



## Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023

Cindy Kiro, Governor-General

### Order in Council

At Wellington this 28th day of August 2023

Present:

Her Excellency the Governor-General in Council

These regulations are made under sections 137A and 138 of the Credit Contracts and Consumer Finance Act 2003—

- (a) on the advice and with the consent of the Executive Council; and
- (b) on the recommendation of the Minister of Commerce and Consumer Affairs made in accordance with sections 137A and 138 of that Act.

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## Regulations

### 1 Title

These regulations are the Credit Contracts and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023.

### 2 Commencement

These regulations come into force on 2 September 2024.

### 3 Principal regulations

These regulations amend the Credit Contracts and Consumer Finance Regulations 2004.

### 4 Regulation 3 amended (Interpretation)

In regulation 3, insert in their appropriate alphabetical order:

**BNPL contract** (buy now, pay later contract) means a credit contact—

- (a) that provides credit to enable the debtor to purchase goods or services offered by a third party; and
- (b) that would be a consumer credit contract in the absence of a declaration under section 137A(1) of the Act, but for the requirements of section 11(1)(c) of the Act; and
- (c) in respect of which the creditor or any one of their associated persons—
  - (i) is paid fees by the third party or payment services provider; or
  - (ii) is required to pay an amount to the third party that is less than the amount to be repaid by the debtor

**new borrower** means a person who on and after 2 September 2024 becomes a debtor, for the first time, with a lender under a BNPL contract between the creditor and that debtor

### 5 New regulation 5B and cross-heading inserted

After regulation 5A, insert:

*BNPL contracts are consumer credit contracts***5B BNPL contracts declared to be consumer credit contracts**

It is declared under section 137A(1) of the Act that a BNPL contract is a consumer credit contract.

**6 New regulations 18J to 18L inserted**

After regulation 18I, insert:

**18J Exemption from requirement for BNPL contracts to make reasonable inquiries that finance or credit will meet borrower's requirements and objectives**

A lender is exempt from the application of section 9C(3)(a)(i) of the Act in respect of a BNPL contract.

**18K Exemption for certain BNPL contracts from affordability assessment criteria**

- (1) A lender is exempt from the application of section 9C(3)(a)(ii) of the Act in respect of a BNPL contract if the lender complies with subclauses (3) and (4) and, if applicable, (5) of this regulation.
- (2) In this regulation, unless the context otherwise requires, **total credit limit**, in relation to a BNPL contract, is the total of the maximum unpaid balances permitted under all BNPL contracts between the borrower and the lender.
- (3) The exemption provided by subclause (1) applies in relation to a new borrower only if—
  - (a) the lender first obtains information from a credit report (as defined in the Credit Reporting Privacy Code 2020 (the **2020 Code**)) on the borrower in a manner permitted by that code, and that report includes, where available, all information set out in paragraph (e) of the definition of credit information in the 2020 Code, namely,—
    - (i) the type of credit account of the borrower; and
    - (ii) the amount of credit extended to the borrower; and
    - (iii) the capacity of the borrower (for example, account holder, joint account holder, or guarantor); and
    - (iv) the status of the account as open or closed; and
    - (v) the date the account was opened; and
    - (vi) if the account is closed, the date it was closed; and
    - (vii) details of the credit provider; and
    - (viii) the credit provider's client reference number; and
    - (ix) the repayment history information (as defined in the 2020 Code) in relation to the account; and

- (b) the lender provides to the credit reporter (as defined in the 2020 Code) all the information referred to in paragraph (a).
- (4) The exemption provided by subclause (1) applies only if, while a BNPL contract is in force,—
  - (a) the lender discloses to the borrower, in a manner that is clear, concise, and likely to bring the information to the attention of a reasonable person, at the time of each purchase made by the borrower using a BNPL contract between the lender and the borrower,—
    - (i) the dates and amount of payments required for the purchase; and
    - (ii) details of any default fees that may be payable under the contract, including how and when those fees would become payable; and
  - (b) the lender has in place at all times a credit policy that—
    - (i) explains how credit report information will be used by the lender when assessing whether or not to provide credit to a borrower; and
    - (ii) is complied with by the lender; and
    - (iii) is available to the Commission on request.
- (5) If a lender proposes to increase an existing borrower's total credit limit, the exemption provided by subclause (1) applies only if—
  - (a) the lender obtains information from another credit report on the consumer in a manner provided by the 2020 Code; and
  - (b) that report contains the information set out in subclause (3)(a).
- (6) To avoid doubt, a lender is not required to obtain a second or subsequent credit report in respect of the same borrower unless subclause (5) applies.

**18L Exemption for certain BNPL contracts from requirement under section 17 to give written notice of right to cancel contract under section 27**

- (1) A lender is exempt from the requirement of section 17 and paragraph (s) of Schedule 1 of the Act to give written notice of the right to cancel the contract under section 27 of the Act, if the contract is a BNPL contract.
- (2) However, the exemption applies only if the lender discloses details of its cancellation policy to the borrower.

Rachel Hayward,  
Clerk of the Executive Council.

## Explanatory note

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations, which come into force on 2 September 2024, amend the Credit Contracts and Consumer Finance Regulations 2004 (the **principal regulations**).

These regulations define the term BNPL contract (buy now, pay later contract) by inserting a definition into regulation 3 of the principal regulations (*see regulation 4*). A BNPL contract is a credit contract—

- that provides credit to enable the debtor to purchase goods or services offered by a third party; and
- that would be a consumer credit contract in the absence of a declaration under section 137A(1) of the Credit Contracts and Consumer Finance Act 2003 (the **Act**), but for the requirements of section 11(1)(c) of the Act; and
- in respect of which the creditor or any one of their associated persons is paid fees by the third party or payment services provider, or is required to pay an amount to the third party that is less than the amount to be repaid by the debtor.

*Regulation 5* inserts *new regulation 5B* into the principal regulations. *New regulation 5B* declares that a credit contract between a lender and a borrower is a consumer credit contract if it is a BNPL contract.

*Regulation 6* inserts *new regulations 18J, 18K, and 18L* into the principal regulations. *New regulation 18J* exempts a lender from the requirement in section 9C(3)(a)(i) of the Act to make reasonable inquiries to ensure that the credit or finance meets the requirements and objectives of the borrower if the contract is a BNPL contract. *New regulation 18K* provides that a lender is exempt from the application of section 9C(3)(a)(ii) of the Act (which requires affordability assessments) in respect of a BNPL contract. However, this exemption applies only if the lender obtains comprehensive credit reporting information and provides all this information to the credit reporter and, while the BNPL contract is in force, discloses in the required manner to the borrower—

- the date and amounts of payments required for the purchase; and
- details of any default fees that may be payable under the contract, including how and when those fees would become payable.

A further condition of the exemption is that the lender has in place, at all times while a BNPL contract is in force, a credit policy that, among other matters, explains how credit reporting information is used when the lender makes a decision whether to approve a loan.

Under *new regulation 18K(5)*, a lender must go through the same process if the lender proposes to increase the borrower's total credit limit.

*New regulation 18L* exempts a lender from the requirement of section 17 and paragraph (s) of Schedule 1 of the Act to give written notice of the right to cancel the contract under section 27 of the Act, if the contract is a BNPL contract.

*Statement of reasons*

The Minister of Commerce and Consumer Affairs is satisfied (as required by section 137A(2) of the Act) that it is necessary or desirable to promote the purposes of the Act set out in section 3 by declaring buy now, pay later (**BNPL**) contracts to be consumer credit contracts because—

- BNPL contracts provide, in economic substance, a form of credit in which consumers can purchase goods and services while deferring payment for them. They currently fall outside the definition of consumer credit contract in section 11 of the Act because BNPL providers charge fees to merchants, rather than charging interest or credit fees directly to consumers:
- BNPL contracts can materially contribute to financial hardship for some consumers:
- applying the protections of the Act in a proportionate manner would, for example,—
  - ensure that information about BNPL contracts is disclosed in a complete and timely manner, and require lenders to assist borrowers to make informed decisions:
  - ensure that any default fees charged are reasonable, and that borrowers in default are treated reasonably and ethically:
  - ensure that BNPL lenders are part of an external dispute resolution scheme, and ensure that borrowers can be referred to appropriate services where they miss payments or have complaints:
  - lessen the risk of financial hardship:
- a class declaration under section 137A(1)(b) is therefore necessary or desirable to protect the interests of consumers and promote the other purposes of the Act.

The Minister of Commerce and Consumer Affairs, having had regard to the purposes of the Act set out in section 3 of the Act (as required by section 138(1A)(a) of the Act), and being satisfied as to the matters set out in section 138(1A)(b) and (c)(ii) of the Act, considers the exemptions in respect of a BNPL contract made in *new regulations 18J, 18K, and 18L* of the principal regulations to be appropriate because—

- requiring a suitability assessment in accordance with section 9C(3)(a)(i) of the Act would impose unduly onerous and burdensome requirements because it would require significant changes to BNPL lender processes, and there is a low risk that the products will be unsuitable, given the simplicity of the product:
- requiring an affordability assessment in accordance with section 9C(3)(a)(ii) of the Act would impose unduly onerous and burdensome requirements, given that an affordability assessment is time-consuming and requires seeking detailed information from borrowers, and BNPL credit is interest-free and does not have a cost to the consumer if repaid on time:
- the requirement to disclose the right to cancel a BNPL contract under section 27 of the Act may result in conflicting and unnecessary information being

given to consumers because BNPL lenders currently provide a right to cancel by allowing the borrower to repay the full balance owed at any time. It is preferable, and would avoid confusion, if borrowers are informed of the lender's cancellation policy, rather than rights of cancellation under section 27 of the Act:

- exempting the credit contracts from the specified requirements will not cause significant detriment to borrowers because—
  - buy-now, pay-later lending is predominantly focused on smaller amounts of credit:
  - the exemption only covers interest-free lending:
  - under the conditions of the exemption, lenders will still have to seek credit information about borrowers:
  - other key lender responsibilities, such as those under section 9C(2)(a)(ii) of the Act (exercising the care, diligence, and skill of a responsible lender before entering into an agreement to provide credit), will still apply:
  - other provisions in the Act, such as those relating to disclosure (subpart 2 of Part 2), will still apply:
- the purposes of the Act to protect the interests of consumers, to promote confident and informed participation of consumers in markets for credit, to promote fair, efficient, and transparent markets for credit, and to provide remedies for consumers in relation to oppressive conduct will continue to be met if this exemption regulation is made.

Issued under the authority of the Legislation Act 2019.

Date of notification in *Gazette*: 31 August 2023.

These regulations are administered by the Ministry of Business, Innovation, and Employment.