

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Amended Statement of Facts, Issues and Contentions

File Number: ACT1 of 2019

File Title: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code and the determination made by the ACCC on 5 December 2019

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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DEPUTY REGISTRAR

Dated: 30/03/2020 10:36 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT1 of 2019

Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code

FLEXIGROUP LIMITED

Applicant

APPLICANT'S AMENDED STATEMENT OF FACTS, ISSUES AND CONTENTIONS

PART A: FACTS

1. The Applicant

1. The Applicant, Flexigroup Limited (**Flexigroup**), is an Australian company listed on the Australian Securities Exchange (**ASX**). The shares in Flexigroup Limited trade under the ASX Code "FXL".
2. Flexigroup is a diversified financial services group with operations in Australia, New Zealand and Ireland across a diverse range of industries including: home improvement, solar energy, fitness, IT, electrical appliances, travel and trade equipment.
3. Flexigroup provides a range of finance products and payment solutions to consumers and businesses through a network of retail and business partners. This includes interest free cards and no interest ever payment plans and business leasing solutions.
4. Flexigroup is the leading provider of no interest ever payment plans to retail customers, through its product 'hummm'. hummm allows customers to pay off a loan in instalments over their choice of fixed term. hummm is available on purchases up to \$30,000 and with payment plans from 5 fortnights to 5 years. Hummm is a long

established form of Buy Now, Pay Later (**BNPL**) finance products that, although not new, are becoming increasingly prevalent in the consumer finance industry.

5. Flexigroup is the oldest and one of the largest providers of BNPL finance in Australia. Flexigroup's product humm has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia¹.
6. Flexigroup works with approximately 380 solar sellers that offer New Energy Technology (**NET**) to residential and small business consumers. Of the top 50 solar sellers with whom Flexigroup does business, approximately 60% were expected to or have become members of one of the Authorisation applicants, and would therefore also likely become signatories to the New Energy Tech Consumer Code (**NETCC**).

2. The Application for Authorisation

7. This proceeding concerns the application for authorisation (non-merger) dated 29 April 2019 pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) made by the following parties:
 - (a) Australian Energy Council (**AEC**);
 - (b) Clean Energy Council (**CEC**);
 - (c) Smart Energy Council (**SEC**); and
 - (d) Energy Consumers Australia (**ECA**) (together, **the Applicants**).(**the Application**²).
8. Flexigroup participated in the ACCC's public consultation in respect of the Application. It provided four written submissions in the periods both before and after the ACCC's draft determination: on 31 May 2019, 29 August 2019, 26 September 2019 and 8 November 2019. Flexigroup also participated in the Pre-Decision Conference held by the ACCC on 9 September 2019.
9. The Application concerned a new draft code of conduct, entitled "The New Energy Tech Consumer Code" (**NETCC**). The NETCC was prepared by the Applicants in

¹ Flexigroup submission to the ACCC dated 31 May 2019, [2.1] and [2.3]. Almost half of the revenue generated by Flexigroup's humm product is from providing credit for sales of solar panels and other home improvements. Senate Committee Report referencing Rebecca James, CEO, Flexigroup Limited, para [5.6]

² Application for authorisation AA1000439.

response to a request from the Council of Australian Governments Energy Council (**COAG Energy Council**) to them to develop an industry code for sellers of "behind-the-meter" products and services, including small-scale solar power generation and storage technologies ("new energy technologies" or **NET**).

10. Signatories to the NETCC will include the Applicants and providers of New Energy Tech. The Application stated that those expected to become signatories range in scale from micro businesses to large energy companies with New Energy Tech Lines of Business. Signatories will therefore include persons that currently offer Flexigroup's BNPL finance products to customers seeking to purchase NET products.
11. The NETCC is a voluntary code. However, some state government rebate schemes only offer rebates for installations performed by signatories to a relevant code, and some government tenders require tenderers to be signatories to a relevant code. The effect of these requirements is that suppliers and installers of NET products are very likely to become signatories to the NETCC.
12. The draft NETCC prepared by the Applicants and the subject of the Application included proposed limitations on signatories' ability to offer deferred payment arrangements to residential customers.
13. In particular, under clause 25 the draft NETCC as amended during the Application, if the deferred payment arrangement includes an interest component, additional fees or an increased price, signatories would undertake to ensure, inter alia, that:
 - (a) the deferred payment arrangements would be offered through a credit provider licenced under the *National Consumer Credit Protection Act (2009)* (Cth) (**NCCPA**); or
 - (b) the deferred payment arrangements would be regulated by the NCCPA and the National Consumer Code (**NCC**) or complies with a regulator approved code of conduct (such as those meeting ASIC RG 183) that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections.

3. The ACCC Determination

14. On 5 December 2019, the ACCC issued its Determination in respect of the Application. The Determination granted authorisation in respect of the NETCC subject to conditions.

15. The conduct which the ACCC authorised is set out in paragraph 5.6 of the Determination (**Proposed Conduct**) as follows:

To enable the Applicants and future signatories to the NETCC to agree, sign up to and comply with (give effect to) provisions of the NETCC:

- (a) *according to which signatories will commit to abide by minimum standards of good practice as set out in the NETCC, which intended to cover all aspects of the customer experience*
- (b) *for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the NETCC, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and*
- (c) *requiring signatories to only offer deferred payment arrangements that are regulated under the NCCPA and the NCC, and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.*

16. The conditions to the grant of authorisation are described in paragraphs 5.11 to 5.18 of the Determination, and set out in Attachment A and the Annexure to the Determination. The conditions relate to clauses 3(d), 25, A7 and A7A of the NETCC (the **ACCC's BNPL Conditions**) to the effect that:

- (a) clause 25 and clauses A7 and A7A of the NETCC be amended to the effect that:
 - (i) if the credit provider is not licenced under the NCCPA; and
 - (ii) if the deferred payment arrangement is exempt from the NCCPA and the NCC (that is, BNPL finance),

then signatories must not offer those finance terms unless the Administrator of the Code had determined that the credit provider was itself a signatory to an industry code of conduct that required the credit provider to, in effect, adhere to standards equating to the NCCPA and NCC regulatory regime; and

- (b) signatories must not offer customers finance arrangements not regulated by the and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a NET product if the sale of the NET product is unsolicited.

17. A consolidated version of the NETCC as authorised by the ACCC and posted on the Tribunal's website is set out in Annexure [A].

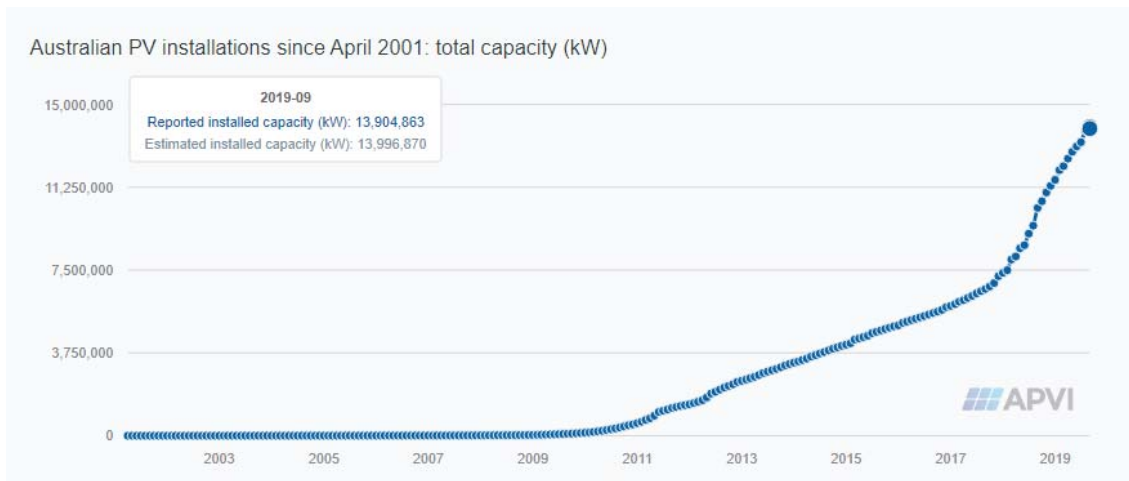
4. Demand for NET

18. NET, as defined in the NETCC, encompasses a variety of products and services that relate to and include small scale products and systems that generate, store or trade energy away from Australia's main energy transmission and distribution networks or as distributed energy resources connected to an energy network.³
19. The sector is currently dominated by solar photovoltaics (**PV**) which is now being followed by energy storage (mostly batteries).⁴
20. Between 2001 and 2010 the growth in solar PV installations for solar PV was around 15%. A period of extremely rapid growth occurred between 2010 and 2013. The number of monthly installations stabilised through 2014 and 2015, and now appears to be trending slightly upwards in the residential sector, with an increase in the number of larger (commercial and utility-scale) PV systems keeping overall installed capacity high.⁵

³ NETCC Part C "Definitions"

⁴ Application, [10]

⁵ Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019.



(Source: Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019 and 13 February 2020)

21. As of 30 September 2019, there were over 2.2 million PV installations in Australia, with a combined capacity of over 13.9 gigawatts.⁶
22. In the Application, the Applicants submitted that in 2018, the number of solar installations on homes and small businesses increased by 43% on the previous year and that the Clean Energy Regulator expected that growth was likely to continue for at least 10 years.⁷
23. The Australian Finance Industry Association Limited (**AFIA**) contended that its members (which include Flexigroup) have supported the installation of 200,000 solar panel systems with BNPL finance.⁸

5. BNPL finance

Basic features

24. BNPL finance is an affordable and flexible financing option. It can be cheaper for consumers than other types of credit because consumers are not charged interest and because the fees that are payable are limited and are periodic or other fixed charges.



⁶ Ibid.

⁷ Application, paragraph 10(a).

⁸ AFIA submission to ACCC dated 29 August 2019, page 7

25. For Flexigroup's product, humm, the fees are known upfront and are published on the humm website:

How it all breaks down.

	 Little things <\$2K		 Big things <\$30k	
	5 x fortnight	10 x fortnight	6 - 60 months	
Time to pay				
Monthly fee	-	\$8	\$8	
Establishment fee	-	-	\$35 - \$90	
Repeat purchase fee	-	-	\$22	
Late payment fee	\$6	\$6	\$6	

(Source <https://www.shophumm.com.au/how-it-works>, accessed 17 December 2019 and 13 February 2020)

Regulation - NCPP

26. BNPL finance is not subject to regulation under the NCCPA and the NCC where providers operate in accordance with the exemption in section 6(5) of the NCCPA which states.

"This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed."

27. Under that exemption, a provider of 'continuing credit contract' can only charge the consumer a maximum of \$200 in the first year and \$125 in each subsequent year, regardless of the amount of the credit provided.⁹

⁹ Regulation 51 National Consumer Credit Protection Regulations 2010 (Cth)

28. This means that BNPL providers such as Flexigroup do not need to hold a credit licence to provide these arrangements under the NCCPA.¹⁰ Under BNPL finance, no interest is charged on outstanding balances, even if the consumer is in default. The facility is unsecured and the margin for error by the finance provider is low. BNPL providers therefore have a stronger commercial imperative to ensure that customers can afford their credit.
29. Both ASIC and a Senate Committee have recently undertaken a review of BNPL finance. ASIC Report 600 followed extensive engagement with BNPL providers, key stakeholders and consumers. ASIC in ASIC Report 600 has undertaken a detailed review of the BNPL sector involving engagement with:
- (a) BNPL providers identified based on, amongst other things:
 - (i) the market and prominence of providers, and
 - (ii) complaints data from consumer groups and ASIC's own internal systems;
 - (b) key stakeholders, including
 - (i) the Reserve Bank of Australia, the ACCC and APRA;
 - (ii) ASIC approved EDR schemes, namely the Financial Ombudsman Service and the Credit and Investments Ombudsman;
 - (iii) community legal centres and consumer groups;
 - (iv) industry associations; and
 - (c) consumers who had actual experience of using BNPL finance and who were identified through a screening process to ensure accurate representation across all demographics.
30. The outcome of the ASIC Report 600 was that ASIC did not consider it necessary that BNPL finance be subjected to regulation under the NCCPA and the NCC and ASIC would conduct ongoing monitoring of the industry to help assess whether recommending any such law reform. ▸

¹⁰ ASIC Report 600 at [7].

Regulation – as “credit”

31. The provision of BNPL arrangements is nonetheless regulated by the provisions of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**).¹¹
32. Accordingly, providers of BNPL finance must not under the ASIC Act:
 - (a) impose standard form contractual terms upon consumers that are unfair (Subdivision BA);
 - (b) engage in conduct that is unconscionable within the meaning of the unwritten law or having regard to the specific matters listed in section 12CC (Subdivision C);
 - (c) engage in conduct that is misleading or deceptive or likely to mislead or deceive or make false or misleading representations (sections 12DA, 12DB and 12DC);
 - (d) engage in bait advertising or referral selling (sections 12DG and 12DH); or
 - (e) use physical force or undue harassment or coercion (section 12DJ).
33. The consequences of breach of these prohibitions include:
 - (a) ASIC is empowered by section 1023D of the *Corporations Act 2001* (Cth) to make a product intervention order when it is satisfied that a product, or class or product, has resulted, will result or is likely to result in "significant consumer detriment". ASIC's product intervention power has been extended to all credit facilities, including BNPL finance. In ASIC Report 600, ASIC stated that it would use the product intervention power to act quickly and effectively to address the causes of problems if ASIC identifies a significant detriment to consumers.
 - (b) Section 1023D empowers ASIC to order a ban in respect of a feature of a financial product or, more severely, order a ban in respect of the issue of the product altogether. ASIC can also order that a financial product be offered to specific classes of consumers, order that a financial product be offered through personal advice only, or make an order restricting marketing or prohibiting the distribution of a financial product without prescribed improvements.

¹¹ BNPL finance meets the definition of "credit" and is a "credit facility" under the *Australian Securities and Investment Commission Regulations 2001* (Cth).

34. Relevantly, the legislation effecting this extension also includes design and distribution obligations which will also apply, amongst others, to the BNPL sector. This will require:

- (a) a BNPL provider to issue a publicly available target market determination for its BNPL products specifying the class of retail clients comprising the product's target market and any conditions and restrictions on retail product distribution; and
- (b) issuers and distributors of BNPL products to take reasonable steps to ensure that the distribution of a product is consistent with that target market determination.

35. In the event that BNPL finance was found not to be regulated by the ASIC Act, the *Australian Consumer Law (ACL)* would apply in any event.

36. Providers of BNPL finance would on that basis be subject to the regulatory oversight of the ACCC and similar controls to those contained in Division 2 of Part 2 of the ASIC Act by virtue of the fact that the ACL contains almost identical prohibitions directed to all persons engaging in trade or commerce:

<i>Conduct</i>	<i>ASIC Act Part 2 Div 2 section</i>	<i>Corresponding ACL section</i>
Unfair terms	Subdivision BA	Chapter 2, part 2-3 (ss 23 - 28)
Unconscionable conduct	Subdivision C	Chapter 2, part 2-2 (ss 20 - 22)
	12CC	22
Misleading or deceptive conduct	12DA	18
	12DB	29
	12DC	30
Bait advertising	12DG	35
Referral selling	12DH	49

<i>Conduct</i>	<i>ASIC Act Part 2 Div 2 section</i>	<i>Corresponding ACL section</i>
Physical force, undue harassment or coercion	12DJ	50

6. BNPL Industry Code

37. The BNPL industry has been developing a code of conduct for BNPL products (**BNPL Industry Code**). The BNPL Industry Code is being developed by the Australian Finance Industry Association Limited (**AFIA**), Flexigroup and other providers of BNPL (such as Afterpay, Brighter, Latitude, Openpay, Payright and Zip Co).
38. Since the Determination, AFIA has circulated a draft BNPL Industry Code for consultation which contains provisions requiring signatories to:
- (a) be fair, honest and ethical;
 - (b) keep consumers properly informed about the products, including strategies to help consumers stay in control and to make informed decisions about purchases;
 - (c) make sure that the product is suitable for the consumer;
 - (d) deal fairly with complaints and offer hardship assistance.
39. In particular, in order to make sure that the product is suitable for the consumer, the draft BNPL Industry Code contains provisions which require providers to:
- (a) conduct an upfront assessment process which involves;
 - (i) taking into account customers' characteristics based on common aspects of their objectives, financial situation and needs;
 - (ii) having processes in place to identify customers who may have a higher likelihood of vulnerability;
 - (iii) considering factors promoting good customer outcomes such as the transaction amount, the repayment term, the amount and frequency of payments, the customer's repayment history with the provider, the method of repayment, where and how the

- customer is using the product or service, the information supplied by the customer and external data (eg. credit check);
- (iv) collecting and considering further information if necessary such as information about the consumer's income and existing expenses;
 - (b) only provide products or services to consumers who are assessed as having the ability to pay for the products over time using the information provided; and
 - (c) not provide any additional products or services or increase the transaction amount of existing products or services if the customer is in arrears at the time of the request.
40. The BNPL Code is proposed to become operational by 1 July 2020. It is contemplated that it will be approved under ASIC Regulatory Guide 183.
41. A copy of the current draft of the BNPL Code is set out in Annexure [B].

PART B: ISSUES

7. Issues for determination by the Tribunal

42. The issues for consideration by the Tribunal in this proceeding are whether:
- (a) the public benefits test set out in section 90(7)(b) of the CCA is satisfied in respect of the Proposed Conduct in respect of the NETCC without the ACCC's BNPL Conditions or with different conditions; and/or
 - (b) the ACCC's BNPL Conditions or different conditions are necessary and appropriate under section 88(3) to yield the conclusion that section 90(7)(b) is satisfied in respect of the Proposed Conduct and/or having regard to the subject matter, scope and purposes of the CCA.¹²

¹² Applicant by Medicines Australia Inc (2007) ATPR 42-164 at [133]

Part C: CONTENTIONS

8. Context

43. The relevant comparison to be made in this proceeding is between authorisation of the Proposed Conduct in respect of the NETCC:
- (a) with ACCC's BNPL Conditions (the **factual**); and
 - (b) without the ACCC's BNPL Conditions or with different conditions (the **counterfactual**).

9. The public detriments of the ACCC's BNPL Conditions

44. The ACCC's BNPL Conditions will if implemented result, or be likely to result, in very substantial public detriments.
45. In the factual, the ACCC's BNPL Conditions will result, or be likely to result, in:
- (a) some BNPL providers choosing not to offer BNPL arrangements to consumers of NET products in view of the additional regulatory requirements and the prohibition on BNPL finance for unsolicited customers imposed by the ACCC's BNPL Conditions;
 - (b) some BNPL providers being excluded from providing BNPL arrangements to consumers for NET products as they cannot meet the additional regulatory requirements in the ACCC's BNPL Conditions;
 - (c) other BNPL providers incurring additional costs in supplying BNPL arrangements to consumers of NET products in complying with the additional regulatory requirements of the ACCC's BNPL Conditions;
 - (d) signatories choosing not to offer BNPL finance to consumers of NET products as it is no longer an attractive option, or are only able to offer finance arrangements from a limited number of BNPL finance providers.
46. In this regard, the ACCC appears to have mistakenly concluded that its BNPL Conditions apply only to unsolicited offers by signatories of BNPL finance, whereas in fact it applies to all offers of BNPL finance, whether unsolicited or not, if the sale of the NET products is unsolicited (Determination, 4.66; 5.4).
47. The effect of the above will result, or be likely to result, in the following substantial public detriments:
- (a) loss of consumer choice in finance for NET products;

- (b) increased prices of obtaining BNPL arrangements for NET products;
 - (c) preventing or hindering providers of BNPL finance from offering their lawful products to consumers wishing to purchase NET products; and
 - (d) a substantially lessening of competition in the market for the supply for finance to consumers of NET products; and
 - (e) a progressive reduction in the number of residential solar installations and a concomitant increase in the price of residential solar installations
48. In contrast, if the Proposed Conduct in respect of NETCC is authorised without the ACCC's Proposed Conditions then it will result, or be likely to result, in:
- (a) the anti-competitive public detriments identified above being avoided; and
 - (b) BNPL providers being subject to a single regime of regulatory oversight for all BNPL finance.

10. No real public benefits of the ACCC's BNPL Conditions

49. There is no satisfactory basis for the conclusion that the ACCC's BNPL Conditions will result, or be likely to result, in any real public benefits.
50. The anecdotal material submitted by Consumer Action Law Centre and others of poor practices relating to the selling the NET products is not engaged in by BNPL providers (who do not cold call consumers). In any event, to the extent that any issue arises, it is addressed by other parts of the NETCC not challenged by Flexigroup.
51. As to the latter, the following provisions of the NETCC are relevant:
- (a) paragraph 3(n): *"our advertisements and promotional material will ... be clear about any additional costs for finance or an alternative purchasing arrangement for NET when the cost is being recovered in the overall price (e.g. where the price of financed NET is greater than the price that would apply if immediate payment is made)"*.
 - (b) paragraph 4: *"When marketing directly to you, including through a sales agent)...*

we will explain up-front the purpose of any un-requested ("unsolicited") contact by us, in person or by telephone and

advise that you can ask us to leave or end the contact at any time;

we will leave your premises or end the contact immediately if you ask us to do so..."

- (c) paragraph 5: *"We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the NET you are considering."*
- (d) paragraph 6: *"Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (e.g. illness, impairment, a victim of abuse, financial stress)."*
- (e) paragraph 25: *"We may offer you NET with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price ... we will ensure that:*

you receive the following clear and accurate information:

the proposed cost under the deferred payment arrangement compared with the cost of that same NET product, system or service if you were to purchase it outright on that day."

- 52. In the counterfactual, the risk of public detriment from inappropriate selling practices by merchants of NET products will, or be likely to, be adequately controlled and protected by those other provisions of the NETCC, existing regulation, the BNPL Industry Code and any further regulatory steps taken by ASIC.

11. The ACCC's BNPL Conditions not necessary or appropriate

- 53. In the premises, there is no satisfactory basis for finding that the ACCC's BNPL Conditions are necessary in order to yield the conclusion that the net public benefits test in section 90(7) is satisfied with respect to the Proposed Conduct.
- 54. Indeed, this is a case where the ACCC's BNPL Conditions are imposing substantial public detriment and are not otherwise needed to ensure that the Proposed Conduct will result, or be likely to result, sufficient public benefits.

55. There is similarly no basis for the conclusion that the ACCC's BNPL Conditions are appropriate under section 80(3) in view the subject matter, scope and purposes of the CCA.
56. As noted above, following a far more extensive engagement with the BNPL industry, ASIC did not consider it necessary that BNPL finance be subjected to regulation under the NCCPA and the NCC. Since that time, ASIC has continued to monitor to the industry and is engaging in a wider review of the BNPL market to assess whether BNPL providers should be subject to the NCCPA regime.¹³
57. The ACCC's BNPL Conditions seek to make BNPL providers subject to this regulation by the back-door without any proper or extensive engagement with the BNPL industry. ASIC which has engaged extensively with the BNPL industry is in a far better position to make a decision than the ACCC. It is also the appropriate regulator to do so having regard to its statutory responsibilities.
58. There is also no support in the subject matter, scope and purposes of the CCA for the ACCC acting as de facto regulator in this area. In this regard, there is no satisfactory basis for the ACCC's findings that:
- (a) BNPL finance is not subject to applicable legislative and regulatory requirements such that there are potentially greater risks for consumers who enter into BNPL arrangements (Determination, 4.18);
 - (b) the ACCC's BNPL Conditions impose "substantially equivalent" to responsible lending requirements under the NCCPA (Determination, 4.59);
 - (c) a timeframe of 24 months is realistic for the development of the proposed BNPL industry code. (Determination, 4.46; 4.60).
59. In addition, the Code Administrator is not suitable to adjudicate on the sufficiency of any relevant code of conduct to which a BNPL provider has subscribed as required by the ACCC's BNPL Conditions. There are a number of appropriately qualified bodies experienced in financial services and financial products that are more suitable than the Code Administrator to undertake any such function

12. The Authorisation should be varied

60. The ACCC's Authorisation should be varied so as to:

¹³ ASIC's Submissions to the ACCC dated 11 October 2019 at [5].

(a) remove the ACCC's BNPL Conditions; ~~or~~

(b) remove the factual findings set out in paragraph 3 of the Application; and

~~(a)(c)~~ alternatively, add as conditions of authorisation that:

(i) paragraph 3(d) of the final draft NETCC be deleted;

~~(i)(ii)~~ in lieu of paragraph 25(a) of the ~~ACCC's BNPL Conditions~~ final draft NETCC be deleted and the following paragraph substituted:

"the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC") or complies with a regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA"; and

~~(ii)(iii)~~ in lieu of paragraph 25(c)(iv) of the ~~ACCC's BNPL Conditions~~ final draft NETCC be deleted and the following paragraph substituted:

"the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from or not regulated by the NCC, information as required by any regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA".

61. As such, the public benefits test set out in section 90(7) of the CCA is satisfied.

Dated: ~~14-30 February~~ March 2020

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Attachment B – New Energy Tech Consumer Code

Part A - Overview

Scope

This New Energy Tech Consumer Code (“the Code”) sets good practice standards for providing Residential and Small Business Customers with New Energy Tech products, systems and services. We may extend these protections to other customers if we expressly include this in the contract. New Energy Tech is defined in Part C of the Code to include such things as solar photovoltaic systems, wind turbines, energy storage systems, managing a customer’s energy usage and electric vehicle charging services but does not include some simple, low cost, standard New Energy Tech.

The intention of this Code is to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers.

Providers who have been accepted by the Administrator as Code Signatories (referred to as “we” and “our”) are bound to comply with this Code. Customers protected by this Code are referred to as “you” and “your”.

The Code includes:

- Part A that provides an overview of the key commitments we make to you
- Part B that sets out our required practices in detail
- Part C that defines key terms (which are Capitalised in the Code) and
- an Annexure setting out how the Code is administered, monitored and enforced, including our obligations to the Administrator and the Code Monitoring and Compliance Panel (“The Panel”).

The Code operates alongside a range of existing legal and regulatory protections. Generally, it does not repeat these protections except as needed to provide you with a complete understanding of what to expect from us.

Key Commitments

1. The key commitments made under this Code are to:
 - a) Provide you with clear, accurate and relevant information to help you make informed choices
 - b) Encourage you to be aware of your rights under the law and the Code
 - c) Ensure that our sales practices are responsible
 - d) Ensure that products, systems, services and documentation provided under the Code are suitable and fit for purpose
 - e) Support staff training and work processes that ensure that we comply with the law and the Code
 - f) Ensure that we will be responsive to your needs and take prompt, appropriate action if you make a complaint.

The Code aims to cover the main steps of your 'customer journey' as illustrated below.



Advertising & Promotion

We will be honest, accurate, clear and fair.



Direct marketing & sales

We will identify ourselves, provide unbiased information and use no pressure-selling. We will take extra care throughout if we become aware that you may be vulnerable.



Fit for purpose

Our aim is to ensure that our offers are fit for purpose. Where we are to configure or install on your site, we will ask about your needs and ensure that our offer is fit for that purpose.



Quoting

Our quotes will provide comprehensive details of our offer, including expected performance and any limitations, an itemized list of inclusions, installation times, a breakdown of costs, any relevant warnings and your rights and obligations.

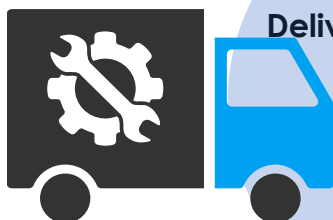


Contracts

If you agree to go ahead with an offer involving a contract, our written contract will address all aspects of the quote, including any variance from the original quote, applicable warranties and any issues that you should particularly note.

Payment & Finance

We will provide clear and complete information about your payment options. We will only offer finance through others if they are a licensed credit provider.



Delivery, installation & safety

We will deliver and install in the timeframe promised and in accordance with all safety regulations, manufacturers' specifications and Australian Standards.



Activation

We will assist you with any necessary activation steps to begin delivering your benefits, including with any necessary approvals and connection to an energy network.



User information

We will provide you with information for safe, effective and optimum use of your service or purchase including any of your obligations.



Customer service

We will have fair terms and maintain high standards of communication and support. We will ensure that we respond courteously and act promptly to any contact or reasonable requests from you.

Warranty

We will honour all guarantees and warranties you may be entitled to and we will promptly fix service issues, and make repairs or replacements.



Complaints

We will respond promptly and fairly if you have a complaint with our service or your purchase. We will keep you informed as to progress and if you are not satisfied with our response, refer you to independent complaints bodies.



Compliance

We will comply with this Code and with all relevant laws, regulations and standards including Privacy laws.



LAW



REGULATIONS



STANDARDS

Part B – Our required practices

Advertising and promotion

2. We will ensure that we have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers.
3. Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:
 - a) ensure all relevant incentive schemes (government and non-government) are honestly and accurately represented
 - b) not misrepresent our association with government or falsely claim to be part of a government scheme
 - c) not make any false or misleading claims about the price, value, quality, capacity, output or other performance characteristic of our New Energy Tech, for example, through selective advertising, exaggeration or misleading focus on one or a few aspects only of the New Energy Tech
 - d) make no unsolicited offers of payment arrangements not regulated by the *National Consumer Credit Protection Act (2009) (Cth)* (“NCCPA”)
 - e) use language that is accessible and that avoids industry jargon
 - f) not make any misleading claims about the place of origin (manufacture and assembly) of our products
 - g) not mislead you about the impact our New Energy Tech will have on your energy usage or costs
 - h) ensure that any claims relating to performance and energy cost savings of our New Energy Tech are reasonably based and where available, based on reputable sources
 - i) advertise the total price for our New Energy Tech as prominently as we advertise any component of the price
 - j) provide information that is specific to the state or region in which the promotional activity takes place
 - k) ensure that any disclaimers are clearly outlined and not buried in small print
 - l) only include a statement, promise, prediction or opinion if it is reasonably based
 - m) not include information that is no longer current, for example, quote an offer or financial incentive that is no longer available
 - n) be clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price (e.g. where the price of financed New Energy Tech is greater than the price that would apply if immediate payment is made).



Direct marketing and sales

4. When marketing directly to you, including through a sales agent (as well as meeting the requirements in paragraph 3):
 - a) we will explain up-front the purpose of any un-requested (“unsolicited”) contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time
 - b) we will leave your premises or end the contact immediately if you ask us to do so
 - c) we will show you our company-issued identification if an unsolicited contact is in person
 - d) any interactive internet marketing channel that we use will clearly identify for you the company whose New Energy Tech is being promoted
 - e) we will provide you with the address of our local office or showroom, an email or other electronic address and a telephone number where any queries can be answered
 - f) we will provide you with the Administrator approved Consumer Information Product that explains the consumer protection framework that applies under legislation and this Code and sets out other key information. The information may be provided to you in electronic format, however if you request, we will provide you the information in hard copy.
5. We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the New Energy Tech you are considering. High-pressure sales tactics include (for example):
 - a) seeking to sell to you if you are unlikely to be able to understand our information and/or our contract (e.g. due to English language difficulties, age, learning difficulties, mental illness or physical disability)
 - b) offering discounts for agreeing to provide testimonials and/or referrals
 - c) claiming special discounts (eg. “community” or bulk-buy discounts) apply, if they don’t
 - d) applying psychological pressure to persuade you to make a quick purchase decision (eg. by unfairly appealing to your emotions)
 - e) employing badgering techniques, such as revisiting your premises uninvited or making frequent telephone calls, to pressure you into signing a contract
 - f) other conduct that the Administrator may reasonably identify as high-pressure sales tactics.
6. Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress).



Fit for purpose inquiry

7. As appropriate to the nature, complexity and cost of the new Energy Tech you are considering, we will support you in making a fit-for-purpose choice including:
- ask you about your specific circumstances, needs and expectations. This includes the extent to which you plan to use our New Energy Tech to supplement or improve the efficiency of energy use while connected to an Energy Network or be isolated from the Energy Network (also known as “off-grid”) or your expected outcomes from participating in forms of New Energy Tech supply such as virtual power plants or other energy markets.
 - enquiring about any need you may have for energy for medical or life-support equipment or services and ensure that our New Energy Tech is suitable for this purpose and that you are made aware of any additional or increased risks.
 - ensuring that any offer of New Energy Tech is fit for purpose in light of your circumstances, needs and expectations as you have described them to us (unless we clearly explain to you orally and in writing that it is not fit for that purpose). We will include a brief description of your circumstances, needs and expectations in our quotes and contracts. Where we offer you a New Energy Tech that is intended to work in conjunction with other New Energy Tech that you already have or are obtaining, we will ensure that our offer is compatible with that other New Energy Tech and confirm this in writing in your quote and contract.
8. If you advise us that you are considering operating off the Energy Network, we will provide you with a copy of the Administrator-approved Consumer Information Product that sets out Energy Networks Australia’s Off-Grid Principles.



Quote – general requirements

9. We will provide you with a written quote that sets out:
- our full name, Australian Business Number (if relevant) and physical address, an email or other electronic address and a telephone number where any queries can be answered
 - an itemised list of the New Energy Tech to be supplied, including relevant specifications. For products and systems, this will include the manufacturer, model, year, quantities, configuration and performance specifications. For services, this will include the nature and purpose of the services, whether the services are ongoing, scheduled (and if so what frequency) or responsive to your request, the duration of the service commitment and whether the services will be provided remotely or at your premises
 - information about how the New Energy Tech operates
 - information about any responsibilities you have to facilitate the operation of the New Energy Tech including maintenance and access issues
 - information about product, system or service limitations that are likely to be relevant to you (eg. where a battery does not provide a back-up facility)



- f) a performance estimate for the New Energy Tech to be supplied, which will be reasonably based, where available rely on reputable sources and comply with any relevant Administrator guidance
- g) where our offer is for a New Energy Tech product or system to be connected to the Energy Network, information that your energy supply contract may change as a consequence of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to find out about this and whether there are any restrictions to your ability to interact with the Energy Network
- h) our timeframe for supplying and installing products and systems or commencing services to be provided to you (if there are circumstances that are out of our control that may cause delay, we will identify this)
- i) our business terms including the method of making payments
- j) details of any guarantees and warranties that apply. We will specify:
 - i. that your rights under your contractual warranty are in addition to the consumer guarantees under the Australian Consumer Law and that these are not excluded or replaced by your contract
 - ii. the specific details of the guarantee or warranty and how it applies to you
 - iii. for a New Energy Tech product or system - the name and contact details of our supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason you are unable to contact us.
- k) for a New Energy Tech product or system, information about its expected life and what is involved in disposing of it at the end of its life
- l) information about the portability of the proposed New Energy Tech
- m) information about the term of any applicable ongoing agreement and any provisions that may impact on your existing relationship with an Energy Supplier
- n) if the quote is for an installation on a strata title property and requires the approval of the Owners Corporation – the need for you to obtain that written approval and provide it to us before you sign the contract with us
- o) your cooling-off and termination rights (if applicable) under the Australian Consumer Law (including the right to terminate a sales agreement within 10 business days if the sale resulted from an unsolicited contact) and this Code
- p) any licenses, accreditation or certification that we hold that are needed to fulfil the offer we are making to you
- q) that we are bound by this Code
- r) the Administrator-approved Consumer Information Product that explains the benefits of the Code for our Customers and any other important information as applicable.

Quote – financial disclosure

10. Our quote to you will specify the deposit payable (if any) and the total price of all offered New Energy Tech including any taxes that apply. We will specify the period of time our pricing is valid for (which will be at least 10 business days).
11. Where our offer is of a Power Purchase Agreement, our quote will specify:
 - a) the energy pricing and all associated fees and charges, any rights we have to change any of these and the notice we will provide of any price change
 - b) a reasonable estimate of the aggregate amount payable over the agreement's term based on a stated, reasonable estimate of your energy consumption, including the basis of the calculation and, if applicable, the energy you will export to the Energy Network
 - c) a clear statement that you must pay the stated energy prices for the term of the contract and that this amount may not reflect or be competitive with available prices for energy from the Energy Network.
12. Our quote to you will specify site conditions and circumstances beyond our control that may result in extra chargeable work not covered by the quote (eg. fees for meter exchange/re-configuration, repairs to existing faults, and changing dedicated off-peak control devices if required).
13. Our quote to you will specify the total value of any discounts, regulatory certificates, incentives or rebates (government and non-government) or government relief schemes and how and when these may or may not apply.
14. Where we offer New Energy Tech services and periodic or intermittent charges apply, our quote will specify the amount or method of calculation, any rights we have to vary charges during the term of the contract and the frequency of bills. For example, if there will be charges for software upgrades, we will aim to provide reasonable certainty as to the cost that you will incur.
15. If we make a claim that you are likely to achieve a favourable return on your investment, we will include in our quote a return on investment calculation that is based on reasonable assumptions and where available from reputable sources. Our quote will set out our assumptions including:
 - a) system design, performance and output
 - b) government and non-government financial incentives
 - c) energy prices and usage
 - d) financing costs (if applicable)
 - e) maintenance costs
 - f) end-of-life costs
 - g) any other relevant factors.

We will also clearly state that our calculation is an estimate only and that if our assumptions prove not to be correct you may not achieve the estimated return.
16. If our offer involves us making payments to you (for example, for energy purchased from you), we will clearly specify how payments will be determined, any rights that we have to change the basis on which payments will be calculated and the frequency with which payments will be made.

Quote – design

17. If the quote includes New Energy Tech that requires custom configuration or specification and/or physical installation by us or a competent or qualified installer:
- a) we will include as part of the quote:
 - i. a site-specific installation design or plan (a sketch or diagram is acceptable) including any configuration or positioning issues and how the New Energy Tech will integrate with other New Energy Tech you may have
 - ii. a site-specific performance estimate for the New Energy Tech.
 - b) before we enter into a contract to provide New Energy Tech to you, we will complete a site-specific installation design or plan and site-specific performance estimate (both must meet the requirements of paragraph 17a)) for a non-refundable agreed fee, with no obligation on you to proceed to contract with us
 - c) we can provide a site-specific installation design or plan and site-specific performance estimate (both of which will meet the requirements of paragraph 17a)) as an initial deliverable of the contract if:
 - i. we do so before the expiry of your cooling-off period (if applicable)
 - ii. we provide you with a full refund, if within 10 business days of receiving the site-specific installation design or plan and performance estimate you notify us that you do not accept these.

Quote - connections

18. If our quote is for a New Energy Tech that requires approval from your Energy Supplier for connection to the Energy Network and/ or reconfiguration of your meter, we will also include in our quote:
- a) an offer to arrange this on your behalf and what, if any, charge we will make for doing this
 - b) an explanation of the steps that need to be taken to obtain approval and/ or reconfiguration of your meter and the relevant paperwork that must be completed and submitted prior to installation
 - c) a statement that your Energy Supplier may impose a charge for connection to the Energy Network and/or reconfiguring your meter and may change your existing energy pricing
 - d) a statement that we will support you through these steps if you decide to obtain Energy Network connection approval yourself and whether there will be any non-refundable charge for this assistance.

Contracts

19. If you accept our quote and agree to purchase our New Energy Tech, we will provide you with a written contract that is clear, uses plain language and is in legible print.
20. Your contract will meet the same requirements as for a quote (and may do this by attaching the quote with any amendments that are necessary). In addition:
 - a) your contract will include our undertaking to you to comply with the Code
 - b) your contract will provide you with a standard minimum supplier's warranty period on the operation and performance of the New Energy Tech including workmanship. The period will meet or exceed the period set from time to time by the Administrator, in consultation with stakeholders, for the particular New Energy Tech
 - c) your contract will include information about how to make a complaint and the complaint resolution process including your right to access an external dispute resolution scheme (where applicable), to take a complaint to the Administrator and to take a complaint to a government regulator and
 - d) at the time we provide your contract to you, we will also provide you with any relevant Administrator-approved Consumer Information Product. We may give these to you electronically, but if requested, we will provide them in hard copy.
21. We will not offer you a contract that involves requiring you to purchase energy or services from another supplier (called "third line forcing"), except where this is permitted by the *Competition and Consumer Act 2010 (Cth)* and we have made this clear to you.
22. We will explain the contract to you prior to you entering into the agreement. In particular:
 - a) we will draw your attention to any particular requirements of the contract that may cause confusion or disagreement (e.g. where additional fees may arise, early termination fees, end of contract payments or any difference between a verbal quote and the final price)
 - b) we will clearly explain the process for the payment and trade of any government or regulatory certificates, and of any relevant trading facility and any limitations
 - c) we will advise you that your Energy Supply contract may change as a result of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to check what new pricing may be applied and, after installation of the New Energy Tech, to confirm that the agreed pricing has been applied.
23. Both of us will sign the contract and any amendments. Equivalent methods of legal agreement other than physically signing a written contract in person are also permitted (for example, electronic acceptance).



Payment and finance

24. We will issue you with a receipt for any deposit or other payment you make under the contract.
25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n., we will ensure that:



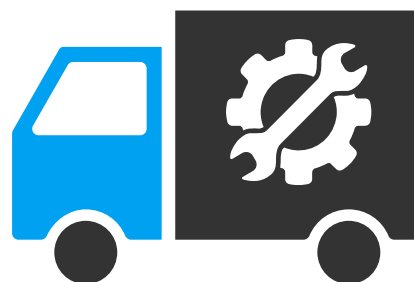
- a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that is:
- i. licenced under the NCCPA and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code (“NCC”), or
 - ii. licensed under the NCCPA or is a related body corporate (as defined in section 5 of the NCCPA) of a credit provider licensed under the NCCPA and the deferred payment arrangement is exempt from the NCC, and:
 - (A) the Administrator has determined that the credit provider is a signatory to an industry code of conduct that requires the credit provider to:
 - (I) resolve any complaints you may have using an internal dispute resolution process and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
 - (II) have processes to identify whether you are experiencing payment difficulties due to hardship
 - (III) offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
 - (IV) comply with the following sections of the NCCPA as if the credit provider was a licensee and the credit contract was regulated by the NCCPA and the NCC:
 - s 128 (obligation to assess unsuitability)
 - s 129 (assessment of unsuitability)
 - s 130 (reasonable inquiries about the consumer)
 - s 131 (when the credit contract must be assessed as unsuitable)
 - s 132 (giving the consumer the assessment) and
 - s 133 (prohibition on entering, or increasing the credit limit of, unsuitable credit contracts), or
 - (B) the Administrator has approved the credit provider’s deferred payment contract in accordance with paragraph A7 of the Annexure – Code Administration. (This

paragraph (B) is as an interim measure pending the development of an approved code of conduct that will enable paragraph (A) to apply. Paragraph (B) ceases to apply on 1 January 2021 regardless of whether a regulator approved code of conduct is in operation by that date)

- b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system
 - c) you receive the following clear and accurate information:
 - i. the name of the licensed credit provider to whom you will be contracted for the arrangement
 - ii. a clear statement that the deferred payment arrangement is a voluntary finance option
 - iii. the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
 - iv. the disclosures required under the NCC, including in relation to fees and charges (regardless of whether the arrangement is regulated under the NCC)
 - v. whether at the conclusion of the deferred payment arrangement
 - you own any elements of the New Energy Tech or
 - you have any entitlement to any ongoing services or pricing and/or
 - you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and
 - vi. a statement that questions and complaints about the payment arrangement should be directed to the licensed credit provider with whom you will be contracted.
26. Paragraph 25 does not apply if the finance is provided by a government body.
27. Paragraph 25 does not apply if we offer you, as an alternative to full payment on delivery or installation, the opportunity to make progressive instalments to us over a period of not more than 6 months, provided that the total amount to be paid by you does not include an interest component, additional fees or an increased price (see paragraph 3. n.).
28. Paragraph 25 does not apply if the Administrator is satisfied that the contract we offer you is a Power Purchase Agreement and our contract includes a commitment to try and assist you if you notify us that you are experiencing financial hardship, including by advising you of any relevant government assistance schemes and by offering you a payment plan.
29. Where we are providing an ongoing service to you and the contract allows us to change the price that we charge you, we will advise you as soon as practical and no later than five business days prior to the price change taking effect.
30. If your contract requires us to make payments to you (whether by transfer of money or by offset to a payment you make to us), we will make those payments on time in accordance with your contract. If our payments to you are calculated using an undisclosed formula, we will ensure that our payment calculation system is regularly audited by a registered company auditor to ensure that payments are accurately calculated.

Delivery, installation and safety

31. We will arrange delivery and installation (if applicable) of New Energy Tech you purchase from us within the timeframe specified in your contract, unless any delay is because of circumstances that were identified in your contract as outside our control.
32. If you purchase New Energy Tech that requires physical installation by us, we will ensure your safety and the safety of our installers. We will install in accordance with all applicable safety standards, manufacturer's specifications, relevant Australian Standards, Energy Network standards, any binding guidance issued by the Code Administrator and good industry practice, using an installer that is trained, competent and where applicable, holds any required qualification or certification to undertake the work.



Activation

33. If you authorise us to obtain Energy Network connection approval on your behalf for New Energy Tech, we will:
 - a) not install or commence the New Energy Tech until approval is provided
 - b) provide you with a full refund if the relevant approvals are not obtained
 - c) prepare and submit within a reasonable timeframe all relevant documentation required by the Energy Supplier for connection to the Energy Network and for reconfiguration of your meter (if relevant)
 - d) respond within a reasonable timeframe to any additional compliance requests from the Energy Supplier (for example, re-submitting incorrect paperwork), and consult with you if necessary
 - e) keep you informed of progress at each step, including any restrictions or limitations that may adversely affect you.
34. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech, we supply to you, we will:
 - a) clearly explain to you each step in the process for preparing and submitting the documentation to the Energy Supplier
 - b) provide you with information as to where to find and how to complete and submit paper or on-line forms
 - c) provide you with expected timeframes and any deadlines for each step of the process
 - d) advise you of contact details for queries or following up on progress
 - e) advise of any potential problems that may arise
 - f) provide you with a refund consistent with paragraph 48 if your application is rejected.



35. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech and your application is rejected after you have signed a contract for that New Energy Tech, we will provide you with a refund minus reasonable expenses incurred by us to the point of termination of the contract.
36. If we supply you with New Energy Tech that needs another form of activation in order to provide you with the intended benefit, we will explain to you the steps that need to be taken and who is responsible for these. We will promptly fulfil our responsibilities and keep you informed of progress at each step.

Operating Information

37. Prior to the activation of the New Energy Tech we are providing you, we will:

- a) provide you with comprehensive information for safe and effective operation, maintenance and optimisation of your New Energy Tech
- b) explain to you any obligations that you may have to facilitate or enable the New Energy Tech (for example, to maintain an internet connection that we are able to access)
- c) advise you how to use your New Energy Tech and/or assess the benefit you are deriving from these. The advice will be appropriate to the New Energy Tech we are providing to you and will involve at least one of the following:
 - i. written instructions and a physical or electronically recorded demonstration (for example, an instructional video)
 - ii. providing you either with a measuring or monitoring device that connects to the New Energy Tech or with continuous access to a remote monitoring service (in either case that will facilitate accurate measurement of benefit that is based on objective standards acceptable to the Administrator) together with written instructions as to how to use that device or access that service
 - iii. a commitment to provide you with regular reports that accurately quantify the benefit that you are deriving and that meet any guidelines made by the Administrator in relation to reporting of this kind (for example, in the case of a service that is designed to reduce your energy bills by smart management of your energy consuming products).



The required information will vary depending on the specifics of the New Energy Tech but will meet the Administrator's requirements. The information may be provided to you in electronic format, hard copy or by web link or something similar. If you request, we will provide you the information in hard copy (in which case, we will provide it at least quarterly, namely every three months).

Performance

38. Our New Energy Tech will meet your reasonable expectations including but not limited to:
 - a) meeting your needs as explained to us (see paragraph 7), unless we have clearly explained to you and confirmed in writing that those needs cannot be met
 - b) performing properly
 - c) reflecting any agreed contract and meeting the performance specifications outlined by us to you;

- d) fulfilling any commitments we make to you (for example, to provide access to an accurate monitoring service or regular reports that accurately quantify the benefit you are gaining)
 - e) New Energy Tech that utilises information and communications technology will be secure
 - f) all our services will be provided with due care and skill.
39. If we become aware that New Energy Tech that we have supplied to you is defective or unsafe, we will promptly tell you and offer to fix the problem if this is possible or otherwise remove the product or system from your premises and provide reasonable compensation to you.
40. If we provide you with New Energy Tech that involves the use of equipment that you own, we will do so in a way that is consistent with the equipment manufacturer's instructions and warranty requirements.

Move from premises

41. If our contract with you includes a lock-in period and imposes fees if you terminate early, and
- a) the services are not transferrable to another property
 - b) you sell or move from the property to which those services are being provided
 - c) the occupier of the property agrees to take over your contract

we will agree to the occupier of the property substituting for you under the contract and will not charge you early termination fees, unless we have a reasonable basis for refusing to contract with the occupier of your property.

Warranty claim

42. We will respond promptly to any warranty claim by you and within a reasonable timeframe implement warranty repairs and replacements, remedy service issues or provide compensation.
43. We will provide you with the name and contact details of our New Energy Tech product or system supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason, you are unable to contact us.
44. In some circumstances, you may not be entitled to a consumer guarantee under Australian Consumer Law, and in that case, you may not be entitled to a remedy, if the claim is due to something that:
- a) someone else said or did (excluding our agents or employees) or
 - b) beyond human control that happened after the goods or services were supplied (for example, an extreme weather event).



Termination of contract

45. You are entitled to terminate your contract and we will provide you with a full refund if:
- a) your contract is for the supply of New Energy Tech that requires physical installation
 - b) consistent with paragraph 17.b), we provide you with a site-specific installation design or plan and site-specific performance estimate as an initial deliverable under the contract (rather than as part of our quote)
 - c) within 10 business days of receiving our site-specific installation design plan and performance estimate you notify us that you do not accept these.
46. You are also entitled to terminate your contract and we will provide you with a full refund, if your contract is for the supply of New Energy Tech that requires physical installation and either of the following applies:
- a) we propose to significantly change the New Energy Tech installation design from that previously provided to you (whether provided in our quote or as a first deliverable under your contract) and you are not willing to accept the change or
 - b) site conditions and circumstances beyond our control result in extra chargeable work not within the contract price and we are not willing to bear those additional costs.
47. You are also entitled to terminate your contract for the supply of New Energy Tech, and we will provide you with a full refund, if we fail to meet the timeframe specified in your contract for delivery and installation (if applicable), or commencement of service of any New Energy Tech. This does not apply, however, if the delay was because of circumstances that were identified in your contract as outside our control.
48. If you take responsibility for obtaining Energy Network connection approvals and your application is rejected after you have signed a contract with us (see para 35), you may terminate the contract and we will provide you with a refund minus reasonable expenses incurred by us up to the time of the termination.
49. We will terminate your contract and remove New Energy Tech that we supplied to you and return the site to its former state, if:
- a) you have a strata title property
 - b) you were required by law to obtain the Owners Corporation written consent before installing our New Energy Tech
 - c) you entered into a contract with us to supply the New Energy Tech before obtaining that written consent and
 - d) the Owners Corporation subsequently refuses to give that consent.
- We will provide a full refund and conduct the removal and restoration at our cost, unless:
- e) we advised you of the need for written consent under paragraph 9.n) and



- f) we have proceeded with the installation on your incorrect advice that yours is not a strata title property.

50. Under the Australian Consumer Law, if the sale to you was unsolicited and you are a Residential Customer, you will be given 10 business days after you sign a contract to cancel the contract without penalty (the “cooling-off period”). If you wish to withdraw from a valid contract after the expiry of any cooling-off period, we may apply our own policies regarding fees for cancellation, provided that we specified them in the initial contract. For all Customers protected by this Code, we may only impose cancellation or termination fees that are reasonable and related to the cost incurred by us.

Customer service

51. We will provide fair terms, clear communication and maintain high standards of customer service at all times and respond courteously and promptly to any contact from you and queries you may have about New Energy Tech supplied by us to you.



52. If we have an ongoing service relationship with you and we are aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress or needing energy for medical or life-support equipment or services), we will take additional care to respond promptly to any related issues arising from the use of our New Energy Tech.

Complaints

53. If you are dissatisfied with a New Energy Tech we offered or supplied, you can submit a complaint directly to us. A complaint may include, for example, any expression of dissatisfaction with a New Energy Tech offered or provided, with the sales process or salesperson, or with the complaints handling procedure itself.



54. We will handle your complaint in a way that is fair, timely and transparent. This means that:

- a) we will have information readily available for you and our staff about how complaints may be made, how these are handled and available avenues to which you can escalate your complaint if you are not satisfied with our response
- b) we will acknowledge receipt of your complaint as soon as possible and tell you when we expect to be able to respond to your complaint
- c) we will log your complaint in a complaint’s register and promptly begin investigating the issues
- d) we will aim to provide you with a response to your complaint within 15 business days of receipt of your complaint. If we do not provide you with a final response by then, we will advise you before 15 business days have passed and provide an update of progress;
- e) we will provide you with a final response to your complaint within 25 business days of receipt of your complaint, unless we have both agreed to a further extension
- f) if you are dissatisfied with our response to your complaint, we will provide you with contact details for escalation options including any external dispute resolution (Ombudsman) scheme of which we are a member, the State Consumer Affairs or Fair Trading body and the Administrator

- g) we will maintain appropriate record keeping of complaints and their outcomes and steps that we take to minimise similar complaints in the future.

Legal and privacy obligations

55. We will comply with all local, state and federal legislation, relevant Accreditation Guidelines, and regulations including but not limited to:

- a) The Renewable Energy (Electricity) Act 2000 (Cth) which is supported by the Renewable Energy (Electricity) Regulations 2001 (Cth)



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- b) The Do Not Call Register Act 2006 (Cth) and associated telemarketing standards including permitted hours for contacting consumers
- c) Australian Consumer Law
- d) Respecting “Do Not Knock” and “No Hawkers” stickers.

56. Even if we are not bound by the Privacy Act 1988 (Cth), we will take reasonable steps to ensure the safety of your personal information and we will only use your personal information:

- a) for the purpose of providing you with a requested quote or carrying out our obligations under your contract (as applicable)
- b) for future marketing of other related New Energy Tech or providing you with information that you might reasonable expect to receive from us or
- c) to provide your personal information to a third party if you have given express permission for this.

57. We will not provide you with marketing material unless we also provide a simple, easy way for you to ask not to receive future direct marketing communications and include a clear, prominent opt-out provision in each marketing communication.

Training

58. We will train our sales agents, representatives, contractors and employees about our New Energy Tech and their responsibilities under this Code, so that they can provide you with accurate information and quality services.
59. We will ensure the safety of our installers, subcontractors and employees and demonstrate due diligence in ensuring the safety of persons under our direct or indirect responsibility.
60. Our people will be competent, appropriately qualified and have completed the relevant safety training modules (as specified by the relevant regulator or by the Administrator) appropriate to the work.

Compliance with the Code

61. We agree to comply with this Code as amended from time to time and any mandatory standards published by the Administrator on the Code website that apply to New Energy Tech that we provide. We will also ensure that our employees, contractors, agents, representatives and any other individuals

or businesses acting on our behalf do likewise. This includes third parties we engage to undertake direct marketing and sales for us.

62. We will be responsible for all actions governed by this Code, whether taken by our employees, contractors, agents, representatives or any other individuals or businesses acting on our behalf. This includes third parties we engage to undertake direct marketing for us or who we engage to install products or systems we provide to you or to deliver services to you.

Part C – Definitions

The definitions for terms used in this Code are as follows.

Administrator is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration.

Australian Consumer Law – Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth).

Business day – A day that is not a Saturday, Sunday or public holiday in the relevant location in Australia.

Customer – A potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies.

Consumer Information Product – consumer information (hardcopy, web-based, electronic, etc) that is approved by the Administrator to provide independent information to assist a customer or potential customer to make informed choices about New Energy Tech.

Energy Network – Any of Australia’s principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market).

Energy Supplier – Any of Australia’s public offer energy providers, including retailers and network businesses.

New Energy Tech are:

- a) small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia’s main transmission and distribution Energy Networks or as distributed energy resources connected to an Energy Network
- b) services that support or are closely related to those products and systems
- c) products, systems and services that monitor or manage a Customer’s usage of energy whether on or off an Energy Network
- d) any other product, system and service that the Administrator is satisfied is appropriately within this Code.

The term does not, however, include simple, low cost or off-the-shelf New Energy Tech that are within a class exemption made by the Administrator in accordance with paragraph 17 of the Annexure – Code Administration.

Examples of New Energy Tech are:

- e) distributed energy resources owned by or leased to the Customer that are connected to an Energy Network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
- f) a microgrid that may be connected or fully isolated from the Energy Network
- g) a power system for a single Customer, whether or not the Customer is also connected to an Energy Network

- h) energy management products, systems and services supplied to a Customer including home energy management systems and services, battery and other storage products, systems and services
- i) programs aimed at stabilising the supply of energy including by paying Customers an incentive to reduce their usage during critical peak periods or by shutting down or restricting the power consumption of Customer appliances during critical peak periods
- j) a Power Purchase Agreement
- k) person to person energy trading systems and services
- l) electric vehicle charging services
- m) suppliers of repair, maintenance and removal services for New Energy Tech products and systems.

These examples are not intended to limit the scope of the definition. Rather the term has been defined to accommodate new products and services as they enter the Australian market where the nature, complexity and cost is such that the Code protections are appropriate.

Owners Corporation – The body (however described) that has legal responsibility for the common property in a strata development.

Panel – The independent Code Monitoring and Compliance Panel appointed to oversee the work of the Code Administrator.

Power Purchase Agreement - An agreement for a Signatory to supply a customer with energy from New Energy Tech which may be from generation or storage equipment located on the customer’s premises or remotely. This is not intended to cover energy purchased through the wholesale electricity or gas markets.

Residential Customer – A customer that is purchasing New Energy Tech for personal, domestic or household purposes. The term includes an Owners Corporation for a residential strata property and the operator of a retirement village.

Small Business Customer – A customer that is a business or not for profit organisation that employs less than 20 people. Associated entities are taken to be one entity when calculating the number of employees.

Annexure – Code Administration

Introduction

- A1. The Code is administered in accordance with the Memorandum of Understanding agreed to on 24 January 2019 by Energy Consumers Australia, Energy Networks Australia, Public Interest Advocacy Centre, Clean Energy Council, Smart Energy Council, Australian Energy Council and Renew (MOU). The MOU provides that the governance, accountability and administration structure of the Code will be guided by the following principles:
- a) Customer focused
 - b) Fair and not anti-competitive
 - c) Relevant expertise
 - d) Independent and avoiding conflicts of interest
 - e) Inclusive
 - f) Adequately resourced.
- A2. The MOU specifies that the Code will be governed and administered by:
- a) The Council, which must comprise representatives of key stakeholders including industry associations and consumer bodies
 - b) The Steward, appointed by the Council to be the legal entity responsible for the Code, for entering into any contracts related to the Code and funding any shortfall in Code revenue
 - c) The Administrator, appointed by the Council and responsible for day to day administration of the Code
 - d) The Code Monitoring and Compliance Panel (Panel) appointed by the Council and comprising industry and consumer representatives and independent persons with relevant expertise.

This Annexure to the Code expands upon the role of the Administrator and the Panel and may be revised by the Council from time to time, following consultation with stakeholders.

Applications and renewals

- A3. The Administrator is responsible for developing application forms and renewal forms for use by industry participants wanting to become a signatory to the Code (Signatory) or renew their status as a Signatory.
- A4. Where an application is made by an industry participant and the application fee is paid, the Administrator must assess whether to admit the applicant as a Signatory. In making this assessment, the Administrator must take into account:
- a) whether the applicant's processes and documents are sufficient to support compliance by the applicant with the Code (other than a provision of the Code from which the Administrator has exempted the applicant)

- b) whether the key personnel in the applicant's business have had a significant involvement in another business that became insolvent.
- A5. Where a Signatory applies to renew their status as a Signatory, the Administrator may take into account any complaints that have been made about the Signatory, whether the Signatory has co-operated with the Administrator and Panel in carrying out their responsibilities and any other relevant factors.
- A6. Where an applicant is refused admittance or renewal as a Signatory, the Applicant has a right to appeal the Administrator's decision to the Panel (a fee may be payable by the Applicant).

Deferred payment arrangement providers

- A7. Where a Signatory requests the Administrator at any time until 30 June 2020 to approve a deferred payment contract for the purposes of paragraph 25(a)(ii)(B), the Administrator must do so if:
- a) an appropriately qualified person engaged by the Administrator reviews the deferred payment contract and certifies that the contract includes undertakings to comply with the consumer protections set out in paragraph 25(a)(ii)(A)(I) to (IV) ; and
 - b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work).

Fees

- A8. The Council must, on an annual basis, agree to the fees and contributions required to cover the costs of operating the Council. These shared costs include the costs of the Independent Chair and the Consumer representatives. Industry members of the Council must cover the attendance costs of their own representatives. Council members may volunteer additional contribution but are not liable for any shortfall in funding to meet the costs of governing and administering the Code.
- A9. The Administrator, on an annual basis, must review the fees payable by applicants and annual and other fees payable by Signatories, with a view to cost recovery including Code governance and administration costs. As part of its annual budgeting process, the Administrator must propose a schedule of fees and contributions to the Council for approval, at least 3 months prior to the intended date of effect.
- A10. If the Council is not willing to endorse the fees proposal, the Steward must engage an independent accountant to review the reasonableness of the fees proposal in light of the budget for the Code and, if relevant, the extent of revenue shortfall that the Steward has indicated it is willing to fund. The Steward must bear the accountant's costs. Fees for the coming year will then be set by the Administrator taking into account any recommendations made by the independent accountant.
- A11. The Administrator must publish details of fees on the Code website. A change in fees is not effective until at least 3 months after publication of the new fee on the Code website.

Code promotion and branding

- A12. The Council and the Administrator must promote the benefits of the Code to customers, to industry participants and to other stakeholders.
- A13. The Council and the Administrator must develop Code brand mark guidelines for Signatories and publish these on the Code website. The Administrator must enforce compliance with these guidelines.
- A14. The Administrator must maintain an easily accessible list of Signatories on the Code website.

Supplementary materials

- A15. The Administrator may develop supplementary materials to assist Signatories to meet the expectations of the Code. These may include written standards, guidelines, approved Consumer Information Products, checklists, templates or training. They may apply to particular technologies or systems or address particular aspects of New Energy Tech that apply across many or all types.
- A16. These materials may include any combination of:
- a) Mandatory and binding standards which must be followed where they apply
 - b) Safe harbour guidelines which provide a Signatory with an approved method of complying with an aspect of the Code while allowing for other ways of compliance
 - c) Non-binding guidance, which may be of assistance to Signatories
 - d) Independent consumer information, designed to assist consumers to make informed choices
- A17. The Administrator must consult with stakeholders (including consumer representatives, industry and government) in the development of these materials. The period of consultation may vary and must be adequate to the importance and impact of the proposed materials. In the case of materials that are intended to be mandatory and to bind Signatories, the period of consultation must not be less than 3 months and may well be longer.
- A18. Where substantive disagreement emerges in the course of the consultation over mandatory or safe-harbour guidance, the Administrator may refer the proposed material to the Panel for decision. Where a Signatory makes an application for referral, the Administrator must refer the proposed material to the Panel for decision.

Exemptions

- A19. If an applicant or a Signatory applies to the Administrator for an exemption from a provision of the Code, the Administrator may agree to an exemption if satisfied that the exemption would not unduly diminish customer protection. For example, an exemption might be sensible if:
- a) an existing Code requirement was not appropriate to a proposed New Energy Tech or a trial involving new technology or a new offering
 - b) A product or service is a free additional 'value-added' service that does not materially impact the benefit of the core offering.
- A20. The Administrator, following consultation with stakeholders, may publish a class exemption. This does not require an individual application by a Signatory. A class exemption may set out conditions required for a Signatory to be able to rely on the exemption. (For example, it is intended that the Administrator will issue a class exemption to exempt simple, low-cost or off-the-shelf products or services (say priced below \$199) for which the Code consumer protections are not appropriate. The Administrator may also publish a class exemption that permits temporary customer trials of new offerings.) The Administrator must publish class exemptions on the Code website.
- A21. Any exemption (including a class exemption) must be for a fixed period and may only be extended following review by the Administrator.

Monitoring and investigations

- A22. The Administrator must monitor compliance with the Code. This might include undertaking regular compliance audits and reviews of Signatories' systems, policies and procedures, mystery shopping, assessing customer satisfaction, analysing customer complaints and investigating repeat instances. For example, the Administrator may conduct audits of sales conducted via direct marketing.
- A23. The Administrator must develop and publish a Complaints Procedure, consistent with Australian Standard AS ISO 10002, setting out the process where an allegation of breach of the Code is made. This must provide that:
- a) a complaint may be self-reported by a Signatory or made by Customers, another Signatory, regulators or others
 - b) if a complaint is made by a Signatory's Customer, the Administrator will investigate the complaint and, where appropriate, attempt to negotiate an outcome that is fair for both the Signatory and the Customer
 - c) where the Administrator is satisfied that a Signatory has breached the Code, the Administrator will determine what, if any, remedial action or sanction is appropriate
 - d) if the Signatory wishes to do so, the Signatory may ask the Panel to review a decision by the Administrator requiring the Signatory to take remedial action or imposing a sanction on the Signatory in response to a breach.
- A24. The Administrator has the power to require a Signatory to:
- a) rectify the issues that gave rise to the breach
 - b) train staff to minimise the likelihood of repeat breaches
 - c) require sales agents to undertake an assessment and accreditation process
 - d) appoint an external auditor, at the Signatory's cost, to audit areas of activity relevant to the breach (generally required if there are more than three major breaches in a 12-month period).

The Administrator also has the power to publicise the breach, including the name of the Signatory, on the Code website.

- A25. If the Administrator requires a Signatory to undertake remedial action in accordance with paragraph A24 a. to d., the Administrator must monitor the Signatory's compliance with that requirement.
- A26. If the Administrator considers that a Signatory has breached the Code in a way that may warrant the suspension or expulsion of the Signatory, the Administrator may refer the matter to the Panel for its consideration. For example, the Administrator may do this if the Signatory fails without reasonable excuse to undertake remedial action as required by the Administrator in accordance with paragraph A24 a. to d.
- A27. If the Administrator identifies an issue that may constitute a serious or systemic breach of law, the Administrator may refer the matter to the Panel to decide whether the matter should be referred to the relevant regulator.

Panel

- A28. The Panel is responsible for:

- a) overseeing the monitoring of compliance and enforcement of this Code by the Administrator
- b) reviewing a proposed mandatory or safe-harbour standard or guideline referred to it by the Administrator under paragraph A18
- c) reviewing a decision made by the Administrator requiring rectification of a breach (under paragraph A24), if the relevant Signatory requests a review
- d) reviewing a decision made by the Administrator to refuse admittance or renewal as a Signatory if requested under Paragraph A6
- e) deciding matters of suspension or expulsion referred under paragraph A26 to it by the Administrator
- f) referring serious or systemic breaches of law to relevant regulators under paragraph A27
- g) publishing on-line an annual report about the Code's operation. This must include reporting on Code compliance to enable assessment of the Code's effectiveness and extent to which the Code is promoting the confidence of the community in New Energy Tech. The report must also set out any exemptions from Code requirements agreed to by the Administrator. It must also include each finding of breach by the Administrator or Panel and the remedial action or sanction imposed on the relevant Signatory. This information must only identify the name of the relevant Signatory if the Signatory has been suspended or expelled
- h) every 3 years, engaging an independent body to undertake a review of the Code and its governance framework including by seeking the views of stakeholders (the review report must be published on the Code website) and revising the Code in light of that review.

Signatories' obligations to Administrator and Panel

- A29. A Signatory must ensure that it takes all reasonable steps to promote the benefits of this Code to Customers including prominent links to or a display of the latest version of this Code on its online presence.
- A30. A Signatory must promptly pay annual and any other Code-related fees applicable to it.
- A31. A Signatory must comply with the Code and all standards mandated by the Administrator in accordance with the Code.
- A32. A Signatory must co-operate with the Administrator and Panel in their exercise of their powers and responsibilities under the Code.



AFIA

CODE OF PRACTICE

FOR BUY NOW PAY LATER PROVIDERS



AFIA BUY NOW PAY LATER PROVIDERS GROUP



AUSTRALIAN FINANCE INDUSTRY ASSOCIATION



CODE OF PRACTICE FOR BUY NOW PAY LATER PROVIDERS

CODE PART A – INTRODUCTION AND BACKGROUND

This is the Code of Practice for those Buy Now Pay Later Providers who are members of the Australian Finance Industry Association Limited (**AFIA**) (the **Code**).

This Code is effective from 1 July 2020. AFIA will arrange for a review of this Code to start within 2 years or sooner (as outlined in clause 8).

1. OBJECTIVES OF THIS CODE

- 1.1 This Code has been voluntarily developed by the AFIA Buy Now Pay Later Providers Group to assist them to:
- (a) Promote a customer-centric approach to the design, marketing and distribution of a Buy Now Pay Later Product or Service;
 - (b) Promote high industry standards of service for customers and build best practices across the BNPL Industry; and
 - (c) Support compliance with legal and industry obligations.

2. WHO IS BOUND BY THIS CODE?

- 2.1 Subject to the terms of this Code, this Code is binding on Code Compliant Members of the AFIA Buy Now Pay Later Providers Group when they provide Buy Now Pay Later Products or Services (the particular circumstances in which the Code will apply are set out in the balance of this Part A).
- 2.2 A list of Code Compliant Members, and when they became Code Compliant Members, can be found on the AFIA website.
- 2.3 Code Compliant Members are subject to the oversight of the Code Compliance Committee (CCC).
- 2.4 The CCC is an independent committee that has been established by AFIA to monitor and investigate compliance by Code Compliant Members with this Code.



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2.5 All Members of the AFIA Buy Now Pay Later Providers Group must at all times comply with the terms and conditions of the AFIA Constitution including clause 6.3.

3. **READING THIS CODE**

3.1 Commitments in this Code reflect the broad nature the products or services of BNPL Buy Now Pay Later Providers' products or services and their merchants and retail partners.

3.2 The commitments represent the proposed minimum standards that the AFIA Buy Now Pay Later Providers Group will meet in the provision of Buy Now Pay Later Products or Services.

3.3 This Code is drafted to be an important set of standards, reflecting the nature of the BNPL Industry and the expectations of our customers.

3.4 The commitments in this Code have originally been set as best practice and we will monitor domestic and international developments to ensure they remain best practice.

3.5 We will consider developments in technology, data, comprehensive credit reporting and open banking as a means of undertaking a process of continuous improvement and developing a more holistic view of our customers.

3.6 In this and the following parts of this Code, the words "You" and "Your" – refer to an individual who is our customer.

3.7 In this and the following Parts of this Code, the words "we", "us" and "our" are to be read as referring to a relevant Code Compliant Member that is bound by this Code and that has agreed with you that it will comply with this Code.

3.8 Some words or phrases used in this Code have special meaning and are identified by the use of capital letters, such as in the case of 'BNPL'. These words and phrases are defined in clause 10 of Part B of this Code.



CODE OF PRACTICE FOR BUY NOW PAY LATER PROVIDERS

4. **APPLICATION OF THIS CODE TO BNPL PRODUCTS OR SERVICES PROVIDED BY CODE COMPLIANT MEMBERS**

- 4.1 This Code is applicable to Buy Now Pay Later Products or Services provided by us when we are or were a Code Compliant Member at the time that the relevant product or service was provided
- 4.2 For Buy Now Pay Later Products or Services, provided by us prior to the date we became a Code Compliant Member, this Code will apply in our future dealings with you in the manner set out in clause 6 below.

5. **WHAT IS A BNPL PRODUCT OR SERVICE?**

- 5.1 Buy Now Pay Later Product or Service has a specific meaning as set out in clause 10 of Part B below.

6. **WHEN DOES THIS CODE APPLY TO YOU?**

- 6.1 Where you are a customer, this Code applies to the interactions and arrangements we have with you in relation to a Buy Now Pay Later Product or Service provided on or after the date that we became a Code Compliant Member.
- 6.2 Even where we cease to be a Code Compliant Member, where this Code applied to us in respect of your Buy Now Pay Later Product or Service, we will continue to be bound by this Code for that Buy Now Pay Later Product or Service.

7. **LEGAL STATUS OF THIS CODE**

- 7.1 This Code describes contractually enforceable commitments made by Buy Now Pay Later Providers.
- 7.2 These commitments are enforceable by customers through AFCA.



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- 7.3 This Code operates alongside, and is subject to, existing laws and regulations and does not limit your rights under such laws and regulations.
- 7.4 This Code endeavours to impose standards on Code Compliant Members that are above those required by the law or regulation and, where it does so, the commitment of Code Compliant Members is to the higher standards of the Code.
8. **REVIEW OF THE CODE**
- 8.1 This Code will be fully reviewed (**Full Review**) on a regular basis, but no later than two years after the commencement of the Code, to ensure that it continues to promote high industry standards of service for customers and build best practices across the BNPL Industry.
- 8.2 A Full Review of the Code will include open and wide public consultation, and AFIA's Board may appoint an independent person to conduct the review.
- 8.3 The AFIA Board may make minor or non-significant changes to the Code outside of a Full Review process, after consultation with, and seeking comments and suggestions from:
- (a) The then members of the CCC;
 - (b) The then Code Compliant Members; and
 - (c) Such other organisations (for example, consumer advocates, regulators) or people as it considers appropriate.
- 8.4 For significant changes to the Code, outside of a Full Review process, in addition to clause 8.1 and 8.3, the AFIA Board, where it considers it appropriate, will also undertake a public consultation process.



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9. **COMPLAINTS**

9.1 You can:

- (a) Access our complaints process set out in clause 6 of Part B of this Code, if you are unhappy with any aspect of your experience with us; or
- (b) Report any concerns about our Code compliance, or about possible Code breaches, to the CCC, which it can investigate at its discretion (see clause 6 of Part B of this Code); or
- (c) Go to AFCA, which can consider whether we have complied with the commitments of this Code when determining or dealing with a matter before it.

PART B – OUR 8 KEY COMMITMENTS TO YOU

1. **WE WILL FOCUS ON CUSTOMERS**

1.1 We will provide a high quality and responsive service. We will make sure our staff, agents or representatives are well trained and deliver our commitments to you.

1.2 To ensure we are providing a service that meets your needs, we will:

- (a) Ensure our Buy Now Pay Later Products or Services are suitable for you and we have appropriate safeguards in place while you continue to be our customer;
- (b) Review the reasons for customers contacting us and look for ways to improve our Buy Now Pay Later Products and Services;
- (c) Only provide our Buy Now Pay Later Products or Services to customers aged 18 and over;
- (d) Proactively engage with you to obtain feedback, both positive and negative; and
- (e) Respond to your queries promptly and acknowledge all queries within 3 Days of your enquiry.



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2. **WE WILL BE FAIR, HONEST AND ETHICAL**

We will always act fairly and honestly, be ethical and treat you reasonably in all our dealings.

3. **WE WILL KEEP YOU PROPERLY INFORMED ABOUT OUR PRODUCT OR SERVICE**

3.1 To help you stay in control and make informed decisions about your Buy Now Pay Later Products and Services, and repayments:

- (a) Our terms and conditions will be fair, clear and transparent and written in plain language. We will also provide you with a glossary of key terms and provide this information on our and AFIA's website.
- (b) Prior to you becoming a customer, we will provide clear and prominent information about your scheduled repayments obligations.
- (c) We will provide clear and prominent information upfront about the fees we charge.
- (d) We will send you relevant and useful reminders about your repayment obligations
- (e) If you miss a payment:
 - (i) We will contact you before commencing to charge late fees; or
 - (ii) If we do not contact you in accordance with sub-clause (i), we will reverse any late fees we have charged you, if you make a catch-up payment within 2 Days of the missed payment.
- (f) If we charge a late fee, it will be fair, reasonable, and capped.
- (g) We will give you at least 40 Days' notice before introducing new fees or increasing existing fees.
- (h) We will provide notice as soon as is reasonably possible, where we make any other material changes to our terms and conditions.



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- 3.2 In addition:
- (a) We will make sure our advertising and promotional material is clear and not misleading or deceptive. Furthermore, our terms and conditions will be distinguishable from our marketing material and we will comply with ASIC's best practice guidance on advertising.
 - (b) We will automatically opt you out of receiving promotional material if you are behind on repayments or we become aware that you are experiencing Financial Hardship.
 - (c) We will take reasonable steps to ensure that our merchants or retailers adhere to the minimum standards outlined in Part C of this Code.
 - (d) We will provide you with readily available account information, and information that we are required to provide under all applicable laws and regulations, within an appropriate timeframe.
- 3.3 To the extent permitted by law, we may provide any notice or other information required by this Code to you in writing, electronically or by telephone or by telling you that the information is available on our website or other electronic forum.
- 3.4 When providing disclosure documents, account statements, notices and other prescribed information to you electronically, we will ensure that we adopt practices that take appropriate account of online security risks and are consistent with ASIC's regulatory guidance on online disclosure.
- 3.5 We will provide information about how to close your account on our website in a readily available manner.
- 3.6 If you wish to close your account, we will enable you to do so quickly and easily. Some products may have a minimum notice period (however, this will be disclosed to you prior to you using our products and services).



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4. WE WILL MAKE SURE OUR PRODUCT OR SERVICE IS SUITABLE FOR YOU

Our Upfront Assessment Process

- 4.1 We will assess customers to ensure our product or service will be suitable for them prior to providing it for every new Transaction Amount. We will take into account customers' characteristics based on the common aspects of their objectives, financial situation and needs.
- 4.2 As part of clause 4.1, we will have processes in place to identify customers who may have a higher likelihood of vulnerability – see clause 4.6 below.
- 4.3 Using the information provided to us, we will only provide our products or services to customers who we assess have the ability to pay for the product or service over time.
- 4.4 We will verify your identity when you first become a customer and undertake appropriate upfront and ongoing checks to meet our obligations under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
- 4.5 We will not provide any additional products or services or increase the Transaction Amount of the current product or service if you are in arrears at the time of the request for additional products or services or increase in limit.
- 4.6 To promote good customer outcomes and set industry standards, our Upfront Assessment Process will include and consider factors, such as:
 - (a) The Transaction Amount;
 - (b) The repayment Term of the product or service;
 - (c) The amount and frequency of repayments;
 - (d) Your repayment history with us;
 - (e) Your method of payment, for example, use of direct funds transfer, BPay, or use of a debit or credit card;



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- (f) Where and how you are using our product or service;
 - (g) The information you supply to us; and/or
 - (h) External data sources, for example, we may do a credit check.
- 4.7 The outcome of our Upfront Assessment Process may be that we:
- (a) Approve you for the full amount;
 - (b) Approve you for a lower amount;
 - (c) Require an initial payment to be made upfront;
 - (d) Require an initial payment within 25 Days from approval of the first Transaction Amount or installation of goods or services;
 - (e) Collect and consider more information to ensure you have the ability to pay for the product or service over time; and / or
 - (f) Decline to provide our product or service to you if we do not believe it will be suitable for you.
- 4.8 The types of information that we will consider and collect in clause 4.7 (e) will include one (1) or more of the following:
- (a) External data sources, for example, undertaking a credit check;
 - (b) Your repayment history with us;
 - (c) Information about your income; and / or
 - (d) Information about your existing expenses, which may also include existing debts.
- 4.9 We will always apply clause 4.8 if we are providing a Transaction Amount of more than \$3,000 or for Buy Now Pay Later Products or Services with a fixed term of more than 2 years.



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- 4.10 Once approved for our products or services, we will ensure there are safeguards so our product or service remains suitable for you. We will:
- (a) Cap our fees and keep them fair;
 - (b) Prevent you spending more through our product or service if your payments are not up to date with us;
 - (c) Adjust your future spending limit with us based on your repayment history; and
 - (d) Proactively provide Financial Hardship assistance – see clause 7.
- 4.11 If we have prevented you from spending more due to missed payments, we will ensure that you can still access your account for a reasonable period of time, so that you can monitor your debt, repayments and any fees.

5. **WE WILL UNDERTAKE AN ONGOING REVIEW OF THE SUITABILITY OF OUR PRODUCTS OR SERVICES**

5.1 To make sure we are providing our customers with a service that meets our customers' needs on an ongoing basis, we will review our products or services to make sure they remain suitable for them. We will also make sure that our products or services are not being used by customers for whom it is not suitable.

5.2 We will:

- (a) Monitor our products or services to ensure they remain suitable to our customers; and
- (b) Monitor how customers are using our products or services to identify whether our products or services are meeting their needs and whether they remain suitable. For example, if some of our customers are incurring late fees on a repeated basis, we may decide that our products or services are not suitable for these types of customers.



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- 5.3 To ensure we are meeting this commitment, we will consider the following types of information:
- (a) Complaints data;
 - (b) Consumer feedback (including on the performance of the products or services);
 - (c) Requests for information from consumers;
 - (d) Samples of recorded sales calls;
 - (e) Conversion rates;
 - (f) Volume of sales;
 - (g) Web analytics (e.g. click data and website paths);
 - (h) Feedback from our merchants or retailers;
 - (i) Hardship data; and
 - (j) Internal data and benchmarks.

6. **WE WILL DEAL FAIRLY WITH COMPLAINTS**

We will handle complaints promptly and fairly and, if we cannot reach agreement, give you information on ways to resolve disputes. As part of this commitment:

Complaints

- 6.1 We will have a complaints policy that is visible and easily accessible from our website and / or the digital platforms that we participate in.
- 6.2 We will work to resolve complaints as quickly as possible.
- 6.3 We will acknowledge all complaints within 3 Days and provide an initial response within 10 Days from the date of the complaint.
- 6.4 We are committed to responding to complaints and disputes in a way that is:
- (a) Prompt and efficient;
 - (b) Consistent with the law; and
 - (c) Fair in all the circumstances.



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- 6.5 If you cooperate with us and respond to our requests for information, we will work with you (or your representative if you have one). Where relevant, we will draw your attention to clause 7 – Hardship Assistance.

AFCA

- 6.6 Even where we are not required by law, we will give you the opportunity to take your complaint to AFCA if you are unhappy with our response.
- 6.7 We will be subject to AFCA's Rules. AFCA may not deal with your dispute unless you have tried to resolve the problem with us first, and either:
- (a) We have provided you with a formal response; or
 - (b) At least 20 Days (or the timeframe outlined by AFCA) has elapsed since you made your complaint.
- 6.8 AFCA can consider whether we have complied with this Code when seeking to resolve a matter. To lodge a complaint with AFCA, contact them on either 1800 931 678, or **info@afca.org.au**.

The Code Compliance Committee (CCC)

- 6.9 In addition to contacting us or AFCA, you can report an alleged breach of this Code to the CCC. The CCC is an independent committee that has been established to monitor our compliance with this Code (as outlined in the Terms of Reference for the CCC).
- 6.10 The CCC is authorised to investigate any activities within its Terms of Reference and, in carrying out its administrative, compliance and investigative roles, is authorised to take such actions as are within its powers and to make recommendations to the AFIA Board if appropriate further actions are required.



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- 6.11 The CCC will have unrestricted access to relevant records to carry out its task and will have the right to seek such additional information and explanations as (acting reasonably) it considers appropriate in the circumstance provided that a Code Compliant Member is not obliged to provide access to records if to do so would cause it to be in breach of existing obligations at law (including obligations of privacy and confidentiality).
- 6.12 We will co-operate and comply with all reasonable requests of the CCC in the performance of its monitoring and investigative functions.
- 6.13 The CCC can investigate any alleged breaches of this Code, at its discretion.
- 6.14 Where it is appropriate for it to do so, the CCC can make a range of recommendations to resolve a complaint. In some circumstances, the CCC is also able to impose sanctions upon us. You can access further detail about the powers of the CCC at [*hyperlink to be inserted later*].

7. **WE WILL OFFER FINANCIAL HARDSHIP ASSISTANCE**

We will treat you fairly and respectfully if you are experiencing financial difficulty. As part of this commitment:

Arrangements with you

- 7.1 We will train our staff to treat our diverse and vulnerable customers with sensitivity, respect and compassion. This includes specific training to identify signs of vulnerability, such as where there may be mental health or domestic and family violence concerns, and training for staff who regularly assist customers from diverse cultural backgrounds.
- 7.2 We will make sure customers understand they can ask for financial hardship assistance for example, by including information on our websites and /or the digital platforms that we participate in.
- 7.3 If we become aware you are having trouble meeting your financial obligations with us, we will discuss your situation and the options available to help you, which may include negotiating a new repayment arrangement.



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- 7.4 If you prefer, we will work with your representative (such as, a family member or friend, a financial or legal representative or a financial counsellor).
- 7.5 We will not continue normal collection activity while we are considering how to help you. Our late fees will also be frozen during this time.
- 7.6 We will consider whether your payment method, i.e. the use of a debit card and / or credit card remains an appropriate payment method.
- 7.7 We will not list your default on your credit reference file while we are considering your request for Financial Hardship, unless legally required to do so.
- 7.8 If we agree and enter into a Financial Hardship arrangement with you, we will retain you as our customer and not refer you to a third-party debt collection agency.
- 7.9 If we reach agreement about assistance to help you with your financial difficulty, we will:
- (a) Provide confirmation in writing of what we have agreed with you, including what your obligations will be when our period of financial assistance ends;
 - (b) Not charge you late fees while you are meeting any conditions of the financial assistance;
 - (c) Make reasonable efforts to contact you if you breach any conditions of assistance agreed with you and not re-activate enforcement action until we have given you at least 5 Days' notice.
- 7.10 If we cannot agree a new repayment arrangement, we will give you information on how to contact AFCA. We will also refer you to financial support services, such as the National Debt Helpline.



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Recovering a debt

- 7.11 We and our agents will comply with the ACCC's and ASIC's *Debt collection guideline: For collectors and creditors* and the Code of Operation: Recovery of Debts, published by the Federal Government.
- 7.12 We will not seek recovery of, and will not sell, statute-barred debts.
- 7.13 We will never initiate bankruptcy proceedings against you, and we will never allow our agents to do so.
- 7.14 If you are in Financial Hardship, we will consider waiving our fees and charges (including those already applied) and take steps to work out a mutually acceptable repayment arrangement with you.

8. WE WILL COMPLY WITH OUR LEGAL AND INDUSTRY OBLIGATION

- 8.1 We will comply with our obligations under the law and this Code. We will act fairly and, in a way, consistent with good practice.
- 8.2 As part of this, we will:
- (a) Respect your privacy and comply with our privacy obligations;
 - (b) Treat your personal and financial information with respect and in accordance with our Privacy Policy;
 - (c) Not disclose that information to any other organisation unless:
 - (i) We are required to by law (for example, under the Anti-Money Laundering and Counter-Terrorism Act 2006 Cth.)
 - (ii) There is a duty to the public to disclose the information,
 - (iii) You ask us to disclose the information;
 - (iv) You have consented to us doing so; or
 - (v) We are otherwise not restricted from doing so under applicable laws.



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- 8.3 We will take reasonable steps to protect your personal and financial information from misuse or loss, and from unauthorised access, modification or disclosure. We will regularly review the security and reliability of our services.
- 8.4 We will not permit your personal and financial information to be shared with other lenders or credit providers, or anyone who sells such information to lenders or credit providers unless we receive your express consent.
- 8.5 We will comply with relevant unfair contract laws.

9. **WE WILL SUPPORT AND PROMOTE THIS CODE**

- 9.1 We will promote this Code, so you are aware of the protections we provide our customers. Promotion will include making available this Code on our website and / or the digital platforms that we participate in and engaging with key stakeholders, including via AFIA.
- 9.2 We will make sure our staff, agents and representatives are well trained so they can do their work and understand this Code and how to comply with it.
- 9.3 We will review regularly the effectiveness of our training programs for staff, agents and representatives.



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10. DEFINITIONS

AFCA means The Australian Financial Complaints Authority, an independent, external dispute resolution handling authority overseen by the Australian Securities and Investments Commission, that is able to review our handling of Complaints.

AFIA Buy Now Pay Later Providers Group means the AFIA Buy Now Pay Later Providers Group that has been established with the approval of the AFIA Board

AFIA Constitution means the Constitution of AFIA as amended from time to time.

BNPL Industry means that section of the Australian financial services industry in which Code Compliant Members are participants to consumer customers under any Buy Now Pay Later Products or Services

Buy Now Pay Later Product or Service means:

- a shorter-term product or service for the purchase of goods or services where the purchase price is repaid in equal instalments. Consumers pay no extra charges if they pay within a specified period; or
- a product or service that is a continuing credit contract for up to \$30,000 for the purchase of goods or services. Some contracts require a minimum periodic repayment; others involve a fixed repayment plan for each purchase. Multiple advances of credit may be available. Fees and charges are limited to \$200 in the first year and \$125 in each subsequent year; and
- there is a contract between the customer and the Buy Now Pay Later Provider, a contract between the consumer and the merchant or retailer, and a contract between the Buy Now Pay Later Provider and the merchant or retailer; and
- the customer buys and receives goods or services from a merchant; the Buy Now Pay Later Provider pays the merchant or retailer for the purchase (minus merchant fees); and the customer repays the Buy Now Pay Later Provider for their purchase.



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For the avoidance of doubt, the following types of product or service, or any arrangement of a similar nature, are not a Buy Now Pay Later Product or Service for the purposes of this Code:

- products or services offered to persons or strata corporations that are predominantly for a purpose that is not a consumer purpose (e.g. to be used for a business purpose).
- 'Predominant' (as defined in s5(4) of the National Credit Code) means: (a) the purpose for which 'more than half' of the credit is intended to be used and (b) if the credit is intended to be used to obtain goods or services—the purpose for which the goods or services are intended to be 'most used'; and
- Buy Now Pay Later Products or Services that are offered as part of a product under the National Credit Code.

Buy Now Pay Later Provider means a provider who offers Buy Now Pay Later Products or Services in Australia and is a member of the AFIA and is a signatory to this Code.

Code Compliant Member means an AFIA Member that has been approved as a Code Compliant Member of the AFIA Buy Now Pay Later Providers Group and is a signatory to this Code.

Complaint means any expression of dissatisfaction made to us related to our products or services, or to our complaints handling process, where a response or resolution is explicitly or implicitly expected.

Days means business days.

Financial Hardship means a situation which occurs when you are unable to meet your existing Transactional Amount obligations for a period of time. It may be caused by a number of factors, such as unforeseen weather events, a major change in your circumstances, such as illness or injury, or a change in employment.



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Merchant and retail partners mean third parties who distribute our products or services and can also include vendors, such as sellers of solar panels and services.

Minimum standards for merchant and retail partners are set out in Part C of this document.

Term means a defined period of time.

Transaction Amount means either

- (a) the dollar amount of a single or of cumulative transactions within a Term; or
- (b) the dollar amount of a continuing credit contract
(excluding any upfront payment made by you)

PART C – MINIMUM STANDARDS FOR OUR MERCHANT AND RETAIL PARTNERS

Each Code Compliant Member will require its merchant and retail partners to meet minimum standards. These standards are to:

- Act lawfully, fairly and ethically in their dealings with consumers;
- Communicate clearly when dealing with consumers and in marketing and advertising material that relates to Buy Now Pay Later Products or Services;
- Safeguard customer confidentiality;
- Respond to customer complaints on a timely basis; and
- Require that their employees or agents understand the standards and are trained to meet them.

Each Code Compliant Member will continue to monitor their merchant and retail partners to ensure they meet these minimum standards.