

Buy Now Pay Later – Consultation on draft Amendment Regulations December 2022

Submitted to:

Ministry of Business, Innovation and Employment
Consumer Policy Team

10 March 2023



Commerce Commission submission on the Buy Now, Pay Later Consultation Paper and draft Amendment Regulations

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Buy Now, Pay Later (BNPL) Consultation Paper relating to the draft Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (Draft Regulations) issued by the Ministry of Business, Innovation and Employment (MBIE) on 19 December 2022.
2. The Commission is an independent Crown entity and is New Zealand's primary competition, fair trading, consumer credit, and economic regulatory agency. Our vision is to make New Zealanders better off. We work to ensure markets work well and that consumers and businesses are confident market participants.
3. Our submission sets out our views on:
 - 3.1 the requirement for BNPL lenders to obtain a credit report as a condition of the affordability assessment exemption for credit limits under the threshold;
 - 3.2 whether the affordability assessment required for credit limits over the threshold should include compliance with the Credit Contracts and Consumer Finance Regulations 2004 (CCCF Regulations); and
 - 3.3 the content of Responsible Lending Code guidance if BNPL lenders' affordability assessment obligations for credit limits over the threshold do not include compliance with the CCCF Regulations.
4. We also set out at **Attachment A** comments on the definition of "BNPL contract" in the Draft Regulations as well as comments on the drafting of provisions to improve clarity and workability.

Requirement to obtain a credit report

5. Under 18I(3) of the Draft Regulations the exemption in 18I(1) applies "only if the lender first obtains information from a credit report". We note that while the lender is required to obtain a credit report, there is no express obligation placed on the BNPL lender in the Draft Regulations to use the information in the credit report in any particular way when making its lending decision.
6. We recommend that a form of obligation is imposed on BNPL lenders to review and use the credit report information in their lending decision, particularly because the absence of any such obligation appears to create no consequence for a BNPL lender that ignored the content of the credit report.

Application affordability regulations

7. We acknowledge that in determining the affordability assessment required for BNPL contracts above the credit limit threshold, MBIE needs to balance the protection of consumers from unaffordable lending against the detrimental impact compliance

with obligations could have on potential consumer benefits arising from innovative products.

8. Our view is that it is preferable for the affordability assessment obligations in the CCCF Regulations to apply where an affordability assessment is required for credit limits above the threshold.
 - 8.1 This view is consistent with the consumer protection purpose of the Credit Contracts and Consumer Finance Act 2003 (CCCF Act) and with providing BNPL borrowers with the same protections against incurring unaffordable debt as when obtaining credit through a different consumer loan product for a similar amount for similar purposes.
 - 8.2 Applying the current affordability regulations also avoids additional complexities associated with introducing dual affordability regimes for BNPL and other consumer credit products.
 - 8.3 Applying the same rules to BNPL lenders and other consumer lenders also appears preferable from a competition perspective.

Responsible Lending Code guidance

9. If BNPL lenders are not required to comply with the CCCF Regulations for affordability assessments where the credit limit is above the threshold then, in our view, the Responsible Lending Code needs to contain sufficiently detailed guidance around the nature and extent of the inquiries that BNPL lenders need to undertake. This is necessary in order to provide a degree of certainty to lenders, borrowers, and the Commission as enforcement agency about the affordability obligations in section 9C(3)(a)(ii) of the CCCF Act.

Conclusion

10. We thank MBIE for the opportunity to provide comments.
11. If you have any specific questions on this submission please contact Mark Atwell via mark.atwell@comcom.govt.nz in the first instance.

Attachment A

1. We comment on the definition of “**BNPL contract**” as follows:
 - 1.1 In line 1 consider inserting “credit” immediately after the word “a”.
 - 1.2 In line 2 consider replacing “lender” with “creditor” on the basis that “lender” is defined in the CCCF Act as “a creditor under a consumer credit contract” (section 9B).
 - 1.3 In order to avoid the potential for the definition to include loans for business purposes consider adding a new sub paragraph (d) that “the credit is to be used, or is intended to be used, wholly or predominantly for personal domestic or household purposes”.
 - 1.4 The definition, as it stands, may be wide enough to also capture pawnbroking contracts where the credit is used for personal, domestic or household purposes if pawnbrokers’ redemption fees are not credit fees (the Commission’s position is that redemption fees are credit fees and the issue is currently before the courts). We suggest MBIE considers how to expressly exclude pawnbroking contracts from this definition in the event that redemption fees are found to not be credit fees.
2. **New 4AEA(1)** – In sub paragraph (b) consider replacing “these regulations” with “section 9C(3)(a)(ii) of the Act” and deleting paragraph (3) on the basis of redundancy.
3. **New 5B** – Consider replacing “lender” with “creditor” (refer comment at 1.2 above).
4. **New 18(1)(3)(b)** – Consider:
 - 4.1 Clarification of the timing of provision of information by the BNPL lender or the credit reporter (e.g. when and how often).
 - 4.2 The purpose of the information at draft regulation 18(1)(3)(a)(i) to (ix) being provided to the credit reporter. If it is for the benefit of:
 - 4.2.1 Other BNPL lenders – consider an express obligation to review and use this information when making their lending decisions (refer comment at 6 above); and
 - 4.2.2 Other non-BNPL lenders – consider not limiting this requirement to where the 18(1) exemption is used. We suggest information about BNPL contracts greater than \$600 is also, if not even more, important to non-BNPL creditors assessing new credit applications.
5. **New 18(1)(3)(c)** – We query whether the intention is to ensure that the specified information is disclosed to the borrower before the purchase is made. We note that some methods of disclosure under section 35 of the CCCF Act would result in the borrower receiving the information after the purchase (e.g. if the information were posted to the borrower in accordance with section 35(1)(b)).