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By email: [kaitlin.hanrahan@acc.gov.au](mailto:kaitlin.hanrahan@acc.gov.au);

cc [theo.kelly@acc.gov.au](mailto:theo.kelly@acc.gov.au)

Dear Ms Hanrahan

### **New Energy Tech Consumer Code (NETCC) – Draft Determination**

The Australian Finance Industry Association [AFIA] appreciates the opportunity to provide further insights to enable us to lodge this submission on the application for ACCC authorisation of the New Energy Tech Consumer Code [NETC Code].

AFIA acknowledges the attempt by the Applicants to enable consumers to benefit from a market where alternate finance options, including buy now pay later [BNPL], could be available to acquire new energy tech as an alternate to cash.

We also acknowledge the challenge that the ACCC faces in trying to balance the comments and interests of the various stakeholders.

Our industry insights build from our submissions dated 4 March, 29 August 2019 and 26 September 2019.

### **AFIA Response**

AFIA submits that the latest revisions primarily around amendments to clause 25(b) and 25(d) would result in:

- A compliance obligation that imposes a much higher compliance obligation on BNPL providers that is not proportionate to the consumer risk identified by the Applicants in the 6 September letter
- Customers being prevented from choosing the product that they think is the most effective, convenient and appropriate for their situation;

- Reduced innovation in deferred payment products; and
- Reduced competition

We believe that the current proposed solution is not proportionate to the risk sought to be addressed with the flow-ons for consumers of either higher price or lack of availability.

For this reason, AFIA proposes an alternate revision of both these clauses designed to achieve the balance with the flow on benefits to the consumers.

We also provide some suggested amendments to clause 3d and the infographic.

Finally, the timing of the proposed NETC Code, once final form is agreed, is unclear. Regardless of the obligations placed on BNPL providers under the final NETC Code, should the final form of the NETC Code create additional obligations for BNPL providers who wish to finance NET products, AFIA members require sufficient lead time to comply - for example, an obligation to comply with an industry code of conduct requires time to finalise and implement, as does the requirement to have policies determined by a Code Administrator. As a result, AFIA suggests a minimum lead time of 12 months is required before any final agreed form of the NETC Code is effective.

### **Conclusion + Next steps**

AFIA Members' are committed to working with the ACCC on its authorisation decision for the NETCC as currently drafted and we would welcome the opportunity to discuss the contents of this submission further.

If you have any questions, please contact me at [REDACTED] or via [REDACTED]

Kind regards



Karl Turner  
Chief Executive Officer (Acting)

## 1. Amended Code: Page 3 Infographic

For ease of reference we have provided below the relevant section of the Infographic contained in the Amended Code:



### AFIA Submission

This Infographic refers only to the offering of finance through a licensed credit provider and does not reflect the inclusion of payment arrangements not regulated by the National Consumer Credit Protection Act 2009 (Cth) (BNPL) in accordance with the remainder of the Code.

### AFIA Infographic Proposed Revision

AFIA proposes that the Infographic be updated to reflect the inclusion of BNPL providers. This can be achieved by amending the text in the Infographic to include the underlined text below:

#### **Payment & Finance**

*We will provide clear and complete information about your payment options. We will only offer finance through others if they are a licensed credit provider or comply with a code of conduct.*

## 2. Amended Code: Revision Proposed by the Applicants to Clause 3(d)

The relevant content of clause 3(d) of the Amended Code is provided below showing the Applicants' revision in blue:

*3. Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:*

...

*d) make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act (2009) (Cth) ("NCCPA")*

### AFIA Response

Australian Consumer Law already contains consumer protections in relation to unsolicited sales by door-to-door sale- people and telemarketers. The requirements include:

- How and when they can approach a consumer;
- The information they must provide to a consumer, including disclosures in the unsolicited consumer agreement; and
- Cancellation rights (cooling off periods).

### **AFIA Clause 3(d) Proposed Revision**

In its current form, due to the abovementioned consumer protections, AFIA proposes that, as clause 3(d) provides not additional benefits, it should be removed.

If this is not acceptable to the ACCC or the Applicants, AFIA requests the ACCC or the Applicants describe or identify the particular behaviours or practices that, in their view, create a risk of consumer detriment that is not sufficiently managed under the existing Australian Consumer Law. This will enable AFIA to provide more meaningful feedback to address these specific concerns.

### **3. Amended Code: Revision Proposed by the Applicants to Clause 25(a)**

Due to the suggested revisions of clause 25(b) and the rationale for these revisions, AFIA proposes that clause 25(a) is superfluous and unnecessary. Further AFIA is concerned that its retention may create confusion for customers and NET retailers as to the benefits for consumers of having and retaining an ACL and the associated perceived consumer detriment associated with BNPL providers not having an ACL. AFIA suggests this may not be the intention of the Applicants or the ACCC.

### **4. Amended Code: Revision Proposed by the Applicants to Clause 25(b)**

The relevant content of clause 25(b) of the Amended Code is provided below showing the Applicant's revision in blue:

*25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n. 2.m)), we will ensure that:*

...

*b) the deferred payment arrangement is either regulated by the NCCPA and the National Consumer Code ("NCC") or complies with a regulator approved code of conduct (such as those meeting ASIC RG 183) that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections*

### **AFIA Response**

- It is our understanding that ASIC is the regulator being considered by clause 25(b).
- As AFIA outlined in its submission dated 26 September 2019, the development of the proposed industry BNPL Code is following ASIC's RG183 and will be supported by a robust governance framework and independent oversight.

ASIC, as a key external stakeholder, will be consulted through its development ASIC. In addition, the Consumer Advocates (including CALC and the Financial Rights Legal Centre) and new energy tech industry bodies will also be consulted and, in addition to ASIC's RG183, this consultation will also take into account the consumer advocate expectations regarding review of codes:

<http://consumersfederation.org.au/wp-content/uploads/2018/05/Guidelines-Codes-EDR-Schemes.pdf>

- The objective is to enable these key external stakeholders to provide insights to shape the final form of the BNPL Code and the Code to be finalised and implemented at the earliest opportunity with the flow-on benefits to consumers.
- Given the time/resources involved with the review by ASIC of the ABA Banking Code of Practice that saw finalisation and implementation delayed, we believe our suggested approach of removal of the concept of a regulator-approved Code on the basis that the proposed revision (and taking into account the proposed consultation process to support the BNPL Code development) will achieve the consumer protection objective sought at the earliest opportunity minimising delay with the flow-on benefits to consumers.

### **AFIA Clause 25(b) Proposed Revision**

AFIA proposes that clause 25 (b) be amended as follows:

*25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n. 2.m)), we will ensure that:*

...

*b) the deferred payment arrangement is:*

- (i) ~~either~~ regulated by the NCCPA and the National ~~Consumer~~ Credit Code ("NCC"); or*
- (ii) offered by a credit provider, whether licensed under the NCCPA or not, that subscribes to and maintains continuing compliance with a relevant Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA relating to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management.*

### **5. Amended Code: Revision Proposed by the Applicants to Clause 25(d)**

The relevant content of clause 25(d) of the Amended Code is provided below showing the Applicant's revision in blue:

*d) ~~ensure that~~ you receive the following clear and accurate information:*

- (i) the name of the licensed credit provider to whom you will be contracted for the arrangement*
- (ii) a clear statement that the deferred payment arrangement is a voluntary finance option*
- (iii) the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day*
- (iv) the disclosures required under the NCC, including in relation to fees and charges (regardless of whether the arrangement is regulated under the NCC)*
- (v) whether at the conclusion of the deferred payment arrangement*
  - a. you own any elements of the New Energy Tech or*
  - b. you have any entitlement to any ongoing services or pricing and/or*
  - c. you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs and*
- (vi) a statement that questions and complaints about the payment arrangement should be directed to the licensed credit provider with whom you will be contracted.*

## AFIA Response

It is unclear what the role and obligations of the BNPL provider are for the New Energy Tech provider's compliance with the disclosure requirements of 25(d). The Code does not provide:

- how BNPL providers are expected to ensure their associated New Energy Tech providers will comply with these provisions (and other provisions of the Code); or
- the consequences for the BNPL provider if their associated New Energy Tech providers fail to comply with these provisions.

## AFIA Clause 25(d) Proposed Revision

In the absence of any information addressing these issues, AFIA proposes that clause 25(d) be reverted to the amended content set out in Annexure 1 of AFIA's submission dated 26 September 2019.

## 6. Amended Code: Revision proposed by the ACCC to Clause 25 (clause 24 of the Draft Code)

The relevant content of clause 24 of the Draft Code is provided below showing the ACCC's revision in red:

*24. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 2.m), we will ensure that:*

- (a) this **deferred** payment arrangement is offered through a credit provider (whether ourselves or a third party) **that is either:***
  - i. licenced under the **National Consumer Credit Protection Act (2009) (Cth)** ("**NCCPA**") **NCCPA** and the deferred payment arrangement is regulated by the **NCCPA** and the **National Consumer Code** ("**NCC**"); or*
  - ii. a licensee or a related body corporate (as defined in s5 of the **NCCPA**) of a licensee under the **NCCPA** and the deferred payment arrangement is exempt from the **NCC** and:
    - (A) the Code Administrator has determined that the credit provider has policies that require the credit provider to:*
      - (I) resolve any complaints you may have using an internal dispute resolution process and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)*
      - (II) have processes to identify whether you are experiencing payment difficulties due to hardship*
      - (III) offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments*
      - (IV) comply with the following sections of the **NCCPA** as if the credit provider was a licensee and the credit contract was regulated by the **NCCPA** and the **NCC**:*
        - *s 128 (obligation to assess unsuitability)*
        - *s 129 (assessment of unsuitability)*
        - *s 130 (reasonable inquiries about the consumer)*
        - *s 131 (when the credit contract must be assessed as unsuitable)*
        - *s 132 (giving the consumer the assessment) and**

- s 133 (prohibition on entering, or increasing the credit limit of, unsuitable credit contracts)
- (b) *the term of the deferred payment contract or lease is no longer than the expected life of the product or system*
- (c) ~~ensure that~~ *you receive the following clear and accurate information:*
- i. *the name of the licensed credit provider to whom you will be contracted for the arrangement*
  - ii. *a clear statement that the deferred payment arrangement is a voluntary finance option*
  - iii. *the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day*
  - iv. *the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from the NCC, the credit provider's fees and charges, including any merchant fees.*
  - v. *whether at the conclusion of the deferred payment arrangement*
    - (A) *you own any elements of the New Energy Tech, or*
    - (B) *you have any entitlement to any ongoing services or pricing, and/or*
    - (C) *you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and*
  - vi. *a statement that questions and complaints about the payment arrangement should be directed to the licensed credit provider with whom you will be contracted.*

### **AFIA Response**

In respect of the proposed changes to clause 24(a):

- The ACCC's proposed amended drafting (requiring the providers of BNPL finance to either hold an Australian Credit Licence (ACL) or be a related body corporate to an ACL holder) has the effect of substantially lessening competition in the BNPL industry and also in the financing of New Energy Tech products.
- The inclusion of specific sections of the NCCPA relating to responsible lending attempts to bring the otherwise exempt BNPL providers into the realm of the NCCPA by requiring compliance with these legislative provisions.
- AFIA notes the significant reviews of the BNPL products offered by significant market participants in this segment by the Senate Economics Reference Committee and ASIC which culminated in a determination that there was no evidence of consumer risk of harm to warrant regulation (e.g. extension of the NCCPA to BNPL).
- If the latest proposed changes are driven by a perceived lack of regulation, as previously stated, the BNPL product, while not regulated by the NCCPA, is not 'unregulated'.
- It is subject to a range of consumer protection laws, including the ASIC Act prohibitions against misleading or deceptive conduct and unconscionability as well as the unfair contract terms provision protections.

- Other laws also have relevance including the Privacy Act (to regulate the handling of BNPL customer personal information including consumer credit reporting information) and Anti-Money Laundering Act (including regulation of customer identity). These laws are enforced by robust regulators providing consumers with free access to avenues to raise complaints and have them determined.
- In addition to these external dispute resolution options available through these regulators, customers of our BNPL members also have the option of using the ASIC-approved EDRS – Australian Financial Complaints Authority – our BNPL members are subscribers of that Scheme; either as a voluntary self-regulatory initiative or as a flow-on from offering a NCCPA-regulated credit product requiring EDRS-membership as a pre-cursor to obtaining an ACL and then seeing complaints relating to other products offered (e.g. BNPL product) also able to be considered by AFCA (e.g. a complaint relating to breach of privacy or breach of the ASIC Act).
- Consumers also have rights to seek ASIC’s new Product Intervention Power which are able to be used to take action against a BNPL provider if the product offered is determined to raise risk of consumer harm. The Design and Distribution Obligations will equally apply to the BNPL product as other consumer credit products.
- Proposed changes, as currently drafted, will have the effect of excluding BNPL providers who do not have an ACL from offering their products to consumers which has clear anti-competitive consequences and creates a barrier to entry for new BNPL financiers.
- It also limits innovation for existing BNPL providers either desiring to or currently providing finance for New Energy Tech products who currently do not hold an ACL. This would have potentially significant unjustified, unquantified and unknown impacts on the legitimate activities various BNPL providers, their associated New Energy Tech providers and their contractors and employees.
- One final point relates to the role of the proposed Code Administrator. As currently drafted, under (A), the Code Administrator has various review and monitor obligations. However, this potentially is a duplication as the AFIA Code of Conduct which will have a Code Compliance Committee (CCC) appointed to oversee and management governance. An example of a current terms of reference of one of our Codes is enclosed [here](#). As part of the By Laws that support a Code, BNPL members will have to meet certain requirements around complaint management, financial hardship, and disclosure to the CCC’s satisfaction in order to become a Code Compliant Member – a current example of the process the AFIA On-Line Lenders followed is detailed in section 5 [here](#).



- The accountability for designing, approving and monitoring policies and procedures relating to financial situation assessment, complaint management, financial hardship, and disclosure sits with BNPL Member's boards, with oversight by ASIC not the Code Administrator or the ACCC.

Finally, in respect of the proposed changes to clause 24(c):

- It is unclear what types of fees the ACCC is referring to as "merchant fees". If "merchant fees" refers to those service fees paid by merchants to BNPL finance providers, then this amendment is contrary to the intent of the disclosures required under the National Credit Code (**NCC**).
- The NCC requires finance providers to disclose fees and charges that are, or may become, payable by the customer to the finance provider. Providers of New Energy Tech products and services are contractually prevented from charging a consumer a different price if they choose to use a BNPL product instead of another form of payment. Therefore, signatories to the NETCC should only be required to disclose fees and charges paid by the customer to the finance provider.

#### **AFIA Clause 24 Proposed Revision**

AFIA proposes that clause 24 be reverted to the amended content set out in Annexure 1 of AFIA's submission dated 26 September 2019 - reattached.

## Annexure 1

### Proposed revised Clause 24 in full

We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 2.m)), we will ensure that:

- a) this payment arrangement is offered through a credit provider (whether ourselves or a third party) licenced under the National Consumer Credit Protection Act 2009 (Cth) ("NCCPA") and the deferred payment arrangement is regulated by the NCCPA and the National Credit Code ("NCC"); or
- b) the payment arrangement is offered by a credit provider, whether licensed under the NCCPA or not, that subscribes to and maintains continuing compliance with a relevant Code of Conduct or an industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA relating to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management.
- c) the term of the deferred payment arrangement or lease is no longer than the expected life of the product or system
- d) you receive the following clear and accurate information:
  - i. the name of the credit provider to whom you will be contracted for the arrangement
  - ii. a clear statement that the deferred payment arrangement is a voluntary finance option
  - iii. the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
  - iv. the disclosures required under the NCC if the deferred payment arrangement is regulated by the NCCPA and other clear and transparent information, including in relation to fees and charges
  - v. whether at the conclusion of the deferred payment arrangement
    - you own any elements of the New Energy Tech or
    - you have any entitlement to any ongoing services or pricing and/or
    - you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs and
  - vi. a statement that questions and complaints about the payment arrangement should be directed to the credit provider with whom you will be contracted and that if a complaint cannot be resolved with the credit provider you may take your complaint to the Australian Financial Complaints Authority for resolution.