNPL providers. For instance, better informed lending decisions lead to a potential reduction in defaults and late payments, thereby offsetting costs associated with obtaining credit reporting information.

In relation to the cost associated with accessing credit reports and credit report information, whilst a precise figure cannot be provided (as pricing is dependent upon a range of factors), we understand that the cost of obtaining a credit report in connection with a credit application will not be substantial.²⁷

²⁷ We understand that some stakeholders are concerned that participation within the credit reporting system will be more costly for providers of BNPL transaction facilities because each purchase is a new credit contract and 'must' be subject to a new credit inquiry. This is not true. The BNPL provider would be free to determine the relevant points at which an inquiry is undertaken (subject to the requirements of the Privacy Act). For example, this could be when the customer first signs-up with the provider and potentially when the provider is assessing whether to allow a purchase to exceed the provider's previous 'spend limit' for the customer. Importantly, the PRDE (which requires signatories to contribute relevant credit information) does not apply to credit inquiries.

Appendix A – BNPL participation in credit reporting – practical considerations

Background

Information about BNPL accounts can be reported through the credit reporting system.

While these accounts are currently unregulated by the National Credit Code, these accounts still meet the definition of ‘credit’ under the Privacy Act²⁸. This means information about the account can be disclosed through the credit reporting system, although restrictions may apply to access and disclosure of repayment history information and financial hardship information²⁹ depending on whether the BNPL provider holds an Australian Credit Licence (ACL).

On 26 February 2021³⁰ the Australian Credit Reporting Data Standard (ACRDS) was amended to introduce new account types and payment terms to make it easier to report BNPL accounts.

How the PRDE applies to BNPL account reporting

The Principles of Reciprocity and Data Exchange (PRDE) were developed to enable credit providers to contribute and access comprehensive credit reporting information contributed by other signatory credit providers. It is not mandatory to sign the PRDE to participate in comprehensive credit reporting, however, if a CP wishes to access signatory-contributed information, it must sign the PRDE.

For a BNPL provider operating at negative tier level only, it is not necessary to sign the PRDE to access the negative tier information contributed by other credit providers.

However, if the BNPL provider wishes to contribute at the partial tier (which includes consumer credit liability information (CCLI)) or comprehensive tier (which includes CCLI and repayment history information and –since 1 July 2022 – financial hardship information³¹) and access information contributed by signatory credit providers at the same corresponding tier level, that BNPL provider will need to sign the PRDE.

When contributing credit reporting information under the PRDE³², allowing for a 12-month transition period, the BNPL provider will be required to contribute all available credit information for its eligible accounts. It should be stressed that whether or not an account is regulated by the NCC is not a criteria for determining PRDE-reporting eligibility; both NCC-regulated and unregulated credit falls within the remit of the PRDE (provided it meets the

²⁸ Privacy Act, section 6M

²⁹ From 1 July 2022

³⁰ Version 2.1 of the ACRDS included changes to support BNPL reporting, namely new account types and credit terms other than ‘month’ (i.e. days, weeks and years). Subsequent ACRDS Versions will continue to incorporate these changes.

³¹ It should be noted that where a CP wishes to supply financial hardship information, that CP will need to implement Version 3 of the ACRDS

³² It should also be noted that CPs impacted by the mandatory CCR legislation [the National Consumer Credit Protection Amendment (Mandatory credit reporting and other measures) Act 2021] (at the date of this guideline, these CPs are the four major banks only) will be subject to both the mandatory CCR contribution obligations, as well as the PRDE

definition of consumer credit in the Privacy Act). This contribution requirement is of particular relevance to the reporting of default information and RHI for BNPL transaction accounts, as discussed in further detail below.

Choosing the BNPL account type

Under the ACRDS, there are two BNPL account types: BNPL facility accounts and BNPL transaction accounts, which allow BNPL accounts to be distinguished from other account types (such as Personal Loan Revolving) when reporting credit information to a CRB. This enables credit reporting bodies to easily identify BNPL accounts, and ensure these accounts are properly displayed for both consumers and other credit providers.

A BNPL provider will need to select the appropriate BNPL account type from the two account types provided for in the ACRDS, and in doing so will need to ensure consistency with the terms and conditions for the relevant account. In determining whether an account is a facility account or transaction account, consideration must be given to how the credit³³ is defined and operates under the terms and conditions. This characterisation is a matter for each BNPL provider to determine.

BNPL Facility account

The BNPL Facility account operates in a manner consistent with traditional revolving credit products, such as credit cards (although noting, of course, that the BNPL Facility account will often be unregulated).

Negative information

Default information can be reported in respect to the failure to meet a payment obligation for the facility (provided the default meets the preconditions for listing, including being at least \$150 and the relevant notices have been given). If the BNPL provider has signed the PRDE it will be obliged to report this default information within a reasonable timeframe of the account falling due.

Likewise, the reporting of both payment information will apply to disclosed default information.

³³ As defined in section 6M of the Privacy Act – “Credit is a contract, arrangement or understanding under which:

- (a) payment of a debt owed by one person to another person is deferred; or
- (b) one person incurs a debt to another person and defers the payment of the debt.”

Consumer credit liability information (CCLI)

The following table sets out a suggested approach for reporting a BNPL 'facility' account via the ACRDS. A further explanation of the suggested inputs is provided underneath:

Account ID/ Account Number/ Account Sub-ID	[determined by CP]
Credit purpose	R (Consumer)
Type of Account	BF (BNPL Facility)
Consumer Credit Liability Information (CCLI) data block	
Open date	[ordinary open date – corresponding to date that facility is opened]
Closed date	[ordinary close date – corresponding to date that facility is closed]
Loan payment method	N [not applicable – no principal/interest component – broader change is required to Loan payment method for a number of credit products via Privacy Regulation change]
Term type	Revolving
Secured	Unsecured
Term of loan	XXX [Ongoing] <i>It should be noted:</i> <ul style="list-style-type: none"> ○ <i>the ACRDS was previously amended to include unit types 'day', 'week', 'month' and 'year' (noting in previous versions the term option was months only).</i> ○ <i>This change was enabled to support reporting of BNPL accounts, noting that the term of credit is often expressed in weeks rather than months.</i>
Maximum amount of credit available	Facility limit [revolving]

Repayment History Information (RHI) & Financial Hardship Information (FHI)

As noted above, only ACL-holders may disclose and access RHI. For BNPL providers who otherwise do not hold an ACL, this will preclude RHI reporting.

However, for BNPL providers who are also ACL-holders, RHI reported for a facility account will, again, operate in a manner similar to an ordinary revolving facility account. RHI will be reported in respect to the monthly payment obligation. Where payments under the facility are required to be made more frequently than monthly, the RHI reported will reflect whether or not the payment obligation has been met for the oldest outstanding payment for that RHI month. This is established under section 12 of the Privacy Regulations:

12 Meaning of repayment history information

For paragraph 6V(2)(a) of the Act, an individual will be taken to have not met an obligation to make a monthly payment that is due and payable in relation to consumer credit if the individual misses any or all repayments due in a month, irrespective of the actual payment cycle for that obligation.

Because BNPL credit is not regulated by the NCC, CPs are currently unable to report FHI where BNPL payment obligations are affected by a financial hardship arrangement. The PRDE provides an exemption from reporting RHI in these circumstances, which means the RHI will ordinarily be suppressed for BNPL credit during a financial hardship arrangement.

Beside the ACL and NCC-requirements for BNPL providers, there should otherwise be no impediment to BNPL facility accounts having RHI and FHI reported in a manner consistent with any other form of revolving credit (e.g. credit card or revolving personal loan).

BNPL Transaction account

The BNPL Transaction account can be readily reported. However, consumption of that data may be more challenging, simply because the appearance of a multitude of transactions may be difficult for both other CPs and consumers to understand and consume. ARCA has been working closely with its credit reporting bodies and credit providers to identify and resolve these issues, with feedback highlighting that these issues can be resolved in the near future and will not provide a barrier to participation in the credit reporting system.

Negative information

There are several issues in reporting default information for BNPL transaction accounts including:

- Whether the payment obligation in respect to the BNPL transaction would meet the definition of default information – namely whether it is for an amount in excess of \$150, and whether it is more than 60 days overdue (noting the BNPL transaction account may run for a period less than 60 days).
- Whether the individual may have default information reported for a number of defaulted transactions, resulting in multiple defaults reported by the BNPL provider. While these defaults may meet the Privacy Act and CR Code requirements, the

reporting of multiple defaults may provide a distorted view of the individual's behaviour – given that had the BNPL account operated as a single credit account, there would only be a single default reported, albeit for a larger amount (representing the sum total of outstanding transactions).

- The reporting of default information within a reasonable timeframe of an account falling due is a requirement of the PRDE. It is suggested that further consideration be given to whether the PRDE contribution requirement for a BNPL transaction account should require:
 - Default information to be reported for each eligible transaction (noting again that eligibility will be determined by compliance with the Privacy Act and CR Code requirements); OR
 - Default information be reported for less than each eligible transaction based on either:
 - Transaction overdue for the longest period
 - Transaction overdue for the highest amount
 - Some other measure

CCR data inputs

It is proposed that the BNPL transaction data supply occur in much the same fashion as a BNPL facility account but on the basis that each separate BNPL transaction would be reported in a similar manner to a BNPL facility account, with the key difference being that a BNPL transaction account would be fixed term credit, as opposed to revolving, ongoing credit. It should also be noted the same qualifications to reporting of RHI and FHI also apply to BNPL transaction data.

However, when it comes to how that information is then reported by CRBs to both consumers and credit providers, it is proposed that CRBs apply an aggregated view to that information so that:

- CCLI is reported at an account level (reflecting each purchase), but the information which is displayed within CCLI by credit reporting bodies reflects:
 - (i) the total number of BNPL transactions at the reporting point in time,
 - (ii) an aggregation of other relevant transaction data (for instance, the 'limit' reported is the aggregated total of all transaction limits), and
 - (iii) other variations from the usual approach to CCLI reported, as are considered appropriate (for instance, by not including open/close dates)
- RHI is calculated at an account level (again, reflecting each purchase), but the information which is displayed for RHI in a month by credit reporting bodies would reflect the 'worst' RHI status for that month across all the open accounts.

For example, in respect of credit information being contributed by a BNPL provider that offers BNPL transaction accounts this aggregated view would look like³⁴:

³⁴ We have displayed a three-month snapshot. In practice, this record would extend for up to 24 months.

	June	July	August
Open transactions	5	8	7
Closed transactions	0	2	6
Total current credit limits*	\$895	\$1100	\$1050
RHI value	1	2	2

* Only the total current credit limit for the current month would be displayed to other credit providers who obtain access to the individual's credit report.

Importantly, this approach can be achieved utilising the existing ACRDS (with some minor amendment made to reporting of maximum amount of credit available, as identified as part of the BNPL Facility reporting) and without requirement to make significant other changes.

Appendix B - Application of Credit Reporting and NCCP/NCC (under Option 3) to BNPL summary

Type of BNPL	Key features	Credit reporting (currently)	NCC (if 'credit' under NCC)	NCCP (if 'credit' under NCC)
Both types of BNPL – common features	<ul style="list-style-type: none"> • Payments will be calculated and deducted (by DDR) for each purchase, rather than overall balance owed by customer (for many BNPL products; otherwise may take the form of a 'minimum monthly payment' similar to credit cards) • Accordingly, multiple payments/payment dates in a month are likely (and will depend on the date of the purchase) 	<ul style="list-style-type: none"> • BNPL accounts, including CCLI and RHI*, can currently be reported into credit reporting system (and must be if provider an 'eligible licensee'). • PRDE currently allows suppression of RHI during hardship arrangement as non-NCC regulated and FHI can't be reported (if NCC applied, FHI reportable) • Monthly payments reported as per section 12 of Privacy Regulations and clause 	<ul style="list-style-type: none"> • Disclosure/ credit contract/ variations/ hardship/ enforcement etc requirements of NCC will apply ('NCC-obligations') • May be appropriate to review select NCC-obligations to ensure they work for BNPL, including statements (s32) and eComms (s187) • Related Sale Contract provisions (Part 7) may apply (depending on relationship between provider and seller^). 	<ul style="list-style-type: none"> • Is also 'credit' within NCCP. Provision of BNPL would involve 'credit activity' (and provider must be licenced) • POS exemption (reg 23 NCCP Regs) will exempt merchants unless "the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer" (more relevant for larger BNPLs (e.g. for solar panels); less relevant for small BNPLs).

		<p>8 of CR Code (if provider holds ACL)</p> <ul style="list-style-type: none"> • Credit report will reflect only current 'maximum amount of credit' (either the credit limit if facility account or amortised balance if transaction account. The 2021 Independent review of CR Code has noted that this could be changed to allow historic record of how this has changed. <p>* Subject to provider holding an ACL</p>	<ul style="list-style-type: none"> • Privacy Act hardship regime would apply (i.e. FHI reportable as NCC applies to credit) <p>^ Some BNPL products rely on bilateral arrangements between issuers and merchant. Others are routed through Visa/MasterCard schemes.</p>	<ul style="list-style-type: none"> • BNPL provider will be responsible for conduct of merchants (where they are a 'representative'). Liability potentially joint and several with other BNPL providers (if merchant is representative of multiple suppliers) • RLOs will apply, including credit guide; suitability assessment; • Additional credit card-related RLOs won't apply (without additional changes*) - key fact sheets; restrictions on credit limit increases (s67 NCC would still apply); limit reduction requirements; overlimit requirements; application of payments; interest calculation; termination requirements • Breach reporting will apply
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				<p>* We understand that some BNPL facility-type accounts may use a form of 'card' to initiate a purchase. Whether this is a 'credit card' under 133BA(2) would need to be clarified.</p>
BNPL transaction account	<ul style="list-style-type: none"> • Each purchase is a separate credit contract • Customer may be advised of an indicative/non-contractual 'spend limit' • No contractual 'credit limit' • There may be an overall 'facility' agreement that relates to the technology used to access credit 	<ul style="list-style-type: none"> • 'BNPL Transaction' account type under ACRDS • Each purchase reported as a separate credit contract. • Consumption of data (by consumers and credit providers) will be assisted by work by CRBs to consolidate multiple 'credit contracts' with one provider on single-line basis and develop protocol for reporting default information (across multiple 'credit contracts'). 	<ul style="list-style-type: none"> • Each purchase will be subject to separate pre-contractual disclosure/ credit contract/ variations/ enforcement etc ('NCC multiple contract issue'). • However, definition of 'contract' may create uncertainty for providers, i.e. would the overarching arching arrangement be considered one 'contract' and, if so, what is the nature of that contract ('contract uncertainty issue') • NCC/NCCP multiple contract issues and contract uncertainty issue could be resolved through: 	<ul style="list-style-type: none"> • Would be a small amount credit contract; exception may be necessary • NCCP RLOs would apply in respect of each purchase/ 'credit contract' ('NCCP multiple contract issue'). See NCC-column for ways to address this issue.

			<ul style="list-style-type: none"> ○ Provisions in NCC/ NCCP (e.g. allowing for NCC disclosure via 'master credit contract'; requiring compliance with NCCP RLOs based only on certain triggers); or ○ Providers adopting Facility-type product structure (without material changes to practices/ processes) 	
BNPL facility account	<ul style="list-style-type: none"> • Customer is given a contractual credit limit and may spend up to that limit. Additional credit becomes available as purchases are paid off (i.e. 'continuing credit contract' under NCC) • Each purchase may be subject to its own payments schedule but is <i>not</i> a separate credit contract. 	<ul style="list-style-type: none"> • 'BNPL Transaction' account type under ACRDS • Purchases not reported separately. Information (including CCLI and RHI) would resemble an ordinary 'line of credit'-type account. 	<ul style="list-style-type: none"> • Under NCC, facility would be a 'continuing credit contract' • One credit contract only. NCC-obligations would largely reflect a credit card • 'Limit' must be disclosed (s17) and only increased at request/with consent of customer (s67(4)) agreement 	<ul style="list-style-type: none"> • NCCP RLOs would apply only at contract opening and limit increases.