

29 March 2022

Comment Intake—Statement into BNPL Providers
Consumer Financial Protection Bureau
1700 G Street NW
WASHINGTON DC 20552
Ref: Docket No.: CFPB-2022-0002
Email: BNPLInquiry@cfpb.gov

NOTICE AND REQUEST FOR COMMENT REGARDING THE CFPB'S INQUIRY INTO BUY NOW PAY LATER (BNPL) PROVIDERS

The Australian Finance Industry Association (AFIA) welcomes the opportunity to provide a submission to the Notice and Request for Comment Regarding the Consumer Financial Protection Bureau's inquiry into BNPL providers released on 24 January 2022. We apologise for the slight delay in providing this submission.

AFIA is a leading advocate for the Australian financial services industry. We support our members to finance Australia's future. We believe that our industry can best support Australia's economy by promoting choice in and access to consumer and business finance, driving competition and innovation in financial services, and supporting greater financial, and therefore social, participation across our community.

AFIA represents over 135 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial innovation in consumer finance.

AFIA's members are the providers of the majority of BNPL transactions in Australia.

THE AFIA BUY NOW PAY LATER CODE OF PRACTICE

AFIA published the world-first [Buy Now Pay Later Code of Practice](#) (BNPL Code) on 1 March 2021. The BNPL providers accredited to this Code represent approximately 95 percent of the BNPL market in Australia. A number of the signatories have operations in multiple jurisdictions, including the United States of America.

The BNPL Code was recently updated following a year of operation onto make it explicit that so-called online payday lending and wage advance activities are not BNPL products or services for the purposes of the Code, even if they are marketed or described as a BNPL product or service.

This change demonstrates the BNPL sector's commitment to ensuring the Code sets the highest standards and consumer protections and applies relevantly to the nature of BNPL products and services, which are used to make a payment for goods or services, not for other purposes or to gain early access to wages for any reason.

The BNPL Code is a leading initiative in the BNPL sector and has been designed as a dynamic framework to enable the BNPL sector to take a proactive approach to dealing with and capturing industry and other developments as well as increasing consumer protections.

It is important to highlight that the BNPL Code goes above and beyond existing legislative requirements in Australia. It sets best practice standards for the sector and strengthens protections for customers, while preserving customer choice to make purchases and payments in a way that suits their needs and preferences.

More information about the BNPL Code is set out in the attachment to this letter and is available on our [BNPL Code website](#). We would be happy to discuss any aspect of the Code in more detail if this would assist your inquiry and supplement details provided directly to you from some BNPL providers.

OUR SUBMISSION

AFIA believes that legal and regulatory frameworks should be enhanced and modernised to remain agile, with the flexibility to continue evolving as markets and customer expectations do.

AFIA also supports regulation that is proportionate, scalable, and targeted. We believe that the role of government is to provide strategic direction to ensure regulatory oversight of the payments ecosystem is fit for the future, evidence-based, and is flexible to respond to new and emerging products. This will ensure that self-regulation remains an important part of the framework.

AFIA recognises there are significant changes taking place around the world with the increasing digitisation of financial services. In this operating environment, it is critical to put customer expectations at the centre of the design of frameworks, so there continues to be simple, transparent, low-cost, and integrated options for finance. This will make it easy for customers and deliver benefits to the economy, while maintaining consumer safeguards and promoting competition and innovation.

The BNPL sector is an example of innovation across the value chain, giving customers and retailers greater benefits and choice in the way payments are made. The BNPL Code is an example of an industry sector taking proactive, targeted action to supplement existing regulation by introducing standards suitable for the nature of the product and customer expectations.

The BNPL Code reflects components of financial services, credit, and payments regulation and adds further consumer safeguards relevant for the way it is accessed and used by customers.

AFIA understands that it is a matter for the US Government to determine whether the application of a statutory regulatory regime is a necessary outcome of this inquiry. However, we believe another option is to take a phased approach to the introduction of standards and requirements that apply to BNPL providers. This approach is consistent with Australia where the Federal Government is seeking to balance customer choice, customer safeguards, and competition and innovation in financial services and payments. This approach would also allow for the development and introduction of new products and services in manner that ensures consumers are appropriately protected, while providing customers with simple technology to integrate their purchases, manage their payments, and budget their money in a more holistic manner.

The growth and diversity of the BNPL sector enhances consumer choice to use a product or service that suits their needs and preferences. The BNPL sector itself is diverse – there is a broad range of business models so customers wanting a BNPL option can choose the right one for them depending on their payment preferences, the type of purchase and their circumstances.

PENDING CONSULTATION IN AUSTRALIA

AFIA takes this opportunity to note the statement in your news item dated 12 January 2022 by Ashwin Vasan titled 'Our public inquiry on buy now, pay later' that "*in late October, the Reserve Bank of Australia said that BNPL firms will no longer be able to bar merchants from passing on surcharges for their services.*"

It is worth clarifying that the Reserve Bank of Australia is not the decision-maker on this matter, but has made a recommendation to the Federal Government to this effect. The surcharging regime in Australia differs from approaches to payments regulation adopted in other countries.

The Treasurer, the Hon Josh Frydenberg MP, has indicated that surcharging will be considered as part of a broader review of the operation of the payments system in Australia, which is a policy debate not just relevant for the BNPL sector, but other payments products.

This consultation is yet to commence. It remains the case that BNPL providers in Australia continue to preclude retailers from passing on the merchant fee to a consumer. We believe this is particularly important because it would be unfair for consumers to have to cover the costs that are a retailer benefit, with additional services, tools, and customer management offered by BNPL providers to their merchants and retail partners.

CLOSING REMARKS

AFIA looks forward to working with the CFPB and contributing further information and data to support the creation of policy and regulatory settings that keep pace with evolving industry developments and customer expectations, strengthening economic recovery, and supporting the shift to a digitised economy.

We hope our submission assists the CFPB with its consideration of the most practical and effective model for regulation of BNPL in the United States. I would welcome the opportunity to provide further information about the BNPL Code if that would be helpful. If you would like to discuss our feedback further or require any additional information, please contact me at diane.tate@afia.asn.au or Tracey Lyons, Director, Industry Standards at tracey.lyons@afia.asn.au

Yours sincerely



Diane Tate
Chief Executive Officer

THE AFIA BUY NOW PAY LATER CODE OF PRACTICE

In March 2021, AFIA published the [Buy Now Pay Later Code of Practice](#) (BNPL Code). The BNPL providers accredited to this Code represent approximately 95 percent of the BNPL market in Australia, including Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright and Zip Co. A number of the signatories have operations in multiple jurisdictions, including the United States.

The BNPL Code was recently updated following a year of operation onto make it explicit that so-called online payday lending and wage advance activities are not BNPL products or services for the purposes of the Code, even if they are marketed or described as a BNPL product or service.

Background to development of the Code

The BNPL Code represents the industry's comprehensive response to concerns of the Australian Parliamentary Senate Select Committee Inquiry on Australia as a Technology and Financial Centre, consumer advocates, and key regulators in Australia including the Australian Securities and Investments Commission (ASIC) about regulation of the BNPL sector.

The BNPL Code has been developed in response to recommendations in ASIC's Report 600 and by the Senate Economics Reference Committee. The Senate Inquiry's September 2020 interim report also recommended that the Australian Government support initiatives where self-regulation can be utilised appropriately and highlighted the BNPL Code as a clear example of industry working constructively together to respond to stakeholder concerns.

The Code was subject to an extensive consultation process to ensure that insights from the broad spectrum of stakeholders were included. Key stakeholders including Federal and State government politicians, policymakers, regulatory agencies, ombudspersons, and consumer groups were closely consulted in the development of the Code and continue to be highly engaged in its ongoing operation and effectiveness. Given the emerging nature of the industry and community expectations, AFIA welcomes this collaborative approach to the evolution of the Code.

The Code will be fully reviewed on a regular basis, but in any event not later than two years after commencement, and then at least every three years after that. As noted, we recently amended the definition of BNPL to ensure that it clearly did not cover online payday lending or wage advance products. These products have very different target markets and consumer risks.

The Code is customer-centric

The BNPL Code is a leading initiative in the BNPL sector and has been designed as a dynamic framework to enable the BNPL sector to take a proactive approach to dealing with and capturing industry and other developments as well as increasing consumer protections.

The BNPL Code has been voluntarily developed and is intended to assist AFIA members who are signatories to the Code 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 sector
- (c) support compliance with legal, regulatory, and industry obligations.

It is important to highlight that the BNPL Code goes above and beyond legislative requirements in Australia. It sets best practice standards for the BNPL sector and strengthens protections for customers, while preserving customer choice to make purchases and payments in a way that suits their needs and preferences.

The BNPL Code requires code compliant BNPL providers to take a responsible approach to the provision of their products and services through nine key commitments. These are:

- focussing on customers
- acting fairly, honestly and ethically
- keeping customers informed about products and services
- making sure the product or service is suitable for the customer, including upfront assessment and existing customer assessment processes
- ongoing review of the suitability of products or services
- dealing fairly with complaints
- offering financial hardship assistance
- complying with legal and industry obligations
- supporting and promoting the Code.

BNPL providers are regulated

Contrary to much public commentary, BNPL providers in Australia are required to meet multiple legal and regulatory obligations, and have oversight from ASIC, the Australian Competition and Consumer Commission, the Australian Transaction Reports and Analysis Centre (which enforces the anti-money laundering regime, among other things), the Office of the Australian Information Commissioner, and the courts. This regulatory oversight includes ASIC's broad product intervention power and the product design and distribution obligations in Chapter 7 of the Australian *Corporations Act 2001*. The BNPL Code proactively included commitments reflecting the design and distribution obligations in the law before they became effective for BNPL and other financial services providers on 5 October 2021.

The Code provides consumer protection

The growth and diversity of the BNPL sector enhances consumer choice to use a product or service that suits their needs and preferences. The sector itself is diverse – there is a broad range of business models so customers, who want to use a BNPL product or service, can choose the right one for them, depending on their payment preferences, the purchase type and their circumstances.

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.

All code compliant BNPL providers conduct upfront assessments on customers, prior to providing a product or service, to assess if the product will be suitable for them as a customer. It is also mandatory for these providers to have robust internal dispute resolution processes and to be members of the Australian Financial Complaints Authority, which is the external dispute resolution scheme for consumers who are unable to resolve complaints with member financial services organisations.

To support and protect their customers, all code compliant BNPL providers have caps on late fees, and conduct 'in life' checks to ensure the product or service remains suitable for them as customers. The Code also requires providers to be proactive in offering hardship assistance for customers in financial difficulty.

The Code requires BNPL providers to keep customers properly informed about the product or service

Under the BNPL Code, code compliant BNPL providers commit to keep customers properly informed about the product or service. To help customers stay in control and make informed decisions about products, services and repayments:

- (a) Terms and conditions will be fair, clear and transparent and written in plain language.
- (b) There is information about features and fees of different BNPL Products and Services on the AFIA website.
- (c) Prior to becoming a customer, applicants receive clear and prominent information about:
 - (i) Scheduled repayments obligations; and
 - (ii) The fees charged, including the fee amounts or how they will be charged.
- (d) Providers will send relevant and useful reminders about repayment obligations.
- (e) Through a provider' electronic platforms, a customer can access their statement and see each purchase and the total outstanding balance of purchases.
- (f) If a customer misses a payment:
 - (i) The provider will contact them before commencing to charge late fees; or
 - (ii) If the provider does not contact the customer in accordance with sub-clause (i), they will reverse any late fees charged if the customer makes a catch-up payment within 2 days of the missed payment.
- (g) If a late fee is charged, it will be fair, reasonable, and capped.
- (h) Customers will receive at least 40 days' notice in writing before introducing new fees or increasing existing fees.
- (i) Providers will provide notice as soon as is reasonably possible (and give at least 30 days' notice) when they make any other material changes to terms and conditions.
- (j) Contact details will be available on websites and electronic forms.

In addition, code compliant BNPL providers have committed to ensuring that advertising and promotional material is clear and not misleading or deceptive. Furthermore, terms and conditions will be distinguishable from marketing material and code compliant BNPL providers will comply (where relevant) with ASIC's best practice guidance on advertising.

The Code requires providers to assess the suitability of their product or service for a customer

Assessing the suitability of a BNPL product or service is an important part of the customer onboarding process. In Australia, code compliant BNPL providers assess all new customers to ensure the product or service will be suitable, prior to providing it to a customer. Importantly, they ensure that affordability assessments are tailored, proportionate, and relate to the complexity of the product or service.

Under the BNPL Code, code compliant BNPL providers commit to ensuring that their products and services are suitable for customers and will assess all new customers prior to providing a product or service. This process includes but is not limited to identifying and verifying the customer in accordance with AML laws, being reasonably satisfied the customer is not a vulnerable customer as per ASIC's description of customer vulnerability¹, the customer meets the suitability assessment criteria, is able to make the initial payment, and the repayment term is determined as suitable and consistent with the provider's internal risk management processes.

¹ Australian Securities and Investments Commission (2019) ASIC Corporate Plan 2019-2023

For existing customers, code compliant BNPL providers assess all new transaction amounts to ensure that the product or service remains suitable to the customer prior to providing the new transaction amount. In addition, no additional product or service or increased transaction amount will be provided to a customer who is behind in payments.

More detailed information about the customer assessment process is set out in Section 11 of the BNPL Code.

The Code promotes compliance that keeps pace with the law and looks for opportunities for continued evolution of best practice

Within the AFIA BNPL Code, critically, there is a robust governance framework to support compliance with the BNPL Code and a range of sanctions that can be applied to a member that breaches its obligations under the Code.

The BNPL Code Compliance Committee (BNPL CCC) is an independent body that has been established by AFIA to monitor and investigate compliance by code compliant BNPL providers within the Code. The members of the BNPL CCC are appointed by the AFIA Board and each member must be an independent person with relevant experience at a senior level in finance, regulation, retail, or the community in Australia.

The BNPL CCC can conduct enquiries and audits of a code compliant BNPL provider's compliance with the Code and can investigate code compliance in response to an allegation from any person who alleges that a code compliant BNPL provider has or may have breached the Code.

If the BNPL CCC determines that a code compliant BNPL provider has breached a Code, the CCC and the relevant BNPL provider may agree on any corrective measures and timeframes for implementing them. The BNPL CCC can also impose sanctions on members including requiring the member to undertake a commercially reasonable rectification process, requiring a compliance review of remedial actions, issuing a formal warning, requiring a code compliance audit, publicising the non-compliance on AFIA's website and periodic reports, issuing a media release about the non-compliance, reporting the alleged breach to a regulatory body, suspending the member's code accreditation and/or recommending to the AFIA Board that the membership of AFIA be reviewed, suspended or terminated.

Some or all of the above sanctions in any code adopted in the United States would likely be of significant deterrence value in addressing compliance issues and will create confidence that a code provides substantive consumer protections and produces meaningful outcomes.

More information about the BNPL CCC, including its role and the actions it can take, is set out in the [Terms of Reference](#).

The Code requires BNPL providers to assist customers suffering financial hardship

In relation to financial hardship assistance, code compliant BNPL providers have given commitments to:

- (a) Treat customers fairly, respectfully and consider their specific circumstances if they are experiencing financial difficulty
- (b) Train staff to treat diverse and vulnerable customers with sensitivity, respect and compassion. This includes specific training to identify signs of vulnerability, such as where there may be

- mental health or domestic and family violence concerns, and training for staff who regularly assist customers from diverse cultural backgrounds including First Nations people
- (c) Make sure customers understand they can ask for financial hardship assistance for example, by including information on how to request hardship and who to contact on websites and /or digital platforms
 - (d) Discuss the situation and the options available to help customers, which may include negotiating a new repayment arrangement
 - (e) Be responsive to hardship requests and inform customers of the outcome, including providing reasons if a request is denied
 - (f) Provide contact information for financial support services such as the National Debt Helpline
 - (g) Work with a representative (such as, a family member or friend, a financial or legal representative, or a financial counsellor) if the customer prefers
 - (h) Not continue normal collection activity while considering how to help a customer. Late fees will also be frozen during this time
 - (i) Consider whether payment methods (ie. use of a credit card) remains an appropriate
 - (j) Not list a default on a customer's credit reference file while requests for hardship assistance are being considered
 - (k) Not refer a customer to a third-party debt collection agency if a financial hardship arrangement is entered
 - (l) Not charge additional late fees while the customer is meeting the conditions of the financial hardship arrangement
 - (m) Comply with the Australian guidance such as the ACCC and ASIC's *Debt Collection Guideline: For collectors and creditors* and the *Code of Operation: Recovery of Debts*, published by the Australian Federal Government
 - (n) Never initiate bankruptcy proceedings against a customer or allow agents to do so.

The Code sets minimum standards that each BNPL provider requires its merchant and retail partners to meet

Under the Code each code compliant member requires its merchant and retail partners to meet minimum standards. These standards are to:

- (a) Act lawfully, fairly and ethically in their dealings with consumers
- (b) Communicate clearly when dealing with consumers and in marketing and advertising material that relates to BNPL products or services
- (c) Safeguard customer confidentiality
- (d) Respond to customer complaints on a timely basis
- (e) Require that their employees or agents understand the minimum standards and are trained to meet them
- (f) Provide customers with clear and upfront information about the provider's services, fees and charges in a format that is accessible to the customer.

Each code compliant BNPL provider must have monitoring processes and policies in place for their merchant and retail partners to ensure they meet these minimum standards on an ongoing basis.

Code compliant BNPL providers are required to report instances of material non-compliance with their minimum standards (including any proposed consequences) to the BNPL CCC on a quarterly basis.