

**7 March 2025**

██████████  
Chair  
Australian Securities and Investments Commission  
GPO Box 9827  
MELBOURNE VIC 3001

By email: [rri.consultation@asic.gov.au](mailto:rri.consultation@asic.gov.au)

Dear ██████████

### **Buy Now Pay Later Regulatory Guidance**

1. The Law Council of Australia welcomes the opportunity to provide feedback to the Australian Securities and Investments Commission (**ASIC**) in response to Consultation Paper 282 and the draft Regulatory Guide for low cost credit contracts, namely Buy Now Pay Later (**BNPL**) arrangements.
2. This submission is informed by contributions from our Business Law Section's Financial Services Committee (**FSC**) and our Legal Practice Section's Australian Consumer Law Committee (**ACLC**).
3. In the time available, we have not had sufficient opportunity to consolidate the input received into a settled Law Council position on the draft regulatory guidance. Instead, set out below is the feedback that we have received from each of these Committees for the Treasury's consideration.

### **Feedback from the Business Law Section's Financial Services Committee**

#### Proposal B3

4. Proposal B3 is to set out guidance on the mandatory factors that must be considered in determining what constitutes 'reasonable' inquiries about a consumer's requirements, objectives, and financial situation (and the steps taken to verify the information obtained from those inquiries).<sup>1</sup>
5. The FSC observes that, currently, a credit provider is able to determine what constitutes reasonable inquiries depending on the circumstances. The *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (Cth) (**Responsible BNPL Act**) imposes requirements that—although they are mandatory and somewhat prescriptive—appear to be intended to be scalable and somewhat flexibly applied.

---

<sup>1</sup> ASIC, *Low cost credit contracts* ([Consultation Paper 382](#), February 2025) 9.

6. While the Explanatory Memorandum to the originating Bill includes similar details to the draft Regulatory Guide about the relevant factors that must be considered,<sup>2</sup> they are drafted in a prescriptive manner in the Regulatory Guide.<sup>3</sup> For example, the heading for Table 2, at page 13 of the draft Regulatory Guide, reads, 'Mandatory factors to consider as part of "reasonable" inquiries and verification'.<sup>4</sup>
7. The FSC's preference is that the Regulatory Guide does not introduce additional mandatory requirements, and instead provides practical examples.
8. The FSC recommends that ASIC amend the heading for Table 2, and other language in the draft Regulatory Guide, so that it is less prescriptive, such as by removing or replacing the word 'mandatory'.

#### Proposal B4

9. Proposal B4 is to include guidance on the rebuttable presumptions that low cost credit contracts with a credit limit up to \$2,000 (or a threshold prescribed by the regulations) will:
  - (a) meet the consumer's requirements and objectives, for the purpose of section 131 of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**); and
  - (b) be presumed to be 'not unsuitable' in terms of meeting the consumer's requirements and objectives for the purpose of section 133 of the Credit Act.<sup>5</sup>
10. The FSC has advised that the guidance could be clearer. RG 000.39 clarifies that, while a presumption can be made about suitability where the amount is less than \$2,000, the requirement to make reasonable inquiries remains. However, what is a reasonable inquiry has also presumably shifted, particularly because (as per RG 000.42) only where the presumptions do not apply must the provider assess whether the requirements and objectives are met.
11. The FSC considers that ASIC could potentially provide further guidance about whether a more simplified approach to meeting those inquiry requirements is sufficient (given that the information is not being critically assessed).

#### Proposal B5

12. Proposal B5 is to include guidance on assessments for low cost credit contracts that are larger than the initial limit provided, including on making the initial assessment, making protected increases, and the interaction with the rebuttable presumptions.<sup>6</sup>
13. The FSC supports the proposed guidance and, in general, finds it clear and appropriate, subject to the comments and suggestions outlined below.

---

<sup>2</sup> Explanatory Memorandum, Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 and Capital Works (Build to Rent Misuse Tax) Bill 2024, 60.

<sup>3</sup> ASIC, *Low cost credit contracts* ([Regulatory Guide 000](#), February 2025) 12-14.

<sup>4</sup> Ibid 12.

<sup>5</sup> ASIC, *Low cost credit contracts* ([Consultation Paper 382](#), February 2025) 10.

<sup>6</sup> Ibid.

14. Firstly, new section 133BXD of the Credit Act will introduce the concept of an unsuitability assessment for a larger amount than the credit limit of the initial contract (as defined in subsection 133BXD(1)). This approach is intended to support the current practice of many providers, by which an initial credit limit is increased over time, as the customer gains a positive track record in meeting their obligations with the provider.
15. The FSC suggests that it may assist providers if the draft Regulatory Guide (at paragraphs 000.45 to 000.49) included a reminder that the reasonable inquiries, verification and assessment undertaken are not limited to the consumer's financial situation. These inquiries should include consideration of the consumer's requirements and objectives, and should also investigate anticipated changes in the consumer's circumstances over the two-year protected period (as defined in the Responsible BNPL Act).
16. The FSC observes that this reform is a partial departure from the policy position taken in Division 4 of Part 3-2B of the Credit Act, in the sense that it provides for a credit contract with built-in future increases to the credit limit. This is understandable, from the perspective of the credit provider seeking to utilise the benefit of a growing history with their customer. However, it is a very specific—and potentially unusual—consumer objective to seek a credit facility with automatic future limit increases (or to be willing to wait for these increases to be granted).
17. Secondly, the proposed guidance at paragraph 000.47 adopts the drafting of the Responsible BNPL Act when it refers to the assessment being larger than the amount of credit that is initially 'entered into'.<sup>7</sup> This paragraph should be revised to include a timing element. Specifically, the FSC suggests that, to avoid confusion between the assessment (that is 'made' or 'begins'), and the credit contract (that is 'entered into'), the relevant point in time identified in paragraph 000.47 of the Regulatory Guide should be '2 years from when the initial assessment begins'.
18. Thirdly, paragraph 000.51 of the Regulatory Guide asserts that a protected increase 'must' be at the request of the consumer or with the consumer's written consent.<sup>8</sup> Given the importance of this issue, the FSC considers that:
  - (a) the statutory support for the imperative should be cited; or
  - (b) the drafting of the paragraph should be clarified (e.g., by replacing 'must' with 'should') to assist providers to distinguish between ASIC's view of good practice and their regulatory obligations.

---

<sup>7</sup> ASIC, *Low cost credit contracts* ([Regulatory Guide 000](#), February 2025) 16; *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (Cth) sch 2, item 18(1).

<sup>8</sup> ASIC, *Low cost credit contracts* ([Regulatory Guide 000](#), February 2025) 16.

## Feedback from the Legal Practice Section's Australian Consumer Law Committee

19. The Treasury recently conducted a public consultation on the draft National Consumer Credit Protection Amendment (Low Cost Credit) **Regulations** 2025.<sup>9</sup> The ACLC provided a submission in response to this consultation on 14 February 2025.<sup>10</sup> ASIC is encouraged to have regard to that submission, given the overlapping subject matter.

### RG 000.29

20. Regarding inquiries about the financial situation of the consumer, draft sub-regulation 28HAD 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.*

21. The Treasury's accompanying draft Explanatory Statement to the Regulations states:<sup>11</sup>

*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 [low cost credit contract] 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.*

22. In ASIC's draft Regulatory Guide, RG 000.29 notes that:<sup>12</sup>

*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).*

---

<sup>9</sup> The Treasury, *Buy Now Pay Later Draft Regulations 2025* ([Web Page](#), 2025).

<sup>10</sup> Law Council of Australia (Legal Practice Section), *Buy Now Pay Later Draft Regulations 2025* ([Submission](#), 14 February 2025).

<sup>11</sup> [Draft Explanatory Statement](#), National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2025, 9.

<sup>12</sup> ASIC, *Low cost credit contracts* ([Regulatory Guide 000](#), February 2025) 11.

23. The ACLC does not consider that this guidance about benchmarks in the draft Regulatory Guide goes far enough. By contrast, the ACLC highlights that ASIC provides guidance in Regulatory Guide 209 that:<sup>13</sup>

*... 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 by the consumer is true.*

The ACLC observes that the language and tone in RG 209 regarding using benchmarks is more cautionary and detailed, compared with the brief guidance provided in the draft Regulatory Guide. The ACLC anticipates that these differences may lead to confusion for stakeholders as to which guidance is to be preferred.

24. The ACLC recommends that ASIC provides detailed guidance about the appropriate use of benchmarks in the draft Regulatory Guide, that is consistent with—and complementary to—the existing guidance contained in RG 209. Further, ASIC could consider providing an example of what is an appropriate use of benchmarks, in the context of assessing the suitability of a low cost credit contract.

#### RG 000.59

25. RG 000.59 provides that the financial firm must prepare a written policy, known as an ‘unsuitability assessment policy’, with Table 3 in the draft Regulatory Guide outlining a summary of the requirements.<sup>14</sup>
26. The ACLC suggests that the draft Regulatory Guide could be amended to require licensees to provide a copy of their unsuitability assessment policy when requested by a consumer. This requirement would contribute to transparency in licensee and consumer interactions, and would help to ensure a fair dispute resolution process for consumer complaints.
27. Further, Table 3 in the draft Regulatory Guide states that:<sup>15</sup>

*If you identify changes that would better facilitate compliance, you must ensure the policy is revised to incorporate those changes as soon as practicable: reg 28HAF(5).*

The ACLC suggests that ASIC could consider providing guidance to industry that, if they identify changes that would better facilitate complaint, they should also consider whether any remediation action is appropriate.

#### RG 000.72

28. Item 17 of the Treasury’s draft Regulations seeks to amend regulation 85 of the *National Consumer Credit Protection Regulations 2010* (Cth) by adding subregulation 85(2), which sets out the information that a first default in payment notice must contain. The draft Regulations mirror the information that is provided to consumers in default, under subsection 88(3) of the National Credit Code.

---

<sup>13</sup> ASIC, *Credit licensing: Responsible lending conduct* ([Regulatory Guide 209](#), December 2019) 209.134.

<sup>14</sup> ASIC, *Low cost credit contracts* ([Regulatory Guide 000](#), February 2025) 18.

<sup>15</sup> *Ibid.*

29. The ACLC welcomes ASIC's proposed guidance at RG 000.72 that:<sup>16</sup>

*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).*

30. The ACLC suggests that ASIC could consider mandating that the information in the Credit Forms be used. Specifically, the payment notice should also include the period for remedying the default, and how to contact a financial counsellor, including the phone number for the National Debt Hotline.

### **Contact**

31. We appreciate the opportunity to contribute to this consultation. If the Law Council can be of further assistance to ASIC, please contact [REDACTED], Senior Policy Lawyer, at [REDACTED] or on [REDACTED].

Yours sincerely

[REDACTED]

[REDACTED]  
**President**

---

<sup>16</sup> Ibid 22.