

# Buy-Now, Pay-Later – Discussion Document November 2021

Submitted to:

Ministry of Business, Innovation and Employment  
Consumer and Competition Policy Team

16 December 2021



# Commerce Commission submission on the Buy-Now, Pay-Later Discussion Document

## Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Buy-Now, Pay-Later (BNPL) Discussion Document issued by the Ministry of Business, Innovation and Employment (MBIE) on 4 November 2021.
2. We are New Zealand's competition, fair trading, consumer credit and economic regulatory agency; our overarching objective is to make New Zealanders better off. We work to ensure markets work well, so that consumers and businesses can participate confidently.
3. As an independent Crown entity, we provide independent advice and regulation. We act in a spirit of service to everyone in our communities and we do not take for granted the trust that New Zealanders place in us to protect and promote their interests.
4. We are governed by a Board of Commissioners, appointed for their knowledge of, and experience in, areas relevant to the Commission's interests. We have responsibilities for enforcing laws relating to competition, fair trading, and consumer credit contracts. We also have regulatory responsibilities in the electricity lines, gas pipelines, telecommunications, fuel, dairy and airport sectors.
5. The Discussion Document is seeking feedback on the benefits of BNPL, how BNPL can trigger harm for consumers, how risks of financial hardship could be addressed through BNPL product features, what an effective BNPL sector looks like, and feedback on three options available to achieve an effective BNPL sector.
6. Feedback is intended to inform MBIE's advice to the Government on how financial hardship could be addressed while maintaining the benefits of BNPL so that, overall, the BNPL sector delivers long-term benefits.
7. Our submission sets out our views around:
  - 7.1 Overlap with other regimes
  - 7.2 General observations about BNPL
  - 7.3 Regulating BNPL products
  - 7.4 Industry codes.

## Overlap with other regimes

8. Any reform of the regulation of BNPL to address the consumer credit aspects of consumer harm (eg, an industry code or bringing BNPL within the consumer credit provisions of the Credit Contracts and Consumer Finance Act 2003 (CCCF Act)) has the potential to intersect with other Commission functions and regimes the Commission enforces.

9. These functions include a potential new role for the Commission (as set out in the Retail Payment Systems Bill as drafted) to monitor competition and efficiency in the retail payment system. Among other proposed functions, the Commission would also have the ability to recommend that a payment network (eg, BNPL services) be designated if it requires regulation.
10. The overlap between potential BNPL consumer credit protections and the Commission's existing and potential functions in relation to competition and retail payment systems are complex, particularly in light of the evolving nature of BNPL products (eg, BNPL providers partnering with banks and credit card companies).
11. We would therefore welcome the opportunity to engage directly with MBIE regarding the interrelationships between the current and developing toolbox and how they are used in practice to address the range of harms noted in the Discussion Document.

#### **General observations about BNPL**

12. The Commission does not currently regulate BNPL arrangements under its consumer credit remit because typical BNPL arrangements do not fall within the definition of 'consumer credit contract' under the CCCF Act. As noted in the Discussion Document this is because BNPL arrangements do not ordinarily provide for interest and credit fees, and no security interest is taken.
13. BNPL arrangements are 'credit contracts' for the purposes of the CCCF Act meaning that provisions against acting oppressively (Part 5) and providing disclosure before debt collection (section 132A) apply. BNPL providers also need to comply with the Fair Trading Act 1986, including provisions prohibiting false and misleading representations and unfair contract terms.
14. Key implications of BNPL not being regulated as consumer credit are that:
  - 14.1 BNPL providers are not required to disclose key information about the credit before the credit contract is entered into;
  - 14.2 BNPL providers are not subject to responsible lending obligations to assess affordability before granting credit; and
  - 14.3 default fees are not subject to the unreasonable fees provisions of the CCCF Act.
15. Because BNPL does not currently fall within the Commission's consumer credit remit our involvement to-date with BNPL has been limited. However, we are able to make the following observations:
  - 15.1 The Commission has received around 70 complaints about BNPL between 2017 and December 2021. The most common complaints relate to difficulties customers have had obtaining refunds, followed by customers' payments not

being what customers expected they would be, and then the level of fees being charged.

- 15.2 Financial mentoring services have raised concerns with us about customers being able to sign up to accounts with multiple BNPL providers with few checks around affordability leading to financial hardships for some (either because they default on their BNPL and incur default fees, or they make their BNPL payments in preference to household necessities).
- 15.3 From time to time retail banks have also raised concerns directly with us about customers with BNPL having higher default rates on credit facilities with them.

### **Regulating BNPL products**

16. If MBIE concludes that intervention beyond the status quo is needed to address the triggers of harm identified, we can see there is merit in seeking to regulate BNPL arrangements as consumer credit contracts under the CCCF Act.
17. BNPL arrangements have features which make them similar to other credit products currently regulated as consumer credit contracts (particularly store cards). With BNPL arrangements customers are typically able to borrow money up to a credit limit to purchase consumer items for their personal, domestic household purposes. Customers are required to repay the loan by instalment payments and incur default fees when payments are missed.
18. As noted in the Discussion Document section 137A of the CCCF Act allows the Minister of Commerce and Consumer Affairs to recommend making regulations on 'any class of arrangements or facilities that has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment to be a consumer credit contract'.
19. Our preliminary view is that BNPL contracts could, with some legislative amendments, be incorporated into the CCCF Act as 'revolving credit' contracts. However, further discussion around how this could be implemented in practice will be needed.
20. The definition in the CCCF Act for a revolving credit contract is:

Revolving credit contract means a credit contract, whether or not the contract specifies a credit limit, if the contract—

(a) anticipates multiple advances, to be made when requested by the debtor in accordance with the contract; and

(b) does not limit the total amount to be advanced to the debtor under the contract.

21. Starting with a BNPL contract being a revolving credit contract, it would likely be considered that the contract is entered into with the customer when they first sign up to use the BNPL service. It is at this stage that the customer agrees to the terms and conditions of the service. Each additional use of the service to purchase goods or services would then be an advance in accordance with the original contract.
22. Being a revolving credit contract would mean continuing disclosure is required every 45 days (section 18(2)(a)). This time limit is likely to present practical difficulties as many BNPL arrangements would be almost complete before the period of 45 days is completed. Assuming four payments made fortnightly, a BNPL arrangement would be complete in 56 days.
23. We understand there is some variation between BNPL providers. If the analysis in placing BNPL as revolving credit contracts is not correct in all circumstances and instead individual contracts are entered into at the point of sale, it is worth considering how the exceptions at section 15(1) of the CCCF Act apply. This section provides:

**Certain contracts not consumer credit contracts**

(1) The following contracts are not consumer credit contracts:

- (a) a contract for the sale of property, or the provision of services, to a person if the total amount payable under the contract by the person (other than any amount payable solely as a result of a default in payment by the person) is the agreed price of the property or services and is to be paid within 2 months from the day the contract is entered into:

24. The above points demonstrate that some thought needs to be put into including BNPL under the CCCF Act in order for regulation to operate effectively.

*Applying the CCCF Act to BNPL*

25. We set out below our comments on the potential application of particular sections of the CCCF Act to BNPL.
26. As a preliminary comment, on the assumption that BNPL may not be subject to all of the provisions applying to consumer credit contracts and on the basis that the harms identified as arising from BNPL centre around lack of affordability and problems following default, we suggest that the application of the CCCF Act consumer credit provisions be prioritised in order of provisions relating to:
  - 26.1 the requirements to assess affordability, treatment of debtors where problems occur, and the reasonableness of default fees
  - 26.2 ensuring that the BNPL product is suitable, that customers make an informed decision, and disclosure

- 26.3 applying the certification regime and duty of due diligence to improve compliance with the new CCCF Act obligations.

*Responsible lending*

27. We agree with the Discussion Document that the responsible lending principles in section 9C would be most relevant to address the triggers of financial responsibility (paragraph [100]).
- 27.1 On the basis that lack of adequate affordability assessments is the key harm with the status quo, then we support, as a minimum the application of:
- 27.1.1 the lender responsibility in relation to affordability in section 9C(3)(a)(ii) (for new contracts and increases in credit limits); and
- 27.1.2 section 5A, being the requirement to comply with the regulations (ie, Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020).
- 27.2 Although not explicitly mentioned in the Discussion Document we would also support application of the following responsible lending suitability obligations:
- 27.2.1 the lender responsibility in relation to suitability in section 9C(2)(a)(i) (for new contracts and increases in credit limits); and
- 27.2.2 section 5A, being the requirement to comply with the regulations.
- 27.3 We also support extending the application of the remaining responsible lending provisions in section 9C to BNPL with some exceptions:
- 27.3.1 section 9C(3)(f) – this is may not be needed if MBIE are looking for a tailored application of the CCCF Act; and
- 27.3.2 sections 9C(4) and (5) –these provisions are probably not needed on the basis that guarantees and insurance are likely not relevant for the BNPL product.
- 27.4 We also suggest application of the new section 9CA which sets out the obligation on lenders to keep records of suitability and affordability assessments.
- 27.5 We suggest that it would be preferable to amend the existing Responsible Lending Code (RLC) to address BNPL specific issues rather than create a stand-alone BNPL Responsible Lending Code. We have formed this view because:
- 27.5.1 This appears to fit better with the wording of the CCCF Act which refers to a Code (singular).

27.5.2 Section 9F(2) states that the RLC may contain different provisions in relation to particular lenders or class of lenders.

27.5.3 The RLC already contains different provisions for high cost credit providers and pawnbrokers, reflecting the differing rules applying to these products. We are unclear why BNPL should be treated differently.

#### *Unreasonable fees*

28. BNPL contracts typically only provide for default fees (if they provided for credit fees it would turn them into consumer credit contracts), and we support the application of the unreasonable fees provisions in the CCCF Act to BNPL. In addition to sections 41 and 44A we would also suggest the application of section 41A, which is the obligation to keep records and review fees.

#### *Unforeseen hardship*

29. We support the application of unforeseen hardship provisions to BNPL. However, we note that there are aspects of BNPL which may mean that these provisions don't work particularly well for either the lender or customer:

29.1 Under section 57A the lender must consider any written hardship application "within 20 working days". This is a long time in light of the generally short terms of BNPL loans.

29.2 BNPL providers may not have much incentive to agree to change the contract payment terms in one of the ways set out in section 56. This is on the basis that because they don't charge interest, all of the changes will result in the BNPL provider being paid back the same amount of money, just over a longer period.

29.3 We would expect that, in practice, it is likely to be more beneficial for both the BNPL provider and customer to deal with repayment difficulties outside of the formal hardship provisions and in accordance with the responsible lending principles (section 9C(2)(a)(iii) – due care, diligence and skill in subsequent dealings and section 9C(3)(d) - treating the customer reasonably and in an ethical manner where there are breaches or problems arise). Chapter 12 of the RLC would also provide guidance to lenders dealing with repayment difficulties and other problems.

#### *Disclosure*

30. We support the inclusion of an initial disclosure obligation (section 17) and the key items in the Discussion Document:

30.1 the BNPL provider's contact details (Schedule 1, (a) and (aa));

30.2 the initial unpaid balance (Schedule 1, (b) and (c));

- 30.3 the fees payable (if any) (Schedule 1, (n));
  - 30.4 the payments required (Schedule 1, (o));
  - 30.5 if the issues at [29] are addressed, the customer's hardship rights (Schedule 1, (sa)); and
  - 30.6 the BNPL provider's dispute resolution scheme details (Schedule 1, (ua)).
31. We would also suggest the following additional key items be required for initial disclosure:
- 31.1 credit limit (schedule 1, (f)); and
  - 31.2 the creditor's Financial Service Providers Register registration name and number (Schedule 1, (ub) and (uc)).
32. In addition to the initial disclosure provisions suggested in the Discussion Document, we suggest that MBIE give consideration to application of the following:
- 32.1 Continuing disclosure (sections 18 to 21). This is on the basis that a BNPL contract operates similar to a credit or store card and therefore it would be useful for customers to have access to regular statements showing their purchases, fees charged and payments to their accounts. It is possible that this could be achieved through the existing app platforms.
  - 32.2 Variation disclosure (section 22). This would be applicable to credit limit increases.

*Other CCCF Act obligations*

33. In addition to the obligations set out above we suggest that MBIE give consideration to the application of:
- 33.1 Requirement for certification (Part 5A). Certification would help to ensure that the BNPL's directors and senior managers are fit and proper persons to hold their respective positions.
  - 33.2 Duty of directors and senior managers (Part 2, subpart 9). This would incentivise BNPL's directors and senior managers to ensure that BNPL providers comply with their CCCF Act obligations.

*Sequential application of CCCF Act provisions*

34. If provisions of the CCCF Act are to be applied sequentially we suggest that the first provisions to be applied should relate to responsible lending affordability assessments and not disclosure. We suggest this on the basis that the key harms of BNPL identified relate to customers being able to enter multiple BNPL arrangements with limited checks on affordability. Improving initial disclosure is less likely to address this concern. If provisions of the CCCF Act are to be applied sequentially, we



would welcome discussion with MBIE around the extent of the Commission's powers to monitor credit markets under section 111 of the CCCF Act.

### **Industry codes**

35. When considering the option of a voluntary industry code with independent review by the Commission, we suggest that MBIE will need to be mindful of several issues revolving around how the regime might work in terms of the power to act and the mechanisms used as discussed below.

#### *Commission lacks power*

36. The Commission likely does not currently have the legal powers to conduct an independent review and we may need to be given specific powers to do so.
37. The role of the Commission is to promote compliance with the CCCF Act (section 111(1)) and not compliance with a voluntary industry code. Under section 111(2)(a) a function of the Commission is to "*monitor trade practices in credit markets*". While BNPL arrangements are credit contracts this may not provide sufficient legal authority to conduct a review of the efficacy of a voluntary industry code to address the triggers of consumer harm.

#### *Minister's letter of expectation*

38. The suggestion that a Commission review could be undertaken following "encouragement" in a Minister's annual letter of expectation is potentially incongruent with the role of the annual letter. We therefore question whether this is appropriate.
39. Triggering a review of this nature through the letter of expectation is potentially problematic given our role as an independent Crown entity, particularly in the context of uncertainty around our power to undertake any review. We suggest that any requirement for the Commission to undertake an independent review of a voluntary code be formalised by other means.

#### *Unclear implications*

40. The implications for the Commission in conducting any review are to an extent unclear given the uncertainties around the content of the code, the frequency of review(s) and number of BNPL providers.

### **Conclusion**

We thank MBIE for the opportunity to provide comments. We recognise that any new intervention or regulation will take time to develop and implement. We would welcome further opportunities to discuss the options in more depth so that there is a good understanding of the implications of options and to ensure they can be effectively implemented.

Please contact Mark Atwell via [REDACTED] in the first instance