



9 April 2024

## Response to consultation on Buy Now Pay Later regulatory reforms

### Introduction

The Economic Abuse Reference Group (**EARG**) welcomes the release of the Exposure Draft *Treasury Laws Amendment Bill 2024: Buy Now Pay Later* (the **Bill**) and the Exposure Draft *National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024* (the **Regulations**) and supports the Government's steps towards regulating Buy Now Pay Later (**BNPL**) as a form of credit.

We welcome the opportunity to provide feedback on the proposed BNPL regulatory reforms (collectively, the **proposed laws**). Given the EARG's expertise in economic abuse, this submission will focus on improvements to the proposed laws that would minimise opportunities for economic abuse and fraud and better protect customers experiencing family violence.

In particular, we urge the Government to consider mandating income verification and to remove the rebuttable presumption that BNPL products under \$2000 meet the customer's requirements and objectives. These are critical for preventing BNPL products being misused to perpetrate economic abuse and fraud.

### *Economic Abuse Reference Group*

The [EARG](#) is an informal group of community organisations across Australia which work collectively with government and industry to reduce the financial impact of family violence. Members include domestic and family violence (**DFV**) services, community legal services and financial counselling services. Our work encapsulates the experience of our members (as lawyers, financial counsellors or DFV support workers) who assist clients who have experienced economic abuse.

Over the past few years, members of the EARG have seen a sharp increase in clients who have experienced financial abuse who have problems with BNPL debt.

[Good Shepherd](#), a provider of family violence and financial wellbeing services, reports a large increase in the number of financial counselling and No Interest Loan clients presenting with BNPL debt. Women and families who rely on the inadequate social safety net are increasingly using BNPL to pay for essentials. There has also been an alarming increase in cases of fraudulent and coercive debt occurring in the context of family violence and financial abuse.

[WEstjustice](#), which runs a multidisciplinary legal and financial counselling clinic for people who have experienced family violence and financial abuse in the Western suburbs of Melbourne,

reports seeing these clients presenting every week with BNPL debt and issues. Some of these clients have debts incurred in their name by their ex-partners and some are applications made by the victim survivor themselves because they have otherwise been left in poverty after leaving an abusive relationship.

[Redfern Legal Centre](#), which runs a state-wide Financial Abuse Service providing family law, credit, debt and consumer law assistance to people who have experienced financial abuse in New South Wales, has seen a significant increase in victim survivors who have BNPL debts resulting from domestic and financial abuse over the past two years. Many of our clients' debts were incurred by their ex-partners opening BNPL accounts in their name without their knowledge.

### **Summary of recommendations**

Our key concerns about the proposed laws with respect to economic abuse are:

- The lack of income verification and recognition of family violence as a s133BXD(3) factor that may lead to identity theft and fraud;
- The rebuttable presumption under s133BXF of the Bill that BNPL products under \$2000 meet the requirements and objectives of the customer;
- The lack of clarity about whether a BNPL provider has opted in to the full responsible lending obligations (**RLOs**) or the tailored RLOs for BNPL products; and
- Inadequate financial hardship and family violence practices and policies.

The *National Plan to End Violence against Women and Children 2022-2032* identifies economic and financial abuse as one of six key areas of focus for addressing gender-based violence and emphasises the importance of working with the financial sector to promote safety and prevent the misuse of financial products. The proposed laws are an opportunity for the Government to help prevent the misuse of financial products in the context of family violence, and reduce the harms experienced by victim survivors of economic and financial abuse.

Hereafter we refer to BNPL as a form of Low Cost Credit Contract (**LCCC**), and licensees that provide LCCC as LCCC providers, for consistency with the language in the proposed laws.

Our recommendations, explained in detail below, are:

1. Mandate verification of income and remove any discretion to verify income.
2. Include specific reference to financial abuse and domestic violence in the s133BXD(3) factors. For example, the LCCC provider must be satisfied that a customer is not experiencing financial abuse.
3. Provide guidance on the meaning and examples of 'financially vulnerable' in s133BXD(3)(c) either in the Bill or the Regulations.
4. Require LCCC providers to obtain and report Consumer Credit Liability Information for all LCCCs.
5. Remove the rebuttable presumption under s133BXF of the Bill and replicate the requirement to verify a customer's requirements and objectives in relation to LCCCs.
6. Require LCCC providers to publicly disclose whether they have opted into the tailored RLOs or the full RLOs.
7. Require LCCC providers to make publicly available their policies relating to suitability assessments and the processes they follow.
8. Require LCCC providers to implement mandatory and binding family violence policies which are publicly available.
9. Require LCCC providers to implement mandatory family violence training for all staff that interact with customers and their advocates.

## 1. The lack of income verification and recognition of family violence as a s133BXD(3) factor that may lead to identity theft and fraud

The Bill provides that, in determining whether a LCCC provider has complied with its responsible lending obligations under s130, regard must be had to the factors in s133BXD(3) of the Bill, including (c) *whether the consumer belongs to a class of persons whose members are likely to be financially vulnerable*.

Victim survivors of family violence are at greater risk of identity theft and fraud because it is often their partner (or ex-partner) who uses the victim survivor's personal identity information, which is typically known by spouses, to apply for credit in their name.

Victim survivors are unlikely to make reports to the police where identity theft or fraud has been committed by their ex-partner, including due to safety concerns or fear of reprisal. In the experience of EARG members Redfern Legal Centre and WEstjustice, even where victim survivors do report fraud to the police, such reports are unlikely to be taken seriously by the police and investigated, much less prosecuted.

Many victim survivors do not realise they have LCCC debts in their name until their credit score has been tarnished or they are being pursued by debt collectors.

The proposed LCCC lending model will continue to facilitate identity theft and fraud because of frictionless online sign-up processes. Whilst it is proposed that LCCC providers will have to gather information on income and expenses, there is no express requirement that the information must be *verified*. Verification of income is not only a key factor in determining capacity to pay, but verification of income makes it more difficult for perpetrators of fraud and financial abuse to set up accounts in another person's name. Fraudulent LCCC applicants can be easily identified through income verification as the income and expenses nominated by the 'customer' (that is, the perpetrator using the customer's personal details) typically do not match the customer's payslips and bank account statements.

The Bill only requires that reasonable steps have been taken to verify the customer's financial situation having regard to the factors listed at s133BXD(3), including 'whether the customer belongs to a class of persons whose members are likely to be financially vulnerable'. A LCCC provider can rely on unverified income and expenses information provided by the customer if the circumstances support this.

We are concerned about this for the following reasons:

- It will be nearly impossible for a LCCC provider to be aware if a customer belongs to 'a class of persons whose members are likely to be financially vulnerable' without requiring the LCCC provider to first independently verify the financial information the customer has provided, via documents including bank statements and payslips.
- In determining whether 'reasonable steps' have been taken to verify a customer's financial situation, the LCCC provider can have regard to whether it has policies in place that mitigate and reduce the likelihood of unaffordable credit being provided. However, there is no requirement for those policies to be made publicly available and therefore, customers and their representatives will be unable to confirm whether those policies have been followed.
- The drafting is too vague to be effective and will leave too much room for discretion of the LCCC provider to not verify a customer's financial situation in most cases, including because s133BXD(6) of the Bill allows the provider to follow general policies and rely on unverified documents and presumptions about the customer's circumstances.

### **Recommendations**

1. Mandate verification of income and remove any discretion to verify income.
2. Include specific reference to financial abuse and domestic violence in the s133BXD(3) factors. For example, the LCCC provider must be satisfied that a customer is not experiencing financial abuse.
3. Provide guidance on the meaning and examples of 'financially vulnerable' in s133BXD(3)(c) either in the Bill or the Regulations.

The case study below demonstrates the consequences of failing to verify income and recognise family violence, which has led to economic abuse, identity theft and fraud.

#### **Case study: Identity theft and fraud**

Abby\* was in a domestic violence relationship where she experienced emotional and financial abuse for many years. When she decided to leave her partner, he threatened to send naked photos of her to her friends and family. The abuse continued even after Abby escaped the relationship and fled to another state. Months after she had relocated, her ex-partner forwarded her emails from a debt collector that had been sent to an email address set up in her name, chasing her for debts she knew nothing about. Her partner's email threatened that there were 'more to come'.

When Abby sought help from Redfern Legal Centre's Financial Abuse Service, she was stressed and afraid and didn't know where to turn for assistance. Redfern Legal Centre (RLC) assisted her to obtain her credit reports and request information from the debt collector and credit provider. This uncovered a pattern of BNPL accounts that Abby's ex-partner had fraudulently created in her name with various providers, using her personal details and an email address that he had created in her name. She had no knowledge these accounts existed until she was being chased by multiple companies to pay thousands of dollars that were owed on these accounts.

Engaging with the BNPL providers was very daunting for Abby as she was born overseas and relied heavily on interpreters and assistance from RLC to navigate her through resolving her dispute. When RLC assisted Abby to contact the BNPL providers and explain her situation, she was told that they required a police statement as evidence of fraud before they could move forward with their investigation and consider her complaint. In order to have the debts waived, the accounts closed, and the listings removed from her credit report, she would have to make a report to the police.

When Abby went to the police to report the fraud, a male police officer interviewed her and took down very basic details of her situation. The police statement they provided to her stated that the "possible identity fraud" was committed online "by an unknown person" and that there would be no further investigation because "all reasonable enquiries" had been completed. The fact that Abby was a domestic violence survivor was not noted, despite the fact there was an Apprehended Domestic Violence Order in place to protect her from her ex-partner. The police noted that Abby was receiving assistance from RLC to seek account closures and debt waivers, and that the only purpose of Abby making a complaint to the police was to receive an Event number so the accounts could be closed. The police provided no further assistance for her matter and failed to make appropriate enquiries

regarding the domestic violence she had experienced. The BNPL provider's requirement for a police statement left Abby feeling retraumatized, as the police had not taken her situation seriously or shown any intention to investigate her ex-partner's fraudulent behaviour.

After protracted correspondence between RLC and the BNPL providers, they agreed to waive the debts and remove the enquiries from her credit reports. Her credit rating improved, and she was able to escape the debts incurred by her ex-partner and move forward with her life.

*\*Name changed to protect client's privacy and safety*

## 2. Rebuttable presumption that LCCC products under \$2000 meet the requirements and objectives of the customer

Through coercion, a victim survivor may be pressured to obtain LCCC for the benefit of their partner. The victim survivor does not receive a significant benefit from the LCCC and therefore it is unsuitable for them.

LCCC providers do not verify or identify the intended recipient of purchases or cash advances, nor do they seek to understand their requirements and objectives in taking out the loan.

Section 133BXF of the Bill applies an automatic presumption for credit under \$2000 that the credit will not be unsuitable for the requirements and objectives of the customer unless the contrary is proved (the **rebuttable presumption**). This is problematic as it assumes that LCCC under \$2000 is 'low risk' and fails to recognise the potential for LCCC products to cause considerable harm and financial hardship, particularly for victim survivors of family violence who typically have multiple coerced or fraudulent LCCC debts in their name.

While we support the introduction of credit checks, the proposal to only require negative credit checks for LCCC under \$2000 is insufficient. Again, this arbitrary distinction fails to recognise that LCCC under \$2000 can be just as harmful as LCCC over \$2000. A LCCC provider cannot fully assess the suitability of a LCCC for a customer based on information about defaults and negative credit events. Our members observe that victim survivors of family violence often prioritise repayment of LCCC above other essentials, even when they are in extreme financial hardship, in order to preserve their credit score and their ability to access LCCC products in future. For many victim survivors, relying on the customer's stated income and expenses and a negative credit check would not reveal the full extent of their vulnerability and financial hardship, and would not allow the LCCC provider to make an informed suitability assessment. LCCC providers should be required to obtain Consumer Credit Liability Information for all applications, including LCCC under \$2000.

It will also be extremely difficult in practice to rebut this presumption of suitability for LCCC under \$2000. Tailored RLOs do not require verification of the customer's financial position; there is no need to verify the details of the income and expenses provided on the application. It is possible to dispute a responsible lending assessment (through internal dispute resolution or through AFCA) and request documents such as the unsuitability assessment, but it is unlikely the LCCC provider would have obtained bank statements unless there were risk factors identified in the documents they obtained or credit checks undertaken, for example other payday loans or LCCC accounts. This puts all the responsibility on the customer to provide the information which will be relied on for the LCCC provider's assessment which, for a victim

survivor, is outside of their control. This will also make it harder for customers to succeed in bringing complaints about breaches of RLOs without the requirement for verification.

The rebuttable presumption introduces an unnecessary loophole that will enable economic abuse. A requirements and objectives check introduces a minimal but important amount of friction to the sign-up process, and guards against economic abuse in relation to other credit products. We see many victim survivors of family violence who have unsuccessful credit applications on their credit reports for credit cards or personal loans, because the lender has made inquiries about their requirements and objectives which led to them identifying that the victim survivor was being coerced and would not receive any benefit from the credit, and the lender has therefore rejected the application. The Australian Banking Association's [Industry Guideline on Preventing and responding to family and domestic violence](#) and the Banking Code of Practice require member banks to consider whether the applicant will receive a substantial benefit from the credit before approving it.

Coupled with a lack of verification of income and expenditure, the proposed laws offer very limited opportunity to mitigate against the risk of LCCC being used to perpetrate economic abuse.

### **Recommendations**

4. Require LCCC providers to obtain and report Consumer Credit Liability Information for all LCCCs.
5. Remove the rebuttable presumption under s133BXF of the Bill and replicate the requirement to verify a customer's requirements and objectives in relation to LCCCs.

### **3. The lack of clarity about whether the LCCC provider has opted into the full responsible lending obligations or the tailored LCCC obligations**

The Bill provides that LCCC providers can either apply the full RLOs under the *National Consumer Credit Protection Act 2009* (Cth) or use the tailored version of RLOs under the Bill. It is unclear how customers and their representatives will know if a LCCC provider has opted in to the full RLOs or the tailored RLOs, and therefore which standard to test the LCCC provider's conduct against.

Nothing in the Bill or the Regulations states that a LCCC provider must make their policies relating to suitability assessments publicly available. Without this information, there will be no way for customers and advocates to know whether a LCCC provider has followed their own policies. This will make it extremely difficult for:

- customers to make AFCA complaints, as a complainant will not be able to assess compliance against a provider's policy;
- ASIC to monitor and enforce compliance; and
- AFCA to identify systemic issues.

This will limit opportunities for customers to obtain advice about whether the LCCC provider has breached the law, successfully bring a complaint against the LCCC provider, and receive a remedy for their loss. This will also increase the time and resources required of customers, representatives (such as community lawyers and financial counsellors), LCCC providers and AFCA staff in resolving LCCC disputes.



### **Recommendations**

6. Require LCCC providers to publicly disclose whether they have opted into the tailored RLOs or the full RLOs.
7. Require LCCC providers to make publicly available their policies relating to suitability assessments and the processes they follow.

## **4. Inadequate financial hardship and family violence practices and policies**

Our members observe that LCCC providers currently offer vastly inconsistent responses to financial hardship issues and other issues affecting customers experiencing family violence. Publicly available information about LCCC providers' approaches to family violence and financial hardship varies greatly.

The [Buy Now Pay Later Code of Practice](#) places the onus on customers to disclose their vulnerability rather than giving LCCC providers a positive obligation to proactively identify vulnerability where there are potential warning signs, as the Banking Code of Practice does. This is problematic because many customers experiencing vulnerability will not self-identify or disclose due to stigma and the fear of being excluded from accessing LCCC products in future, particularly if they are unable to access mainstream forms of credit and receive inadequate social security payments.

Some LCCC providers are difficult for customers and their advocates to contact because they do not have a phone number for their hardship team and only have web enquiry forms.

LCCC providers often refuse to provide customers and their advocates with critical documents used to uncover economic abuse, such as statements of account, and frequently refer customers to download these themselves from the app, placing the responsibility wholly onto customers. This is a subpar response, particularly for customers who are less digitally literate, or for victim survivors of family violence whose perpetrators may have access to or control of the app.

LCCC providers often require a high level of documentation to progress claims of fraudulent transactions. For example, they may require receipts for each individual transaction, which is both unreasonable in the case of fraudulent debt and poses risks in the context of family violence. In our experience, LCCC providers repeatedly request documentation of family violence (like police reports and apprehended violence orders or intervention orders) before assisting victim survivors and providing remedies. This type of documentation may not exist or may be difficult or dangerous for a victim survivor to access.

While the Bill will subject LCCC providers to the same hardship obligations as other credit providers, we do not consider the proposed laws will improve hardship responses in practice, especially in circumstances of family violence and economic abuse. To build consistency and better practice in this area, LCCC providers should be mandated to have publicly available family violence policies and undertake family violence training with all customer-facing staff.

## Recommendations

8. Require LCCC providers to implement mandatory and binding family violence policies which are publicly available.
9. Require LCCC providers to implement mandatory family violence training for all staff that interact with customers and their advocates.

### Case study: High level of detail required to waive fraudulent debt

Anna\* is a single mother with a high school aged son. Anna's primary income is Centrelink payments, and she also works casually with fluctuating income. Anna and her son live in a private rental together but were served a Notice to Vacate as the property was being sold. Until recently, Anna's mother had lived with them so that Anna could care for her. Anna's mother moved into public housing, which reduced Anna's capacity to make rental payments.

At the time of referral, Anna had been separated from her ex-partner, who perpetrated family violence, for around a year. The ex-partner was still perpetrating financial abuse, including by withholding child support payments and fraudulently incurring BNPL debt in her name. Anna was referred to a financial counsellor from the Victorian Legal Aid Child Support Legal Service. At the time of referral, Anna had debts owing to a telecommunications company (\$730), childcare (\$300), the Australian Taxation Office (\$3,794) and BNPL debt from fraudulent activity perpetrated by her ex-partner (over \$1,500).

The financial counsellor contacted the BNPL provider to negotiate a waiver, as the BNPL purchases were completed by Anna's ex-partner in her name, without her consent. The financial counsellor provided a copy of an interim intervention order and medical certificates to corroborate her story. Anna was asked by the BNPL provider to provide purchase evidence for the particular items that were bought by her ex-partner. The financial counsellor and Anna managed to provide evidence for three items, which resulted in a partial debt waiver only (~\$1,000). The BNPL provider refused to waive any purchase debts without proof of purchase.

Finding proof of purchase for all items was incredibly difficult for Anna, as the threat of violence and the intervention order made contacting her ex-partner inappropriate. It was also difficult for her to repay the remainder of the BNPL debt in the context of the financial abuse she was experiencing. Anna was struggling to service a number of other debts that existed because of her ex-partner's refusal to pay child support.

This case study demonstrates a lack of sound family violence policy and training. The requirement that victim survivors of family violence provide proof of purchase in the case of fraudulent debt is impractical and poses safety risks. The BNPL provider did not consider the broader context of financial abuse and family violence in relation to Anna's capacity to repay the fraudulent BNPL debt.

*\*Name changed to protect client's privacy and safety*