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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT BILL 2024: BUY NOW, PAY LATER

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ASIC	Australian Securities and Investments Commission
AFCA	Australian Financial Complaints Authority
Bill	Treasury Laws Amendment Bill 2024: Buy now, pay later
BNPL	Buy Now, Pay Later
Credit Act	<i>National Consumer Credit Protection Act 2009</i>
Credit Code	National Credit Code as set out in Schedule 1 to the <i>National Consumer Credit Protection Act 2009</i>
LCCC	Low cost credit contract
RLOs	Responsible lending obligations

Chapter 1: *Buy Now, Pay Later*

Outline of chapter

- 1.1 The Bill amends the Credit Act and the Credit Code to provide a means for regulating LCCCs, which include BNPL arrangements. LCCCs are continuing or non-continuing credit contracts that involve the provision of credit to consumers that is low cost, interest free, and generally short term.
- 1.2 The new regulatory framework for LCCCs is intended to maintain the benefits of consumer access to these kinds of credit products, while providing appropriate and proportionate protections. The Bill seeks to achieve this outcome by the following means:
 - ensuring that LCCCs are a form of credit regulated under the Credit Act and extending the application of the Credit Code to cover LCCCs;
 - requiring providers of LCCCs to hold and maintain an Australian credit licence, and comply with the relevant licensing requirements and licensee obligations, with some modifications to ensure regulation is proportionate;
 - modifying the existing RLO framework to create an opt-in RLO framework that scales better with the risks posed to consumers, including requiring providers of LCCCs to develop and review a written policy on assessing whether each LCCC would be unsuitable for the relevant consumer; and
 - establishing anti-avoidance protections to prevent LCCC providers from structuring their business models to avoid regulation.

Context of amendments

- 1.3 Safe and well-regulated markets for consumer credit products are necessary for an efficient financial system. Credit products allow consumers to smooth the up-front cost of purchasing a good or service over a period of time for a fee or charge.
- 1.4 Historically, credit regulation in Australia has focused on protecting consumers from deceptive or predatory lending practices and being charged excessively

- high fees. This is reflected in the Credit Act, which does not apply to low cost continuing credit and low cost, short term credit products.
- 1.5 In recent years, advancements in technology have enabled credit businesses to build a profitable market for low cost credit and credit-like arrangements. These arrangements are currently covered by the low cost continuing and short term credit exemptions in the Credit Code.
 - 1.6 New credit products, such as BNPL arrangements, can offer consumers a cheaper and easier way to access forms of credit when compared to most traditional forms of credit such as credit cards, payday loans, and consumer leases.
 - 1.7 BNPL arrangements generally involve a third-party financing entity that provides consumers with finance to pay for purchases of goods, services, and the payment of bills.
 - 1.8 BNPL consumers are charged low (or no) fixed fees and no (or potentially depending upon the exemption relied upon, low) interest for using the finance. BNPL providers generally also charge the merchant a service fee for accepting the BNPL transaction.
 - 1.9 BNPL providers do not provide cash to consumers. Instead, they pay the merchant the value of the purchase upfront (less the merchant fee). Providers then collect repayments from consumers in instalments (typically four instalments).
 - 1.10 In Australia, BNPL transactions accounted for the equivalent of approximately 2 per cent of Australian card purchases during the 2022 financial year. BNPL products that provide spending limits of less than \$2,000 are most popular in Australia. A small proportion of the BNPL market offers products with spending limits of up to \$30,000; for example, for solar and renewable energy home upgrades.
 - 1.11 These new credit products have a range of benefits to both consumers and the economy. They also place competitive pressure on traditional forms of credit, reducing the cost of some products and triggering innovation in product design. BNPL has also generated increased business for merchants, as consumers have been able to access additional forms of credit to spend on goods and services.
 - 1.12 In some cases, financial inclusion has been improved as members of some groups with limited access to mainstream credit (ie, credit cards), have been able to access low cost credit through BNPL arrangements. It has also been observed that some users of other more expensive and more problematic forms of credit have shifted to using BNPL instead.
 - 1.13 BNPL arrangements are already covered by some *Australian Securities and Investments Commission Act 2001* consumer protection provisions, including those relating to misleading, deceptive and unconscionable conduct. BNPL products are also subject to Product Intervention Power and Design and

Distribution Obligation regimes under the *Corporations Act 2001* (Corporations Act).

- 1.14 Self-regulation has contributed to the development of industry standards. Many BNPL providers, accounting for approximately 90 per cent of all accounts, adhere to the Australian Finance Industry Association’s voluntary Buy Now Pay Later Industry Code (BNPL Code), which came into effect on 1 March 2021. Breaches of the BNPL Code are subject to monitoring, investigation and sanctions by the Buy Now Pay Later Code Compliance Committee. Consumers can also obtain remedies against BNPL Code members from AFCA, or directly against members through contract law. However, the BNPL Code is not enforceable by ASIC and the failure of BNPL Code signatories to comply with its obligations does not attract criminal or civil penalties.
- 1.15 As noted above, BNPL arrangements are not regulated under the Credit Act because they typically fall under the exemptions available to certain types of credit in the Credit Code. Credit products that operate within these exemptions are not subject to responsible lending standards or other requirements of the Credit Act, and providers do not need an Australian credit licence.
- 1.16 The growth of the BNPL market sector was not contemplated by policy makers when the exemption under which they operate was designed. Other forms of third-party merchant finance did exist at that time. However, innovation in technology and business models has resulted in new credit products operating under these exemptions with far greater levels of accessibility, convenience, immediacy and volumes than originally envisaged. While this is not a reason for regulation per se, poor consumer outcomes are being observed in some cases at sufficient levels to justify regulatory intervention.
- 1.17 The key concerns that have been identified relate to unaffordable lending practices, unsatisfactory complaint resolution and hardship assistance, the charging of excessive late payment fees, and a lack of transparency surrounding product disclosures and warnings.
- 1.18 The industry is not homogenous; different providers offer a range of diverse products. As a result, the nature and severity of the concerns vary from product to product, and from provider to provider.
- 1.19 Australian consumers and merchants have benefited from the rise of the BNPL industry. It is important to ensure that these benefits balance any changes to the regulatory framework aimed at addressing the risk of consumer harm.

Summary of new law

- 1.20 The objective of the Bill is to regulate LCCCs by bringing them within the scope of the Credit Act and Credit Code. The regulatory framework set up by the Bill will apply to BNPL contracts and arrangements, and will also be able to capture other classes of LCCC in the future (such as wage advances).

The Credit Act

- 1.21 The Bill defines a BNPL contract as a type of LCCC. It also provides for other classes of LCCC to be prescribed by regulations.
- 1.22 Credit providers will be prohibited from engaging in behaviour that has the effect of restructuring their credit activities so as to fall outside the regulatory framework for LCCCs.
- 1.23 LCCC providers will be subject to the licensing requirements in Chapter 2 of the Credit Act. They will be required to hold and maintain an Australian credit licence and comply with the relevant licensing requirements and licensee obligations.
- 1.24 Where an LCCC provider already holds an Australian credit licence, they may be required to apply for a variation of the authority under their licence to cover the provision of LCCCs under section 45 of the Credit Act. Those who do not hold a licence will be required to obtain one.
- 1.25 If the provision of credit satisfies the requirements governing LCCCs, and could also be characterised as credit provided under a small amount credit contract or a medium amount credit contract, the credit contract in question will be regulated as an LCCC only.
- 1.26 The Reference Checking and Information Sharing Protocol will not apply to LCCC providers. This protocol sets out reference checking and information sharing obligations for licensees and credit representatives in the mortgage industry. These obligations have minimal application to the LCCC business model.
- 1.27 Credit representatives of LCCC providers will not be required to meet requirements relating to sub-authorisation and associated reporting, credit guide provision and AFCA membership unless they are engaging in debt collection.
- 1.28 ASIC will retain the power to suspend, cancel, and vary an LCCC provider's Australian credit licence in accordance with Division 6 of Part 2-2 of the Credit Act.
- 1.29 Licensees that are LCCC providers will be subject to a modified version of the existing scalable RLOs. This will require LCCC providers to assess whether entering into a credit contract or increasing a consumer's credit limit would be unsuitable for the consumer. The modified RLOs will require LCCC providers to take appropriate and proportionate steps to assess the suitability of lending. They will be required to document and review their RLO policies and procedures.
- 1.30 LCCC providers will be able to choose whether to comply with the bespoke RLO framework for LCCCs or with all of the existing responsible lending requirements in Divisions 1 to 4 of Part 3-2 of the Credit Act. This will allow

firms offering both LCCCs and currently regulated consumer credit products to use common responsible lending processes if they wish.

- 1.31 Currently, regulated consumer credit products are subject to principles-based obligations to make reasonable enquiries into, and reasonable verification of, the financial circumstances of the borrower (referred to collectively as ‘reasonable steps’), before assessing the suitability of any proposed credit offering. The scope of these reasonable steps by implication affects the intensity of the suitability assessment that is required.
- 1.32 While these provisions will still apply to LCCCs, the nature of these obligations will be influenced by consideration of a range of factors relating to the risks of unaffordable lending occurring and expected harm mitigation if unaffordable lending does occur. These factors primarily relate to the risks arising from the product and target market, and non-responsible lending processes to mitigate these risks and harms.
- 1.33 Broadly speaking, the factors are expected to operate to effect a reduction in what is reasonably required in conducting reasonable lending assessments compared to what would otherwise apply under Part 3-2. However, the modified RLOs might not have this effect if, for example, a provider was targeting a particularly risky target market or had poor product design.
- 1.34 In order to balance this increased scalability, the modified RLOs for LCCCs will include:
- compliance with additional requirements, to be prescribed in regulations, before entering into a new LCCC with a consumer; and
 - a requirement to have a written policy which contains certain matters, is evidence-based and regularly reviewed.
- 1.35 There are no additional specific civil penalty provisions to accompany the modified RLO framework, as the law is drafted so that breaches of the obligations will be considered as breaches of the current licensee obligations. This could result in a range of remedies including cancellation or suspension of the licence. Further, as the modified regime operates on top of the existing RLO regime, LCCC providers will be subject to a range of existing penalty provisions.

The Credit Code

- 1.36 The Credit Code is intended to apply to LCCCs and LCCC providers, with minor modifications. The requirements relating to interest rates and charges will only apply to LCCC providers that charge interest on the provision of credit. LCCC providers will also be permitted to prompt consumers to increase their credit limit.
- 1.37 Part 10 of the Credit Code sets out requirements relating to comparison rates to enable consumers to determine the ‘true’ cost of the credit offered by the credit provider. This will not apply to LCCCs. Given that a relatively small portion of

LCCC fees are charges to consumers (as opposed to merchants), comparison rates may be more likely to mislead consumers rather than assist them.

- 1.38 The default notice requirements in section 87 of the Credit Code will be expanded beyond direct debit to cover a broader range of payment types, including creditor-initiated charges on a credit card and creditor-initiated charges via the New Payment Platform’s PayTo service.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
<i>Regulating low cost credit contracts</i>	
LCCCs constitute the provision of credit to which the Credit Code applies. As such, they are excluded from the exemptions in subsections 6(1) and 6(5) of the Credit Code. BNPL contracts are LCCCs; other subclasses may be prescribed in regulations.	LCCCs are not regulated under the Credit Act or Credit Code.
<i>Obligations of low cost credit contract providers</i>	
LCCC providers are subject to the licensing requirements in Chapter 2 of the Credit Act. Providers are required to hold and maintain an Australian credit licence and comply with the relevant licensing requirements and licensee obligations.	LCCC providers are not subject to the licensing requirements in Chapter 2 of the Credit Act.
The Credit Code applies in relation to LCCCs. Mandatory disclosure obligations relating to interest rates and charges only apply to LCCC providers that charge interest on the provision of credit. Part 10 of the Credit Code, which deals with comparison rates, does not apply to LCCCs.	The Credit Code does not apply in relation to LCCCs.
<i>Modified RLO regime</i>	
LCCC providers can choose whether to comply with the modified RLO regime for	LCCC providers are not required to comply with the RLOs.

New law	Current law
LCCCs, or with all of the existing responsible lending requirements in Divisions 1 to 4 of Part 3-2 of the Credit Act.	
The extent of the reasonable enquiries and verifications required, upon which the unsuitability test is applied, will scale due to risk factors relating to the product design, target market and risk and harm mitigation arrangements.	Responsible lending obligations do not apply.
Where the credit limit of an LCCC is less than \$2,000 a presumption applies that the contract will not be unsuitable due to not meeting the requirements and objectives of the consumer, if entered into during the relevant assessment period.	Responsible lending obligations do not apply.
During the relevant assessment period, an LCCC provider is able to increase the credit limit of the contact up to the total of less than \$2,000 with the consent of the borrower.	Responsible lending obligations do not apply.
LCCC providers may conduct RLO assessments for amounts higher than the initial credit limit provided, which will cover credit limit increases up to that amount within 2 years.	Responsible lending obligations do not apply.
LCCC providers must have and review a written policy (unsuitability assessment policy) that sets out how the provider will assess whether the contract is unsuitable.	Responsible lending obligations do not apply.

Detailed explanation of new law

- 1.39 The Bill amends the Credit Act to create a modified regulatory framework that LCCC providers can opt in to for some or all LCCC products they offer. When the modified regulatory framework does not apply, the LCCC provider (and the LCCC products it offers) will be subject to the existing RLO framework in Divisions 1 to 4 of Part 3-2 of the Credit Act.

Defining low cost credit contracts

1.40 The Bill introduces definitions for the key terms ‘buy now pay later arrangement’, ‘buy now pay later contract’, and ‘low cost credit contract’. These terms will be defined in the Credit Code and referenced in signpost definitions in the Credit Act.

[Schedule 1, Part 1, items 1, 5-6, subsection 5(1) of the Credit Act and sections 13C, 13D and 204 of the Credit Code]

1.41 The definition of ‘low cost credit contract’ provides that a contract is an LCCC if:

- credit is, or may be, provided under the contract; and
- the contract is a buy now pay later contract, or a contract of a kind prescribed by the regulations; and
- the period during which credit is, or may be, provided under the contract is no longer than the period (if any) prescribed by the regulations; and
- the contract satisfies any requirements prescribed by the regulations that relate to fees or charges payable under the contract; and
- the contract satisfies any other requirements prescribed by the regulations.

1.42 Although this definition only currently applies to BNPL contracts, other types of credit contracts may be brought within scope by future amendments to the regulations.

1.43 A ‘buy now pay later arrangement’ is an arrangement for goods or services between a merchant and a retail client under which the BNPL provider directly or indirectly pays the merchant an amount that is some or all of the price of the goods or services, and where there is a contract between the BNPL provider and the retail client under which the BNPL provider provides credit to the retail client in relation to the transaction.

- However, certain arrangements are excluded, including arrangements by merchants whose principal business is the supply of administration, brokerage, management, collection, recovery or other incidental services in connection with the provision of credit under credit contracts.
- Certain circumstances are stated not to affect whether an arrangement is a BNPL arrangement. These include whether any fees or charges are payable by the retail client or the merchant in connection with the arrangement; when payment by the BNPL provider occurs; whether the contract is a continuing credit contract. It is also not necessary for

the arrangement to include any contract to which the merchant, retail client and BNPL provider are all parties.

1.44 The definitions of BNPL and LCCC will operate in conjunction with any other criteria prescribed in regulations, including maximum fees and charges.

1.45 A ‘buy now pay later contract’ is defined as a contract between the BNPL provider and a retail client and pursuant to a BNPL arrangement, under which the BNPL provider provides credit to the retail client in connection with a transaction between the merchant and retail client for goods or services.

The definitions of ‘short term credit contract’, ‘small amount credit contract’ and ‘medium amount credit contract’ will be amended to exclude LCCCs.

[Schedule 1, Part 1, item 7, subsection 204(1) of the Credit Code]

Extending the application of the National Credit Code

1.46 The Bill will amend the Credit Code to extend its application to the provision of credit under an LCCC.

Responsible lending conduct

1.47 Licensees that are LCCC providers will, when the Bill takes effect, be required to choose between:

- the current ‘full’ version of the RLOs in Divisions 1 to 4 of Part 3-2 of the Credit Act; and
- the new RLOs for LCCCs, which allow the requirements to expressly scale according to certain risk factors.

However, all LCCC providers will be exempted from compliance with Division 4 of Part 3-1 of the Credit Act (which relates to obligations on credit assistance providers before providing credit assistance for credit contracts), regardless of their choice.

[Schedule 1, Part 2, item 8, section 115A of the Credit Act]

1.48 Section 128 of the Credit Act sets out the obligation to assess the unsuitability of credit contracts.

1.49 The Bill clarifies the operation of this section, specifically, how it is to be affected by other provisions in relation to certain low cost credit contracts.

[Schedule 1, Part 2, items 9 and 10, section 128 of the Credit Act]

1.50 The Bill amends section 133(4)(b) of the Credit Act to clarify that a responsible lending assessment can occur on the same day as credit is offered or credit limits are increased, so long as the assessment happens before either

of those actions occur. This clarification applies to all relevant credit activities, not just in relation to LCCCs.

[Schedule 1, Part 2, item 11, paragraph 133(4)(b) of the Credit Act]

Licensees that are credit providers under credit contracts

1.51 The Bill sets out additional rules relating to LCCCs, namely:

- the process by which LCCC providers can elect for the additional rules to apply;
- the additional requirements applying to licensees that have assessed an LCCC as unsuitable; and
- the requirement on licensees to have and review an unsuitability assessment policy.

[Schedule 1, Part 2, item 12, Part 3-2BA of the Credit Act]

1.52 As noted above, the Bill allows LCCC providers to elect to be bound by the modified LCCC RLO regime in relation to some or all of their LCCC products.

1.53 Elections must be in writing, and the licensee making the election must keep a written copy for the specified period (approximately 6 years, depending on stated circumstances). Where a licensee does not elect to be subject to the modified regime (or elects for only certain LCCC products to be subject to the regime), the existing RLO regime will apply to the extent relevant.

[Schedule 1, Part 2, item 12, section 133BXA of the Credit Act]

1.54 The Bill introduces definitions for the key terms ‘low cost credit conduct’, and ‘unsuitability assessment policy’ for the purposes of the new licensing rules for LCCCs.

[Schedule 1, Part 2 item 12, section 133BXB of the Credit Act]

1.55 The explanations below apply to the extent that a provider has elected to operate under the modified RLO framework.

Unsuitable low cost credit contracts

1.56 Division 3 of Part 3-2 of the Credit Act contains the core obligations in the existing RLOs regime to assess the suitability of credit contracts. These include requirements to:

- make reasonable enquiries as to the requirements and objectives of the consumer; and
- make reasonable enquiries as to their financial situation; and
- take reasonable steps to verify their financial situation; and

- subsequently assess whether the credit contract will be unsuitable (including an assessment of affordability and whether the credit meets the requirements and objectives of the consumer).

1.57 Under the new regime for assessing suitability inserted by the Bill, LCCC providers will still be required to perform the steps listed in the paragraph above before entering into an LCCC or increasing a consumer’s credit limit. However, the modified framework:

- allows the regulations to provide greater flexibility in determining when enquiries and verification must occur in relation to the assessment of suitability; and
- gives explicit authority for the provider to take into account various risk factors (‘relevant matters’) in determining reasonable enquiries and reasonable verification (‘reasonable steps’); and
- clarifies that it is possible to meet these reasonable steps solely based on information provided by a consumer, if the circumstances support this; and
- clarifies that it is possible that reasonable steps may involve applying general rules set by the provider, if the circumstances support this; and
- clarifies that it is possible that reasonable steps may rely upon the application of presumptions; and
- clarifies that a provider may conduct inquiries and an assessment for an amount of credit larger than that initially offered to the consumer, and that this assessment will also suffice for any subsequent credit limit increases up to that amount, up to a period of 2 years; and
- creates a rebuttable presumption for LCCCs with a credit limit of less than \$2,000 that the requirements and objectives limb of the unsuitability test is met, when granting credit or increasing a credit limit.

[Schedule 1, Part 2, item 12, Part 3-2BA Division 2 of the Credit Act]

1.58 LCCC providers can satisfy the obligations in section 128 of the Credit Act to make an assessment and inquiries and verification on the credit day, or within 90 days (or the period prescribed by the regulations) before the credit day. Thus, LCCC providers are permitted to grant same-day approval for applications to enter into an LCCC or credit limit increase.

[Schedule 1, Part 2 item 12, section 133BXC of the Credit Act]

1.59 LCCC providers are not required to undertake a preliminary assessment prior to indicating to a consumer that the consumer is eligible for a credit contract or credit limit increase.

[Schedule 1, Part 2 item 12, subsection 133BXC(1) of the Credit Act]

- 1.60 The assessment of whether inquiries made are reasonable pertains to licensees engaging in ‘low cost credit conduct’. This is defined as the same conduct mentioned in paragraphs 128(a) and (b) of the Credit Act, which is any conduct where the licensee enters, or increases the credit limit of, an LCCC with a consumer who will be the debtor under the contract.

[Schedule 1, Part 2 item 12, subsection 133BXD(1) of the Credit Act]

- 1.61 The relevant matters in determining reasonable steps include: the nature of the product; the target market for the product (including whether it contains financially vulnerable persons); the existence of, and compliance with, any policies that reduce the risk of unaffordable lending and mitigate harms arising from unaffordable lending if it occurs; and any other matters prescribed by regulations. These matters do not limit what may be taken into account in determining what is reasonable.

[Schedule 1, Part 2 item 12, subsections 133BXD(2) and (3) of the Credit Act]

- 1.62 Relevant matters relating to product design that may influence what is required to meet the ‘reasonable steps’ requirements may include the amount of credit made available, and other terms of the contract including the amount of any default fees (and circumstances in which they are payable) and the time provided for making repayments.

[Schedule 1, Part 2 item 12, paragraph 133BXD(3)(a) of the Credit Act]

- 1.63 The lender may have historical data on the likely credit risks associated with the target market for their product, including data on bad debt rates, arrears rates, hardship arrangements and complaints relating to unaffordability. These will be relevant to determining how the target market for the product impacts on what is required to meet the ‘reasonable steps’ requirements. Exclusion of higher risk customer groups from a product’s target market would be expected to reduce the extent of the steps that need to be taken.

- 1.64 The reference to ‘target market’ is to the target market defined in the Target Market Determination for the product, as required by the Design and Distribution Obligation regime in Part 7.8A of the Corporations Act.

[Schedule 1, Part 2 item 12, paragraph 133BXD(3)(b) of the Credit Act]

- 1.65 Whether or not the target market includes certain classes of financially vulnerable consumers will be relevant, as will any data that providers possess of the kind referred to above in relation to those vulnerable cohorts.

[Schedule 1, Part 2 item 12, paragraph 133BXD(3)(c) of the Credit Act]

- 1.66 Providers may have policies that, while designed for other purposes, nonetheless have the effect of reducing the risk of unaffordable lending or mitigating harm where unaffordable lending does occur. For example, providers may cut off access to credit in the event of customer arrears or defaults, undertake supplementary real-time monitoring of creditworthiness

during the life of the product, or have policies governing when credit limits are to be increased or decreased. Harm mitigation could also include the provider's approach to debt collection, hardship applications, and engaging with vulnerable consumers.

- 1.67 The existence of such policies, and the provider's compliance with them, would be expected to decrease a product's consumer risk. The reasonable steps would decrease accordingly.

[Schedule 1, Part 2 item 12, paragraphs 133BXD(3)(d) and (e) of the Credit Act]

- 1.68 Additionally, in making reasonable inquiries and taking reasonable steps about the consumer's requirements and financial situation, any matters prescribed by the regulations must be taken into account. These may include the types of information the licensee must use in the assessment of unsuitability; the content and level of detail of the information to be used; whether the information in the licensee's possession is sufficient; and whether and to what extent a licensee may obtain additional information from the consumer.

[Schedule 1, Part 2 item 12, paragraph 133BXD(3)(f) of the Credit Act]

- 1.69 A licensee is taken to have provided credit to the consumer on terms that are not affordable for the consumer if they engage in low cost credit conduct contravening the prohibition on entering, or increasing the credit limit of, unsuitable credit contracts in section 133 of the Credit Act.

[Schedule 1, Part 2 item 12, subsection 133BXD(4) of the Credit Act]

- 1.70 The ability to take relevant matters into account in assessing compliance with section 130 of the Credit Act is not intended to displace regulations made for the purposes of subsection 130(2).

[Schedule 1, Part 2 item 12, subsection 133BXD(5) of the Credit Act]

- 1.71 A licensee will not be presumed to have failed to satisfy section 130 of the Credit Act merely on the basis of having relied on information or documents provided by the consumer, or having followed a general policy about the inquiries to be made or the steps to be taken, in certain kinds of cases, or having relied on certain presumptions about the consumer.

[Schedule 1, Part 2 item 12, subsection 133BXD(6) of the Credit Act]

Assessments in relation to larger contracts

- 1.72 The modified RLO framework inserted by the Bill also includes clarifications on requirements for assessments in relation to larger contracts. The Bill includes definitions for the key terms 'initial contract', 'larger contract', 'protected increase', and 'protected period' for the purposes of the new section regarding assessments in relation to larger contracts.

[Schedule 1, Part 2 item 12, subsection 133BXE(1) and (6) of the Credit Act]

- 1.73 The Bill clarifies that a provider is taken to have satisfied their obligations to assess unsuitability under section 128 of the Credit Act, if they conduct initial inquiries and an assessment for a larger contract that represents an amount of credit larger than the credit limit of the initial contract; and has terms that are otherwise substantially the same as the terms of the initial contract when the initial contract is entered, and that the outcome of this initial assessment will also suffice for any subsequent credit limit increases up to that amount, up to a period of 2 years, thereby allowing for a protected increase.

[Schedule 1, Part 2 item 12, subsections 133BXE(1)-(4) of the Credit Act]

- 1.74 A protected increase of the initial contract is an amount that is no greater than the maximum credit limit made within the protected period, which is the shorter of the period covered by the initial assessment or the period of 2 years beginning when the period covered by the initial assessment begins.

[Schedule 1, Part 2 item 12, subsection 133BXE(6) of the Credit Act]

- 1.75 However, should circumstances change, a licensee is not precluded from making a new assessment in relation to the protected increase at any time after making the initial assessment and before allowing the increase to the credit limit of the initial contract.

[Schedule 1, Part 2 item 12, subsection 133BXE(5) of the Credit Act]

Presumptions where the credit limit of the contract is less than \$2,000

- 1.76 Section 131 of the Credit Act sets out the requirements of when to assess a credit contract as unsuitable for the consumer. The Bill includes a presumption that can be relied upon by LCCC providers when determining for the purposes of section 131, whether an LCCC is unsuitable.

[Schedule 1, Part 2 item 12, section 133BXF of the Credit Act]

- 1.77 In relation to a licensee entering an LCCC with a consumer, if the credit limit of the initial contract, at the time the initial contract is entered is less than \$2,000, then the initial contract is presumed to meet the consumer's requirements or objectives limb of the unsuitability test, if the contract is entered into in the period covered by the assessment as required by paragraph 131(2)(b) of the Credit Act. The presumption operates unless the contrary is proved.

[Schedule 1, Part 2 item 12, subsection 133BXF(2) of the Credit Act]

- 1.78 The presumption will not apply where a licensee has entered into an initial contract based on an assessment made in relation to entering a larger contract with the consumer and the credit limit of the larger contract is \$2,000 or greater.

[Schedule 1, Part 2 item 12, subsection 133BXF(3) of the Credit Act]

- 1.79 In relation to a licensee increasing the credit limit of an LCCC with a consumer, if the credit limit of the initial contract after the increase will be less than \$2,000, then the initial contract is presumed to meet the consumer's requirements or objectives limb of the unsuitability test, if the relevant increase occurs in the period covered by the assessment as required by paragraph 131(2)(b) of the Credit Act. The presumption operates unless the contrary is proved.

[Schedule 1, Part 2 item 12, subsection 133BXF(4) of the Credit Act]

- 1.80 The presumption also applies in relation to assessments for future larger contracts. However, the presumption will not apply where a licensee has increased the credit limit of an initial contract based on an assessment made in relation to a larger contract with the consumer of \$2,000 or greater.

[Schedule 1, Part 2 item 12, subsection 133BXF(5) of the Credit Act]

Prohibition on entering unsuitable low cost credit contracts

- 1.81 Section 133 of the Credit Act details the prohibition on entering, or increasing the credit limit of, unsuitable credit contracts. Under the modified RLO framework, LCCCs with a credit limit of less than \$2,000 are presumed to not be unsuitable when ensuring compliance with section 133 of the Credit Act in relation to entering an LCCC or increasing the credit limit for a consumer.

[Schedule 1, Part 2 item 12, section 133BXG of the Credit Act]

Unsuitability assessment policies

- 1.82 LCCC providers must have written policies, known as 'unsuitability assessment policies', setting out processes for ensuring compliance with sections 128 and 131 of the Credit Act. Providers are obligated to ensure that their policies will genuinely facilitate such compliance, and to comply with any policy-related requirements in the regulations. Such requirements may relate to the content of policies or their review or updating

[Schedule 1, Part 2 item 12, section 133BXH of the Credit Act]

Credit representatives

- 1.83 Part 2-3 of the Credit Act regulates credit representatives and other representatives of licensees. A credit representative is a person who is authorised by an Australian credit licensee to act on behalf of the licensee for the purposes of carrying out the licensee's authorised credit activity. Licensees are permitted to authorise credit representatives under subsection 64(1) of the Credit Act.

- 1.84 Under the new regulatory framework, LCCC providers will be required to hold and maintain an Australian credit licence and comply with the relevant licensing requirements and licensee obligations in Chapter 2 of the Credit Act.
- 1.85 However, the Bill amends the relevant provisions to exclude sub-authorisation, AFCA membership and credit guide requirements from applying to credit representatives of LCCC providers as these are considered to be unnecessarily burdensome in light of any benefit they might provide in an LCCC context.

Sub-authorisation of representatives

- 1.86 Section 65 of the Credit Act provides that a credit representative of a licensee that is a body corporate may sub-authorise a natural person to engage in specified credit activities on behalf of the licensee.
- 1.87 The Bill excludes credit representatives of LCCC providers from this requirement and the associated requirement of registering sub-authorised representatives' details with ASIC unless the sub-authorised representative is collecting repayments made by a debtor under an LCCC. The compliance cost and regulatory burden resulting from body corporates having to sub-authorise all of their employees would be high for many businesses, with marginal benefits for consumers. Hence, a simplified authorisation process is considered appropriate in the LCCC context.

[Schedule 1, Part 3 items 16-17, paragraph 65(6)(c) and subsection 71(5A) of the Credit Act]

AFCA membership

- 1.88 Currently, paragraph 64(5)(c) of the Credit Act provides that the authorisation of a credit representative has no effect if the person is not a member of the AFCA scheme. 'AFCA scheme' is defined in accordance with Chapter 7 of the Corporations Act as the external dispute resolution scheme for which an authorisation under Part 7.10A of the Corporations Act is in force.
- 1.89 The Bill amends the Credit Act to allow licensees that are LCCC providers to authorise representatives that are not members of the AFCA scheme unless the representative is collecting repayments made by a debtor under an LCCC.

[Schedule 1, Part 3 items 14-15, subsection 64(5) of the Credit Act]

- 1.90 It is appropriate to remove this requirement for credit representatives of LCCC providers on the grounds that the costs outweigh the benefits. LCCC providers are ultimately responsible for the conduct of their credit representatives, and the obligation for them to be AFCA members is maintained.

Credit guides

- 1.91 The Bill eases certain requirements in relation to the content and giving of credit guides. It amends section 158 of the Credit Act, which requires a credit representative to give a consumer the licensee's credit guide under Part 3-2 of the Credit Act, along with the credit representative's own credit guide. Only the former requirement will apply to LCCC providers.

[Schedule 1, Part 3 item 18, subsection 158(1A) of the Credit Act]

- 1.92 In addition, minor changes are made to section 160 of the Credit Act, which sets out mandatory features of the credit guide that is to be given to the debtor by a licensee or a credit representative on being authorised by a credit provider under a credit contract. The changes reflect the removal of the requirement to notify ASIC of any sub-authorisations.

[Schedule 1, Part 3 item 19, paragraph 160(3)(e) of the Credit Act]

Interest rates and charges

- 1.93 Part 2, Division 1 of the Credit Code establishes the requirements for negotiating and entering into credit contracts. Section 17 of the Credit Code outlines the matters that must be in a credit contract.
- 1.94 The Bill amends section 17 of the Credit Code to provide that if a credit contract is an LCCC and no interest charges are payable under the LCCC, then subsections 17(4) to (6) of the Credit Code do not apply to the LCCC.
- Subsection 17(4) requires a credit contract to disclose the annual percentage rate or rates.
 - Subsection 17(5) requires a credit contract to disclose the method of calculation of interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.
 - Subsection 17(6) requires a credit contract to contain the total amount of interest charges payable under the contract, if ascertainable.
- 1.95 These requirements will apply only to LCCCs that charge interest on the provision of credit.

[Schedule 1, Part 4 item 20, subsection 17(6A) of the Credit Code]

- 1.96 Part 2, Division 4A of the Credit Code provides for calculating the annual cost rate of a credit contract and prohibitions that relate to annual cost rates.

- 1.97 The Bill amends section 32A of the Credit Code to ensure that the prohibitions relating to credit contracts if the annual cost rate exceeds 48 per cent do not apply to LCCCs.

[Schedule 1, Part 4 item 21, paragraph 32A(4)(b) of the Credit Code]

- 1.98 Part 2, Division 5 of the Credit Code provides for a credit provider’s obligation to account.
- 1.99 The Bill amends section 34 of the Credit Code to clarify that subsection 34(6) only applies in relation to an LCCC if interest charges are payable under the LCCC. Subsection 34(6) requires a statement of account for a credit contract to outline information about interest charges.

[Schedule 1, Part 4 item 22, subsection 34(6A) of the Credit Code]

Default notices

- 1.100 Part 2 of the Credit Code provides for rules relating to credit contracts. Division 5A of Part 2 provides for additional rules relating to small amount credit contracts. Section 39C provides that a credit provider must do prescribed things if a default in payment by direct debit occurs.
- 1.101 The Bill amends section 39C of the Credit Code by repealing subsection 39C(2), thus removing the need to identify subsection 39C(1) as such.

[Schedule 1, Part 5 items 23-24, section 39C of the Credit Code]

- 1.102 Part 5 of the Credit Code relates to ending and enforcing credit contracts, mortgages and guarantees. Division 1 of Part 5 deals with the ending of a credit contract by the debtor or guarantor. Subdivision C of Division 1 relates to a credit provider providing notice of first direct debit default.
- 1.103 The Bill amends the heading of Subdivision C of Division 1 of Part 5 of the Credit Code by changing the wording of the heading to refer to ‘default in payment’ rather than ‘direct debit default’. The heading of Subdivision C is now ‘Notice of first default in payment’.
- 1.104 Section 87 is the only provision in Subdivision C. The Bill amends the heading of section 87 to align with the new language of the Subdivision C heading – default in payment. The heading of section 87 is now ‘One-off notice to be given of first default in payment’.
- 1.105 Subsection 87(1) is amended by inserting the subheading ‘Which defaults does this section apply to?’.
- 1.106 Paragraph 87(1)(a) is amended by inserting ‘(other than a low cost credit contract)’ after ‘credit contract’.
- 1.107 Payment defaults for LCCCs are captured by new subsection 87(1A), which is inserted into section 87. The new provision applies if the debtor under an LCCC is in default in relation to the payment of an amount under the LCCC, and it is the first occasion that the debtor is in default in relation to such a payment.
- 1.108 The Bill also inserts the subheading ‘Offence’ below the new subsection 87(1A) to identify that subsection 87(2) is an offence provision. A further

subheading, ‘Other notice requirements not affected’, is inserted above subsection 87(5) of the Credit Code.

- 1.109 The effect of these amendments is to expand the first time default notice requirements in section 87 of the Credit Code to apply beyond direct debits to cover a broader range of payment types, including creditor-initiated charges on a credit card and creditor-initiated charges via the New Payment Platform’s PayTo service.

[Schedule 1, Part 5 items 25-30, section 87 of the Credit Code]

Comparison rates

- 1.110 Part 10 of the Credit Code sets out the requirements relating to comparison rates to enable consumers to determine the “true” cost of the credit offered by the credit provider. Section 158 of the Credit Code provides that Part 10 does not apply to continuing credit contracts.

The Bill amends section 158 of the Credit Code to identify that LCCCs are also excluded from the application of Part 10 of the Credit Code.

[Schedule 1, Part 6 items 31-33, section 158 of the Credit Code]

- 1.111 Comparison rates for small amount credit contracts can be deceptively high for short-term credit, and therefore provide limited benefits for consumers. The amendment distinguishes short-term credit from other credit contracts as consumers are likely to be confused by receiving the disclosure information of comparison rates for a product that does not actually charge interest.

Avoidance schemes

- 1.112 Part 7-1 of the Credit Act deals with miscellaneous matters. Division 1A of Part 7-1 has rules that prohibit schemes that are designed to avoid the application of the Credit Act in relation to small amount credit contracts and consumer leases or to avoid the application of product intervention orders.

- 1.113 LCCCs (including BNPL arrangements) are currently exempt from regulation under the Credit Act. With the introduction of the new framework, there is a risk that providers will seek to exploit the new reforms by structuring their activities to fall outside the definition of LCCC or BNPL in order to continue being exempt from licensing, RLO and other regulatory requirements under the Credit Act.

The Bill amends section 323, paragraphs 323A(2)(a) to (c), subparagraphs 323B(1)(a)(i) and (ii), and subparagraphs 323B(1)(b)(i) and (ii) to include LCCCs in Division 1A of Part 7-1 of the Credit Act, thereby including LCCCs within the application of the anti-avoidance provisions.

[Schedule 1, Part 7 items 34-37, sections 323, 323A and 323B of the Credit Act]

- 1.114 Failure to comply results in the same penalties as those that currently apply under section 323A of the Credit Act. Further, the presumptions and exemptions in Division 1A of Part 7-1 of the Credit Act also apply to LCCCs, as they apply to small amount credit contracts and consumer leases.
- For example, an avoidance strategy could involve the provision of credit to a consumer by the vendor (not by a third party) at the time of the purchase, but for this credit to be immediately refinanced by a third-party credit provider. Although this would not meet the definition of BNPL (which involves the provision of credit by a third party), the amendments to Division 1A of Part 7-1 of the Credit Act will catch and penalise these avoidance strategies and others.