New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Business, Innovation and Employment

on the

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

10 March 2023

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

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Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the exposure draft of the Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2022 (**Draft Regulations**). NZBA commends the work that has gone into developing the Draft Regulations.

NZBA supports the application of the CCCFA to Buy Now Pay Later (**BNPL**) contracts generally. We consider it is in the best interest of consumers for BNPL to be treated the same way as other forms of consumer credit. There does not appear to be a strong justification for different treatment, with the purpose of BNPL credit often being the same as other credit products. The potential for customer harm from BNPL products is similar to the potential for harm from other forms of consumer credit in the absence of adequate checks.

In relation to MBIE's proposals within the Draft Regulations about the extent to which the affordability assessment requirements in the CCCFA should apply to BNPL, we consider that all BNPL inquiries, regardless of value, should have to comply with the overarching affordability principle in section 9C(3)(a)(ii) of the CCCFA. This would provide greater protection for consumers through a consistent regulatory approach and provide the Commission with the same enforcement powers over BNPL as other consumer credit contracts.

Our key points are set out below.

All BNPL inquiries should comply with the CCCFA's affordability principle

As noted above, in relation to MBIE's proposals within the Draft Regulations about to what extent the affordability assessment requirements in the CCCFA should apply to BNPL, we consider that all BNPL inquiries, regardless of value, should have to comply with the overarching affordability principle in section 9C(3)(a)(ii). There is no clear justification for treating BNPL contracts differently to other consumer credit contracts.

At a minimum, a BNPL provider should be required to make 'reasonable inquiries' into affordability. If MBIE considers it necessary (we do not), a monetary threshold could be applied to set when a BNPL provider must comply with the full affordability requirements (not just the lender responsibility principle).

In our view, a threshold of $600 is too high. We understand that many BNPL consumers borrow at amounts less than $600, yet still suffer harm. A lower threshold would bring more BNPL contracts within the scope of the affordability assessment and provide better protection for more consumers.

For example, if $550 is repaid and used every 6 weeks, it would equate to 8.6 x $550 = $4,730 pa of limit being used which is a significant amount of credit to repay on an annual basis which is not subject to any affordability assessment.

If a decision is made to proceed on the basis of an exemption from the application of s9C(3)(a)(ii) where the total credit limit is $600 or less, this exemption should be extended to all consumer credit contracts to ensure a level playing field. In particular, we consider there is very little practical difference between a $500 BNPL contract and a $500 overdraft.

Current regulations do not address consumers having multiple loans with different providers

We are concerned that the Draft Regulations do not adequately address that consumers may have multiple small BNPL contracts across a number of providers. Draft Regulation 18I(2) provides for the aggregation of the unpaid balances of all BNPL contracts between the provider and the consumer in determining the total credit limit for the purposes of the $600 threshold. It looks across the entire relationship between the BNPL provider and consumer, not just each transaction, which is welcome, but, in our view, does not go far enough.

The Draft Regulation is only focused on the relationship between one provider and the consumer. It does not address what happens if the consumer has taken out multiple small BNPL contracts with multiple BNPL providers. Yet the ability to have multiple BNPL contracts **across** a range of BNPL providers is one of the characteristics of BNPL. You will therefore have a situation in which a consumer with multiple small BNPL contracts with multiple providers may exceed the $600 in total but, under the Draft Regulations, would fail to fall over the threshold unless that threshold is reached for any one provider. We are concerned that, as a result, those consumers will fall outside the scope of full CCCFA affordability assessment protection even though they are borrowing over the threshold.

Our recommendation above (that all BNPL inquiries should be subject to the affordability principle) would resolve this issue. If this recommendation is not accepted, alternative solutions include:

- Imposing a cap on the number of BNPL contracts a consumer can have at any one time; and/or
- Requiring that the total amount on BNPL contracts at any one time is aggregated to a credit limit.

Credit reporting requirements may be insufficient

We question whether the requirements in 18I(3)(a) and (b) are sufficient:

- 18I(3) requires that, to take advantage of an exemption from an affordability assessment if the BNPL contract will be below the monetary threshold, the BNPL provider must get a credit report. However, the provision does not require the BNPL provider to take that credit report into account in determining whether to provide credit. This seems to create a gap. Our recommendation, that section 9C(3)(a)(ii) should apply to all BNPL providers, would remove this inconsistency – obtaining a credit report would contribute to the reasonable inquiries the BNPL provider must make.
- We understand that MBIE's intent is that BNPL must contribute to Comprehensive Credit Reporting (**CCR**). We believe this has driven the requirements in 18I(3)(a)

and (b), particularly (b), however, we don't think they achieve that objective by referring to credit report and the information in a credit report. This may need further consideration. Reference to the BNPL provider entering into subscriber agreements with credit reporters, and being bound to provide credit information about individuals' credit accounts and repayments history, including 'positive reporting' may be needed. However, we don't believe the construction currently incorporates an obligation to be involved with CCR. Engaging the Privacy Commission and Credit Reporters may be sensible.

- We are also concerned the requirement to contribute to CCR may inadvertently contradict the changes MBIE proposes to make around how other lenders are to treat BNPL obligations in their affordability assessments under the Regulations. We believe it would be prudent to consider these elements together, rather than separately. If MBIE provides guidance that lenders can treat BNPL obligations as an expense, rather than as a debt obligation / financial commitment, but BNPL providers report their facilities under CCR, and this is then included in credit reports as a debt obligation, this may complicate processes and treatment in affordability assessments. This seems to create conflicting guidance.

Definition of BNPL contract needs careful consideration

We believe the definition of BNPL contract will need to be carefully considered to ensure it doesn't inadvertently capture other financial arrangements as consumer credit contracts. Paragraph (a) should make it clear that in advancing funds to enable the purchase of goods or services, the consumer acquires those goods and services at the time they enter the BNPL contract (rather than receiving them later). Paragraph (b) should be extended to ensure it covers all of the exclusions that currently apply to the definition of consumer credit contract, including a reference to the lender not taking security for the contract.

Other feedback

We consider that annual reporting requirements should be extended to BNPLs. These reports will allow regulators (and other relevant third parties who see the reports) to gauge whether the regulations are working and assess any change in the levels of customer harm.