

Memorandum

Date: 20 October 2022

To: Ministry of Business, Innovation and
Employment

Privacy of natural persons

Ref: 042629690/5022062.2

by email

SUBMISSION ON EXPOSURE DRAFT OF CREDIT CONTRACTS AND CONSUMER FINANCE AMENDMENT REGULATIONS (NO 2) 2022 AND UPDATED RESPONSIBLE LENDING CODE

Background

- 1 The Ministry of Business, Innovation and Employment (*MBIE*) has sought feedback on:
 - 1.1 the draft Credit Contracts and Consumer Finance Amendment Regulations (No 2) 2022 (the *Draft Amendment Regulations*); and
 - 1.2 updates to the Responsible Lending Code (June 2022) (the *Updated Code*), reflecting the Draft Amendment Regulations.
- 2 We welcome the opportunity to submit on the Draft Amendment Regulations and Updated Code, as the issues arising in relation to them are highly relevant to the advice we provide to many of our clients. Our submissions focus on those proposals that we consider could be materially improved.
- 3 Our submission does not purport to represent the views of any of our clients.
- 4 We would be happy to discuss any of the comments we have made with MBIE.

Summary

Refinancing

- 3 In respect of the changes to regulation 4AH for refinancing another lender's loan, we prefer option 1, as it is the more practical option. However, we suggest some drafting improvements to it below.

Revolving credit contracts

- 4 We recommend updating the changes to regulation 4AL (excluding certain credit card repayments), to make it clear that lenders can still apply the previous credit card repayment treatment. Again, our drafting suggestions are included below.



Updated Code – discretionary expenses

- 5 In respect of the changes to the Updated Code in relation to discretionary expenses, we prefer option 2, as option 1 is confusing.
- 6 However, the drafting of option 2 should be clarified, and we query whether it is appropriate to have a blanket prohibition from treating tithing, remittances and pet expenses as discretionary expenses, even where a borrower states that they would reduce or cease those expenses if they were at risk of substantial hardship.
- 7 We also suggest some other changes to the Updated Code below.

Comments on the Draft Amendment Regulations

Regulation 4AH – exception for refinancing another lender’s loan

Option 1 is preferable

- 8 In our view, option 1 is the more practical option for determining that the refinancing concession applies, subject to our comments below at paragraphs 10 to 13. This is because the old and new contracts could have more than one interest rate (e.g. a credit card with purchase, cash advance and balance transfer interest rates), so determining the “old” and “new” interest rates (as required under option 2) may not be a straight forward exercise.
- 9 If there is a concern that the credit limit may be increased under option 1, an equivalent to regulation 4AH(1)(c) could be included as part of this option.

Drafting comments

- 10 We also have the following suggested drafting improvements for option 1.
- 11 The requirement in regulation 4AL(1B)(a)(i)(B) that the lender calculate the repayment amount sufficient to repay the unpaid balance within no more than 3 years *from the date on which the debit occurs* is not practical. Each purchase or other debit on a credit card will have its own debit date, so this wording would require past statements to be analysed to determine when each debit’s 3 year repayment period ends. It would also require a consideration of any intervening payments and the effect of those. Our proposed change to regulation 4AH(1B)(a) provides for a single 3 year period from the date of testing and reflects the equivalent wording in existing regulation 4AL(2)(b)(i).
- 12 We have also included a similar concept to regulation 4AL(2)(b)(ii) to deal with the possibility that one or both of the minimum payment and the 3 year repayment amount are not able to be calculated easily, but updated for consistency with the wording in subparagraph (B) to be 3.8% of the *unpaid balance* rather than the *credit limit*.
- 13 Regulation 4AH(1B)(a) of option 1 should be updated as follows:
- (i) *in the case of repayments on a credit card, the borrower will make repayments equal to whichever is the greater of the following:*
 - (A) *the minimum required payment:*



(B) an amount sufficient to repay the unpaid balance within no more than 3 years ~~from the date on which the debit occurs:~~

(ii) if the information required to make either calculation in subparagraph (i) is not readily accessible to the lender, at least 3.8% of the unpaid balance of the credit card:

(iii) in the case of a revolving credit contract that is a home loan, the borrower will pay the unpaid balance within no more than 30 years from the date that the loan is taken out:

(iv) in the case of any other revolving credit contract, the borrower will make payments sufficient to pay, within a reasonable period, the total amount advanced to the borrower under the contract:

Updated Code guidance on regulation 4AH

14 Given that the refinancing under regulation 4AH(1A) can be of loans from more than one lender,¹ it would be helpful if this was explicitly noted in the Updated Code.

Regulation 4AL(2A) – treatment of certain credit card repayments

15 We support the intent of the proposed change to prevent double counting of credit card payments where the customer repays their balance in full each month. However, the stated intention that lenders can choose not to apply subparagraph (2A) and instead apply the current treatment to credit card payments is not reflected in this drafting. Instead, regulation 4AL(2A) is expressed as being an absolute rule.

16 To ensure that lenders can choose whether to use the concession in regulation 4AL(2A) or not, the drafting in the introduction to subparagraph (2A) should be updated as follows:

Despite subclause (2), a lender may choose to exclude repayments on a credit card from the borrower's relevant expenses ~~in respect of a payment under any revolving credit contract excludes repayments on a credit card~~ if the lender—

Comments on Updated Code

Affordability process diagram

17 The final affordability process diagram should ensure that any hidden text (e.g. in relation to 4AH) is visible.

18 Existing issues with the affordability process diagram should also be fixed. These issues include:

18.1 the 4AI box is missing the following words in blue “**4AI** Make reasonable inquiries into any other means by which the borrower...”

¹ Under section 19 of the Legislation Act 2019, references to “the lender (lender A)” are interpreted as also being the plural.



18.2 the diagram splits borrowers into two groups – those who rely wholly or in part on income to repay and those that do not. However, this split is not an accurate reflection of the Credit Contracts and Consumer Finance Regulations. If a borrower is using both income and assets to repay their loan, the inquiries under regulation 4AI must be made, whereas the diagram suggests that the regulation 4AI inquiries do not apply.

Exclusions from relevant expenses – replacement para 5.9

Option 2 is preferable

19 We found the draft guidance in option 1 confusing. For example, it is unclear what the assumptions based on statements about “many borrowers” or “most borrowers” are intended to achieve. As such, we consider that option 1 should not be included in the Updated Code.

Comments on option 2 – fixed financial commitments

20 It will be difficult for lenders to determine which otherwise discretionary expenses have underlying contractual requirements or break fees that mean that they should be treated as fixed financial commitments. For example, without reviewing the borrower’s specific contracts, it would be difficult for a lender to determine whether a borrower is subject to a fixed term or break costs for their subscription TV, gym or phone plans. A borrower’s chosen subscription TV plan may have no fixed period or the fixed period may have ended.

21 At a minimum, guidance should be given that lenders can rely on the borrower’s classification of whether these types of expenses are fixed financial commitments or not.

Comments on option 2 – treatment of tithing, remittances and pet expenses

22 The underlined wording in the introduction to option two is difficult to understand and can be interpreted different ways.

In considering whether expenditure is discretionary expenditure that a borrower would cease or reduce, lenders may presume that expenses other than the following are discretionary, unless the lender has reason to believe that this is not correct for a particular borrower:

23 The first (and we believe the intended interpretation) is that:

23.1 any expenses not listed in paragraphs (a) to (d) can be treated as discretionary, unless the lender has reason to believe that the expense is not discretionary for the particular borrower; and

23.2 expenses listed in paragraphs (a) to (d) can never be treated as discretionary.

24 However, the alternative interpretation of the drafting is that:

24.1 expenses listed in paragraphs (a) to (d) can be treated as discretionary if the lender has reason to believe that for the particular borrower they are discretionary; and



- 24.2 any expenses not listed in paragraphs (a) to (d) can be treated as discretionary, unless the lender has reason to believe that the expense is not discretionary for the particular borrower.
- 25 Given the nature of the expenses in paragraphs (a) to (d), the practical difference in these interpretations is around whether outgoings associated with tithing, remittances to a family member overseas and pets can ever be treated as discretionary expenses.
- 26 Based on the Updated Code, we understand the intention is that that regular tithing and remittances are always treated as relevant expenses, even if the borrower considers them as discretionary and would reduce or stop them if they were at risk of substantial hardship. We query whether this is an appropriate outcome.
- 27 Engaging in regular tithing or remittances will limit the borrowing capacity of those borrowers who would happily reduce these expenses if needed. A useful clarification to the proposed drafting which would assist borrowers who do not have social or moral obligations to tithe or remit would be to add the following words to paragraph (d):

Regular or frequently recurring outgoings associated with tithing, remittances to a family member overseas, and pets, unless (and to the extent that) the borrower has stated that they would reduce or cease those expenses if they were at risk of substantial hardship.

Treatment of existing buy now pay later facilities – new para 5.34

- 28 The new paragraph 5.34 in the Updated Code may help lenders understand the consequences of not treating buy now pay later in the same way as other revolving credit contracts. As such, in our opinion it should be included in the Updated Code.

General

- 29 As indicated above, we are happy to discuss any of our comments in this submission with MBIE.

Kind regards,

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