

REVIEW OF THE 'BUY NOW PAY LATER CODE OF PRACTICE'

Consultation Note – 7 November 2022

On 14 October 2022, the Australian Finance Industry Association ('AFIA') announced an independent review of the 'Buy Now Pay Later' ('BNPL') Code of Practice. Promontory, a business unit of IBM Consulting ('Promontory', 'us', 'we') have been appointed to conduct the review. A report setting out findings will be provided to AFIA by 1 March 2023 for consideration. The report will be made publicly available.

As part of this review, Promontory is conducting an open consultation inviting interested parties to provide comments on the issues raised in this Consultation Note, along with any other aspects of the Code that may be relevant to the review by 9 December 2022. As set out below, Promontory will also meet with a range of stakeholders as part of this consultation process.

Background

The BNPL Code of Practice ('the Code') came into effect on 1 March 2021 and was developed by AFIA and its BNPL members in response to a Senate Inquiry in 2019, which recommended that the sector introduce an industry code of practice.¹

The Code is voluntary for BNPL providers and sets out nine key commitments binding on Code Compliant Members. These are:

1. 'We will focus on customers'
2. 'We will be fair, honest and ethical'
3. 'We will keep you properly informed about our product or service'
4. 'We will make sure our BNPL product or service is suitable for you'
5. 'We will undertake an ongoing review of the suitability of our products or services'
6. 'We will deal fairly with complaints'
7. 'We will offer financial hardship assistance'
8. 'We will comply with our legal and industry obligations'
9. 'We will support and promote this Code'²

There are currently nine Code Compliant Members of the AFIA BNPL Providers Group representing an estimated 95% of the BNPL market in Australia by value of transactions.³ There are several other BNPL providers in Australia who are not Code Members.

The BNPL industry is a fast developing sector. The effectiveness of the Code is, in part, dependent on its ability to evolve and adapt in response to factors such as shifts in market and economic conditions, technological changes, and customer and community expectations. A full review of the Code is required on a regular basis to ensure that it continues to promote high standards of service for customers and builds best practices across the BNPL industry.⁴ Promontory has been appointed to undertake a full review of the Code, the first since the Code came into effect.

¹ Recommendation 10

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report/b02

² https://afia.asn.au/files/galleries/AFIA_Code_of_Practice_for_Buy_Now_Pay_Later_Providers.pdf

³ <https://afia.asn.au/BNPL-Members> see also

https://afia.asn.au/files/galleries/Buy_Now_Pay_Later_The_First_Year_of_Self_Regulation_March_2022.pdf

⁴ See Clause 7.1 Review of the Code.

Objectives of the Review

Promontory's review will assess the effectiveness of the Code in achieving its objectives. These objectives are set out within the Code, and include assisting Code Compliant Members to:

- a) promote a customer-centric approach to the design, marketing and distribution of a BNPL Product or Service;
- b) promote high industry standards of service for customers and build best practices across the BNPL industry; and
- c) support compliance with legal and industry obligations.

In making a determination on the Code's effectiveness and impact, Promontory will consider a range of matters as set out in the Terms of Reference for this review (see **Attachment A**).⁵ These include:

- the awareness of the Code among key stakeholders, including consumers, as well as the level of consumer understanding about protections provided under the Code;
- the provisions contained within the Code compared to credit legislation, such as the National Consumer Credit Protection Act ('NCCP Act') and any perceived shortcomings;
- the effectiveness and adequacy of the accreditation process under which a BNPL provider becomes a Code Compliant Member;
- the process for monitoring compliance with the Code; and
- the performance and content of the Code, including whether the Code has enhanced the level of consumer protection in the BNPL sector in Australia and any perceived gaps.

Promontory will conduct interviews with a range of stakeholders across the industry including regulatory bodies, consumer groups, complaint handling bodies, retail organisations, and BNPL providers. This review will also be informed by a review of relevant information and data received by AFIA and other key stakeholders.

Key areas for consultation

Promontory's consultation questions cover the effectiveness of the Code in delivering each of the nine key commitments (with specific questions relating to each of the commitments), as well as other relevant matters sitting outside these commitments.

In responding to this consultation, Promontory also welcomes comments in relation to any or all of the questions listed below along with any other aspect of the Code that may be relevant.

Nine key commitments

1. *'We will focus on customers'*
 - a) Are the Code provisions that relate to dealing with customers with a vulnerability sufficiently clear and specific?

2. *'We will be fair, honest and ethical'*
 - a) Are the requirements around acting ethically, honestly, and fairly, supporting good customer outcomes, for example in relation to unsolicited marketing or selling?

⁵ Also available at: https://afia.asn.au/files/galleries/Terms_of_Reference_BNPL_Code_Independent_Review.pdf

3. *'We will keep you properly informed about our product or service'*
 - a) Are the requirements under the Code in relation to informing consumers of key product features, including fees, ensuring consistent consumer understanding of BNPL products and services?
 - b) Are there any areas where further or different information could be required under the Code to promote consistent consumer understanding of BNPL products and services?

4. *'We will make sure our BNPL product or service is suitable for you'*
 - a) Are the provisions of the Code dealing with the *new* customer assessment process clear and effective?
 - b) Are the provisions of the Code dealing with the *existing* customer assessment process clear and effective?

5. *'We will undertake an ongoing review of the suitability of our products or services'*
 - a) Are the factors set out in the Code relating to the ongoing suitability assessment of BNPL Products and Services (Suitability Assessment) effective?
 - b) Are there limitations to how these factors are applied in practice which impact the effectiveness of the suitability review?

6. *'We will deal fairly with complaints'*
 - a) Are the internal dispute resolution procedures that Code Compliant Members must follow for complaints sufficiently clear and effective?
 - b) Are the internal dispute resolution procedures in place among Code Compliant Members effective in dealing with complaints in practice? Do they lead to fair and timely resolutions for consumers?
 - c) Is the ability for consumers to take complaints to AFCA clear and effective in practice?
 - d) Is the ability to take alleged breaches to the Code Compliance Committee ('CCC') clear to customers?
 - e) Is there a sufficiently clear distinction between the matters that AFCA and the CCC will deal with?

7. *'We will offer financial hardship assistance'*
 - a) Are the provisions relating to customers experiencing financial difficulty adequate?
 - b) Are these provisions being appropriately and consistently applied by Code Complaint Members?

8. *'We will comply with our legal and industry obligations'*
 - a) Are the provisions relating to compliance with legal and industry obligations sufficiently clear, noting that different BNPL providers may be subject to different obligations?
 - b) Are the provisions relating to the protection of personal information, disclosure, and privacy adequate?

9. *'We will support and promote this Code'*
 - a) Overall, is there an adequate level of awareness of the Code including how it applies and the protections it offers?
 - b) How does the current level of awareness of the Code impact its effectiveness as a mechanism for consumer protection? What level of awareness is needed to ensure the Code is effective? How can this best be achieved?
 - c) Is there adequate awareness of the BNPL CCC and its role?

Other issues

1. *Protections offered by the Code compared with Credit Legislation*
 - a) Does the Code contain provisions that deliver comparable consumer outcomes to the relevant provisions in the NCCP Act that would have applied if BNPL products were formally regulated under the NCCP Act?
 - b) Are there additional consumer protections under the NCCP which should be afforded under the Code?

2. *Monitoring and enforcing compliance with the Code*
 - a) How effective are the mechanisms in place to monitor and ensure compliance with the Code?
 - b) Are the sanctions and actions that the Code Compliance Committee may take in response to an alleged or confirmed breach of the Code adequate?
 - c) Is the reporting relating to compliance with the Code, complaints, and breaches sufficient?

3. *Standards for Merchants and Retail partners*
 - a) Are the minimum standards for merchants and retail partners appropriate and are they being monitored effectively in practice?

4. *Performance and Content of the Code*
 - a) Overall, has the Code, including the nine 'Key Commitments', been effective in delivering an enhanced level of consumer protection in the BNPL sector in Australia and in meeting its objectives?
 - b) In addition to the issues raised above, are there any other aspects of the nine 'Key Commitments' which could be improved upon or better articulated within the Code?
 - c) Are there any additional commitments, or apparent gaps in coverage, that should be considered for inclusion within the Code?
 - d) Are there any industry developments which have not been appropriately considered within the Code?

5. *Accreditation as a Code Compliant Member*
 - a) Is the process for accreditation as a Code Compliant Member of the Code transparent, well-understood, effective, and consistently applied?
 - b) Are there opportunities to enhance the accreditation process?

Promontory would welcome any other comments on experience with the Code, both positive and negative, including the process to address and resolve any alleged breaches or complaints.

Next steps

Promontory invites submissions to this consultation letter by email to **'BNPLCode@promontory.com'** by **9 December 2022**. Submissions will be made public unless clearly marked confidential. Confidential submissions will be reviewed by Promontory only.

Comments and information received in submissions will be considered alongside interviews and other relevant information and data to inform Promontory's findings. Subject to the information received in response to this consultation, Promontory may conduct a limited second round consultation in early 2022 on specific issues.

Findings will be reported to AFIA by 1 March 2023.

ATTACHMENT A – TERMS OF REFERENCE FOR INDEPENDENT REVIEW OF THE AFIA BUY NOW PAY LATER CODE OF PRACTICE

TERMS OF REFERENCE FOR INDEPENDENT REVIEW OF THE AFIA BUY NOW PAY LATER CODE OF PRACTICE

1. Scope of the Independent Review

The independent review (review) of the AFIA Buy Now Pay Later Code of Practice (the Code) will consider the impact and effectiveness of the Code in achieving its objectives, by examining the following matters and report to the AFIA Chief Executive Officer no later than 1 March 2023.

1.1 Awareness of the Code

- (a) The level of awareness of the Code among key stakeholders including consumer groups and other BNPL providers operating in Australia who are not signatories to the Code.
- (b) The level of consumer understanding about protections provided under the Code including the role of the Buy Now Pay Later Code Compliance Committee (CCC) to consider alleged breaches of the Code.

1.2 Content of the Code Compared to Credit Legislation

- (a) Whether the Code contains provisions that achieve broadly comparable consumer outcomes to the same provisions in the National Consumer Credit Protection Act (NCCP Act) that would have otherwise applied if a BNPL provider had been regulated under the NCCP Act.
- (b) If there are perceived shortcomings in the consumer outcomes achieved by the Code and the outcomes that would have been achieved if a BNPL provider had been regulated under the NCCP Act, what those shortcomings are.

1.3 Accreditation as a Code Compliant Member of the Code

- (a) The effectiveness of the accreditation process under which a BNPL provider becomes a Code Compliant Member of the Code.
- (b) The adequacy of the Terms of Reference of the CCC in relation to accreditation, including but not limited to the matters the CCC may take into account when considering applications for accreditation.

1.4 Monitoring Compliance with the Code

- (a) Whether the By Laws and Terms of Reference provide an appropriate framework for monitoring compliance with the Code, including but not limited to the matters the CCC may consider and the adequacy of the sanctions the CCC may impose for alleged breaches of the Code compared to other Australian financial sector industry codes of practice.
- (b) Whether the information required to be reported by Code Compliant Members to the CCC on a quarterly basis in accordance with the By Laws is sufficient for compliance monitoring purposes.
- (c) Whether the process of annual attestation about compliance is equivalent to that of other industry codes that operate in the financial sector in Australia.
- (d) Whether the process for considering alleged breaches of the Code is sufficient to ensure any alleged breaches are appropriately examined and suitable outcomes are applied having regard to the scope of the sanctions the CCC may impose.



1.5 Performance and Content of the Code

- (a) Whether the nine Key Commitments in the Code have enhanced the level of consumer protection in the BNPL sector in Australia, having regard to the objectives of the Code⁶ and the industry practices that have been implemented in response to the Key Commitments.
- (b) If there are perceived gaps in the level of consumer protection provided by the Key Commitments, what those gaps are and the recommended additions to the Code to address those gaps.

2. Personnel and Resources

The independent review will have access to the following personnel and resources for purposes of carrying out the review.

- 2.1 AFIA personnel including the Chief Executive Officer and the Director Industry Standards, and AFIA's books and records related to the Code.
- 2.2 The BNPL Code Compliance Committee, including information that is relevant to the CCC's role to oversight and enforce compliance with the Code.
- 2.3 AFIA members who are Code Compliant Members of the Code, including key personnel and information that is relevant to demonstrating compliance with the code.

3. Matters not in Scope

The following matters are not in the scope of the independent review.

- 3.1 Assessment of any aspect of the commercial performance of BNPL providers who are Code Compliant Members, or the general economic conditions in which they operate.
- 3.2 Analysis of or recommendations about the form, content or obligations of any statutory regulation of the BNPL sector in Australia that the Government is considering or may adopt.

⁶ See Clause 1 of the BNPL Code of Practice



Promontory, a Business Unit of IBM
Level 17, 259 George Street | Sydney, NSW, 2000
+61 2 9478 8888 | [promontory.com](https://www.promontory.com)