

Submission template

Buy Now Pay Later: Draft Credit Contracts and Consumer Finance Amendment Regulations 2022

This is the submission template for the consultation paper, *Buy Now Pay Later: Draft Credit Contracts and Consumer Finance Amendment Regulations 2022*.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in the discussion paper by 5pm on **24 February 2023**. Your feedback will help us advise the Government on the *Buy Now Pay Later: Draft Credit Contracts and Consumer Finance Amendment Regulations 2022*.

MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading your submission in full including your name by making a submission, unless you clearly specify otherwise. Please note that submissions are subject to the Official Information Act 1982.

Submission instructions

Please make your submission as follows:

1. Fill out your name and organisation in the table, "Your name and organisation".
2. Fill out your responses to the consultation document questions in the table, "Responses to discussion paper questions". Your submission may respond to any or all of the questions in the consultation paper. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. We also encourage your input on any other relevant issues in the "Other comments" section below the table.
4. When preparing to send your submission:
 - a. Delete these first two pages of instructions.
 - b. Include your e-mail address and telephone number in the e-mail or cover letter accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
 - c. If your submission contains any confidential information:
 - i. Please clearly indicate this on the front of your submission or in the accompanying cover letter or e-mail. Any confidential information, together with reasons for withholding the information, should be clearly marked within the text of your submission. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
 - ii. Please provide a separate version of your submission excluding the relevant information for publication on MBIE's website.
 - d. If you do not wish for your submission to be published:

- e. Please clearly indicate this in the cover letter or e-mail accompanying your submission. However, please note that submissions remain subject to request under the Official Information Act 1982.
5. Send your submission:
- as a Microsoft Word document or searchable PDF to consumer@mbie.govt.nz (preferred), or
 - by mailing your submission to:
*Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand*

Please direct any questions that you have in relation to the submissions process to:
consumer@mbie.govt.nz

Submission on Buy Now Pay Later: Draft Credit Contracts and Consumer Finance Amendment Regulations 2022

Your name and organisation

Name	
Organisation (if applicable)	Dentons Kensington Swan

Responses

1	Do you have any comments on the definition of BNPL? Are there contracts that should be caught, but are not? Are there contracts that shouldn't be caught, but are?
	We suggest clarification is provided as to whether s15 of the CCCFA could apply. For example, is it the case BNPL contracts for products or services and agreed to be paid within 2 months would not be consumer credit contracts for the purposes of s15? If this is the case, this would be an odd result from a policy perspective given the proposed \$600 threshold.
2	Do you have any comment on the proposed threshold of \$600? Should the threshold be higher than \$600? Lower? Why?
	A threshold lower than \$600 may have the unintended consequence of pushing consumers toward unscrupulous lenders or high cost consumer credit contracts.
3	What do you consider the financial impact of a \$600 threshold would be?
	No comment.
4	Aside from the dollar amount, do you have any comments on how the threshold is drafted in regulations 18I(1) and 18I(2), or the exemption condition requiring comprehensive credit reporting is drafted in regulations 18I(3)(a) and 18I(3)(b)?
	It is unclear whether the total credit limit extends to include multiple BNPL contracts from different BNPL lenders. If the total credit limit is only applicable to a single BNPL lender and contract, the credit check safeguards may be insufficient in adequately accounting for multiple contracts affecting affordability. Clarification is needed around the application of the threshold when a customer has BNPL contracts with more than one BNPL lender, and also how the threshold will be applied to BNPL contracts that operate on a 'running-account' model.
5	Should regulations 4AC-4AN apply to BNPL? Why, or why not?
	No, it is not appropriate for the type of product offered. Although BNPL is 'credit' it has

	<p>unique feature of no interest or default fees being payable in if the borrower complies with its repayment obligations. In the majority of cases, applying an affordability assessment would not have a material impact on the decision to grant the BNPL facility or not, except in circumstances where there was little or not surplus for servicing of the repayments. If BNPL liabilities of an individual can be ascertained in credit checks, then a BNPL lender should be able to use that information when determining an BNPL application by using a principles based approach to affordability.</p> <p>For completeness, we generally support adopting a consistent principles based approach to suitability and affordability in respect of most other consumer credit contracts (other than high cost consumer credit contracts) provided the Responsible Lending Code clearly sets out the minimum requirements, and if appropriate, specific considerations for BNPL contracts. For example, it would be an odd result if a \$500 'vanilla' personal loan with interest was subject to the prescribed requirements in regulations 4AC-4AN, but a \$2000 BNPL contract was not.</p>
6	<p>What would the impact be of applying regulations 4AC-4AN on BNPL lenders and consumers?</p>
	<p>It would result in the exit of most BNPL participants in the market, meaning less competition and choice for consumers. We think it is likely consumers would be left with limited options and be pushed towards high cost consumer credit contracts, mobile lending, or unscrupulous or predatory lenders.</p>
7	<p>If regulations 4AC-4AN do not apply to BNPL, what guidance (if any) should be given to BNPL lenders through the Responsible Lending Code about compliance with section 9C(3)(a)(ii) of the CCCFA?</p>
	<p>The guidance provided should expand on the existing Responsible Lending Code requirements with ongoing requirements for BNPL lenders to be active in engaging with the customer and have systems and procedures in place to prevent the likelihood of financial hardship eventuating.</p> <p>See our comment in question 5 above regarding being generally in favour of returning to a principles based approach for assessing suitability and affordability.</p> <p>As this stands apart from typical consumer loans we consider it is reasonable that the requirements expected of BNPL lenders are re this ought to limit the onus of engagement required of lenders to proactively and continually assess a borrower's likelihood of hardship eventuating.</p>
8	<p>Do you have any comments on the drafting of regulations 18I(3)(c)?</p>
	<p>See our response at question 4 above. We presume the intention is for the threshold to apply to all BNPL contracts between a customer and any one BNPL lender. So, a customer could potentially have BNPL contracts with multiple lenders, each under the threshold and the exemption could still apply. We suggest the position on this clarified in the guidance.</p>
9	<p>Are there other CCCFA requirements that should be adjusted or exempted for BNPL? If so, what would the impact be of applying current CCCFA requirements? What would the benefits be of adjusting or exempting from them?</p>
	<p>In practice, the CCCFA advertising regulations as applied to BNPL contracts under the threshold in particular are not appropriate. It would mean the consumer would be bombarded with fine print whenever the BNPL option was advertised. Too much fine print means the consumer is more likely to switch off and ignore it completely. The additional</p>

	initial disclosure obligation is reasonable and gives the consumer a chance to absorb this information in a considered way whereas the advertising requirements are may cause unnecessary confusion.
10	Do you have any other comments or suggestions for the drafting of the regulations?
	<p>There clearly is a demand and market for BNPL, however it is right for BNPL to fall within a regulatory framework, especially for vulnerable consumers who may struggle to repay the debt.. The Regulations should also be considered alongside general fair trading obligations to ensure that BNPL lenders are transparent and fair in their advertising, marketing, and disclosure practices.</p> <p>BNPL customers should be able to easily understand the terms and costs of the BNPL contract, including the fees, payment schedule and example in the event of default. We suggest prescribing minimum disclosure requirements for BNPL contracts at the point the BNPL contract is entered into.</p> <p>BNPL contracts have a lower risk threshold compared to other types of credit already regulated. While there needs to be consumer protections in place, the response should be proportional and take into account consumer choice and the potential risks of a chilling effect brought on by constricting the BNPL sector too greatly, which may include pushing the most vulnerable consumers towards high cost credit or predatory lenders.</p> <p>It would be undesirable to adopt too many different approaches to assessing affordability. We favour promoting a consistent approach to affordability requirements for most consumer credit loans, including BNPL contracts over the threshold as otherwise it is likely to confuse consumers. Specific concerns or issues regarding BNPL contracts for BNPL lenders to follow could be address through guidance in the Responsible Lending Code.</p>
11	Do you have any comments on when the regulations should commence? Please provide reasons for your answer.
	The changes will significantly impact BNPL lenders and all retailers that offer BNPL as a payment option. We suggest a lead in time of approximately 12 months to allow for operationalising the new regime, which will include testing and training of staff.

Other comments