

Memorandum

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To: Ministry of Business, Innovation and
Employment

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by email

SUBMISSION ON DRAFT CREDIT CONTRACTS AND CONSUMER FINANCE (BUY NOW PAY LATER) AMENDMENT REGULATIONS 2022

Background

- 1 The Ministry of Business, Innovation and Employment (*MBIE*) has sought feedback on the draft Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (the *Draft Amendment Regulations*).
- 2 We welcome the opportunity to submit on the Draft Amendment Regulations, as the issues arising in relation to them are relevant to the advice we provide to 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

- 3 The proposed definition of "BNPL contract" in the Draft Amendment Regulations is too broad and captures many unintended contracts, including charitable and not-for-profit lending.
- 4 Our suggested changes to the proposed definition of "BNPL contract" are set out below in paragraph 8.
- 5 However, we are concerned that lenders that may be inadvertently caught by the proposed definition of "BNPL contract" may not be aware of the fact. As a result, we recommend that MBIE conduct targeted consultation with such lenders to ensure that they are aware of the proposals and can determine whether they are caught by the Draft Amendment Regulations.



Comments on the Draft Amendment Regulations

Definition of "BNPL contract"

- 6 The proposed definition of "BNPL contract" in the Draft Amendment Regulations is too broad and captures many unintended contracts. Part of this breadth is a result of not carrying over the other requirements and exclusions contained in sections 11-15 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).
- 7 We set out below some situations that may be caught by the proposed definition of "BNPL contract" despite not being buy now pay later arrangements.

Charitable and not-for profit lending

- 7.1 Various lenders, including charities and other not-for-profit lenders, make loans to natural persons without interest, credit fees or security so that these borrowers can buy necessary goods or services (such as buying a fridge or paying for dental services) without taking out expensive loans or getting into a cycle of debt.
- 7.2 Those loans would be caught by the proposed definition of "BNPL contract". Unlike true BNPL arrangements, there is no intention by these lenders to make a profit from the loan (directly or indirectly). In addition, these loans are unlikely to charge late payment default fees, although it is possible that some may charge enforcement costs which the Commerce Commission generally considers to be default fees¹. Borrowers under those loans are often working with financial mentors when they take out the loans to ensure that they are affordable.
- 7.3 There is no reason that this lending should be captured by the definition of "BNPL contract".

Intra-family lending

- 7.4 Interest free family lending would also be caught by the proposed definition of "BNPL contract" where the lending was to enable the debtor to buy goods or services.
- 7.5 This lending would normally be excluded under section 11(1)(d) of the CCCFA² (as such lenders are not usually in business or meet the other limbs of that test), as well section 11(1)(c). However, the proposed definition of

¹ Commerce Commission, *Consumer Credit Fees Guidelines* (September 2022), page 33.

² Section 11(1)(d) of the CCCFA provides that a credit contract is a consumer credit contract if:

- (d) when the contract is entered into, 1 or more of the following applies:
- (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business);
 - (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor;
 - (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person;
 - (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.



“BNPL contract” does not exclude lending that fails to meet other requirements of section 11 or lending that is excluded by sections 12 to 15 of the CCCFA.

- 7.6 As with the lending above, there is no policy reason to include this type of lending as regulated consumer credit and the definition of “BNPL contract” should be restricted to loans that were excluded from being a consumer credit contract **solely** by reason of being security interest, credit fee and interest free. In other words, a lending contract should only be a “BNPL contract” if it would have been a “consumer credit contract” if it had included interest charges, a credit fee or a security interest.

Credit provided by government sector

- 7.7 We note that some public sector lending could also be caught by the proposed definition of “BNPL contract”. Examples of government lending that may be caught include Work and Income loans such as the Advance Payment of Benefit and Recoverable Assistance Payment³.
- 7.8 In the absence of the proposed definition of “BNPL contract”, some of this lending may have been excluded from being a consumer credit contract by virtue of section 11(1)(d) of the CCCFA. However, the separate statutory exclusion for student loans suggests that section 11(1)(d) may not exclude Crown lending.
- 7.9 Again, we see no reason that this lending should be captured by the definition of “BNPL contract”.

Suggested drafting changes to the definition of “BNPL contract”

- 8 Our suggested drafting changes to the definition of BNPL contract are set out below.

*BNPL contract (buy now pay later contract) means a **credit** contract entered into between a lender and a debtor—*

- (a) which provides credit to enable the debtor to buy goods and services from a third party; and*
 - (b) which is not a consumer credit contract solely by reason of the requirements of section 11(1)(c) of the Act; and*
 - (c) in respect of which the debtor is not charged interest or credit fees; and*
 - (d) in respect of which the lender is paid fees by a third party or a payment services provider.*
- ~~*(e) in circumstances where the debtor is a natural person*~~

³ Descriptions of these loans can be accessed at www.workandincome.govt.nz/products/a-z-benefits/index.html



- 9 An alternative may be to require that default fees can be charged under the contract. However, we understand that there is a BNPL lender in Australia that does not charge default fees. We are also unsure whether all not for profit lending excludes default fees, given that the Commerce Commission guidance is that third party collection and enforcement costs are “default fees”.

Recommendations for additional consultation

- 10 While we have suggested changes to the definition of “BNPL contract” with the intention of reducing the unintended breadth of the definition, we recommend that MBIE proactively consult with entities that may be unexpectedly affected by the definition, as these entities are unlikely to be aware that the Draft Amendment Regulations may impact them.
- 11 For example, we are not sure whether requiring the loan to meet the requirements of section 11(1)(d) would exclude the Ministry for Social Development lending, as the separate statutory exclusion for student loans suggests that it may not.

General

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

Kind regards,

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