

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

Your name and organisation

Name	Nicola Robertson, Director, Sanderson Weir Limited
Organisation (if applicable)	Submissions prepared on behalf of Greenfield Global Limited

Responses

1	<p>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?</p>
2	<p>(a) Supplier as a Third Party</p> <p><i>Our client is interested in the use of 'third party' in the definition. We note the distinction with a layby sale whereby the supplier and the creditor are the same party (s 36B FTA 1986). However, with the new BNPL definition the distinction between a true layby and a BNPL consumer credit contract becomes critically important if the supplier who provides layby sales chooses to not charge establishment fees. Whether or not the contract is deemed to be a credit contract would then turn on whether the supplier is a third party to the creditor.</i></p> <p><i>Accordingly, we suggest that the meaning of third party should be considered further. We note that in the context of credit fees, section 5 the Act defines a third party fee as payable to the other person as long as they are not an associated person of the creditor. Section 8A of the Act provides the definition of associated and associated person.</i></p> <p><i>Accordingly, if the BNPL contract definition is going to rely on the supplier being a third party, we suggest that a consistent approach is adopted whereby a third party is defined as not an associated person of the creditor. We note that this device is used within the mobile trader definition.</i></p>
3	<p>Do you have any comment on the proposed threshold of \$600? Should the threshold be higher than \$600? Lower? Why?</p>
4	<p>(a) Proposed level of the threshold</p> <p><i>BNPL provides consumers with an interest free and credit fee free way of financing purchases. It provides a good alternative to high interest rate unsecured credit. BNPL contracts can also be used by consumers with debit accounts, avoiding the need to have a credit card facility which is subject to high interest on unpaid balances.</i></p> <p><i>The new definition will deem BNPL to be a consumer credit contract and will impose all the requirements for consumer credit contracts in the CCCFA on BNPL providers. It is a level of regulation and compliance cost that has not been incurred by this industry to date.</i></p>

	<p>Accordingly, we consider that the regulations should take a cautious approach in setting the threshold. If the threshold is set too low, it may have the real effect of removing the viability of the BNPL product as an interest free and no credit fee product.</p> <p>We note that the use of the threshold does not remove the requirement for the creditor to be a responsible lender under s 9C of the CCCFA and it will still be required to consider whether the customer can make the payments under the contract without substantial hardship. This is an obligation that does not currently apply to the industry.</p> <p>It is for this reason that we consider that a higher threshold of say, \$1,000 is more appropriate now as it will provide the Ministry time to assess the impact of the inclusion of BNPL as consumer credit contracts for a year or two before the threshold is reassessed.</p> <p>(b) Method of describing the threshold</p> <p>We are concerned with the use of a dollar figure in the Credit Contract and Consumer Finance Regulations 2004. New Zealand is currently in a period of higher inflation and the use of a figure of \$600.00 in real terms will erode faster than the effort required to update that figure.</p> <p>It would make sense for any threshold to be adjusted annually for the rate of inflation or according to the change in the Consumer Price Index.</p> <p>We suggest that a formula is used or that the regulations refer to a published reference figure. This approach has been taken in other legislation, for example, after years of changes to the prescribed interest rate for money judgments under the now repealed Judicature Act 1908, Parliament opted to use a calculator published on the Ministry of Justice’s website, which allows the underlying interest rate to dynamically change with the changes to the retail 6-month term deposit rate most recently published by the Reserve Bank of New Zealand. This mechanism future proofed the legislation against the changes in interest rates.</p>
3	What do you consider the financial impact of a \$600 threshold would be?
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)?
5	Should regulations 4AC–4AN apply to BNPL? Why, or why not?
6	<p>What would the impact be of applying regulations 4AC–4AN on BNPL lenders and consumers?</p> <p><i>If the creditor has to comply with regulations 4AC–4AN, it will likely want to recover the costs of its credit assessment through new credit fees. Essentially the aim to protect consumers may in fact have the effect of causing harm to consumers as the cost effective credit options are removed or changed to pass new costs to consumers. If BNPL products no longer commercially viable, consumers may use more expensive credit options.</i></p>

7	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><i>(a) Guidance should be provided to creditors on their affordability assessment when using the regulation 18I exemption.</i></p> <p><i>(b) Further guidance on the suitability assessment in the context of a BNPL contract should be provided.</i></p>
8	Do you have any comments on the drafting of regulations 18I(3)(c)?
	<p><i>BNPL contracts will be deemed to be consumer credit contracts and that will require disclosure of all the Schedule 1 information, including the default fees that are applicable under the contract.</i></p> <p><i>We query the additional requirement to re-disclose those default fees, where a creditor is meeting its responsible lending requirements via the comprehensive credit reporting method in regulation 18I.</i></p>
9	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>Variations</p> <p><i>To date BNPL providers have not had to consider the impact of agreed changes or changes by exercise of power under their contracts. For each new purchase, a new set of payments is scheduled, which is a different methodology to most other types of credit contract. Further guidance would assist the industry to understand how the contract works in the context of the existing framework of the CCCFA, for example whether each purchase is an agreed change to the requirement payments, or not?</i></p>
10	Do you have any other comments or suggestions for the drafting of the regulations?
	<i>We consider that the amendment should clarify that the definition of BNPL applies to contracts entered into by the lender after the commencement of the amendment to the regulations.</i>
11	Do you have any comments on when the regulations should commence? Please provide reasons for your answer.
	<i>We suggest that the BNPL industry is given 12 months to review compliance and adapt their systems.</i>

Other comments

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