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Submitted via: consumer@mbie.govt.nz

Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation and Employment
Wellington

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

Closing loopholes in our lending consumer protection framework will prevent many whānau in Aotearoa facing the significant stress caused by spiraling debt. Robust affordability assessments must be required for all loans that can trigger debt spirals whether the loan is for 50 dollars or 50,000 dollars.

FinCap welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment (**MBIE**) Draft Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (**Draft Regulations**). Loopholes for buy now pay later lenders have been financial mentors' most regularly noted consumer protection gap in recent years. We strongly support extending the Credit Contract and Consumer Finance Act's (**CCCFA**) requirements to this form of lending.

However, the framework of a threshold amount for lenders being required to complete robust affordability assessments should not be implemented. Instead, total coverage for such requirements would actually address clearly identified issues surrounding simultaneous loans across multiple providers. We also recommend some adjustment to drafting to avoid the creation of further loopholes where the harm identified from this lending could go unchecked.

We expand on these comments in our responses to consultation questions within the submission below.

About FinCap

FinCap (the National Building Financial Capability Charitable Trust) is a registered charity and the umbrella organisation supporting the 200+ local, free financial mentoring services across Aotearoa. These services support more than 70,000 people in financial hardship annually. We lead the sector in the training and development of financial mentors, the collection and analysis of client data and encourage collaboration between services. We advocate on issues affecting whānau to influence system-level change to reduce the causes of financial hardship.

Responses to Consultation Questions

Q1. 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 are concerned that the definition only captures 'third party' lending arrangements and recommend that the definition is broadened, or a strong general anti-avoidance measure also be introduced. These actions should be taken to prevent issues such as large retailers easily replicating this form of lending and associated harm unchecked within a direct loan offering.

However, we do not support the definition capturing deferred payment from services where there are no additional costs to whānau at all, including for late payment. Examples might be a medical practice that allows payment for a doctor's visits without penalty for missed payment or debt collection fee. Additional requirements should also not be applied to social loan providers such as Good Shepherd Good Loans or Ngā Tāngata Microfinance especially where there is never additional cost imposed on a borrower from the lending. Post-paid billing for essentials including electricity, gas, internet and mobile phone plans (sold in isolation not as a finance bundle) that do not have onerous exit fees should also not be captured.

Financial mentors have regularly raised concerns around harm they have seen with some retail chains that sell kai and other essentials making buy now pay later lending available. The below is an excerpt of an email with this alarm that FinCap has heard repeatedly from financial mentors all over the nation.

Excerpt of financial mentor's email: *"I am seeing people buying groceries from The Warehouse with Zip as they can't afford them and meat from Mad Butcher and other butchers – using zip or afterpay."*

From FinCap's perspective it seems entirely possible that major retailers like these could launch a loan service like the current lending they offer and in doing so circumvent the proposed definition in the Draft Regulations. The Regulatory Impact Statement prepared earlier in this reform process identified retailers taking such actions overseas already – *"Apple is launching a BNPL product in the US to complement its Apple Pay service.*[12]

There is an extremely high risk of significant harm from a debt spiral where payments for today's food on the table are taken out of food budgets over the next two months. Hence our recommendation to ensure third party as well as retailer direct interest free lending that have penalties should be covered.

We are also concerned that some current buy now pay later lenders could potentially circumvent the new protections by adapting their applications or websites so as to technically be the retailer of goods and services. The United Kingdoms' Treasury has identified some arrangements like this and are proposing an anti-avoidance mechanism which should also be considered in Aotearoa.[3] FinCap is not against the industry innovating to offer lending that some consumers can benefit from as long as appropriate and robust protections are in place and automatically follow such developments.

In an earlier submission FinCap also pointed out the many similarities relating to the significant gaps in protections where major mobile networks provide thousands of dollars of unaffordable interest free debt with high exit fees and abysmally disclosed late payment fees when selling top end mobile

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[2] See page 6 here: https://www.mbie.govt.nz/dmsdocument/25588-regulatory-impact-statement-applying-the-credit-contracts-and-consumer-finance-act-in-a-proportionate-way-to-buy-now-pay-later-arrangements-proactiverelease-pdf

[3] See page 16 here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1136257/BNPL_consultation_on_draft_legislation.pdf

phones.[4] We appreciated a follow up hui on the issues raised from the Commerce Commission and MBIE but to date we have seen no further real progress with addressing such significant issues from either agency. Expanding the definition to capture direct interest free lending options from retailers could capture these arrangements and rightfully close a loophole in protections. This would prevent harm from high pressure selling of unsuitable and unaffordable lending arrangements and products for whānau looking to access essential telecommunications services.

Recommendation: The Draft Regulation's proposed definition be expanded to include a strong anti-avoidance mechanism and capture situations where retailers have similar lending under direct arrangements with whānau.

Q2. Do you have any comment on the proposed threshold of $600? Should the threshold be higher than $600? Lower? Why?

Excerpt from a financial mentor's email:

"The $600 limit has to be addressed – as we know, this is unaffordable for many of our clients who don't have any spare money at the best of times. Regardless of how the companies try to paint it – this is DEBT."

We do not support an approach of permitting lending without affordability assessments for loans below a certain threshold. The full affordability assessment requirements of the Credit Contract and Consumer Finance Act regulations should apply to all buy now pay later lending. Full application would prevent the known harm caused by outright unaffordability on a single loan.

No matter what amount of repayment is required, there will be whānau who are facing financial difficulties significant enough that they will not be able to pay. Where this is the case, going without essentials or defaulting and incurring late payment fees that lead to debt spiralling are harmful.

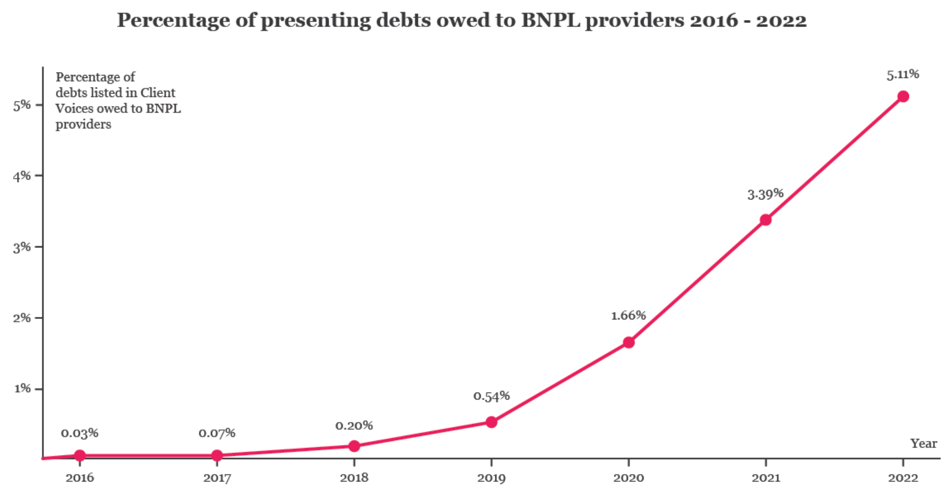

Figure 1 graphed Client Voices data

FinCap analysed data where a debt to a buy now pay later provider is clearly noted on our Client Voices software which is used by the majority of financial mentors in Aotearoa. This showed us that the alarm of financial mentors at the increasing issues they are seeing with buy now pay later lending is backed by a huge rise in the number these loans presenting as shown in *Figure 1*.

[4] See pages 2-3 here: https://www.fincap.org.nz/submission-on-buy-now-pay-later/

In comparison to the information used by MBIE in proposing the $600 based on an average credit limit, the data we have access to focuses on a cohort of those facing potential harm from indebtedness. $810,548 of presenting debt owed to buy now pay later lenders was clearly noted in 2022 and is further broken down in the *Figure 2* below. We looked further into different trends for whānau with some form of income support from the Ministry of Social Development (**MSD)** and further again at what was presenting for those receiving income from the Jobseeker Support benefit.

	All debts	**MSD income**	**Jobseeker income**
Total presenting debt owing for all BNPL debts	$810,548.06	$538,369.31	$102,591.18
Average presenting debt amount	$320.76	$310.66	$304.42
Median presenting debt amount	$170	$165	$180
Average weekly repayment rate	$17.69	$34.18	$28.34
Median weekly repayment rate	$0	$20	$14.31
Average weekly repayment rate **(where there is repayment)**	$43.56	$42.62	$39.95
Median repayment rate **(where there is repayment)**	$27	$25.90	$25

Figure 2 Table of Client Voices data

When broken down, we saw that many were unable to make any repayment on the debt at all when presenting to a financial mentor as demonstrated by a median of zero for repayment rates on all buy now pay later lending. This being the case is likely an indication such lending is often unserviceable from the start, which points to the need for affordability assessments on all loans.

We also further analysed the repayment rate for buy now pay later loans where any payment was being made at all. We found that the median for those repayments of $25 to $27 per loan when presenting to the financial mentor, which is nowhere near enough to service $600 of buy now pay later debt under existing loan structures.

Data relied upon in the Regulatory Impact Statement prepared by MBIE concludes that the average maximum credit amount for buy now pay later is $592 when assessing the impact of a $600 threshold.[5] However, in the Client Voices data set, the average and median presenting amounts of debt for buy now pay later loan listings were well below the $600 proposed threshold. The highest of these numbers was not far over $300 and lowest at $165. A $600 loan without an affordability check for whānau with MSD income could lead to absolute disaster when whānau across Aotearoa are already working with a financial mentor when they have much smaller loans.

Given the numbers we can see align with the harm this reform is seeking to address, it is clear that the $600 threshold is far short of providing the protection needed against unaffordable lending even before issues with loans to multiple providers are considered. $600 of lending being available without an affordability assessment can still entrench or cause insolvency and associated harms.

Full application of robust affordability assessment requirements is also the best intervention to prevent the well-known harm that is caused by substantial hardship from the culmination of multiple

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[5] See page 16: https://www.mbie.govt.nz/dmsdocument/25588-regulatory-impact-statement-applying-the-credit-contracts-and-consumer-finance-act-in-a-proportionate-way-to-buy-now-pay-later-arrangements-proactiverelease-pdf

loans from separate providers. The multiple loans issue could otherwise continue where each loan is permitted when below a set threshold.

Excerpt of email from a financial mentor:

"Full affordability assessment should be made prior to giving any client a credit limit – multiple accounts with multiple providers soon see unaffordable payments mount up. Often 2 or 3 people in a household have their own accounts therefore being able to increase what is bought and increasing the debt for that household."

Financial mentors have also shared real budgets of people they are working with where often any additional lending repayments will trigger a debt spiral or where buy now pay later repayments are doing so. Two examples of unaffordable buy now pay later lending leading to financially impossible situations are below.

Jobseeker support income.
One budget showed a person in Auckland with a Jobseeker Support income and very modest expenses each week, month and year facing a weekly deficit of $191.70 per week with repayments on seven buy now pay later loans across four lenders which made up $220.80 per week of their expenditure. The financial mentor commented this reflected common circumstances for many whānau coming through the door.

Buy now pay later access compounding hardship with other lending.
Another budget showed a person in Auckland with otherwise 'maxed out credit cards' with a $612.61 per week deficit. Repayments of $139.12 per week from 10 separate loans from a single buy now pay later lender were compounding that already existing deficit. The financial mentor sent this budget as example of buy now pay later issues for those in work who are coming for their assistance increasingly.

Both the examples above show that buy now pay later lending with even just $30 repayments each week are enough to tip whānau into deficit or deepen hardship where a robust affordability assessment could intervene. They also show, as otherwise identified by MBIE, that multiple simultaneous loans are a key source of significant harm from these lenders, again something robust affordability assessment requirements would prevent.

The proposed $600 threshold framework for an affordability assessment does not solve this significant problem. While comprehensive credit reporting will be required, we understand that this will only give an idea of repayment behaviour in previous months, not the potential hardship experienced to meet those repayments. The reporting will also only show recent enquiries relating to other credit not whether that credit application turned into a different buy now pay later loan and how much this was for (as there is a lag).

There also seems no proposed clear requirement around what a buy now pay later lender should do where it sees other lending on a credit report. It is therefore possible that a threshold could be multiplied by the three or four buy now pay later lenders who appear to be trading currently. This could quickly see a whānau in substantial hardship have it compounded by $2,400 of debt without an affordability assessment taking place. Relative to the lowest base net weekly income rate of $180.91 for a Jobseeker Support income, $600, let alone $2,400 is a ridiculous amount of debt to service.

Recommendation: Instead of a $600 threshold, the full affordability assessment requirements of the Credit Contract and Consumer Finance Act regulations should apply to all buy now pay later lending.

Q3. What do you consider the financial impact of a $600 threshold would be?

We consider a $600 threshold would continue the harm seen from these loans, especially for people on low incomes where repayments will often default or cause substantial hardship. We also reiterate commentary on multiple loans and our recommendation in response to Q2.

We also note that FinCap has heard regular examples of some other issues with there not being robust processes for assessing affordability which have flow on financial impacts. Many have reported that following up after loans are taken out as part of fraud related to identity theft take significant time resources.[6] We have also heard that the low barrier to acquiring more credit has meant buy now pay later has led to elder abuse and economic harm enabled by these lender's applications coming across financial mentor's desks. The verification of information required in robust affordability assessments for all loans would lower the ease with which such harm is arising and the many financial impacts that can flow on from such issues.

We do also note that affordability assessments do mean that some will no longer have access to this credit. We are aware of situations where these loans have been used when purchases could have otherwise been covered by truly cost-free loans or grants from Work and Income New Zealand (WINZ). We are also separately recommending in other consultation that improvements be made to the processes for access to non-recoverable grants. No whānau, and especially not whānau with children, should be pushed into unaffordable debt by a government department in order to obtain the most basic essentials that are integral to their health and wellbeing.

Expenses related to health, education, housing, food, transport, and heating should be available for all whānau. Currently, grants are accessible through WINZ for items and services, including food, dental, clothing, accomodation, and school costs. Several of the grants for living expenses are non-recoverable, or have the potential to be depending on the applicants situation. However, the majority of these grants for unexpected costs or living expenses are recoverable, requiring repayment. By making grants for these costs non-recoverable whānau that are facing hardship will more easily be able to meet these basic needs without getting into unaffordable debt.

Alongside this, the Community Services Cards should also be used to support whānau with the essentials. The income threshold for eligibility for the cards should be lifted and the services that are available through these cards should be increased to meet the needs of whānau.

While much of this commentary is out of scope for the questions in this consultation, we would welcome MBIE passing on these recommendations to other parts of government as relevant. Issues for whānau on the ground with lending exist within wider systemic issues around hardship and poverty that will not be solved by lending.

Q4. 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)?

We do not support the threshold approach. Please see our above response to Q2 and our response to Q10. A significant gap appears to be that if a buy now pay later lender sees information that could suggest unaffordability of further lending on a credit report, they do not appear to have to take any particular action. Given some lenders are currently willing to lend without a check means we have little confidence they will even consider credit score when required to obtain it. Growing a portfolio

[6] This 'Fair Go' episode gives an example: https://www.1news.co.nz/2022/03/28/mans-identity-fraudulently-used-twice-with-buy-now-pay-later-schemes/

rather than the quality of loan books seems to have been the focus of many buy now pay later lenders and this is not in the interests of financial wellbeing in the community.

Q5. Should regulations 4AC–4AN apply to BNPL? Why, or why not?

The full affordability assessment requirements of the Credit Contract and Consumer Finance Act regulations should apply to all buy now pay later loans. Full application would prevent the known harm caused by outright unaffordability on a single loan.

Full application would also address the well-known harm that is caused by substantial hardship from the culmination of multiple loans from separate providers.

Principles led requirements did not adequately protect whānau in the previous credit law regime. Such an approach could lead to inconsistent consumer protections rather than clear pathways away from hardship when unaffordable loans are made by buy now pay later lenders. Analysis from MBIE in response to option four in the Regulatory Impact Statement for this reform noted these issues too.[7]

Principles based requirements could also lead to uncertainty from industry and ever extending *Responsible Lending Code* guidance which might increasingly perplex all lenders rather than assist them to act in the community's interest.

We reiterate our recommendation in response to Q2.

Q6. What would the impact be of applying regulations 4AC–4AN on BNPL lenders and consumers?

Applying these regulations in full would give clear mechanisms for whānau to realise consistent consumer rights and would enable clear guidance for lenders on how to lend responsibly.

For other lending already captured in these requirements, financial mentors are reporting less issues with affordability on loans in the first place. That or that they have clear options for complaining and resolving issues related to unaffordable loans that should not have been made. We reiterate our recommendation in Q2.

Q7. 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?

We do not support this approach nor expectations on these lenders varying from the expectations of the *Responsible Lending Code* for other lenders. We have also noted some relevant issues with ever expanding guidance in our above response to Q5.

Q8. Do you have any comments on the drafting of regulations 18I(3)(c)?

We recommend that buy now pay later be required to disclose details of payments amounts, due dates and fees for late payment for all purchases associated with lending even if the threshold approach is rightly scraped.

Financial mentors have reported whānau being overwhelmed when they are unable to keep up with the dates and times of multiple buy now pay later repayment schedules. They have also reported it is

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[7] See pages 15-16: https://www.mbie.govt.nz/dmsdocument/25588-regulatory-impact-statement-applying-the-credit-contracts-and-consumer-finance-act-in-a-proportionate-way-to-buy-now-pay-later-arrangements-proactiverelease-pdf

sometimes hard to access this information to plot it on tools like debt schedules and cash flows that aid financial mentoring.

Optimism bias is a well-known issue in decisions about whether to borrow but this can somewhat be countered by the disclosure. The disclosure can also help people to plan and request a readjustment of payments to avoid a debt spiral where missed payments for untracked buy now pay later also attract overdraft or dishonoured payment fees.

Recommendation: Buy now pay later lenders be required to clearly disclose details of payments amounts, due dates and fees for late payment for all purchases associated with lending

Q9. 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?

We do not see reason for these loans to be exempt from requirements on other loans currently covered by the CCCFA. Any exemptions should only be granted on the basis that requirements are completely irrelevant and that the exemption does not in any way risk harm to whānau.

Q10. Do you have any other comments or suggestions for the drafting of the regulations?

Financial mentors have recently raised a new issue in assisting people with buy now pay later debt. This is that some providers are refusing repayment from third parties. This has had the impact of some working with financial mentors being unable to accept a grant from community groups to directly pay off a buy now pay later purchase which is ridiculous. We recommend, if not compelled otherwise, that these providers are made to be flexible to accept methods other than the original payment option.

Recommendation: Buy now pay later and other lenders are not able to refuse repayment from another party where authorised by the account holder.

"…the main cause of financial hardship from BNPL stems from consumers using BNPL to purchase goods which they are unable to afford…This is exacerbated by the ability of a consumer to have multiple BNPL arrangements across different lenders."- Regulatory Impact Statement[8]

As noted above, we reiterate that the current drafting does not include an explicit prevention of multiple buy now pay later lenders extending credit simultaneously without checking if loans will be unaffordable from the start. This is a significant gap in proposed protections given this issue is currently causing debt spirals. We reiterate our recommendation in response to Q2 that would address the issue.

Other lenders have also raised a potential grandfathering issue with the implementation of these regulations. Financial mentors also report concerns that those they work with are surprised to have an ongoing credit limit available on their account, even after previous missed payment fees are applied and paid or they have requested it be lowered. These open limits continue across multiple providers per person or per household.

We also recommend that a mechanism is put in place for affordability assessments for any further purchases for lending on credit limits that were established before the upcoming implementation of

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[8] See page 1: https://www.mbie.govt.nz/dmsdocument/25588-regulatory-impact-statement-applying-the-credit-contracts-and-consumer-finance-act-in-a-proportionate-way-to-buy-now-pay-later-arrangements-proactiverelease-pdf

these regulations. Many accounts with these lenders are already open and this mechanism should prevent unaffordable lending occurring within these accounts once protections are in place.

Recommendation: The regulations apply to any purchase made with buy now pay later lending from the implementation date even if an account existed before the implementation date.

There are issues with the way in which some buy now pay later lenders extend unsolicited increases to total credit limits that could lead to substantial hardship. This is an irresponsible practice, especially when it arises alongside targeted marketing deliberately playing on loss aversion where discounts are only offered on the condition that purchases are through this form of lending. Financial mentors have reported alarm when sighting such aggressive marketing. Issues that arise in such circumstances might be captured by suitability requirements, but this is not explicitly noted that we have seen.

If not otherwise addressed through the regulations (such as through our recommended approach in response to Q2) we also see this as a potential gap that needs to be specifically addressed in the drafting.

Recommendation: Explicitly prevent buy now pay later lenders from providing unsolicited credit limit increases.

Q11. Do you have any comments on when the regulations should commence? Please provide reasons for your answer.

We recommend implementation of the regulations as soon as practicably possible given the significant harm financial mentors continue to observe due to the under-regulation of these loans.

As noted in *Figure 1*, this form of lending has grown significantly. A recent survey from Te Ara Ahunga Ora noted that a four percent increase in the number of people with one of these loans to 24% and that 52% of those surveyed reported deteriorating or poor financial wellbeing.[9]

We have also seen several of these lenders cease to provide loans in recent weeks as well as signs that some might be preparing systems changes to implement CCCFA requirements with new product offerings. The industry already appears to be, or should have been, preparing for implementation of regulation as it now has been signalled for some time.

Implementation should be in weeks not months. The industry should be prepared and whānau should not be facing the harm caused by under-regulation as cyclone recovery and cost of living issues apply pressure on budgets. Financial mentors have been highlighting the need for action for years.

Please contact Jake Lilley, senior policy advisor at FinCap on 027 278 2672 or at jake@fincap.org.nz to discuss any aspect of this submission.

Ngā mihi,

Ruth Smithers
Chief Executive
FinCap

[9] Te Ara Ahunga Ora February Newsletter