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Buy Now Pay Later Consultation
Personal Finances and Funds Team
HM Treasury
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REGULATION OF BUY NOW PAY LATER – CONSULTATION, OCTOBER 2021

The Australian Finance Industry Association (AFIA) welcomes the opportunity to provide a submission to HM Treasury's Regulation of Buy Now Pay Later Consultation, released in October 2021¹.

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

AFIA represents over 100 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial innovation in consumer finance.

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

AFIA's BUY NOW PAY LATER CODE OF PRACTICE

In March 2021, AFIA published our [Buy Now Pay Later Code of Practice](#) (BNPL Code).

The BNPL providers accredited to this Code represent approximately 95 percent of the BNPL market in Australia. A number of the signatories have operations in multiple jurisdictions, including the United Kingdom.

The Code is a world-first and leading initiative in the BNPL sector and has been designed as a dynamic framework to enable industry participants to take a proactive approach to increasing

¹ <http://www.gov.uk/government/consultations/regulation-of-buy-now-pay-later-consultation>

consumer protections and go beyond current regulatory obligations for BNPL products or services.

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

More information about the BNPL Code is set out in the attachment to this letter and is available on our [BNPL Code website](#). We would be happy to discuss any aspect of the Code in more detail.

OUR SUBMISSION

Responses to specific questions in the Consultation are set out in Attachment 1.

AFIA believes that regulatory frameworks should be enhanced and modernised to remain agile, with the flexibility to continue evolving as markets and customer expectations do. AFIA also supports regulation that is proportionate, scalable, and targeted.

AFIA supports the role of government in providing strategic direction to ensure regulatory oversight of the payments ecosystem is fit for the future, evidence-based, and is flexible to respond to new and emerging products.

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

The BNPL sector is an example of innovation across the value chain, giving customers and merchants greater benefits and choice in the way payments are made. The BNPL Code is an example of an industry sector taking proactive, targeted action to supplement existing regulation by introducing standards suitable for the nature of the product and customer expectations. The BNPL Code reflects components of financial services, credit, and payments regulation and adds further consumer safeguards relevant for the way it is accessed and used by customers.

It is a matter for the UK Government to determine whether the application of a statutory regulatory regime is a necessary outcome of this review.

Another option is to take a phased approach to the introduction of standards and requirements that apply to BNPL providers. This would be consistent with the approach taken in Australia where the government is seeking to balance customer choice, customer safeguards with innovation and competition, and the industry has taken a leadership role in implementing best practices through our BNPL Code of Practice. This could allow for the development and

introduction of new products and services in manner that ensures consumers are appropriately protected, while providing customers with simple technology to integrate their purchases, manage their payments, and budget their money in a more holistic manner.

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

CLOSING REMARKS

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

We hope our submission assists HM Treasury with its consideration of the most practical and effective model for regulation of BNPL in the United Kingdom. I would welcome the opportunity to provide further information about AFIA' BNPL Code of Practice if that would be helpful.

If you would like to discuss our feedback further or require any additional information, please contact me at diane.tate@afia.asn.au or Tracey Lyons, Director, Industry Standards at tracey.lyons@afia.asn.au

Yours sincerely

Diane Tate
Chief Executive Officer

AFIA's BUY NOW PAY LATER CODE OF PRACTICE

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

Background to development of the Code

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

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

The Code was subject to an extensive consultation process to ensure that insights from the broad spectrum of stakeholders were included.

Key stakeholders including Federal and State government politicians, policymakers, regulatory agencies, ombudspeople, consumer groups and advocates were closely consulted in the development of the Code and continue to be highly engaged in its ongoing operation and effectiveness. Given the emerging nature of the industry and community expectations, AFIA welcomes this collaborative approach to the evolution of the Code.

The Code will be fully reviewed on a regular basis, but in any event not later than two years after commencement, and then at least every three years after that.

The Code is customer-centric

The Code is a world-leading initiative in the BNPL sector and has been designed as a dynamic framework to enable industry participants to take a proactive approach to increasing consumer protections and go beyond current legal and regulatory obligations for BNPL products or services.

The BNPL Code has been voluntarily developed and is intended to assist AFIA members who are signatories to the Code to:

- (a) promote a customer-centric approach to the design, marketing, and distribution of a BNPL product or service
- (b) promote high industry standards of service for customers and build best practices across the BNPL sector

- (c) support compliance with legal, regulatory, and industry obligations.

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

BNPL providers are regulated

Contrary to much public commentary, BNPL providers in Australia are required to meet multiple legal and regulatory obligations, and have oversight from ASIC, the Australian Competition and Consumer Commission, the Australian Transaction Reports and Analysis Centre (which enforces the anti-money laundering regime, among other things), the Office of the Australian Information Commissioner, and the courts).

This regulatory oversight includes ASIC's broad product intervention power and the product design and distribution obligations in Chapter 7 of the *Australian Corporations Act 2001*. The BNPL Code proactively included commitments reflecting the design and distribution obligations in the law before they became effective for BNPL and other financial services providers on 5 October 2021.

The Code provides consumer protection

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

The BNPL Code contains strong consumer protections including upfront customer assessments, existing customer re-assessments if the customer applies for a higher limit, and internal and external dispute resolution obligations.

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

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

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

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

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

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

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

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

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

ATTACHMENT 1 - AFIA RESPONSES TO SPECIFIC QUESTIONS IN THE CONSULTATION

Q10. Do you have any comments on our analysis of the drivers of risk for consumers in the BNPL market?

Assessing the suitability of a BNPL product or service is an important part of the application process. In Australia, code compliant BNPL providers assess all new customers to ensure the product or service will be suitable, prior to providing it to a customer.

Importantly, they ensure that affordability assessments are tailored, proportionate, and relate to the complexity of the product or service.

In Australia, AFIA's BNPL Code of Practice goes above and beyond the law and sets best practice standards for the BNPL sector. Self-regulation is an important part of the legal and regulatory framework. It is more targeted and more agile than legislation or regulation, making it particularly useful in regulating emerging and innovative products and services in the marketplace.

It can also be much quicker at addressing emerging industry or consumer issues, responding to changes in customer expectations, or supporting market developments. This supports consumer access and choice, competition and innovation in financial services, and economic participation, which is good for customers, good for business, and good for economic recovery.

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

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

Taken together, the key commitments address many of the triggers of consumer detriment identified in the Consultation.

Q11. Do you have any suggestions on how a clear distinction could be drawn between BNPL and short-term interest-free credit?

AFIA would like to make a comment related to activities other than short-term interest-free credit activities that are currently covered by the A60F(2) exemption and considered relatively low risk of causing consumer detriment.

AFIA supports the adoption of activity-based regulation that is fit for purpose, scalable to the activities of the provider, and produces demonstrable consumer value and protection, while supporting customer access and choice to use a product or service that suits their needs and preferences.

Regulation must be designed so that it promotes innovation and does not impede competition and the entry of new providers to the marketplace.

A learning from Australia for the United Kingdom will be to ensure that the definition of BNPL is fit for the future. This means ensuring that consumer protections are afforded irrespective of whether the product or service is governed by a self-regulatory industry code or through more formal statute-based regulation.

By way of example, in Australia, there is a proliferation of other activities that are NOT buy now pay later products or services, but which are being advertised as BNPL, presumably to take advantage of the growth in the BNPL sector, the business opportunities it presents, and the regulatory requirements imposed on BNPL through statute and AFIA's Code of Practice.

These activities include but are not limited to 'wage advance' – re-badging of payday loans or other short-term borrowing where a lender extends high interest credit or fees based on the borrower's income and the principal is typically a portion of the borrower's salary. Specifically, wage advance is where a lender has an arrangement with an employer to give an employee access in advance to the amount they have earned during a pay period before the normal payment date, be that weekly, fortnightly or some other regular interval.

These activities are basically online payday lending and is NOT BNPL products or services used to purchase goods or services, and therefore, not in the scope of AFIA's BNPL Code of Practice.

Q16. If merchants offering BNPL are exempted from credit broking regulation, do you have any views on other ways to mitigate any potential risks to consumer detriment arising from merchants?

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

These standards are to:

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

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

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

Q18. Do you think that the current requirements on BNPL merchants and lenders around advertising and promotion are sufficient?

and

Q20. Do you agree that the approach to pre-contractual information outlined is consistent with a proportionate approach and the government's objectives for BNPL regulation?

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

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

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

Q24. What are your views on the role of creditworthiness assessments as part of a proportionate approach to BNPL regulation?

Under the BNPL Code, code compliant BNPL providers commit to ensuring that their products and services are suitable for customers and will assess all new customers prior to providing a product or service.

This process includes, but is not limited to, identifying and verifying the customer in accordance with AML laws, being reasonably satisfied the customer is not a vulnerable customer as per ASIC's description of customer vulnerability², the customer meets the suitability assessment criteria, is able to make the initial payment, and the repayment term is determined as suitable and consistent with the provider's internal risk management processes.

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

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

Q27. Do you have any views about how customers in financial difficulty should be treated under BNPL agreements?

In Australia, financial hardship is usually driven by unexpected events including:

- Decrease in income or loss of employment
- Marital, family or relationship breakdown
- Significant health or medical issues (i.e. illness or injury).

These events often occur post origination so the introduction of additional oversight through manual processes, BNPL provider checks or regulatory intervention in the application experience, is rarely predictive in assessing future financial hardship.

For these reasons, a detailed affordability assessment requirement for BNPL would be onerous and disproportionate as it may not materially alter the likelihood of a financial hardship event occurring. Conversely, it may result in adverse and unintended consequences for access and choice in BNPL products and services, to the detriment of consumers.

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

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

² Australian Securities and Investments Commission (2019) ASIC Corporate Plan 2019-2023

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

Q32. Do you agree that under a regulatory intervention for BNPL, consumers should be able to bring a complaint to the FOS?

AFIA strongly supports consumer access to external dispute resolution.

As noted above, an industry code is a more dynamic mechanism to respond to emerging industry and consumer issues as well as market developments.

There is substantial value in an industry code that is developed by market participants – in this case, BNPL providers, who voluntarily agree to adopt the requirements of the code and hold their peers up to the same standards of conduct and behaviour.

Code compliant BNPL providers also raise the bar for new entrants and this in turn helps to drive best practice across the industry and good outcomes for customers.

In Australia, code compliant BNPL providers who may not be obliged to hold a financial services or credit licence (which would require that entity to be a member of an external dispute resolution scheme) have voluntarily become members of the Australian Financial Complaints

Authority to ensure that appropriate external dispute resolution arrangements are in place in relation to their business.

The BNPL Code also supports the collection of data about the industry, including macro level data about customers and information about complaints. This enables data driven analysis and benchmarking and helps to identify issues that may need to be addressed and areas where the Code can be enhanced.

While the BNPL Code covers a significant proportion of BNPL providers and transactions in Australia, it is not mandatory and there is some anecdotal evidence of consumer detriment originating from providers who are not Code signatories, primarily because their product does not meet the definition of the BNPL product or service, including but not limited to 'wage advance' (online payday lenders).

This risk can be addressed in part by initiatives such as public awareness campaigns and promotion of an industry code to encourage consumers to preference BNPL providers who are a code signatory and/or encourage BNPL providers to become a code signatory and for other providers to introduce their own codes of practice suitable for their product offering.