



Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
Via email: rri.consultation@asic.gov.au

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To whom it may concern,

National Legal Aid (NLA), representing the Directors of the eight Australian State and Territory Legal Aid Commissions (LACs), welcomes the opportunity to respond to ASIC's *Consultation Paper 382: Low cost credit contracts*.

NLA brings together the practice experience of the eight LACs that provide a wide range of services to community members experiencing disadvantage. LAC lawyers who work in consumer law have extensive experience providing specialist advice and representation to vulnerable clients experiencing financial hardship as a result of one or multiple Buy Now Pay Later (BNPL) products. Increasingly, LACs are seeing more and more consumers making use of BNPL products for day to day living expenses such as groceries, as well as essential services such as dental, school supply and veterinary services.

As a result of the significant and increasing financial harm that BNPL products are causing consumers, NLA welcomes the consultation on low cost contracts and in particular the development of new regulatory guidance (RG).

NLA has some concerns in relation to the consultation paper, which are similar to concerns NLA raised in response to the released of the draft legislation to amend the *National Consumer Credit Protection Act 2009* (NCCP).

Sub reg 28HAD – Inquiries about the financial situation of the consumer

Sub regulation 28HAD(6) provides that:

The licensee must also seek to obtain information that the licensee reasonably believes to be substantially correct about the following:

- (a) the income of the consumer;*
- (b) the expenditure of the consumer;*
- (c) any low cost credit contracts, small amount credit contracts or consumer leases to which the consumer is currently a party.*



Treasury's explanatory statement at page 9 states that:

For example, a benchmark could be considered by a credit provider to test whether the information could be reasonably believed to be substantially correct because it is within the range expected for a person in broadly similar circumstances to the consumer. Alternatively, the comparison may indicate that the information provided may not be true. A LCCC licensee may need to regularly monitor and review benchmarks and how to use them to ensure the benchmarks remain appropriate – for example, by assessing data on defaults, complaints, and dispute resolution.

RG 000.29 notes that: “Benchmarks can be useful to test whether the information is plausible because it is within the range expected for a person in broadly similar circumstances to the consumer (alternatively, the comparison may indicate that the information provided may not be true). You need to regularly monitor and review benchmarks and how you use them to ensure they remain appropriate (e.g. by assessing data on defaults, complaints and dispute resolution).”

NLA considers that the guidance about benchmarks in the draft RG is insufficient, noting that there is a provision in RG 209.134 that states that “income and expense benchmarks do not provide any information about the individual consumer, and do not confirm or verify that the information that has been obtained about the consumer is true.” The tone in RG 209 around using benchmarks is more cautionary and detailed, compared with the brief guidance provided in the draft RG. It may also be confusing for stakeholders as to which guidance is to be preferred.

As such NLA recommends that ASIC provide further detailed guidance about the appropriate use of benchmarks in the draft RG to ensure it is consistent and complementary of its guidance in RG 209. In particular, ASIC should consider providing an example of what is an appropriate use of benchmarks in the context of assessing suitability of a low-cost credit contract.

RG 000.59 – Unsuitability assessment policies

RG 000.59 provides that the financial firm must prepare a written policy known as an ‘unsuitability assessment policy’, with Table 3 providing a summary of the requirements.

It is likely that licensees may have unsuitability assessment policies with different components. It is difficult for a consumer to raise a complaint that the licensee did not comply with their unsuitability assessment policy if this policy is not provided to the



consumer. NLA recommends that the regulation be amended to require licensees to provide a copy of their unsuitability assessment policy when requested by a consumer. This would lead to transparency in licensee and consumer interactions and would ensure a fair dispute resolution process for consumer complaints.

Further, the draft RG provides that if the financial firm identifies changes that would better facilitate compliance, they must ensure the policy is revised to incorporate those changes as soon as practicable (reg 28HAF(5)). NLA recommends that ASIC provides guidance to industry that if they identify changes that would better facilitate compliance, they should also consider if any remediation action is appropriate.

Item 17, amendment to regulation 85 of the Credit Regulations by adding subregulation 85(2)

Item 17 amends regulation 85 of the Credit Regulations by adding subregulation 85(2), which sets out the information that a first default in payment notice must contain. The regulations mirror the information that is provided to consumers in default under s88(3) of the National Credit Code.

We welcome ASIC's guidance at RG 000.72 that "A default notice must include the information set out in reg 85(2). To satisfy this obligation, you may use the information in the forms prescribed under reg 85(1) (Credit Form 11 and Credit Form 11A)." However, NLA recommends that it be mandated that the information in the Credit Forms should be used, specifically, that the payment notice should also include the period for remedying the default, and how to contact a financial counsellor, including the number for the credit and debt hotline.

Thank you for the opportunity to comment on *Consultation Paper 382: Low cost credit contracts*. If you require any further information, please feel free to contact myself or

[REDACTED], Executive Director of NLA on [REDACTED] or at [REDACTED].

Kind regards

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[REDACTED]

Director, Legal Aid WA
Chair, NLA Civil Law Network