6 March 2025

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Dear Ms Morgan

CP382: Low Cost Credit Contracts

Thank you for the opportunity to provide feedback on the Australian Securities and Investment Commission's (**ASIC**) draft regulatory guide for low cost credit contracts (**LCCCs**). This is a joint submission made on behalf of:

- Financial Rights Legal Centre
- Mob Strong Debt Help
- Care ACT
- CHOICE
- Consumer Action Law Centre
- Consumer Credit Legal Service WA
- Economic Abuse Reference Group
- Financial Counselling Australia
- Financial Counselling NSW
- Financial Counselling Victoria
- Redfern Legal Centre

Our organisations have been advocating for the regulation of BNPL products for years and keenly await the implementation of the new legislative regime, which will reduce the risk of people being signed up to unaffordable BNPL debts that leave them worse off. However, the regime is novel and complex so we strongly support ASIC's intention to provide guidance on the laws.

We consider the Draft Regulatory Guide 000 (**Draft Guide**) for LCCCs to generally be consistent with the new laws that will come into effect on 10 June 2025 via the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (**BNPL Act**). However, the Draft Guide sticks extremely closely to the letter of the law and does not offer a great deal of clarity beyond the laws themselves.

We make a number of recommendations below about how the Draft Guide could be improved to be a more valuable resource for those who will rely on it. At a general level though, our thematic recommendations are to:

- increase the number of examples to help users understand ASIC's interpretation of the law in common scenarios that arise with BNPL, particularly those that may cause consumers harm; and
- be willing to set reasonable expectations beyond the strict letter of the law for businesses, by interpreting the law in a manner consistent with the purpose of the *National Consumer Credit Protection Act 2009* (**NCCP Act**) - that is, to protect consumers from being left worse off by unsuitable or poorly designed credit products.

Proposal B1 - Draft Guide section B

What contracts are covered by the regime?

RG000.18-21

There may be value in clarifying the ongoing effect of the Australian Finance Industry Association's BNPL Code of Practice (**AFIA Code**) in this section or elsewhere. Specifically, the Guide could include a reference clarifying that the AFIA Code (or more generically any industry code) continues to apply to the extent it imposes a higher standard than the law applying to LCCCs, and it also may be relevant in determining good industry practice for the purposes of dispute resolution.

Proposal B2 - Draft Guide section C, modified responsible lending obligations

In general, the guidance on the modified responsible lending obligations (**Modified RLOs**) in the Draft Guide should set a standard that expects more of licensees in terms of reasonable verification, particularly where there are inconsistencies or gaps in the information provided by a consumer about their financial situation.

What are the modified responsible lending obligations?

RG000.22

It would be clearer, and hew more closely to the legislation, if paragraph (a) of RG000.22 set out the limbs of the reasonable inquiries and verification component of the responsible lending obligation in its three parts:

a) Make reasonable inquiries about the consumer's requirement and objectives, and
b) Make reasonable inquiries about the consumer's financial situation, and
c) Take reasonable steps to verify the consumer's financial situation.

This would also make it simpler to understand the limited application of the rebuttable presumption described later in the guide.

RG000.22

Table 1 states in relation to both "*determining what constitutes 'reasonable' inquiries under s130, you must have regard to several factors: s133BXC*" and "*determining what constitutes reasonable verification under s130, you must have regard to several factors: s133BXC*", that "*These factors may lower the scope and intensity of reasonable inquiries: see RG 000.34–RG 000.36 and Table 2.*"

We consider the phrase "*These factors may lower the scope and intensity of reasonable inquiries*" in both places inaccurately implies these factors will only lower (i.e. not increase or be neutral as to) the scope and intensity of inquiries/verification. We consider this phrase should be removed, leaving simply the cross reference to the relevant portion of the regulatory guide, where the matter can be more accurately described.

Mandatory inquiries about the consumer's income, expenditure and other credit products

RG000.28

Paragraph RG 000.28 provides only very high-level guidance on the standard for reasonable inquiries and verification obligations for the Modified RLOs. This is a key aspect of the LCCC regime. RG000.28 should be strengthened to make the need for reasonable verification clearer.

We recommend that RG000.28 should be amended to:

- clarify that relying solely on self-assessed income, expenses and loan information alone for the purposes of an unsuitability assessment is unlikely to be sufficient in most cases and should not be standard practice. At a minimum, licensees should be required to consider some form of documentary information to meet reasonable verification obligations;
- consistent with the above, stronger language should be included to mandate making further inquiries where information from a consumer is unclear, inconsistent or unable to be verified. We recommend replacing 'may' in line 3 of RG000.28, to 'will' or 'are likely to';
- strengthen the reference to RG209.120-125 to make it clear that LCCC providers should be seeking the types of information referred to in it. This should not just be a 'note', but rather spell out some of the more obvious examples such as obtaining information via the Consumer Data Right.

RG000.29

There are some poor internal benchmarks used by credit providers that endorse unrealistic expectations for expenses. We recommend that RG000.29 be amended to specify that licensees should note that benchmarks are not a substitution for enquiries and verification and if or when they are used that they use independently recognised benchmarks, such as the Household Expenditure Measure as RG 209 references, to test whether information provided is plausible.

Mandatory inquiries about the consumer's credit history

RG000.33

The draft states that some of a consumer negative credit check and credit liability information may not be available for various reasons. Providing an example of why someone may not have available information from a credit check, and what could be done instead to fill any resulting information gap, would be of value here.

Proposal B3 - Draft Guide section C, reasonable inquiries

The BNPL industry has operated to date using a model that generally seeks to learn as little as possible about the financial situation of its customers. It has also spent a number of years resisting regulation and claiming its products are low risk, while the rate of BNPL use in callers to the National Debt Helpline, and the representation of BNPL providers amongst the ranks of creditors proving in bankruptcies and Pt IX debt agreements, has gradually increased. The Draft Guide should do more to set out when the industry should be proactively making further inquiries about the financial situation of their applicants, in particular.

What mandatory factors must I consider to determine what is 'reasonable'?

RG000.35- 36

LCCC providers are not likely to consider their own product to be 'poorly designed'. While we understand that this is a direct reference to the explanatory memorandum, if a product is poorly designed, it should be incumbent upon ASIC to identify this and discuss it with the firm in line with expectations under the Designed and Distribution Obligations to ensure that the product is more appropriately designed. At a minimum this RG could provide examples of the signs a licensee should be alert to indicating that their LCCC product may be poorly designed or attracting vulnerable consumers.

Similarly further guidance is required to clarify what signs may indicate products are attracting "vulnerable consumers". The guide should include examples of signs that may

indicate that a consumer is experiencing vulnerability that are likely to be identifiable to an LCCC provider. For example, this may include:

- they are aware they are on a Centrelink payment;
- they have multiple other BNPL, SACC or other accounts
- they have a high volume of credit inquiries on their report
- their expenditure is below recognised benchmarks
- the LCCC is being used to pay for essentials, like grocery vouchers or energy bills.

It may be useful to refer to or set out ASIC's existing description of customer vulnerability as set out on page 12 of the *ASIC Corporate Plan 2019-2023* (which we note is referred to in the AFIA Code at [8.4]).

The RG should also detail the extra steps a licensee should take when they are on notice that an applicant may be financially vulnerable.

Further it is not clear what 'especially' vulnerable means and we do not think it is worth retaining this modifier.

Table 2, re: s133BXC (3)(a)

While noting that the table includes material directly from the explanatory memorandum, there is value in considering further elements of the nature of the product beyond the limited list provided. For example, the nature of the product necessarily includes whether a product is specifically designed for use with particular goods or services. Further, sales practices should be considered a factor, in other words, whether unsolicited sales or high pressure sales by retailers make up a significant proportion of the products distribution.

It would also be useful to have practical examples on where it would be appropriate for LCCC providers to conduct a less intensive check versus where a more robust analysis is needed.

Table 2, re: s133BXC (3)(c)

We have concerns about what financial firms (especially smaller lenders) consider "financially vulnerable" to mean. There would therefore be value in providing a broad definition of "financially vulnerable", to ensure it is not interpreted too restrictively.

Further the use of targeted questions should be recommended, not just floated as a possibility. We recommend that the Draft Guide be amended to clarify that licensees should

(not 'could') use targeted questions to help recognise if a consumer is experiencing vulnerability.

Table 2, re: s133BXC (3)(d)-(e)

Licensees should be encouraged to consider use of clear limits to help identify situations where credit should not be provided. We recommend that licensees should develop clear guidance that sets hard limits for when credit should be automatically declined. For example, this could include where applicants have multiple existing credit products, or credit scores below a particular rating.

Further we recommend that licensees be required to have policies in place to proactively identify and support vulnerable consumers. The final line should also be amended to read:

> "Harm mitigation strategies include … procedures for *identifying,* engaging with *and supporting* vulnerable consumers.'

Finally, with respect to something that may "reduce the risk of the licensee providing credit to a consumer on terms that are not affordable for the consumer" under s133BXC(3), tailored referrals to other options such as No Interest Loan Scheme or the National Debt Helpline could be given as an example. The guide would need to make clear that such a step would only be relevant if providers have evidence that such referrals actually change consumer behaviour (i.e. a pro forma pop up for everyone that can be easily dismissed would likely not be sufficient).

Proposal B4 - Section C, rebuttable presumptions

The Draft Guide should set a higher standard in terms of seeking out red flags that a rebuttable presumption may not be appropriate. Otherwise, the effect of the law will be to do away with the requirements and objectives for loans under $2000, which is not the intent of the law.

What are the rebuttable presumptions for assessments?

RG000.40-41

The presumption of suitability regarding consumer requirements and objectives is a new and novel element in the responsible lending obligations context and would benefit from further guidance.

We recommend the Draft Guide provide further examples of evidence that may rebut the presumption, such as:

- evidence that a person is signing up to use the LCCC to pay for essentials, such as utility bills or groceries (or has regularly used an existing product for this purpose)
- where a person states or verification demonstrates they have used multiple SACCs, BNPLs or other high-cost credit products recently
- examples to support RG 000.41 of one-off purchases for under $2000 that should not justify a line of credit, such as a fridge or a solar panel
- signs of spending that indicates possible addiction, such as gambling. (as per RG209.205)

- evidence of a customer specifically asking for finance for a purchase of a few hundred dollars without high fees.

RG000.42

As alluded to above the reference to RG209 in this paragraph does not include RG209.205, which is one of the few places RG209 refers to signs of addiction as a relevant factor in unsuitability assessments. We recommend that this be referenced.

Proposal B5 - Section C, protected increases

The protected increase regime permits conduct very similar to unsolicited credit increases for credit cards, which were banned because of the recognised harm it had on people in financial hardship. ASIC should state upfront in this section that it will be monitoring the use of protected increases closely, and that licensees should be taking steps to prevent these increases from pushing people into financial hardship.

Making an initial assessment

RG 000.48

With respect to identifying "foreseeable changes" an example would be useful. Foreseeable changes to a consumer's financial situation can, for example, include reduced income from cessation of dependent-related payments like child support or family tax benefits.

RG000.49

We recommend replace the passive word 'may' in this paragraph with the word 'should' to ensure that LCCC providers take appropriate steps to adjust the protected period given the additional information they hold, in these circumstances.

Making a protected increase

RG000.51

Greater clarity/guidance is needed here regarding the nature of the consent required to make a protected increase. It should not be possible, for example, to bundle in consent to a protected increase to other terms and conditions. We recommend that this be clarified to ensure that that protected increases should only be made with consent that is specific, limited, express, voluntary, unbundled and able to be easily withdrawn. This would be in line with best practice consent under Rule 4.9 of the Consumer Data Right[1].

RG000.52

Again an example is required here to elucidate regarding when not to make a protected increase. This is an important protection and relates to credit limit increases that are unique to LCCCs. An example of information that suggests the increase may be unreasonable for a consumer can include:

- the consumer has missed payments; or
- there has been regular use of the credit facility for essentials only.

[1] https://www.legislation.gov.au/F2020L00094/latest/text

RG000.55

We note again that the example used here of a term that may change is directly from the explanatory memorandum but we think there is value in providing further examples of terms – for example, changing repayment time periods would also mean a contract is no longer substantially the same and protected increases would not be suitable.

Interaction with the rebuttable presumptions

RG000.58

The description of when the rebuttable presumption applies here is confusing. In our view, if the benefit does not apply for the purpose of s 131(2)(b) National Consumer Credit Protection Act (NCCP Act), this effectively makes it invalid to rely on it in any situation where a larger contract is over $2000.

ASIC should simplify the guidance here and amend RG000.58 to clarify that if a licensee is making an unsuitability assessment for a larger contract over the threshold amount, it is unlawful to rely on the presumption of suitability for the consumer's requirements and objectives, regardless of the initial amount or any protected increase.

Example 1 - Presumptions—Assessment for a larger contract

This example could be enhanced if there was another step where the credit limit was increased to an amount over $2000. We recommend adding another step in to Example 1 to clarify the obligations on the licensee if it made a protected increase to a credit limit of over $2000.

Proposal B6 - Section C, unsuitability assessment policy

We urge ASIC to amend the Draft Guide to recommend that licensees make their unsuitability assessment policies available to the public, or at a minimum, make clear that licensees should be prepared to provide these policies to AFCA in a dispute. While publication of these policies may not be required by law, these documents will effectively form part of the terms of the contract between the licensee and the consumer. It may also be central to the question of whether a licensee has met its obligations under the modified RLOs.

Beyond this, ASIC should include some further recommendations around best practice - such as examples of what licensees should consider including in an unsuitability assessment policy. Again Table 3 largely reproduces the legislation and the Explanatory Memorandum. These policies will be a new and untested area. The regulator responsible for enforcing these policies should be willing to put out some meaningful guidance about what it thinks licensees should be doing to comply with this regime.

In preparing for unsuitability assessment policies, ASIC should heed lessons from the rollout of the design and distribution obligations. While there has been some value in their introduction, the initial target market determinations largely saw the financial services industry engage lawyers to reproduce near identical documents for every product. ASIC should aim higher with the expectations it sets LCCC providers here, or these policies will be nothing more than a box ticking exercise.

Proposal B7 - Section D, Electing to comply with the modified responsible lending obligations

Table 4: Requirements for elections and revocations

We urge ASIC to recommend that the statements in LCCC contracts required under s17(15B) of the National Credit Code should be written in terms which can provide consumers with a reasonable understanding of their meaning.

Proposal B8 - Section E - Other modified obligations for low cost credit contracts

Electronic disclosure

Table 5: Requirements for electronic delivery of materials

The guidance in the 'Notification' row of Table 5 should be strengthened by clarifying that materials should not just be easily visible but also accessible and/or understandable.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact me at drew.macrae@financialrights.org.au.

Kind Regards,

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Financial Rights Legal Centre

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.