



12 December 2022

Mr Peter Kell

Managing Director

Promontory Group

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Dear Mr Kell,

### **Independent Review of the Buy Now Pay Later Code of Practice**

The Australian Finance Industry Association (AFIA)<sup>1</sup> welcomes the opportunity to provide input to the independent review of AFIA's Buy Now Pay Later (BNPL) Code of Practice ('the BNPL Code').

AFIA is the only peak body representing the entire finance industry in Australia.

We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia.

### **INTRODUCTORY COMMENTS**

AFIA is committed to building a more resilient economy through a safe and transparent financial system. We believe self-regulation is an important part of the regulatory framework, providing a mechanism for industry to work collaboratively to achieve customer-centric operating models. Introducing – and just as importantly, regularly reviewing – industry codes is key to driving best practice in industry.

The BNPL Code is a world-leading example of self-regulation in the BNPL space, giving customers the confidence they need to engage with a diverse, innovative and low-cost product that meets their preferences and expectations.

The BNPL Code is working well to set industry standards and provide consumer protections. The design of the BNPL Code was informed by Australia's financial services, credit and payments laws, augmented with additional protections, to create a self-regulatory framework fit for the future. It provides a meeting point between

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<sup>1</sup> [www.afia.asn.au](http://www.afia.asn.au)

consumer expectations about financial safety and consumer preferences regarding financial products, as these two concepts evolve over time.

The BNPL Code contains strong consumer protections, including upfront customer assessments, existing customer re-assessments if the customer applies for a higher limit, and internal and external dispute resolution obligations. Furthermore, all Code Compliant Members (referred to as Code signatories) have caps on fees, and conduct 'in life' checks to ensure products remains suitable for customers.<sup>2</sup> Code signatories must also be proactive in offering hardship assistance to customers in financial difficulty.

It is important to note that the BNPL Code sits alongside multiple existing legal and regulatory obligations for BNPL providers, such as the Australian Securities and Investments Commission's (ASIC's) product intervention power and product design and distribution obligations (DDOs), set out in Chapter 7 of the *Corporations Act 2001*.

It is also a living document and is adjusted to keep pace with broader regulatory changes and developments across the market. This is demonstrated through the inclusion of commitments reflecting DDOs even before they became effective for financial service providers on 5 October 2021 as well as changes to clarify the definition of BNPL, reflecting the emergence of other products seeking to market as BNPL.

Our submission in **Attachment A** outlines the BNPL Code and our assessment of its effectiveness since it came into effect. **Attachment B** addresses specific questions raised in Promontory's Consultation Note.<sup>3</sup>

#### **CLOSING COMMENTS**

Thank you once again for the opportunity to provide input to the independent review of AFIA's BNPL Code of Practice.

Should you wish to discuss our submission or require additional information, please do not hesitate to contact me at [REDACTED].

Yours sincerely

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<sup>2</sup> A Code Complaint Member is defined in the BNPL Code as being a BNPL provider accredited by the BNPL Code Compliance Committee as complying with the BNPL Code, otherwise called a Code signatory.

<sup>3</sup> Promontory (2022), [Review of the 'Buy Now Pay Later Code of Practice' Consultation Note](#).

## APPENDIX A: SUBMISSION

### 1. Nature of the Sector

- 1.1. BNPL represents a small but growing part of Australia's payments ecosystem. According to the Reserve Bank of Australia (RBA), BNPL transactions grew by approximately 37 per cent in 2021/22 measured by value, to \$16 billion.<sup>4</sup> This remains around two per cent the value of debit and credit card payments.<sup>5</sup>
- 1.2. BNPL products are a natural evolution of traditional lay-by services offered by brick-and-mortar retailers, incorporating digitisation and marketisation to provide more tailored, portable, and personalised options for customers.
- 1.3. The increasing popularity of BNPL products has seen a number of new market entrants, with a notably diverse BNPL sector emerging around a decade ago. Early BNPL providers were typically fintech start-ups for whom their BNPL offering was the centre of their business.<sup>6</sup> A range of other small providers have entered the market as well, many of whom are Code signatories. More recently, banks have begun offering BNPL or BNPL-like products, reflecting interest in the sector across the Australian financial services industry.<sup>7</sup>
- 1.4. BNPL products vary in structure throughout the sector. Some BNPL products allow consumers to repay a purchase of goods or services in instalments over a short term. Consumers are informed by the BNPL provider of the repayment amounts and payment schedule and pay no interest charges for individual purchases if they pay within a specified period. Other BNPL products are credit contracts for the purchase of goods or services. Some contracts require a minimum periodic repayment; others involve a fixed repayment plan for each purchase. No interest is charged and any fees for providing the credit are limited, as noted in the Government's recent options paper on BNPL regulation.<sup>8</sup>
- 1.5. This diversity in product structure gives rise to a range of customer use cases. Small dollar-amount BNPL products, such as those under \$2,000, are valuable budgeting tools which allow consumers to smooth their consumption, managing purchases in the context of salary pay periods and other expenses. Larger dollar-amount BNPL products, including those above \$15,000, provide amortisation of larger purchases.<sup>9</sup>
- 1.6. Many homeowners have made use of BNPL products to finance energy efficiency upgrades such as the installation of solar panels, dramatically reducing their household's dependence on fossil fuels and reducing their energy bills. BNPL has helped power Australia's world-leading uptake of solar energy,

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<sup>4</sup> Reserve Bank of Australia (2022), [Payments System Board Annual Report 2022](#), p 18.

<sup>5</sup> Ibid.

<sup>6</sup> Zip was founded in 2013 and Afterpay in 2014: Zip, 'About Zip' <<https://zip.co/about-us>>, accessed 28 November 2022; Afterpay, 'Our Story' <<https://corporate.afterpay.com/our-story>>, accessed 28 November 2022.

<sup>7</sup> Commonwealth Bank of Australia, 'StepPay – a new way to buy now pay later' <<https://www.commbank.com.au/banking/buy-now-pay-later/steppay.html>>, accessed 28 November 2022; National Australia Bank, 'NAB Now Pay Later | Buy now pay later in four instalments – NAB' <<https://www.nab.com.au/personal/buy-now-pay-later>>, accessed 28 November 2022; Westpac, 'Flex Credit Card with 0% Interest | Westpac' <<https://www.westpac.com.au/personal-banking/credit-cards/interest-free/flex-card>>, accessed 28 November 2022.

<sup>8</sup> Treasury (2022), [Regulating Buy Now, Pay Later in Australia: Options paper](#), p 7.

<sup>9</sup> Ibid, p 26.

ranking first in the world for installed photovoltaic generation capacity per capita, around two thirds of which is 'distributed' (i.e., rooftop solar).<sup>10</sup> Code signatories financed 17.4 per cent of all solar installations in Australia in the 2021-22 financial year, reaching 20.8 per cent in June 2022.<sup>11</sup>

## 2. History of the BNPL Code

2.1. The BNPL Code came into effect on 1 March 2021.<sup>12</sup>

2.2. The BNPL Code was developed by AFIA and its BNPL members as a comprehensive response to recommendations by ASIC in its Report 600 and the final report of the 2019 Economics References Committee *Inquiry into credit and financial products targeted at Australians at risk of financial hardship*.<sup>13</sup>

### *Recommendation 10*

*1.66 The committee recommends that the buy now pay later sector develop an industry code of practice.*

2.3. The development of the BNPL Code was subject to an extensive consultation process. As part of that process AFIA incorporated views from a broad range of stakeholders, including consumer advocates, regulators and others.<sup>14</sup>

2.4. The BNPL Code was also informed by Australia's financial services, credit and payments laws, augmented with additional protections, to create a self-regulatory framework fit for the future. It provides a meeting point between consumer expectations about financial safety and consumer preferences regarding financial products, as these two concepts evolve over time.<sup>15</sup>

2.5. It sets best practice standards for the sector and strengthens consumer protections. The BNPL Code has been successful in unifying almost all of the BNPL market under a single, clear code of practice, providing consumers with clarity and confidence about their rights and the responsibilities of the providers with which they engage.

2.6. Around 90 percent of the BNPL market is served by BNPL Code members, including Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright, Plenti and Zip Co.<sup>16</sup>

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<sup>10</sup> International Energy Agency (2022), [Trends in Photovoltaic Applications 2022](#), p 10; Ibid, p 30.

<sup>11</sup> Industry data.

<sup>12</sup> AFIA (2022), [Buy Now Pay Later Code of Practice© Version 2](#), p 1.

<sup>13</sup> ASIC (2022), [REP 600 Review of buy now pay later arrangements](#); Economics References Committee (2019), [Credit and hardship: report of the Senate inquiry into credit and financial products targeted at Australians at risk of financial hardship](#).

<sup>14</sup> Ten submissions were received from the following stakeholders: Australian Small Business and Family Enterprise Ombudsman, Equifax, Financial Counselling Network, Finder, Latitude, Legal Aid Queensland, (individually) Redfern Legal Centre, Speckle, Uniting Kildonan and (jointly) Consumers Federation of Australia, Consumer Credit Legal Service (WA), Consumer Action Law Centre, Financial Rights Legal Centre, South Australian Financial Counsellors Association, Redfern Legal Centre, CHOICE, Financial Counselling Australia, Queensland Consumers Association, Caxton Legal Centre Inc, Consumer Law Centre, Care Inc, Financial Counsellors' Association of Western Australia.

<sup>15</sup> ASIC (2020), [RG 274: Product design and distribution obligations](#); ASIC (2020), [RG 272: Product intervention power](#).

<sup>16</sup> Reserve Bank of Australia (2022), [Payments System Board Annual Report 2022](#), p 18; Industry data.

2.7. Since the BNPL Code came into effect, four reports have been produced by the Code Compliance Committee, monitoring business metrics, internal and external complaints, hardship and merchant reports. These reports include commercially sensitive and confidential information for the purposes of monitoring performance with code compliance. The latest report covers Q3 2022.

### **3. Complaints Handling**

- 3.1. Clause 13 of the BNPL Code commits members to handle complaints ‘promptly and fairly’. Code signatories comply with the same ASIC standards and requirements as AFSLs, except where they commit to improve on those standards and requirements.
- 3.2. In practice, this means Code signatories are complying with *ASIC Regulatory Guide 271: Internal Dispute Resolution* as it applies to AFSLs.<sup>17</sup> If a customer is unsatisfied with the result of an internal dispute resolution (IDR) process, they can seek external dispute resolution (EDR) through the Australian Financial Complaints Authority (AFCA). All Code signatories are required to be members of AFCA, and to inform customers of their rights of appeal and how they can contact AFCA.<sup>18</sup>
- 3.3. IDR complaints have remained relatively steady over the recent period, at 0.1-0.2 complaints per hundred active accounts since Q3 2021.<sup>19</sup>
- 3.4. EDR rates are a significantly small proportion of this, at just 0.005 complaints per hundred active accounts in Q2 2022.<sup>20</sup> This means that over 97 per cent of complaints are resolved without EDR, indicating the BNPL Code has been effective at ensuring a very high level of acceptable complaint outcomes for customers.
- 3.5. According to AFCA, many EDR complaints against BNPL providers relate to freezing or declining to open accounts, which are mechanisms BNPL providers use to prevent customers overextending themselves. In the 2020-21 financial year, 76 per cent of EDR complaints to AFCA were referred back to BNPL providers and resolved internally. Only ten EDR complaints progressed to a final decision by AFCA, with eight of these being decided in favour of the BNPL provider.<sup>21</sup>
- 3.6. This demonstrates the BNPL Code is working to improve consumer outcomes. It also demonstrates the industry’s commitment to a safe and transparent financial system.

### **4. Financial Hardship**

- 4.1. Clause 14 on hardship assistance commits members to the fair and respectful treatment of their customers and obliges them to consider customers’ specific circumstances if they are experiencing financial difficulty.

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<sup>17</sup> ASIC (2021), [RG 271: Internal Dispute Resolution](#).

<sup>18</sup> AFIA (n 12), 13.9; Ibid 13.5 (b); Ibid 13.5 (c).

<sup>19</sup> Data reported for code compliance purposes.

<sup>20</sup> Ibid.

<sup>21</sup> AFCA (2022), [Questions on Notice 10 and 11](#), *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament*, Parliamentary Joint Committee on Corporations and Financial Services.

- 4.2. The hardship rate reached 0.40 per cent of customers in Q1 2022 , stabilising at 0.39 per cent in Q2 2022 despite the intensification of cost-of-living pressures as inflation concerns developed.<sup>22</sup>
- 4.3. Code signatories have proven responsive to customer requests for hardship consideration. The average time for a member to act on a hardship request is 12 days, well within the 21 days specified in the BNPL Code.<sup>23</sup> Additionally, Code signatories decline very few applications, with only ten declined applications in Q3 2022, which is a typical rate over the BNPL Code’s history.<sup>24</sup>
- 4.4. 95 per cent of hardship applications are concentrated in products where the product value is less than \$3,000 in Q3 2022.<sup>25</sup> Less than a quarter of a per cent of applications related to loans over \$15,000.<sup>26</sup> This reflects both the dominance of low-value products in the market, and the progressive and proportionate affordability checking regime that scales with product value.
- 4.5. The ease of access to hardship arrangements for consumers, indicated by the negligibly low rate of declined applications and the short average duration for acting on applications, is a key pillar of consumer protection in the BNPL sector. While finance is accessible, so too is the hardship support customers need should they require it. The BNPL Code commits Code signatories to freezing a customer’s account if they miss a scheduled repayment, immediately preventing further spending and potential overextension.<sup>27</sup>

## **5. Code Compliance Committee and Code monitoring**

- 5.1. The BNPL Code Compliance Committee (CCC) is an independent body established by AFIA to monitor compliance by Code signatories. CCC members are appointed by the AFIA Board and must be independent persons with relevant experience at a senior level in finance, regulation, retail, or the community. The CCC has met 18 times since its inception and meet a minimum of four times in every 12-month period.<sup>28</sup>
- 5.2. BNPL providers who are members of AFIA are eligible to apply to be accredited as ‘Code Compliant Members’ by the CCC.
  - 5.2.1. Applicants need to demonstrate how they fulfil the key Code commitments, which include: focusing on customers (clause 8 of the BNPL Code); being fair, honest and ethical in all their dealings (clause 9); keeping customers informed about their product or service (clause 10); making sure their BNPL product or service is suitable for customers (clause 11); undertaking an ongoing review of the suitability of their products or services (clause 12); dealing fairly with complaints (clause 13); offering financial hardship

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<sup>22</sup> Data reported for code compliance purposes (n 19); Australian Bureau of Statistics (June 2022), [Consumer Price Index, Australia](#), ABS Website, accessed 11 November 2022.

<sup>23</sup> AFIA (n 12), 14.7.

<sup>24</sup> Data reported for code compliance purposes (n 19).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> AFIA (n 12), 11.10.

<sup>28</sup> AFIA (2021), [Buy Now Pay Later Terms of Reference Version 1](#), 8.1.

assistance (clause 14); complying with their legal and industry obligations (clause 15); and supporting and promoting the BNPL Code (clause 16).

- 5.2.2. Applicants must have sufficient policies, procedures, and resources to fulfil their obligations under the BNPL Code, train staff appropriately, and have minimum standards for merchant and retail partners. Directors and majority shareholders must satisfy probity checks as set out in the by-laws.<sup>29</sup>
- 5.3. Following accreditation, Code signatories must provide business, complaint, hardship assistance and merchant metrics to the CCC each quarter for monitoring of Code compliance.
  - 5.3.1. Business metrics are reported for the quarter prior and because this data is commercially sensitive and confidential information, it is reported after related information is publicly released to the market. Data reported to the CCC includes: number of merchants; number of active customers; number of transactions; total value of transactions; and average transaction size.
  - 5.3.2. Complaints metrics include: number of active complaints; number of new complaints received; and number of complaints closed. New and closed complaints are categorised by product and distribution. All complaint data points are separated between IDR and EDR processes.
  - 5.3.3. Hardship assistance metrics include: number of applications received, approved, declined and abandoned; average time to resolve hardship applications; and average duration of repayment arrangements undertaken with customers. These metrics are reported on aggregate and by transaction threshold, in the ranges: \$3,000 and under; over \$3,000 to \$15,000; and over \$15,000. Furthermore, they are also separately reported for transactions involving solar panel financing.
  - 5.3.4. Merchant metrics include: reports of material breach incidents, consisting of: whether the merchant is physical or online; size of the merchant by revenue; relevant minimum standard breached; whether the breach was one-off, systemic, or under investigation, transaction value; sales method; and how the issue was discovered.<sup>30</sup>
- 5.4. The CCC has a role in monitoring and oversight of the BNPL Code commensurate to its status as an industry self-regulation model. The CCC has powers only as delegated to it in the By-Laws and the Terms of Reference. It does not have statutory-like information gathering, enforcement or compensatory powers, which are more akin to that of a regulator or other statutory body.
- 5.5. The CCC is appropriately resourced to carry out its designated functions, but is not equipped to undertake investigations beyond the bounds of the BNPL Code. Fundamentally, industry self-regulation functions by mutual agreement of operating standards, which are enforced by collective and individual accountability.
  - 5.5.1. The CCC can conduct enquiries and audits of Code signatories' compliance.<sup>31</sup> It can investigate Code compliance in response to allegations from any person, or referrals or reports from external stakeholders, that a Code signatory may have breached the BNPL Code. It can also investigate in response to an allegation from another Code signatory that there has been conduct potentially unbecoming of, or prejudicial to the interests of, AFIA or its BNPL member, or that there has been non-compliance with AFIA's Constitution.

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<sup>29</sup> AFIA (2021), [Buy Now Pay Later By-Laws Version 1](#), 5.1 (a) – (c).

<sup>30</sup> AFIA (n 12), 17.1.

<sup>31</sup> AFIA (n 28), 10.

- 5.5.2. Furthermore, the CCC can initiate an investigation if its compliance monitoring gives it reason to suspect there may have been a breach of the BNPL Code, including where the BNPL Code signatory has itself identified the potential or actual breach.<sup>32</sup>
- 5.5.3. The CCC is not an external dispute resolution body: it oversees compliance with the BNPL Code and investigates alleged breaches of the BNPL Code. The CCC cannot investigate alleged breaches where the complainant is also seeking compensation for damages arising from the same situation, in which case the allegation must be referred to IDR and or EDR schemes.<sup>33</sup> Additionally, the CCC cannot investigate alleged breaches that are also subject to an EDR or conciliation scheme or an investigation by a regulatory body, in which case the CCC must await the final determination or findings before investigating.<sup>34</sup>
- 5.5.4. The CCC's investigative remit is thus broad and readily initiated, either by itself or referral, while respecting the primacy of existing regulatory systems and complaint management frameworks. Only five allegations of Code breaches were made to the CCC in the BNPL Code's first full year.<sup>35</sup> A further eight alleged breaches have been raised with the CCC from 1 March 2022 to the time of writing. This indicates that IDR and EDR processes are largely effective at delivering efficient and effective outcomes for customers.
- 5.6. If the CCC determines a Code signatory has breached the BNPL Code, the CCC and the relevant BNPL provider may agree on corrective measures and timeframes for implementing them.<sup>36</sup> The CCC can also impose a number of sanctions on Code signatories, including issuing a formal warning, requiring corrective measures, and recommending to the AFIA Board that a Code signatory's membership of AFIA is reviewed, suspended or terminated.<sup>37</sup>
- 5.7. The CCC is separate from AFIA. The AFIA CEO meets with the CCC to discuss the BNPL sector and exchange views about industry developments and emerging issues. AFIA, beyond the code administrator, do not engage in the work of the CCC. Therefore, we are unable to provide detailed comments about the specific engagement between Code signatories and the CCC, including accreditation and monitoring functions.
- 5.8. However, AFIA has received feedback from Code signatories that the level of engagement and investigation is deeper than other code compliance committees within the Australian financial services industry. This has been confirmed through discussions between the AFIA CEO and the CCC. For example, the accreditation processes have required each applicant to change, adjust or introduce new systems, policies, and procedures. This is evidence that the BNPL Code and the CCC have changed the BNPL sector and lifted consumer safeguards.

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<sup>32</sup> Ibid, 10.1.

<sup>33</sup> Ibid, 10.2 (a).

<sup>34</sup> Ibid, 10.2 (b).

<sup>35</sup> BNPL CCC (2022), [Buy Now Pay Later: The First Year of Self-Regulation](#), p 3.

<sup>36</sup> AFIA (n 28), 10.7.

<sup>37</sup> Ibid, 10.9.



## APPENDIX B: SPECIFIC QUESTIONS

### Nine key commitments

#### 1. 'We will focus on customers'

##### 1.1. ***Are the Code provisions that relate to dealing with customers with a vulnerability sufficiently clear and specific?***

- 1.1.1. Clauses 8.1 - 8.6 contain provisions that govern how Code signatories deal with vulnerable customers with the stated aim of providing 'an inclusive and accessible service'.<sup>38</sup>
- 1.1.2. The Code seeks a firm grounding in established regulatory practice around vulnerabilities. Clause 8.4 commits members to using the description of vulnerability set out by ASIC, while clause 8.6 makes specific reference to documentation by AFCA on dealing with vulnerabilities.
- 1.1.3. The Code aims to provide clarity through concrete guidance, with subsections 8.4 (a) - (c) making specific reference to several vulnerability factors. These include 'actions of the market or individual [BNPL] providers', '[e]xperiencing specific life events or temporary difficulties', and '[p]ersonal or social characteristics that affect a person's ability to manage their financial interactions'. Furthermore, it gives examples of these factors, including 'being inappropriate inadequate or overly complex documentation', 'an accident or sudden illness', and 'speaking a language other than English'.
- 1.1.4. AFIA believes this dual approach of incorporating established regulatory practice, while providing specific examples of vulnerabilities, provides a clear and specific framework for handling vulnerabilities. This approach is consistent with regulatory guidance issued in the United Kingdom and New Zealand as well as regulatory expectations set by ASIC.<sup>39</sup>

#### 2. 'We will be fair, honest and ethical'

##### 2.1. ***Are the requirements around acting ethically, honestly, and fairly, supporting good customer outcomes, for example in relation to unsolicited marketing or selling?***

- 2.1.1. Clause 9.5 commits Code signatories to taking 'all reasonable steps' to ensure their products are not 'used or suggested in relation to unlawful unsolicited marketing or selling'. Furthermore, clause 9.6 commits members to take action against any merchants or retail partners found to be engaging in such behaviour, including reporting the merchant or retail partner to the CCC.
- 2.1.2. In addition, clause 10.2 (a) specifies that Code signatories will ensure 'advertising and promotional material is clear and not deceptive' and commits them to complying with ASIC guidance.<sup>40</sup>
- 2.1.3. Good customer outcomes in this area are evident in the low number of both IDR and EDR complaints recorded by Code signatories, as noted in Appendix A paragraphs 3.3 and 3.4.

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<sup>38</sup> AFIA (n 12), 8.2.

<sup>39</sup> ASIC (2020), [ASIC's expectations for protecting vulnerable customers](#).

<sup>40</sup> For example, see: ASIC (2012), [RG 234 Advertising financial products and services \(including credit\): Good practice guidance](#).

### **3. 'We will keep you properly informed about our product or service'**

#### **3.1. *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?***

3.1.1. Clause 10 of the BNPL Code contains numerous provisions to ensure that customers are fully informed about the product with which they are engaging. These include providing terms and conditions that are 'fair, clear and transparent and written in plain language', and 'prominent' information about scheduled repayment obligations and fees charged<sup>41</sup>.

3.1.2. Furthermore, the BNPL Code commits members to providing 'at least 40 Days' notice in writing' of the introduction of new fees or the increase of existing fees,<sup>42</sup> and 'at least 30 Days' notice' where other material changes are made to terms and conditions. This provides substantial notice to customers about variation in the product with which they are engaging, allowing them to adjust their usage and repayments accordingly.

#### **3.2. *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?***

3.2.1. The BNPL Code requires disclosure of product features and costs, supporting clear and transparent information.<sup>43</sup>

3.2.2. In addition to the BNPL Code, the AFIA website and other materials produced by BNPL providers and others promote further information, such as fee comparison tables.

3.2.3. While not all work need be done through the BNPL Code, additional education, financial literacy assistance and other activities are needed to promote the BNPL Code and support consumer understanding of products to ensure positive consumer outcomes.

### **4. 'We will make sure our BNPL product or service is suitable for you'**

#### **4.1. *Are the provisions of the Code dealing with the new customer assessment process clear and effective?***

4.1.1. Clause 11.1 to 11.8 of the BNPL Code clearly detail the criteria that must be met as part of the new customer assessment process, setting out a graduated approach based on transaction amount to provide proportionality in the assessment process.

4.1.2. The Code seeks to incorporate established regulatory practice, while augmenting it with clear and concise requirements in the Upfront Assessment Process.<sup>44</sup> This process requires that a new customer is not vulnerable, meets the Suitability Assessment Criteria, and is able to make an initial payment upfront (or within 15 days). Furthermore, it requires that the BNPL Code signatory is reasonably satisfied with the

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<sup>41</sup> Ibid, 10.1 (a), (c).

<sup>42</sup> Ibid, 10.1 (h).

<sup>43</sup> Ibid, 10.1 (b).

<sup>44</sup> Ibid, 11.3.

information obtained about the customer, and that the repayment term is suitable. This is consistent with the technology neutral approach undertaken by credit providers.

- 4.1.3. The BNPL Code achieves proportionality by segmenting the assessment process by transaction amount. Where the transaction amount is less than or equal to \$2,000, the small amount is recognised by the ability to support new customer assessment with an indicative data source, such customer or third-party data, where any of the above criteria is not met.<sup>45</sup> It gives specific examples to provide clarity, such as 'information about income and expenses that satisfy ... internal risk management processes' and 'credit check[s]'. As above, the exact method of assessment is determined by available technologies, data, and business practices.
- 4.1.4. Where the transaction amount is more substantial, such as between \$2,001 and \$15,000 (inclusive), either customer or third-party data (as mentioned above) must be provided. For larger transaction amounts, between \$15,001 and \$30,000 (inclusive), both these checks must be passed.<sup>46</sup> Where the transaction amount exceeds \$30,000, further checks are required.<sup>47</sup>

## **4.2. *Are the provisions of the Code dealing with the existing customer assessment process clear and effective?***

- 4.2.1. Similar to the provisions related to the new customer assessment process, clauses 11.9 to 11.14 of the BNPL Code clearly set out the criteria for assessing new transaction amounts for existing customers to ensure the product remains suitable for them.
- 4.2.2. The Code commits members to 'not provide any additional [products] or increase the Transaction Amount of the current [product] if you are behind in payments'.<sup>48</sup> This is a simple, clear, and important safety measure that ensures customers cannot overextend themselves when they are already experiencing difficulty meeting their existing obligations.
- 4.2.3. The Code sets out the criteria required to be met as part of the Existing Customer Assessment Process, including that the customer is up to date with all payments, have shown their repayment ability, still meet the Suitability Assessment Criteria, and are not vulnerable. Furthermore, it requires that the repayment term is still deemed appropriate and that internal data shows there is no inappropriate use of the product.
- 4.2.4. As in the Upfront Assessment Process, proportionality is achieved through transaction amount thresholds, with similar checks in place, albeit with the lowest threshold raised to \$3,001 (from \$2,001).

## **5. 'We will undertake an ongoing review of the suitability of our products or services'**

### **5.1. *Are the factors set out in the Code relating to the ongoing suitability assessment of BNPL Products and Services (Suitability Assessment) effective?***

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<sup>45</sup> Ibid, 11.4.

<sup>46</sup> Ibid, 11.5.

<sup>47</sup> Ibid, 11.6.

<sup>48</sup> Ibid, 11.10.

- 5.1.1. The Suitability Assessment provides the overarching framework for the ongoing suitability assessment of BNPL products, setting high level commitments and providing concrete examples of data that could be used. The effectiveness of this assessment is evident in the low levels of hardship in the BNPL sector generally – just 0.39 per cent of customers were in hardship in Q2 2022 (see paragraph 4.2 in Appendix A)
- 5.1.2. The Suitability Assessment commits Code signatories to ensuring their products meet customer needs 'on an ongoing basis',<sup>49</sup> by monitoring their products and how customers and merchants are using them and taking 'reasonable steps and processes' that lead to appropriate distribution of their products.<sup>50</sup>
- 5.1.3. It lists a range of concrete data series that a Code signatory may consider as part of monitoring, including complaints data, hardship data, consumer behaviour and feedback, and external feedback (e.g. from AFCA).

**5.2. *Are there limitations to how these factors are applied in practice which impact the effectiveness of the suitability review?***

- 5.2.1. There are no limitations, with Code signatories able to apply the Suitability Assessment in a manner that is suitable to their customers, e.g. transactions level, and their business models. This approach is appropriate given the different business models across the market and the changing expectations and needs of customers.

**6. 'We will deal fairly with complaints'**

**6.1. *Are the internal dispute resolution procedures that Code Compliant Members must follow for complaints sufficiently clear and effective?***

- 6.1.1. The complaint handling provisions in clause 13 of the BNPL Code incorporates existing regulatory practices, augmenting them with additional measures to ensure positive complaint resolution. It commits Code signatories to complying by 'the same ASIC standards and requirements that Australian Financial Service Licensee holders must comply with', except where there is a 'promise to improve on those standards and requirements',<sup>51</sup> indicating that the regulatory standard is treated as a baseline for customer outcomes.
- 6.1.2. Code signatories are required to be members of the AFCA<sup>52</sup> and refer complainants to AFCA when delivering a response to a complaint.<sup>53</sup> Furthermore, under the BNPL Code a person (which under the Terms of Reference can include a customer, an external stakeholder or another code signatory) can report an alleged breach of the Code to the CCC. In this instance, where it has been resolved by AFCA, they are able allege a breach of the BNPL Code as it may relate generally to the issue of concern. Code

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<sup>49</sup> Ibid, 12.1.

<sup>50</sup> Ibid, 12.2.

<sup>51</sup> Ibid, 13.2.

<sup>52</sup> Ibid, 13.9.

<sup>53</sup> Ibid, 13.5 (b), (c).

signatories commit to co-operating with the CCC<sup>54</sup>, which has 'access to relevant records to carry out its task' and 'the right to seek additional information and explanation'.<sup>55</sup>

**6.2. 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?'**

- 6.2.1. As noted in paragraphs 3.3 and 3.4 of Appendix A, there are very few EDR complaints relative to the number of IDR complaints, indicating that most complaints are dealt with acceptably to customers through the IDR process.
- 6.2.2. In Q2 of 2022 there were 0.18 IDR complaints per hundred active accounts, compared with just 0.005 EDR complaints per hundred active accounts. This is typical of the life of the BNPL Code to date, with around 42 IDR complaints for every EDR complaint, on average.
- 6.2.3. BNPL providers are well placed to assist customers in resolving complaints pertaining to vendors. Vendor agreements may contain requirements to address customer complaints, and hence BNPL customers are in a position of greater leverage in the case of a dispute than customers who pay with other forms of finance.

**6.3. Is the ability for consumers to take complaints to AFCA clear and effective in practice?**

- 6.3.1. Code signatories provide information about contacting AFCA via multiple methods, including complaint handling policies, websites, apps, as part of the complaint handling procedures, to customers in writing prior to the product commencing and in customer default notices.

**6.4. Is the ability to take alleged breaches to the Code Compliance Committee ('CCC') clear to customers?**

- 6.4.1. Code signatories provides information about contacting the CCC via multiple methods, including complaints handling policies, websites, apps, and to customers in writing prior to the customer loan commencing.

**6.5. Is there a sufficiently clear distinction between the matters that AFCA and the CCC will deal with?**

- 6.5.1. The Code clearly sets out the distinction between AFCA and the CCC in the complaint handling process for BNPL products covered by the BNPL Code. It establishes the order in which a complaint progresses from IDR to EDR and potential review by the CCC:

13.14 *If you have a specific complaint about us, you should first talk to us, and then AFCA (if necessary). The CCC will not consider your Complaint if you are still trying to resolve it with us, or within AFCA.*

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<sup>54</sup> Ibid, 13.17.

<sup>55</sup> Ibid, 13.16.

6.5.2. AFIA notes that we received feedback from AFCA during the recent review of the Online Small Business Lenders Code of Practice that changes could be made to better clarify the role of AFCA and the CCC, which have been made with the latest version of this code.

## **7. 'We will offer financial hardship assistance'**

### **7.1. *Are the provisions relating to customers experiencing financial difficulty adequate?***

7.1.1. The provisions set out in clauses 14.2 to 14.15 of the BNPL Code relate to treatment of customers experiencing financial difficulty. They commit Code signatories to treating customers with 'sensitivity, respect and compassion', including through 'specific training' for staff on a range of causes of vulnerability.<sup>56</sup> The Code seeks to ensure communication is available<sup>57</sup> and helpful for customers experiencing financial difficulty.<sup>58</sup>

7.1.2. The provisions also set out a clear timeline for hardship request evaluation<sup>59</sup> and the ability for customers to nominate a representative to communicate on their behalf<sup>60</sup> (for example, if the customer is vulnerable and has difficulty communicating with the BNPL provider).

7.1.3. The Code provides guarantees to the customer while their request is being evaluated, that no collection activities, late fees<sup>61</sup>, or default reports to credit reporting agencies<sup>62</sup> will occur. If the BNPL Code signatories grants the request for financial hardship assistance, they commit to retaining the customer and not referring them to a 'third-party debt collection agency',<sup>63</sup> as well as waiving late fees while the customer meets the agreed conditions.<sup>64</sup>

7.1.4. If the debt is referred to an agent, the BNPL Code signatory commits to the Australian Competition and Consumer Commission's (ACCC's) and ASIC's debt collection guidelines, as well as the Federal Code of Operation: Recovery of Debts.<sup>65</sup> Furthermore, Code signatories agree to 'never initiate bankruptcy proceedings' against their customers, nor allow agents to do so,<sup>66</sup> providing protection against very negative outcomes if a customer is completely unable to make repayments.

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<sup>56</sup> Ibid, 14.2.

<sup>57</sup> Ibid, 14.3, 14.5.

<sup>58</sup> Ibid, 14.4.

<sup>59</sup> Ibid, 14.6, 14.7.

<sup>60</sup> Ibid, 14.9.

<sup>61</sup> Ibid, 14.10.

<sup>62</sup> Ibid, 14.12.

<sup>63</sup> Ibid, 14.2.

<sup>64</sup> Ibid, 14.14 (b).

<sup>65</sup> Ibid, 14.16.

<sup>66</sup> Ibid, 14.17.

## **8. 'We will comply with our legal and industry obligations'**

### **8.1. *Are the provisions relating to compliance with legal and industry obligations sufficiently clear, noting that different BNPL providers may be subject to different obligations?***

8.1.1. AFIA believes that industry codes are not expected to replicate legal obligations, and this view is reinforced by regulatory guidance from ASIC and the ACCC. However, industry codes can do good work by explaining how customers can expect to be treated by code signatories, including with respect to legal obligations. The BNPL Code commits Code signatories complying with 'their obligations under the law and this Code'.<sup>67</sup> Therefore, we believe that the BNPL Code is sufficiently clear as it relates to the offer and distribution of BNPL products. BNPL providers may have different business models and adhere to different legal obligations because they may also offer other products, but it is important that all BNPL providers are subject to the same legal and industry frameworks with regards to their BNPL products. Importantly, proportionate, scalable, and targeted regulation does not equate to the same obligations – this principle is inherent in the BNPL Code and ensures that the commitments make sense for customers and BNPL providers, where BNPL products are very different.

### **8.2. *Are the provisions relating to the protection of personal information, disclosure, and privacy adequate?***

8.2.1. The BNPL Code contains provisions that commit Code signatories to protecting customer information and privacy in accordance with their legal and industry obligations. Code signatories must treat 'personal and financial information in accordance with [their] Privacy Policy' and 'take reasonable steps to protect ... personal and financial information from misuse or loss, and from unauthorised access, modification or disclosure'.<sup>68</sup>

8.2.2. Furthermore, it acknowledges the continually evolving landscape of cyber threats and the necessity for data holders to adapt to new threats, as Code signatories must 'regularly review the security and reliability of [their] services'.<sup>69</sup>

## **9. 'We will support and promote this Code'**

### **9.1. *Overall, is there an adequate level of awareness of the Code including how it applies and the protections it offers?***

9.1.1. AFIA notes that Code signatories promote the BNPL Code to their customers as per their obligations under the BNPL Code, including referring to the AFIA code website, which includes useful consumer-friendly information about the BNPL Code, additional information, such as BNPL fees, and the role of the CCC.<sup>70</sup>

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<sup>67</sup> Ibid, 15.1.

<sup>68</sup> Ibid, 15.2 (b), 15.3.

<sup>69</sup> Ibid, 15.3.

<sup>70</sup> Ibid, 16.1.

9.1.2. There has been a high level of media attention on the BNPL Code. The AFIA CEO has conducted substantial outreach about the BNPL Code. As with all industry codes, additional promotional activities will always benefit, and AFIA is open to suggestions about how to raise awareness of the BNPL Code.

**9.2. *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?***

9.2.1. AFIA is not aware that there is a benchmark for industry code awareness against which the BNPL Code could be measured. AFIA is open to further discussions about how to raise awareness of the BNPL Code.

**9.3. *Is there adequate awareness of the BNPL CCC and its role?***

9.3.1. AFIA notes that Code signatories promote the BNPL Code to their customers, including referring to the AFIA code website, which includes useful consumer-friendly information about the BNPL Code, additional information, such as BNPL fees, and the role of the CCC. AFIA is open to further discussions about how to raise awareness of the CCC.

**Other issues**

**10. Protections offered by the Code compared with Credit Legislation**

**10.1. *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?***

10.1.1. The Code requires Code signatories to conduct a Suitability Assessment, which uses the language of the Design and Distribution Obligation (DDO), rather than the language of the Responsible Lending Obligation (RLO) contained in the Credit Act. The Code also requires Code signatories to have financial hardship assistance programs and be members of AFCA.

10.1.2. AFIA is making a submission on the Government's consultation on the future of BNPL regulation. We would be happy to provide our submission.

**10.2. *Are there additional consumer protections under the NCCP which should be afforded under the Code?***

10.2.1. AFIA is making a submission on the Government's consultation on the future of BNPL regulation. We would be happy to provide our submission.

**11. Monitoring and enforcing compliance with the Code**

**11.1. *How effective are the mechanisms in place to monitor and ensure compliance with the Code?***

11.1.1. AFIA believes that the mechanisms in place are effective and adequate. AFIA is open to further discussions about how to ensure the functions of the CCC continue to reflect best practices.



**11.2. *Are the sanctions and actions that the Code Compliance Committee may take in response to an alleged or confirmed breach of the Code adequate?***

11.2.1. AFIA believes that the sanctions and actions available for the CCC are effective and appropriate. The remedies available cover a range of actions. Furthermore, the CCC has an ability to escalate to the AFIA Board where there has been serious, egregious or systemic compliance failure. This AFIA Constitution and Member Protocol gives the AFIA Board the power to cease membership and publicise this action. AFIA is open to further discussions about how to ensure the functions of the CCC continue to reflect best practices.

**11.3. *Is the reporting relating to compliance with the Code, complaints, and breaches sufficient?***

11.3.1. AFIA has received feedback from Code signatories that they believe the accreditation and re-accreditation processes are thorough in assessing processes and governance procedures to understand their ability to comply with the BNPL Code. The Code provides avenues for customers to report non-compliance through complaint handling procedures. It also provides members the opportunity to self-report non-compliance. These mechanisms are adequate in the framework of an industry self-regulation model. AFIA is open to further discussions about how to ensure the functions of the CCC continue to reflect best practices, such as whether re-accreditation processes could specifically investigate specific emerging issues as part of this process, in addition to existing requirements.

**12. *Standards for Merchants and Retail partners***

**12.1. *Are the minimum standards for merchants and retail partners appropriate and are they being monitored effectively in practice?***

12.1.1. AFIA has received feedback from Code signatories that they believe minimum standards are appropriate and being monitored through various processes and governance structures.

**13. *Performance and Content of the Code***

**13.1. *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?***

13.1.1. AFIA's BNPL Code of Practice was world-first and introduced best practices for the BNPL sector, not just in Australia, but overseas as well. Regulators in the United Kingdom and New Zealand are introducing additional regulation which reflects the standards and practices in the BNPL Code. We believe not only has the BNPL Code been effective in lifting consumer safeguards in Australia, it is also influencing best practices around the world.

**13.2. *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?***

13.2.1. AFIA believes that the provisions in the BNPL Code largely remain relevant and appropriate. However, we also believe that further work can be done to reinforce the BNPL Code through a co-regulatory

framework. AFIA is making a submission on the Government's consultation on the future of BNPL regulation. We would be happy to provide our submission.

**13.3. *Are there any additional commitments, or apparent gaps in coverage, that should be considered for inclusion within the Code?***

13.3.1. While the BNPL Code covers around 90 per cent of the BNPL sector, AFIA is conscious that not all BNPL providers are Code signatories. Some BNPL providers are banks and are covered by the Australian Banking Association's Banking Code of Practice. Other BNPL providers are very small and/or specialised in Australia. AFIA is in discussion with a number of BNPL providers regarding being a Code signatory.

**13.4. *Are there any industry developments which have not been appropriately considered within the Code?***

13.4.1. AFIA notes there are a number of other businesses that are not BNPL products, such as wage advance and instalment payment options.<sup>71</sup>

**14. Accreditation as a Code Compliant Member**

**14.1. *Is the process for accreditation as a Code Compliant Member of the Code transparent, well-understood, effective, and consistently applied?***

14.1.1. As noted above, AFIA is informed by Code signatories that the accreditation process is rigorous. This is confirmed through discussions between the AFIA CEO and the CCC. AFIA is open to further discussions about how to ensure the functions of the CCC continue to reflect best practices and whether additional details about the high-level work of the CCC should be included in its annual report.

**14.2. *Are there opportunities to enhance the accreditation process?***

14.2.1. As noted above, AFIA is informed by Code signatories that the accreditation process is rigorous. This is confirmed through discussions between the AFIA CEO and the CCC. AFIA is open to further discussions about how to ensure the functions of the CCC continue to reflect best practices, particularly accreditation and re-accreditation.

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<sup>71</sup> The latter are like traditional lay-by where the business carries the risk of that the customer will not make the payments.