



CFA submission to the independent review of the AFIA BNPL Code

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Dear Mr Peter Kell

Consumer's Federation Australia Joint Consumer Submissions: Review of the Australian Finance Industry Association (AFIA) Buy Now Pay Later Code of Practice

We welcome the opportunity to provide our response to the AFIA consultation paper for review of the Buy Now Pay Later (**BNPL**) Code of Practice (**Code**).

Consumer Credit Legal Services (WA) Inc. (**CCLSWA**) has drafted these submissions on behalf of the Consumers' Federation of Australia (**CFA**) and its members. CFA is the peak body for consumer organisations in Australia, representing a diverse range of consumer organisations, including most major national consumer organisations.

The objectives of the CFA are to promote the interests of consumers, in particular low income and disadvantaged consumers, through various means, including:

- identifying areas in which the interests of consumers are being adversely affected;
- advocating policy and law reform changes to benefit Australian consumers;
- conducting consumer awareness and information programs;
- liaising with other consumer and community groups to advance the interest of consumers; and
- facilitating consumer participation in the development of Australian and international standards for goods and services.

The CFA members who have endorsed these submissions are:

- Consumer Credit Legal Service (WA) Inc.
- Consumer Action Law Centre (**CALC**)
- Financial Counselling Australia (**FCA**)
- Financial Counsellors' Association of Western Australia (**FCAWA**)
- Financial Rights Legal Centre (**FRLC**)
- Good Shepherd Australia New Zealand (**Good Shepherd**)
- Mob Strong Debt Help

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

Background

BNPL is an arrangement that allows consumers to buy and receive goods and services immediately and pay for those purchases over time. BNPL providers do not charge interest on the finance used, however, they may charge consumers fixed fees for using the finance and charge merchants service fees for accepting BNPL.

The Code is voluntary, and was drafted by AFIA and its BNPL members to establish an industry code of best practice. Since the Code's commencement in March 2021, nine BNPL providers have become Code signatories, which represents 95% of the BNPL market in Australia by value of transactions.¹ CFA made submissions to the first draft of the Code calling for the following:

- BNPL arrangements should be regulated under the *National Consumer Credit Protection Act 2009 (NCCPA)*
- Until NCCPA regulation is in place, the Code should incorporate NCCPA protections, such as responsible lending, hardship arrangements and information and document provisions 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 independent from 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

Some of those recommendations were incorporated into the Code published in March 2021, though many of our key recommendations were overlooked. Further, our experience enforcing the Code brings to the fore the concerns we maintain for the dangers these products can pose to consumers.

It is our view this danger arises mostly due to the under regulation of BNPL products.

BNPL products generally fall within loopholes in the NCCPA and the *National Credit Code (NCC)*. As a result, BNPL providers are not subject to responsible lending obligations and are not required to consider the income or existing debts of consumers. This means BNPL providers can – and do – offer finance to consumers who cannot afford to repay it; and we often see people who are in financial hardship and in default with multiple BNPL providers. The lack of proper suitability assessments makes BNPL more susceptible to misuse, particularly in circumstances of financial abuse. This means BNPL products are more accessible to consumers in financial hardship, whilst operating with fewer consumer protections than traditional credit products. A product being used by vulnerable people and those in financial hardship should have greater protection, not less. If BNPL products are going to be available to people in financial hardship, who perceive themselves as having no choice but to turn to these alternative sources of credit, it is vital BNPL products contain meaningful consumer protections. This should primarily come in the form of legislation and supported by a robust Code. The current Code does not meet this standard.

It is not within the scope of these submissions to assess any aspect of the commercial performance of BNPL providers who are Code signatories, or the general economic conditions in which they operate. Similarly, it is not within the scope to analyse or make recommendations about the form,

¹ Buy Now Pay Later Code Compliance Committee, [Buy Now Pay Later: The First Year of Self-Regulation](#) (Report, March 2022) 2.

content, or obligations of any statutory regulation of the BNPL sector in Australia the Government is considering or may adopt. That said, we strongly support statutory regulation of BNPL as a credit product. The BNPL industry cannot continue to be left to self-regulate – the Code has failed to deliver good consumer outcomes. We are conscious there is a concurrent consultation through the Federal Treasury considering regulating the sector. Any comments in this submission should not be construed as support for any particular option proposed in the consultation paper.

However, we draw the review's attention to the joint consumer submission to Treasury, which advocates strongly that BNPL is credit and should therefore be regulated as credit. The joint consumer advocate position is that the role of any industry code should be to elaborate on and move beyond the law.

The CFA appreciates the value a robust code can bring by way of consumer protections and are pleased to see AFIA's BNPL members are taking steps towards strengthening the standards for the sector.

We have incorporated case studies as examples of our experiences. The case studies in this submission have been de-identified and all names changed for privacy reasons. If the review would like to know the name of a BNPL provider or further detail on a particular case study, CCLSWA can approach the relevant service provider and/or client and seek their permission for those details to be provided.

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Nine Key Commitments

1. “We will focus on customers”

Question 1(a): Are the Code provisions that relate to dealing with customers with a vulnerability sufficiently clear and specific?

- 1.1. In our experience, the Code provisions that relate to dealing with consumers with a vulnerability are not sufficiently clear and specific and do not adequately protect vulnerable consumers.
- 1.2. We have set out our experience and recommendations below.

Vulnerability

- 1.3. CFA members, comprising of financial counsellors, community legal centres and other community organisations, regularly deal with particularly vulnerable consumers who have issues with BNPL products.
- 1.4. We acknowledge since its first draft, the Code has expanded its commitment to vulnerable consumers. Initially focusing on vulnerability only in the context of financial hardship, the current Code now also refers to vulnerability in the context of focusing on consumers and assessing new and existing consumers at clauses 8.3, 8.5, 11.3(a) and 11.11(e).
- 1.5. However, our experience indicates the Code has not gone far enough.
- 1.6. Firstly, clauses 8.3, 11.3(a) and 11.11(e) state that BNPL providers may only become aware of a consumer’s vulnerability if they disclose it to the BNPL provider.
- 1.7. This is problematic as it places the onus on the consumer to self-identify as vulnerable. BNPL providers must be proactive in identifying risk factors and triggers for vulnerable consumers.
- 1.8. There are many reasons why a consumer may fail to self-identify as vulnerable, including the considerable stigma that continues to be attached to being vulnerable, particularly those experiencing financial difficulty.
- 1.9. Furthermore, consumers may be reluctant to identify themselves as vulnerable, as they feel this may limit their ability to access BNPL arrangements. This is a strong theme identified by financial counsellors noting:²

“Currently I have clients who would rather keep their BNPL accounts up to date, rather than pay their rent”

² Financial Counselling Australia, [It’s Credit, It’s Causing Harm and It Needs Better Safeguards: What Financial Counsellors Say About Buy Now Pay Later](#) (Report, December 2021) 6.

“Clients prioritise BNPL repayments over rent, food and utilities – due to the pressure applied from the creditor and approximately 50% of cases, due to the need to keep using the facility to buy food”

- 1.10. Similarly, a 2020 report from the Australian Securities and Investment Commission (**ASIC’s 2020 BNPL Industry Update**) found 20% of consumers surveyed said they cut back or went without essential, such as food, in order to meet their BNPL obligations on time.³
- 1.11. Accordingly, given consumers may not acknowledge or recognise their own vulnerability, a simplified and non-exhaustive list should be incorporated into the Code and brought to the attention of new or prospective consumers.
- 1.12. The definition of ‘vulnerability’ at clause 8.4 should also be simplified. Whilst the ASIC definition is comprehensive, it is quite wordy and not necessarily easy for consumers to read and identify specific vulnerabilities. We consider a simplified, non-exhaustive list would be preferable. For example, using the following:

We are committed to taking extra care with customers who are experiencing vulnerability. A person’s vulnerability may be due to a range of factors, such as:

- a) age;*
- b) disability;*
- c) mental health conditions;*
- d) physical health conditions;*
- e) family violence;*
- f) language barriers;*
- g) literacy barriers;*
- h) cultural background;*
- i) Aboriginal and/or Torres Strait Islander peoples or identifies as Aboriginal or Torres Strait Islander;*
- j) remote location;*
- k) financial distress; and*
- l) any other personal, or financial circumstances causing significant detriment.*

- 1.13. One of the key flaws of the BNPL Code is that it lacks language that makes explicit and specific commitments to assist people experiencing vulnerability, as defined above.

³ ASIC Report 672, [Buy Now pay later: An industry update](#), November 2020, 15.

- 1.14. We recommend that the Code make specific commitments to assist consumers by (without limitation):
- (1) Providing access to free interpreter services to consumers where required. This should include interpreters for Aboriginal and/or Torres Strait Islander customers.⁴
 - (2) Communicating with consumers having hearing difficulties through the National Relay Service, and for those customers who use it, AUSLAN interpreters.⁵
 - (3) If required, facilitate the consumers use of additional support – for example a lawyer, consumer representative, interpreter, family member, carer, or friend – ensuring that processes are flexible enough to recognise the authority of the consumer’s support person.⁶
 - (4) If consumers need support to meet verification and identification requirements, BNPL providers will take reasonable care to support the consumer, especially if they are from an Aboriginal and/or Torres Strait Islander community, a non-English speaking background or impacted by family violence, whilst remaining in line with AUSTRAC guidance and legal obligations.⁷
- 1.15. Further, we consider that if a consumer discloses family violence as a reason for vulnerability, the Code should be clear they do not have to provide evidence of their situation. This is discussed further at paragraph 6.19.
- 1.16. Moving the onus from consumers to self-identify will require BNPL providers to commit to recognising the red flags for vulnerability. The use of BNPL arrangements to pay for essentials, such as utilities or buying gift cards for food and petrol, should be considered a ‘red flag’ and trigger ‘scaled up’ enquiries and obligations, such as a requirement to issue warnings and provide information about alternatives, similarly to that required for Small Amount Credit Contracts (**SACCs**) by the *National Consumer Credit Protection Regulation 2010* (the **Regulations**).⁸
- 1.17. We recommend such warnings mirror the Regulations and go further to also include:
- (1) National Debt Hotline – 1800 007 007
 - (2) Speak to electricity, gas, phone or water providers for payment plans
 - (3) Centrelink – if on government benefit
 - (4) 1800 Respect
 - (5) Mob Strong Debt Help 1800 808 488

⁴ Rec 48 of the Banking Code review, GICOP paras 101-102.

⁵ Rec 48 of the Banking Code review.

⁶ Financial Services Council, [Life Insurance Code of Practice](#), clause 6.13.

⁷ *Ibid*, clause 6.14.

⁸ See [National Consumer Credit Protection Regulation 2010](#) Regs 28LCA, 28LCB, 28LCC, as prescribed in Schedule 7 and 9.

(6) Referrals to the Moneysmart website

- 1.18. We liken BNPL arrangements to SACCs that offer similarly small amounts of credit that have similar potential for causing consumers, and in particular vulnerable consumers, significant harm. This is addressed further throughout this submission.
- 1.19. More than just ‘scaling up’ enquiries in these situations, the minimum requirements when setting up an account also need to be raised. The concept of scalability is not a new for consumer credit products and apply to responsible lending obligations under the NCCPA.⁹
- 1.20. Additionally, BNPL providers should commit to not referring or selling debts to external debt collectors if they are aware the consumer is experiencing vulnerability, or there is no reasonable chance the consumer will be able to repay the debt in the future. In relation to the latter, BNPL providers should accept as a commercial risk and consequence of their lending model, which requires minimal assessment of a consumer’s financial situation, that bad debts will need to be written off.
- 1.21. The story of Wes and his wife highlights a number of issues that we see with BNPL providers and vulnerable clients, including a lack of any kind of suitability assessment, prohibitive fees and absence of easy access to hardship assistance when consumers are experiencing financial distress.

Case study – Wes’ story

Wes has been on a disability support pension for over 20 years and is the primary carer for his wife, who is 80 years old. Neither of them has any assets and they regularly rely on their daughter for food. The only thing keeping them from acute risk of homelessness is that his landlord has not raised the rent for over 20 years.

Wes has simply not had enough money coming in to cover their essentials while caring for his wife over the last five years. As a result, Wes has taken out small amounts of credit at times when he was desperate, the repayments for which have made it even harder for Wes to make ends meet over time. When Wes was approved recently for regulated credit products, the affordability assessments involved ridiculous underestimates of his expenses (such as \$60 a month for living expenses).

Two of his more recent debts however are owed to BNPL providers that are signatories to the Code, under which Wes owes over \$3,000. Even though he was only making the minimum repayments on these loans for over a year (and barely paying down the balance), the account limits increased over time. He said that his wife also owes over \$1000 under another account. This is a significant amount of their debt.

Wes said he was so concerned about his financial situation that he approached a private debt management firm (or debt vulture). Wes says he was told to stop paying his debts (causing him to incur extra late fees), but when the firm realised he wasn’t going to be able to afford their upfront fees, the firm told him to file for bankruptcy. This created additional anxiety for him and could have left him worse off.

⁹ See ASIC, [Regulatory Guide RG 209 Credit licensing: Responsible lending conduct](#), December 2019 at 209.79.

A financial counsellor is now assisting Wes with his debts, including disputing the fees charged for regulated credit products that have been charged under loans that were never affordable for him. While the BNPL products were similarly unaffordable and caused him financial harm, the absence of regulation applying to these loans leaves far fewer legal options available to dispute the debts.

Source: Consumer Action Law Centre

Recommendation 1: The Code should include an obligation that BNPL providers be proactive in identifying risk factors and triggers for vulnerable consumers.

Recommendation 2: BNPL providers must provide warnings and information regarding alternatives and forms of assistance prior to opening an account or increasing the account limit.

Recommendation 3: Vulnerability should be defined in a non-limiting way to make it easy for consumers to identify specific categories of vulnerability.

Recommendation 4: BNPL providers should be required to scale up enquiries where red flags are raised, such as the use of BNPL for essentials.

Recommendation 5: BNPL providers must commit to considering vulnerability during every interaction of their customer's journey.

Recommendation 6: Expand clause 14 of the Code to commit to not engage debt external collectors where BNPL providers are aware that the customer is (1) experiencing vulnerability; or (2) is in financial hardship and is highly unlikely to be able to repay the debt in the future.

Identity Verification

- 1.22. BNPL consumers have informed us they are only required to provide basic personal information when setting up their account, such as a debit/credit card information and a photo of their ID. These minimal requirements give the appearance BNPL providers are wilfully remaining ignorant of their consumer's issues and make the product almost frictionless to access compared to other forms of credit.
- 1.23. Minimal processes for identity verification have caused harm to vulnerable consumers, facilitating financial abuse by enabling perpetrators to set up multiple BNPL accounts in their victim's name, without their knowledge or consent. This occurs whilst BNPL providers turn a blind eye with plausible deniability of 'red flags' that would obviously appear with reasonable enquiries akin to the responsible lending obligations contained in the NCCPA.

- 1.24. We consider as part of the assessment process for new accounts, more needs to be done to verify the identity of a consumer.

Recommendation 7: BNPL providers should commit to more meaningful verification of the identity of its customers.

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

Question 2(a): Are the requirements around acting ethically, honestly, and fairly, supporting good customer outcomes, for example in relation to unsolicited marketing or selling?

- 2.1. In our experience the Code does not ethically, honestly and fairly support good customer outcomes, particularly in the following circumstances.

Fee Caps / Disproportionately High Fees

- 2.2. The Code is lacking in specificity, with the language used for obligations often written in extremely general terms. This is particularly relevant for fee caps.
- 2.3. Clause 10.1(g) of the Code states that if a BNPL provider is to charge a late fee, it will be “fair, reasonable, and capped”. This clause is ineffective. It makes no real commitment of measurable value, nor does it provide a point of reference for what constitutes fair and reasonable. Similarly, there is no indication provided as to what late fee would be considered high.
- 2.4. By comparison, the Australian Customer Owned Banking Code of Practice clarifies that similar fees will be reasonable, *having regard to their costs*.¹⁰
- 2.5. For the Code to be effective, there needs to be clear and measurable limits on the late fees a BNPL providers can impose, like the provisions in the NCCPA that cap fees for SACCs.¹¹
- 2.6. Research from Curtin University has shown BNPL fees can operate as a quasi-interest rate that can be more expensive than credit card interest rates.¹² This issue is prominent for small purchases as the fee structure for BNPL products is highly regressive (i.e., the less the consumer owes, the greater the effective interest rate charged).
- 2.7. For example, the average BNPL transaction value is \$151.¹³ If a consumer was to incur the maximum late fees of a purchase of this value, the effective annual interest rate is:¹⁴

¹⁰ Credit Unions, Mutual Building Societies and Mutual Banks, [‘Customer Owned Banking Code of Practice’](#) (January 2018), clause 5.2.

¹¹ See NCC Division 4 – Fees and charges s 31A

¹² Curtin University, [Comparative analysis on credit interest rates vs BNPL fees in the consumer credit market](#), (Report, July 2022).

¹³ AFIA, [The Economic Impact of Buy Now Pay Later](#) (Report, June 2022) 25.

¹⁴ Curtin University (n 12) 8.

- (1) 28.25% for Afterpay;
 - (2) 30.18% for Humm – Little Things (10 fortnightly repayments); and
 - (3) 49.83% for LatitudePay.
- 2.8. In comparison, according to the Reserve Bank of Australia (**RBA**), the average annual credit card rate in Australia as of November 2022 is 19.94%.¹⁵
- 2.9. While BNPL providers may claim their flat \$10 (or similar) fee is reasonable, it seems far less reasonable when you consider most Code signatories impose these fees regardless of the value of the payment missed. Assuming the maximum late fee is incurred on a \$30 purchase, customers of LatitudePay and Humm – Little Things (10 fortnightly repayments) pay an effective annual interest rate of 276.12% and 254.07% respectively.¹⁶
- 2.10. It could be argued fees will only be charged if a consumer is late, however, the lack of any affordability assessment means more consumers are set up to fail and will inevitably end up paying the fees. This is discussed further below at paragraph 4.1.
- 2.11. ASIC’s 2020 BNPL Industry Update found 21% of BNPL users surveyed missed a payment in the last 12 months.¹⁷ In the 2018-2019 financial year, missed payment fee revenue for all BNPL providers in the review totalled over \$43 million, a growth of 38% compared to the previous financial year.¹⁸
- 2.12. Consumer advocates also hold concerns about the effect on consumers who have linked their credit card to their BNPL account, as they risk paying account keeping fees, late fees, and interest on their credit card.

Case study – Jane’s story

Jane presented to financial counselling after struggling to pay for essential items, which led her to using a BNPL provider. This resulted from months of struggling to pay the costs of bills from a telecommunications company that had upsold her goods that she wasn’t able to afford. Jane was a single parent on the Disability Support Pension and long-term public housing tenant.

She relied on the BNPL provider to cover essential items, which meant she often accumulated smaller BNPL debts. She was close to paying off one BNPL debt, totalling \$32, when she was charged a \$10 late fee by the BNPL provider after she failed to make the final payment of a debt which totalled \$8 as she did not have the funds in her nominated account. This surprised Jane, who felt the late fee was disproportionate for the amount owed and it placed additional financial pressure on her already difficult situation.

Source: Financial Counselling Australia

¹⁵ Reserve Bank of Australia, [Table F5 – Indicator Lending Rate](#).

¹⁶ Curtin University (n 12) 8.

¹⁷ ASIC, [Buy now pay later: An industry update](#) (Report 672, November 2020) 4.

¹⁸ Ibid.

- 2.13. Jane’s story is illustrative of the impact of disproportionate fees on consumers.
- 2.14. As part of the joint submission to Treasury, consumer advocates are asking that a fee cap be embedded into the law, in line with the other fee caps in the NCCPA.
- 2.15. Regardless of whether this is ultimately legislated, we recommend the Code provide clear guidance on what may be considered “reasonable” and implement fee caps.

Recommendation 8: Late fees should be capped and limited to the reasonable pre-estimated loss.

Recommendation 9: BNPL providers should not be permitted to link accounts to a consumer’s credit cards.

Using BNPL to supplement other forms of credit

- 2.16. Consumer advocates have become aware of circumstances where BNPL products are being used to circumvent consumer protections entrenched within the NCCPA and to finance low value add-on warranty products.

Case study - Steve’s story

In about November 2020, Steve (then 19 years old) purchased a second-hand car from a dealership for \$20,000, with an odometer reading of about 139,000km.

Finance application

The purchase was ‘subject to finance’ and Steve paid a deposit of \$3,000 with the expectation the dealership’s in-house finance provider (**Lender**) would provide finance for the remainder of the purchase price and for an extended warranty, totalling \$19,500.

Steve told the dealership that he would only be able to afford repayments of \$50 a week. Steve is a casual employee and provided his payslips. An application for finance was made to the Lender for a loan with an \$80 a week repayment, contrary to Steve’s instructions.

BNPL arrangement

The application was rejected, and at this point, Steve wanted to cancel the contract. However, when he notified the dealership of his intention to cancel the contract, he was told that finance would instead be approved by way of two separate loans, being \$17,000 with interest at 9% per annum with the Lender for the cost of the car, and a further amount of \$2,500 with a BNPL provider, for the cost of the extended warranty.

Steve was told that as the loan had been approved, he would not be able to cancel the contract.

Steve pays the Lender \$75 a week and the BNPL provider \$46 a fortnight, totalling \$98 per week. Not surprisingly, he had difficulty making the repayments.

In respect of the extended warranty, Steve says he was told by the dealership that it covered everything except for tyres or cosmetics. He was not told that the warranty had a claim limit of \$3,000.

Steve feels that he was tricked into getting the extended warranty.

On 20 February 2021 (only some 3 months after the purchase), the car broke down. Steve was informed by RAC that the car's head gasket had blown, and that the engine would need to be replaced at a cost of \$12,000.

Steve does not have the funds to replace the engine. He now has a car that does not work, an unaffordable loan with the Lender, and a further unaffordable BNPL agreement with the BNPL provider for a warranty that does not protect him.

Source: Consumer Credit Legal Service (WA) Inc.

- 2.17. Steve's case reflects predatory behaviour used by certain dealerships to circumvent responsible lending laws by deliberately arranging a BNPL arrangement for the add-on warranty to reduce the total amount required as a regulated car loan. The dealership then pressured Steve to proceed with the purchase as finance had been approved.
- 2.18. This conduct is particularly concerning given Steve had not asked for a BNPL arrangement, he was not told about the arrangement beforehand, and the dealership was fully aware the loan sought had been rejected by a credit provider (complying with responsible lending laws). Steve was young, financially vulnerable, and significantly, he did not have the ability to meet the proposed weekly repayments.
- 2.19. Clearly the dealership used the BNPL arrangement to secure the sale and advance its own interest. This is not in keeping with the Code's commitment of being fair, honest, and ethical. It is also a clear example of an unsolicited sale of a BNPL arrangement, which has caused poor consumer outcomes.

Case study - Susan's story

In about February 2021, Susan entered a contract to purchase a 2015 Land Rover Discovery Sport for \$39,950 from a dealership and paid a deposit of \$1,000 (the **First Contract**).

Prior to signing the First Contract, Susan informed the dealership she had pre-approval of up to \$40,000 through a lender to purchase the car. Susan noted she wanted to use this lender (the **Preferred Lender**) because she had an existing loan with them, and the loan repayments would be more affordable if she consolidated her loans through refinancing.

After signing the First Contract, Susan was taken to see a staff member in the delivery section of the dealership who said they would provide a quote for an additional warranty. Susan was unaware the staff member had in fact presented her with another contract for purchase (the **Second Contract**). The Second Contract included the costs of an additional warranty with IWC Mechanical Protection for \$5,990 for 60 months to be financed with a BNPL provider.

She instructs that she was not shown any of the warranty documents, and the dealership then sent the Second Contract onto the Preferred Lender.

Susan was subsequently informed the loan application had been declined by the Preferred Lender, as they did not think the car was worth that much, and they would only approve a loan amount of \$31,000. The dealership said they would send a further application to their finance provider (the **Other Lender**) for assessment.

The Other Lender approved the finance but with a fortnightly repayment of \$380 over a 5-year term, as opposed to a fortnight repayment of about \$175 for the car component over 7 years with the Preferred Lender.

Susan informed the dealership that she did not want to proceed with the purchase and requested the return of her \$1,000 deposit.

Susan felt that the dealership had been 'strong arming' her into accepting the finance from the Other Lender by telling her they had a binding contract. This is despite her instructions that the dealership had represented the Second Contract as nothing more than a quotation for the warranty.

Source: Consumer Credit Legal Service (WA) Inc.

- 2.20. Similar to Steve's case study above, consumer advocates are noticing a worrying trend that unregulated BNPL products are being used to either lower the amount of regulated credit required, thereby improve the chance of a loan being approved, and/or to finance unwanted add-on insurance products.
- 2.21. Steve and Susan's stories highlight the Code's current protections are not enough to dissuade merchants from engaging in predatory behaviour. Instead, the lack of protections has enabled dealerships to use easily accessible BNPL arrangements to circumvent responsible lending laws to secure a sale without regard to the interest of the consumer.

- 2.22. The Code has been ineffective in ensuring both BNPL providers and merchants/retailers are acting fairly, honestly, and ethically.
- 2.23. Consumers are unknowingly being signed up to unaffordable BNPL products to assist in the purchase of costly products and services, often in conjunction with NCCPA regulated credit.
- 2.24. BNPL providers should commit to not working with retailers who are known to engage in unconscionable high-pressure sales tactics coupled with unsolicited selling. The absence of any inquiry into a BNPL applicant's requirements and objectives also means that by design, BNPL providers have little oversight of when retailers are engaging in this kind of harmful conduct.
- 2.25. Where a retailer or merchant engages 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.
- 2.26. Margaret's story below also illustrates how merchants unethically engage with consumers and how difficult it can be otherwise to get an appropriate resolution.

Case study - Margaret's story

Margaret approached CCLSWA for assistance, as she had been trying to change an order for the purchase of a large number of photographs. This purchase had been facilitated through using BNPL by the merchant, who had encouraged Margaret to use BNPL when Margaret had been reluctant to go ahead with the purchase.

Margaret had excitedly believed she won a Facebook competition for a free photoshoot. However, Margaret did not realise she would need to separately pay for the photographs and what those costs would be. If Margaret had known about the cost of the photographs prior to the photoshoot she would not have attended.

After the photoshoot and on the same day, the merchant used high pressure sales tactics to get Margaret to purchase a significant volume of photos. When Margaret pushed back due to the exorbitant cost (and wanted to take a few days to consider), the merchant encouraged her to use a BNPL provider through their website.

Margaret ultimately agreed to purchase through the BNPL provider, and the merchant then filled in the application form on behalf of Margaret. As part of filling in the application, where options were provided (such as the length of the repayment plan) the merchant often made decisions on behalf of Margaret. The merchant also gave Margaret advice on what information was required to get the application approved.

Very shortly after the purchase, Margaret unsuccessfully attempted to change her order – which the merchant refused to do. Margaret then continued to try after the purchase to resolve the issue with the merchant and the BNPL provider. At this stage, the merchant had been fully paid for the purchase of the photographs by the BNPL provider, although the photos had not yet been finished or provided to Margaret. It was also clear the merchant had not complied with its separate obligations to the BNPL provider in relation to the use of BNPL and the having an appropriate refund policy.

Ultimately, the matter was resolved after CCLSWA's assistance, although a complete refund was not provided.

Resolving the matter was complicated by the fact the merchant had been paid by the BNPL provider – not Margaret – and any refunds needed to be organised through that BNPL provider who had separately been charging Margaret fees.

Source: Consumer Credit Legal Service (WA) Inc.

- 2.27. We are also aware of less extreme forms of unsolicited selling in which merchants and/or retailers direct consumers to BNPL products, for example, by directing them to an in-store QR code that allows them to sign up on the spot.
- 2.28. BNPL has also facilitated the widespread practice of unsolicited selling of solar panels and associated products, which has led to significant consumer harm. By being able to market no or low upfront costs, retailers are able to lubricate the sale of a complex product in circumstances where the finance provided is unregulated and lacks safeguards. The harms associated with this sort of selling were set out in some details by CALC in submissions to the Australian Competition Tribunal.¹⁹
- 2.29. We also note that the Regulations exempt vendor-introducers from credit licencing obligations where they facilitate access to regulated consumer credit, and that this exemption does not apply where the introduction is unsolicited. If Code signatories truly want to commit to standards above those required by the law, they should commit to not dealing with vendors or merchants who make unsolicited sales.

Recommendation 10: BNPL providers should commit to not dealing with vendors or merchants who make unsolicited sales.

Supporting good customer outcomes

- 2.30. BNPL products and services were originally marketed for 'discretionary' items, such as fashionable clothing. However, there has been a notable shift in the range and breadth of products and services being financed through BNPL arrangements.
- 2.31. We commend the Code for the existing restrictions on using BNPL for gambling and firearms. However, the Code needs to go further in supporting good customer outcomes in other areas, particularly:
- (1) medical services;
 - (2) free services;
 - (3) hospitality; and

¹⁹ See [Application by Flexigroup Limited Act \[2020\] a CompT2](#)

(4) utilities.

Medical services

- 2.32. With the growth of the BNPL industry, the types of products and services purchased with BNPL has expanded to medical and health goods and services.
- 2.33. We urge BNPL providers to consider their ethical obligations towards consumers in when providing products or services for medical procedures. This is of particular concern given 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 being under-informed when doing so.

Free products/services

- 2.34. We acknowledge it may not be easy for BNPL providers to establish what is free for every consumer, given what is free for one consumer may not be for another. However, when BNPL providers are considering whether a BNPL agreement is suitable, particularly for 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 arrangement will not be suitable under the Code.
- 2.35. We accept that there are circumstances where a basic product or service can be obtained for free, but the same products or services with additional features may be obtained at an additional cost. An example is accessing a copy of a consumer's credit file. It is free for consumers to request a copy of their credit file free every 3 months, which is to be provided within 10 business days. However, if the consumer wants the information quicker, more frequently or would like to have additional services associated with their credit report – for example credit alerts, this can come at an additional cost. BNPL providers should commit to providing an upfront comparison about what additional features may be obtained through a BNPL arrangement, compared to what the consumer may be able to obtain for free. This would empower consumers to make an informed decision regarding whether entering the BNPL arrangement, as opposed to opting for a free service, best meets their objectives and requirements.

Hospitality

- 2.36. We also hold concerns about the use of BNPL to pay for alcohol, or purchase food and beverages in licenced venues. Allowing, and even encouraging, use of BNPL arrangements in situations where it is likely a consumer's inhibitions will be lowered, is not ethical.
- 2.37. In many of licenced venues, there is also easy access to gambling. Some consumers may use BNPL for food and beverages, to save their cash for gambling. In restricting use of BNPL in licenced venues, it may also have the added benefit of reducing gambling.
- 2.38. An argument could also be made that consumers using BNPL arrangements to manage the cost of a meal may be showing signs of financial hardship.

Utilities

- 2.39. Consumers who are unable to pay for essential services like utility bills, are likely entitled to access the hardship provisions of their utility provider. Under the National Energy Retail Law, energy providers are required to provide hardship programs, including making payment plans, providing energy efficient advice, or waving late fees if someone is having difficulties paying a bill.²⁰
- 2.40. By encouraging consumers to use BNPL products for utility bills, consumers are losing access to free hardship assistance, and instead face additional costs to essential services through various fees.
- 2.41. BNPL providers should be referring consumers to their utility provider's hardship options, before providing a BNPL arrangement to pay for them. The BNPL providers that currently advertise this option (for example Zip) charge certain fees for account management, which leaves no doubt that people are worse off than if they engaged with utility providers hardship processes.

Recommendation 11: When a consumer is using a product or service which can be obtained for free, BNPL providers must provide information to the consumer about the free alternative options.

Recommendation 12: BNPL providers should be prohibited from providing BNPL arrangements to consumers at hospitality venues.

Marketing and advertising

- 2.42. Prior to the commencement of the Code, CFA made submissions suggesting several inclusions around the marketing and advertising of BNPL products, which ultimately were not incorporated.²¹
- 2.43. Since the Code's inception, there has been a number of issues with the advertising of BNPL products and services.
- 2.44. FCA called out the issues with Afterpay explaining debt to minors in a way that minimised the risk of BNPL products.²² More recently, Afterpay have run in person campaigns at department stores, where sales staff make cold approaches to people suggesting they sign up for their services. This kind of unsolicited selling is entirely inappropriate for a credit product.
- 2.45. Although clause 9.5 of the Code commits to taking reasonable steps to ensure that BNPL products are not used or suggested in relation to unlawful unsolicited marketing or selling, the commitment is meaningless while the industry remains underregulated and outside of the

²⁰ See Australian Energy Regulator, [Your Energy Rights](#).

²¹ Consumers' Federation of Australia, Submissions to Australian Finance Industry Association, *Review of AFIA's Draft Buy Now Pay Later Code of Practice and Terms of Reference for the Code Compliance Committee* (6 May 2020).

²² FCA, [Call for Afterpay Rebel Wilson advertisement to be discontinued](#) (Media Release, 27 July 2021).

credit laws. This is clearly evidenced by the behaviours of BNPL providers such as those called out at para 2.44.

- 2.46. We also hold concerns consumers are being confused by BNPL being advertised as a comparative alternative to lay-by. They are not the same and have very different risks and costs associated. We recommend BNPL advertising should not include comparisons to lay-by arrangements.
- 2.47. We continue to advocate BNPL providers should make sure their advertising and promotional material is ethical, specifically, that it:
- (1) is clear and not misleading or deceptive;
 - (2) does not encourage excessive use, misuse or abuse of BNPL products or services;
 - (3) does not glamorise debt or financial hardship;
 - (4) does not encourage irresponsible behaviour;
 - (5) is not targeted at vulnerable groups, including by not depicting minors; and
 - (6) does not misrepresent the extent of protections offered by the Code.
- 2.48. Although we acknowledge clause 10.2(a) of the Code commits to BNPL providers ensuring advertising and promotional material is clear and not misleading or deceptive, our experiences indicate such conduct continues despite the Code provisions.
- 2.49. Therefore, we consider there needs to be more effective oversight and enforcement of the Code, including appropriate sanctions for breaches of the Code provisions.

Recommendation 13: The Code must commit to advertising and marketing ethically.

Recommendation 14: The Code must commit to greater oversight and enforcement of appropriate sanctions for breaches of the Code.

Recommendation 15: BNPL providers should commit to not engaging in unsolicited selling.

Early Opt-Out / Repayments Fees

- 2.50. Clause 10.7 of the Code provides that early opt out or repayment fees should not be imposed. However, the same clause goes on to allow for minimum notice periods to be imposed for “some” products and services without justification. Minimum notice periods are being attached to products and services with longer repayment schedules, which has led to additional and unnecessary account keeping fees being charged.

Recommendation 16: Consumers should be able to make early repayments on all products and services with no fees attached.

Recommendation 17: Consumers should be able to pay out any transaction or any contract and close the account at any time with no early termination fee.

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

Question 3(a): Are the requirements under the Code in relation to informing consumers of key product features, including fees, ensuring consistent consumer understanding of BNPL products and services?

- 3.1. The current disclosure requirements under the Code are not doing enough to ensure consistent consumer understanding of BNPL products and services.
- 3.2. The lack of a single coherent Code for the entire industry, makes it very difficult for consumer to understand their rights and obligations.
- 3.3. 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.
- 3.4. Consistency reduces confusion. This could be achieved by the Code applying the same consumer rights and obligations associated with other credit products.
- 3.5. Additionally, we consider there is value in BNPL providers being more transparent in terms of their fee structures, potentially leveraging product features and fee structure to competitive advantage. What is required is clear consistent information, which allows consumers to compare fees and other associated conditions to make informed choices about BNPL arrangements.
- 3.6. We are advocating for the Code to require BNPL providers to produce consistent or standardised terms, covering key product features, including fees, for ease of comparison and understanding by consumers.

Information requirements

- 3.7. BNPL providers agree to help consumers make informed decisions by making their terms and conditions fair, clear, and transparent and written in plain language.²³
- 3.8. Although disclosure has an important role to play in contributing to market transparency, integrity and efficiency, disclosure alone is not enough to protect consumers.²⁴ Reasons for this include:
- (1) **Financial products are inherently complex** – whilst the simplification of the terms and conditions may amount to simplified language, it does not simplify the concepts and issues.
 - (2) **Volume of information** – consumers can be overwhelmed by information and often do not read the information or skip large parts.
 - (3) **Context and emotions** – disclosure does not ease the contextual and emotional decisions of financial decision making, such as the mindset of the consumer, or emotional nature of fast decisions made by vulnerable consumers.
 - (4) **Consumer differences** – consumers financial decision-making processes, needs, and understandings differ person to person and situation to situation in how we make financial decisions.
- 3.9. As a result, a “one size fits all approach” cannot meet the demands of all consumers, and BNPL providers must be expected to make more effort to ensure consumers are fully informed of their rights and obligations under their agreements.
- 3.10. To alleviate the shortcomings of disclosure alone, the Code needs to be updated to:
- (1) acknowledge the limitations of disclosure;
 - (2) tailor disclosure to consumers, particularly when a consumer vulnerability has been identified; and
 - (3) ensure all disclosures are appropriate, consumer tested and prominent.
- 3.11. Even though we advocate for appropriate disclosure and recognise that warnings and disclosure on credit products are important consumer protections built into the NCCPA, we also recognise that disclosure and warnings may not be the most effective form of consumer protection.
- 3.12. We consider the Code needs to go further than any legislative requirements for disclosure. It is important to ensure that disclosure is consumer tested and the information is prominent so that consumers are not in the dark or surprised when things go wrong.

²³ Clause 10.1(a) of AFIA’s BNPL Industry Code of Practice.

²⁴ ASIC and the Dutch Authority for the Financial Markets, [REP 632 Disclosure: Why it shouldn’t be the default](#) (14 October 2019).

- 3.13. Under clause 10.8 of the Code, a copy of the contract and information about complaints, hardship and enforcement will be given to the consumer. These should be easily accessible for consumers before they sign up to a BNPL arrangement, as they may include important information that affects their decision to enter a BNPL arrangement.
- 3.14. A significant factor for consumers when engaging with BNPL providers are the costs associated with the service. Clause 10.1(b) directs consumers to the AFIA website for a table outlining the fees of the Code signatories. However, practically speaking, consumers simply do not think of turning to the website of the body representing the finance industry when considering different product comparisons.
- 3.15. To promote consistent consumer understanding of BNPL products and services, disclosures around how much a BNPL arrangements costs need to be more transparent and prescriptive. We also consider there needs to be tougher penalties for non-compliance with disclosure obligations.
- 3.16. We refer again to the recent Curtin University report discussed at paragraph 2.6, that highlights the real interest rates applicable to BNPL products and services.²⁵ Comparative interest rates should be available to consumers, who are often unaware of the true cost of signing up to a BNPL arrangement.
- 3.17. Consistent and clear disclosure, as well as fee caps, would allow consumers to confidently enter BNPL arrangements knowing what their total liability may be.
- 3.18. Consistently capped fees would also mean BNPL providers could assess a consumer's 'worst case scenario', allowing them to ensure that even where an account attracts the maximum amount of additional fees, the consumer can still afford the BNPL arrangement.
- 3.19. We recommend BNPL providers be required under the Code to produce a uniform table of fees, charges and the effective interest rate, and displaying this information prominently on their websites. Having a consistent approach to how that information is displayed will make it easier for consumers to compare and contrast BNPL arrangements, straight from the BNPL providers website.

Recommendation 18: Introduce a Code commitment that disclosure by BNPL providers will be appropriate, consumer tested and prominent.

Recommendation 19: BNPL providers have a standardized format for disclosing fees and effective annual interest rates.

²⁵ Curtin University, [Comparative analysis on credit interest rates vs BNPL fees in the consumer credit market](#), (Report, July 2022).

Design and Distribution Obligations

- 3.20. We acknowledge BNPL providers, are required to comply with ASIC’s design and distributions obligations (**DDOs**).
- 3.21. BNPL products should be consistent with the objectives, financial situation and needs of the target market. Likewise, BNPL providers, merchants and retailers need to take reasonable steps to ensure the product is consistent with the relevant target market determination (**TMD**).
- 3.22. Under the DDOs, BNPL providers are required to take reasonable steps to ensure that it distributes financial products consistent with the TMD for each product.
- 3.23. We recommend that the Code introduces a commitment to provide redress to consumers who are sold products in breach of the TMD.

Recommendation 20: BNPL providers should commit to provide redress to consumers who are sold products in circumstances where they are not in the DDO target market.

Suitability Assessments

- 3.24. Not only should consumers be fully informed of their rights and obligations before they enter a BNPL agreement, but they should also have appropriate and timely access to information about their accounts once they become a customer.
- 3.25. Timely access to information about their accounts is of increased importance to victim-survivors of financial abuse, as it enables them to understand accounts that may have been taken out in their name, without their knowledge or consent.
- 3.26. We appreciate clause 10.9 allows consumers to request copies of the following documents, which are to be provided within 7 days:
- (1) any contract including terms and conditions;
 - (2) any related insurance contract;
 - (3) any notices;
 - (4) statements of account; and
 - (5) a payout figure and how it was calculated.
- 3.27. Noting clause 10.9 largely mirrors the provision of the NPPCA, it significantly neglects to include obligations to conduct and provide a suitability assessment. The right to a copy of your suitability assessment is also entrenched in the Banking Code of Practice.²⁶ We have addressed

²⁶ Australian Banking Association, [Banking Code of Practice](#) (5 October 2021), clause 58.

the merits of BNPL providers conducting suitability assessments later in these submissions at paragraph 4.2.

- 3.28. There are existing obligations to undertake a (albeit completely inadequate) form of suitability assessment for new accounts with limits over \$2,00 or \$3,00 for existing accounts. Any documentation relating to these assessments should be required to be provided under clause 10.9.
- 3.29. Receiving a suitability assessment may help consumers to determine whether a BNPL provider has breached their obligations under the Code relating to the appropriateness of the product.
- 3.30. Without this, consumers will find it difficult to establish any wrongdoing by the BNPL provider.

Recommendation 21: BNPL providers must conduct suitability assessments and in addition to clause 10.9 commit to provide copies of suitability assessments to consumers upon request.

Document Request Time Frames

- 3.31. In our experience, it is often difficult to obtain copies of documents within the 7-day timeframe espoused at clause 10.9 of the Code.
- 3.32. Our organisations assist many consumers who are vulnerable and do not necessarily have the capacity to request documents themselves. Requesting documents is often one of the first steps we take as consumer representatives in order to understand the merits of our client's matter. BNPL providers failure to comply with this provision of their own Code delays the progress of our client's matter, often adding to their hardship.
- 3.33. CFA members have received a range of unsatisfactory responses from Code signatories in response to requests for information and documents, such as:
 - (1) the request being 'declined' on the basis that the BNPL product is 'not regulated' (in this case the financial counsellor had to inform the BNPL provider of relevant provisions of the Code, and the provision of all documents took months);
 - (2) receiving a number of transaction statements but no copies of any contracts; and
 - (3) being told the BNPL product is a digital shopping tool (and not a loan), that all that is required to use the account is a registration form, so there is no application form and statements of account are only accessible via the app. The same representative suggested a financial counsellor simply tell their client to return some/all their purchases.
- 3.34. Grace's story below sets out some of the barriers consumers face when trying to get information about their accounts and the excessive effort required to obtain documents.

Case study - Grace's story

Grace came to CCLSWA for advice about a number of loans taken out in her sole name, but for the benefit of her abusive ex-partner, including a BNPL arrangement.

On 29 April 2022, CCLSWA made a request for documents from the BNPL provider under clause 10.9 of the Code. On 2 May 2022, the BNPL provider requested further information in order to process the request. CCLSWA provided this information the same day and reiterated their client was entitled to documents under the Code.

The BNPL provider responded by indicating CCLSWA would receive a response within 5 to 7 business days. On 12 May 2022, CCLSWA received an email from the BNPL provider stating they were still working on the request but wanting to know if the client was disputing the balance. The BNPL provider considered this information essential for them to come up with the best course of action regarding the request.

CCLSWA responded to the BNPL provider, again reiterating the request was simply for documents – which the client is entitled to under the Code within 7 days. At this point it had been over 2 weeks since the original request.

The BNPL provider then provided an incomplete response to the document request. CCLSWA was told the BNPL provider did not have physical or paper statements and the client needed to log on through the app to see the account.

CCLSWA was also told the account had been referred and was being handled by a third-party agency.

When CCLSWA contacted the third-party debt collection agency, CCLSWA were told it had been recalled by the BNPL provider. CCLSWA had to contact the BNPL provider to correct who the account was now being handled by.

Source: Consumer Credit Legal Service (WA) Inc.

- 3.35. The extent of the BNPL provider's failure to comply with the request fully and within the required timeframe is simply unacceptable. Grace's story also raises an issue around the provider asking the consumer to access their account for information through an app. Where consumers are vulnerable, and in particular have experienced financial abuse, they may not have such access to their accounts. BNPL providers should not be able to bypass their obligations under the Code by redirecting consumers to their app.

Case study - Andrea's story

Andrea contacted CCLSWA in early 2022 as she was in a debt spiral. Andrea was on a low income with a dependent child and had multiple debts, including home loans, personal loans, BNPL facilities and unpaid utilities.

Some of these facilities had been used for day to day living expenses, such as the purchase of gift cards to buy groceries. Andrea was unsure what to do and had not been paying off a number of these debts. As a result, she was incurring additional fees and charges which made her financial position worse.

CCLSWA offered to assist Andrea, with the first step being to request documents, including from the BNPL facilities. This document request is the first and critical step in the process of CCLSWA advising clients as to the options available to them. One of these BNPL facilities was with the provider (Company A).

CCLSWA wrote to Company A seeking various categories of documents in accordance with the BNPL Code of Practice within 7 days of the date of the emailed letter.

Company A responded 6 days after the request, notifying CCLSWA that:

- the provision of documents would be delayed;
- they were working through extracting the data;
- they needed engineering support to do this in a streamlined fashion; and
- they anticipated being able to respond in the next few days.

63 days after the request, we still had not received documents from Company A and sent a further follow up request seeking an urgent response as soon as possible and, in any event, with the next 7 days.

64 days after the request (and 1 day after the previous email), Company A responded apologising and stating they had some recent staff changes which resulted in the document request being delayed.

77 days after the request, we still had not received documents from Company A and sent a further follow up request.

79 days after the request, Company A responded stating CCLSWA would have the documents by close of business that day.

80 days after the request, Company A responded with copies of the document. In their response, Company A stated they are required to request a reason for why this information was sought under the *Privacy Act 1988 (Cth)* and requested we provide this information.

CCLSWA were provided with 4 documents, being CRM Notes, two contracts and an excel spreadsheet of her account. This entire process took 80 days from the original request.

Source: Consumer Credit Legal Service (WA) Inc.

3.36. Again, the above case study illustrates our concerns BNPL providers are failing to comply with the Code requirements to provide certain documents within the required time frame.

3.37. We consider this demonstrated inability to meet time frames is an indication of:

- (1) the Code signatories not taking their commitments under the Code seriously; and
- (2) the failure of effective oversight and monitoring to drive improved Code signatory behaviour.

3.38. We consider the solution to the above-mentioned issues is to strengthen the enforceability of the Code and build in incentives such as strong sanctions and independent oversight (discussed further at paragraph 11.8).

3.39. CFA members have also experienced a number of difficulties in contacting BNPL providers, as being digital businesses, they say they operate 'online only'. This means that it is difficult for consumers, and their advocates to contact the BNPL providers, particularly by phone.

- 3.40. We recommend the Code commit BNPL providers to having multiple, well-advertised contact points for consumers and advocates for the purpose of requesting information, making complaints and dealing with hardship. This is discussed further below at 6.29.

Recommendation 22: BNPL providers who do not comply with the timeframes in the Code should commit to providing compensation to affected consumers.

Recommendation 23: The Code should contain incentives for BNPL providers to comply with its provisions, including independent oversight and strong sanctions.

Surcharges

- 3.41. Retailers and merchants should be allowed to charge consumers a surcharge for BNPL arrangements, and BNPL providers must not be able to prohibit retailers and merchants from surcharging consumers.
- 3.42. This is in line with the recommendations of the Reserve bank of Australia's (**RBA**) 2021 review of retail payments regulations which stated it would be in the public interest and consistent with the RBA's longstanding position on such rules.²⁷
- 3.43. Any surcharge should be capped and not be greater than the reasonable cost to the retailer or merchant of the consumer for using BNPL.
- 3.44. Imposing reasonable surcharges improves transparency to consumers, who can consider the true cost of using different payment methods, whilst driving payment system efficiencies by encouraging consumers to choose lower cost options.
- 3.45. Surcharging will also reduce the extent to which the price of goods and services are increased to non-BNPL consumers, who subsidise BNPL consumers for the fees retailers and merchants pay BNPL providers.

Recommendation 24: BNPL providers should allow retailers and merchants to charge consumers a surcharge for using BNPL arrangements.

Recommendation 25: Surcharges should be capped to the reasonable cost to the retailer or merchant.

Question 3(b): Are there any areas where further or different information could be required under the Code to promote consistent consumer understanding of BNPL products and services?

- 3.46. We reiterate our comments above, that in order for there to be consistent consumer understanding of BNPL products and services, there needs to be consistent regulation applied

²⁷ RBA, [Review of Retail Payments Regulation: Conclusions](#) (Media Release, 22 October 2021).

to all BNPL providers. These regulations need to align with existing regulation of consumer credit products.

- 3.47. We have set out below a number of areas where further or different information could be provided to promote consistent understanding of BNPL products and services.

BNPL providers covered or not covered by the Code

- 3.48. There is little general awareness of the Code, never mind the distinction between Code signatories and providers not covered by the Code.

- 3.49. The limited scope of the Code across the BNPL industry as a whole means consumers who have issues with BNPL providers are often confused and do not know where to turn to make a complaint.

- 3.50. This confusion is exacerbated by the discourse around BNPL providers being ‘regulated’ and the Code going ‘above and beyond the law’. Chief executive of AFIA, Diane Tate has made these comments to media on several occasions.²⁸ Ms Tate has also made similar comments in response to the Treasury options paper ‘Regulating Buy Now Pay Later in Australia’.²⁹

- 3.51. We understand there are laws that apply to many providers of the BNPL industry. However, we have concerns that saying the industry is currently ‘regulated’ may be misleading for consumers. It may also lead consumers to believe the same consumer protections that apply to credit regulated under the NCCPA are available to consumers of BNPL products.

- 3.52. Currently, the regulations that apply to BNPL providers are:

- (1) *The Australian Securities and Investment Commission Act 2001*
- (2) Some parts of Chapter 7 of the *Corporations Act 2001*
- (3) Schedule 2 of the *Competition and Consumer Act 2010*
- (4) *The Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

- 3.53. In reality though, many of the most important protections for a product with the attributes of BNPL (i.e. credit) are contained in the NCCPA. We recommend BNPL providers be advised against making broad statements about being regulated or subject to legislation, without qualification or specification of the applicable laws.

- 3.54. This also applies to any promotional or marketing material. Any material should refer to specific regulations or legislation when making assertions the product, business or industry is regulated.

- 3.55. The Code also risks lending legitimacy to BNPL providers who are not signatories to the Code.

²⁸ See The Age, [BNPL providers reject consumer group criticisms](#) (Article 22 January 2022); ABC, [Charities, consumer groups launch campaign for better regulation of buy now, pay later services](#) (Article, 11 May 2022).

²⁹ AFIA, [AFIA Welcomes Treasury Buy Now Pay Later Consultation](#) (Media Release, 21 November 2022).

- 3.56. Currently, there are nine Code signatories, out of the roughly twenty BNPL providers operating in Australia. There are also several AFIA members, who provide BNPL products but are not Code signatories. The Code has no application to BNPL providers who are not signatories. Although the market share of the BNPL providers who are signatories to the Code is significant, the lack of consistency across the entire market makes it difficult for consumers to understand their rights if there is no single standard for the industry.
- 3.57. This is particularly relevant given additional competitors, including major banks and global tech firms, are now entering the market, but have not signed up to the Code.
- 3.58. We recommend all BNPL providers who are AFIA members should be required to sign up to the Code. Additionally, non-AFIA members, should be permitted to sign up to the Code.
- 3.59. Given the Code is currently voluntary, BNPL providers who do not agree to any enhanced protections to consumer can choose no longer to be bound. Ultimately, this leaves the Code in a state where BNPL providers can avoid amendments which do not suit their business interests or require them to alter their existing business model.
- 3.60. Tiana's story below highlights the issues around lack of awareness of the Code, and the confusion caused by the industry's lack of uniformity.

Case study - Tiana's story

Tiana's daughter needed orthodontic work and she took up the option offered by the orthodontist to pay for the work using a BNPL product from an external provider. The BNPL provider was not a signatory to the Code. Almost a year later, Tiana relocated to escape her abusive ex-partner. As a result, her daughter was not able to complete the orthodontist treatment.

Tiana contacted the orthodontist practice to let them know of her change in circumstances. They agreed to an alternative repayment plan for less than half the original fee. This fee covered the partial treatment her daughter received.

This agreement was either not communicated to the BNPL provider or not processed by them. The BNPL provider engaged lawyers and a debt collector to pursue Tiana for the full amount of the agreement, despite her efforts to negotiate with both the BNPL provider and the debt collector. The debt collector also listed a default on Tiana's credit file at which point she contacted CCLSWA.

CCLSWA's research found the BNPL provider was part of a complicated corporate structure, and it would have been very difficult for a layperson to work out how and where to make a successful complaint. Tiana could not rely on the Code as they were not a Code signatory.

The BNPL provider's website also incorrectly claimed a particular entity in their business held an Australian Financial Services Licence and that complaints could be escalated to AFCA. These references were removed from the website after CCLSWA became involved in the case.

CCLSWA managed to resolve the matter in Tiana's favour. However, this was only possible because Tiana's debt was assigned to a debt collector who was a member of AFCA.

Source: Consumer Credit Legal Service (WA) Inc.

- 3.61. Tiana’s story shows that until there are consistent statutory regulations for the BNPL industry, the impact of the Code will be limited.
- 3.62. Having multiple sets of regulations, each with their own rights and obligations applying to consumers and BNPL providers, makes it very difficult for consumers to understand and exercise their rights.
- 3.63. In the absence of statutory regulation, the Code needs to be promoted to BNPL providers as a real point of difference, in the same way certain health foods carry a health star rating or certain products are endorsed as CHOICE recommended. A robust code with defined obligations and protections could carry a gravitas providing competitive advantage to its signatories and the reassurance of fairness and protection to consumers who sign up with Code signatories. That said, to justify promotion as a genuine point of difference, the Code still needs drastic improvement to genuinely meet its claims that it goes beyond the law.
- 3.64. There also needs to be greater disclosure from providers who offer multiple different products, some of which may also be regulated under the NCCPA. There is a high-risk consumers will assume products issued from a provider with a credit licence will meet NCCPA requirements for their BNPL offering, which is not accurate.
- 3.65. We also draw attention to Humm’s Bundll product. This is marketed as BNPL but is not considered by Humm to be a BNPL product subject to the Code. This is an extremely problematic approach taken by a Code signatory that creates further confusion. AFIA should not permit its ‘Code Complaint Members’ (or their subsidiaries) to undermine the Code in this manner.

Recommendation 26: BNPL providers who are AFIA members must also be Code signatories.

Recommendation 27: The Code should permit BNPL providers who are not AFIA members to become Code signatories.

Costs disclosure

- 3.66. We reiterate our earlier comments made at paragraph 3.19 recommending that the Code commit to implementing standardised and consistent disclosure of the costs of BNPL arrangements.
- 3.67. Consistent disclosure of information, particularly consistent formatting of such information, will ensure that consumers can easily compare BNPL products and make informed choices, based on that information.

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

Question 4(a): Are the provisions of the Code dealing with the *new* customer assessment process clear and effective?

- 4.1. No, we do not consider that there is an effective assessment or identity verification process for new customers. The current assessments being conducted by BNPL providers are ineffective, as evidenced by the high levels of harm and financial stress we have outlined in these submissions.

Lack of suitability Assessment

- 4.2. Clause 11 of the Code does little to properly assess the financial situation of a consumer before providing access to BNPL products or increasing transaction limits. The Code is too reactionary, only considering a person's position when it is too late, and the consumer is already in financial hardship.
- 4.3. For example, BNPL providers are only required to verify the identity of new customers before approving them for a line of credit up to \$2000 (this limit is increased to \$3000 for existing customers).³⁰ The commitments to checks for transactions above these amounts are also vague and likely meaningless.
- 4.4. Similarly, clause 11.3 does not contemplate any form of actual assessment of an individual's circumstances, merely noting providers will ensure the consumer is not vulnerable and are satisfied with the information provided.
- 4.5. The obligation to "ensure a consumer is not vulnerable" is misleading. Ensuring no vulnerability exists denotes some form of proactive step being taken by the BNPL provider, however, as outlined previously, this commitment currently relies on consumers to self-identify.
- 4.6. Currently, the only criterion for assessing affordability is the consumer can make the initial payment upfront, or within 25 days from either the issuance of the first statement, or installation or delivery of the relevant goods/services.
- 4.7. This ultimately contributes to financial hardship, as the process fails to identify if a person cannot afford the ongoing repayments, ultimately setting them up to fail and causing them to incur late fees.
- 4.8. A central part to assessing suitability is ensuring that the entire arrangement being provided is affordable to the consumer. This involves verifying a consumer's income and existing debts and expenses. Affordability is not the only consideration in completing a suitability assessment, however it is an important first step.
- 4.9. BNPL providers should also make reasonable inquiries into the requirements and purpose for which consumers are seeking to use their BNPL products.

³⁰ See cl 11.5 and clause 11.12 of AFIA's BNPL Industry Code of Practice.

- 4.10. Understanding a consumer’s purpose for using their products will provide valuable insights in identifying vulnerabilities and red flags for financial abuse, including fraudulent and coercive debt.

Model incentivises prioritising BNPL repayments

- 4.11. As a mechanism of reducing financial hardship, BNPL providers often freeze the accounts of consumers who have missed payments and will not increase a consumer’s spending limit. Again, this is very reactionary, without a proper affordability assessment upfront, this reaction can encourage consumers to act in a manner that leaves them worse off.
- 4.12. A recent report by FCA found many consumers prioritised repayments over other essential expenses in order not to lose access to the product.³¹
- 4.13. Offering greater leniency for missed payments is not an appropriate solution to this issue. The only way to resolve this problem is by preventing consumers getting to this point in the first place. This entails introducing an obligation on BNPL providers to get a proper understanding of a person’s financial situation before they extend the credit.
- 4.14. BNPL providers should not conduct this assessment via screen scrapping technology nor asking consumers to provide their information such as passwords for bank accounts. Not only is screen scrapping unreliable and subject to error, but it also induces consumers to breach obligations they may have under their contract with their bank, the e-Payments Code, and poses a cyber security risk.

Case Study – Donna’s Story

Donna is a single mother of three living in regional Victoria who works part time and receives a variable income. Donna contacted the National Debt Helpline in 2021 because she was struggling to manage debts accrued from utility bills, a car loan, a credit card, insurance and multiple BNPL debts. The BNPL debts were with companies subject to the Code.

Donna told CALC she had recently obtained a loan from a third-tier lender to pay off the credit card and some of her BNPL debts, because she was struggling to meet the repayments. Initially, Donna indicated that she was comfortable with her remaining BNPL debts. In the following months while CALC were assisting Donna negotiate some of her debts, she informed CALC she was struggling for money and had been using a BNPL provider to pay for food. Donna had also taken out other short-term credit to pay for her daughter’s living expenses (which was likely provided in breach of credit laws).

Donna had high credit limits for BNPL products. At one point she owed \$2000 to one BNPL provider, nearly \$2000 to another BNPL provider, and a similar amount owing to the same provider via regulated credit as well. She had high BNPL credit limits because she had consistently made her repayments, which disguised her financial hardship.

³¹ Financial Counselling Australia, [*It’s Credit, it’s causing harm and it needs better safeguards*](#) (Report, December 2021) 6.

The reality was that she couldn't afford the repayments with her other debts and was using these services to pay for essentials. Rather than being a useful budgeting tool, using BNPL in this way meant so many direct debits were made by BNPL providers that a financial counsellor had trouble confirming how much repayments were costing her. **In a five week stretch in 2021, unregulated credit providers made 77 deductions from her bank account, totaling over \$2958.** The vast majority of these were made by one BNPL provider. Donna was in severe financial hardship at this time.

Donna is still paying off her BNPL debts. CALC assisted her to negotiate the debt with the other BNPL provider, but this was difficult because so few laws apply to BNPL. Initially, the BNPL provider refused to provide any documents regarding the BNPL debt (a likely breach of the Code). The BNPL provider described the BNPL facility as 'not regulated'.

Source: Consumer Action Law Centre

Recommendation 28: Code signatories should commit to undertaking a suitability assessment prior to providing a BNPL arrangement.

Recommendation 29: The Code should prohibit BNPL providers extending an arrangement that would cause the customer substantial hardship.

When new consumers are vulnerable

- 4.15. When assessing new consumers, there is a list of factors for the BNPL provider to consider at clause 11.3. In the event a consumer satisfies those factors, the consumer will be provided with the BNPL arrangement. However, if the consumer does not satisfy all listed requirements, for example they are considered to be vulnerable, then there are additional requirements at clause 11.4 for the BNPL provider to consider.
- 4.16. Clause 11.4 requires the BNPL provider to gather customer data and/or third-party data.
- 4.17. It is not clear from the Code how those additional checks will essentially 'cure' a consumer's vulnerability and make the BNPL arrangement suitable.
- 4.18. Further, we have ongoing concerns about the use of benchmarks as set out at paragraph 4.28.
- 4.19. We refer to our earlier comments at paragraph 4.2 outlining the steps that BNPL providers should take as a part of a suitability assessment for consumers.
- 4.20. The Code does not state any parameters for the BNPL provider to assess the information, and what information would indicate the arrangement would not be suitable for the consumer. There is no requirement to inquire about or verify a consumer's financial situation, including their income or expenses, or to make any inquiries into their requirements and objective for entering into the BNPL arrangement.

- 4.21. The section on affordability in the Code appears to be designed to give the appearance the industry has considered affordability. In reality, original signatories to the Code have no additional obligation nor does it require them to change their existing models.
- 4.22. For example, under the Code there is no guidance on how customer data or third-party data obtained, such as a credit check, is to be used. This renders this section virtually worthless in terms of enforceability. The provisions at clauses 11.6 and 11.13 regarding transactions over \$30,000 are even more vague and meaningless. This section needs to be completely reworked to require a proper assessment of a consumer's financial situation, and bars on facilities that would cause hardship. Without this, the Code will remain a failure on this vital issue.

Clear easy to read fact sheet

- 4.23. Under clause 10.1(b) information about features and fees of different BNPL Products and services are available on the AFIA website. However, we consider that housing this information on the AFIA website does not make it easily accessible for consumers.
- 4.24. As noted at paragraph 3.14, consumers simply do not think of turning the website of the body representing the finance industry when considering different product comparisons.
- 4.25. Information on fees and repayment obligations needs to be included in a fact sheet detailing the BNPL product or service key features and costs. This information would be provided on the BNPL provider's website and to each consumer prior to them signing up. This would enable consumers to compare different products and services across BNPL providers.
- 4.26. 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. Retailers and merchants should also be providing this information if the consumer is signing up for the products at the store/place of business.
- 4.27. We reiterate our earlier recommendation 20 that information disclosures by BNPL providers about their fees, charges and additional costs be clear, consistent and provided in a standardised format across all Code signatories.

Use of Benchmarking

- 4.28. Consumer advocate groups consider the current process of determining product suitability is inadequate.
- 4.29. To assess product suitability, BNPL providers can rely on industry benchmarks as the sole assessment criteria (for example, when assessing a new customer requesting a transaction amount between \$2,001 and \$15,000).
- 4.30. Benchmarks on income and expenses do not provide an assessment about the individual consumer, and do not confirm or verify whether the information obtained from a consumer is true.
- 4.31. We reiterate the position set out in *ASIC Regulatory 209: Credit Licencing: Responsible lending Conduct (ASIC RG 209)* which acknowledges benchmarks can have a role in the broader

verification and assessment process, particularly in making comparisons with the information provided by the consumer. However, they should not be used in isolation, and the limitations of using benchmarks should be noted and accounted for.³²

Recommendation 30: BNPL providers should commit to not relying solely on benchmarks and should be required to make enquiries into a consumer’s financial situation before opening an account or increasing credit limits.

Use of automated systems

- 4.32. Automated systems are heavily relied on to process and approve BNPL applications.
- 4.33. Automated systems do not allow for reasonable enquiries to be made into an individual’s circumstances nor allow for any enquiries to be verified. This leads to an individual’s financial position not being accurately captured and inappropriate BNPL arrangements being provided.
- 4.34. ASIC RG 209 notes automated systems should be:³³
- (1) tested prior to implementation, and at reasonable regular intervals, to ensure the decisions made using these systems are appropriate;
 - (2) 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
 - (3) capable of maintaining or producing a meaningful record of the assessment.
- 4.35. BNPL providers must at least commit to be bound by ASIC’s RG 209 requirements to ensure assessments are more effective in identifying individual circumstances in which their products are unsuitable.

Recommendation 31: If automated systems are used, they must be:

- (1) tested prior to implementation, and at reasonable regular intervals, to ensure the decisions made using these systems are appropriate;
 - (2) 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
 - (3) capable of maintaining or producing a meaningful record of the assessment.
-

³² ASIC, [Regulatory Guide 209 – Credit licensing: Responsible lending conduct](#) (December 2019) at 209.133.

³³ Ibid, 209.252.

Question 4(b): Are the provisions of the Code dealing with the *existing* customer assessment process clear and effective?

4.36. In our experience the provisions of the Code dealing with existing customer assessment are not clear and effective.

Unsolicited Transaction Limit Increases

4.37. Consumer groups have noticed BNPL providers are providing unsolicited transaction limit increases to consumers, a practice licensed lenders are prohibited from engaging in the credit card industry.

4.38. Repayment history is not a reliable indicator of affordability, as it does not consider the consumer's income or expenses outside of the single BNPL product.

4.39. As noted at paragraph 4.12, the BNPL model incentivises consumers to prioritise BNPL payments. Whilst BNPL payments may be met, consumers can still be experiencing financial hardship, leading to rent/mortgage, food and other essential costs being missed.

4.40. If a consumer's credit limit is increased when they are experiencing financial hardship, it is possible the consumer may be incentivised to make more purchases through BNPL, propelling the debt cycle.

4.41. Antony's study below is illustrative of the harms that occur when unsolicited limit increases are given to those experiencing financial hardship and using BNPL to pay for essentials.

Case study – Antony's story

Antony is a teenager living in the outer suburbs of Melbourne. He contacted CALC earlier this year as he was overwhelmed by his BNPL debts. He said he had lost his job a few months prior and was due to start a new job soon.

Antony said he had at least three BNPL accounts (with Code signatories) that he had opened when he was employed, and he owed an estimated \$5000 across them. He said he used BNPL to buy some big-ticket items but had also paid for groceries when his mother couldn't afford them. Antony told us that over time the BNPL providers had automatically increased his spending limits, but he had stopped paying them since he lost his job.

In the time between jobs, he reported he had been contacted by debt collectors and was feeling too stressed to answer his phone or read his emails, though he had tried to call some back but didn't get through. Antony was referred to a local financial counsellor to help him find a way to deal with these and other debts.

Source: Consumer Action Law Centre

4.42. We note the joint consumer submission to the Treasury review is calling for a prohibition on unsolicited transaction limit increases to be included as part of the law.

- 4.43. Consumer advocates are also calling on the Treasury to legislate to entitle BNPL users to reduce their limits.
- 4.44. Regardless of any potential legislative change, and in the vein of going above and beyond the law, the Code should commit to prohibiting unsolicited transaction limit increases and allowing consumers to reduce their limits. Like with credit cards, we recommend consumers should not be able to consent to receiving unsolicited limit increases.
- 4.45. Tess's story below shows how a consumer's financial position can change, and the risks in not undertaking meaningful affordability assessments upfront or when increasing transaction limits.

Case study – Tess' story

Tess lives in regional Victoria with her partner and baby. She had been doing contract work earlier this year but had to stop when she had a baby. Tess says she had been told she was unable to fall pregnant, so her pregnancy was a (very welcome) surprise, but not one they had a chance to financially plan for.

Tess told CALC that she is eligible to receive only \$150 from Centrelink because her partner works full time, and this along with cost-of-living pressures means they are currently struggling to afford essentials such as food and petrol. She told us she had a range of debts made up of a range of utilities, regulated credit products and unregulated credit products.

Prior to becoming pregnant, Tess said she had used BNPL products irregularly for special purchases she could afford, but since having a baby and with the cost-of-living pressures, she started using it for essentials. She said that she discovered she could buy gift cards and petrol cards with a number of different BNPL providers to use at the supermarket, and so began doing this from time to time. Before long, she had fallen into significant debt and was experiencing financial hardship, made worse by buy now pay later debts.

Since falling into financial hardship, to get by Tess says she has also opened up further accounts with more BNPL providers BNPL accounts and used them for similar purposes, however this just caused her to fall further into debt. Tess said she had gone multiple days where she hardly ate at all at times.

Tess told CALC that she sought hardship assistance from the first two BNPL providers when her baby was airlifted to hospital, and she had no money for accommodation. Tess said that the absence of a contact number for one of the BNPL providers and their rigid online portal meant she had to write a detailed email explaining her circumstances despite being in acute distress, just to initiate the process. She also said once or twice one of the BNPL providers had tried to debit her account contrary to agreements to delay repayments. Tess also recounted that another of the BNPL providers had repeatedly attempted to debit her account and applied hefty late fees despite knowing about her hardship. She said this happened again with that same BNPL provider even after they acknowledged a written hardship request from a financial counsellor on her behalf.

Source: Consumer Action Law Centre

- 4.46. Tess’s story is also illustrative of how consumers are using BNPL arrangements to purchase essential goods as discussed above.

Recommendation 32: The Code should prohibit unsolicited transaction limit increases to consumers

5. ‘We will undertake an ongoing review of the suitability of our products or services’

Question 5(a): Are the factors set out in the Code relating to the ongoing suitability assessment of BNPL Products and Services (Suitability Assessment) effective?

Question 5(b): Are there limitations to how these factors are applied in practice which impact the effectiveness of the suitability review?

- 5.1. In our experience the ongoing suitability requirements of the Code are not effective.
- 5.2. We understand clause 12 of the Code allows for BNPL providers to review and monitor their services and products generally and does not relate to individual consumers.
- 5.3. As per our previous submissions, we suggest on a general level, how a BNPL provider reviews its products and services and who it will accept as consumers does not belong in the BNPL Code.
- 5.4. Further, given the DDO requirements are mandated by ASIC, the process outlined in clause 12 does not need to be set out in the Code.
- 5.5. Industry should consider introducing commitments that go above and beyond requirements of the DDO regime to help improve consumer outcomes in this section of the Code.

Recommendation 33: Industry should consider whether it can make meaningful commitments in the Code regarding product design that improve upon the DDO regime.

6. ‘We will deal fairly with complaints’

Question 6(a): Are the internal dispute resolution procedures that Code Compliant Members must follow for complaints sufficiently clear and effective?

- 6.1. While the internal dispute resolution procedures are set out in a relatively clear and effective manner it is our experience that BNPL providers are not following those procedures.

Inappropriately categorised requests

- 6.2. Further guidance for BNPL providers needs to be provided on the distinction between simple requests for information, a hardship request, and a complaint.

- 6.3. In our experience, BNPL providers can inappropriately characterise requests for information as hardship requests or complaints.
- 6.4. Adam’s story below illustrates how vulnerable consumers are reluctant to raise any issues with their BNPL providers for fear of no longer being able to access the service. Adam’s story also demonstrates how raising a simple request for documents can be miscategorised and elicit an unhelpful response from the BNPL provider.

Case study – Adam’s story

Adam is a young man with some literacy issues. Adam 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 had become dependent on BNPL products. In one particular month, Adam’s total repayments to 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, and discretionary items like games. He uses BNPL arrangements to buy gift cards, which are then used to buy fuel and groceries.

He instructed CCLSWA to request documents from one BNPL provider, as he had amassed a significant debt. As soon as CCLSWA requested documents, the BNPL provider placed a freeze on the account as a “duty of care” while the situation was assessed. CCLSWA then had to explain to the provider they were only instructed to request information about the account, and not hardship assistance.

After CCLSWA provided Adam with advice on his situation, he was too nervous to pursue any claims against the provider for fear he might lose access to their facilities.

Source: Consumer Credit Legal Service (WA) Inc.

- 6.5. Adam’s story was included in the CFA submission to the draft Code in 2020. However, this phenomenon is still occurring where consumers are reluctant to ‘rock the boat’ with BNPL providers for fear of losing access to the service.
- 6.6. We refer to the story of the Omenuku Family at paragraph 10.2110.21, which shows this trend is continuing to cause considerable harm.

Question 6(b): Are the internal dispute resolution procedures in place among Code Compliant Members effective in dealing with complaints in practice? Do they lead to fair and timely resolutions for consumers?

- 6.7. No. In our experience Code signatories responses to complaints falls below the standards imposed on credit providers subject to ASIC RG 271. This is concerning given the Code claims to go beyond legal requirements, when in fact it frequently barely even meets them.
- 6.8. We refer again to Margaret’s story above which outlines the difficulties in dealing with BNPL providers. Margaret’s story also demonstrates the complexity when dealing with the BNPL

provider and the merchant. Margaret was required to wait for an appropriate resolution while the roles of the merchant and BNPL provider in resolving the dispute were clarified.

Family Violence

- 6.9. BNPL products can be used as a weapon to perpetrate domestic and family violence and financial abuse. We have seen many examples of victim-survivors only becoming aware of accounts after leaving abusive relationships and establishing new homes.³⁴
- 6.10. BNPL has itself become an avenue for financial abuse, with these products being used as coercive and fraudulent debt, including through creating multiple BNPL accounts in a partner's name to accumulate debt.
- 6.11. An increased risk of financial abuse through fraudulent accounts is caused primarily by the ease in which an account can be opened and operated online using basic personal information. Further, BNPL products are not being subject to the same mandated checks applied to other products, which can be used to reveal financial abuse (e.g., loans for which the applicant receives no benefit).
- 6.12. We have seen these coercive debts often mislabelled as financial stress and irresponsibility.
- 6.13. The Code needs greater protections surrounding the management of debts resulting from financial abuse, including guidance around waivers, and removing adverse information from credit reports.
- 6.14. Grace's story above highlights some of the issues when accounts are handed over to third party debt collection agencies.
- 6.15. The Australian Banking Association has published industry guidance on preventing and responding to financial abuse. This sits alongside their own industry code.³⁵
- 6.16. We recommend the Code introduce similar commitments in line with the ABA guidelines, including, but not limited to:
 - (1) recognising potential financial abuse;
 - (2) understanding why it is difficult for consumers to seek help or report abuse;
 - (3) protecting consumer confidentiality and safety;
 - (4) help customers to manage their own finances;
 - (5) make it easier for consumers to communicate with the provider;
 - (6) help customers when accounts are in dispute; and

³⁴ Good Shepherd, [The Role of Buy Now Pay Later in Exploiting Financial Vulnerability](#), (Report, November 2022) 13.

³⁵ Australian Banking Association, [Preventing and responding to financial abuse \(including elder financial abuse\)](#) (Guideline, March 2021).

- (7) provide appropriate employee training and awareness of policies.
- 6.17. As noted above at paragraph 1.20, BNPL providers need to commit to not selling debts where they become aware that the consumer is vulnerable and more particularly, if a consumer has disclosed a history of domestic violence. This would be an example of vulnerable circumstances that could obviously be exacerbated by debt collector contact.
- 6.18. We also recommend that in circumstances where the debt has been sold, and the BNPL provider subsequently becomes aware that the consumer is vulnerable or is a victim-survivor of family and domestic violence, the BNPL provider commit to buying back the debt and dealing with the consumer directly.
- 6.19. We consider if a consumer discloses family violence as a reason for vulnerability, the Code should be clear victims should not be requested or required to provide evidence of their situation. This in line with the AFCA approach that Code signatories commit to adhere to.
- 6.20. The Code should express this position rather than referring to external sources and expect consumers find those protections for themselves.

Inconsistent approaches to hardship

- 6.21. Consumer groups are finding BNPL providers are taking inconsistent approaches to hardship requests, some of which are inappropriate.
- 6.22. Under ASIC *Regulatory Guide 271 – Internal Dispute Resolution (RG 271)*, BNPL providers must be flexible about how complaints are lodged and offer multiple lodgement methods— including telephone, email, letter, social media, in person, or online.³⁶ We are seeing BNPL providers only provide hardship requests over email.
- 6.23. This is another example of where the Code promises to go above and beyond the law and regulations, however in practice the conduct of BNPL providers falls short of meeting minimum standards. Consumers should, at a basic level, have appropriate access to the BNPL provider.
- 6.24. Insisting complaints be provided in written form can disincentivise a complainant, and BNPL providers should be required to provide a toll-free or local call telephone number.
- 6.25. This is also contrary to clause 13.4 of the Code which states the complaint resolution procedures “*will comply with the same ASIC standards and requirements that Australian Financial Service Licensee holders must comply with*”.
- 6.26. CFA members have had multiple clients dealing with a particular BNPL provider, providing inconsistent approaches to request for hardship. In two particular instances, the provider offered a moratorium on interest, fees and charges for a 6-month period. However, despite the offer, the provider continued to charge account keeping fees. This was particularly concerning as one of the clients was particularly vulnerable as they were experiencing a

³⁶ ASIC, [Regulatory Guide 271 – Internal Dispute Resolution](#) (September 2021) at 271.136.

mental health illness and homelessness. The vulnerable client did not have the literacy to understand the account structure or to manage their money.³⁷

6.27. CFA members have also made the following comments:³⁸

“BNPL have fewer financial hardship options. [One provider] has a comprehensive FV [family violence] policy and framework, however, others do not. Most will give short term hardship moratoriums fairly easily, however will usually only consider long term payment or other longer term plans when family violence is involved and many will not even consider long term solutions such as debt waiver, long term payment plans, suspension of interest or fees and charges or wavier of fees and charges. These longer-term solutions are commonly negotiated with credit cards/unsecured personal loans routinely with majority of lenders”

“[It’s] sometimes impossible to get through to relevant financial assistance team (some of the BNPL companies don’t even have call centres), response times [are] much longer”

6.28. We refer back to Tess’s story above where a vulnerable consumer, at a time of significant distress, was given inconsistent communication from BNPL providers about their hardship policies. Tess’s story also shows how even after being apparently approved for hardship some BNPL providers continue to debit accounts and charge fees.

Language Barriers

6.29. RG 271 requires information provided to the public about internal dispute resolution processes be available in a range of languages and formats. These alternative formats include large print, Braille, audio tape, and using Australian Sign Language (**AUSLAN**) video presentations of material on their website.

6.30. Consumer groups have noticed that BNPL providers are limited on the languages other than English in which information is provided, as well as using no alternative formats to communicate information.

6.31. We recommend that the Code make commitment for BNPL providers to provide information on their website with an easy to find link to:³⁹

- (1) information on interpreting services;
- (2) national relay service;
- (3) any information on products that have been translated into other languages;
- (4) any relevant information for people with language barriers; and

³⁷ Source – FCAWA.

³⁸ Good Shepherd, [Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability](#) (Report, 15 November 2022)

³⁹ In line the Financial Services Council, [Life Insurance Code of Practice](#), at clause 6.8.

(5) any supports targeted towards culturally and linguistically diverse individuals, Aboriginal and/or Torres Strait Islander peoples and individual who may have difficulty understanding due to certain health issues.

6.32. We reiterate our comments earlier at paragraph 1.13 that the Code lacks specific commitments to assist consumers who are experiencing vulnerability.

Recommendation 34: BNPL providers should be flexible about how complaints are lodged and offer multiple methods to lodge complaints.

Recommendation 35: BNPL providers to provide information on internal dispute resolution processes in a range of languages and formats.

Question 6(c): Is the ability for consumers to take complaints to AFCA clear and effective in practice?

6.33. We consider references to AFCA in the Code make it clear that consumers can take complaints to AFCA.

6.34. Consumer's ability to take disputes to AFCA is valuable.

6.35. In our experience, it is often necessary to escalate a matter to AFCA to get an appropriate and considered response from a BNPL provider. Often when complaints are made to AFCA, a reasonable offer to resolve is made by the BNPL provider at registration and referral stage on a 'without admission of liability basis'.

6.36. While ultimately this may result in the outcome the consumer was seeking, it means cases do not progress to AFCA's case management stage, which in turn, may mask systemic issues.

6.37. See Tiana's story for the difficulties lack of effective access to external dispute resolution causes.

Question 6(d): Is the ability to take alleged breaches to the Code Compliance Committee ('CCC') clear to customers?

Question 6(e): is there a sufficiently clear distinction between the matters that AFCA and the CCC will deal with?

6.38. In our experience the ability to take alleged breaches to the CCC is not clear to consumers. Further the distinction between matters dealt with by AFCA and the CCC is not clear.

- 6.39. The Code allows for consumers to report an alleged breach of the Code to the CCC, however, the CCC will not consider a complaint if the consumer is trying to resolve it directly with the BNPL provider or AFCA.⁴⁰
- 6.40. We consider that this restriction is misconceived. The purpose for making a complaint to Internal Dispute Resolution (**IDR**) / External Dispute Resolution (**EDR**) and a code compliance body are different. The former seeks to resolve the individual complaint. The latter seeks to support the compliance body in its broader compliance function. By restricting access to the CCC while a complaint is being considered by the BNPL provider or within AFCA defeats the purpose and ability of the CCC to do its job.
- 6.41. We acknowledge that rarely will individual consumers make complaints to the CCC, not least because of limited awareness. For that reason, there needs to be strong information sharing between providers (about their IDR complaints), AFCA and the CCC. Information about IDR and EDR complaints are an important source of intelligence for the CCC.
- 6.42. However, consumer representatives will often be well-placed to make complaints to the CCC where they are supporting individual customers. This is because consumer representatives will be able to identify systemic breaches with the Code. Clause 13.14 also prevents consumer representatives from undertaking this important task.
- 6.43. During the period from 1 March 2021 to 28 February 2022, the CCC received five allegations that a Code signatory had breached the Code.⁴¹ Of those complaints, four were referred back to the BNPL provider's IDR. The CCC investigated the fifth allegation, although this had already been through the AFCA process and the CCC made the same recommendation as AFCA.⁴²
- 6.44. However, over a similar period AFCA received over 1,000 complaints about BNPL providers.⁴³
- 6.45. This data suggests that the CCC is not obtaining the information it needs to support its Code compliance function.
- 6.46. We are aware the AFIA website has a process map for complaints processes⁴⁴. However, this is not adequately reflected in the Code. Furthermore, this information should be contained in the Code itself, and not an external source.
- 6.47. Again, we reiterate the need for consistency and one reference source of information for consumers to avoid confusion.

⁴⁰ clause 13.14 of AFIA's BNPL Industry Code of Practice.

⁴¹ Buy Now Pay Later Code Compliance Committee, [Buy Now Pay Later: The First Year of Self-Regulation](#) (Report, March 2022) 10.

⁴² Ibid.

⁴³ Australian Financial Complaints Authority, [Annual Review 2021-22](#), 52.

⁴⁴ <https://afia.asn.au/BNPL-Making-Complaints>

- 6.48. We recommend that clause 13.14 be removed to allow complaints to be made to CCC notwithstanding that there is also a complaint to the relevant IDR/EDR.

Recommendation 36: Remove clause 13.14 to allow complaints to be made to the CCC concurrently while being considered by the BNPL provider or by AFCA.

Recommendation 37: The role of the CCC needs to be more clearly defined in the Code, in particular, clarity is required around when consumers should approach AFCA and/or the CCC in the dispute resolution process.

7. 'We will offer financial hardship assistance'

Question 7(a): Are the provisions relating to customers experiencing financial difficulty adequate?

- 7.1. In our experience, the provisions relating to customers experiencing financial difficulty are not adequate to effectively assist those consumers who require it.
- 7.2. The provisions under clause 14 of the Code mirror similar provisions of the NCCPA, and go some way to ensuring consumers are able to access hardship arrangements when required.
- 7.3. However, we reiterate our ongoing concerns around the application and enforceability of the Code. Based on our experience, and those of our clients, Code signatories do not always provide reasonable responses to hardship requests, and many of their representatives do not appear to be adequately trained in this part of the Code. Code signatories need to invest in staff training in this area.
- 7.4. We refer to comments made at paragraph 6.26 and at 6.21 about the difficulties in obtaining hardship variations for consumers, and the inconsistent approaches to hardship of BNPL providers.
- 7.5. Therefore, we recommend there needs to be greater oversight and sanctions for BNPL providers who are in breach of the provisions of the Code. Many of our recommendations could be achieved by the BNPL industry being regulated by the NCCPA and NCC.

Selling a debt

- 7.6. We acknowledge our recommendation made in 2020 regarding circumstances in which BNPL providers can use an agent or sell a debt were incorporated into clause 14.20.
- 7.7. However, we note that the Code did not include the term "effective" in relation to the quality of a debt collector's complaints process.
- 7.8. BNPL providers should ensure their agents or purchasers of debt have a good track record of dealing ethically, honestly, and fairly with their consumers.

- 7.9. BNPL providers should also commit to complying with the ABA’s industry guideline on the sale of unsecured debts.⁴⁵
- 7.10. We also recommend BNPL providers inform consumers when the debt has been sold. We refer to Tiana’s story at paragraph 3.60 where there was ongoing confusion, and lack of communication about who now had the right to recover the debt.

Recommendation 38: BNPL providers should commit to only selling debts to debt collectors, or using debt collectors as agents, that have an *effective* complaints process.

Recommendation 39: To incentivise compliance, the Code should provide greater sanctions against BNPL providers who breach the hardship provisions.

Question 7(b): Are these provisions being appropriately and consistently applied by Code Compliant Members?

- 7.11. In our experience, the Code provisions relating to financial hardship are not being appropriately and consistently applied by Code signatories. We refer to our earlier recommendation that there needs to be greater sanctions applied to Code signatories who are in breach of the Code.

8. ‘We will comply with our legal and industry obligations’

Question 8(a): Are the provisions relating to compliance with legal and industry obligations sufficiently clear, noting that different BNPL providers may be subject to different obligations?

- 8.1. No, the provisions are not clear – and so long as BNPL remains outside the NCCPA, it should be called out that different providers have different obligations.

Applicable Legislation

- 8.2. Throughout the Code, there are several occasions where legislation and regulations are referred to but not named. For example:
- (1) “existing laws and regulations” (clause 6.3)
 - (2) “under all applicable laws and regulations (clause 10.2(d))
 - (3) Committed to responding to complaints and disputes in a way that is “consistent with the law” (clause 13.7)
 - (4) “we will comply with relevant unfair contract laws” (clause 15.5)
- 8.3. This is misleading, as consumers are likely to assume they have greater protections afforded to them via law than they actually do in reality. We believe the specific legislation and

⁴⁵ Australian Banking Association, [Industry Guideline: Sale of unsecured debt](#) (Guide, 2019).

regulations should be expressly stated, and in situations where a number of laws and regulations are applicable, it may be more appropriate to include a number of examples. Currently not many laws or regulations do apply, so this should not be a difficult exercise.

- 8.4. Not only will consumers have a greater understanding of their rights, but there will be greater accountability for BNPL.

Recommendation 40: Where the Code refers to legislation and regulation, the relevant law should be specifically referenced.

Broad statements by BNPL providers and industry reps about it being already ‘regulated’

- 8.5. We are aware that AFIA and the BNPL industry often make public comments that the industry is already regulated. We refer to para 3.50 which references public comments made to this effect by AFIA CEO Diane Tate.
- 8.6. We draw the review’s attention to clause 6.4, which states the “Code imposes Standards on Code Compliant Members that are above those required by the law or regulation...”.
- 8.7. We consider that this creates the false impression that the Code offer a superior level of protection.
- 8.8. This is problematic for consumers who are mistakenly led to believe that they are protected when entering BNPL arrangements.
- 8.9. We refer to our earlier comments about the marketing and advertising of BNPL products, and our recommendation that advertising of BNPL products and services needs to be ethical.

Question 8(b): Are the provisions relating to the protection of personal information, disclosure, and privacy adequate?

- 8.10. In our experience, the current provisions relating to the protection of personal information, disclosure and privacy are not adequate.

Personal Information Disclosure

- 8.11. Under cl 15.2(c)(v), BNPL providers are permitted to disclose personal information to any third party if they are not restricted from doing so under applicable laws. This is a very low bar.
- 8.12. What is also concerning is the Code remains silent on circumstances which BNPL providers can use a consumer’s information.
- 8.13. We consider the commitment to protecting personal information is too low and would permit BNPL providers to use a consumer’s personal information for a purpose unrelated to providing their product or service.

- 8.14. The Code's privacy provisions should align with Chapter 6 of the Office of Australian Information Commissioner's (OAIC) Australian Privacy Principle's.⁴⁶ This would permit BNPL providers to only use or disclose personal data for the original purpose for which the information was collected unless an exception applies.⁴⁷
- 8.15. These exceptions include:
- (1) the individual consented to a secondary use or disclosure, noting consent for administering the account and the secondary use should not be bundled (for example for marketing purposes);
 - (2) the individual would reasonably expect the secondary use or disclosure, and that is related to the primary purpose of collection or, in the case of sensitive information, directly related to the primary purpose;
 - (3) the secondary use or disclosure of the personal information is required or authorised by or under an Australian law or a court/tribunal order;
 - (4) using or disclosing personal information where a permitted general situation exists, such as lessening or preventing a serious threat to life, health or safety.
- 8.16. By aligning the Code with OAIC's Privacy Principles, consumers can feel safe about the handling of their information and ensuring personal information is only being used for the purpose for which it was originally disclosed. Consumer expectations in data use and protection are rapidly changing. If AFIA continue to contend that the Code goes beyond existing laws, it should be setting a high bar for its members in this area.
- 8.17. The Consumer Finance Protection Bureau in the US produced a report that found many BNPL providers were shifting their business model towards proprietary app usage, allowing them use sophisticated data analytic systems to create an individual profile of consumer's shopping preferences and behaviours.⁴⁸
- 8.18. The purpose of this is to boost sales and profit by producing targeted and personalised marketing content. By harvesting and monetising consumer data, these BNPL providers are threatening consumer's privacy, security and autonomy.⁴⁹
- 8.19. A number of the BNPL providers considered by the report are signatories to the Code, which underscores the need for enhanced protections around data and personal information, particularly the use of that data.
- 8.20. CHOICE has also published an article highlighting the concerns with BNPL provider's use of data and their privacy policies. This investigation highlighted the limited regulation on

⁴⁶ Office of Australian Information Commissioner, [Chapter 6: Australian Privacy Principle 6 – Use or disclosure of personal information](#) (Version 1.1, July 2019)

⁴⁷ Ibid 3.

⁴⁸ Consumer Financial Protection Bureau, [CFPB Study Details the Rapid Growth of “Buy Now, Pay Later” Lending](#) (Media Release, 15 September 2022).

⁴⁹ Ibid.

allowing third parties to use the data collected by BNPL providers, and the limited transparency around who those third parties are.⁵⁰

- 8.21. While, at a minimum we recommend that BNPL providers commit to the OAIC Privacy Principles, the Code should make commitments that go above and beyond the APPs.
- 8.22. As the Code's ethos is to go above and beyond the law, the Code can go above and beyond the Privacy Principles by committing to:
- (1) not selling data to third parties;
 - (2) de-identifying data;
 - (3) allowing customers to delete data;
 - (4) at a minimum provide a list of third parties that the data is shared with and allow consumers to refuse to share data with those third parties; and
 - (5) a prohibition on location tracking.
- 8.23. Please note that the above is not an exhaustive list.

Recommendation 41: BNPL providers should commit to aligning with the OAIC Privacy Principles.

Recommendation 42: BNPL providers should commit to going above and beyond the privacy principles by providing additional consumer protection in the use of consumer's data and consumer privacy.

9. 'We will support and promote this Code'

Question 9(a): Overall, is there an adequate level of awareness of the Code including how it applies and the protections it offers?

Question 9(b): How does the current level of awareness of the Code impact its effectiveness as a mechanism for consumer protection? What level of awareness is needed to ensure the Code is effective? How can this best be achieved?

Question 9(c): Is there adequate awareness of the BNPL CCC and its role?

- 9.1. Anecdotally, our experience suggests that there is limited knowledge of the Code, the CCC and its role amongst consumers.

⁵⁰ CHOICE, [Buy now, pay later providers move into the data business](#) (Article, 7 March 2022).

- 9.2. Furthermore, our experience is that even practitioners working in this space to support consumers have limited practical awareness of the Code, what it covers and who is bound by the Code.

Other issues

10. Protections offered by the Code compared with Credit Legislation

Question 1(a): Does the Code contain provisions that deliver comparable consumer outcomes to the relevant provisions in the NCCPA that would have applied if BNPL were formally regulated under the NCCPA?

- 10.1. In our experience, the Code does not deliver comparable consumer outcomes to similar provisions in the NCCPA.
- 10.2. In a report published by AFIA earlier this year, it is noted that “[t]he Code *goes above and beyond the law*”.⁵¹ While it is technically correct, this is an exceptionally low bar given consumer credit laws do not apply to BNPL.
- 10.3. The Code provisions relating to financial difficulty and complaints handling mirror similar provisions under the NCCPA, and in fact have shorter timeframes in which Code signatories are required to respond. However, in our experience, BNPL providers often fail to meet the prescribed time limits under the Code. Therefore, while the Code apparently goes above and beyond, in practice it does not improve consumer outcomes.
- 10.4. We refer to the case studies above of Grace and Andrea.
- 10.5. We do not consider the Code is, of itself, is a substitute for appropriate legislation and statutory consumer protections.
- 10.6. Furthermore, we do not consider self-regulation by a few providers within the industry is adequate for appropriate consumer protections.
- 10.7. We note the Code is only binding on Code signatories. Not all BNPL providers, or even BNPL providers who are AFIA members, are bound by the Code. As such, there lacks consistency and competitive neutrality across the sector. If BNPL providers were regulated by the NCCPA, all BNPL providers would be required to comply, meaning there would be a level playing field for the industry.
- 10.8. Further, as the Code is not law, it is not enforceable by a real regulator. Consumers must therefore rely on it being part of their contract to make any claims against the BNPL provider for breaches of the Code. A signatory’s failure to comply with the obligations set out in the Code can only lead to limited sanctions from the CCC – which are far weaker than regulatory penalties that can be imposed upon credit that is actually regulated. This further contrasts with the penalties applicable for breaches of the NCCPA, where failing to uphold the statutory obligations can result in fines, or even a term of imprisonment.

⁵¹ AFIA, [The Economic Impact of Buy Now Pay Later](#) (Report, June 2022) 22.

Question 1(b): Are there additional consumer protections under the NCCP which should be afforded under the Code?

- 10.9. We consider there are additional consumer protections which should be afforded to consumers that engage with BNPL providers. Consumer advocates have long held the view BNPL providers are credit provider, and therefore should be covered under the same laws as other credit providers. Legislation should then be supported by a robust Code that goes further than the NCCPA.
- 10.10. We have set out below the additional consumer protection we consider should be afforded to consumers of BNPL products and services.

Responsible Lending

- 10.11. It is in the best interest of consumers for all BNPL providers to be subject to the same regulations as all other forms of credit. We stress the need for consistency in regulation across the consumer credit industry.
- 10.12. Responsible lending obligations were introduced to encourage prudent lending and attempt to ensure consumers are only provided financial products they can afford to pay back.
- 10.13. The affordability of a product is a key component of whether a loan has been responsibly provided under the NCCPA. We note the current Code makes no reference to “affordability” in terms of assessing whether a BNPL product is suitable.
- 10.14. By adopting the responsible lending provision of the NCCPA into the code, we believe this will minimise the risk that consumers will:
- (1) enter, or are encouraged to enter, or remain in, an unsuitable BNPL product; or
 - (2) increase the transaction limit of an existing BNPL product to a limit that is unsuitable.
- 10.15. Some BNPL providers have argued, as it is more efficient and cost effective to do so, a responsible lending obligation would incentivise providers to offer higher initial spending limits. However, consumer advocates perceive properly performed suitability assessments would reduce the ability of providers to provide unsuitably higher spending limits and ultimately reduce the threat of harm to customers.
- 10.16. Steph’s story below demonstrates what can happen where there is lack of suitability assessment applied to BNPL arrangements, and the subsequent debt spiral.

Case study – Steph’s story

Steph is a single mother of four living in regional Victoria. Her only source of income is Centrelink. Steph told CALC she has been struggling with BNPL debts for years, from at least four providers that are signatories to the Code.

In June this year, Steph contacted the National Debt Helpline after being told by a private debt management firm (or a debt vulture) to enter into a Part IX debt agreement to deal with her BNPL debts. Steph told CALC she had been using BNPL regularly for years, often to pay for essentials

such as bills or for food (by buying gift vouchers). Her good repayment history meant her credit limits had been increased a number of times on the platforms. At that time, she told CALC she had around \$4500 in BNPL debt, and the repayments for these along with the costs of other essentials for her family clearly left the household budget in a deficit.

CALC spoke with Steph again recently. She told CALC she had continued to rely on BNPL for essentials, and now her accounts were all maxed out. She recognised BNPL was contributing to her financial hardship, but she felt stuck in a cycle where she relied on access to the products. She said the repayments were costing her \$1000 a fortnight, so she had tried to enter into a debt consolidation loan to pay off the BNPL debts altogether.

Steph said she recently got approved for a \$10,000 consolidation loan that would have reduced her fortnightly repayments. However, she was told before receiving the money she had to pay insurance for the credit product. After transferring the money, Steph said she realised it was a scam when she couldn't get a hold of the 'lender'. Steph told CALC this had left her in a really difficult position, and she didn't know how she was going to pay the rent or buy Christmas presents for her children.

Based on the way Steph described her payment history to CALC and her unwillingness to seek hardship assistance, it is likely that her BNPL providers would have assumed Steph was not in financial hardship.

Source: Consumer Action Law Centre

10.17. We refer to our earlier comments at paragraph 4.2 recommending BNPL providers institute suitability assessments.

Multiple Buy Now Pay Later Accounts

10.18. Consumer advocates maintain concerns around consumers having multiple accounts with multiple different BNPL providers and the unsustainable level of debt that this perpetuates. We consider where a consumer is using multiple BNPL accounts, this is a red flag they are financially vulnerable.

10.19. Due to the lack of affordability assessments and the timing of instalments, when a consumer holds multiple BNPL accounts it makes it more difficult to manage the various payments across BNPL providers. An appropriately legislated suitability assessment will provide additional consumer protections not currently available under the Code.

10.20. As it commits to do, the Code could go further and commit BNPL providers to doing additional checks and making enquiries regarding other liabilities including to other BNPL providers. If the check reveals the consumer is over-committed, then the BNPL provider must decline the application.

10.21. Multiple BNPL accounts can lead to some consumers accessing an unsuitable amount of credit. For example, as outlined in paragraph 4.3, BNPL are only required to verify a consumer's ID for credit limits below \$2,000. As a result, a consumer could have five accounts with five

different BNPL providers, giving them access to \$10,000 worth of credit with no assessment of suitability. See Donna’s story at paragraph 4.14.

Case study – The Omenuku family

A young family of 2 children attended a community service to address their financial situation. The family has really been struggling financially with the current pressures of the increased cost of living. The family’s main stable income was Centrelink, parenting pension. Their other income was inconsistent due to the nature of the industry worked in and employees at the company currently being sick due to Covid-19.

The family had acknowledged their excessive use of one particular BNPL provider and explained they used it to buy food for their children and clothes for them. They had also explained they would go without food at dinner at times in order to only feed their children. The client’s transactions towards the BNPL provider displayed 35 transactions on the one day, meaning 35 concurrent facilities with the provider.

22 Nov	0 Days		AU AUS Card x06733 Value Date: 18/11/2022	-\$21.29
22 Nov	0 Days		AU AUS Card x06733 Value Date: 18/11/2022	-\$17.50
22 Nov	0 Days		AU AUS Card x06733 Value Date: 18/11/2022	-\$22.50
22 Nov	0 Days		AU AUS Card x06733 Value Date: 18/11/2022	-\$15.00
22 Nov	0 Days		AU AUS Card x06733 Value Date: 18/11/2022	-\$15.28
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$30.00
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$48.81
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$35.00
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$69.88
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$36.75
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$8.80
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$14.96
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$11.14
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$37.50
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$25.00
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$16.01
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$7.75
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$2.70
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$2.50
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$9.46
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$3.90
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$2.21
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$26.24
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$12.62
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$5.18
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$15.91
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$8.54
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$9.75
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$6.09
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$62.50
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$7.70
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$20.33
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$6.15
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$9.03
22 Nov	0 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$4.01
22 Nov	3 Days		AU AUS Card x06733 Value Date: 19/11/2022	-\$7.44

The financial counsellor’s main concerns were there are currently 35 different opportunities (potentially more) for the family to be charged with late fees, putting additional financial strain on their situation. Further, the family was unaware of how many facilities they currently have, and the repayments that come with those facilities.

Following discussions with the family regarding their debt and BNPL use, the family decided to not address their BNPL account usage as they believed they needed the product to be able to afford their living expenses and did not want to jeopardise being able to use the product.

Source: Financial Counsellors Association of Western Australia and Gosnells Community Legal Centre

- 10.22. As consumers who have reached their credit limit by one BNPL provider, can simply apply to use another provider with minimal checks, additional consideration needs to be given to consumers total liability across all providers.
- 10.23. Again, we draw parallels with SACCs. We consider there is significant overlap between vulnerable class of consumers who use SACCs and those who enter BNPL arrangements. There is also a significant similarity in the type of harm caused to consumers emanating from these credit products. Applying the same logic, we recommend the protected earnings caps (**PEA**) provisions of the NCCPA, as amended in the *Financial Sector Reform Bill 2022*, should be applied to BNPL contracts. This would require the support of suitable credit reporting.

Credit Reporting

- 10.24. BNPL providers are not required to report a person's credit information to the credit reporting bodies, such as defaults, credit limits, repayment history and outstanding balances.
- 10.25. Given BNPL is credit, we believe at a minimum, BNPL providers should be required to participate in the credit reporting regime found in *Part 3-2CA of the Credit Act*.
- 10.26. This participation would include reporting on:
- (1) a customer's existing debts and liabilities;
 - (2) whether consumers have met their repayments obligations; and
 - (3) whether consumers have entered financial hardship arrangements.
- 10.27. As outlined at paragraph 10.18, a key risk of BNPL is the ease in which users can open multiple accounts across various platforms. By participating in the credit reporting regime, this issue can be addressed by increasing the visibility of all accounts a consumer holds with other BNPL providers and credit providers.
- 10.28. As demonstrated in Steve and Susan's case studies, in the absence of credit reporting, there are circumstances where BNPL is used to finance add-on products alongside regulated forms of credit. In these cases, there is a risk a credit licensee assessing an application for credit may overlook the BNPL repayments.
- 10.29. Given BNPL providers can voluntarily decide whether to adhere to Australia's credit reporting framework, both consumers and credit providers are missing out on the benefits of reporting credit information. These benefits include:

- (1) giving credit providers with additional information to establish a consumer's creditworthiness;
 - (2) assisting credit providers meet their responsible lending obligations;
 - (3) decreasing levels of over-indebtedness and lower credit default rate;
 - (4) improving the credit markets competition and efficiency, leading to a reduction of the costs in providing credit to individuals; and
 - (5) consumers who effectively use BNPL products are given the opportunity to demonstrate good repayment history, which may impact their ability to access credit in the future.
- 10.30. Given the lack of credit reporting leads to a negative impact on the wider credit market, the Code should require BNPL providers to comply with the mandatory comprehensive credit reporting regime.
- 10.31. Treasury's Option Paper refers to how BNPL providers in New Zealand have established a credit reporting-like database to address concerns of vulnerable consumers signing up to multiple BNPL accounts.
- 10.32. Consumer advocates strongly oppose developing something similar in Australia.
- 10.33. BNPL is credit, and to be consistent and avoid further complexity to the industry, it should be reported in line with other forms of credit. It would be completely redundant and duplicative to build a totally new system when the objective of credit reporting is to develop a complete picture of a consumer's debts and liabilities.

Recommendation 43: BNPL providers must comply with mandatory comprehensive credit reporting regime.

Credit File Concerns

- 10.34. The Code currently recommends credit checks as one of the methods of determining suitability of facilities. However, we consider the recommendation has been unsuccessful in bringing about participation in the credit reporting system for all but a small number of BNPL providers.
- 10.35. Consumer advocates are aware a balance needs to be struck between ensuring purchases are affordable through credit checks, whilst simultaneously protecting a consumers' credit file and score.
- 10.36. If BNPL providers perform credit checks during the assessment of each new transaction, this may result in a consumer's credit file and score being negatively impacted due to the multiple enquiries recorded.
- 10.37. BNPL providers should commit to being considerate of their consumers' credit files and scores.

- 10.38. We suggest the best approach would generally be to undertake an initial check when a consumer first enters a contract, and then, additional checks performed at least every two years between them if the consumer continues to use BNPL arrangements.
- 10.39. The timing between checks should ultimately be dictated by the consumers' transaction monetary amounts and number of different transactions.

Recommendation 44: BNPL providers commit to being considerate of their consumers' credit files and credit scores. Credit checks should not be conducted as part of a routine, automatic process.

11. Monitoring and enforcing compliance with the Code

Question 2(a): How effective are the mechanisms in place to monitor and ensure compliance with the Code?

- 11.1. In our experience, the current mechanisms in place to monitor and ensure compliance with the Code are not effective.

Effectiveness of the complaints process

- 11.2. Consumer advocates believe the effectiveness of the CCC is reduced by the delay in which complaints can be considered by them. Under the current process, the CCC must await the final determination or findings under IDR, EDR or investigation of any relevant regulatory body before commencing any investigation themselves.⁵²
- 11.3. In principle, consumer advocates have concerns about the BNPL industry regulating itself. Further there are concerns that there are a select few providers who are making the regulations on behalf of the industry.
- 11.4. We refer to our earlier comments at paragraph 6.38 about the effectiveness of the CCC.
- 11.5. We consider the effectiveness of the CCC is reduced by the requirement to effectively choose whether to take a complaint to the CCC or to AFCA or wait a long time for one full process to conclude before the other begins.
- 11.6. As noted at paragraph 6.43 to 6.44, very few complaints are being made to the CCC, particularly in comparison to the volume of complaints made to AFCA.
- 11.7. If consumers are preferencing making a complaint to AFCA, the CCC and the industry may be missing out on important data to monitor and ensure compliance with the Code. It also indicates it is quite likely consumers are getting complaint fatigue and are unwilling to progress matters beyond AFCA or have no idea about the existence of the CCC.

⁵² clause 13.14 of AFIA's BNPL Industry Code of Practice.

Independence

- 11.8. The stated purpose of the CCC is to be an independent committee responsible for the administration and enforcement of the Code.⁵³
- 11.9. One of the guiding principles is to act in a fair and effective manner with integrity and impartiality.
- 11.10. We consider that the composition, processes and procedures of the CCC do not achieve independence.
- 11.11. The control of the board through the Terms of Reference reduces independence of the CCC, for example clauses 1.1 and 1.2.
- 11.12. For a code to be effectively administered, the body overseeing the Code needs to be independent of the industry or the industries that subscribe to the code and provide the funding. Further, there needs to be a balance of industry representatives and consumers representative and an independent chair.⁵⁴

Recommendation 45: The Code needs oversight by a body independent of the industry, such as AFCA Code compliance group.

Question 2(b): Are the sanctions and actions that the Code Compliance Committee may take in response to an alleged or confirmed breach of the Code adequate?

- 11.13. With limited data from the CCC, and so far, no reported use of the sanctions and actions, it is difficult to assess the efficacy of such provisions.
- 11.14. It is concerning that in the 12 months since the Code came into effect the CCC has not used its powers. The number of AFCA cases would suggest there is cause to consider the role of the CCC and its effectiveness.
- 11.15. Furthermore, advocates consider that although there are enforceable commitments within the Code, these are not a substitute for adequate regulation by government under Australia's credit laws. While some of the sanctions do mirror equivalent powers under other finance industry codes, those codes operate in areas where there are meaningful enforcement powers wielded by a regulator as well.

⁵³ Clause 3.1 AFIA's BNPL Terms of Reference; see also <https://afia.asn.au/BNPL-CCC-Role-Members>

⁵⁴ ASIC, [Regulatory Guide 183: Approval of financial services sector codes of conduct](#) at 183.76.

Enforcement Powers

- 11.16. One of the biggest shortcomings of the Code is the lack of incentive for BNPL providers to uphold the few consumer protections afforded, specifically the lack of financial penalties.
- 11.17. If a BNPL provider is found to have breached the Code by EDR, the provider is only required to fairly reinstate the consumer.
- 11.18. Likewise, the financial penalties which can be imposed by the CCC is limited to:⁵⁵
- (1) requiring the BNPL provider to undertake a commercially reasonable rectification process;
 - (2) requiring the BNPL provider to undertake a compliance review of their remedial actions or remedial action plan; and
 - (3) requiring the BNPL provider to undertake an additional Code compliance audit at their own expense.
- 11.19. The CCC's power is centred towards reputational damage, such as a notice of non-compliance being published on the AFIA website and annual report, or in a public media release. Again, this is all assuming a complaint is brought to the CCC, which noted above is not likely.
- 11.20. The NCCPA has impact as it empowers ASIC to impose significant financial penalties on those who breach its provisions and allows consumers to rely on stronger protections in EDR. This is one glaringly obvious example of how the industry's claims it is already regulated do not stack up.
- 11.21. Given BNPL products and services may cause as much harm as credit products like SACCs, we are of the strong belief BNPL providers who fail to act as expected should face the same financial penalties as other credit providers.

Recommendation 46: BNPL providers face the same financial penalties enforced by ASIC upon other credit providers.

Question 2(c): Is the reporting relating to compliance with the Code, complaints, and breaches sufficient?

- 11.22. From a consumer advocate perspective, there is little information available on the AFIA website around the results of any reporting requirements, complaints, and any alleged breaches.
- 11.23. The CCC has released one report, which has minimal substantive data. We understand some information is commercially sensitive, but if the CCC is to perform its independent function, it is important the processes are transparent and subject to appropriate public scrutiny.

⁵⁵ see clause 10.9 of AFIA's BNPL Terms of Reference.

- 11.24. This will also allow consumers to avoid BNPL providers with a poor track record.

Recommendation 47: All CCC reports should be public, with a focus on reports being comprehensive, transparent, and making BNPL providers accountable for their actions by naming them and their breaches.

12. Standards for Merchants and Retail partners

Question 3(a): Are the minimum standards for merchants and retail partners appropriate and are they being monitored effectively in practice?

- 12.1. In our experience, the minimum standards for merchants and retail partners are not appropriate and are not being monitored by Code signatories.
- 12.2. Whilst clause 17 of the Code sets out some minimum standards for merchant and retail partners of Code signatories, they are broad and do not contain any firm commitments or transparent processes for Code signatories to follow.
- 12.3. There is no incentive for merchants and retail partners to meet those minimum standards, as the Code is not enforceable.
- 12.4. We refer above to the case studies of Steve and Susan at paragraph 2.16 and 2.19 which demonstrate how merchants are not acting lawfully, fairly and ethically in their dealings with consumers.

Unsolicited marketing and selling

- 12.5. Another area of concerns is the unsolicited marketing and selling of goods where BNPL arrangements are proposed by merchants as a source of funding those purchases.
- 12.6. We draw the review's attention to the case studies set out above at paragraph 2.16, 2.19 and 2.26.
- 12.7. We strongly advocate for the prohibition of unsolicited marketing and selling, as outlined in recommendation 10. We acknowledge that currently at clause 9.4, Code signatories will take *"all reasonable steps to ensure that our BNPL Products and Services are not used or suggested in relation to unlawful unsolicited marketing or selling of BNPL Products and Services"*.
- 12.8. The Code states at clause 9.6 that if a BNPL provider becomes aware of a merchant or retail partner is engaging in unsolicited marketing or selling in a manner which is unlawful, they will deal with them appropriately under the minimum standards for merchant and retail partners in Part C of the Code. However, the issue is there is also no repercussions under Part C clause 17 of the Code for any breaches of the minimum standards. There are some vague references to each Code signatory having their own processes and requirement to report any *"instances of material non-compliance"* to the CCC.
- 12.9. However, as we have previously raised, the Code is not enforceable by any meaningful oversight body.

- 12.10. For consumers, consistency is key to ensuring all BNPL providers are requiring the same of their merchant and retail partners. Lack of consistency may mean those businesses with ‘sharper’ practices may only offer particular BNPL platforms with less stringent standards. Consumers will not necessarily be aware of such standards and the different standards across the providers, putting them at a disadvantage.

Recommendation 48: BNPL providers should facilitate a cancellation of the purchase of goods or services sold through unsolicited marketing or selling and provide a full refund at no cost to the consumer.

13. Performance and Content of the Code

Question 4(a): Overall, has the Code, including the nine ‘Key Commitments’, been effective in delivering an enhanced level of consumer protection in the BNPL sector in Australia and in meeting its objectives?

- 13.1. Overall, the nine ‘Key Commitments’, have been wholly ineffective in delivering an enhanced level of consumer protection in the BNPL sector, for all the reasons above. Fundamentally, many of the commitments are not valuable or effective in delivering adequate consumer protections. They were obviously written to accommodate a range of industry models that have inherent flaws in them from a consumer safety perspective.
- 13.2. The case studies we have included are just a sample of the issues that consumers, and in particular vulnerable consumers, are experiencing with BNPL products and services.

Question 4(b): In addition to the issues raised above, are there any other aspects of the nine ‘Key Commitments’ which could be improved upon or better articulated within the Code?

Question 4(c): Are there any additional commitments, or apparent gaps in coverage, that should be considered for inclusion within the Code?

Consumer Law crossover

- 13.3. BNPL providers are an additional platform inserted in transactions between consumers and retailers/merchants. Given they are benefitting from this relationship, they should be required to guarantee certain consumer protections in these transactions.
- 13.4. The Code is completely silent on any procedure or forms of assistance BNPL providers need to provide if there are problems with an item or service purchased using a BNPL product.

- 13.5. Although some BNPL provider may have their own processes, we suggest a standardised process for refunds and product returns be incorporated within the Code. The chargeback system could be a model to base this upon.

Recommendation 49: A standardised process should be set out for refunds and product returns.

Question 4(d): Are there any industry developments which have not been appropriately considered within the Code?

Small business

- 13.6. BNPL is extending into small business lending, and there are concerns that the same issues experienced by individual consumers, particularly in relation to over-commitment, will occur in the small business space.
- 13.7. The BNPL industry is a rapidly evolving industry, and as such any Code should make it clear that the protections afforded to consumers and prospective consumers who are natural persons, are also afforded to small businesses.

Recommendation 50: The Code should clearly state the protections contained in the Code are afforded to small businesses.

14. Accreditation as a Code Compliant Member

Question 5(a): Is the process for accreditation as a Code Compliant Member of the Code transparent, well-understood, effective and consistently applied?

Accreditation Process

- 14.1. The Code does not itself set out the process by which Code signatories become accredited. The process is set out in the Code by-laws.
- 14.2. As the Code is a consumer facing document, this seems to be appropriate. However, it does mean that for interested consumers, the required information is contained quite separately.
- 14.3. There are limited references to the by-laws in the Code, and specifically the Code does not state the accreditation process for Code subscribers are contained in the by-laws.
- 14.4. We consider there needs to be more prominent notice that the accreditation process is contained in the by-laws so interested consumers can easily find them.

Question 5(b): Are there opportunities to enhance the accreditation process?

- 14.5. We are not familiar with the Codes accreditation process and are not in a position to comment.

Annexure – List of Recommendations

Nine Key Commitment

'We will focus on the customer'

Recommendation 1: The Code should include an obligation that BNPL providers be proactive in identifying risk factors and triggers for vulnerable consumers.

Recommendation 2: BNPL providers must provide warnings and information regarding alternatives and forms of assistance prior to opening an account or increasing the account limit.

Recommendation 3: Vulnerability should be defined in a non-limiting way to make it easy for consumers to identify specific categories of vulnerability.

Recommendation 4: BNPL providers should be required to scale up enquiries where red flags are raised, such as the use of BNPL for essentials.

Recommendation 5: BNPL providers must commit to considering vulnerability during every interaction of their customer's journey.

Recommendation 6: Expand clause 14 of the Code to commit to not engage debt external collectors where BNPL providers are aware that the customer is (1) experiencing vulnerability; or (2) is in financial hardship and is highly unlikely to be able to repay the debt in the future.

Recommendation 7: BNPL providers should commit to more meaningful verification of the identity of its customers.

'We will be fair, honest and ethical'

Recommendation 8: Late fees should be capped and limited to the reasonable pre-estimated loss.

Recommendation 9: BNPL providers should not be permitted to link accounts to a consumer's credit cards.

Recommendation 10: BNPL providers should commit to not dealing with vendors or merchants who make unsolicited sales.

Recommendation 11: When a consumer is using a product or service which can be obtained for free, BNPL providers must provide information to the consumer about the free alternative options.

Recommendation 12: BNPL providers should be prohibited from providing BNPL arrangements to consumers at hospitality venues.

Recommendation 13: The Code must commit to advertising and marketing ethically.

Recommendation 14: The Code must commit to greater oversight and enforcement of appropriate sanctions for breaches of the Code.

Recommendation 15: BNPL providers should commit to not engaging in unsolicited selling.

Recommendation 16: Consumers should be able to make early repayments on all products and services with no fees attached.

Recommendation 17: Consumers should be able to pay out any transaction or any contract and close the account at any time with no early termination fee.

'We will keep you properly informed about our product or service'

Recommendation 18: Introduce a Code commitment that disclosure by BNPL providers will be appropriate, consumer tested and prominent.

Recommendation 19: BNPL providers have a standardized format for disclosing fees and effective annual interest rates.

Recommendation 20: BNPL providers should commit to provide redress to consumers who are sold products in circumstances where they are not in the DDO target market.

Recommendation 21: BNPL providers must conduct suitability assessments and in addition to clause 10.9 commit to provide copies of suitability assessments to consumers upon request.

Recommendation 22: BNPL providers who do not comply with the timeframes in the Code should commit to providing compensation to affected consumers.

Recommendation 23: The Code should contain incentives for BNPL providers to comply with its provisions, including independent oversight and strong sanctions.

Recommendation 24: BNPL providers should allow retailers and merchants to charge consumers a surcharge for using BNPL arrangements.

Recommendation 25: Surcharges should be capped to the reasonable cost to the retailer or merchant.

Recommendation 26: BNPL providers who are AFIA members must also be Code signatories.

Recommendation 27: The Code should permit BNPL providers who are not AFIA members to become Code signatories.

'We will make sure our BNPL product or service is suitable for you'

Recommendation 28: Code signatories should commit to undertaking a suitability assessment prior to providing a BNPL arrangement.

Recommendation 29: The Code should prohibit BNPL providers extending an arrangement that would cause the customer substantial hardship.

Recommendation 30: BNPL providers should commit to not relying solely on benchmarks and should be required to make enquiries into a consumer's financial situation before opening an account or increasing credit limits.

Recommendation 31: If automated systems are used, they must be:

- (1) tested prior to implementation, and at reasonable regular intervals, to ensure the decisions made using these systems are appropriate;
- (2) 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
- (3) capable of maintaining or producing a meaningful record of the assessment.

Recommendation 32: Prohibit unsolicited transaction limit increases to consumers.

‘We will undertake an ongoing review of the suitability of our products or services’

Recommendation 33: Industry should consider whether it can make meaningful commitments in the Code regarding product design that improve upon the DDO regime.

‘We will deal fairly with complaints’

Recommendation 34: BNPL providers should be flexible about how complaints are lodged and offer multiple methods to lodge complaints.

Recommendation 35: BNPL providers to provide information on internal dispute resolution processes in a range of languages and formats.

Recommendation 36: Remove clause 13.14 to allow complaints to be made to the CCC concurrently while being considered by the BNPL provider or by AFCA.

Recommendation 37: The role of the CCC needs to be more clearly defined in the Code, in particular, clarity is required around when consumers should approach AFCA and/or the CCC in the dispute resolution process.

‘We will offer financial hardship assistance’

Recommendation 38: BNPL providers should commit to only selling debts to debt collectors, or using debt collectors as agents, that have an *effective* complaints process.

Recommendation 39: To incentivise compliance, the Code should provide greater sanctions against BNPL providers who breach the hardship provisions.

‘We will comply with our legal and industry obligations’

Recommendation 40: Where the Code refers to legislation and regulation, the relevant law should be specifically referenced.

Recommendation 41: BNPL providers should commit to aligning with the OAIC Privacy Principles.

Recommendation 42: BNPL providers should commit to going above and beyond the privacy principles by providing additional consumer protection in the use of consumer’s data and consumer privacy.

‘We will support and promote this Code’

Other Issues

Protections offered by the Code compared with Credit Legislation

Recommendation 43: BNPL providers must comply with mandatory comprehensive credit reporting regime.

Recommendation 44: BNPL providers commit to being considerate of their consumers’ credit files and credit scores. Credit checks should not be conducted as part of a routine, automatic process.

Monitoring and enforcing compliance with the Code

Recommendation 45: The Code needs oversight by a body independent of the industry, such as AFCA Code compliance group.

Recommendation 46: BNPL providers face the same financial penalties enforced by ASIC upon other credit providers.

Recommendation 47: All CCC reports should be public, with a focus on reports being comprehensive, transparent, and making BNPL providers accountable for their actions by naming them and their breaches.

Standards for Merchants and Retail partners

Recommendation 48: BNPL providers should facilitate a cancellation of the purchase of goods or services sold through unsolicited marketing or selling and provide a full refund at no cost to the consumer.

Performance and Content of the Code

Recommendation 49: A standardised process should be set out for refunds and product returns.

Recommendation 50: The Code should clearly state the protections contained in the Code are afforded to small businesses.