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| **EXPOSURE DRAFT (29/02/2024)** |

Inserts for

Treasury Laws Amendment Bill 2024: Buy now, pay later

| Commencement information | | |
| --- | --- | --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Schedule 1 | A single day to be fixed by Proclamation.  However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. |  |

Schedule 1—Low cost credit contracts

Part 1—Extending the application of the National Consumer Credit Protection Act 2009

National Consumer Credit Protection Act 2009

1 Subsection 5(1)

Insert:

***buy now pay later arrangement*** has the same meaning as in section 13D of the National Credit Code.

***buy now pay later contract*** has the same meaning as in section 13D of the National Credit Code.

***low cost credit contract*** has the same meaning as in section 13C of the National Credit Code.

2 Subsection 5(1) (paragraph (a) of the definition of *short‑term credit contract*)

After “continuing credit contract”, insert “or a low cost credit contract”.

3 Subsection 5(1) (paragraph (a) of the definition of *small amount credit contract*)

After “continuing credit contract”, insert “or a low cost credit contract”.

4 Subsection 160G(2) (note)

Omit “sections 5 and 6”, substitute “sections 5, 6 and 13B”.

5 After Part 1 of the *National Credit Code*

Insert:

Part 1A—Low cost credit contracts

13B Application of this Code to low cost credit contracts

*[A provision will be included here that extends the application of the National Credit Code to the provision of credit under low cost credit contracts and sets out the constitutional basis for the extension.]*

13C Meaning of *low cost credit contract*

(1) A contract is a ***low cost credit contract*** if:

(a) credit is, or may be, provided under the contract; and

(b) the contract is:

(i) a buy now pay later contract; or

(ii) a contract prescribed by the regulations for the purposes of this subparagraph; and

(c) 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 for the purposes of this paragraph; and

(d) the contract satisfies any requirements prescribed by the regulations for the purposes of this paragraph that relate to fees or charges that are, or may be, payable under the contract; and

(e) the contract satisfies any other requirements prescribed by the regulations for the purposes of this paragraph.

Fees and charges

(2) To avoid doubt, regulations made for the purposes of paragraph (1)(d) may prescribe that a specified fee or charge (or a fee or charge of a specified kind) must (or must not) be payable under the contract.

(3) For the purposes of this section, fees or charges:

(a) include a charge referred to in paragraph (a) of the definition of ***credit fees and charges*** in subsection 204(1); and

(b) do not include a fee, charge, duty or expense referred to in paragraph (b), (c) or (d) of that definition.

13D Meaning of *buy now pay later arrangement* and *buy now pay later contract*

Buy now pay later arrangement

(1) A ***buy* *now pay later arrangement*** is an arrangement, or a series of arrangements:

(a) under which a person (the ***merchant***) supplies goods or services to another person (the ***retail client***); and

(b) under which a third person (the ***BNPL provider***) directly or indirectly pays the merchant an amount that is some or all of the price for the supply mentioned in paragraph (a); and

(c) that includes a contract between the BNPL provider and the retail client under which the BNPL provider provides credit to the retail client in connection with the supply mentioned in paragraph (a).

(2) However, an arrangement or a series of arrangements of the kind described in subsection (1) is not a ***buy now pay later arrangement***if the principal business of the merchant is the supply of administration, brokerage, management, collection or recovery services, or other incidental services, in connection with the provision of credit under credit contracts.

(3) For the purposes of subsection (1), and to avoid doubt:

(a) it does not matter whether any fees or charges are payable by the retail client or the merchant in connection with the arrangement or series of arrangements; and

(b) it does not matter whether the payment by the BNPL provider mentioned in paragraph (1)(b) occurs before, at or after the time when the goods or services are supplied by the merchant to the retail client as mentioned in paragraph (1)(a); and

(c) it does not matter whether the contract mentioned in paragraph (1)(c) is a continuing credit contract; and

(d) it is not necessary for the arrangement or series of arrangements to include any contract to which the merchant, retail client and BNPL provider are all parties.

Buy now pay later contract

(4) A contract is a ***buy now pay later contract***if:

(a) it is part of a buy now pay later arrangement involving a retail client, a BNPL provider and a merchant; and

(b) it is a contract, between the retail client and the BNPL provider, of the kind mentioned in paragraph (1)(c).

6 Subsection 204(1) of the *National Credit Code*

Insert:

***buy now pay later arrangement***: see section 13D.

***buy now pay later contract***: see section 13D.

***low cost credit contract***: see section 13C.

7 Subsection 204(1) of the *National Credit Code* (after paragraph (d) of the definition of *medium amount credit contract*)

Insert:

(da) the contract is not a low cost credit contract; and

Part 2—Responsible lending conduct

National Consumer Credit Protection Act 2009

8 Before section 115

Insert:

115A Scope of this Division

This Division does not apply in relation to a credit contract that is a low cost credit contract.

9 Section 128

After “the regulations”, insert “for the purposes of this section”.

10 At the end of section 128 (before the penalty)

Add:

Note: Part 3‑2BA affects how this section, and other provisions in this Part, apply in relation to certain low cost credit contracts.

11 Paragraph 133(4)(b)

Omit “at the time of the contract is entered or the credit limit is increased, the information”, substitute “at the time the contract is entered or the credit limit is increased”.

12 After Part 3‑2B

Insert:

Part 3‑2BA—Licensees that are credit providers under credit contracts: additional rules relating to low cost credit contracts

Division 1—Introduction

133BX Guide to this Part

This Part has rules that apply to certain licensees who are, or are to be, credit providers under certain low cost credit contracts. It applies in addition to the general rules in Part 3‑2, and modifies some of those rules.

Division 1 provides that a licensee may elect that this Part apply to the licensee in relation to some or all low cost credit contracts. This Part only applies to a licensee who has made an election, and only applies to such a licensee in relation to low cost credit contracts covered by the election.

Division 2 modifies how some of the general rules in Part 3‑2 apply to a licensee who has made an election. These modifications affect the obligations that the licensee has under Part 3‑2:

(a) to assess whether a low cost credit contract will be unsuitable for a consumer before doing particular things in relation to the contract; and

(b) not to enter, or increase the credit limit of, a low cost credit contract that is unsuitable for a consumer.

Division 3 requires a licensee who has made an election to have a policy (called an unsuitability assessment policy) that sets out how the licensee will comply with the licensee’s obligation under Part 3‑2 to assess whether a low cost credit contract will be unsuitable for a consumer.

133BXA Scope of this Part

This Part applies if licensee makes election

(1) A licensee may, in writing, elect that this Part apply to the licensee in relation to:

(a) all low cost credit contracts; or

(b) each low cost credit contract in a specified class of low cost credit contracts.

(2) This Part:

(a) applies to a licensee if the licensee has made an election under subsection (1) and has not revoked the election; and

(b) applies to such a licensee in relation to a credit contract if the credit contract is a low cost credit contract covered by the election.

Licensee must keep copy of election

(3) A licensee who makes an election under subsection (1) must keep a written copy of the election for the period:

(a) starting at the time when the licensee makes the election; and

(b) ending 6 years after the earlier of the following:

(i) the day when the licensee revokes the election;

(ii) the last day, during the period when the election is in force, when the licensee does a thing mentioned in paragraph 128(a) or (b) in relation to a low cost credit contract that is covered by the election.

Application of Part 3‑2 not otherwise affected

(4) Nothing in this Part affects how Part 3‑2 applies to a licensee in relation to a credit contract if the licensee has not made an election under subsection (1) of this section that covers the contract.

133BXB Definitions

In this Part:

***low cost credit conduct*** has the meaning given by subsection 133BXD(1).

***unsuitability assessment policy*** has the meaning given by subsection 133BXH(1).

Division 2—Unsuitable low cost credit contracts

133BXC When inquiries etc. must be made

For the purposes of applying section 128 to a licensee in relation to a low cost credit contract:

(a) paragraphs 128(aa) and (ba) are to be disregarded; and

(b) the period for making the assessment mentioned in paragraph 128(c), and the inquiries and verification mentioned in paragraph 128(d), is taken to be the period of 90 days (or other period prescribed by the regulations for the purposes of this paragraph) ending immediately before the licensee starts to do the thing mentioned in paragraph 128(a) or (b) (whichever applies).

133BXD When inquiries etc. are reasonable

(1) This section applies to a licensee who engages in any of the following conduct (***low cost credit conduct***):

(a) entering a low cost credit contract with a consumer who will be the debtor under the contract, as mentioned in paragraph 128(a);

(b) increasing the credit limit of a low cost credit contract with a consumer who is the debtor under the contract, as mentioned in paragraph 128(b).

Note: The licensee must also have elected under subsection 133BXA(1) that this Part apply to the licensee in relation to the low cost credit contract: see subsection 133BXA(2).

Relevant matters

(2) In determining whether the licensee has:

(a) made reasonable inquiries about the consumer’s requirements and objectives in relation to the low cost credit contract, as required under paragraph 130(1)(a); and

(b) made reasonable inquiries about the consumer’s financial situation, as required under paragraph 130(1)(b); and

(c) taken reasonable steps to verify the consumer’s financial situation, as required under paragraph 130(1)(c);

regard mustbe had to the matters covered by subsection (3) of this section, and regard may be had to any other relevant matters.

(3) The matters covered by this subsection are the following:

(a) the nature of the low cost credit contract (including the terms of the contract and the type and amount of credit provided under the contract);

(b) the nature of the target market for the low cost credit contract, as described in the target market determination (within the meaning of the *Corporations Act 2001*) for the contract;

(c) whether the consumer belongs to a class of persons whose members are likely to befinancially vulnerable;

(d) whether the licensee has in place any policies that reduce the risk of the licensee providing credit to a consumer on terms that are not affordable for the consumer;

(e) whether the licensee has in place any policies that mitigate the harm that may be caused to a consumer if the licensee provides credit to the consumer on terms that are not affordable for the consumer;

(f) any matters prescribed by the regulations.

Note: The particular things that a licensee must do in order to satisfy the licensee’s obligations under paragraphs 130(1)(a) to (c) in relation to low cost credit contracts may vary from case to case, and may be less onerous in some cases than in others, depending on matters such as those covered by this subsection.

(4) For the purposes of paragraphs (3)(d) and (e), if the licensee engages in low cost credit conduct in contravention of section 133 (which contains prohibitions relating to unsuitable credit contracts), then the licensee is taken to have provided credit to a consumer on terms that are not affordable for the consumer.

Note: This subsection does not limit the circumstances in which the licensee is taken to have provided credit to a consumer on terms that are not affordable for the consumer.

Inquiries or steps prescribed by regulations

(5) Subsections (2) and (3) do not affect the application to the licensee of regulations made for the purposes of subsection 130(2).

Note: Regulations made for the purposes of subsection 130(2) may prescribe particular inquiries or steps that must be made or taken, or that do not need to be made or taken, for the purposes of paragraph 130(1)(a), (b) or (c).

Relying on information or documents provided by consumer etc.

(6) Subject to subsections (2) and (3), and subject to any regulations made for the purposes of subsection 130(2), nothing in this Act has the effect that the licensee cannot satisfy the requirements in paragraphs 130(1)(a), (b) and (c), as they apply in relation to the low cost credit contract and the consumer, if the licensee:

(a) relies on information or documents provided by the consumer; or

(b) follows a general policy about the inquiries to be made, or the steps to be taken, in certain kinds of cases; or

(c) relies on presumptions (for example, presumptions about the consumer’s requirements or objectives in relation to the low cost credit contract, or presumptions about the consumer’s financial situation).

133BXE Assessments etc. in relation to larger contracts

(1) This section applies to a licensee who enters a low cost credit contract (the ***initial contract***) with a consumer (the ***relevant consumer***)whowill be the debtor under the contract.

Entering the initial contract

(2) The licensee may satisfy paragraphs 128(c) and (d) in relation to entering the initial contractby (respectively):

(a) making an assessment that would satisfy paragraph 128(c) in relation to entering a larger contract with the relevant consumer; and

(b) making inquiries and verification that would satisfy paragraph 128(d) in relation to entering the larger contract with the relevant consumer.

Note: For ***larger contract***, see subsection (6).

Subsequent credit increases

(3) Subsection (4) applies if:

(a) the licensee satisfies paragraphs 128(c) and (d) in relation to entering the initial contract by:

(i) making an assessment (the ***initial assessment***)that would satisfy paragraph 128(c) in relation to entering, with the relevant consumer, a larger contract with a particular credit limit (the ***maximum credit limit***); and

(ii) making inquiries and verification (the ***initial inquiries and verification***)that would satisfy paragraph 128(d) in relation to entering the larger contract with the relevant consumer; and

(b) the initial assessment is an assessment that the larger contract will not be unsuitable for the relevant consumer if the larger contract is entered in the period covered by the initial assessment.

(4) If the licensee subsequently, within the protected period, makes a protected increase to the credit limit of the initial contract, then:

(a) the licensee is taken to satisfy section 128 in relation to the protected increase (regardless of whether the initial assessment, and the initial inquiries and verification, were made within the period that applies in relation to the protected increase under that section); and

(b) the initial assessment is taken to be:

(i) an assessment that covers the protected period*;* and

(ii) an assessment that the initial contract will not be unsuitable for the relevant consumer if the protected increase is made in the protected period.

Note 1: For ***protected increase*** and ***protected period***, see subsection (6).

Note 2: Even if the licensee is taken under this subsection to satisfy section 128 in relation to the protected increase, it is still possible for the licensee to contravene subsection 131(1) or 133(1) in relation to the protected increase.

(5) Despite subsections (3) and (4):

(a) the licensee may, at any time after making the initial assessment and before making the protected increase, make a new assessment in relation to the protected increase for the purposes of paragraph 128(c); and

(b) if the licensee does so, then subsection (4) of this section does not apply to the licensee in relation to the protected increase.

(6) In this section:

***larger contract*** means a low cost credit contract that:

(a) has a credit limit that is greater than the credit limit of the initial contract when the initial contract is entered; and

(b) has terms that are otherwise substantially the same as the terms of the initial contract when the initial contract is entered.

***protected increase***: an increase to the credit limit of the initial contract is a ***protected increase*** if:

(a) after the increase, the initial contract has a credit limit that is no greater than the maximum credit limit (within the meaning of subparagraph (3)(a)(i)); and

(b) the terms of the initial contract after the increase are otherwise substantially the same as the terms of the initial contract immediately before the increase.

***protected period*** means whichever of the following is shorter (disregarding paragraph (4)(b)):

(a) the period covered by the initial assessment;

(b) the period of 2 years beginning when the period covered by the initial assessment begins.

133BXF Assessments of low cost credit contracts—presumptions where credit limit of contract is less than $2,000

(1) This section applies when determining, for the purposes of subsection 131(1), whether a low cost credit contract will be unsuitable for a consumer under paragraph 131(2)(b) if the contract is entered, or the credit limit of the contract is increased, in the period covered by the assessment mentioned in subsection 131(1).

Note: This section does not affect whether a low cost credit contract will be unsuitable for a consumer under paragraph 131(2)(a) or (c).

Entering a low cost credit contract

(2) For the purpose of applying subsection 131(1) in relation to a licensee entering a low cost credit contract (the ***initial contract***)with a consumer, if the credit limit of the initial contract, at the time the initial contract is entered, will be less than $2,000, then it is presumed (unless the contrary is proved) that the initial contract will not be unsuitable for the consumer under paragraph 131(2)(b) if the initial contract is entered in the period covered by the assessment.

(3) However, subsection (2) does not apply if:

(a) the licensee satisfies paragraph 128(c) in relation to entering the initial contract by making an assessment that would satisfy that paragraph in relation to entering a larger contract with the consumer (see subsection 133BXE(2)); and

(b) the credit limit of the larger contract is $2,000 or greater.

Increasing the credit limit of a low cost credit contract

(4) For the purpose of applying subsection 131(1) in relation to an increase (the ***relevant increase***) made by a licensee to the credit limit of a low cost credit contract(the ***initial contract***)with a consumer, if the credit limit of the initial contract after the increase will be less than $2,000, then it is presumed (unless the contrary is proved) that the initial contract will not be unsuitable for the consumer under paragraph 131(2)(b) if the relevant increase occurs during the period covered by the assessment.

(5) However, subsection (4) does not apply if:

(a) the licensee previously satisfied paragraph 128(c) in relation to entering the initial contract by making an assessment (the ***initial assessment***) that would have satisfied that paragraph in relation to entering a larger contract with the consumer (see subsection 133BXE(2)); and

(b) the credit limit of the larger contract was $2,000 or greater; and

(c) because of the initial assessment, the licensee is taken under subsection 133BXE(4) to satisfy section 128 into relation to the relevant increase.

Definitions

(6) In this section:

***larger contract*** means a low cost credit contract that:

(a) has a credit limit that is greater than the credit limit of the initial contract when the initial contract is entered; and

(b) has terms that are otherwise substantially the same as the terms of the initial contract when the initial contract is entered.

133BXG Prohibition on entering unsuitable low cost credit contracts etc.—presumptions where credit limit of contract is less than $2,000

(1) This section applies when determining, for the purposes of subsection 133(1), whether a low cost credit contract is unsuitable for a consumer under paragraph 133(2)(b).

Note: This section does not affect whether a low cost credit contract is unsuitable for a consumer under paragraph 133(2)(a) or (c).

Entering a low cost credit contract

(2) For the purpose of applying subsection 133(1) in relation to a licensee entering a low cost credit contract with a consumer, if the credit limit of the contract, at the time the contract is entered, is less than $2,000, then it is presumed (unless the contrary is proved) that the contract is not unsuitable for the consumer under paragraph 133(2)(b).

Increasing the credit limit of a low cost credit contract

(3) For the purpose of applying subsection 133(1) in relation to an increase made by a licensee to the credit limit of a low cost credit contractwith a consumer, if the credit limit of the contract after the increase is less than $2,000, then it is presumed (unless the contrary is proved) that the contract is not unsuitable for the consumer under paragraph 133(2)(b).

Division 3—Unsuitability assessment policies

133BXH Licensee must have an unsuitability assessment policy

(1) A licensee must have a written policy (an ***unsuitability assessment policy***) that sets out how the licensee will comply with sections 128 and 131 (which deal with assessments of unsuitability), as those sections apply in relation to low cost credit contracts.

Unsuitability assessment policy must be effective

(2) The licensee must ensure that the licensee’s unsuitability assessment policy is one that will facilitate compliance by the licensee with sections 128 and 131, as those sections apply in relation to low cost credit contracts.

Regulations may prescribe further requirements

(3) The licensee must comply with any requirements relating to unsuitability assessment policies prescribed by the regulations for the purposes of this subsection.

13 Saving provision—regulations

To avoid doubt, regulations prescribing a period for the purposes of section 128 of the *National Consumer Credit Protection Act 2009* that were in force immediately before the commencement of this Part:

(a) continue in force on and after that commencement; and

(b) are taken, on and after that commencement, to be made for the purposes of that section as amended by this Part.

Part 3—Credit representatives

National Consumer Credit Protection Act 2009

14 Subsection 64(5)

Omit “This section”, substitute “This subsection”.

15 Paragraph 64(5)(c)

Repeal the paragraph, substitute:

(c) a person who is not a member of the AFCA scheme to engage in a credit activity in relation to a contract that is not a low cost credit contract; or

(ca) a person who is not a member of the AFCA scheme to collect, on the licensee’s behalf, repayments made by a debtor under a low cost credit contract; or

16 Paragraph 65(6)(c)

Repeal the paragraph, substitute:

(c) a natural person who is not a member of the AFCA scheme to engage in a credit activity in relation to a contract that is not a low cost credit contract; or

(ca) a natural person who is not a member of the AFCA scheme to collect, on the licensee’s behalf, repayments made by a debtor under a low cost credit contract; or

17 After subsection 71(5)

Insert:

Exceptions—sub‑authorisations relating to low cost credit contracts

(5A) Subsections (1) and (4) do not apply to an authorisation under subsection 65(1) (which deals with sub‑authorisations) that authorises a person to engage in credit activities in relation to a low cost credit contract.

18 After subsection 158(1)

Insert:

Exceptions—credit activity relating to low cost credit contracts

(1A) Subsection (1) does not apply if the credit representative gives the consumer the licensee’s credit guide:

(a) for the purpose of satisfying subsection 113(1) in connection with the provision of credit assistance to the consumer in relation a low cost credit contract; or

(b) for the purpose of satisfying subsection 126(1) in connection with entry into a low cost credit contract with the consumer; or

(c) for the purpose of satisfying subsection 127(1) in connection with the assignment to the licensee of rights or obligations of a credit provider under a low cost credit contract.

Form and content of credit guide

19 Paragraph 160(3)(e)

After “is a credit representative”, insert “and has been allocated a credit representative number”.

Part 4—Interest rates and charges

National Consumer Credit Protection Act 2009

20 After subsection 17(6) of the *National Credit Code*

Insert:

Where no interest charge is payable under low cost credit contract

(6A) In the case of a credit contract that is a low cost credit contract, if no interest charges are payable under the contract then:

(a) subsections (4), (5) and (6) do not apply in relation to the contract document; and

(b) the contract document must contain a statement to the effect that no interest charges are payable under the contract.

21 Paragraph 32A(4)(b) of the *National Credit Code*

After “the credit contract is a”, insert “low cost credit contract,”.

22 After subsection 34(6) of the *National Credit Code*

Insert:

(6A) Subsection (6) applies in relation to a low cost credit contract only if interest charges are payable under the contract.

Part 5—Default notices

National Consumer Credit Protection Act 2009

23 Subsection 39C(1) of the *National Credit Code*

Omit “(1) If”, substitute “If”.

24 Subsection 39C(2) of the *National Credit Code*

Repeal the subsection.

25 Subdivision C of Division 1 of Part 5 of the *National Credit Code* (heading)

Omit “**first direct debit default**”, substitute “**first default in payment**”.

26 Section 87 of the *National Credit Code* (heading)

Omit “**the first time a direct debit default occurs**”, substitute “**of first default in payment**”.

27 Before subsection 87(1) of the *National Credit Code*

Insert:

Which defaults does this section apply to?

28 Paragraph 87(1)(a) of the *National Credit Code*

After “credit contract”, insert “(other than a low cost credit contract)”.

29 After subsection 87(1) of the *National Credit Code*

Insert:

(1A) This section also applies if:

(a) a debtor under a low cost credit contract is in default in relation to the payment of an amount under the contract; and

(b) it is the first occasion when the debtor is in default in relation to such a payment.

Offence

30 Before subsection 87(5) of the *National Credit Code*

Insert:

Other notice requirements not affected

Part 6—Comparison rates

National Consumer Credit Protection Act 2009

31 Section 158 of the *National Credit Code* (at the end of the heading)

Add “**or low cost credit contracts**”.

32 At the end of subsection 158(1) of the *National Credit Code*

Add “or low cost credit contracts”.

33 Subsection 158(2) of the *National Credit Code*

Repeal the subsection, substitute:

(2) Accordingly, a reference in this Part to the provision of credit (or to a credit contract or related matters) does not include a reference to:

(a) the provision of credit under a continuing credit contract (or to a continuing credit contract or matters related to such a contract); or

(b) the provision of credit under a low cost credit contract (or to a low cost credit contract or matters related to such a contract).

Part 7—Avoidance schemes

National Consumer Credit Protection Act 2009

34 Section 323 (paragraph beginning “Division 1A”)

After “small amount credit contracts”, insert “, low cost credit contracts”.

35 Paragraphs 323A(2)(a) to (c)

After “small amount credit contract”, add “, a low cost credit contract”.

36 Subparagraphs 323B(1)(a)(i) and (ii)

After “small amount credit contract”, insert “or a low cost credit contract”.

37 Subparagraphs 323B(1)(b)(i) and (ii)

After “small amount credit contracts”, insert “, low cost credit contracts”.