

EXPOSURE DRAFT

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024

Section 329 of the *National Consumer Credit Protection Act 2009* (the Credit Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Credit Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Credit Act.

The *Treasury Laws Amendment Bill 2024: Buy now, pay later* amends the Credit Act and the Credit Code (i.e. Schedule 1 to the Credit Act) to provide the means for regulating low cost credit contracts (LCCC), which include Buy Now Pay Later (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.

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. It 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 Responsible Lending Obligations (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 the contract will be unsuitable for the consumer; and
- establishing anti-avoidance protections to prevent providers of LCCCs from structuring their business models to avoid regulation.

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The purpose of the *National Consumer Credit Protection Amendment (Low Cost Credit Regulations 2024* (the Regulations) is to prescribe:

- other matters that indicate when an LCCC licensee has made reasonable inquiries about the consumer's requirements and objectives and the consumer's financial situation, and taken reasonable steps to verify the consumer's financial situation;
- requirements relating to an LCCC licensee's unsuitability assessment policy, including the content of the policy, conducting reviews of the policy and updating the policy; and
- to set the maximum level of fees and charges (including default fees or charges) for a credit product to be considered to be an LCCC (including to be BNPL).

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 new low cost continuing credit products and other low cost, short term credit products. BNPL arrangements are an example of these new credit products, which offer consumers a cheaper and easier way to access forms of credit when compared to traditional forms of credit such as credit cards, payday loans, and consumer leases. These credit products are not regulated under the Credit Act because they typically fall under the exemptions available to certain types of credit in the Credit Code.

For example, under BNPL arrangements, a consumer is charged low (or no) fixed fees and no (or potentially depending upon the exemption relied upon, low) interest for using the BNPL product. Additionally, the BNPL provider charges the merchant a service fee for accepting the use of the BNPL product to fund the transaction and it pays the merchant the value of the purchase upfront (less the merchant service fee). The BNPL provider then collects the purchase price from the consumer via repayments in instalments.

Credit products that operate within these exemptions, such as BNPL arrangements, are not subject to RLOs or other requirements of the Credit Act, and providers of these credit products do not need an Australian credit licence. While these exemptions have supported the growth of BNPL arrangements, they were not designed with that outcome in mind. This regulatory gap creates the potential for consumer harm, including through unaffordable lending practices, unsatisfactory complaint resolution and hardship assistance, the charging of excessive default fees and a lack of transparency surrounding product disclosures and warnings.

The Regulations outline that an LCCC licensee must seek to obtain from a credit reporting body the following information about the financial situation of a consumer who is, or will be, a debtor under an LCCC that has a value of less than \$2,000:

- identification information (within the meaning of the *Privacy Act 1988* (Privacy Act)) about the individual;
- details of any information requests (within the meaning of the Privacy Act) that have been made in relation to the individual;

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- default information (within the meaning of subsection 6Q(1) or (2) of the Privacy Act) about the individual;
- payment information (within the meaning of the Privacy Act) about the individual;
- personal insolvency information (within the meaning of the Privacy Act) about the individual;
- information about the individual that is information covered by paragraph 6N(k) of the Privacy Act (which covers certain kinds of publicly available information);
- new arrangement information (within the meaning of the Privacy Act) about the individual; and
- court proceedings information (within the meaning of the Privacy Act) about the individual.

If the value of the LCCC is \$2,000 or greater, the LCCC licensee must seek to obtain the information identified above as well as information about consumer credit (within the meaning of the Privacy Act) provided to the individual that is consumer credit liability information (within the meaning of the Privacy Act) about the individual.

Access to information from credit reporting bodies may be subject to requirements such as those set out in Part IIIA of the Privacy Act, the Privacy (Credit Reporting) Code 2014 and the Principles of Reciprocity and Data Exchange (PRDE). Seeking to obtain information includes complying with these requirements.

Regardless of the value of the LCCC, the LCCC licensee is also required to seek to obtain information about the income of the consumer; the consumer's expenditure; and the details of any other LCCCs, small amount credit contracts, or consumer leases that the consumer has entered into.

It is open to the LCCC licensee to determine how, from where, and in what form to obtain this information. The Regulations do not prescribe any particular source, means or format. However, these things may influence the licensee's belief in the accuracy of the information.

IntervalCash is a LCCC licensee designing a new webform for consumers to use when applying for credit. IntervalCash plans to use the webform to obtain the required information about each consumer's income, expenditure and use of other credit products. IntervalCash's options include:

- Asking the consumer to supply a response in a free text field;
- Asking the consumer to upload documents such as payslips and bank statements;
- Asking the consumer to authorise IntervalCash to access the consumer's information through a third party banking transaction data service.

IntervalCash elects to make all of these options available to consumers. In some cases, when they already hold this information on a customer, they instead rely on that information.

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The Regulations require that the LCCC licensee reasonably believes that the information it has regard to is accurate.

IntervalCash has received applications for credit from Aarti and Dustin.

Aarti authorised IntervalCash to access his financial information directly from a third-party banking transaction data service, so that it can derive the required information. Aarti then confirms IntervalCash's estimates of his income and expenses and its assessment of whether other SACC, consumer leases or LCCC debts exist.

IntervalCash reasonably believes the information provided.

Dustin provided answers in the free text fields only. Dustin disclosed an annual income of \$275,000, annual expenses of \$20,000 and no other relevant credit products. Dustin's credit report shows a credit score ranked 'low', multiple defaults on consumer leases and other credit products, and several recent inquiries from other credit providers.

In the case of Dustin, IntervalCash does not reasonably believe the information is substantially accurate in light of the exceptionally low expenses in comparison to the high income; a conflict between having no disclosed consumer leases but a credit report that reveals recent consumer lease use; and multiple defaults on his credit report notwithstanding a disclosed surplus income of \$255,000.

The Regulations establish the requirements for an LCCC licensee's unsuitability assessment policy, including the completion of reviews of the policy.

The Regulations also prescribe additional requirements relating to fees or charges payable under a contract in order for it to satisfy the definition of an LCCC. The Regulations seek to largely replicate the existing fee caps for certain exempt credit products in subsection 6(5) of the Credit Code. However, the Regulations additionally impose a separate fixed monthly cap on default fees and charges. These default fees and charges are currently not capped under the existing exemption.

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ATTACHMENT A

Details of the *National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024*

Section 1 – Name

This section provides that the name of the instrument is the *National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commences at the same time as the associated amendments of the *National Consumer Credit Protection Act 2009*.

Section 3 – Authority

The Regulations are made under the *National Consumer Credit Protection Act 2009* (the Credit Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1—Main amendments

Items 1 and 2 amend paragraph 28LCF(2)(b) of the *National Consumer Credit Protection Regulations 2010* to extend the prescribed circumstances where a credit contract is unsuitable for a consumer to include where credit is provided, or to be provided, as part of an arrangement involving 2 or more low cost credit contracts (LCCCs) or a combination of at least 2 LCCCs, small amount credit contracts or medium amount credit contracts, where the amount that is payable under the combination of credit contracts (in circumstances in which there is no default by the debtor) is higher than the maximum amount that could be charged under a single credit contract.

Part 3.4A—Additional rules relating to low cost credit contracts

Item 3 inserts Part 3.4A into the *National Consumer Credit Protection Regulations 2010*. Part 3.4A outlines the additional rules relating to LCCCs.

Division 1—Preliminary

Division 1 contains sections 28HAA and 28HAB.

Section 28HAA outlines the scope of Part 3.4A. For Part 3.4A to apply to a licensee, the licensee must have elected under subsection @133BXA(1) of the Credit Act for Part 3-2BA of the Credit Act (the LCCC responsible lending conduct regime) to apply to some or

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all of its LCCC offerings, and the relevant credit contract must be an LCCC covered by the election. This is further highlighted in the Note to section 28HAA.

If a licensee does not elect to be subject to Part 3-2BA, it is instead subject to the existing responsible lending conduct requirements in Divisions 1 to 4 of Part 3-2 of the Credit Act.

Section 28HAB provides for the definition of ‘unsuitability assessment policy’.

Unsuitability assessment policy is defined by reference to Part @3-2BA of the Credit Act.

Division 2—Unsuitable low cost credit contracts

Division 2 contains sections 28HAC and 28HAD.

Section 28HAC sets out that, for the purposes of paragraph @133BXC(b) of the Credit Act, for making the assessment mentioned in paragraph 128(c) and the inquiries and verification mentioned in paragraph 128(d) of that Act, the prescribed period is 120 days. This prescribed period applies to LCCCS that are covered by an election.

Section 28HAD sets out the other inquiries that a licensee must make about the financial situation of a consumer who will be a debtor under an LCCC or is a debtor under an LCCC with a credit limit that has increased. These inquiries are in addition to the inquiries identified by subsection @133BXD(3) of the Credit Act.

Subsection 28HAD(2) identifies the other credit information that a licensee must seek to obtain from a credit reporting body if the value of the LCCC is less than \$2,000 and the consumer is an individual. A credit reporting body is defined in subsection 5(1) of the Credit Act by reference to the Privacy Act. The other information that a licensee must seek to obtain is:

- identification information (within the meaning of the Privacy Act) about the individual;
- details of any information requests (within the meaning of the Privacy Act) that have been made in relation to the individual;
- default information (within the meaning of subsection 6Q(1) or (2) of the Privacy Act) about the individual;
- payment information (within the meaning of the Privacy Act) about the individual;
- personal insolvency information (within the meaning of the Privacy Act) about the individual;
- information about the individual that is information covered by paragraph 6N(k) of the Privacy Act (which covers certain kinds of publicly available information);
- new arrangement information (within the meaning of the Privacy Act) about the individual; and
- court proceedings information (within the meaning of the Privacy Act) about the individual.

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This information aligns with the data contained in what is commonly known as a ‘negative credit check’ with a credit reporting body.

Subsection 28HAD(3) requires that if the value of the LCCC is \$2,000 or greater, and the consumer is an individual, the licensee must seek to obtain from a credit reporting body, the information required by subsection 28HAD(2) as well as information about consumer credit (within the meaning of the Privacy Act) provided to the individual that is consumer credit liability information (within the meaning of the Privacy Act) about the individual.

This information aligns with the data contained in what is a commonly known as a ‘partial credit check’ with a credit reporting body.

The requirement for a licensee to seek to obtain this other information from a credit reporting body acknowledges that some of this information may not exist for each consumer. It also reflects that there are circumstances in which a credit reporting body is legally not able to provide certain types of credit information – for example, because of time limits, bans in place, or the application of the Privacy (Credit Reporting) Code 2014. A licensee can therefore be compliant with section 28HAD despite not obtaining all the other information identified in subsections 28HAD(2) and (3) so long as they have made reasonable efforts to obtain that information.

In practice, this would require a licensee to comply with the PRDE in order to obtain partial credit information from a PRDE-signatory credit reporting body. It is expected that credit reporting bodies engaged by the licensee will be signatories to the principles titled “Principles of Reciprocity and Data Exchange” dated 6 January 2021 and published by the Australian Retail Credit Association, as amended from time to time. The PRDE could, in 2024, be viewed on the Australian Retail Credit Association website (<http://www.arca.asn.au>).

The requirement for an LCCC licensee to seek to obtain this other information as part of the RLO framework is directed at both assessing whether a credit contract will be unsuitable for a consumer and to create a record of credit inquiry (an information request) by that licensee on the consumer’s credit report. This report will indicate to other credit providers that the consumer may have an existing LCCC liability, as information requests are part of the information providers must seek to obtain.

Subsection 28HAD(4) confirms that nothing in the *National Consumer Credit Protection Regulations 2010* requires or authorises a credit reporting body to disclose the information referred to in any of paragraphs 28HAD(2)(c) to (j), or in paragraph 28HAD(3)(d), to a licensee.

Subsection 28HAD(5) requires a licensee to obtain information about the consumer that the licensee reasonably believes is substantially correct. That information is:

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- the current income of the consumer;
- the expenditure of the consumer; and
- any LCCCs, small amount credit contracts, or consumer leases to which the consumer is currently a party.

The modified RLO framework requires LCCC licensees to make reasonable inquiries into the financial situation of a consumer. The regime sets out a non-exclusive list of factors that may be taken into account in determining what is reasonable – including information on the nature of the credit product, the target market and any other processes that minimise the risk of unaffordable lending or mitigate harm if unaffordable lending occurs. The Regulations make it clear that this principle-based scaling of information collection will always require the licensee to collect the basic information of the current income of the consumer, the expenditure of the consumer and whether the consumer already has certain other credit products that are often held by financially constrained consumers.

Division 3—Unsuitability assessment policies

Division 3 contains sections 28HAE and 28HAF.

Section 28HAE identifies that Division 3 is made for the purposes of subsection @133BXH(3) of the Credit Act.

Subsection @133BXH(1) of the Credit Act requires a licensee to have a written policy, defined as an ‘unsuitability assessment policy’, that sets out how the licensee will comply with the requirements in sections 128 and 131 of the Credit Act. Subsection @133BXH(3) of the Credit Act requires a licensee to comply with any requirements relating to unsuitability assessment policies that are prescribed by the Regulations.

Section 28HAF outlines the requirements for a licensee to review and update its unsuitability assessment policy.

Subsection 28HAF(1) requires a licensee to conduct regular reviews of its unsuitability assessment policy. This subsection is informed by subsection 28HAF(2), which provides that a licensee must have regard to its obligations under subsection @133BXH(2) of the Credit Act in deciding when to conduct a review of the policy. Subsection @133BXH(2) of the Credit Act provides that the licensee must ensure that its unsuitability assessment policy is one that will facilitate compliance by the licensee with sections 128 and 131.

Subsection 28HAF(3) sets out that when undertaking a review of its unsuitability assessment policy, a licensee must assess whether the policy has facilitated, and will continue to facilitate, compliance by the licensee with sections 128 and 131 of the Credit Act, as those sections apply in relation to LCCCs. The licensee must also identify any changes to the policy that would enable the policy to better facilitate such compliance. Compliance with subsection 28HAF(3) is contingent on fulfilment of subsection 28HAF(4), which outlines the requirements for the information and evidence that a licensee must have regard to when carrying out a review. The licensee must reasonably believe the information and evidence to be accurate, and that they provide an appropriate basis for assessing the policy and identifying any changes to the policy that are deemed

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necessary. This would be expected to include information or evidence on poor consumer outcomes that indicates unsuitable lending may have occurred. At a minimum, this includes the rates at which debts are being partially or fully written off, measures of the rates of arrears, relevant complaints data (both under internal and external dispute resolution processes) and hardship data. The licensee is already obliged to collect complaints and hardship arrangement data. The licensee must also already collect information on consumer outcomes in order to comply with its obligations to review the target market determination for the product as part of its design and distribution obligations.

Subsection 28HAF(5) requires that a licensee make changes to its unsuitability assessment policy if it has identified that such changes are necessary. It is expected that changes to the policy would be necessary if the licensee has identified that the policy does not enable it to comply with sections 128 and 131 of the Credit Act, or if the licensee identifies that it could more fully comply with these obligations.

Part 7-1A – Low cost credit contracts

Item 4 inserts Part 7-1A into the *National Consumer Credit Protection Regulations 2010*. Part 7-1A prescribes the total amount of fees and charges that are, or may be, payable under a contract in order to satisfy the definition of LCCC in paragraph @13C(1)(d) of Schedule 1 to the Credit Act.

Subsection 69E(2) provides that in order for a contract to be an LCCC the total amount of fees and charges (other than default fees or charges) that are, or may be, payable under the contract in a 12-month period must not exceed \$200 for the 12-month period commencing when the debtor enters into the contract and \$125 in any subsequent 12-month period during which the contract is in effect. However, if when the contract is entered into the debtor is already, or was within the previous 12 months, a party to an LCCC with the credit provider or an associate neither of which is an ADI, a maximum amount of nil applies.

Subsection 69E(3) provides that in order for a contract to be an LCCC the total amount of default fees or charges that are, or may be, payable under the contract in a month of the contract must not exceed \$10. However, if when the contract is entered into the debtor is already, or was within the previous 12 months, a party to an LCCC with the credit provider or an associate neither of which is an ADI, a maximum amount of nil applies.

Subsection 69E(4) clarifies that a month for the purposes of subsection 69E(3) includes the month commencing when the debtor enters into the contract and any later month during which the contract is in effect.

Part 2—Other amendments

Item 5 amends subsection 79C(1) of the *National Consumer Credit Protection Regulations 2010* to omit the reference to subsection 39C(1) and instead substitute section 39C. This amendment is consequential to amendments made by the *Treasury Laws Amendment Bill 2024: Buy now, pay later* to repeal subsection 39C(2) of the Credit Code which is no longer necessary.