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Karl Turner

Chief Operating Officer, Executive Director, Policy & Risk Management

Australian Finance Industry Association

Level 11, 130 Pitt Street

Sydney NSW 2000

**By email only: [karl@afia.asn.au](mailto:karl@afia.asn.au)**

Dear Mr Turner

**Consumer's Federation of Australia Joint Consumer Submission: Australian Finance Industry Association (AFIA) Buy Now Pay Later Code of Practice and AFIA Terms of Reference for the BNPL Code Compliance Committee**

Thank you for the opportunity to comment on AFIA’s Draft Buy Now Pay Later (**BNPL**) Code of Practice (**BNPL Code**) and Terms of Reference (**TOR**) for the Code Compliance Committee (**CCC**).

This submission is drafted by Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) on behalf of the Consumers’ Federation of Australia (**CFA**) and its members. The CFA is the peak body for consumer organisations in Australia. CFA:

- represents a diverse range of consumer organisations;
- advocates in the interests of Australian consumers;
- promotes and supports the campaigns and events of its consumer organization members; and
- develops policy on consumer issues.

We provide our submissions below and also in the form of the **enclosed** marked up BNPL Code and Terms of Reference.

We thank you AFIA for providing CFA with a grant to coordinate this submission.

Where we refer to BNPL Code and TOR clause numbers they are the original clause numbers in the draft BNPL Code and TOR. The case studies in this submission have been de-identified and all names changed.

## **Introduction**

BNPL arrangements allow consumers to buy and receive goods and services immediately and pay for those purchases over time.

As AFIA would be aware, the BNPL industry has seen a high level of growth in recent years.<sup>1</sup> As noted in the Australian Securities and Investments Commission’s (**ASIC**) Report 600:<sup>2</sup>

*The number of consumers who used at least one buy now pay later arrangement has increased about five-fold from 400,000 consumers during the 2015–16 financial year to over 2 million consumers during the 2017–18 financial year. This represents about 10% of the adult population in Australia.*

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<sup>1</sup> Australian Securities and Investments Commission (November 2018) ‘Report 600: Review of buy now pay later arrangements’ (**ASIC Report 600**) page 9, [24]-[27]; Roy Morgan, Rapid growth in the use of ‘Buy-Now-Pay-Later’ digital payments – such as Afterpay, zipPay and zipMoney (6 November 2019) Article No. 8190 [https://www.roymorgan.com/~media/files/findings%20pdf/2019/october/8191-buy-now-pay-later-september-2019\\_051119.pdf](https://www.roymorgan.com/~media/files/findings%20pdf/2019/october/8191-buy-now-pay-later-september-2019_051119.pdf)

<sup>2</sup> ASIC Report 600, pg 4.

The surge in consumers' use of BNPL arrangements led to the ASIC's review of BNPL arrangements, to better understand the BNPL industry in 2018. This review is summarised in the ASIC's Report 600 'Review of buy now pay later arrangements'.

The BNPL industry is, and the various available BNPL arrangements are, diverse.<sup>3</sup> There are a multitude of existing BNPL providers, such as AFIA members Afterpay, Brighte, Latitude, Klarna, Openpay, Payright and ZipMoney.

Consumer advocates are concerned that BNPL arrangements are under regulated. Many BNPL arrangements are not regulated by the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and *National Credit Code* (**NCC**). This is particularly concerning in light of the findings that consumers' use of BNPL arrangements may increase spending<sup>4</sup> and over-commitment is a risk.<sup>5</sup> Already in our experience, we have spoken with consumers that have suffered from the provision of unsuitable BNPL arrangements and lack of adequate BNPL regulation. Examples were shared with the Australian Government, as seen by the Senate Economics References Committee's consideration of the BNPL industry in February 2019.<sup>6</sup>

It is not within the scope of these submissions to set out how the NCCPA and NCC ought to be amended to provide for the regulation of BNPL arrangements. Should an opportunity arise to provide submissions on that, we would be eager to contribute.

We appreciate the value that codes can provide to consumers. We are pleased that AFCA's BNPL members are taking steps towards accountability.

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<sup>3</sup> ASIC Report 600, [28]-[33].

<sup>4</sup> ASIC Report 600, [42]-[46].

<sup>5</sup> ASIC Report 600, [47]-[56].

<sup>6</sup> Commonwealth of Australia, Report on 'Credit and financial services targeted at Australians at risk of financial hardship' 22 February 2019, Chapter 5 'Buy now pay later' [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Creditfinancialservices/Report](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report).

## Summary of Recommendations

**BNPL arrangements should be regulated under the NCCPA**

**Until NCCPA regulation is in place, the Code should incorporate NCCPA protections such as responsible lending, hardship arrangements and information and document provision requirements**

**Commitments in the Code should be specific to improve enforceability**

**The Code should do more to protect vulnerable consumers**

**The Code should go further than the obligations under the NCCPA where possible**

**Consumer Law rights should not be impinged by BNPL arrangements**

**The CCC should be an independent body of the BNPL industry**

**BNPL providers should allow retailers/merchants to charge a surcharge**

**All BNPL providers (including non-AFIA members) should be able to sign up to the Code**

*A full list of recommendations is located in the Annexure*

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## 1. The form of BNPL regulation

The need for regulation of BNPL has been recognised by the ASIC and consumer groups.<sup>7</sup> We provide submissions of the form that regulation should take.

It is our submission that BNPL products and services (or “arrangements”) should be regulated by the NCCPA and NCC. BNPL arrangements should be considered credit as defined by the NCCPA and NCC. BNPL providers should hold credit licences.

Some aspects of BNPL arrangements are regulated by legislation, for example, the *Australian Securities and Investments Commission Act 2009 (Cth) (ASIC Act)*.<sup>8</sup> However, a large proportion of the BNPL products and services remain unregulated by the NCCPA. We refer to the ASIC Report 600 and its summary of arrangements that are unregulated by the NCCPA.<sup>9</sup>

We note AFIA’s intention that the BNPL Code will reach ‘above and beyond the law’.<sup>10</sup> We embrace this goal. The goal is in line with ASIC’s Regulatory Guide 183 ‘Approval of financial services sector codes of conduct’, which we discuss below. AFIA’s BNPL members will be better able to reach this goal if consumers are provided with basic protections under the NCCPA, then the BNPL Code can focus on additional commitments.

### **BNPL is ‘credit’**

BNPL arrangements are credit, and should be regulated under the NCCPA. We note that the definitions of credit under the ASIC Act and *Privacy Act 1988* capture BNPL arrangements.

The essential elements of ‘credit’ are that there is:<sup>11</sup>

1. the payment of a debt,
2. owed by the debtor to another, and
3. that payment is deferred.

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<sup>7</sup> ASIC Report 600 at [68]-[72]; Commonwealth of Australia, Report on ‘Credit and financial services targeted at Australians at risk of financial hardship’ 22 February 2019, Chapter 5 ‘Buy now pay later’ [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Creditfinancialservices/Report](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report).

<sup>8</sup> Australian Finance Industry Association (19 December 2019) ‘AFIA releases Draft Buy Now Pay Later Code of Practice for public consultation’.

<sup>9</sup> At [21].

<sup>10</sup> Australian Finance Industry Association (19 December 2019) ‘AFIA releases Draft Buy Now Pay Later Code of Practice for public consultation’.

<sup>11</sup> NCC, s 3.

Similarly, under BNPL arrangements:

1. there is a payment of a debt , being the purchaser’s payment of the purchase price for a product or service under a contract of sale;
2. the purchaser/debtor must pay the purchase price to the BNPL provider for the BNPL to then pay to the goods or services provider; and
3. the payment is deferred, as it is split into several payments that take place over a period of time.

The primary reason that BNPL arrangements do not fall under the current definition of credit in the NCCPA is because there is no interest and the numerous exceptions such as the short term credit and continuing credit contract exemptions. We note these particular exemptions were present in the NCCPA’s predecessor, the *Uniform Consumer Credit Code*<sup>12</sup> and were not intended to apply to BNPL products and services.

The consumer advocate perception is that BNPL providers are exploiting loopholes in the law that avoid regulation under the NCCPA.

### **Why regulation under the NCCPA is important**

In addition to BNPL arrangements being credit, there are three key policy reasons for BNPL providers to be regulated by the NCCPA:

1. Consumer protections,
2. Consistency and competitive neutrality, and
3. Authority of the BNPL Code.

Each is discussed below.

#### ***Consumer protections***

Compliance with the NCCPA is integral to consumer protection in the financial services industry, including the BNPL sector.

Consumers who do business with financial service providers rely on the NCCPA as their basis for protection. There is no other piece of legislation that provides adequate protection for consumers of

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<sup>12</sup> *Consumer Credit Code*, appendix to the *Consumer Credit (Queensland) Act 1994*. We note that the *Uniform Consumer Credit Code* legislation in each state and territory was either a copy of or based on the *Consumer Credit (Queensland) Act 1994*.

credit products. The BNPL Code's introduction of responsible lending obligations and hardship obligations are based on those in the NCCPA, which reinforces the importance of the NCCPA protection.

The ASIC Act's protections for consumers including misleading and deceptive conduct, unconscionable conduct and the implied warranty of services being rendered with due care and skill are important protections. However, they are utilised less than the NCCPA protections. This is because the legal claims are harder to establish. The NCCPA protections have the benefit of being more objective as to whether obligations have been met or not, and require less legal knowledge and argument to make a case. For example whether or not a responsible lending assessment has been made is an objective fact.

ASIC Report 600 stated that 'it may be ... required that BNPL comply with the [NCCPA]' but ASIC has not yet formed a view that this is necessary.<sup>13</sup> However, we note that the purpose of the ASIC Report 600 'was to develop a broad understanding of this industry and to identify potential risks for consumers',<sup>14</sup> and not to consider whether, and not how, BNPL products and services should be captured under the NCCPA. We are awaiting the ASIC's updated report on BNPL arrangements. We note this has been delayed due to ASIC's COVID-19 response.

The need for consumers to be protected in relation to BNPL arrangements was evidenced in the ASIC Report 600. ASIC's report into BNPL found 1 in 6 BNPL customers experienced a negative impact as a result of BNPL spending,<sup>15</sup> and 81% of customers are spending more than they would otherwise be able to afford.<sup>16</sup>

### ***Consistency and competitive neutrality***

It is in the best interests of consumers for all BNPL providers to be subject to the same regulations. We stress the need for consistency in regulation across the consumer credit industry.

Consistency is important because consumers only have to be aware of one set of regulations, instead of multiple sources of regulations. Having multiple sets of regulations with their own rights and obligations applying to consumers and BNPL providers makes it very difficult for consumers to become aware of their rights and obligations. Even with one main piece of legislation, consumers often struggle to understand it and access any remedies. It is also not fair for a consumer to have certain non-contractual legal rights and obligations in relation to a BNPL product being provided by company A, and another

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<sup>13</sup> [72].

<sup>14</sup> [13].

<sup>15</sup> ASIC Report 600, at [49].

<sup>16</sup> ASIC Report 600, at [44].



consumer to have different rights and obligations in relation to a different BNPL product provided by company B.

The importance of a 'single standard and uniform regime for consumer credit regulation' was the first point raised in the second reading speech for the *National Consumer Credit Protection Bill 2009*.<sup>17</sup> There is no good or rational reason for different regimes relating to credit in Australia.<sup>18</sup> One of the key reasons the NCCPA was brought in to replace the Uniform CCC was so that the system would be 'fairer, more consistent and more workable'<sup>19</sup>.

The BNPL providers that will be bound by the BNPL Code will be 'Code Compliant Members' of the AFIA Buy Now Pay Later Providers Group (BNPL Code, cl. 2.1). However, not all BNPL providers, or even BNPL providers who are AFIA members, will be bound by the Code. We understand that there are 7 BNPL providers who are all AFIA members, and almost currently 20 in the market, meaning over half are not members. We understand that the 7 bound BNPL Providers currently represent around 95% of the BNPL market. However, the lack of coverage of the BNPL Code across all BNPL providers is one of the BNPL Code's fundamental flaws.

In the rapidly changing BNPL sector, where new BNPL providers are entering the market there is a risk that new companies may not seek to be bound by the BNPL Code, or may take some time in agreeing to be bound to the BNPL Code. It would be more consistent if there is a standard set of regulations for the industry, covering all providers.

Further, new BNPL providers are taking new approaches in how to deliver their products and services. Some of these new approaches may side-step or confuse obligations. For example, Klarna has partnered with Commonwealth Bank of Australia (**CBA**) to deliver its BNPL arrangements. This joint or shared product or service offering is ripe for consumer confusion in relation to rights and obligations. If both CBA and Klarna are subject to the same basic regulations, consumers have more certainty of what they are entitled to, and obligated to do, and will be more able to self advocate. If there are different regimes for CBA and Klarna, then consumers are likely to be confused as to what they are entitled to from which entity.

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<sup>17</sup> Commonwealth of Australia, Parliamentary debates, House of Representatives, Thursday, 25 June 2009, 7147 (Chris Bowen, MP).

<sup>18</sup> Commonwealth of Australia, Parliamentary debates, House of Representatives, Thursday, 20 August 2009, 8505 (Chris Bowen, MP).

<sup>19</sup> Above n 11.

From the perspective of regulatory bodies, regulation and enforcement would be easier if BNPL products were regulated consistently with other credit products. If the same rules apply, regulatory bodies can more easily regulate consumer credit products.

This is also true for financial counsellors assisting consumers with BNPL. If credit products are consistently regulated, financial counsellors can more efficiently help consumers.

The lack of consistency between BNPL provider's obligations towards consumers can be rectified by the industry being regulated under the NCCPA. Until that happens:

- BNPL providers should commit to abiding by key requirements under the NCCPA (as discussed in this submission); and
- the BNPL Code should at least reflect the NCCPA and go beyond it .

### ***Authority of the BNPL Code***

We submit that under the current suggested regime the BNPL Code lacks authority.

One reason for this is that it is written by a small group of BNPL providers to regulate themselves.

The other key reason is that it is not clear that ASIC has the power to formally approve the BNPL Code.<sup>20</sup> As BNPL providers are not required to hold an Australian Credit Licence, they are not regulated by the ASIC. A consequence of this is that the ASIC does not have the authority to approve the BNPL Code through the normal channels.<sup>21</sup> Again, this could be rectified by BNPL providers being subject to the NCCPA, which we acknowledge requires law reform.

Until the BNPL sector is regulated by the NCCPA it should behave as if it was, and particularly:

- the BNPL Code should comply with ASIC Regulatory Guide 183 'Approval of financial services sector codes of conduct'; and
- AFIA could allow non- AFIA BNPL providers to sign up to the BNPL Code. We note that the Life Insurance Code (owned by the Financial Services Council) includes a provision cl. 2.1(b), allowing for a non-member of the FSC to be a subscriber of the Life Insurance Code. We have marked this up in the BNPL Code, cl. 2.

### **Commercial impact of the NCCPA on BNPL providers**

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<sup>20</sup> ASIC have confirmed this view - [https://www.competitiontribunal.gov.au/\\_\\_data/assets/pdf\\_file/0018/62262/200323-ASICs-Statement.pdf](https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0018/62262/200323-ASICs-Statement.pdf)

<sup>21</sup> *Corporations Act 2001* (Cth), s1101A.

Application of the NCCPA would not disturb the growth of the sector. Certainty in the regulatory framework will assist BNPL providers and investors. Also, the playing field will be evened if all BNPL providers are all subject to the same rules and the reputation of the BNPL sector will be improved by being regulated uniformly.

We note that the COVID-19 crisis has brought to light potential issues with the BNPL business model.<sup>22</sup> Increased regulation, and compliance with that regulation, would bring about reduced bad debt and strengthen the BNPL industry.

We acknowledge that not all banks adopted early versions of the Australian Banking Association's (ABA) Banking Code of Practice.<sup>23</sup> We note that even banks that did not adopt the Banking Code of Practice were required to abide by the NCCPA. The basic protections are in place. Consumers are entitled to the same baseline of behaviour from all lenders. Treating customers well, and providing them with adequate protections and rights, is ultimately good for business.

### **NCCPA and BNPL Code interaction**

As currently drafted, the way that the BNPL Code and the NCCPA interact is disappointing.

The definition of 'Buy Now Pay Later Product or Service' in the BNPL Code, part B cl. 10 states that if a product or service falls under the NCCPA, it will not be subject to the BNPL Code.<sup>24</sup> This exception should be removed. If the intention of the BNPL Code is to reach 'above and beyond' the law, it cannot exclude basic protections under the NCCPA.

The BNPL Code, part A, clauses 7.3 and 7.4 in conjunction with the definition of a 'BNPL Products and Services' are misleading. Clause 7.3 states that the BNPL Code operates alongside and is subject to existing laws and regulations; however, under the definition for 'BNPL Products and Services' in cl. 10, if the NCCPA applies to the product or service the BNPL Code does not apply. What laws and regulations BNPL arrangements are subject to should be explicitly set out. We discuss this in more detail below under heading 12 'Applicable legislation'.

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<sup>22</sup> For example Sydney Morning Herald, Kruger, C. (20 March 2020) 'Afterpay rebounds but cloud lingers over buy now, pay later sector' <https://www.smh.com.au/business/companies/afterpay-rebounds-but-cloud-lingers-over-buy-now-pay-later-sector-20200320-p54c8y.html>; Global Data Financial Services (2 April 2020) 'Buy Now, Pay Later facing hard times with the COVID-19 pandemic' <https://www.verdict.co.uk/electronic-payments-international/comments/buy-now-pay-later-covid-19/>.

<sup>23</sup> Australian Banking Association <https://www.ausbanking.org.au/policy/banking-code/code-signatories/>.

<sup>24</sup> Code, Part B, cl. 10 'Definitions', pg 18.

Clause 3.3 describes the commitments in the BNPL Code to ‘represent the proposed minimum standards’ while clause 3.4 refers to ‘best practice’. These two statements are at odds. ‘Best practice’ is beyond ‘minimum standards’. The BNPL Code should seek to establish best practice.

If BNPL providers were regulated by the NCCPA, the BNPL Code would be able to focus on higher best practice standards.

We note AFIA and BNPL Providers’ intent that the BNPL Code be a code and not an informal self-regulatory arrangement. We note that the ASIC’s Regulatory Guide 183 ‘Approval of financial services sector codes of conduct’ at 183.22 states ‘We consider that effective codes should deliver stronger consumer protection outcomes because ...(c) they set standards that elaborate on, exceed or clarify the law, or in the case of codes approved under s962CA, obviate the need for compliance with a legal requirement’. We note this is reflected in cl. 7.5.

We have marked up suggestions in the BNPL Code to enhance the BNPL Code’s extensions beyond the law.

### **How the NCCPA could be amended to include BNPL products and services**

We do not provide submissions on how the NCCPA should be amended to include BNPL products and services. Should the opportunity arise in the future we would seek to provide submissions on this. In this submission we provide our views on the BNPL Code and CCC TOR.

#### **Recommendations from Section 1:**

1. BNPL providers should commit to abiding by the key requirements under the NCCPA discussed in this submission.
2. The BNPL Code should reflect key consumer protections in the NCCPA and go beyond when possible.
3. The BNPL Code should comply with ASIC Regulatory Guide 183 ‘Approval of financial services sector codes of conduct’.
4. AFIA could allow non- AFIA BNPL providers to sign up to the BNPL Code.
5. The definition of ‘Buy Now Pay Later Product or Service’ in the BNPL Code, part B cl. 10 should be amended to not exclude a product or service that falls under the NCCPA.
6. The BNPL Code should seek to establish best practice.

## 2. Contractual enforceability

It is vital that the BNPL Code is contractually enforceable and we welcome this provision.

This should be strengthened by amending BNPL contract terms and conditions to include a reference to the BNPL Code forming a part of the terms and conditions.

We note that some terms and conditions in existing contracts between BNPL providers and consumers may contain terms that contradict the BNPL Code. A clause needs to be included both in the BNPL Code, and in terms and conditions, that in the case of inconsistency between terms and conditions and the BNPL Code, the BNPL Code prevails.

### Recommendations from Section 2:

7. BNPL contract terms and conditions should state that the BNPL Code forms a part of the terms and conditions.
8. The BNPL Code should state that where there is an inconsistency with the contractual terms and conditions and the BNPL Code, the BNPL Code prevails.

## 3. Review of BNPL Code

Reviews of the BNPL Code after the initial review should be every 3 years. The Board should be required to appoint an independent panel to conduct the review under cl. 8.2.

Other suggestions are marked up in the BNPL Code.

### Recommendations from Section 3:

9. The BNPL Code should be reviewed every 3 years.
10. The review should be conducted by an independent panel appointed by the Board.

## 4. Specificity

The BNPL Code would be improved by increased specificity, for example in relation to time periods and obligations. Specificity would enable consumers to understand their rights, when they have been maintained, and when they have been breached. This will better enable consumers to enforce their rights.

In these submissions and the enclosed marked up BNPL Code we make suggestions on specificity.

**Recommendation from Section 4:**

11. The promises in the BNPL Code should be more specific to increase enforceability.

## 5. Focus on customers

We agree that BNPL products and services should not be provided to persons under the age of 18 years old.

The BNPL Code would be improved by making a general commitment to take extra care with customers experiencing vulnerability, in a similar way to the Banking Code of Practice.

The BNPL Code's only mention of vulnerability is in the area focused on hardship in Part B, cl. 7.1. This section commits to training staff to treat vulnerable customers with sensitivity, respect and compassion in the context of hardship. The section mentions specifically mental health, domestic violence and cultural diversity. However, BNPL customers are much more likely to deal with the merchant's sales staff rather than the BNPL provider directly. The BNPL Code should therefore ensure that merchants and retail partners train their staff in dealing with these issues.

The commitment to vulnerable customers should be expanded.

One aspect of this expansion should be to ensure that vulnerable customers are treated appropriately at every stage of dealing with a BNPL provider. For example, when signing up to the service or product, and when debts are being collected.

Further, what is considered to be a vulnerability should be explored in more detail. We have received contributions from consumer groups who have noted how some vulnerable groups are harmed by BNPL services. A commitment to respecting and taking extra care in cases of such vulnerabilities would ensure that these consumers are treated fairly.

We are also cognisant of not excluding any potentially vulnerable groups. Any restrictions on what makes someone vulnerable ought to be avoided.

There should be a non-exhaustive list of vulnerabilities. We refer you to the Australian Banking Code of Practice and General Insurance Code of Practice, which have adopted non-exhaustive lists of vulnerabilities (extracted below).

Australian Banking Code of Practice	General Insurance Code of Practice
<p>We are committed to taking extra care with customers who are experiencing vulnerability, including:</p> <ul style="list-style-type: none"> <li>a. Age-related impairment;</li> <li>b. Cognitive impairment;</li> <li>c. elder abuse;</li> <li>d. family or domestic violence;</li> <li>e. financial abuse;</li> <li>f. mental illness;</li> <li>g. serious illness; or</li> <li>h. any other personal, or financial, circumstance causing significant detriment.</li> </ul>	<p>91. We are committed to taking extra care with customers who experience vulnerability. We recognise that a person’s vulnerabilities can give rise to unique needs, and that their needs can change over time and in response to particular situations.</p> <p>92. A person’s vulnerability may be due to a range of factors such as:</p> <ul style="list-style-type: none"> <li>a. age;</li> <li>b. disability;</li> <li>c. mental health conditions;</li> <li>d. physical health conditions;</li> <li>e. family violence;</li> <li>f. language barriers;</li> <li>g. literacy barriers;</li> <li>h. cultural background;</li> <li>i. Aboriginal or Torres Strait Islander status;</li> <li>j. remote location; or</li> <li>k. financial distress.</li> </ul>

Part B, cl. 1 should be expanded to include a commitment to take extra care with customers who may be vulnerable, and include a non-exhaustive list of vulnerable factors.

Further, we suggest that the BNPL Code make reference, and BNPL providers commit, to abiding by existing publications concerning best practice in relation to vulnerable consumers.<sup>25</sup> For example, the

<sup>25</sup> <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches/>.

Australian Financial Complaints Authority's (AFCA) approaches to elder abuse and joint facilities and family violence.

We raise specific issues in relation to some of the vulnerabilities below.

### **People in financial hardship**

Consumer advocates are concerned that people in chronic financial hardship are being lured by BNPL arrangements to pay for day-to-day living expenses, which is not sustainable and problematic as NCCPA protections are absent. In our experience, just because the debts may be small amounts does not mean they are not difficult to repay for someone in hardship or someone with little or no income. People can very quickly 'get in over their heads' especially if they open up multiple accounts with different services. We note that BNPL arrangements have become the last resort service that people are using and they can be very conscious of not wanting to make any complaints that may restrict their access to BNPL arrangements.

While credit products including BNPL products and services can assist to smooth the irregularities of income and expenditure, it is not difficult for a person to become caught in, or continue down, a harmful debt spiral.

#### ***Andrea's story***

Andrea is a First Nations person. She is a single mother, and living in Perth with two children currently at home, one of her children has special needs. Andrea was being assisted in relation to other credit products.

In the course of preparing Andrea's statement of financial position for AFCA, Andrea provided CCLSWA with her BNPL provider account that listed a number of recent purchases. Andrea instructed that she uses the BNPL provider to cover expenses for her and her dependent children (such as shopping for school uniforms at Big W, Target etc). Andrea used to rely on small amount credit contracts with pay day lenders, and she instructs that now she avoids the pay day lender and now uses BNPL. Andrea is using BNPL arrangements to fund essential household purchases, and this is not sustainable.

Source: Consumer Credit Legal Service (WA)

#### ***Adam's story***



Adam is a young man with some literacy issues who relies on a support person in his dealings with lawyers. Adam was being assisted in relation to responsible lending claims for a car loan and several personal loans. Adam was struggling to make repayments on his loans. Adam was also liable for a Centrelink debt and child support, which he paid by cash under a private arrangement. Adam has become dependant on BNPL products.

In one particular month, Adam's total repayments for different BNPL arrangements were over \$500. This was unaffordable.

As Adam spiralled further into debt he began to regularly use BNPL arrangements to buy everyday essentials such as groceries and petrol as well as discretionary items like games. He uses BNPL arrangements to buy gift cards and then use these gift cards to buy fuel and groceries. After amassing significant debt on one BNPL service, Adam was too nervous to pursue any claims against the provider for fear that he might lose access to their facilities.

Source: Consumer Credit Legal Service (WA)

### ***Jean's story***

Jean sought assistance because she was overwhelmed by her debts. Jean had a significant home loan, seven credit cards all with high monthly repayments, a personal loan and owed \$5,000 to a BNPL provider.

For several years, Jean had been in and out of work. She had hardship agreements on nearly all of her credit cards and had been denied a hardship request on her personal loan. Despite all of this, she received \$5,000 from a BNPL provider which stacked another debt onto her already very shaky financial situation.

Source: Consumer Credit Legal Service (WA)

### **First Nations Peoples**

Consumer advocates have found that a very high proportion of First Nations Peoples are using or have been exposed to BNPL products and services.

In our experience, people from remote communities are particularly vulnerable to predatory practices from financial firms. Consumer advocates have anecdotal evidence that in these remote communities, BNPL products have been advertised on websites of First Nations Peoples owned companies, and have

been known to use language to make community think they are making the right decision or are choosing the right company.

Cultural differences must also be considered by BNPL providers. For example, some First Nations People may appear to agree to certain arrangements without fully understanding or consenting to the terms of the contract. English is not a first language for some. Notably in the context of hardship, we would argue that there needs to be explicit reference to First Nations People.

### **Non-English speakers**

The BNPL Code should commit to providing interpreters and information in languages other than English to persons for whom English is a second language. This should be both on request or where the BNPL provider becomes aware of the language barrier, such as during a telephone call with a client and a language difficulty is encountered.

### **Family Violence**

Women are predominantly victims of family violence. Family violence often includes financial control. Consumer advocates have found that women who have experienced or are experiencing family violence are very vulnerable. Consumer advocates have assisted clients whose partners have coerced them into creating BNPL accounts for their partner's benefit.

We refer to Hannah's story below. We note that under AFCA's approach to 'Joint facilities and family violence', 'where a customer discloses family violence the financial firm should take this on face value and not require a customer to provide evidence'.<sup>26</sup> If BNPL providers were held to the same standard as this, Hannah would not have had to go through the process of having to prove her family violence, which is rife with issues.

#### ***Hannah's story***

Hannah was in a family violence relationship for many years where she experienced various forms of emotional and financial abuse. Hannah eventually fled to another state. When she decided to leave her ex-partner, he threatened to send exposed pictures of her to her friends and family. After separation, the abuse continued as Hannah's ex-partner had opened various BNPL accounts in her name. She had no knowledge these accounts existed until she was being chased by multiple companies to pay thousands of dollars that were owed on these accounts.

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<sup>26</sup> AFCA 'The AFCA Approach to joint facilities and family violence' Paragraph page 12, p 2.7 <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches/>.

When Hannah presented to RLC, she was stressed and afraid. English was her second language so RLC assisted Hannah to investigate the account and check her credit report. This uncovered more Buy Now, Pay Later accounts in her name that she had never taken out. From the documents obtained from the Buy Now, Pay Later companies, it was clear her ex-partner had fraudulently created the accounts and an email address in Hannah's name.

RLC assisted Hannah to request debt waivers and closure of the accounts. The BNPL companies required Hannah to obtain a police report and send them a copy of this in order for their investigations to move forward. After protracted correspondence between RLC and the BNPL companies, they agreed to waive the debts.

Source: Redfern Legal Centre

#### **Recommendations from Section 5:**

12. Protection to vulnerable customers should be expanded:
  - (a) Part B, cl. 1 should be expanded to include a commitment to take extra care with customers experiencing vulnerability at every stage of their involvement with a BNPL provider;
  - (b) The BNPL Code should ensure that merchants and retail partners train their staff in dealing with vulnerabilities in connection with BNPL arrangements; and
  - (c) What is a 'vulnerability' should be stated in a non-limiting way.

## **6. Fair, honest and ethical**

We agree with the promise to 'act fairly and honesty' and 'be ethical' in cl. 2.

### **Restrictions on use of BNPL for some products**

From an ethical point of view, BNPL providers should avoid providing BNPL arrangements to customers to purchase products and services that a consumer can obtain for free. This is particularly an issue for consumers experiencing financial difficulty.

We acknowledge that it may not be easy for BNPL providers to establish what is for free for every consumer. What may be free for one consumer may not be for another. However, when BNPL providers are considering whether a BNPL arrangement is suitable for consumers – particularly vulnerable consumers - consideration should be given to whether the product or service can be obtained for free.

If a consumer can obtain a product or service for free, then arguably the BNPL product or service is not suitable under the BNPL Code, cl. 1.2(a).

If under existing legislation a consumer cannot use credit, or be offered credit, for a particular purpose, then BNPL products and services should commit to the same restrictions. For example, in the health care industry and in the future, potentially in the gambling industry as discussed below.

### **Health care**

Generally consumers can bulk bill general practitioner doctor visits.

Further, where there are legal restrictions on credit being used to purchase particular products or services, BNPL providers should abide by those restrictions. We note that the Medical Board of Australia issued 'Guidelines for registered medical practitioners who perform cosmetic medical and surgical procedures' in which section 1.4 states:

*12.4 The medical practitioner should not offer financing schemes to patients (other than credit card facilities), either directly or through a third party, such as loans or commercial payment plans, as part of the cosmetic medical or surgical services.<sup>27</sup>*

We suggest that these guidelines show a concern for increased use of BNPL arrangements in medical procedures and health care more broadly. BNPL providers should consider their ethical obligations towards consumers in relation to providing credit for medical procedures. This is of particular concern as there is often a high level of trust between consumers and health care providers, which may lead consumers to unknowingly sign up for BNPL arrangements, or be under-informed when doing so.

Helen's story below illustrates the unfortunate effects of consumers unwittingly using BNPL services for healthcare.

### **Helen's story**

Helen contacted Consumer Action in November 2019 for help with a BNPL debt. Helen was 64 years old at the time. She got a hearing aid from an audiologist and asked them whether they had any payment plans. They said yes and signed her up to a BNPL arrangement.

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<sup>27</sup> Medical Board of Australia 'Information Sheet' 'Cosmetic medical and surgical procedures – guidance on financing schemes', 13 May 2019 from Medical Board of Australia, 'Guidelines for Registered Medical Practitioners who perform cosmetic medical and surgical procedures' (1 October 2016) <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Cosmetic-medical-and-surgical-procedures-guidelines.aspx>.

Helen told Consumer Action she thought she was signing up for a payment plan directly with the audiologist, and says she would never have signed up had she known it was a third party BNPL provider.

Helen says she was never told about the fees or terms of the arrangement when they signed her up. Looking at her bank statements, Helen wondered why she was paying more than she thought each fortnight. When she contacted the BNPL provider, they said it was an administration fee.

There was a problem with Helen's BNPL account. She stated that someone else was using her account to make purchases without her knowledge or consent. She tried to resolve this directly with the BNPL provider but says they were not particularly helpful in resolving the matter. It was only when Helen lodged a complaint with AFCA against the BNPL provider after speaking to Consumer Action that they fixed the problem. She still does not know how this happened.

Source: Consumer Action Law Centre

### ***Gambling***

BNPL providers should commit to not providing BNPL arrangements for gambling. Currently, gambling operators cannot provide credit to consumers, or help them access it.<sup>28</sup> The ABA sought community views on credit cards being used for gambling in December 2019.<sup>29</sup>

Consumer advocates are hopeful that no credit, in any form, will be allowed to be used for gambling in the future.

We are extremely concerned about the impact of providing BNPL arrangements for gambling.

There is a community expectation that financial institutions will protect their customers from financial harm. A prohibition on using BNPL arrangements for gambling would be an effective and practical way to limit harm and meet community expectations.

We note that BNPL providers' promises to protect vulnerable consumers, and not provide unsuitable credit, suggest that they would not provide credit for gambling.

### **Marketing and advertising**

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<sup>28</sup> <https://www.acma.gov.au/offering-or-promoting-credit-gamblers>.

<sup>29</sup> <https://www.ausbanking.org.au/consultation-paper-use-of-credit-cards-for-gambling-transactions/>.

BNPL providers should make sure their advertising and promotional material is ethical. Specifically that it:

- is clear and not misleading or deceptive;
- does not encourage excessive use, misuse or abuse of BNPL Products or Services;
- does not glamourise debt or financial hardship;
- does not encourage irresponsible behaviour; and
- is not targeted at vulnerable groups including by not appealing to vulnerable groups such as depicting minors.

We have added this in cl.3.2(a) of the BNPL Code.

#### **Recommendations from Section 6:**

13. BNPL providers should avoid providing BNPL arrangements to customers to purchase products and services that a consumer can obtain for free.
14. BNPL providers should abide by restrictions on credit being used to purchase particular products and services.
15. BNPL providers should commit to not providing BNPL arrangements for gambling purposes.
16. BNPL advertising and marketing should be ethical.

## **7. Information requirements**

### **General comments**

We note both the importance, and limitations, of information disclosure. Consumers should be fully informed of their rights and obligations under their agreements. However, disclosure alone is not an effective consumer protection tool and shouldn't be the default.<sup>30</sup>

Limitations of disclosure include that:

- when products are complex, it is hard to explain them accurately and simply;
- consumers can be overwhelmed by information and not read or understand information;
- if consumers do not read or understand the disclosed information they may still be treated as if they did; and

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<sup>30</sup> Australian Securities and Investments Commission and the Dutch Authority for the Financial Markets (14 October 2019) 'REP 632 Disclosure: Why it shouldn't be the default' <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

- consumers have varying levels of understanding, needs, decision making styles and processes.

In order to mitigate against these issues, we suggest that:

- the limitations of disclosure be acknowledged;
- disclosure should be tailored, especially when a consumer has a vulnerability; and
- all disclosure should be consumer tested and prominent.

The commitment to provide terms and conditions in plain language is a step in the right direction (cl.3.1(a)). The glossary should be provided in the same document. Consumers should not have to go looking for the glossary to be able to make sense of the terms and conditions.

### **Basic commitments - NCCPA requirements**

Disclosure obligations should at least mirror the NCCPA.

The customer should be able to request copies of the following documents:

- any contract including terms and conditions;<sup>31</sup>
- any related insurance contract;<sup>32</sup>
- any notices the provider has sent to the customer (for example a default notice);<sup>33</sup>
- statements of account for the whole period of the credit contract;<sup>34</sup>
- a payout figure and how it was calculated;<sup>35</sup> and
- assessment of suitability.<sup>36</sup>

If the BNPL arrangement was provided less than 1 year ago, the BNPL provider should provide the consumer with documents within 14 days of the request. If the BNPL arrangement was provided more than 1 year ago, the BNPL provider should provide the consumer with documents within 30 days of the request.<sup>37</sup>

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<sup>31</sup> NCC, s 185 (1)(a).

<sup>32</sup> NCC, s 185 (1)(b).

<sup>33</sup> NCC, 73, 88, 185(1)(c).

<sup>34</sup> NCC, s 36.

<sup>35</sup> NCC, s 83.

<sup>36</sup> NCCPA, s 132.

<sup>37</sup> NCC, s 35, 185.

A BNPL provider should give a consumer a written copy of the suitability assessment within 7 business days of a request if the contract was entered into in the last 2 years, or within 21 days if the contract was entered into more than 2 years ago.<sup>38</sup>

BNPL providers should provide payout figures within 7 days of the request.<sup>39</sup>

Under the NCCPA credit providers should provide consumers with a credit guide as soon as practicable after it becomes apparent to the licensee that the consumer is likely to enter into a credit contract with it.<sup>40</sup> BNPL providers should commit to providing an equivalent document under the BNPL Code. This document would set out:

- the BNPL provider's name and contact details; and
- information about the complaints process including the procedure for resolving disputes with a consumer, including contact details for a consumer to access the provider's internal dispute resolution procedure; and the AFCA scheme; and
- information about the BNPL provider's responsible lending obligations.

We mark up suggestions in the BNPL Code.

Jamie's story below illustrates how having access to the above information is important.

### ***Jaime's story***

Jaime started using a BNPL provider after seeing it advertised online. She was 25 years old and her only source of income was Newstart. Jaime experiences chronic pain on a daily basis, for which she is yet to receive a diagnosis.

Jaime missed a number of BNPL repayments after she mistakenly believed the BNPL would apply a limit. When she could not pay, and missed a few payments she was locked out of her account while the BNPL provider decided whether to send her account to debt collection, and so was unable to understand when and how late fees were being charged.

Jaime saw a financial counsellor and proposed a repayment arrangement, but could not get a written response from the BNPL provider, a statement of account or confirmation of what she had been told verbally i.e. that her account was "on hold" while the Provider considered her proposal.

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<sup>38</sup> NCCPA, s 132(2).

<sup>39</sup> NCC, s 83.

<sup>40</sup> NCCPA, s 126.



Jaime was then contacted by the BNPL provider's debt collectors, who told her that the amount she owed had increased to \$900 and would keep increasing. Jamie could not understand how this could be, given she thought she only had about \$500 of outstanding purchases.

With assistance, Jaime wrote to the BNPL provider, again proposing her repayment arrangement, requesting a statement of account, and flagging a possible dispute about fees. The provider responded, agreeing Jaime could pay the proposed amount, noting that she now owed over \$1,300, and still did not provide any statement of account or confirmation that if she complied with the repayment arrangements, late fees would stop accruing. With assistance, Jaime again wrote to the BNPL provider, insisting on clarification of the details of her account and the repayment arrangement. Finally, the provider produced Jaime's statement of account, and confirmed that it would waive the late fees from the date of her hardship application onwards, bringing her outstanding balance down to \$800. The waiver was conditional on Jaime complying with the repayment arrangement, and the provider noted that if the payment plan was not adhered to, the full balance of over \$1300 (less any payments made) would become due and payable immediately.

Source: Financial Rights Legal Centre

### **Additional commitments - Before an account is established**

With the NCCPA providing the minimum standards, BNPL providers should make additional commitments.

The commitment in the BNPL Code to provide clear and prominent information on repayment obligations before a consumer becoming a customer is good (cl.3.1(b)). We refer to Maeve's story below to show the importance of this. Information on the fees should be provided before a consumer becomes a customer (cl.3.1(c)).

We suggest that information on fees and repayment obligations be included in a fact sheet detailing the BNPL product or service key features and costs. This fact sheet would enable consumers to compare different products and services across BNPL providers. This fact sheet should be available on the BNPL provider's website to the general public and also be provided to the consumer before the time of account sign-up.<sup>41</sup> If the fact sheet is freely available online, it will allow consumers to consider their options and choose the product and service best for them in their own time. The fact sheet should be

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<sup>41</sup> NCCPA, s 133BB.

provided to consumers by retailers and merchants if the consumer is signing up for the product at the store/place of business. We refer to Helen's story

above, which shows that consumers can be unaware that they are signing up for BNPL arrangements. If Helen had received information about the 'payment plan' she would have been able to make an informed decision about whether to use it or not.

We also suggest that the following information be freely available on a BNPL provider's website:

- contact details,
- standard terms and conditions,
- hardship policy and contact details,
- complaints policy and contact details,
- privacy policy, and
- the BNPL Code.

BNPL providers should provide information to their customers on accessing free and independent services that can assist them if they are in financial difficulty. For example, a BNPL provider's hardship page should include information about seeking support from financial counselling services and the National Debt Helpline. This information should be clearly available on BNPL providers' websites.

In light of the use of BNPL products and services on discretionary items, which may lead to an increase in spending, consumers who heavily use BNPL may require assistance with managing their finances.

Also, some BNPL providers market themselves as a budgeting tool. This kind of marketing should stop, as BNPL is not a budgeting tool but a credit product. Information should be provided to customers that financial counsellors can provide assistance with budgeting and are free and impartial.

In line with promises made to vulnerable consumers, where a consumer cannot access the information online, or requests a copy of the information in a different format, it should be provided in that format within 7 days of the request. Michael's story below illustrates the problems with having terms and conditions only available on a company's website or electronically and there being no requirement to provide customers with a copy. As a gentleman who is elderly and has a disability, Michael had no means of accessing a computer and understanding the arrangement he was entering into.

### ***Michael's story***

Michael was 79 years old and diagnosed with dementia when a door to door salesman came to his door and sold him solar panels. Michael entered into a contract to buy the panels for \$14,000. The contract included a finance arrangement with a BNPL provider, fortnightly payments were due for \$140. The salesman made no assessment of Michael's income or ability to pay the loan. He told Michael that the terms and conditions were available on their website but Michael did not own a computer or know how to access one.

Source: Consumer Credit Legal Service (WA)

### ***Maeve's story***

Maeve was on the age pension when she was approved for a \$14,000 loan with a BNPL provider for solar panels. At the time Maeve believed she was signing up for a cheaper loan, approximately \$5,000. That was the amount she had seen advertised on TV for the product.

She was not asked to provide any information about her income before entering into the loan and her pension status was not correctly recorded. Maeve diligently paid back the loan even when she was paying directly from her pension which affected her other living expenses. When she tried to contact the BNPL provider for assistance, she was offered more money which she refused. She was finally referred to the hardship department who asked her to supply a medical certificate, 3 months banking statements, proof of social security, outstanding bills and a certificate to say why she was on the age pension. Maeve was reluctant to supply so much information especially when none of it was required when she initially entered into the loan. It is incongruous that more information is required to assess an application for hardship than it is in the granting of the original credit.

Source: Consumer Credit Legal Service (WA)

### **Additional commitments - Once account is established**

We agree that sending customers reminders of repayment obligations is useful (cl. 3.1(d)). In order for it to be a commitment that BNPL providers can be held accountable for, more detail is needed. We refer to the enclosed marked up BNPL Code.

When consumers sign up they should also be provided with a copy of the BNPL providers key policies, including policies on hardship and enforcement. We understand that some BNPL providers already do that.

As well as repayment reminders being sent, consumers should be able to easily access information of their overall exposure across all purchases.

We agree with cl. 3.1(e) and make some suggestions in the marked up BNPL Code.

We suggest that consumers should be able to make early repayments with no fees attached.

We agree with cl. 3.1(f). The cap or how it is calculated should be stated in the BNPL Code. We suggest that the late fee be capped at the reasonable pre-estimated loss. Also, we suggest that the BNPL sector seek the Australian Competition and Consumer Commission's permission to introduce a cap at \$5 or 10% of the purchase price, whichever is lower.

We agree with cl. 3.1(g) and suggest that it could be improved by greater specificity (see marked up BNPL Code). This time period is fair and improves on the current legal requirements under the NCCPA.

Clause 3.2(d) states that BNPL providers will provide their customers with 'readily available' information within 'an appropriate timeframe'. This is potentially inconsistent with the NCCPA, NCC and *Privacy Act 1988*. Information must be provided even if it is not readily available. There are set timeframes provided in legislation and regulation, so 'an appropriate timeframe' is not suitable. Timeframes under the NCCPA are set out under heading 'Basic commitments - NCCPA requirements' above. Under *Australian Privacy Principle 12.4(a)(i)* relating to access to personal information, information holders must substantively respond to an information request within 30 calendar days. Clause 3.2 could be amended to state that BNPL providers will comply with the NCCPA, *Privacy Act 1988* and any other relevant information request legislation.

In relation to cl. 3.3 communication methods, we suggest that when customers are being told about the location of information on a website or other electronic forum, the BNPL provider should provide the customer with a link to the document. We suggest the situation should be avoided where consumers are trying to find a document by themselves. Where customers have a relevant vulnerability, such as Michael in the story above, the BNPL provider should make appropriate arrangements so that that consumer may access the notice or other information.

We agree with cl. 3.4.

We generally agree with cl. 3.5. We suggest that if a customer requests information on how to close the account it be provided within 7 days. This information should be presented in a simple way, for example flow charts.

We generally agree with cl. 3.6. In addition to this clause, the BNPL Code should state that the customer has a right to pay out the contract and close the account at any time. There should be no termination fee/penalty for early closure. This aligns with NCC, s26 under which a credit provider must accept any payment under a credit contract that is made before it is payable unless the contract prohibits its early payment.

We note that the BNPL Code focuses on the BNPL provider providing information to the consumer. This is undoubtedly important. However, the consumer will need to be able to easily contact the BNPL provider as well. We refer to Jerome's story below. BNPL Providers should provide consumers with their contact details.

### ***Jerome's story***

In 2018 Jerome owed money on his BNPL account but the amount was unknown. He made arrangements for payments to be direct debited from his MasterCard. The first payment was successfully processed, but then Jerome had to cancel his MasterCard because of unrelated unauthorised payments on the card. Jerome tried, unsuccessfully, to contact the BNPL provider, but he could not reach them. There were not sufficient contact details provided on the Provider's website.

A second BNPL payment was processed through Jerome's bank account overdrawing the account. Jerome's bank was unable to explain why the BNPL transaction was processed at all when his MasterCard had been cancelled and there was no authority on file to take payments from Jerome's bank account. Jerome was concerned the BNPL provider would take more funds while he was unable to reach them to change his payment details.

Source: Financial Rights Legal Centre

### ***Zach's story***

Zach tried to use his BNPL account to purchase a product. When he logged in to his BNPL account he realised his account was on hold. He called the BNPL provider immediately and was put through to customer care but they told him they could not advise on the issue.

Zach received an email in response to his call, which referred to a disputed transaction on his account requiring payment for 11 x \$40 transactions in the past year. The BNPL provider stated the credit card used in these transactions had been reported as fraudulent. Zach believed this was an internal issue at the bank or BNPL provider. He later found out that the credit card

details recorded in his account were incorrect. Zach believes this was an error on the part of the BNPL provider. However, the BNPL provider would not provide him with any details on the issue including the bank that reported the credit card as being used fraudulently.

When Zach tried to resolve the issue with the BNPL provider, the agents he spoke to told him they cannot take calls and the only communication is via email and they initiate the emails. Zach was unable to properly communicate with the BNPL provider. Zach did not know how to dispute these transactions with the BNPL provider. The BNPL provider sought to charge Zach a penalty of \$10 per transaction which he does not want to pay.

Source: Consumer Credit Legal Service (WA)

### **Additional commitments - Once account is closed**

We agree with cl. 4.11.

#### **Recommendations from Section 7:**

17. Disclosure should be appropriate, consumer tested and prominent.
18. Disclosure obligations should at least mirror the NCCPA and NCC.
19. Information on fees and repayment obligations be included in a fact sheet detailing the BNPL product or service key features and costs.
20. Contact details, standard terms and conditions, key policies and the BNPL Code should be freely available on a BNPL provider's website.
21. When consumers create an account with a BNPL provider they should be given copies of key policies.
22. Consumers should be able to make early repayments with no fees attached
23. Consumers should be able to pay out a transaction or the contract and close the account at any time with no early termination fees.
24. Late fees be capped, and limited to the reasonable pre-estimated loss.
25. When BNPL providers are telling customers about the location of information on a website or other electronic forum BNPL providers provide the customer with a link to the document.

## 8. Responsible lending

BNPL providers should commit to complying with responsible lending requirements under NCCPA, Chapter 3, Part 3-2 and ASIC Regulatory Guide 209 Credit Licensing: Responsible lending conduct (**RG 209**). RG 209 sets out ASIC's guidance on the responsible lending obligations under NCCPA.

These NCCPA requirements are aimed at informing consumers and stopping them from being sold unsuitable credit contracts.

### Summary of requirements

We have marked up the BNPL Code to incorporate the NCCPA responsible lending requirements.

A summary of the requirements follows.

Essentially, whether a contract is suitable should be assessed. If a contract is unsuitable, it should not be entered into.

A BNPL provider should not:

- say it can provide a BNPL product or service,
- provide a BNPL product or service,
- say it can increase a BNPL product or service, nor
- increase a BNPL product or service,

unless that BNPL provider has made an assessment in the last 90 days of the suitability of the product or service or increase to the product or service (**Assessment**).<sup>42</sup>

In order to make the Assessment, the BNPL provider must make reasonable enquiries about the consumer's requirements and objectives in relation to the BNPL product or service. The BNPL provider must also make reasonable enquiries into the consumer's financial situation, and verify the financial situation.<sup>43</sup> RG 209 provides guidance on what reasonable enquiries and verification means.

RG 209 sets out what is required to assess a consumer's ability to meet all the financial obligations they will commit to in entering into a new credit product (without substantial hardship). At the very least, the information to be considered in assessing suitability under RG 209 is a consumer's income and

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<sup>42</sup> NCCPA, ss 128 and 129.

<sup>43</sup> NCCPA, s 130.

expenditure.<sup>44</sup> RG 209 suggests that credit licensees must consider information about the amount, frequency and sources of income and any reasonably foreseeable changes. In terms of outgoings, a credit provider would need enough information to determine how much of the consumer's income will continue to be needed for outgoings that the consumer is unable or unwilling to reduce or forego.

A BNPL contract should be assessed as unsuitable when:<sup>45</sup>

- the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or
- the contract will not meet the consumer's requirements or objectives.

Some of the small amount credit contract provisions ought to apply to BNPL arrangements. In the context of assessments, a BNPL arrangement should be assessed as unsuitable if in the 90-day period before the time of the assessment, the consumer has been a debtor under two or more other BNPL arrangements or small amount credit contracts.<sup>46</sup>

A BNPL provider should not enter into a BNPL contract, or increase the amount of money available to a consumer under a BNPL contract, if the contract is unsuitable.<sup>47</sup>

A BNPL contract would also be unsuitable when:<sup>48</sup>

- it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship;
- the contract does not meet the consumer's requirements or objectives; or
- a consumer is behind on payments to a BNPL provider at the time of Assessment.

A BNPL contract is unsuitable if in the 90-day period before the contract is entered into or the limit is increased, the consumer has been a debtor under two or more BNPL arrangements or small amount credit contracts.<sup>49</sup>

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<sup>44</sup> *ASIC v The Cash Store (in liquidation)* [2014] FCA 926 referred to in ASIC RG 209 at 209.59.

<sup>45</sup> NCCPA, s 131.

<sup>46</sup> NCCPA, ss 131 (3A)(b).

<sup>47</sup> NCCPA, s 133.

<sup>48</sup> NCCPA, s 133(2).

<sup>49</sup> NCCPA, ss 133 (3A)(b).



### ***Olive's story***

Olive was contacted by a photography company by telephone and was told that she had won a competition and the prize was a photo shoot and photo package. Olive booked with the company to claim her prize.

After the photoshoot, Olive was shown the photos and asked to choose a package. The company then told Olive it would cost \$7,500. Olive told the company that she could not afford it. The company offered to process a finance application with a BNPL provider to pay for it. Olive was only working part time and was confident that her application would not be approved. Olive filled out a piece of paper asking for the name and contact number of her employer and her income, for the purpose of the finance application however she did not sign this or any other document accepting a finance agreement. Olive did sign a tax invoice from the company for her order. The BNPL provider did not make any checks to verify this information. The BNPL provider accepted Olive's application.

Olive went back and forth between the photography company and the BNPL provider to try and get this arrangement cancelled. In this process Olive had to prove her income and the BNPL provider informed her that her application stated her income was \$1000 a week, instead of her actual income of \$1000 per fortnight. The photography company did not have a cooling off period and had a no cancellation policy.

If the BNPL provider had a clear policy of assessing suitability and verifying information, Olive would likely not be in her current situation as her application would not have been approved in the first place.

Olive would also have greater recourse to a remedy if her finance contract was regulated under the NCCPA.

Source: Consumer Credit Legal Service (WA)

### **BNPL Code and NCCPA requirement integration**

We agree with cl. 4.1. Under the BNPL Code, BNPL providers promise to ensure that products or services will be 'suitable' for customers before providing every new 'Transaction Amount'. We suggest that a fresh assessment is made on the suitability of each separate use of a BNPL service or product's

appropriateness. Just as with credit under the NCCPA, an assessment is required for a credit limit increase.<sup>50</sup>

We note that scalability of the assessments under RG 209 would apply to BNPL arrangements, thus what would be considered in each assessment would change depending on the consumer's financial position, repayment history and amount sought.

We agree with the direction of cl. 4.2 -- Vulnerable consumers should be identified and vulnerabilities should be considered in the assessment process. We refer to Hannah's story above. We suggest that if consideration had been given to her requirements and objectives, and had sufficient verification taken place, her partner would not have been able to establish and use a BNPL account in her name.

We note that cl. 4.3 suggests that affordability is a key aspect of suitability. We agree. This is captured in the NCCPA requirements to be included in the BNPL Code.

We strongly support the commitment to verify consumers' identities in cl. 4.4. This might be moved to cl. 1 'Focus on customers'. Again, we refer to Hannah's story above, which if a proper verification of identity had taken place, may have prevented the financial abuse. We also refer to Sally's story below.

### ***Sally's story***

Sally sought assistance about a BNPL account which was set up in her name without her knowledge. She was contacted by a debt collector for the outstanding amount. The BNPL provider would not remove the debt for her and requested that she file a police report to have the matter taken further. The debt collector later informed her that it had made a repayment arrangement with the person who set up the account.

There are now defaults on Sally's credit file and she expects more in the future from this false account. Neither the debt collector nor the BNPL provider provided much assistance. It is important for BNPL providers to perform thorough ID checks when customers create accounts otherwise others may fall into similar situations to Sally.

Source: Consumer Credit Legal Service (WA)

We agree with cl. 4.5 that if a consumer is in arrears, they should not be provided with additional products or services or increases in transaction amounts. If consumers repay arrears, and get 'back on track' with their finances, they could then be reconsidered for BNPL products and services.

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<sup>50</sup> NCCPA, s 118(1).

We understand that BNPL providers have in place a maximum transaction amount. There should also be a limit on the number of transactions a consumer may make. Limiting the number of transactions available to a customer will help to discourage over-reliance on BNPL services, and limit over commitment. Customers will be less likely to make a habit out of using BNPL when it is not truly necessary. Consumers who are new to BNPL products and services should have more restrictions.

As the responsible lending obligations would be imported into the BNPL Code, clauses 4.6 to 4.9 are unnecessary.

The following consumer stories show how not conducting the proper assessment can impact on consumers' lives.

### ***Juliette's story***

Juliette fled a relationship of family violence and has a 12-year-old child with disabilities.

Juliette has three BNPL products totalling \$3,000 which she cannot afford. She used BNPL to purchase essential items for her child. These were accessed whilst the NDIS package was insufficient and being appealed at the Australian Administrative Appeals Tribunal.

When Juliette first met her financial counsellor, she still had a number of other items she needed to purchase and was going to use BNPL to do so. These included a laptop for her child, school uniform, schoolbooks and an air conditioner. Her Financial Counsellor helped her to access philanthropic organisations to access these items without further relying on BNPL.

The three BNPL products increased Juliette's financial hardship. Had the BNPL companies been obliged to complete an assessment before the money was provided, it would have been deemed that all of the contracts were unsuitable.

Source: South Australian Financial Counsellors Association

### ***Liz's story***

Liz applied for a BNPL service in about January 2017 to purchase some goods at Retailer 1. At the time she was only 17, a student and was working one, sometimes two days per week. After having partially paid off the first purchase in May 2017, Liz used the BNPL provider again at Retailer 2's website in order to buy a watch and some other goods which totalled about \$400.

She sought help after she was no longer working because she had been involved in a car accident.

Liz's mother helped to pay some of her BNPL debt, but Liz's mother is also unemployed and can no longer afford to help. The balance owing on Liz's BNPL account is approximately \$280 and she thinks she is attracting \$10 late fees every time she fails to pay. Liz is struggling with several other debts including damages from a car accident and has no capacity to pay off her BNPL debt.

Liz says the application form only asked her for personal details such as name, address and phone number. There were no questions about her employment or income. At the time of applying for a BNPL service she was working one to two shifts at Coles as a casual earning \$100/week.

Source: Financial Rights Legal Centre

### ***Renee's Story***

In late 2017 Renee opened an account with BNPL Provider 1 initially for \$250.

In 2017 she was working as a beauty therapist on a casual basis and earned approximately \$700 per week. She lived with her husband and five dependent children in a private rental and paid \$460 rent per week. She was also paying off her car loan at this time.

Renee took out an NCCPA regulated contract with the same BNPL Provider 1, for \$1,000 in March 2018. She frequently used the accounts in order to purchase items for her job, as well as bedroom furniture for her young children.

Renee also started using BNPL provider 2 in April 2018, initially for \$260 and then a further 57 purchases ranging from \$36 to \$338 at various retailers, including at the butchers. When she came to Financial Rights she had 28 overdue BNPL Provider 2 accounts.

Renee does not recall the BNPL provider requesting copies of any financial information from Renee before approving the credit facility and did not take any steps to assess her capacity to make repayments.

BNPL provider 1 owns and operates a credit check company and after entry into the facility accessed her bank accounts via screen scraping and assessed her credit score.

Renee says that the debt has placed a financial burden on her and that she has been struggling to repay the BNPL providers since she first opened the account. Renee ceased working in September 2019 due to mental health reasons and now relies on the Centrelink Parenting Payment and Family Tax Benefit A and B as her sole source of income.

Source: Financial Rights Legal Centre

### ***Clarence's Story***

Clarence is 25 years old and has been diagnosed with autism, his income is from a disability support pension. In 2018 he signed up online with a BNPL provider, he only had to provide his driver's license number and wasn't asked details of employment, income, expenses and other debts. He believed he was only assessed on his credit rating. Clarence paid off a smaller loan from the Provider of \$200, he was then approved for \$700 by the same provider which he used to buy an accessory for his car. He wasn't able to make repayments, and his account was sent to the BNPL provider's collections department. He could not remove the accessory to the car, and was stuck trying to work out how to repay the debt.

Source: Financial Rights Legal Centre

We also refer to ***Maeve's story*** and ***Jean's story***

, referred to above.

### **Avoid benchmarking**

The use of "benchmarking" by major lenders when undertaking affordability assessments is a significant problem, and risks breaching responsible lending laws. RG 209 on responsible lending states that "benchmarks do not provide any information about the individual consumer, and do not confirm or verify that the information that has been obtained about the consumer is true."<sup>51</sup>

We suggest BNPL providers commit not to relying solely on benchmarks.

### **Multiple BNPL provider accounts**

Consumer advocates are concerned about consumers having accounts with multiple BNPL providers and having unsustainable debt. In our collective experience, consumers using multiple BNPL accounts and products and services are financially vulnerable.

This could be mitigated against by compliance with the NCCPA assessment requirements, which should allow for the BNPL provider to obtain an accurate picture of the financial situation of the consumer. As well as by a limit on the number of BNPL transactions a consumer may have at any one time.

### **Credit file concerns**

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<sup>51</sup> RG 209 at 209.134.

Consumer advocates are concerned that BNPL providers may perform a credit check during the assessment process for each new transaction. We anticipate that such a practice may have a negative impact on a consumer's credit file and credit score, as there is the potential for a multitude of enquiries by BNPL providers to build up on a credit file.

We suggest that BNPL providers commit to being considerate of their customers' credit files and credit scores.

We suggest that restrictions be put on credit checks. There is a balance to be achieved between ensuring affordability of purchases through credit checks and protecting a consumers' credit file and credit score.

An option is that credit checks only be performed when the customer first enters into a contract with the BNPL provider, and then, if the customer continues to use the BNPL product or service, additional credit checks be performed with at least 2 years between them. The appropriate timing between credit checks would of course depend on the consumers' transaction monetary amounts and number of different transactions.

At the very least, credit file checks should not be conducted as part of a routine, automatic process.

In relation to reporting Repayment History Information (RHI) under the *Privacy (Credit Reporting) Code 2014*, we understand that BNPL providers do not currently participate in comprehensive credit reporting. However, in the event that BNPL providers do engage in comprehensive credit reporting,, we suggest that they commit to not reporting payments made by consumers that would be late if not for being on hardship arrangements. RHI should accurately reflect variations of a contract (including financial hardship variations).<sup>52</sup> Consumers would not be making late payments if they are making payments as agreed under the variation. Reporting RHI may discourage people from accessing financial hardship arrangements.

### **Automated assessment concerns**

The use of automated systems to process and approve applications for unsecured credit, and BNPL products and services is problematic. There is a significant risk of BNPL providers breaching future

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<sup>52</sup> This interpretation was supported by the Financial Ombudsman Service, Determination 422745, 21 April 2016 <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>.

responsible lending obligations if relying solely on automated processes as it is unlikely to provide a full and up-to-date picture of a person's financial circumstances.<sup>53</sup>

In our experience, online assessments breach the NCCPA as they do not allow for the required reasonable enquiries or verifications. Consumers' financial positions are generally not accurately captured by the automated systems.

RG 209 provides that any automated system be tested prior to implementation, and at reasonably regular intervals, to ensure the decisions made using the system are appropriate. Also that the system is capable of identifying situations that require further inquiries or verification steps, and either completing those additional steps or referring the application for manual consideration. And that the system is capable of maintaining or producing a meaningful record of the assessment.

If BNPL providers use automated systems they should be bound by or commit to these requirements.

We note that the Banking Code Compliance Monitoring Committee states that: 'at this point in time banks have not demonstrated, to the CCMC's satisfaction, that the use of an automated system or statistical credit scoring model alone is sufficient to comply with the BNPL Code obligations...'<sup>54</sup>

BNPL providers should commit to the Australian Government's AI Ethics Principles.<sup>55</sup> These relate to the building of automated systems. So if BNPL providers are going to use some amount of automation in their business, then those automated systems should be built in accordance with the AI Ethics Principles.

#### **Recommendations from Section 8:**

26. BNPL providers agree to apply the responsible lending assessment under the NCCPA and RG 209.
27. A BNPL arrangement should be assessed as unsuitable if a consumer is in default under a BNPL arrangement.
28. A BNPL contract is deemed unsuitable if in the 90-day period before the contract is entered into or the limit is increased, the consumer is a debtor under two or more BNPL arrangements or small amount credit contracts.
29. There should also be a limit on the number of transactions a consumer may make.
30. Consumers who are new to BNPL products and services should have more restrictions.

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<sup>53</sup> In the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Commissioner Hayne considered case studies on automated assessments of credit cards, see Interim Report Volume 2 'Case Studies' at pg 65 and 106 <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>.-

<sup>54</sup> Code Compliance Monitoring Committee, Own Motion Inquiry Provision of Credit, January 2017, p 5 <http://www.ccmc.org.au/cms/wpcontent/uploads/2017/01/CCMC-Inquiry-Report-Provision-of-credit-January-2017.pdf>.

<sup>55</sup> <https://www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework>

31. BNPL providers commit not to relying solely on benchmarks.
32. BNPL providers commit to being considerate of their customers' credit files and credit scores. Credit file checks should not be conducted as part of a routine, automatic process.
33. Repayment History Information should accurately reflect variations of a contract (including financial hardship variations).
34. If automated systems are used those systems will be:
  - (a) tested prior to implementation, and at reasonably regular intervals, to ensure the decisions made using the system are appropriate;
  - (b) capable of identifying situations that require further inquiries or verification steps, and either complete those additional steps or referring the application for manual consideration; and
  - (c) capable of maintaining or producing a meaningful record of the assessment.
35. BNPL providers should commit to the Australian Government's AI Ethics Principles.

## 9. Ongoing review of suitability

We understand that clause 5 allows for BNPL providers to review and monitor their services and products generally, and does not relate to individual consumers.

We suggest that how a BNPL provider reviews its products and services and who it will accept as customers on a general level does not belong in the BNPL Code.

## 10. Complaints and dispute resolution

We agree that the BNPL Code should be enforced through AFCA. Consumers' ability to take disputes to AFCA is valuable.

However, this commitment could go further. BNPL providers should be regulated by the NCCPA. BNPL providers should be regulated under the NCCPA so that all consumers can take complaints they may have with any BNPL provider to AFCA. Until all BNPL providers are regulated by the NCCPA, BNPL providers should commit to mirrored complaints handling requirements in the BNPL Code.

Financial counsellors report many problems with BNPL dispute resolution including inconsistency of approaches and poor handling of cases. BNPL providers should commit to having a complaints handling and dispute resolution system that consists of:<sup>56</sup>

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<sup>56</sup> NCCPA, s 47.



(a) IDR procedures that comply with the standards and requirements made or approved by ASIC (eg ASIC Regulatory Guide 165 (**RG 165**)), and that cover disputes in relation to the BNPL provider's activities and those engaged in by their representatives; and

(b) membership of AFCA.

We agree with cl. 6.1, that BNPL providers should have a complaints policy that is visible and easy to access. We suggest that if a consumer requests a copy, it be provided within 7 business days of that request.

We agree with cl. 6.2, that complaints should be resolved as soon as possible. We agree with the time periods set out in 6.3, as they improve on those in RG 165.

We suggest that cl. 6.5 be re-worked. As it stands it seems that a certain level of cooperation from clients is required before BNPL Providers will work with the clients.

We refer again to *Helen's story*

above to illustrate a lack of adequate complaint resolution. Helen had to lodge a complaint with AFCA to get a response, even though the complaint could have been resolved internally with the BNPL provider.

## **AFCA**

We suggest changes to clauses 6.6 to 6.8, please see marked up BNPL Code.

## **CCC**

The BNPL Code should clearly explain for consumers when it is appropriate to take a complaint to AFCA and when to take a complaint to the CCC.

## **Compensation Scheme of Last Resort**

BNPL Providers should commit to participating in any Compensation Scheme of Last Resort that may be established following recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

### **Recommendations from Section 10:**

36. Until all BNPL providers are regulated by the NCCPA, BNPL providers should commit to the complaints and dispute resolution provisions in the NCCPA.
37. BNPL providers should commit to having a complaints handling and dispute resolution system

that consists of:

- (a) IDR procedures that comply with the standards and requirements made or approved by ASIC, and that cover disputes in relation to the BNPL provider's activities and those engaged in by their representatives; and
- (b) membership of AFCA.

38. The BNPL Code should clearly state when a complaint should be made to AFCA and when it should be made to the CCC.

39. BNPL Providers should commit to participating in any Compensation Scheme of Last Resort that may be established.

## 11. Hardship

### Regulation under the NCCPA

BNPL providers should abide by the hardship provisions under the NCCPA as a minimum, and provide additional commitments as set out in the BNPL Code.

A short summary of the hardship provisions under the NCCPA follows.

Under the NCCPA, a consumer who is unable to meet their repayments under a credit contract can give their credit provider a hardship notice.<sup>57</sup> Within 21 days of the hardship notice, the credit provider can ask the debtor for more information. The debtor must provide the relevant information within 21 days of the request. Credit providers must respond in writing within 21 days to the hardship notice (after any requested information is supplied). The credit provider must state whether they agree to the request, or if they do not agree they must provide reasons for refusing and the contact details of the AFCA.

We incorporate these provisions in the marked up BNPL Code.

### Assessing requests for hardship

Maeve's story, outlined above, shows how Maeve was asked to provide an excessive level of documentation to "prove" her financial hardship. Those kinds of practices are long gone in other industries, such as banking. Commercially, ethically and practically it makes more sense to believe what

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<sup>57</sup> NCC, ss 72-75.

people say and to come to a sensible and affordable payment arrangement in the minimum amount of time.<sup>58</sup>

### **Additional commitments**

We agree with cl. 7.1, that BNPL provider's staff should be trained to treat vulnerable customers appropriately.

We agree with the need for BNPL providers to make hardship assistance information available. The wording of cl. 7.2 goes beyond that. We suggest wording in the marked up BNPL Code. The BNPL Code does not make it clear how customers will be made aware of hardship assistance. We suggest that the BNPL Code set out how BNPL providers will make sure customers understand they can ask for financial hardship assistance. This could be achieved by informing clients of the hardship policy in writing when they first sign up to the service, when a customer signs up for a new transaction and if a customer is experiencing financial hardship for example, as evidenced by contact from the consumer with the BNPL provider because of an inability to pay.

We appreciate cl. 7.3 which improves on the NCCPA's hardship provisions by saying that if BNPL providers become aware consumers are having trouble meeting their financial obligations the BNPL provider will discuss the situation and options available to help. The BNPL Code would be improved by setting out how the BNPL provider may become aware, apart from the consumer telling them.

We agree with the commitments in clauses 7.5 to 7.8 (inclusive) to stop collection activity and freeze late fees while considering a hardship request, not listing a default on a customer's credit file while considering a request and not referring to debt collection agencies. We acknowledge that these clauses in the BNPL Code go beyond the NCCPA.

We generally agree with cl. 7.9, but more detail is required. We refer to the marked up version of the BNPL Code.

We generally agree with cl. 7.10, except to add that consumers should also be referred to financial counsellors in their state or territory.

We agree with clauses 7.11 – 7.12.

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<sup>58</sup> For example the ABA's guide on 'Promoting understanding about banks' financial hardship programs' states that Banks will only request information from customers that is reasonably necessary to assess their situation and determine an appropriate response.

BNPL providers should commit to only selling debts to debt collectors, or using debt collectors as agents, that:

- comply with the ACCC's and ASIC's *Debt collection guideline: For collectors and creditors and the Code of Operation: Recovery of Debt* published by the Federal Government. This should be monitored;
- are AFCA members; and
- have an effective complaints process.

BNPL providers should also commit to complying with the ABA's Industry Guideline on the sale of unsecured credit.<sup>59</sup>

The block on bankruptcy proceedings in cl. 7.13 is supported.

We refer to ***Jaime's story*** again, and suggest that if the above obligations were in place she would have been able to resolve her issues more efficiently.

We refer to ***Alyce's story*** below. If the debt collectors used by the BNPL provider had have abided by the *Debt collection guideline*, Alyce would have not endured abuse.

Amanda's story below provides an example of how a consumer would have benefitted if the above obligations were in place.

#### ***Amanda's story***

Amanda is in her early 30's and was earning approximately \$850 per week. She contacted Consumer Action for help with debts she owed to two BNPL providers after losing her job.

Amanda also had a number of payday loan debts that she was trying to manage.

Amanda purchased a couch using BNPL finance but was unable to keep up with the repayments after losing her job. She contacted the BNPL provider and negotiated a payment arrangement with them but soon after started getting contacted by a debt collection company. Amanda was

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<sup>59</sup> <https://www.ausbanking.org.au/wp-content/uploads/2019/11/Industry-Guideline-on-the-Sale-of-Unsecured-Debt-November-2019.pdf>.

confused as she had been complying with the repayment arrangement with the BNPL provider. She was never told that her debt had been sold to a debt collector.

Dealing with the debt collection company was also problematic. They refused to accept the amounts she proposed to pay off the debt. Amanda explained to Consumer Action that they also refused to give her details on how to pay and told her “it had already gone to legal” when she requested to speak to the manager.

At this time, Amanda was also behind on her debts with another BNPL provider which were around \$700. She said these had also gone to a debt collector but she “could still pay in the app” which confused her. Amanda told us she is glad she can’t use this BNPL service anymore as it “tricks me into buying things and paying for them later”.

Amanda was referred to her local financial counsellor for face to face assistance.

Source: Consumer Action Law Centre

## **Enforcement**

If BNPL providers were regulated by the NCCPA, consumers would have the benefit of various protections connected to enforcement proceedings.

The key NCCPA commitments in relation to enforcement should be incorporated into the BNPL Code. We note that including all relevant sections would make the BNPL Code significantly longer. Until the BNPL industry is regulated by the NCCPA, we suggest that the most important provisions from the NCC be incorporated into the BNPL Code, and BNPL providers make a commitment to abide by the NCCPA.

A key protection for consumers is the requirement that if they are in default, they must be provided with a default notice by a credit provider before the credit provider can bring enforcement proceedings or sell the debt. We have included these provisions in the marked up BNPL Code.

We refer to Alyce’s story below. If Alyce had been informed that her debt had been sold, and to which company, she would have been in a better position.

Alex’s story also demonstrates the need for BNPL providers to give notice when they sell debts to debt collectors

### ***Alyce’s story***

In 2017 Alyce purchased a vacuum cleaner using a BNPL service. Alyce owed the BNPL provider \$1026 but did not make any repayments. Alyce's debt was sold to debt collectors and she sought help in relation to the debt recovery.

Without her knowledge, Alyce's debt was sold four times to four different debt collectors. The final debt collector used lawyers who Alyce thought were acting as agents for the BNPL provider, and told Alyce that she owed \$1,300. Alyce made an arrangement to slowly repay the debt.

After paying off the original sum for the vacuum cleaner she made inquiries about what the extra almost \$300 was charged for. She was informed it was a debt collection fee. Throughout this period of dealing with this debt collector, Alyce received harassing, abusive phone calls at all hours of the day and night pressuring her to pay. In the end, she decided to pay the extra fee just to close her account and end the business.

However, money continued to be taken out of her account and Alyce had limited avenues to pursue for help. The debt collector was not helpful. The BNPL provider could not and would not help because it had sold the debt. AFCA did not have records of the debt collector she was dealing with. She finally got the contact details of one of the debt collectors in the line of four. She was told it would be investigated and eventually received the unsatisfactory response that she still owed 'some money' and it would need to be looked into further.

Source: Consumer Credit Legal Service (WA)

### ***Alex's story***

Alex took out a personal loan with a BNPL provider for \$15,000. After losing his job, he struggled to make repayments and eventually stopped paying with only \$1,500 left owing. He did not receive a default notice.

After getting a new job and moving to another state Alex forgot about his loan. He received no correspondence from the provider at his new or old address. Then he started receiving text messages from a debt collector threatening court action if he did not pay.

Alex found the debt collectors to be very inflexible with making arrangements for him to pay off his debt. Alex needed to know when his loan fell into default and when his last chance to pay it off with the BNPL provider was before it was sold on.

Source: Consumer Credit Legal Service (WA)

### **Recommendations from Section 11:**

40. BNPL providers should agree to abide by the hardship provisions under the NCCPA as a minimum, and provide additional commitments as set out in the BNPL Code.
41. BNPL providers should commit to only selling debts to debt collectors, or using debt collectors as agents, that:
  - (a) comply with the Debt Collection Guidelines. This should be monitored;
  - (b) are AFCA members; and
  - (c) have an effective complaints process.
42. When consumers are in default, a BNPL provider will provide them with a default notice before bringing enforcement proceedings or selling on the debt.

## **12. Applicable legislation**

It is misleading to refer to, but not name, legislation and regulation that applies to BNPL products and services. Consumers are likely to assume that they have more protection than they do.

In order to manage this, the specific legislation and regulations being referred to need to be explicitly stated for example, the ASIC Act, the *Privacy Act 1988* (Cth), or the *Electronic Transactions Act 1999* (Cth). We note that was done in relation to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) in cl. 4.4.

While consumers are unlikely to know the exact protections afforded by the named laws, at least they are a step closer to being able to find out. Examples of unnamed laws being referred to in the BNPL Code follow:

- 'existing laws and regulations' (Part A, cl. 7.3)
- provision of account information 'under all applicable laws and regulations' (Part B, cl. 3.2(d))
- complaints policy will be 'consistent with the law' (Part B, cl. 6.4)
- we will comply with relevant unfair contract laws (Part B, cl. 8.5)

### **Recommendation from Section 12:**

43. We suggest that the specific legislation and regulations being referred to are explicitly stated.

## 13. Privacy

BNPL Code, Part B, cl. 8.2(c)(v) seems to allow BNPL providers to disclose information to any third party unless they are not restricted from doing so under the law. This is a very low bar.

BNPL providers should commit to becoming 'accredited persons' under the *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth).

BNPL providers should not use screen scraping technology nor ask consumers to provide their private information such as passwords for bank accounts. We note that this ties in with the commitment to be ethical. Seeking and having access to an individual's private bank account is unethical. It also induces consumers to breach:

- obligations they may have under their contract with the institution they hold the bank account with; and
- the e-Payments Code section 12 'Passcode security requirements'.

### **Recommendations from Section 13:**

44. BNPL providers should commit to becoming 'accredited persons' under the *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth).
45. BNPL providers should commit to not using screen scraping technology.

## 14. Consumer Law crossover

BNPL providers should be covered by the NCCPA and thus the NCC so that consumers receive basic protections in relation to the contracts for sales of goods and services purchased using BNPL products and services.

### **Returns**

At the moment, there is no appropriate process to be followed when a refund for a product or service under a sale contract for which BNPL was used. This is a glaring omission for credit products that most often directly linked to the purchase of goods. We understand that BNPL providers may have their own processes.

Consumer advocates suggest that a standardised process be set out for refunds and product returns.

### **Unsolicited marketing and selling**



Another area of concern is the unsolicited marketing and selling of goods where BNPL arrangements are proposed by merchants as a source of funding those purchases. We strongly advocate for the prohibition of unsolicited marketing and selling. BNPL providers should commit not to working with retailers known for unsolicited selling. Where a retailer or merchant does engage in unsolicited marketing and selling connected with a BNPL arrangement, the BNPL provider should facilitate a cancellation of the purchase and provide a full refund at no cost to the consumer.

We make suggestions in the marked up BNPL Code under cl. 2, 'We will be fair, honest and ethical' and Part C.

### ***David's Story***

David bought a number of items from a gift company to the total value of \$470, these items included two hamper packs, Uber gift vouchers, Coles gift cards and EFTPOS vouchers. David used a BNPL service to buy the items.

David made the first payment of \$125 through the BNPL provider. David was under the impression that the items would be shipped within days of making that first payment. However, that did not occur. In the meantime, David made another \$500 purchase from the merchant using the same BNPL provider. None of the purchases were delivered to David.

David did not make any further payments through the BNPL providers because he did not receive the products. David requested a two week payment extension from the BNPL provider so that he could resolve the matter with the merchant.

David has attempted communication with the merchant and has requested the products or a refund which the merchant is refusing to do.

David has also spoken to the BNPL provider and requested that it refund him but it advised David that it cannot do anything, it is only the 'middle man'. The BNPL provider did email the merchant but the merchant ignored the communication.

David is now in a situation where the merchant refuses to cancel the BNPL service or refund him for the products and the BNPL provider cannot cancel the order because the merchant has to do it.

Source: Consumer Credit Legal Service (WA)

### ***Chris' Story***

In June 2019 Chris was approached by a solar panel company at his home. The company offered to sell him solar panels for his home for \$10,000. The company told him the solar panels were German made solar panels and a battery was included. The \$10,000 was to be paid through a BNPL provider.

Chris was in a rush for church, the company agent followed him to his church and he signed a document on his car bonnet. At the time Chris did not know the document was a contract and was not made aware of this.

When the solar panels were installed, Chris realised they were not German-made panels and the company did not provide a battery as verbally promised.

As Chris did not receive what he asked for, he rejected the goods by refusing for the panels to be connected, the panels were only installed. The BNPL provider took money from Chris' account and then Chris put a stop on this.

The BNPL provider is requesting payment. Chris is refusing to pay as he did not receive the agreed product.

Source: Consumer Credit Legal Service (WA)

#### **Recommendations from Section 14:**

46. A standardised process should be set out for refunds and product returns.
47. BNPL providers should commit not to working with retailers and merchants known for unsolicited selling.
48. Where BNPL arrangements are used in connection with unsolicited marketing or selling, BNPL providers should facilitate a cancellation of the purchase of good or services sold through unsolicited marketing or selling and provide a full refund at no cost to the consumer.

## **15.Surcharge issue**

We support allowing retailers and merchants to charge customers a surcharge for BNPL arrangements, provided that the surcharge is no more than the reasonable costs incurred. BNPL Code members should not be able to prohibit retailers and merchants from surcharging customers for the use of the BNPL facility. We suggest BNPL providers remove the no-surcharge requirements currently imposed on retailers and merchants.

We strongly support caps on excessive surcharging. Any surcharge should be no greater than the reasonable cost to the retailer or merchant of the customer using the BNPL arrangement.

We are generally supportive of retailers and merchants being able to impose reasonable surcharges as this improves transparency about the true cost of using different payment methods and drives efficiencies in the payments system by encouraging people to choose lower cost options.

The ability to surcharge also reduces the extent to which prices to all customers are increased by the fees that retailers and merchants pay to the BNPL providers. When this happens, non BNPL customers subsidise BNPL customers.

#### **Recommendations from Section 15:**

49. BNPL providers should allow retailers and merchants to charge consumers a surcharge for BNPL arrangement use.
50. Surcharges should be capped to the reasonable cost to the retailer or merchant.

## **16.Code Compliance Committee**

### **CCC in the BNPL Code**

The role of the CCC as opposed to the role of AFCA should be explained to consumers. We suggest how this could be done in the marked up BNPL Code.

We make other suggestions in the marked up BNPL Code.

### **CCC in the Terms of Reference**

We provide suggestions to amend the TOR as mark ups in the TOR. We also provide the following comments.

#### **Independence**

The stated purpose of the CCC in clause 3.1 is to be an independent committee. One of its guiding principles is to act in a fair and effective manner with integrity and impartiality.

The composition, processes and procedures of the CCC do not achieve independence.

The control of the AFIA Board throughout the TOR reduces the independence of the CCC, for example cl. 1.1 and 1.2.

In the marked up copy of the TOR we make suggestions as to how the independence of the CCC can be improved.

### ***CCC Members***

TOR, cl. 4 requires amendment. The TOR should require that each of the three members of the CCC have a different background. For example:

1. An independent chairperson – appointed jointly by Consumers Federation Australia and AFIA
2. A consumer representative – appointed by Consumers Federation Australia; and
3. An industry representative – appointed by AFIA.

This suggested composition would assist the CCC to fulfil its purpose of independence and that a balance of voices will be represented.

We also recommend that cl. 4.4 be amended so that members are only eligible for appointment for a maximum of three consecutive terms.

### ***Termination***

The Board should not have the power to unilaterally terminate the appointment of a CCC Member. CCC Members should only be able to be terminated by the person that appointed them, and with 7 days' written notice. The Board may raise concerns with the performance of the appointer, but the CCC member's appointment must be the decision of the appointer.

### ***Casual vacancies***

Casual vacancies should be filled by the appointer of the relevant position, not the Board.

### ***Appeal***

The ability to appeal a decision from the CCC to the AFIA Board in cl. 10.15 reduces the independence of the CCC. There should be no appeal to a third party. A customer should be able to ask the CCC to reconsider the decision, and it may do so at its discretion. The CCC may rely on professional advice (as provided by cl. 3.5) in any decision and in reconsidering any decision.

### ***Consultation***

Consultation and any changes to the BNPL Code's of TOR are limited. The CCC is only required to consult with other Code Compliant Members in cl. 14.4. Other organisations and individuals with an interest in the BNPL Code may only be consulted at the CCC. The CCC should be obliged to consult with the wider community especially consumer organisations when making changes to the TOR.

## **Reporting**

Any reports should be public.

We note that AFCA has moved towards identified determinations. 'Naming and shaming' providers that do not comply with the BNPL Code will incentivise Code compliance and will provide a meaningful deterrent effect.

## **Review**

There should be a scope for an independent review of the CCC. The self-assessment approach in clause 16 is manifestly insufficient. Consumer's confidence in the BNPL Code would be enhanced by an independent assessment process.

## **Functions**

The CCC appears intended to fulfil more of a monitoring role and is not designed to deal with specific complaints from consumers. This should be stated clearly in the TOR.

Clause 10.6 should include a stronger guarantee that details of a determination will be provided to the person who made the allegation. It is in the interests of fairness and accountability, two of the guiding principles of the CCC, to make available to complainants what steps have been taken to investigate and resolve a matter, the final determination and the reasons for the determination.

Please see our marked up copy of the TOR.

### **Recommendations from Section 16:**

51. The TOR should require that each of the three members of the CCC have a different background, such as:
  - (a) An independent chairperson – appointed jointly by Consumers Federation Australia and AFIA
  - (b) A consumer representative – appointed by Consumers Federation Australia; and
  - (c) An industry representative – appointed by AFIA.
52. CCC Members should only be able to be terminated by the person that appointed them, and with 7 days' written notice.
53. Casual vacancies should be filled by the appointer of the relevant position, not the Board.
54. There should be no appeal from a CCC decision to a third party.
55. The CCC should be obliged to consult with the wider community especially consumer organisations when making changes to the TOR.
56. All CCC reports should be public.



## **Annexure – List of Recommendations**

### **Recommendations about the form of BNPL regulation**

1. BNPL providers should commit to abiding by the key requirements under the NCCPA discussed in this submission.
2. The BNPL Code should reflect key consumer protections in the NCCPA and go beyond when possible.
3. The BNPL Code should comply with ASIC Regulatory Guide 183 ‘Approval of financial services sector codes of conduct’.
4. AFIA could allow non- AFIA BNPL providers to sign up to the BNPL Code.
5. The definition of ‘Buy Now Pay Later Product or Service’ in the BNPL Code, part B cl. 10 should be amended to not exclude a product or service that falls under the NCCPA.
6. The BNPL Code should seek to establish best practice.

### **Recommendations about contractual enforceability**

7. BNPL contract terms and conditions should state that the BNPL Code forms a part of the terms and conditions.
8. The BNPL Code should state that where there is an inconsistency with the contractual terms and conditions and the BNPL Code, the BNPL Code prevails.

### **Recommendations about reviewing the BNPL Code**

9. The BNPL Code should be reviewed every 3 years.
10. The review should be conducted by an independent panel appointed by the Board.

### **Recommendation about specificity**

11. The promises in the BNPL Code should be more specific to increase enforceability.

### **Recommendations about focus on customers**

12. Protection to vulnerable customers should be expanded:
  - (a) Part B, cl 1 should be expanded to include a commitment to take extra care with customers experiencing vulnerability at every stage of their involvement with a BNPL provider;
  - (b) The BNPL Code should ensure that merchants and retail partners train their staff in dealing with vulnerabilities in connection with BNPL arrangements; and
  - (c) What is a ‘vulnerability’ should be stated in a non-limiting way.

### **Recommendations about being fair, honest and ethical**

13. BNPL providers should avoid providing BNPL arrangements to customers to purchase products and services that a consumer can obtain for free.
14. BNPL providers should abide by restrictions on credit being used to purchase particular products and services.
15. BNPL providers should commit to not providing BNPL arrangements for gambling purposes.
16. BNPL advertising and marketing should be ethical.

#### **Recommendations about information requirements**

17. Disclosure should be appropriate, consumer tested and prominent.
18. Disclosure obligations should at least mirror the NCCPA and NCC.
19. Information on fees and repayment obligations be included in a fact sheet detailing the BNPL product or service key features and costs.
20. Contact details, standard terms and conditions, key policies and the BNPL Code should be freely available on a BNPL provider's website.
21. When consumers create an account with a BNPL provider they should be given copies of key policies.
22. Consumers should be able to make early repayments with no fees attached
23. Consumers should be able to pay out a transaction or the contract and close the account at any time with no early termination fees.
24. Late fees be capped, and limited to the reasonable pre-estimated loss.
25. When BNPL providers are telling customers about the location of information on a website or other electronic forum BNPL providers provide the customer with a link to the document.

#### **Recommendations about responsible lending**

26. BNPL providers agree to apply the responsible lending assessment under the NCCPA and RG 209.
27. A BNPL arrangement should be assessed as unsuitable if a consumer is in default under a BNPL arrangement.
28. A BNPL contract is deemed unsuitable if in the 90-day period before the contract is entered into or the limit is increased, the consumer is a debtor under two or more BNPL arrangements or small amount credit contracts.
29. There should also be a limit on the number of transactions a consumer may make.
30. Consumers who are new to BNPL products and services should have more restrictions.
31. BNPL providers commit not to relying solely on benchmarks.



32. BNPL providers commit to being considerate of their customers' credit files and credit scores. Credit file checks should not be conducted as part of a routine, automatic process.
33. Repayment History Information should accurately reflect variations of a contract (including financial hardship variations).
34. If automated systems are used those systems will be:
- (a) tested prior to implementation, and at reasonably regular intervals, to ensure the decisions made using the system are appropriate;
  - (b) capable of identifying situations that require further inquiries or verification steps, and either complete those additional steps or referring the application for manual consideration; and
  - (c) capable of maintaining or producing a meaningful record of the assessment.
35. BNPL providers should commit to the Australian Government's AI Ethics Principles.

#### **Recommendations about complaints and dispute resolution**

36. Until all BNPL providers are regulated by the NCCPA, BNPL providers should commit to the complaints and dispute resolution provisions in the NCCPA.
37. BNPL providers should commit to having a complaints handling and dispute resolution system that consists of:
- (a) IDR procedures that comply with the standards and requirements made or approved by ASIC, and that cover disputes in relation to the BNPL provider's activities and those engaged in by their representatives; and
  - (b) membership of AFCA.
38. The BNPL Code should clearly state when a complaint should be made to AFCA and when it should be made to the CCC.
39. BNPL Providers should commit to participating in any Compensation Scheme of Last Resort that may be established.

#### **Recommendations about hardship**

40. BNPL providers should agree to abide by the hardship provisions under the NCCPA as a minimum, and provide additional commitments as set out in the BNPL Code.
41. BNPL providers should commit to only selling debts to debt collectors, or using debt collectors as agents, that:
- (a) comply with the Debt Collection Guidelines. This should be monitored;
  - (b) are AFCA members; and

(c) have an effective complaints process.

42. When consumers are in default, a BNPL provider will provide them with a default notice before bringing enforcement proceedings or selling on the debt.

#### **Recommendation about applicable legislation**

43. We suggest that the specific legislation and regulations being referred to are explicitly stated.

#### **Recommendations about privacy**

44. BNPL providers should commit to becoming 'accredited persons' under the Competition and Consumer (Consumer Data Right) Rules 2020 (Cth).

45. BNPL providers should commit to not using screen scraping technology.

#### **Recommendations about Consumer Law crossover**

46. A standardised process should be set out for refunds and product returns.

47. BNPL providers should commit not to working with retailers and merchants known for unsolicited selling.

48. Where BNPL arrangements are used in connection with unsolicited marketing or selling, BNPL providers should facilitate a cancellation of the purchase of good or services sold through unsolicited marketing or selling and provide a full refund at no cost to the consumer.

#### **Recommendations about surcharges**

49. BNPL providers should allow retailers and merchants to charge consumers a surcharge for BNPL arrangement use.

50. Surcharges should be capped to the reasonable cost to the retailer or merchant.

#### **Recommendations about the CCC**

51. The TOR should require that each of the three members of the CCC have a different background, such as:

(a) an independent chairperson – appointed jointly by Consumers Federation Australia and AFIA;

(b) a consumer representative – appointed by Consumers Federation Australia; and

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56. All CCC reports should be public.