

S9(2)(a)

OIA 003/21

Dear S9(2)(a)

Thank you for your email of 8 June 2021 requesting, under the Official Information Act 1982 (the Act), all reports, briefings, memos and aide memoires received by my office this term regarding Buy Now Pay Later services and regulation.

There are eight documents that fall within the scope of your request. These are listed in the table below, including the grounds under which any information has been withheld.

No.	Date	Document subject	Suggested response	Grounds for redactions (Section of the Act)
1.	4 February 2021	Briefing: Update on the Buy Now, Pay Later Industry	Release with redactions	Section 9(2)(a) Section 9(2)(ba)(i) Section 9(2)(b)(ii) Section 9(2)(f)(iv) Section 9(2)(g)(i)
2.	26 February 2021	Event briefing: Christians Against Poverty	Release with redactions, minus out of scope content	Section 9(2)(a)
3.	4 May 2021	Event briefing: Meeting with the representatives of the Buy-Now Pay-Later sector on 6 May 2021	Release with redactions	Section 9(2)(a) Section 9(2)(ba)(i) Section 9(2)(g)(i)

No.	Date	Document subject	Suggested response	Grounds for redactions (Section of the Act)
4.	18 March 2021	Briefing: Buy now pay later – options and next steps	Release with redactions	Section 9(2)(a) Section 9(2)(ba)(i) Section 9(2)(b)(ii) Section 9(2)(g)(i) Section 9(2)(f)(iv)
5.	9 April 2021	Event briefing: Meeting with Consumer NZ	Release with redactions, minus out of scope content	Section 9(2)(a) Section 9(2)(f)(iv)
6.	16 June 2021	Private debt issues – summary of work – June 2021	Release in full, minus out of scope content	
7.	5 May 2021 12 May 2021	Weekly Reports from 6 November 2020 to now	Release with redactions, minus out of scope content	Section 9(2)(a)
8.	4 December 2020 22 January 2021 28 May 2021 18 June 2021	CCA Hot Topics from 6 November 2020 to now	Release with redactions, minus out of scope content	Section 9(2)(a) – applies to 8c and 8d only

Where information in a document has been redacted, I do not consider that the withholding of this information is outweighed by public interest considerations in making the information available.

You should also note that document 8 (the CCA Hot Topics from 6 November 2020 to now) includes four variations of content and talking points related to Buy-Now, Pay-Later services and regulations. The Hot Topics send the same content each week, unless updated. Therefore, I have not included every Hot Topic sent since November 6 2020, and have instead attached the original (at 6 November 2020) and the subsequent versions where content has substantially changed. The remainder of the Hot Topics are out of the scope of your request and therefore excluded; I have also taken a similar approach with the Weekly Reports.

A number of redactions have been made to the first six documents, many on the basis of free and frank advice from my officials related to ongoing policy decisions. I have commissioned a discussion document from my officials on the nature and

extent of consumer harms caused by Buy-Now, Pay-Later products, in order to inform any possible future intervention – including advice relating to the potential for regulation under the Credit Contracts and Consumer Finance Act. I expect many of the redactions in the documents you have requested will be resolved when the discussion document is released later this year.

You have the right under section 28(3) of the Act to seek a review of this response by the Ombudsman. The Ombudsman has an online complaints form at <http://www.ombudsman.parliament.nz/make-a-complaint/make-a-complaint-now/make-a-complaint-online-now>. Complaints can also be made by e-mail at [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or by post at:

The Ombudsman  
PO Box 10-152  
Wellington 6143

Yours sincerely,

Hon Dr David Clark  
**Minister of Commerce and Consumer Affairs**



# BRIEFING

## Update on the Buy Now, Pay Later Industry

<b>Date:</b>	4 February 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	<b>In Confidence</b>	<b>Tracking number:</b>	2021-1889

Action sought		
	Action sought	Deadline
<b>Hon Dr David Clark</b> Minister of Commerce and Consumer Affairs	<p><b>Note</b> that BNPL products are leading to some instances of consumer harm but we consider the evidence is insufficient to warrant bringing them under the CCCFA at this point in time, especially given the benefits of the products and the innovation that is still occurring in the industry.</p> <p><b>Note</b> that regulation is likely to be more effective if it occurs once the industry has further matured.</p> <p>S9(2)(f)(iv)</p> <p><b>Agree</b> to meet with BNPL providers.</p>	18 February 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Jason Le Vaillant	Principal Policy Advisor, Competition and Consumer Policy	04 462 4291		✓
Daniel O'Grady	Manager, Competition and Consumer Policy		S9(2)(a)	

The following departments/agencies have been consulted:
N/A

**Minister's office to complete:**

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments:**



# BRIEFING

## Update on the Buy Now, Pay Later Industry

Date:	4 February 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1889

### Purpose

To provide you with information on the buy now, pay later sector (**BNPL**), the impact that they are having on consumers and the credit industry, and whether there is a need for regulation in the sector.

### Executive summary

1. During the meeting with the Financial Services Federation in December, you asked for an update on the BNPL industry and the development of the industry Code of Practice (**the Code**).
2. MBIE advised the previous Minister of Commerce and Consumer Affairs, Hon Faafoi, in November 2019 that there was not sufficient evidence of harm to warrant bringing BNPL products under the CCCFA. As BNPL arrangements do not charge interest or fees, they are not currently classified as a consumer credit contract. BNPL were encouraged to develop an industry Code of Practice to ensure there are adequate protections for vulnerable consumers.
3. Since that time BNPL products have experienced rapid growth, particularly following the COVID-19 pandemic. Officials are also beginning to see increasing evidence of consumer harm. There is a lack of quantitative evidence of consumer harm within New Zealand. However, officials are getting increasing reports from stakeholders with concerns regarding the BNPL industry. There have also been extensive reviews of the BNPL industry in Australia which show that consumers are suffering financial hardship as a result of BNPL products.
4. However, officials recognise BNPL products allow consumers to access credit without the fees and interest that are seen with credit cards and short term loans. This is allowing consumers to spread their spending and absorb financial shocks at lower cost.
5. The BNPL industry have been working to develop an industry Code of Practice (**the industry Code**) which offers additional protections for consumers. Whilst this is a positive step to ensuring there are adequate consumer protections, there are concerns that consumers will still gain access to BNPL options which they are unable to pay off without financial hardship.
6. To address these concerns we recommend S9(2)(f)(iv) [REDACTED]
7. S9(2)(f)(iv) [REDACTED]

8. Officials will continue to assess the consumer harm that is arising from BNPL products and watch for developments in the regulatory frameworks for BNPL products in other jurisdictions.

## Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that there is increasing evidence of consumer harm arising from the use of buy now, pay later products.

*Noted*

- b **Note** that at this point in time officials do not consider that there are sufficient indicators of consumer harm to warrant bringing buy now, pay later providers within the scope of the Credit Contracts and Consumer Finance Act, although this may change as the industry develops.

*Noted*

- c **Note** that officials consider that better regulatory outcomes will likely be achieved if regulation is to occur once the industry has matured.

*Noted*

- d S9(2)(g)(i)

- e **Agree** to meet the buy now, pay later businesses to outline your concerns about buy now, pay later products and discuss how these concerns can be addressed.

*Agree / Disagree*

Daniel O'Grady  
Acting Manager, Competition and Consumer  
Policy

Hon Dr David Clark  
Minister of Commerce and Consumer  
Affairs

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04/ 02 / 2021

## Background

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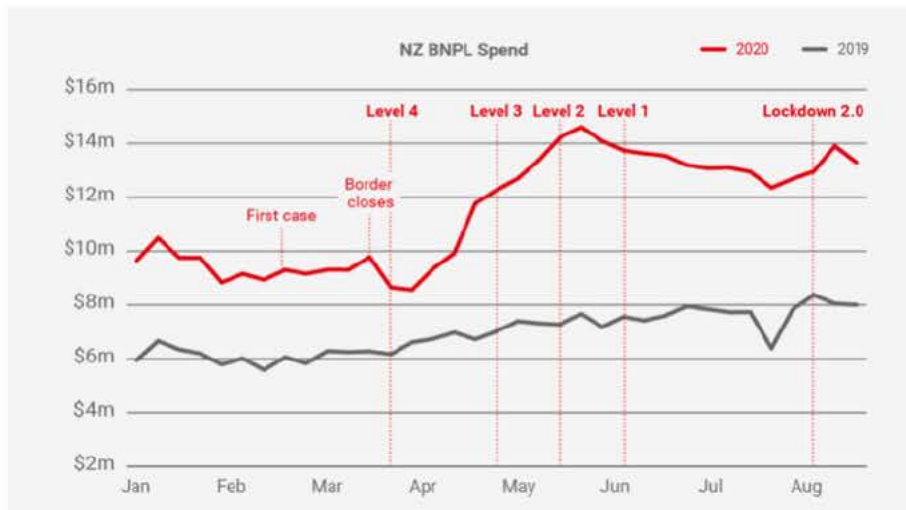
9. During your meeting with the Financial Services Federation on 15 December 2020, you requested advice on the buy now, pay later industry (**BNPL**). In particular, you sought advice on the background of the BNPL industry, the industry's progress on development of the industry Code of Practice (**the Code**) and whether officials have reconsidered their advice given in the November 2019 briefing 1538 19-20 that there was insufficient evidence of harm from the BNPL sector to bring them into regulation under the CCCFA.

### How BNPL products work

10. BNPL provides an interest free, short-term consumer credit product for individual transactions. When a customer pays using a BNPL system, the BNPL provider pays the merchant the full price immediately and assumes all credit risk.
11. The customer pays the first instalment to the BNPL provider at the time of the purchase and enters into a contract to pay off the remaining amount. Depending on the BNPL provider, the payments may be split into four, six or ten payments over two to three months. Payments are direct debited from a customer's debit or credit card.
12. Unlike other forms of credit, BNPL providers do not charge their customers interest or fees for the service unless the customer defaults on their repayments. The BNPL model relies on charging merchants a fee for using the BNPL service.
13. Customers generally begin with a credit cap of around \$500, with Laybuy having credit caps as low as \$120. BNPL providers increase these caps over time if the customer proves that they can keep up with their repayments. Customers can increase their credit limits over time to \$2,000 through Afterpay, \$1,500 through Laybuy and \$1,000 through Humm Little Things.
14. BNPL providers have other products that have higher limits (e.g. Humm Big Things allows customers to access \$10,000) but customers are charged fees that result in these products being regulated as consumer credit contracts under the CCCFA. These products will not be considered in the scope of this advice.

### About the BNPL industry in New Zealand

15. BNPL products are a relatively new service within New Zealand. There are currently five significant market players within New Zealand; Afterpay Limited (**Afterpay**), Laybuy Holdings Limited (**Laybuy**), ZIP Co Limited (**Zip**), FlexiGroup New Zealand Limited which operates Humm (Previously known as Oxipay) (**FlexiGroup**) and Latitude Innovation Holdings Limited which operate Genoapay (**LIHL**). All of these providers established themselves in New Zealand in 2017.
16. Over the past four years the BNPL industry has experienced significant growth in the number of consumers who are using these products as an alternative form of credit. BNPL has proven to be a popular product with young women: 77 per cent of users are under the age of 45 and 68 per cent of users are female.
17. As seen in the below graph, there has also been a significant uptake in spending through BNPL services in 2020, in comparison to 2019, particularly following the Alert Level 4 lockdown. As more merchants provide BNPL services, and BNPL options continue to move into new industries such as healthcare, motor vehicle servicing and homeware we expect this growth to continue.



Source: NZPost eCommerce Spotlight Hub August 2020 edition

### BNPL differs from other forms of credit

18. BNPL products have many features of a consumer credit contract. However, BNPL products fall outside the statutory definition of a consumer credit contract, as they do not charge credit fees<sup>1</sup>, interest or take a security interest over goods. BNPL providers do charge default fees, but these are not regarded as credit fees for the purposes of the CCCFA. This means BNPL products are not regulated by the CCCFA, however they are subject to the Fair Trading Act 1986 and Consumer Guarantees Act 1993.
19. Consumers use BNPL in a similar manner to credit cards as they spread consumption over time. However, credit card providers rely on interest and fees to generate revenue. Customers generally only have to repay 2-4% of the outstanding balance each month. In contrast, BNPL contracts are fully paid off over a shorter period or two to three months.
20. Credit cards also give consumers access to greater amounts of credit, which increases the opportunity for financial hardship. In 2020, Westpac released data which set out that the average limit on a credit card is \$8,500 and the average amount owed by Westpac consumer is \$2,000. S9(2)(ba)(ii)
 

However, these averages may include accounts that are not being used. Therefore, the averages of active accounts may be considerably higher.
21. BNPL products also have similarities to common invoicing practices. Many consumers will put an item such as a car or medical bill onto an account which can be paid off at a later date. If a consumer is late paying their account they may incur a fee or interest charges. Invoicing is a credit sale, however, they are exempted from the being a consumer credit contract under s 15 of the CCCFA when the amount payable is to be repaid within two months. BNPL operate a similar model, but they are shifting the risk from the merchant to themselves.

<sup>1</sup> Credit fees mean fees or charges payable by the debtor under a credit contract such as establishment fees but does not include default fees.



## The future of BNPL in New Zealand

22. The BNPL industry is experiencing significant growth and has the potential to significantly disrupt the payment systems industry in New Zealand as this growth continues and international BNPL providers enter the market.
23. Last year the Commonwealth Bank of Australia (CBA) invested \$300m to rollout the Swedish BNPL provider Klarna into Australia and New Zealand. Klarna is the biggest Fintech provider in Europe. Klarna offers additional consumer protections as it allows more flexible repayment schedules and does not charge fees for seven days following a missed payment.
24. Recently, Flexigroup introduced its subsidiary Bundll to Australia. Bundll creates a Bundll Mastercard which is added to your digital wallet on your phone. This allows Bundll to be used wherever Mastercard is accepted. This means that BNPL can be used to purchase groceries, petrol or pay other bills. Visa is also trialling a BNPL service in the US as part of their offering on existing Visa cards.
25. International providers have the ability to leverage their resources and established networks to gain large market shares. Flexigroup CEO Rebecca James has gone as far as to say that they are “seeing a structural shift from credit cards into buy now, pay later as banks are looking for ways to catch up.”

## Previous Regulatory Approach to BNPL products

26. In the 2018 Review of Consumer Credit, MBIE found that there was very little evidence of harm from BNPL to date. The 2018 Cabinet paper, *Review of consumer credit* [CAB-18-MIN-0466] stated that the previous Minister of Commerce and Consumer Affairs did not consider that they should be brought within the scope of the CCCFA at that time.
27. However, the Credit Contracts Legislation Amendment Act (**CCLAA**) inserted s 137A into the CCCFA to allow the Minister of Commerce and Consumer Affairs to declare “*any class of arrangements or facilities that has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment to be a consumer credit contract.*” This change was intended to allow BNPL contracts, and other unregulated products, to be brought within the scope of the CCCFA in the future if necessary.
28. Throughout last year, Minister Faafoi outlined his concerns of consumer harm with BNPL providers. As part of these discussions, he also encouraged BNPL providers to improve their models to ensure that consumers are staying within their means, being treated fairly, and have accessible options around debt relief when they are in hardship.
29. It was also indicated to providers that regulations would be considered in light of industry practices and evidence of consumer harm. It was hoped that this would encourage the sector to adopt additional consumer protection measures. The industry has since been working on an industry Code (see Annex 1). The Code was originally drafted in Australia for Australian BNPL providers but has been adjusted to fit New Zealand’s regulatory framework. BNPL providers have kept the Government informed throughout the development of the Code, allowing officials and the Minister the opportunity to comment.
30. Whilst officials are supportive of a number of commitments made in the Code, we believe more needs to be done to address concerns that we raised with BNPL providers in a meeting in September 2020. The Code has been revised since the meeting, however, many of these key concerns are yet to be addressed. We have highlighted in the attached Code where changes have been made following discussions with officials.

## Summary of consumer protection measures in BNPL products


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### Current Measures

31. In May 2020, BNPL providers wrote to the previous Minister of Commerce and Consumer Affairs outlining mechanisms which help to protect consumers. Their responses are summarised below. Most of the mechanisms help providers to minimise the risk of default.

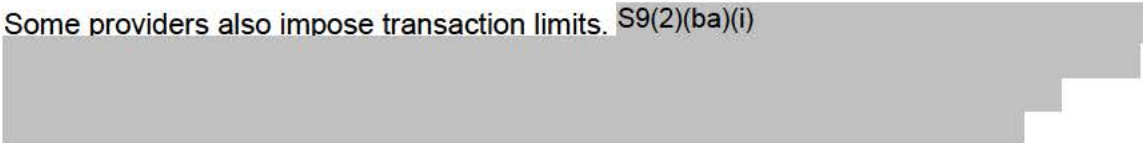
#### *Declining customers with low credit scores:*

32. Four of the five BNPL providers use credit scores to determine the creditworthiness of a customer when they establish an account. These checks help to prevent some customers who have a history of default from accessing new lines of credit.

33. S9(2)(ba)(i)
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#### *Credit and transaction limits*

34. All BNPL providers impose tailored credit limits on each customer. New customers are offered lower credit limits (e.g. \$500 with Afterpay and \$120 with Laybuy). As a customer meets their repayment obligations they can build up a credit limit to the value of \$1,000-\$2,000 depending on the provider.

35. Some providers also impose transaction limits. S9(2)(ba)(i)
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#### *Capped late fees for missed payments*

36. All BNPL providers have a cap on the late fees that can be incurred for each missed payment. The cap varies between providers but generally falls between \$40-\$68. Humm charges a \$10 fee for all missed payments whilst Afterpay charges \$10 for a missed payment and an additional \$7 if the amount is not paid after a week. Afterpay's fees are capped at \$10 for transactions under \$40, and either 25% of the transaction value or \$68, depending on what is less, for transactions over \$40.
37. Each transaction is treated separately, therefore, it is possible for customers to accumulate considerable fees when they are in default for multiple active transactions.

#### *Account suspension following missed payments*

38. BNPL providers freeze accounts that are in arrears. Accounts are generally reactivated when the outstanding payments and late fees are rectified. Some providers will cancel a customer's account once they have entered into a payment plan as a result of financial hardship.

#### *Hardship policies to help people in financial difficulties*


39. BNPL providers provide customers facing financial difficulties with options for resolving their defaults. They encourage customers to contact them if they are concerned about their ability to make repayments. They can work with customers to find a mutually acceptable solution such as waiving late fees, deferring payments, payment moratoriums, entering long-term repayment plans and in extreme cases debt waiver or partial settlement.

### *Member dispute resolution schemes*

40. All five BNPL businesses are registered on the Financial Service Providers Register and are members of a dispute resolution scheme. This provides consumers with an avenue to resolve disputes with the BNPL business without initiating legal proceedings.

### **Additional protections within the draft Code**

S9(2)(ba)(i)



43. While these requirements are positive, the Code does not provide a clear articulation of how these requirements will be met and enforced. Currently, the Code sets out factors that should be considered as part of the application process. However, BNPL providers can carry out their current checks and still comply with the Code. Officials raised these concerns with providers in September 2020, however the revised draft did not make changes to reflect these concerns.

### **Concerns about BNPL products**

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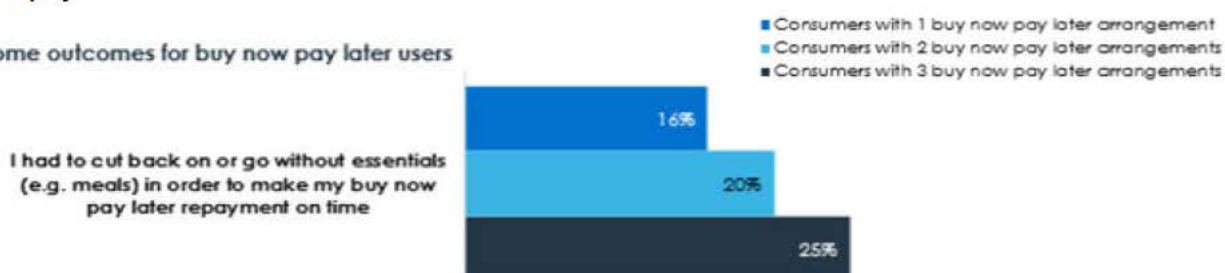
44. MBIE has engaged with various stakeholders who have shared their concerns about the increasing harm that they are seeing.
45. Currently, there is a lack of quantitative data and research to show consumer harm as a result of BNPL use within New Zealand. We have looked to the Australian Securities and Investments Commission industry update of buy now, pay later (**ASIC report 2020**), as they

have conducted an extensive review of the industry and resulting consumer harm. We suspect that similar results would be seen within New Zealand.

### Evidence of consumer harm

46. BNPL providers have stated that they do not believe there is significant evidence of consumer harm as they have low default rates of around 1–2 per cent and rates of missed payments of around 9–15 per cent. These measures are of limited value in assessing the overall harm that is occurring within the sector.
47. Various stakeholders have raised concerns that consumers are spending beyond their means and becoming increasingly reliant on BNPL products, which is leading to an accumulation of debt. As a result, consumers are going without essential goods in order to make their BNPL payments and defaulting on household bills, credit card and home loan repayments.
48. The ASIC 2020 report found that consumers were going without essentials in order to make BNPL repayments:

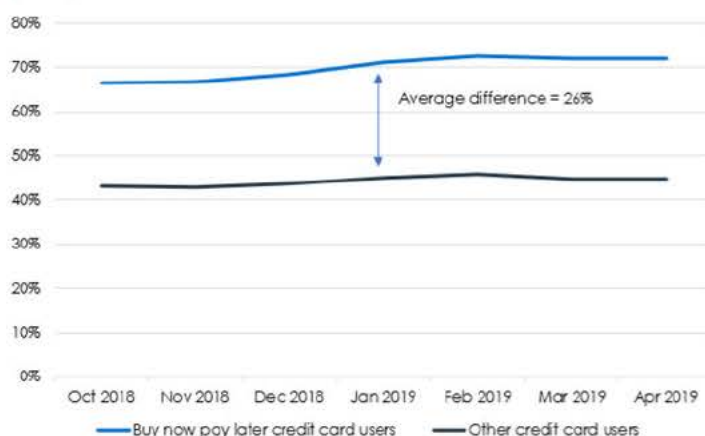
Figure 12: Some outcomes for buy now pay later users



49. The ASIC report 2020 also found that one in five consumers missed or were late with household bills in order to make BNPL repayments on time. Of these individuals 44 per cent missed paying household bills, whilst 32 per cent missed credit card payments and 22 per cent missed home loan payments.
50. There is also increasing evidence of BNPL customers using credit to make their BNPL repayments. S9(2)(ba)(i)

The ASIC report 2020 found that those who use a credit card to make repayments are more likely to incur interest charges in comparison to other credit card users as seen below:

Figure 13: Percentage of credit card accounts that incurred a monthly interest charge (October 2018 to April 2019)



51. The ASIC 2020 report also found that BNPL users are taking out additional loans in order to make repayments on time as seen below:



52. Consumer advocates have also raised concerns that the BNPL model is incentivising consumers to keep up with repayments in order to retain the line of credit. They are concerned that users are prioritising BNPL repayments over other debts or essential spending as a result. This can result in them going into arrears, and worsening their financial position.

### Causes of consumer harm

#### *Lack of affordability and suitability assessments*

53. The lack of affordability and suitability checks being conducted is likely to be a core reason for poor consumer outcomes. Under the CCCFA, lenders are obliged to conduct suitability and affordability assessments to ensure that consumers are able to make repayments without financial hardship.
54. While four BNPL providers conduct credit checks to assess a customer's financial position, credit checks are only a retrospective indicator of an individual's financial position. BNPL providers rely on credit scores from Centrix as the basis for their credit check, rather than obtaining credit information from multiple credit reporting bureaus to ensure they have complete information.
55. BNPL providers also only conduct credit checks when the customer initially signs up with the provider to make an account. As BNPL providers increase the credit cap, they do not tend to redo credit checks as they rely on a customer's repayment history. This means that a consumer who has fallen into arrears on other debts can still automatically gain access to more credit through their BNPL provider, therefore increasing the potential financial hardship that may arise.
56. It appears that Flexigroup who operate Humm are now conducting more extensive affordability checks including income and expense assessments. More information is needed to understand how extensive these checks are. However, this appears to be a positive step to ensuring that consumers are not borrowing more than they can afford.

#### *Prioritisation of BNPL payments*

57. BNPL payments are direct debited from a nominated debit or credit card. If the direct debit fails, some providers retry payments multiple times. This means that customers are forced to make their BNPL payments ahead of other essential expenditure and debt payments.

#### *Consumers using multiple BNPL products*

58. Stakeholders and officials are concerned that consumers are exposing themselves to hardship and increased risk by using multiple BNPL products. The use of multiple BNPL products allows people to circumvent the credit/transaction limit imposed by providers.

59. S9(2)(ba)(i)

*Excessive fees for missed payments*

61. There are also concerns that the fees that are being charged for missed payments are excessive and further impacting vulnerable consumers. Whilst the fees charged are capped at around \$40–68 or 25% of the transaction value, these fees are being charged on small transactions. If a consumer has multiple transactions, it is possible for a consumer to accumulate considerable fees in a short time frame.
62. As these fees are being charged over a two month period, consumers are being charged fees that are considerably higher than interest charges on a credit card. A fee cap of 25 per cent which accumulates over a two-month period is equivalent to an interest rate of 150 per cent per annum. In comparison, a credit card charges an interest rate of 17–20 per cent per annum. As a result, BNPL customers can be charged higher fees in a two month period than would be charged for credit card interest over the full year.
63. BNPL providers do tend to freeze late fees once hardship notice is given. However, people facing serious financial difficulties may be less likely to plan for the future or be proactive in taking steps to seek help.

**Additional concerns**

*Lack of regard for insolvency proceedings*

64. S9(2)(ba)(i) [redacted] Insolvency law requires an individual to inform the assignee about any funds they obtain over \$1,300 during the insolvency. As most BNPL product have a credit limit below this amount a consumer can continue to use BNPL products.
65. BNPL providers will not approve customers with insolvency proceedings. However, such proceedings can only be brought to their attention when they conduct credit checks when a customer signs up. As providers do not tend to re-conduct credit checks, a customer can continue to access credit after insolvency proceedings are brought against them. This is an issue that would need to be explored further as we are unaware of how extensive it is.

*Lack of consumer understanding about BNPL*

66. Officials and stakeholders are concerned that many consumers do not view BNPL products as a form of debt. Providers can report any negative activity such as missed payments or

defaults to credit bureaus, however it is unclear what extent they carry out credit reporting. If a BNPL debt is passed onto a debt collection agency, it will also leave a negative mark on a customer's credit report. Many consumers do not understand the impact that BNPL can have on their credit score and their ability to gain further credit such as a car or loan.

#### *Disproportionate effect of consumer harm on women*

67. As 68 per cent of users are women and 70 per cent of users are between the ages of 18-45, there are concerns that BNPL may disproportionately affect young women who already experience worse financial wellbeing outcomes than men. A survey conducted by the Commission for Financial Capability found that women have lower financial literacy than men whilst studies also show that women have lower savings than men. BNPL has the potential to disproportionately affect women, however, further research is necessary to determine the extent of the issue.

#### *Disparity of treatment between BNPL and other lenders*

68. There is also concern that an unregulated BNPL industry creates a market for credit that is not competitively neutral. This is because lenders must comply with prescriptive regulatory requirements whilst BNPL has no responsible lending obligations. This disparity in treatment may be a cause for concern as the industry continues to grow.


### **Benefits of BNPL for consumers**

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69. It is necessary to note that the harm that arises from the use of BNPL products is impacting only a small portion of users. Many of those experiencing financial harm may have been experiencing financial harm regardless of whether or not they used BNPL. However, many New Zealanders are benefiting from being able to access goods which they would not have been able to afford or which they would have purchased using a more expensive form of credit. A recent Colmar Brunton study showed that of those who were declined BNPL credit, 57 per cent reduced spending on important living expenses to make the purchase whilst 26 per cent applied for another type of credit.
70. In writing to the previous Minister of Commerce and Consumer Affairs in May last year, Laybuy provided some examples of feedback they had received from their customers. One example was from a mother who was able to buy her kids raincoats worth \$120 as she could repay them over a couple of months. Another example was from a father who could buy his son's rugby boots at the start of the season which he would not have been able to do without Laybuy.
71. We are also seeing BNPL shift into healthcare and vehicle servicing. Consumers often experience a financial shock as a result of these bills, with many individuals having to pay them off with a short term loan or credit card. BNPL allows consumers to spread the shock that occurs over multiple pay checks, therefore reducing the financial harm that could occur.
72. Use of BNPL may also reduce the potentially greater harms that come from other forms of credit. To gain access to maximum credit limits, consumers using BNPL have to meet their repayment obligations consistently for a long period. As a result, the average outstanding balance <sup>S9(2)(a)</sup> [redacted] in comparison to average Westpac credit card balance of \$8,500. The fee caps that are voluntarily imposed by BNPL providers also mean that consumers avoid the debt spirals that can result from other forms of credit. Whilst there is not substantive evidence to support such claims, some vulnerable consumers may otherwise have turned to other credit products such as high cost loans if they were not using BNPL. Due to the interest and fee charges and higher credit limits, many consumers may be worse off if they used other forms of credit.

## Impact of BNPL on merchants

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73. Merchants are charged a commission of 4–5% of the transaction value depending on the provider, with some larger merchants being able to negotiate lower fees. These fees are much higher than those charged to merchants for accepting contactless debit and credit cards (circa 1.5%).
74. Merchants are unable pass on the charges due to a 'no surcharge rule' within their contracts with BNPL providers. Merchants have generally been willing to pay this commission as they experience increased sales and more frequent purchasing. However, there are concerns about the cost that BNPL products will impose on merchants as the industry grows and the pressure to provide BNPL products to remain competitive increases.
75. S9(2)(ba)(i) 
76. The no surcharge rule was traditionally applied to credit cards. However, in 2009 the Commerce Commission found the rule to be uncompetitive for credit cards. Therefore, merchants are able to charge credit card surcharges.
77. The no surcharge rule also applies in Australia and is an issue the Reserve Bank of Australia is looking into. In November 2019, they released as Issues Paper - Review of Retail Payments Regulation - which considers the no surcharge rule for BNPL products.
78. Whilst the findings of the review have been delayed due to COVID-19, in a speech in December 2020, Australia's Reserve Bank Governor Philip Lowe said that after examining the no surcharge restriction on merchants during the payment regulation review "the board's preliminary view is that the BNPL operators in Australia have not yet reached the point where it is clear that the costs arising from the no-surcharge rule outweigh the potential benefits in terms of innovation." However, it was said that "over time, a public policy case is likely to emerge for the removal of the no surcharge rules in at least some BNPL arrangements."
79. The ability to charge surcharges may help to promote payment system competition and put downward pressure on merchant fees. We will continue to assess the impact that BNPL providers are having on merchants and will consider the issue as part of our work on the regulation of merchant service fees.

## International approach to BNPL regulation

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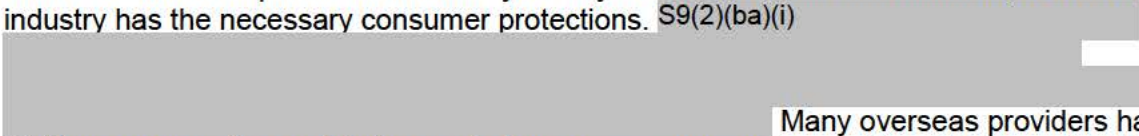
80. Most overseas jurisdictions have encouraged self-regulation, and have allowed BNPL providers to remain outside the regulatory perimeter of their consumer credit laws. However, with the rapid growth that is being seen within the industry and increasing evidence of harm, some jurisdictions are conducting reviews into the sector. It is worth noting when considering overseas approaches to BNPL that the products have been available to consumers for longer and the industry is more developed in other jurisdictions. Klarna launched in the UK in 2014, whilst Afterpay launched in Australia in 2015, in comparison to BNPL being introduced to New Zealand in 2017.
81. In August 2020, the UK announced that it will undertake a review of the regulation of unsecured credit, which includes unregulated BNPL arrangements. Following the publication of the review on 2 February 2021, the UK Government announced plans to regulate BNPL products. This will give the Financial Conduct Authority oversight of BNPL providers and will require BNPL to providers undertake suitability and affordability checks. It is unclear in these early stages how extensive these regulations will be.



82. Concerns about consumer harm from BNPL products in the UK appear considerably greater than the harms we are aware of in New Zealand. From January 2020 to December 2020, the volume of BNPL transactions in the UK has more than tripled. One possible explanation of this is that the impact COVID-19 has had on the UK has resulted in increased financial pressures, which in turn have caused households to turn to credit to afford their living expenses.
83. In Australia, BNPL products are not regulated under the National Consumer Protections Act 2009, however, they are regulated as credit under the Australian Securities and Investment Commission Act 2001. This means that BNPL providers are subject to the Australian Securities and Investments Commission's new product intervention powers which allows ASIC to intervene in a range of ways if a product has resulted in, or is likely to result in significant detriment to consumers.
84. In Australia, BNPL providers are also subject to design and distribution obligations which come into effect in October 2021. These require BNPL providers to identify the class of consumers for which their products are appropriate and direct distribution to that market. It is necessary to consider whether the product and its attributes are likely to be consistent with the objectives, financial situation and needs of that market. Issuers are required to take reasonable steps that will result in distribution being consistent with these determinations.
85. These measures will likely assist vulnerable consumers as BNPL providers must assess whether their arrangement is being appropriately distributed. If consumer harm is occurring, they will need to consider how this can be addressed. However, it does not appear that these intervention powers will significantly impact the BNPL model in Australia.
86. The Australian Senates Select Committee on Financial Technology and Regulatory Technology is currently reviewing the regulatory settings of BNPL products. The final report for the review is expected on 16 April 2021. An interim report released in September 2020 recommended that the Australian Government should support initiatives where self-regulation can be utilised in financial services. They see the development of the code of practice as an example of the industry working together to address stakeholder concerns and achieve appropriate regulation that protects consumers.
87. Alternatively, Sweden has passed specific legislation in response to credit options such as BNPL. The E-Commerce Payments Bill prohibits merchants from presenting credit payment options to consumers ahead of direct payment methods and prohibits merchants from marketing credit payments as a first choice ahead of low cost direct payment options. Sweden have taken this stand to minimise the accumulation of consumer credit.

## **Options moving forward:**

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88. There are various options available to you as you work with the BNPL industry to ensure the industry has the necessary consumer protections. S9(2)(ba)(i)  
 Many overseas providers have similar concerns. In considering next steps, we recommend assessing options against the following criteria:
  - a. Minimising the potential for consumer harm.
  - b. Allowing consumers to continue to experience the benefits that can arise from the use of BNPL products. BNPL products allow consumers to access goods which they would

not have been able to afford, or which they would otherwise have accessed through more expensive credit.

- c. Providing competitive neutrality between BNPL providers and other lenders.
- d. Promoting competition and innovation within payment systems and credit markets. In particular, it is possible that a regulatory regime may deter or delay the entrance of overseas BNPL providers due to the additional costs of adapting their systems to our regulatory framework.
- e. Adaptability to a rapidly evolving industry. As BNPL is experiencing rapid growth, it is necessary that the option choices can adapt and evolve with the industry as it matures.

### Option 1: Status quo

89. The first option available to you is to allow BNPL providers to implement the draft Code and wait to see what changes occur. Industry codes can provide a dynamic means of ensuring that there are appropriate set standards which balance the need for financial services providers to operate prudently and commercially while optimising consumer protections. They are also very adaptable to an evolving industry.

90. There are additional protections under the Code, particularly for those experiencing financial hardship. We also expect that new BNPL providers will enter New Zealand which will increase competition. S9(2)(g)(i)

The draft Code also does not promote competitive neutrality as there are vastly different obligations for BNPL providers and other lenders.

S9(2)(g)(i)

*Benefits of Self-Regulation*

96. The Code presents a cost effective and low resource intensive option to ensure that there are the necessary protections for consumers whilst allowing BNPL providers to create industry-led solutions. Stricter consumer protection obligations within the Code will also help to ensure that the industry is more competitively neutral in comparison to other lenders.
97. The Code is also to be reviewed on a regular basis. Therefore, the Code can be adapted to the evolving industry and the introduction of new BNPL providers. It can also be easily adapted as new evidence of consumer harm arises.
98. There is also evidence that a smaller number of market players and homogeneity of products can lead to greater likelihood of industry self-regulation being effective. Given that there are only five BNPL providers who offer a similar product, self-regulation does have the potential to be a viable option.

*Risks with Self-Regulation*

99. There is a risk that self-regulation will not result in the necessary changes to prevent financial hardship for consumers. Voluntary industry codes need wide buy-in and effective enforcement. There have been instances where industry codes have not provided the necessary benefits. For example, the Code of Practice for Parking Enforcement on Private Land was not effective in reducing consumer harm from wheel clamping which led to regulation subsequently being introduced to cap clamping fees. However, Codes such as the Advertising Standards Authority Code of Practice have resulted in the necessary changes occurring.
100. There is evidence to show that compliance with industry self-regulation is greater when there is enforcement and monitoring by an independent regulatory body that is not close to the

businesses that it oversees. Allowing a voluntary compliance approach means that parties have an incentive to adhere only to the extent that they deem it in their interests to do so. S9(2)(b)(ii)

101. There is also the potential that BNPL providers will not agree on the necessary additional protections despite increasing pressure from the Government. The different providers operate under different models. For example, Afterpay has a different assessment criteria. Therefore, it will likely be more difficult for them to implement additional suitability and affordability assessments. S9(2)(b)(ii)

S9(2)(f)(iv)

S9(2)(f)(iv)

S9(2)(g)(i)

S9(2)(f)(iv)

## Next steps

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116. We recommend meeting with BNPL businesses to acknowledge the steps they have taken to ensure consumer protection and encourage them to go further to address ongoing concerns. You could use this meeting to:
- a. Acknowledge the measures they have in place to protect consumers.
  - b. Inform them that there is evidence that their products are being used by people who are already in deficit, or in some cases insolvent, as a line of credit.
  - c. Remind businesses that low missed payments and low default rates are not the only indicators that BNPL products are not causing substantial hardship. There is increasing evidence that BNPL products are causing individuals to go without essential goods, and that some BNPL customers are missing payments on other bills and incurring additional debt in order to make BNPL repayments.
  - d. Emphasise the importance of responsible lending practices in the current environment where consumers are at risk of reduced income and unemployment. Such financial

stresses increase the chances that people will make short term decisions about spending they can't afford in the medium term.

e. s9(2)(f)(iv) and s9(2)(g)(i)

117. A meeting could be followed up by a letter to providers setting out your expectations.

118. Officials will continue to engage with BNPL providers on the content of the draft Code of Practice. We will continue to keep a watching brief on BNPL products and the international regulatory landscape.

## **Annexes**

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S9(2)(ba)(i)



**CODE OF PRACTICE**

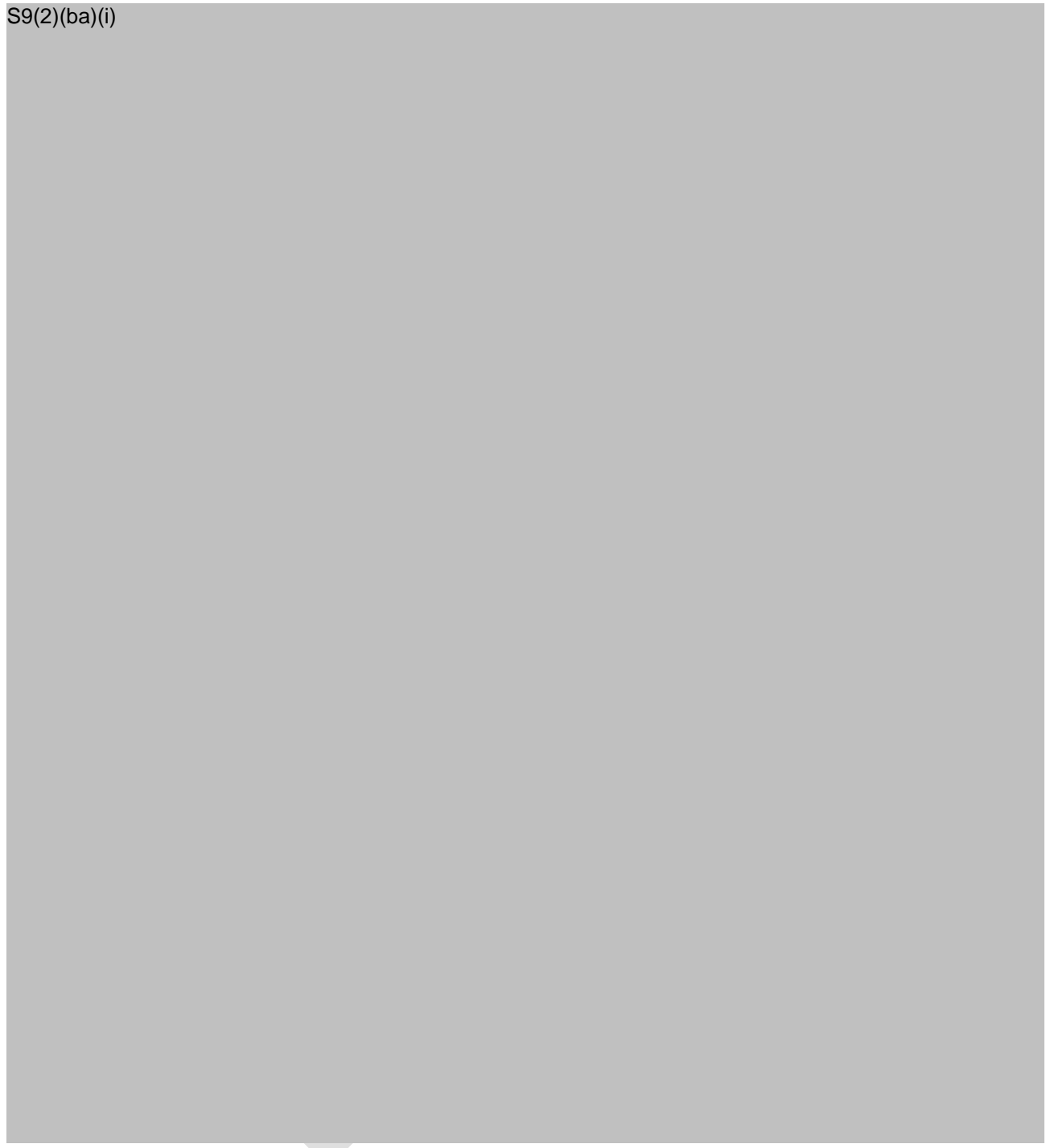
**FOR MEMBERS OF THE  
NEW ZEALAND BUY NOW PAY LATER (BNPL) INDUSTRY**

**[DATE] 2020**


**DRAFT**



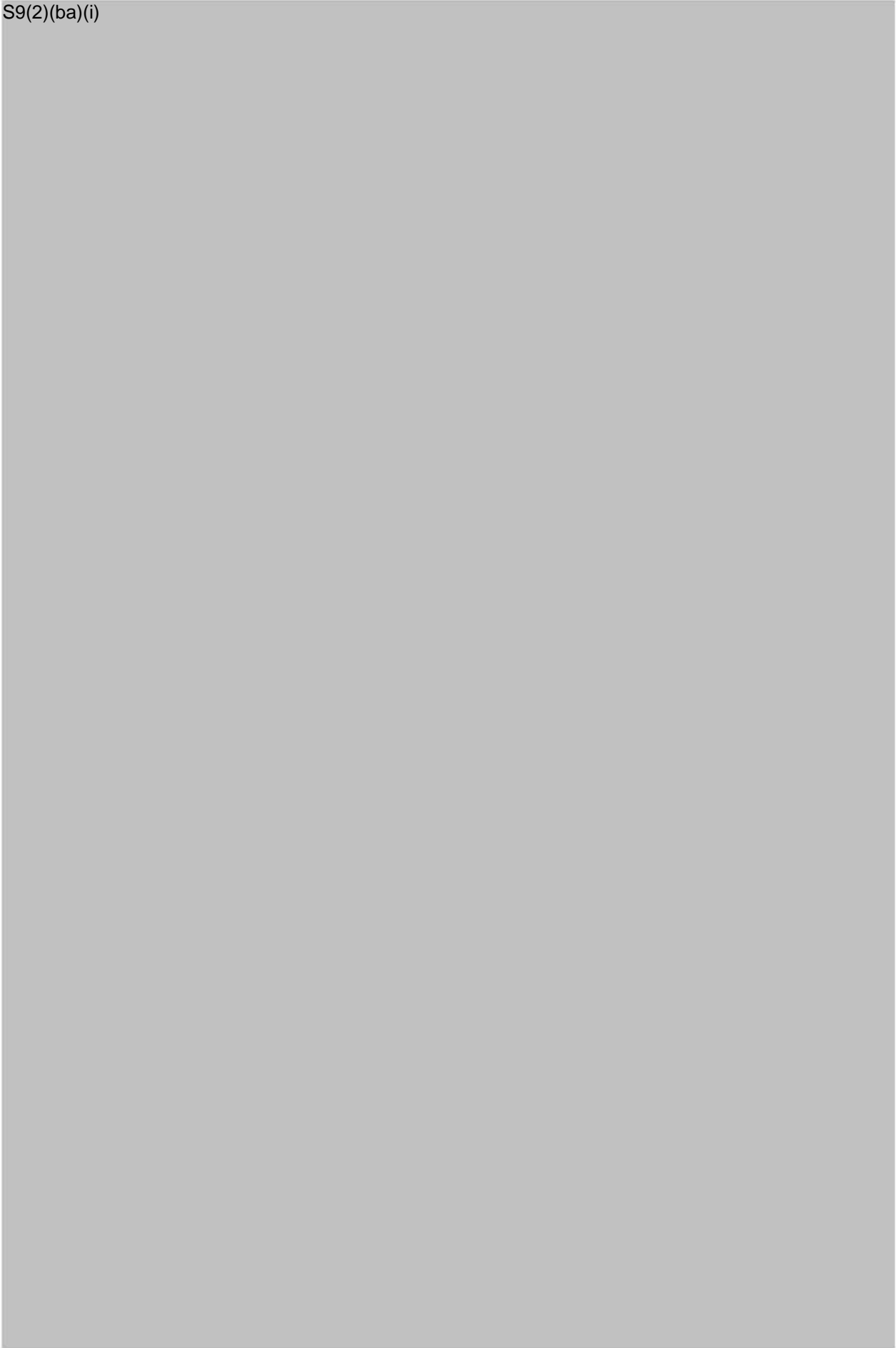
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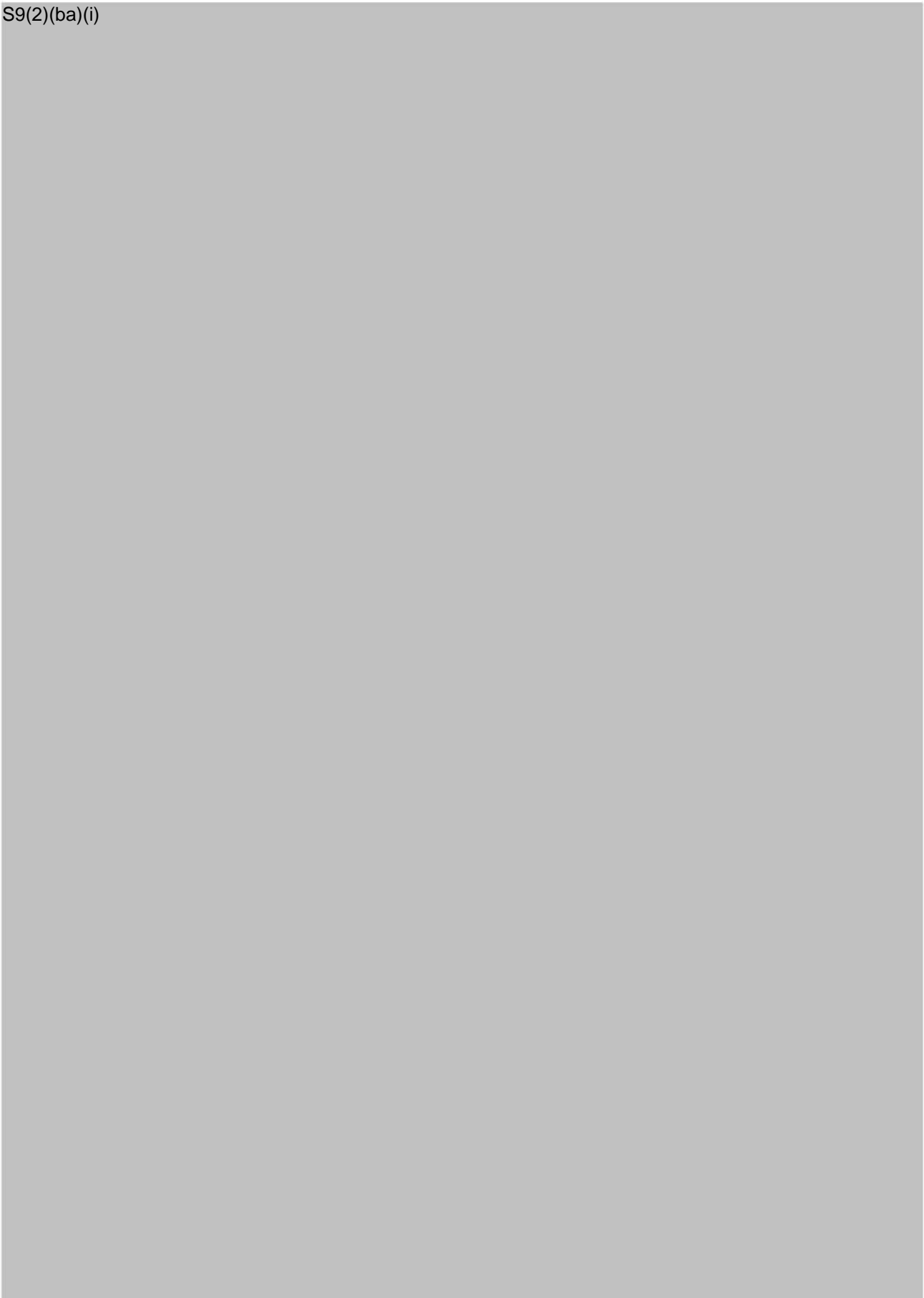
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S9(2)(ba)(i)




S9(2)(ba)(i)



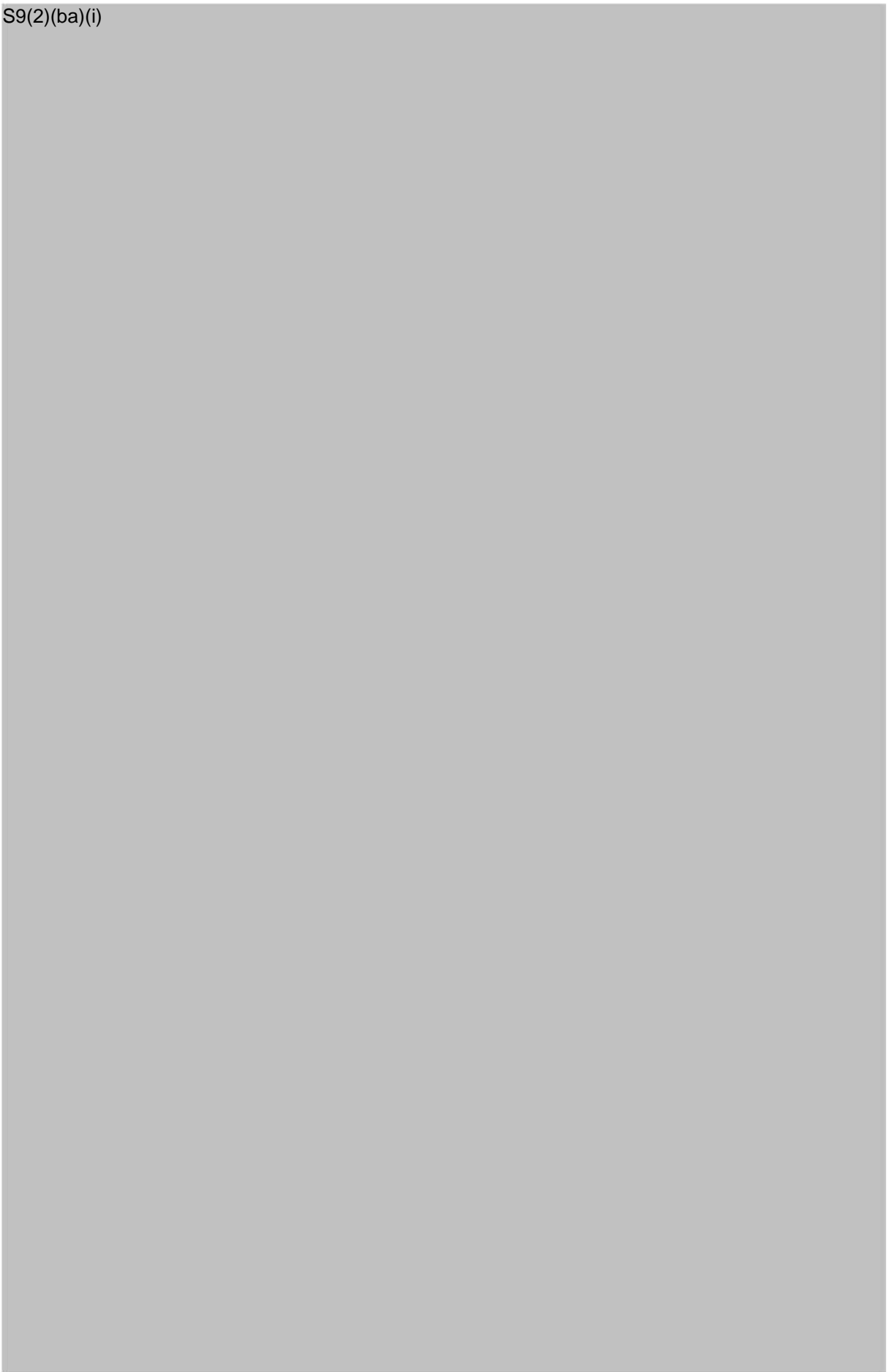
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S9(2)(ba)(i)

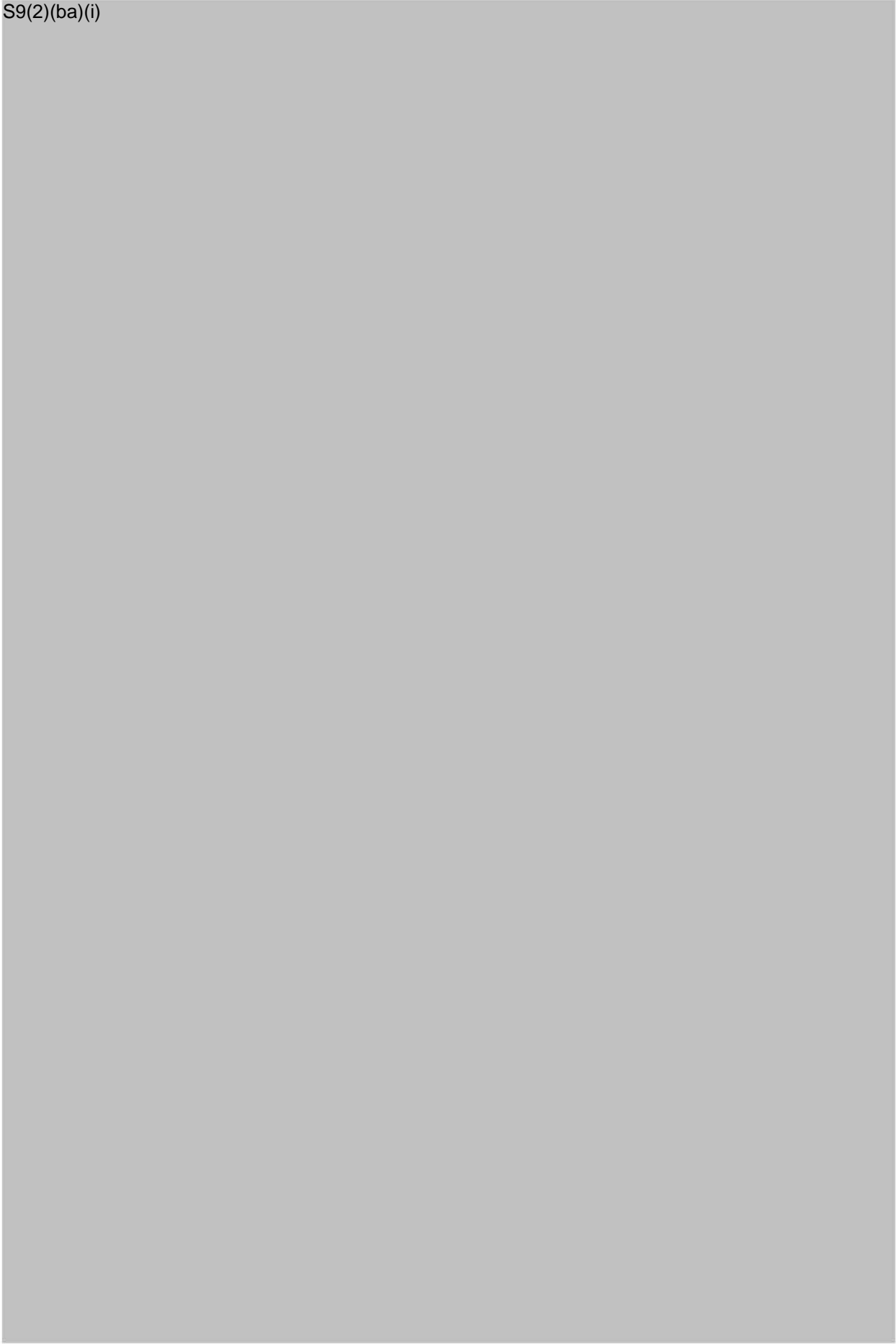


S9(2)(ba)(i)

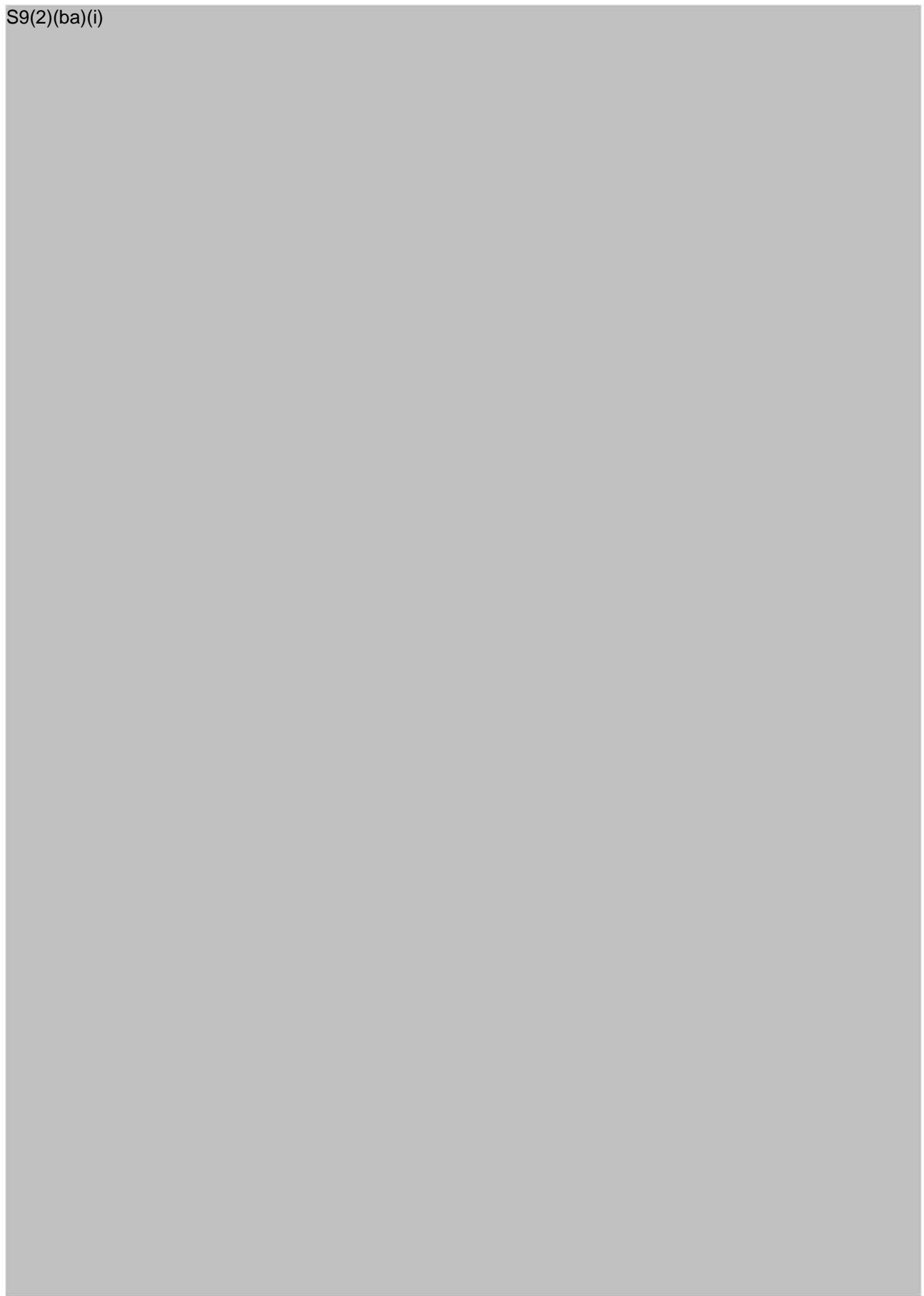





S9(2)(ba)(i)

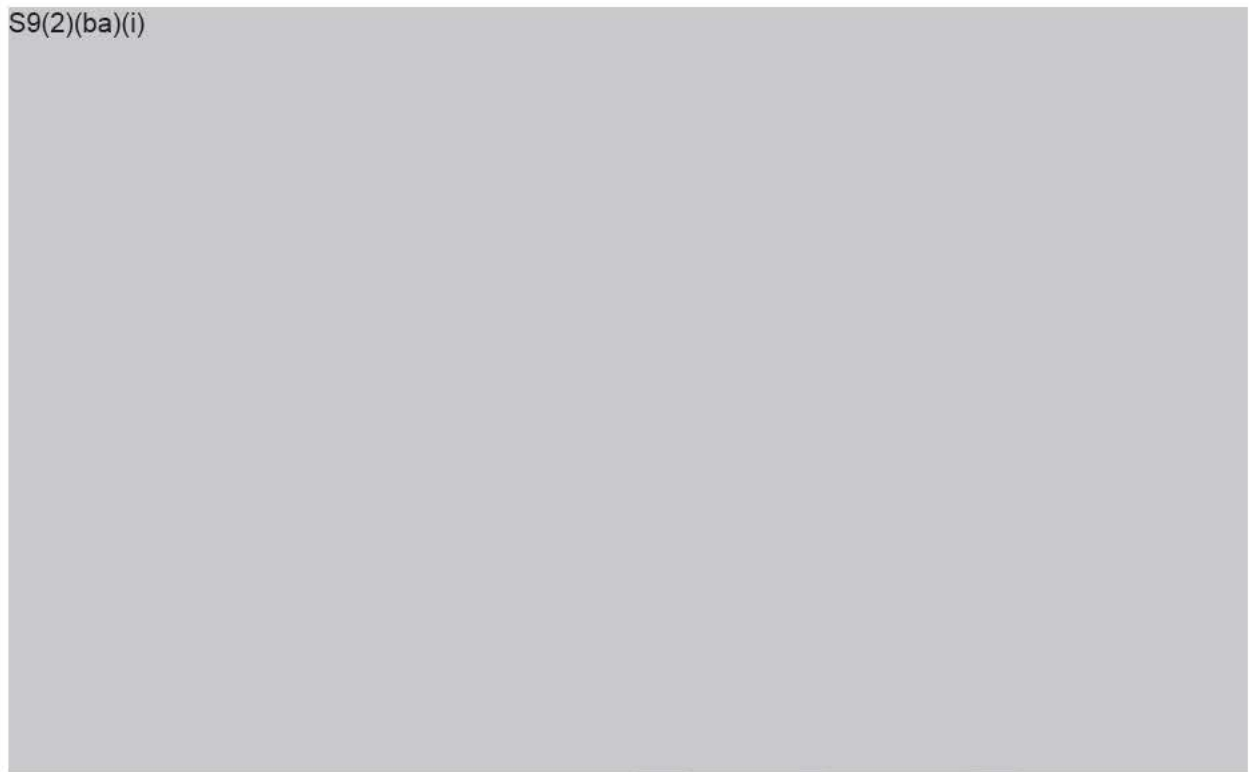


S9(2)(ba)(i)



S9(2)(ba)(i)





DRAFT



## EVENT BRIEFING

### Meeting with Christians Against Poverty

<b>Date:</b>	26 February 2021	<b>Priority:</b>	Low
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2521

Action sought		
	Action sought	Deadline
Hon Dr David Clark Minister of Commerce and Consumer Affairs	<b>Note</b> the background information and talking points in this briefing.	3 March 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Daniel O'Grady	Manager, Competition and Consumer Policy	04 470 2295	S9(2)(a)	
Chloe Thompson	Senior Policy Advisor	04 901 8214		✓

<b>The following departments/agencies have been consulted:</b>
N/A

**Minister's office to complete:**

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments:**



# EVENT BRIEFING

## Meeting with Christians Against Poverty

<b>Date:</b>	26 February 2021	<b>Priority:</b>	Low
<b>Security classification:</b>	<b>In Confidence</b>	<b>Tracking number:</b>	2021-2521

### Purpose

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This report provides you with background information and talking points to support your meeting with the 'Christians Against Poverty' organisation, scheduled for 8.45am on Wednesday 3 March 2021.

### Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** the background information and suggested talking points in this briefing, ahead of your meeting.

*Noted*

Daniel O'Grady  
Manager, Competition and Consumer Policy

Hon Dr David Clark  
Minister of Commerce and Consumer  
Affairs

26 / 02 / 2021

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Out of Scope

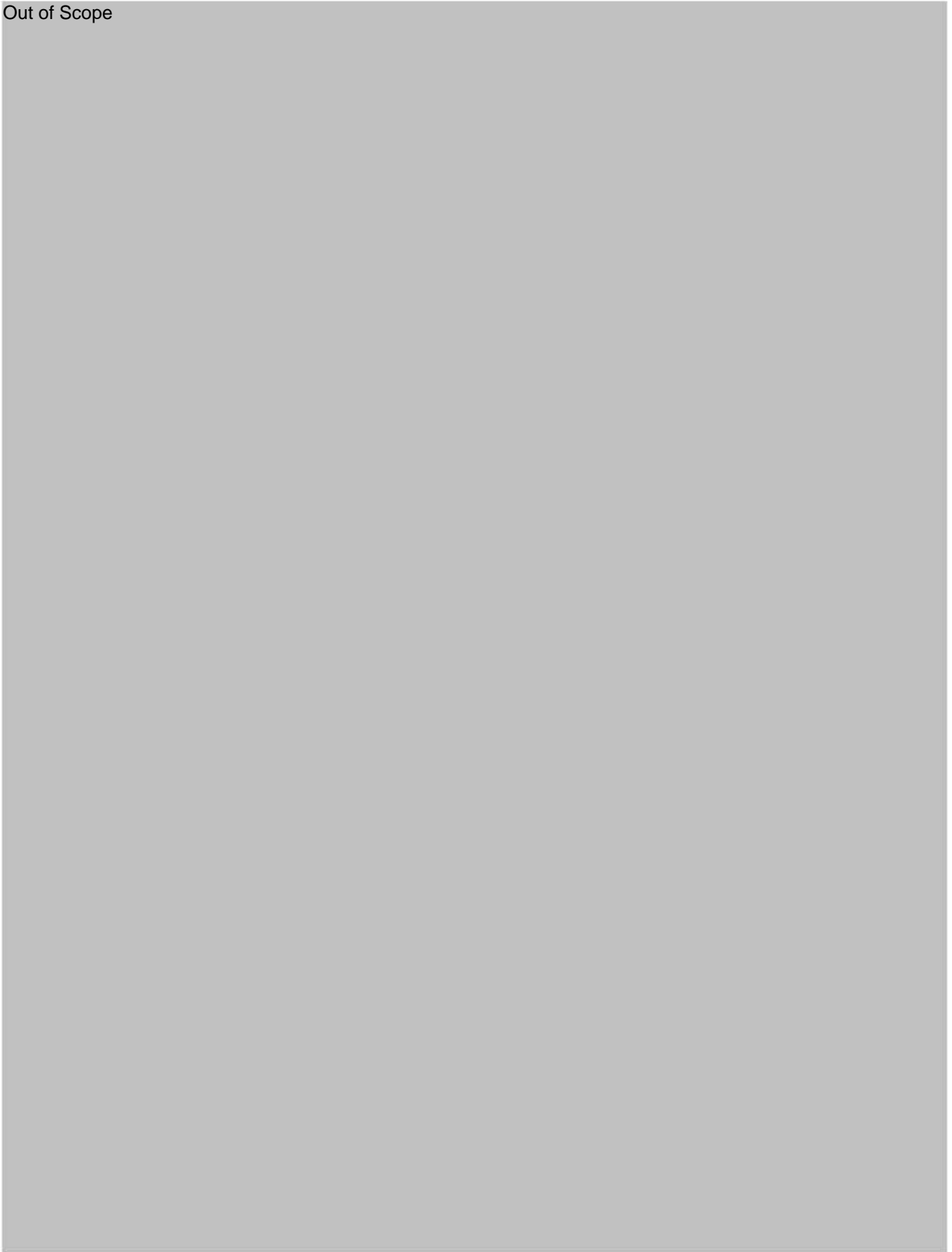


Out of Scope





Out of Scope



Out of Scope



**Buy-now, Pay-later**

- 32. Although not raised directly by CAP, we expect the organisation will be interested to hear your views on the Buy-now, Pay-later sector. As requested by you, MBIE is currently working on further advice regarding potential policy responses to the risks raised by this sector.
- 33. Refer to Annex 1 for suggested talking points on this topic.


Out of Scope



*Potential measure to address unmanageable debt and create a fairer consumer credit market: regulation of Buy-now, Pay-later sector*

- In some overseas countries, governments have taken steps or indicated their intention to regulate unmanageable debt caused by the high uptake of buy-now, pay-later products.
- This is an area that I will be monitoring closely. My predecessor wrote to buy-now, pay-later providers to inquire about the steps they are taking to protect consumers. I understand that those providers are now working to develop an industry code.
- I am interested to hear whether CAP has any ideas for what steps could be taken to ensure buy-now, pay later schemes are not contributing to the causes of financial hardship in New Zealand.

Out of Scope



Out of Scope



## EVENT BRIEFING

### Meeting with representatives of the Buy-Now Pay-Later sector on 6 May 2021

<b>Date:</b>	4 May 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-3265

Action sought		
	Action sought	Deadline
<b>Hon Dr David Clark</b> Minister of Commerce and Consumer Affairs	<b>Note</b> the background information and talking points ahead of your meeting at 4pm on 6 May 2021.	6 May 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Glen Hildreth	Acting Manager, Competition and Consumer Policy	901 0687		
Rosie Jaffer	Principal Policy Advisor		S9(2)(a)	
Ella Hughes	Policy Advisor		S9(2)(a)	✓

The following departments/agencies have been consulted
N/A

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments:



## EVENT BRIEFING

### Meeting with representatives of the Buy-Now Pay-Later sector on 6 May 2021

Date:	4 May 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-3265

#### Purpose

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To provide you with background and talking points for your meeting with the representatives of the Buy-Now Pay-Later (BNPL) sector on 6 May 2021, to be held in the Executive Wing at 4pm.

#### Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** the background information and talking points ahead of this meeting.

*Noted*

Glen Hildreth  
**Acting Manager, Competition and Consumer Policy**

04 / 05 / 2021

Hon Dr David Clark  
**Minister of Commerce and Consumer Affairs**

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## Background

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1. You are meeting with the representatives of the BNPL sector including Afterpay Limited (**Afterpay**), Laybuy Holdings Limited (**Laybuy**), ZIP Co Limited (**Zip**), FlexiGroup New Zealand Limited which operates Humm (Previously known as Oxipay) (**FlexiGroup**) Openpay Limited (**Openpay**) and Latitude Innovation Holdings Limited which operate Genoapay (**LIHL**) on Thursday 6 May. Further detail on the representatives is attached in the Attendee section.
2. This meeting was arranged at the request of Gary Rohloff, the managing director of Laybuy, who wrote to you in November 2020. This letter is included in **Annex 2**.
3. We expect that the providers may raise the following:
  - a. the impact of COVID-19 on the BNPL sector and BNPL consumers
  - b. the progress on the New Zealand Industry Code, given the introduction of Australian Finance Industry Association's Buy-Now Pay-Later (BNPL) industry Code of Practice which came into effect on 1 March 2021.
4. This meeting is an opportunity for you to raise and discuss your concerns with the BNPL sector and inform the sector of your plans to develop and release a discussion document. This discussion document will further explore the existing risks of the BNPL models and potential interventions.
5. This briefing provides background information and advice on these issues, and biographical information about the attendees. **Annex 1** provides talking points.

## Overview of the Buy-Now Pay-Later Sector

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### **The BNPL sector is a growing alternative to traditional credit products, and is not regulated by the CCCFA**

6. There are currently six significant market players within New Zealand; Afterpay, Laybuy, ZIP, FlexiGroup/Humm, Openpay and LIHL. Afterpay makes up approximately 40 per cent of the market share.
7. BNPL is a method of payment which enables consumers to buy and receive goods and services immediately, but pay for them in instalments over a specified period. BNPL providers earn revenue by charging merchants a percentage of the price of the product or service (merchant service fee) and/or a fixed fee, and by charging consumers for missed payments or other account holding/establishment fees [Briefing 2021-1889 refers].
8. The BNPL sector is innovative and disrupts existing credit models by charging the merchant for the credit instead of the consumer. Assuming sufficient affordability assessments and proper use, the BNPL sector provides a highly effective competitive constraint on other forms of credit - unlike credit cards and loans, which charge interest over a long period, the payments and duration of the BNPL contract are clear up front. However, as BNPL contracts do not charge interest or fees (other than missed payment fees) or take security, they are not required to comply with the Credit Contracts and Consumer Finance Act (CCCFA).

### **The BNPL sector grew in the aftermath of COVID-19 Alert Level 4**

9. Since COVID-19, there has been an increase in BNPL transactions as well as an expansion of where BNPL can be used from online transactions and in store goods to now becoming a method of payment for services (e.g. dental treatment and vehicle servicing).
10. Recent data from Centrix suggests that the growth in BNPL transactions is levelling out and dropping to levels consistent with use in February 2020. However, this data only accounts for

approximately 50 per cent of the BNPL market, as it does not include data relating to Afterpay or Humm.

### **The level of consumer harm caused by BNPL products is disputed between providers and consumer representative organisations**

11. BNPL providers have stated that they do not believe there is significant evidence of consumer harm as they have low default rates of around 1 – 2 per cent, and rates of missed payments of around 9 – 15 per cent. Based on our current understanding of the issues officials are of the view that the low default rates do not measure consumer harm arising from:
  - a. the way BNPL payments are prioritised from consumer bank account (debit payments) and then subsequently the inability for some consumers to afford essential goods and services
  - b. the use of credit cards by some consumers to make BNPL payments, and accumulating credit card debt in doing so.
12. Various stakeholders, including FinCap, Christians against Poverty and Consumer NZ have echoed these consumer harms and have also raised concerns that some consumers hold multiple BNPL accounts across various providers which further leads to an accumulation of debt.

### **The BNPL sector is drafting an Industry Code which provides some protections for consumers**

13. As outlined above, following Alert Level 4, BNPL products saw a significant uptake, particularly in comparison to their equivalent use in 2019, and relative to other credit products following Alert Level 4. This caused some concern about the measures for consumer protection inbuilt into BNPL models.
14. Providers introduced a number of protective measures in response to concerns that COVID-19 Alert Level 4 would expose significant numbers of consumers to hardship. These included declining consumers with low credit scores, putting caps on the number of transactions consumers can make and the late fees which will be imposed, and suspending accounts following missed payments. These measures demonstrate the sector can adapt in response to potential consumer harm. However, many of the mechanisms outlined focus on minimising the risks of consumers defaulting, as opposed to addressing the consumer harm that arises from consumers who are unable to afford BNPL.
15. The industry also moved to begin self-regulating through the development of an industry Code of Practice (**the Code**) which offers additional protections for consumers.
16. The Code was originally drafted in Australia for Australian BNPL providers but has been adjusted to fit New Zealand's consumer credit regulatory landscape. BNPL providers have kept government informed throughout the development of the Code.
17. Hon Kris Faafoi met with the sector in July of 2020 to discuss the development of the Code and the protections for consumers. As part of the discussions he had with BNPL providers, he encouraged the sector to ensure that consumers are staying within their means, not borrowing more than they can afford, being treated fairly, and have accessible options around debt relief when they are in hardship.

18. S9(2)(ba)(i)

S9(2)(ba)(i)

19. The Code will regularly be reviewed to ensure it reflects domestic and international developments in the sector. The sector will monitor the suitability of BNPL products through complaints data, consumer feedback, sales volumes and hardship data along with public consultation.

20. S9(2)(g)(i)

### **Australia is proceeding with self-regulation and obligations on BNPL to design their products according to their target consumer**

21. The BNPL providers may also raise progress of self-regulation in Australia. The Australian Finance Industry Association's BNPL industry Code of Practice came into effect on 1 March 2021.
22. Australian BNPL providers are also subject to product design and distribution obligations set by the Australian Securities and Investments Commission (ASIC). The obligations are in place to make sure BNPL providers design products in a way that is suitable for the needs of the intended market. These obligations are intended to prevent products being targeted to consumers outside the target market.
23. S9(2)(ba)(i)
24. It is worth noting that Australia is rolling back significant consumer credit protections in favour of increasing the flow of credit to consumers and reducing lender compliance costs. The changes move towards a principles-based approach rather than a process driven one.

### **Aspirations for the Buy-Now Pay-Later Sector in New Zealand**

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25. This meeting is an opportunity to signal to the sector that your intention is to direct officials to publish a discussion document.
26. In our previous briefing [Briefing 2021-2723 refers] officials demonstrated the potential causes of harm to consumers through a number of customer journey maps. The discussion document will be an opportunity to test the validity of the consumer harm that has been identified, and ensure that officials have analysed all sources of consumer harm arising from BNPL before assessing suitable regulatory levers while maintaining the benefits from the BNPL sector.
27. As well signalling your intentions, the meeting allows an opportunity for the BNPL providers to connect with officials to appropriately furnish the discussion document with data, such as how BNPL providers earn revenue and how BNPL providers minimise consumer harm.

28. Specifically, officials have developed the following principles which may help steer the types of issues officials are keen to focus on in the discussion document:
- BNPL products should be available to consumers who can make repayments without substantial hardship
  - Consumers who use BNPL products should be well-informed and have the opportunity to consider their agreement and the impact on their financial position
  - BNPL providers should have accurate indicators of consumer hardship and should be responsive to consumers who demonstrate signs of hardship
  - Consumers should not be charged an unreasonable amount for missed payments and the fees should be proportionate to the amount borrowed
  - The advertising of BNPL should help inform consumers of the full nature of the product and should not mislead.
29. We are progressing the development of the discussion document by contacting appropriate stakeholders such as Consumer NZ, Fincap and Christians Against Poverty. Our discussions with these stakeholders will hopefully provide us with more evidence and insights which will assist our development of the discussion document. Officials are also undertaking procurement processes to continue to receive data from Centrix related to BNPL transactions.
30. We expect the discussion document to be refined over the next two months, with release following Cabinet consideration in mid to late June 2021.
31. You may wish to suggest that provider's contact officials directly to assist with the discussion document. This is an opportunity for BNPL providers to assist officials to better understand the landscape of the BNPL sector, and for them to address concerns you have identified before intervention decisions are made.

## **Annexes**

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Annex 1: Talking points

Annex 2: .Laybuy letter from November 2020

## Attendees

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### Shaun Quincey, Latitude Innovation Holdings Limited



Shaun Quincey is the General Manager of Latitude Innovation Holdings Limited (**LIHL**) and founder of their BNPL product, Genoapay. Genoapay was sold and integrated into the suite Latitude Innovation Holdings Limited's financial products in March 2020. Prior to this, Mr Quincey was the National Sales Manager of Debitsuccess USA.

LIHL is a wholly owned subsidiary of Latitude Financial Services Limited which provides consumer lending products under the Gem brand and Kiwibank personal loans. The BNPL product, Genoapay, is owned by LIHL. LIHL is part of the Australian Latitude Financial Services Group, which delivers financial services, merchant growth tools and payment innovations for more than 2.5 million customers and over 1,950 merchant partners across Australia and New Zealand.

### Michael Saadat, Afterpay Limited



Michael Saadat is the Director of Public Policy and Regulatory Affairs at Afterpay. Before joining Afterpay in 2019, Mr Saadat was an executive director of financial services at Australian Securities and Investments Commission (**ASIC**). During his time at the ASIC, he led the inquiry into buy-now, pay-later businesses in Australia.

Afterpay is an Australian financial technology company which launched a BNPL product in 2016. Across New Zealand and Australia, Afterpay has a customer base of approximately 3 million.

### Gary Rohloff, Laybuy Holdings Limited



Gary Rohloff is the co-founder and managing director at Laybuy. Prior to entering the BNPL industry, Mr Rohloff held a number CEO roles at various New Zealand retail companies, including Ezibuy. Mr Rohloff also has 20 years' experience in the banking industry.

Laybuy is small family-owned business based in New Zealand providing a BNPL product of the same name. They launched the product in 2017 with over half a million New Zealanders using their product.

## **Julian Grennell, Zip Co Limited**



Julian Grennell is the Strategy Manager of Zip. He was previously the Head of Commercial for Part Pay, which was acquired by Zip in 2019. He has also had governance roles with the Cancer Society, Davis Carr Cancer Society Endowment Trust and Cancer Trials New Zealand.

Zip is a financial technology business operating in Australia and New Zealand offering two credit products, Zip Money an interest-bearing credit product, and Zip Pay (previously PartPay) the interest-free BNPL product. Zip has almost 1.4 million customers across Australia and New Zealand.

## **Chris Lamers, FlexiGroup New Zealand Limited**



Chris Lamers is the Chief Executive Officer at FlexiGroup New Zealand Limited since April 2017. Prior to joining Flexigroup, Mr Lamers was the Chief Marketing Officer at Sovereign where he established the online sales channel, customer engagement programs, and data analytics functions. Mr Lamers also held several roles with Loyalty New Zealand (Fly Buys).

Flexigroup is a finance company based in Australia and New Zealand. In addition to their BNPL product, Oxipay, they offer a range of consumer credit products to approximately 650,000 New Zealanders. Other key consumer credit products include Q Card, Q Mastercard and partnerships with leading retailers including Farmers and Flight Centre.

Mr Lamers will be accompanied by Olivia Meo-Groser, General Counsel at Flexigroup.

## **Ed Bunting, Openpay Limited**



Ed Bunting is the Head of Legal, Compliance and Company Secretary at Openpay since September 2016. He has also acted as Legal Counsel for a number of large companies previously, including Meydan Group, Cricket Australia and the Toyota Motor Corporation Australia.

Open Pay is a finance company based in Australia. Like the other providers, Openpay offers a BNPL product. Openpay recently made the APAC Tech Fast 500, an award based on revenue growth from July 2018 to the end of June 2020. During that period Openpay saw their subscriptions triple. Openpay has also focused on partnerships in Australia with larger business clients such as Woolworths and Ford.

## **Annex 1: Talking points**

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### **Introductions**

- Thank you for proactively seeking to self-regulate to provide consumer protections.
- I think BNPL products are an innovative, low-cost credit product that should continue to be available in New Zealand, with appropriate safeguards.

### **Australian Code**

- The Australian Code was met with a mixed response, and was criticised by a number of consumer representative organisations, who felt it did not go far enough.
- How does the Code you are developing differ and improve on the Australian Code?

To respond to the assertion New Zealand should follow Australia:

- Australia has recently introduced a series of reforms to their wider consumer credit legislation which reduce 'red tape' and consumer protections in order to enable wider access to credit.
- New Zealand is not following that example. The recent CCCFA regulations demonstrate how seriously this Government takes the harm caused by lending, to parties who cannot afford the debt they take on.
- The sector still has the opportunity while work is underway on the discussion document, to further innovate and address the concerns my predecessor and I have both raised, particularly regarding affordability.

### **COVID-19 updates**

- Your businesses introduced a number of additional protection measures following Alert Level 4, are those still in place?
- How have your businesses and customers been impacted, nearly a year on from Alert Level 4?

### **Discussion document on Buy-Now Pay-Later risks and intervention options**

- I have instructed my officials to begin drafting a discussion document on the Buy-Now Pay-Later sector.
- My intention is to gather more evidence on the nature of the sector from BNPL providers, consumer representatives, and consumers themselves, to understand the risks and benefits of the products.
- This evidence will inform any potential regulatory interventions. We will seek opinions on the costs and benefits of various interventions, including the application of section 137A of the CCCFA, which would designate the sector as providing consumer credit contracts.

- I encourage you to reach out to my officials to participate in the development of the discussion document.

## **Regulatory Options**

- The Government has new powers under the CCCFA) to extend legal requirements to buy-now, pay-later schemes, which can be used if industry-led measures are unsatisfactory.
- The success of any regulatory solution, including the use of class designation powers under s137A of CCCFA, depend upon a clear understanding of the root causes of consumer harm and identifying how best to address that harm. I have tasked officials with providing advice on these issues.

To respond to the assertion that regulating BNPL sector will kill innovation:

- Section 137 enables partial application of the CCCFA, so officials could apply the requirements only so far as necessary to prevent consumer harm.
- The discussion document will explore how best to intervene so that BNPL products can maintain their innovative qualities and accurately address harms.

## **BNPL products should be available to consumers who can make repayments without substantial hardship**

- My concern is that using consumers' repayment behaviours in lieu of full affordability assessments will fail to accurately assess a consumer's financial position and ability to afford credit, and therefore expose consumers to hardship.
- This is especially concerning when the amount of credit a consumer can access increases with ongoing borrowing.
- Automatic deductions from consumers' accounts prioritise buy-now pay-later repayments, potentially over essential payments.

## **Questions**

- Do your ongoing assessments of affordability take into account likely and existing consumer expenses?
- Where you also offer credit products regulated under the CCCFA, do you also comply with those requirements for your other non-CCCFA regulated products?
- If you were to conduct more extensive affordability assessments on your buy-now pay-later products, what would the impact be?



## **BNPL providers should have accurate indicators of consumer hardship and should be responsive to consumers who demonstrate signs of hardship**

- Many of you freeze consumer accounts when they are in arrears. This is a good mechanism to help prevent consumers in hardship from taking on further credit, but I wonder if there are potential consumer harms which result.
- You have previously stated you hope to align your hardship policies with Chapter 12 of the Responsible Lending Code, or exceed that guidance. I support you in this endeavour.

### Questions

- What indicators do your business models allow for, so that you can proactively identify consumers in hardship?
- Once a consumer rectifies arrears, how long until their account is available to use again?
- Do you monitor their future repayments if they are allowed to access new credit?
- Are you aware of any consumer harm caused by the account freezes for consumers in arrears?

## **Consumers who use BNPL products should be well-informed and have the opportunity to consider their agreement and the impact on their financial position**

- Could your models adapt to build in time for considerations? How would that impact your services?

## **Consumers should not be charged an unreasonable amount for missed payments and the fees should be proportionate to the amount borrowed**


- Late fees are capped, but can still build up and amount to fees higher than the equivalent interest charges on credit cards.
- How is this cap calculated?

## **The advertising of BNPL should help inform consumers of the full nature of the product and should not mislead**

- Your advertising rules within the Code seem to have consumer interests in mind.
- I am aware that in Australia, BNPL products are subject to the Regulatory Guide for product design and distribution obligations, which requires you define your target market and ensure your design and distribution is specific enough to not deviate substantially.
- Do you see merit in this approach?



S9(2)(ba)(i)



S9(2)(ba)(i)



## BRIEFING

### Buy now pay later – options and next steps

<b>Date:</b>	18 March 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2723

Action sought		
	Action sought	Deadline
Hon Dr David Clark Minister of Commerce and Consumer Affairs	Agree to the development of a discussion document to consult on options for regulating buy now pay later products.	1 April 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Daniel O'Grady	Manager, Competition and Consumer Policy	04 470 2295	S9(2)(a)	
Rosie Jaffer	Principal Policy Advisor	S9(2)(a)		✓

<b>The following departments/agencies have been consulted:</b>
N/A

**Minister's office to complete:**

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments:**



# BRIEFING


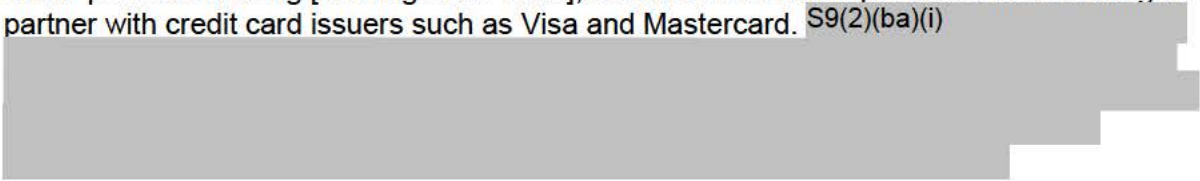

## Buy now pay later – options and next steps

Date:	25 June 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-2723

### Purpose

To provide you with advice on options and a process for regulating buy-now-pay-later products.

### Executive summary

1. At the officials meeting on 11 February 2021 you discussed our initial advice on buy-now-pay-later (**BNPL**) products [Briefing 2021-1889 refers]. You asked us to prepare advice on regulatory options to address the harms in the sector including limits on default fees charged under BNPL contracts.
2. As part of our analysis on options to limit default fees, we undertook a journey mapping exercise from the view of the consumer to understand how default fees create consumer harm.
3. S9(2)(f)(iv)  

4. The consumer journey mapping exercise also highlighted that the success of BNPL relies upon consumer psychology – such as discounting future payments and the attractiveness of small default payments. We therefore also recommend exploring how insights from behavioural economics can ‘nudge’ consumer behaviour to minimise consumer harm.
5. In our previous briefing [Briefing 2021-1889], we noted that BNPL providers were looking to partner with credit card issuers such as Visa and Mastercard. S9(2)(ba)(i)  

6. To understand how to regulate effectively, we recommend that MBIE publish a discussion document for public consultation, in line with Government best practice. S9(2)(f)(iv)  
 as well as testing:
  - the objectives and features of an effective BNPL sector;
  - the underlying causes of consumer harm, using the consumer journey mapping exercise;

- options for how best to address consumer harm, S9(2)(f)(iv)
- the costs and benefits of applying the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to the BNPL sector, via s137A of that Act.

7. S9(2)(f)(iv)

8. We propose to communicate our approach of publishing a discussion document to the BNPL sector and inform them that we will be seeking information on their operations including their revenue mix, approach to credit limits and the nature and timing of affordability assessments.

9. Since our last briefing to you, the Australian BNPL industry has finalised its Code. Annex 1 contains an updated comparison of the draft New Zealand Code and the Australian equivalent. S9(2)(g)(i)

10. We will continue to engage with and seek input from the Commerce Commission and the Financial Markets Authority as well as consumer organisations such as FinCap.

## Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a. **Agree** to MBIE officials developing a discussion document for your consideration, which will test:
- the objectives and features of an effective BNPL sector;
  - the underlying causes of consumer harm using the consumer journey mapping exercise; and
  - options to address consumer harm while still maintaining an effective BNPL sector. S9(2)(f)(iv) and will seek feedback on the costs and benefits of applying s137A of the CCCFA to achieve desired outcomes.

*Agree/Disagree*

Daniel O'Grady  
**Acting Manager, Competition and Consumer Policy**

.... / ..... / .....

Hon Dr David Clark  
**Minister of Commerce and Consumer Affairs**

.... / ..... / .....

## Background

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### Context

11. Following your consideration of Briefing 2021-1889 'Update on the Buy Now, Pay Later Industry', on the 11 February 2021 you asked for advice on:

- how to regulate buy-now-pay-later (BNPL) transactions, S9(2)(f)(iv) (default fees)<sup>1</sup>; and
- how best to progress these options.

12. This briefing responds to that request by:

- unpacking how BNPL default fees cause consumer detriment using a consumer pathway approach
- assessing how different options, including limits on default fees, could address the consumer detriment identified
- recommending MBIE publish a discussion document which will provide the basis for taking a regulatory approach to the harms identified, and in the meantime will motivate the BNPL sector to progress the industry code of conduct.

13. BNPL is a two-sided market which impacts both merchants and consumers. This briefing focuses on the consumer harm potentially created by BNPL rather than the impact on merchants which is covered in 'Briefing 2021-2334'. It has been informed by recent submissions from BNPL providers on the merchant service fees issues paper, international developments and desk research.

### How BNPL differs to existing forms of credit

*BNPL - receive goods and services now and pay in instalments, without interest rates*

14. Buy now pay later (BNPL) - where consumers are able to buy and receive goods and services immediately but pay for them in instalments over a specified period (usually 1-3 months) - is rapidly becoming an established payment channel in New Zealand. Initially, BNPL was an online retail payment system but is now well established for goods in stores and is expanding as a payment system for services e.g. dental treatment and vehicle servicing [Briefing 2021-1889 refers].

*BNPL is a two sided market, where our current evidence suggests that the majority of revenue is earned by charging merchants.*

15. BNPL providers earn revenue by charging merchants – normally a percentage value of the price of the product or service (merchant service fee) and/or a fixed fee. In exchange for this fee, merchants get up-front full payment for the goods or services, and services such as data analytics on the types of consumer using the BNPL payment channel.

16. Our understanding from BNPL providers and analysis of overseas studies,<sup>2</sup> is that the majority of revenue is currently generated through merchant service fees, with relatively small amounts of revenue coming from consumers through missed and late payment charges.<sup>3</sup> In addition some BNPL providers apply establishment and/or account holding fees

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<sup>1</sup> To provide consistency and read across to the CCCFA, charges related to missed or late payments are referred to as default fees throughout.

<sup>2</sup> UK FCA Woolward review

<sup>3</sup> Given that merchant fees are the main way that BNPL providers earn revenue, extending proposed regulations on reducing merchant service fees to BNPL is likely to have a major impact on the industry [Briefing 2021-2334 refers].



to consumers, often known as other 'consumer fees'.<sup>4</sup> We lack any current data on BNPL providers' revenue mix, particularly since May 2020 when the industry made steps to reduce default risk (see paras 26-27 below).

*Growth in BNPL is expected to continue both in online and in-store transactions across the globe as it taps into consumer psychology*

17. Currently there are five players in the New Zealand market, all of which have operations overseas, where BNPL transactions are also growing rapidly [Briefing 2021-1889 refers]. More recent data indicates that the use of buy now pay later payment grew 10 per cent in New Zealand last year and its use could outstrip card payments for e-commerce by 2024.<sup>5</sup>
18. An Australian expert has suggested that the success of the BNPL industry is because it is able to take advantage of consumer psychology - by giving consumers instant access to goods and services and at a perceived lower price due to consumers discounting future payments. The consumer psychology is even stronger for online purchases, due to the speed at which the consumer is able to make transactions, with arguably lower search costs than traditional in-store transactions.<sup>6</sup>

*However, an effective BNPL sector is a market disruptor and provides competition to established credit products*

19. The BNPL sector is innovative and disrupts existing credit models by charging the merchant for the credit instead of the consumer. Assuming sufficient affordability assessments and proper use, the BNPL sector provides a highly effective competitive constraint on other forms of credit as unlike credit cards and loans, which charge interest over a long period, the payments and duration of the BNPL contract are clear up front.

*BNPL transactions are not covered by the CCCFA as they are not considered to be consumer credit contracts nor are they covered by the FTA layby sale agreements regulations*

20. As BNPL contracts do not charge interest or fees (other than missed payment fees) or take security, they are not required to comply with the CCCFA. The CCCFA includes requirements relating to not charging unreasonable fees, providing adequate disclosure and complying with the responsible lending obligations.<sup>7</sup>
21. BNPL products also fall outside the definition of "layby sale agreements" in the Fair Trading Act 1986 (FTA) and as a result BNPL consumers do not have the same protections under the FTA as they would with layby agreements.
22. BNPL providers are however, required to be registered on the Financial Service Providers Register and be a member of an approved dispute resolution scheme. They are also subject to the unfair contract terms regime in the FTA and the general restrictions against engaging in misleading or deceptive conduct.

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<sup>4</sup> Australian Securities and Investment Commission, Report 672: Buy now pay late: An industry update, Figure 5 page 9.

<sup>5</sup> <https://www.nzherald.co.nz/business/buy-now-pay-later-to-outstrip-card-payments-by-2024-expert-forecasts/6CFYEBWAMIHJFF5RGIQSG5L3ZQ/>

<sup>6</sup> Specialist commentary from Dr Paul Harrison invited by Australian Senate Economic References Committee investigation into Credit and Financial Services targeted at Australians at Risk of Financial Report, 2019

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Creditfinancialservices/Report/c05](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report/c05)

<sup>7</sup> This means that BNPL providers are not required to assess the consumer's financial position or make an assessment as to whether the consumer is able to repay the credit without substantial hardship.

*As of May 2020, BNPL providers have made steps to reduce the risk and impact of default but the approaches are not standardised across the industry*

23. In May 2020, BNPL providers wrote to the previous Minister of Commerce and Consumer Affairs outlining policies they had developed to address default risk and impact.
24. Our assessment of the policies suggests there are a lack of minimum standards and that as of February 2021 implementation across BNPL providers is fragmented [Briefing 2021-1889 refers]. In effect, the policies primarily help BNPL providers manage their default risks rather than minimising consumer harm.

## **Recent developments in the BNPL industry and regulation overseas**

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*Recent interactions with BNPL providers suggest the industry is evolving at pace – we will need to factor this in to ensure that interventions are future-proof*

25. S9(2)(b)(ii)

[Redacted]

[Redacted]

[Redacted]

26. S9(2)(b)(ii)

[Redacted]

27. S9(2)(b)(ii)

[Redacted]

### **Industry code in Australia**

*The recently published Australian BNPL industry code is similar to the draft New Zealand industry code that we have seen but is more detailed.*

28. The Australian Finance Industry Association's Buy-Now Pay-Later (BNPL) industry Code of Practice came into effect on 1 March 2021.
29. The New Zealand draft Code (dated September 2020) and Australian Code align in the majority of their approach. The purpose statements of the two codes are identical, both seek to promote customer-centric approaches to design, marketing and distribution, as well as high industry standards of service. On the whole the Codes are similar. However, the main difference is in the level of detail the Australian Code provides, where the New Zealand Code pitches protections at a high level.
30. Table 1 in **Annex 1** compares the Australian code with the draft New Zealand code and also provides read across to the CCCFA and the Responsible Lending Code.

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<sup>8</sup> <https://www.mbie.govt.nz/have-your-say/regulating-to-reduce-merchant-service-fees/>

## Consumer harms and possible regulatory options

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### S137A – Issues to consider

*S137A of the CCCFA allows for BNPL providers to be treated as consumer credit contracts, with exemptions able to provide flexibility to the BNPL sector.*

31. As discussed in our last briefing to you, regulation of BNPL providers will rely on the use of s137A of the CCCFA. Section 137A of the CCCFA allows the Minister of Commerce and Consumer Affairs to recommend to make regulations on ‘any class of arrangements or facilities that has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment to be a consumer credit contract’. The rationale of this regulation-making power was to allow for un-regulated products to be brought into the scope of the CCCFA in the future if necessary.
32. The class designation powers under s137A of the CCCFA provide for a relatively swift regulatory option as opposed to new primary legislation. Furthermore, s137A can be tailored to the BNPL sector by applying exemptions where particular provisions of the CCCFA would be unworkable for the BNPL sector and fail to achieve desired outcomes. It may also be necessary to fortify any exemptions with a robust industry code - similar to the approach taken with the Responsibility Lending Code - so that BNPL providers are consistently applying regulation.

*The success of the use of s137A, like any regulatory solution, rests upon clear problem definition and a proper assessment of the costs and benefits*

33. The success of a regulatory solution using s137A will depend upon a clear understanding of the root causes of consumer harm and identifying how best to address that harm. We therefore have focused this briefing on identifying the causes of consumer harm and proposing options to address it.

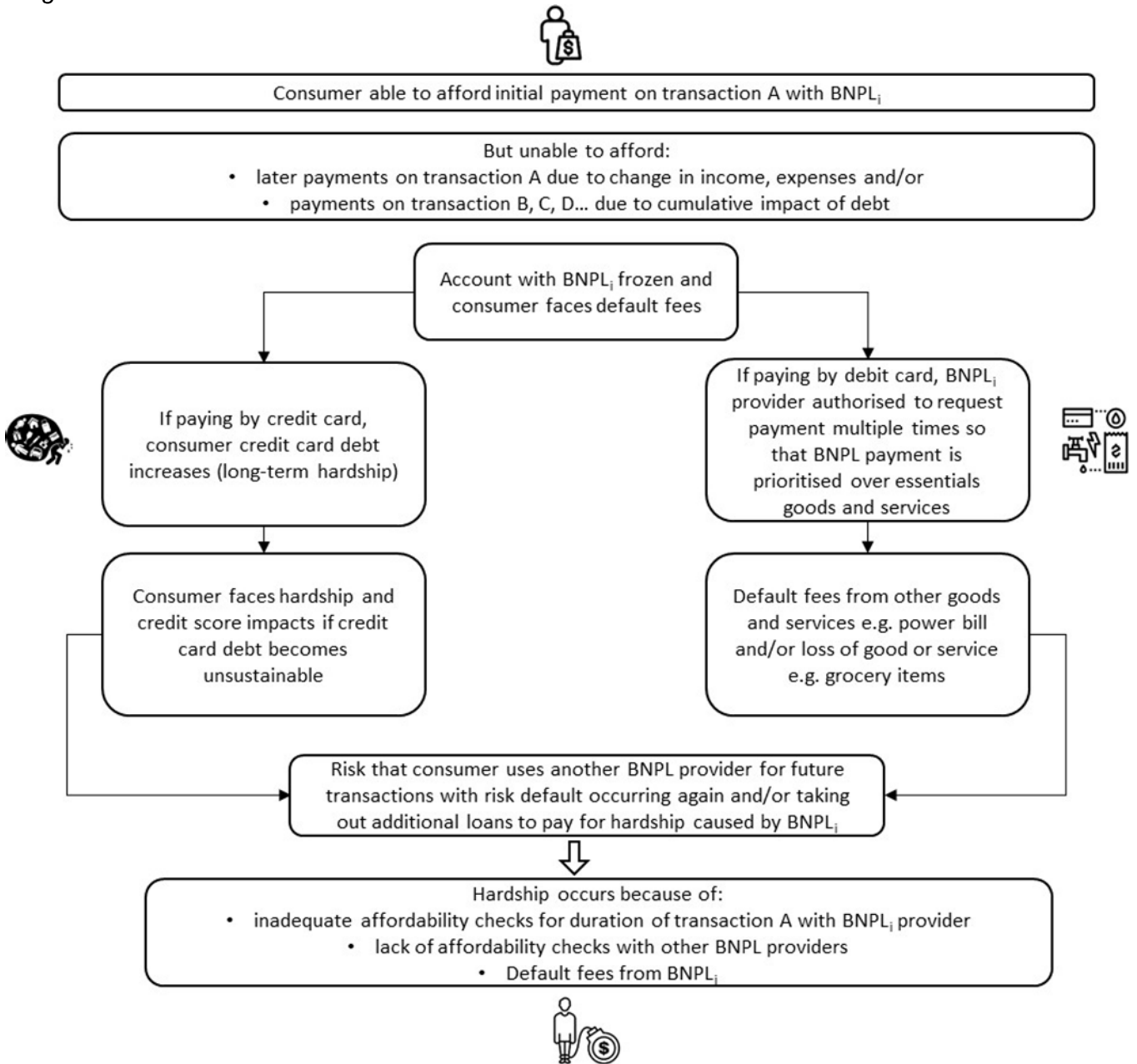
### Applying a Consumer Journey Approach to identify the cause of consumer harm from BNPL

34. To understand how consumer harm is being caused we have conducted a journey mapping exercise.<sup>9</sup> The purpose of this exercise is to provide a dynamic understanding of the consumer’s journey from making a BNPL transaction to facing financial hardship. The consumer journey approach has been informed by examples and stories of financial hardship that we have heard from consumer organisation stakeholders [Briefing 2021-1889 refers].

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<sup>9</sup> <https://dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/design-thinking/journey-mapping>

Diagram 1:



*Initial analysis identifies a lack of affordability assessments during the BNPL consumer journey as causing consumers financial hardship*

35. The diagram above summarises our initial analysis using a consumer journey mapping approach to BNPL. As outlined below, at the point of a missed payment default fees are applied. It is now common practice for BNPL providers to freeze consumer accounts when payments are missed. In cases where the consumer is unable to make any future payments, the default fee will also not be paid.
36. The consumer harm from a missed payment arises through further credit card debt and/or BNPL payments being prioritised over other expenses. Financial hardship occurs from:
  - not being able to afford other essential items
  - default fees being applied from other goods and services where the ability to freeze consumer accounts is not an option e.g. utility bills
  - further credit card debt or other loan payments (debt spiral)

- negative impacts on a consumer's credit score.

*Default fees are likely to be a symptom of poor affordability assessments*

37. While default fees are likely to be creating direct harm to consumers who miss a payment but then are able to pay subsequent payments, it is the lack and breadth of affordability assessments at the inception of a BNPL transaction that we consider to be the main driver of financial hardship.
38. A thorough affordability check at the inception of the BNPL transaction would mean that consumers who are unable to afford BNPL payments for the duration of the transaction, alongside existing financial commitments, would not be able to use BNPL and therefore not be subject to default fees regardless.

*Focusing on affordability across the lifetime of the BNPL product would ensure that regulation is outcomes focused*

39. Affordability assessments could also be linked to credit limits to ensure that affordability features across the lifetime of the contract between the BNPL provider and the customer. Considering the lifetime of a contract between the BNPL provider and the customer is consistent with the approach advocated by the UK Financial Conduct Authority's review of BNPL.<sup>10</sup>
40. Currently, credit limits vary by BNPL provider but generally credit limits increase if the customer proves that they can maintain repayments. If affordability assessments could be triggered in response to changes in income these would provide a natural point at which credit limits could be amended, whilst ensuring that consumers are staying within their means and are being treated fairly.

*However, currently we have very little data on the cost implications of affordability assessments and subsequent impacts on revenue mix*

41. We currently have little data on how costly it would be for BNPL providers to undertake affordability assessments in line with obligations under the CCCFA. While more thorough affordability assessments may increase some costs on BNPL providers, a more thorough assessment of customer suitability, should, all other things equal, decrease the likelihood of default occurring and the associated costs of bad debt.
42. Open banking could alleviate some of the issues around conducting affordability assessments but hinges on an established consumer data right regime. This inability to conduct real time affordability stems from New Zealand's relatively immature online banking system – for example, in overseas jurisdictions real time affordability assessments by BNPL providers are being considered.<sup>11</sup>
43. The discussion document would provide us with information on how best to ensure affordability assessments are conducted to minimise consumer harm without the costs of making those assessments outweighing the consumer harm.

S9(2)(f)(iv)

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<sup>10</sup> UK Woolard Review, February 2021 – <https://www.fca.org.uk/publications/corporate-documents/woolard-review-unsecured-credit>

<sup>11</sup> <https://www.finextra.com/pressarticle/84515/zilch-works-with-credit-kudos-to-shake-up-credit-assessment-for-buy-now-pay-later>

S9(2)(f)(iv)

45. S9(2)(g)(i)

S9(2)(f)(iv)

*Transparency on default rates and fees could be used to incentivise the sector to conduct better affordability assessments*

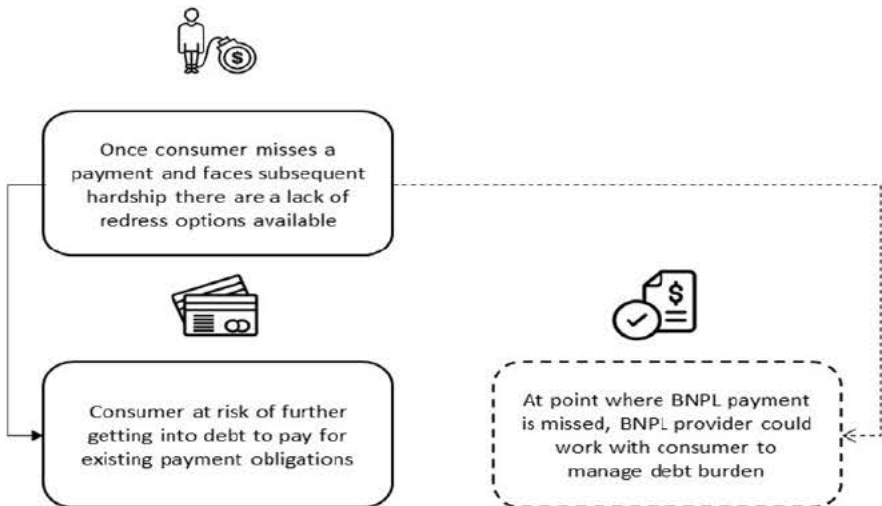
47. S9(2)(f)(iv)

## **Using the consumer journey mapping approach to identify additional levers to minimise consumer harm**

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48. In addition to identifying the drivers of consumer harm, the consumer journey mapping approach can also be used to identify potential options to mitigate or minimise the harm. These options that would benefit from being tested in a public discussion document.
49. The diagram below suggests that there is an opportunity for consumers to receive assistance from the BNPL provider once a payment has been missed.
50. For example, if a payment is missed, rather than continuing to seek payments from a consumer, one option could be that the BNPL provider at this point automatically provides a time-limited grace period e.g. 7 days, informing the consumer that if they are unable to pay within 7 days, then default fees will apply.
51. Alternatively, for multiple missed payments where default fees are not incentivising payments from the consumer, the BNPL provider could seek to work with the consumer to manage their debt burden. There would need to be workable missed payment thresholds to ensure that the costs of providing such debt management services do not outweigh the benefits to consumers.

Diagram 2



*The psychology of BNPL – living for today rather than tomorrow – is an important aspect to note when considering potential options for minimising consumer harm.*

52. As outlined in paragraph 21, the success of BNPL can be explained by its use of consumer psychology, including the use of incentives and relatively small payments over time.<sup>12</sup> As we discount the future more heavily than we do today, consumers focus on the relatively small initial payment or payment chunks that BNPL transactions display as opposed to the full total cost, including potential default fees or impacts on other expenses.

53. The consumer journey mapping approach can also be useful to unpack whether behavioural insights can be useful levers in minimising consumer detriment.<sup>13</sup> S9(2)(f)(iv)

[Redacted]

54. S9(2)(f)(iv)

[Redacted]

[Redacted]

[Redacted]


[Redacted]

<sup>12</sup> Page 20-21 of UK Cabinet Office publication – Mindspace: <https://www.bi.team/wp-content/uploads/2015/07/MINDSPACE.pdf>

<sup>13</sup> <https://dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/behavioural-insights>

Diagram 3

S9(2)(f)(iv)



55. S9(2)(f)(iv)

### **Proposal to publish a discussion document**

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*Consulting on a discussion document will address the gaps in our information and understanding and ensure that policy options are likely to achieve desired outcomes*

56. To understand how to regulate effectively, we recommend that, in line with Government best practice, MBIE publish a discussion document for public consultation by late-May. We propose that the discussion document will, among other options, S9(2)(f)(iv)

57. As part of the analysis underpinning the appraisal of options, we propose that the discussion document include:

- a clear articulation of the objectives and features of an effective BNPL sector
- discussion of underlying causes of consumer harm using the consumer journey mapping exercise
- questions about how best to address consumer harm, S9(2)(f)(iv) while still maintaining an effective BNPL sector.

58. The discussion document will also seek information on the costs and benefits of applying the CCCFA to the BNPL sector, via s137A, to achieve desired outcomes.

*Active engagement with BNPL providers will both yield data and information for the discussion document and also spur the sector to progress their code in a way which is aligned to policy objectives*

59. In order to furnish the discussion document with data and evidence, we propose to communicate our approach of publishing a discussion document with the BNPL sector and inform them that we will be seeking information from them on their operations including



revenue mix, their approach to credit limits and the nature and timing of affordability assessments.

60. Industry engagement in response to a discussion document is likely to motivate the BNPL sector to make visible progress on the industry code of conduct.

*Engagement with regulators and consumer organisations will also be important to the success of the discussion document*

61. There has been an interest in the BNPL sector from regulators. While the New Zealand approach to financial regulation differs to that of other countries, the links to these countries provided by regulators like the Commerce Commission and the Financial Markets Authority will assist us in our understanding of the consumer harms and assessment of the policy options.
62. Consumer organisations have already been vocal about their concerns with the sector, which have been raised directly with you or through media channels. Engagement with consumer organisations as part of the development of the discussion document will ensure that the consumer harms identified and options being assessed are fit for purpose.

## Next steps

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63. We anticipate the following next steps:

Milestone	Timing
Active engagement with sector, Commerce Commission, Financial Markets Authority and overseas counterparts	S9(2)(f)(iv)
Draft discussion document for your consideration	
Refinement of draft discussion document	
Cabinet consideration	
Discussion document published	

## Annexes

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Annex 1: Table comparing the CCCFA, Responsible Lending Code, New Zealand draft Code, the Australian Industry Code and Officials Commentary

Annex 2: How consumer harm may occur as the BNPL industry evolves to partner with credit card networks

## Annex 1: Table comparing the CCCFA, Responsible Lending Code, New Zealand draft Code, Australian Industry Code and Officials Commentary

Issue	CCCFA	RLC	NZ Draft Industry Code	Australian Industry Code	Officials Commentary
<p><b>Affordability and suitability inquiries:</b> BNPL products should be available only to consumers who can repay each payment without substantial hardship.</p>	<p>Regulations: 4AA, 4AJ, 4AK, 4AM.</p> <p>Inquiries prior to agreements or variations.</p> <p>Verified and reliable evidence to determine income and expenses.</p>	<p>Chapter 5.</p> <p>Information must be reliable.</p> <p>Product risks to affordability can warrant different buffers, surpluses and adjustments.</p>	<p>S9(2)(ba)(i)</p>	<p>Parts 8, 11 and 12.</p> <p>Products must be suitable and appropriate.</p> <p>For initial agreement, inquiries will be made.</p> <p>Lenders must be reasonably satisfied information is reliable.</p> <p>For ongoing agreements, products will be subject to safeguards and lender will look to considerations like repayment history.</p> <p>For ongoing agreements, consumers in arrears will not receive lending.</p>	<p>S9(2)(g)(i)</p>


<p><b>Informed decisions to borrow:</b> Consumers who use BNPL products should have awareness of the total cost and the cost of total potential default fees.</p>	<p>Must assist borrower reach informed decision.</p> <p>Borrower must be made aware of full implications of agreement.</p>	<p>Chapter 7.</p> <p>Borrowers must be made aware the full implications and key features of the agreement.</p> <p>The agreement should be in plain language.</p> <p>Borrowers must have the opportunity to seek further advice.</p> <p>Consideration as to whether borrower needs greater assistance.</p> <p>Online agreement requires lender take steps to ensure understanding.</p>	<p>S9(2)(ba)(i)</p>	<p>Part 10.</p> <p>The agreement should be in plain language.</p> <p>Clear and prominent information about repayment obligations.</p>	<p>S9(2)(g)(i)</p>
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<p><b>Hardship provisions:</b> BNPL providers should have accurate indicators of consumer hardship and should proactively engage consumers who demonstrate signs of hardship.</p>	<p>Section 55. Creates a process for borrower applications for extension or postponement of their contract where they cannot reasonably meet obligations due to a change in circumstances (similar to illness or injury).</p>	<p>Chapter 12. Lenders should use indicators of hardship to proactively identify.  Once process initiated, suspend direct marketing or promotion.  Should only request information reasonably necessary.  Consideration of whether assistance will enable borrower to meet obligations.</p>	<p>S9(2)(ba)(i)</p>	<p>Part 8 and 14.  The Code enables proactive recognition of hardship.  Staff training to recognise vulnerability.  Escalation where hardship claims are denied is allowed for, as well as halts on collection activity.  Once process initiated, suspend direct marketing or promotion.</p>	<p>S9(2)(g)(i)</p>
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<p><b>BNPL products advertised accurately:</b> Consumers are aware of the full nature of the product and not misled by advertisements.</p>	<p>Section 9 and 4AAAQ and 4AAAU.</p> <p>Lenders must exercise care, diligence and skill in any advertisement.</p> <p>The lender must state the total amount of repayments.</p> <p>Clear communications.</p>	<p>Chapter 3.</p> <p>The Code provides guidance on prominence.</p>	<p>S9(2)(ba)(i)</p>	<p>Part 10.</p> <p>Adverts must be clear and not misleading.</p> <p>Providers must ensure that terms and conditions are distinct from other marketing material.</p>	<p>S9(2)(g)(i)</p>
<p><b>Dispute resolution available:</b> Consumers know how to access dispute resolution and complaints are dealt with within a reasonable period.</p>	<p>Lenders must comply with the Financial Service Providers (Registration and Dispute Resolution) Act.</p>	<p>Chapter 2, 11, and 12.</p> <p>Internal dispute resolution process.</p> <p>Membership of external dispute resolution scheme.</p> <p>Information about processes for consumer throughout lifetime of agreement.</p> <p>Lenders must keep records.</p>		<p>Part 13.</p> <p>Providers must have a complaints process which is visible to consumers.</p> <p>Internal dispute resolution process</p> <p>Membership of external dispute resolution scheme.</p> <p>Complaint avenue for breaches of Code.</p>	

<p><b>Default/missed payment fees should be reasonable:</b> Consumers should not be charged an unreasonable amount for missed payments. The fee should be proportionate to the amount borrowed.</p>	<p>Section 41 and 44A, regulation 4D.</p> <p>Fees must be reasonable and accurately compensate lender costs and losses.</p> <p>Information provided to the borrower must include a description of the fees that are or could be incurred.</p>	<p>Chapter 10.</p> <p>Lenders should ensure that costs relate to the specific costs of the credit contract.</p> <p>Fees should be reviewed regularly.</p>	<p>S9(2)(ba)(i)</p>	<p>Part 10.</p> <p>Fees will be fair, reasonable and capped.</p> <p>Consumers will be kept informed of fees for different products and changes.</p>	<p>S9(2)(g)(i)</p>
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S9(2)(ba)(i)





# EVENT BRIEFING

## Meeting with Consumer NZ

<b>Date:</b>	9 April 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2874

Action sought		
	Action sought	Deadline
Hon Dr David Clark Minister of Commerce and Consumer Affairs	Note the background information and talking points ahead of your meeting with Consumer NZ on 14 April 2021.	14 April 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Daniel O'Grady	Manager, Competition and Consumer Policy	04 470 2295	S9(2)(a)	
Dmitry Mitenkoff	Policy Advisor	04 897 5029		✓

The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments:





# EVENT BRIEFING

## Meeting with Consumer NZ

<b>Date:</b>	9 April 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	<b>In Confidence</b>	<b>Tracking number:</b>	2021-2874

### Purpose

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To provide you with background information and talking points for your meeting with Consumer NZ on 14 April 2021.

### Recommended action


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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** the background information and talking points ahead of your meeting with Consumer NZ.

*Noted*

S9(2)(a)



Daniel O'Grady  
**Manager, Competition and Consumer Policy**

9 / 04 / 2021

Hon Dr David Clark  
**Minister of Commerce and Consumer Affairs**

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## Summary of your meeting with Consumer NZ

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1. You will be meeting with Consumer NZ at your office in Wellington at 10am on Wednesday, 14 April 2021.
2. The meeting will be a good opportunity for you to learn more about emerging issues facing New Zealand consumers. In particular, Consumer NZ has indicated it would like to discuss the following matters:
  - a. Out of Scope
  - b.
  - c.
  - d. buy-now-pay-later products
  - e. Out of Scope
  - f.
  - g.
  - h.
3. This briefing provides you with background information on the above issues. Biographical information about the attendees and talking points are provided in Annex 1 and Annex 2 respectively.
4. Officials are available to attend the meeting.

Out of Scope

Out of Scope




Out of Scope



Out of Scope



Out of Scope



## Buy-now, pay-later products

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46. Buy-now, pay-later (**BNPL**) is a financial product which allows consumers to buy and receive goods and services immediately but pay for them in instalments over a specified period (usually one to three months). It is a two sided market, where BNPL providers earn revenue by charging merchants (normally a percentage value of the price of the product or service (merchant service fee) and/or a fixed fee) and consumers (eg through missed and late payment charges as well as in some cases establishment and/or account holding fees).

### *Consumer NZ views on BNPL*

47. Consumer NZ chief executive Jon Duffy was quoted in a news article saying that "... the schemes can be advantageous for some people, they can lead to a world of trouble for others. The buy now, pay later company relies on a certain percentage of people defaulting - at which time they get slapped with penalty fees."<sup>1</sup>


### *You are currently considering our advice [Briefing 2021-2723]*

48. Our understanding from BNPL providers and analysis of overseas studies is that the majority of revenue is currently generated through merchant service fees, with relatively small amounts of revenue coming from consumers through missed and late payment charges. We lack current data on BNPL providers' revenue mix, particularly since May 2020 when the industry made steps to reduce default risk.

49. S9(2)(f)(iv)
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50. You have asked us to prepare a discussion paper on options for addressing issues with BNPL. You may wish to indicate that you are also concerned about BNPL products and are considering next steps.

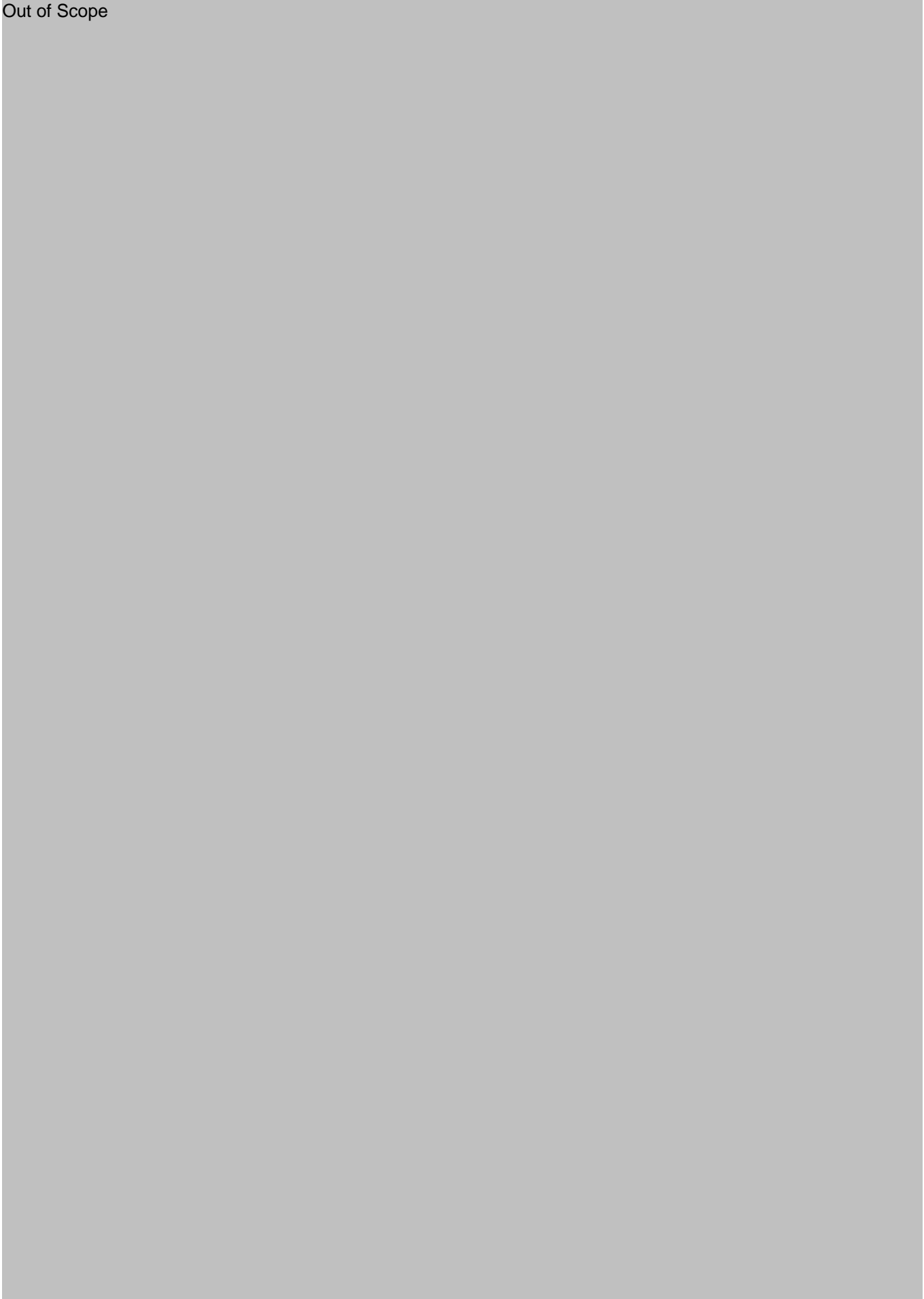
Out of Scope



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<sup>1</sup> Earlier in March: <https://www.newshub.co.nz/home/money/2021/03/the-dangers-of-buy-now-pay-later-schemes.html>

Out of Scope





Out of Scope



## **Annexes**

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Annex 1: Attendees from Consumer NZ

Annex 2: Talking points

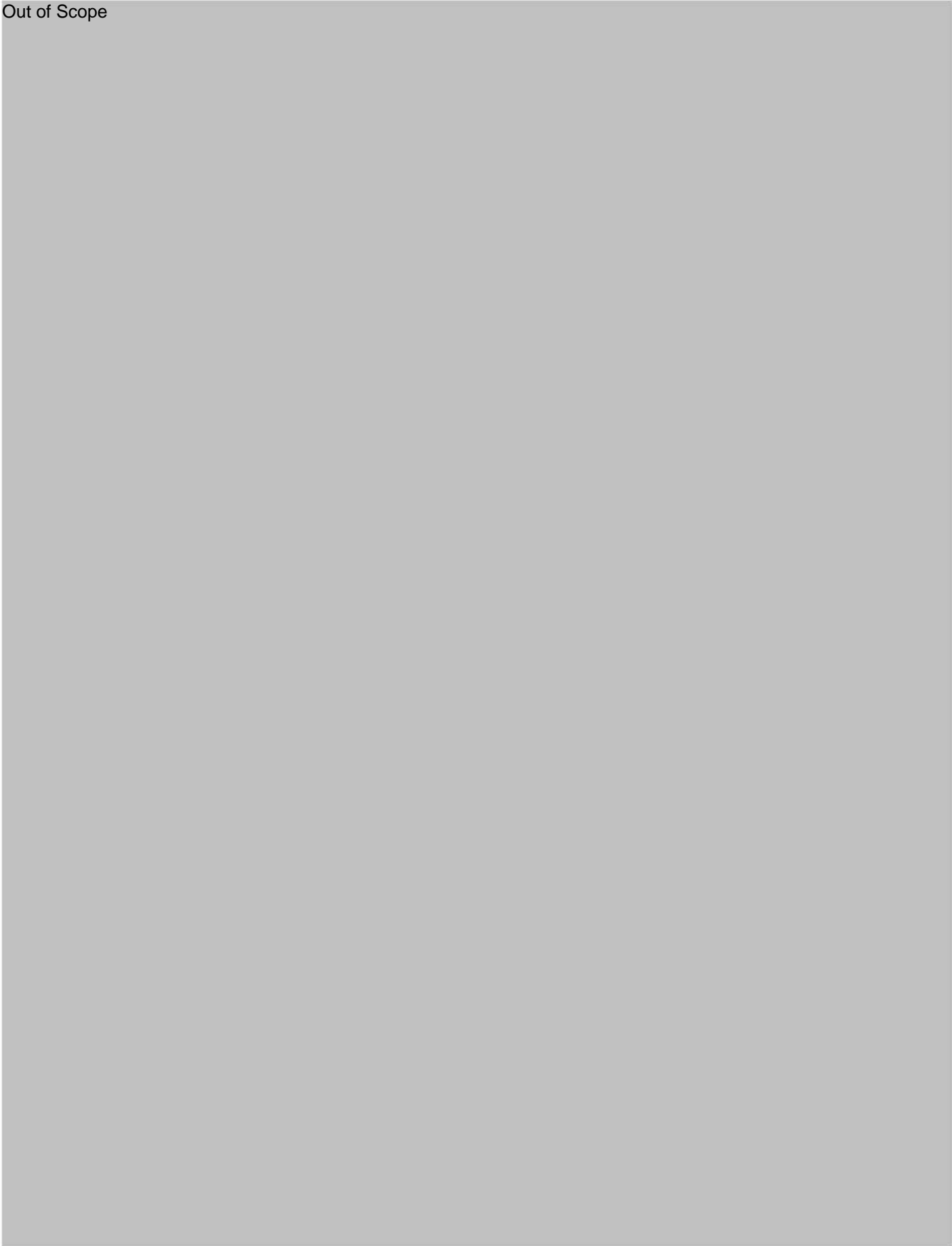
## **Annex 1: Attendees from Consumer NZ**

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Out of Scope



Out of Scope



*BNPL*


*If asked about BNPL products and what the Government is doing to protect consumers from unmanageable debt in this area:*

- I am aware of this trend and share your concerns about these products.
- The previous Minister wrote to buy-now, pay-later providers asking them what steps they were taking to protect consumers. I understand that the providers are working on a buy-now, pay-later industry code. Officials are monitoring the progress of the Industry Code.
- The Government has new powers under the Credit Contracts and Consumer Finance Act (**CCCFA**) to extend legal requirements to buy-now, pay-later schemes, which can be used if industry-led measures are unsatisfactory.
- I am considering what further steps to take.
- The success of any regulatory solution, including the use of class designation powers under s137A of CCCFA, depends upon a clear understanding of the root causes of consumer harm and identifying how best to address that harm. Officials are continuing to collate information on issues and benefits arising from the sector.

Out of Scope




Out of Scope



# PRIVATE DEBT ISSUES – Summary of work – June 2021

Private debt = Personal debt owed to private businesses or lenders

Out of Scope





Out of Scope

Preventing unaffordable new debt	Buy Now Pay Later (MBIE)	Discussion paper in development, aiming for publication Q3 2021	On track	Public consultation
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Out of Scope



## SECTION 1: THE MOST IMPORTANT ISSUES FOR THE WEEK AHEAD

### Urgent Matters for Attention / Action

No updates

### Key Issues for Noting

#### Buy now pay later (BNPL) – entry of Klarna into New Zealand market S9(2)(a)

Headquartered in Sweden, Klarna has announced it has entered the New Zealand BNPL market.

As well as providing competition to existing BNPL providers, Klarna's entry into New Zealand may also help to address consumer affordability and debt concerns associated with BNPL transactions as they have operations in countries where regulation of BNPL have been introduced. Officials will follow developments with interest and provide updates.

Klarna operates in many countries including the UK, US and more recently Australia where it initially partnered with the Commonwealth Bank of Australia to provide BNPL services. According to media sources, Klarna has indicated that in addition to BNPL, it will also provide additional services such as allowing consumers to create wishlists and tracking individual consumer spending patterns.

Out of Scope

## SECTION 1: THE MOST IMPORTANT ISSUES FOR THE WEEK AHEAD

### Urgent Matters for Attention / Action

No updates

### Key Issues for Noting

Out of Scope

#### **Buy now pay later (BNPL) evidence of consumer harm** S9(2)(a)

Following on from the meeting you had with BNPL providers on Thursday 6 May, we checked the consumer harm research that the Australian Securities and Investment Commission (ASIC) published in November 2020. The ASIC commissioned research found that in the last 12 months, in order to make their buy now pay later payments on time: 20% of consumers surveyed said they cut back on or went without essentials (e.g. meals); and 15% of consumers surveyed said they had taken out an additional loan. This was based on a sample of over 1,500 BNPL consumers and weighted by age, gender and location to ensure that the responses were nationally representative.

Another issue raised at the meeting was that of consumers holding multiple BNPL accounts and the risk of getting into financial difficulty across different BNPL providers. We have recently received data from FINCAP which indicates that in February 2021 some 57 consumers working with Financial Mentors had three or more active BNPL accounts and 16 consumers had more than five BNPL accounts. It is unclear from the data we received whether these accounts were in arrears or not. We will continue to work with FINCAP and other organisations to ascertain the size and extent of the consumer harm arising from BNPL products.

### Other Cabinet Papers of Note

No updates

9. Buy-now, pay-later products (like Afterpay, Oxipay etc)

Afterpay and other buy-now, pay-later products have seen a huge boom recently. They are not covered by responsible lending rules. What is the Government doing to protect consumers from unmanageable debt in this area?

- I am aware of this trend, and the previous Minister wrote to buy-now, pay-later providers asking them what steps they were taking to ensure consumer protection. I understand that the providers are currently working on a buy-now, pay-later industry code.
- Each scheme has built-in limits on how much debt a person can take on, and most have capped default fees. It is also worth noting that unlike with other credit, buy-now, pay-later schemes do not charge borrowers any interest on these debts and default fees are generally capped. This prevents unpaid debts from growing.
- The Government does have new powers under the Credit Contracts and Consumer Finance Act to extend legal requirements to buy-now, pay-later schemes, which can be used if industry-led measures are unsatisfactory.

Contact: Ella Hughes – 489 76392

## 9. Buy Now Pay Later

### Overview

Buy now pay later (BNPL) is a financial product which allows consumers to buy and receive goods and services immediately but pay for them in instalments over a specified period (usually 1-3 months). It is a two sided market, where BNPL providers earn revenue by charging merchants (normally a percentage value of the price of the product or service (merchant service fee) and/or a fixed fee) and consumers (eg missed and late payment charges as well as in some cases establishment and/or account holding fees).

### Q&A

**Afterpay and other buy-now, pay-later products have seen a huge boom recently. They are not covered by responsible lending rules and/or obliged to undertake credit checks. What is the Government doing to protect consumers from unmanageable debt in this area?**

- I am aware of this trend and the previous Minister wrote to buy-now, pay-later providers asking them what steps they were taking to ensure consumer protection. I understand that the providers are working on a buy-now, pay-later industry code. Officials are monitoring the progress of the Industry Code.
- The Government has new powers under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to extend legal requirements to buy-now, pay-later schemes, which can be used if industry-led measures are unsatisfactory.
- There are benefits of a BNPL sector. Assuming sufficient affordability assessments and proper use, the BNPL sector provides an effective competitive constraint on other forms of credit as, unlike credit cards and loans which charge interest over a long period, the payments and duration of the BNPL transaction are clear up-front. By charging the merchant instead of the consumer, the BNPL is also innovative and disrupts existing credit models.
- The success of any regulatory solution, including the use of class designation powers under s137A of CCCFA, depend upon a clear understanding of the root causes of consumer harm and identifying how best to address that harm. I have tasked officials with providing advice on these issues.

Contact: Rosie Jaffer – S9(2)(a) & Ella Hughes – 489 76392

## 9. Buy Now Pay Later

### Overview

Buy now pay later (BNPL) is a financial product which allows consumers to buy and receive goods and services immediately but pay for them in instalments over a specified period (usually 1-3 months). It is a two sided market, where BNPL providers earn revenue by charging merchants (normally a percentage value of the price of the product or service (merchant service fee) and/or a fixed fee) and consumers (e.g. missed and late payment charges as well as in some cases establishment and/or account holding fees).

### Q&A

Afterpay and other buy-now, pay-later products have seen a huge boom recently. They are not covered by responsible lending rules and/or obliged to undertake credit checks. What is the Government doing to protect consumers from unmanageable debt in this area?

- I am aware of this trend and have met with BNPL providers to relay my concerns and ask them what steps they are taking to ensure consumer protection.
- The Government has new powers under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to extend legal requirements to buy-now, pay-later schemes, which can be used if industry-led measures are unsatisfactory.
- There are benefits of a BNPL sector. Assuming sufficient affordability assessments and proper use, the BNPL sector provides an effective competitive constraint on other forms of credit as, unlike credit cards and loans which charge interest over a long period, the payments and duration of the BNPL transaction are clear up-front. By charging the merchant instead of the consumer, the BNPL is also innovative and disrupts existing credit models.
- However, I am also concerned about any consumer harm arising from BNPL. The success of any regulatory solution, including the use of powers under the CCCFA, depend upon a clear understanding of the root causes of consumer harm and identifying how best to address that harm. I have tasked officials with providing advice on this and asked them to work with BNPL providers and consumer advocacy organisations to understand the issues.

**The Government should regulate as in other countries like the UK**

- As part of the advice I have tasked officials with, developments on how the sector is evolving and regulatory approaches are being closely monitored. Any insights from overseas will need to be adapted to the New Zealand context to ensure that they are fit for purpose.

Contact: Rosie Jaffer – S9(2)(a) & Ella Hughes – 489 76392