

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

Your name and organisation

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Organisation (if applicable)	Sanderson Weir 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> <p><i>There are four issues we have identified with the current draft of the BNPL definition:</i></p> <p>Consumer Purpose</p> <p><i>1. The definition omits the reference to requirements for the credit to be used for wholly or predominately a personal domestic or household purpose. It is this key purpose that separates consumer credit from credit for business purposes. Accordingly, if a type of credit contract is going to be deemed to be a consumer credit contract in the Regulations it should include this central distinction from credit for business purposes.</i></p> <p><i>The current draft of the BNPL contract definition could capture credit provided by a third party to a sole trader for the purchase of business equipment on bespoke credit terms that don't involve interest. We note that the Act includes a reference to consumer goods. However for clarity, we consider the use of a consumer purpose (consistent with s 11 of the Act) in this definition to be the right approach rather than a reference to 'consumer goods' as the BNPL definition also includes services.</i></p> <p>Use of the word Lender</p> <p><i>2. The BNPL definition uses the word 'lender' not 'creditor'. A lender is defined in section 9B of the Act for the purpose of responsible lending only to refer to a creditor of a consumer credit contract. Given that this definition deems the contract to be a consumer credit contract, we consider that the use of the word lender creates a circular definition. We consider that the term creditor is more appropriate for this definition.</i></p> <p>Supplier as a Third Party</p> <p><i>3. We are interested in the use of third party in the definition. We can see 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</i></p>
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credit contract would then turn on whether the supplier is a third party to the creditor.

If this is the intention of the drafters, then 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.

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.

Premium Funding Agreements

4. We are aware of premium funding products that involve no credit fees, no interest and no security interest. The new BNPL definition would capture these premium funding contracts. Premium funding contract generally have the feature of the debtor being able to cancel at any time, without incurring further liability. Where the debtor can cancel at any time, we consider that the creditor should not be subject to the affordability assessments in the responsible lending requirements. We also note that regulation 18H of the Regulations provides a definition of a premium funding agreement and an exception to the responsible lending requirements.

New Suggested Definition:

In the "Other Comments" section we put forward the position that adding a new BNPL definition is not the right approach for a change to the Act. In fact, we suggest that a new Low Cost or Low Risk Credit Agreement definition (taking from the High Cost Credit Agreement approach), which provides for reduced responsible lending requirements is preferable.

However, if the BNPL contract approach is continued we have set out a new suggested definition which takes into account our comments in 1-4 above.

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

*(a) which provides credit to enable the debtor to buy goods and services from a third party **who is not an associated person of the creditor**; and*

(b) the goods and services purchased by the debtor in (a) are wholly or predominately for a personal domestic or household purpose; and

(c) in respect of which the debtor is not charged interest or credit fees; and

(d) in circumstances where the debtor is a natural person; and

(e) excludes a credit contract that meets the definition above but that otherwise allows the debtor to cancel at any time without incurring any further liability to the creditor.

2

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

No comment

3

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

	<i>No comment</i>
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)?
	<i>No comment</i>
5	Should regulations 4AC–4AN apply to BNPL? Why, or why not?
	<i>No comment</i>
6	What would the impact be of applying regulations 4AC–4AN on BNPL lenders and consumers?
	<i>No comment</i>
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?
	<i>No comment</i>
8	Do you have any comments on the drafting of regulations 18I(3)(c)?
	<i>No comment</i>
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?
	<i>Refer to other comments in relation to the suggestion for a Low Cost Credit Agreement definition and a greater recognition that the responsible lending requirements were originally intended to be scalable.</i>
10	Do you have any other comments or suggestions for the drafting of the regulations?
	Refer to other comments below.
11	Do you have any comments on when the regulations should commence? Please provide reasons for your answer.
	Refer to other comments below.

Other comments

Adding the BNPL definition as a deemed credit contract has the risk of fundamentally changing the Credit Contracts and Consumer Finance Act 2003 without the benefit of academic/ Law Commission input.

The obligations for a creditor offering consumer credit contracts are significant and the penalties and effects of non-compliance are significant and serious. Accordingly, it is critical in the promotion of fair, efficient, and transparent markets for credit that a creditor can clearly

determine when it has a consumer credit contract and when it does not.

Section 11 of the Act is the central definition for whether a credit contract is a consumer credit contract and a core part of this definition is the fact the credit contract has at least credit fees included or interest charged or security taken.

If the Government now considers that there is potential for harm to consumers from credit contracts that don't meet the s 11 definition, then the first consideration is whether s 11 still strikes the right balance for consumer protection in the Act.

The last amendments to the Act and the Regulations saw new definitions for mobile traders and premium funding agreements and added prescriptive requirements for responsible lending assessments. Each new definition and requirement has the potential for unintended consequences and adds further complexity to the assessment of whether a credit contract is a consumer credit contract.

When the costs of non-compliance are so high, as they are in this Act, in order to promote fair, efficient, and transparent markets for credit, we consider that Parliament should work hard to keep the definition of a consumer credit contract as clear and concise as possible.

So, for example, a simple change to s 11 of the Act to include default fees would have the effect of making BNPL contracts consumer credit contracts. However, this change may have other consequences but if the concern with BNPL is that consumers are incurring too many default fees then this would appear to solve that issue – default fees would be required to be reasonable (s 41 of the Act) and could not deliver profit to the creditor.

We note the view of that the prescriptive requirements for affordability assessments in the regulations for consumer credit contracts are too onerous for BNPL relationships under the \$600 threshold. If this is the case, then perhaps the requirements are too onerous for any credit contract to consumers that doesn't charge interest and either is under a certain \$ threshold or allows the debtor to cancel at any time without incurring any further liability to the creditor. In the way that the Act includes High Cost Credit Agreements perhaps the new definition could be for Low Cost/Risk Credit Agreements with corresponding lower responsible lending compliance requirements.

The New BNPL changes risk further muddying the structure of the Act by drafting laws to cover credit products rather than drafting changes to the Act to promote the confident and informed participation in markets for credit by consumers and laws to protect the interests of consumers under credit contracts (s 3 of the Act).