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By email: [REDACTED]  
cc [REDACTED]

Dear Ms Hanrahan

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

Many thanks for providing the Australian Finance Industry Association [AFIA] the opportunity to make a submission on the draft Determination for the application for ACCC authorisation of the New Energy Tech Consumer Code [the draft Determination] and the extension provided to facilitate inclusion of operational insights from relevant members.

#### **AFIA Key Position Summary**

- AFIA is responding to the invitation extended by the ACCC to make further submissions on whether it is feasible and desirable to modify the provisions of the NETCC to permit finance arrangements that fall under other regulatory regimes if they can be demonstrated to provide equivalent consumer safeguards to those in the NCCPA and NCC.
- Currently the NETCC confines the finance option able to be offered by Code-signatories to a consumer to facilitate their acquisition of New Energy Tech products to credit products regulated under the National Consumer Credit Protection Act 2009 (NCCPA) which includes the National Credit Code (NCC) and provided by credit providers licensed under the NCCPA. The basis for this restriction appears to be that these regulations provide important protections for consumers; for example, obliging the credit provider to provide relevant product information disclosures, take appropriate steps to assess a consumer's ability to pay, and provide access to external dispute resolution.
- Currently consumers of New Energy Tech products benefit from competition in the consumer finance market that enables a range of providers – both those regulated under the NCCPA and others that offer products that are not currently regulated by that Act (e.g. Buy Now Pay

Later Providers) to finance these products. As recognised by the ACCC, consumer utilisation of the BNPL option to finance these products is sizeable. Based on the current level of demand, we anticipate that this could increase.

- However, if the NETCC were to remain as currently drafted, this would detrimentally impact competition by removing consumer choice of BNPL from the product selection options. Given the number of consumers utilising this form of finance and likelihood of provision to meet demand, this outcome appears to see consumers particularly disadvantaged from this restriction on product choice and consequently competition.
- We understand that the justification for the restriction is that credit products that are not NCCPA regulated (e.g. Buy Now Pay Later products) are not subject to consumer protection laws and expose consumers to risk of harm. The significance of this risk of harm apparently provides the justification for the restriction to NCCPA-regulated / ACL licensed consumer credit providers and denies consumers the option of finance through other non-NCCPA regulated consumer credit products (including the BNPL product). Implicit is that the harm may be financial harm with a customer potentially paying more through a BNPL product than a NCCPA-regulated product; yet no market evidence appears to have been adduced to substantiate this concern.
- Further, AFIA notes the significant reviews of the BNPL products offered by significant market participants in this segment by the Senate Economics Reference Committee and ASIC which culminated in a determination that there was no evidence of consumer risk of harm to warrant regulation (e.g. extension of the NCCPA to BNPL). Many of these participants, including those that offer BNPL to consumers to acquire New Energy Tech products, have become AFIA members.
- The BNPL product, while not regulated by the NCCPA, is not 'unregulated'. In fact, it is subject to a range of consumer protection laws, including the ASIC Act prohibitions against misleading or deceptive conduct and unconscionability as well as the unfair contract terms provision protections. Other laws also have relevance including the Privacy Act (to regulate the handling of BNPL customer personal information including consumer credit reporting information) and Anti-Money Laundering Act (including regulation of customer identity). These laws are enforced by robust regulators providing consumers with free access to avenues to raise complaints and have them determined. In addition to these external dispute resolution options available through these regulators, customers of our BNPL members also

have the option of using the ASIC– approved EDRS – Australian Financial Complaints Authority – as a result of our BNPL members being subscribers of that Scheme; either as a voluntary self-regulatory initiative or as a flow-on from offering a NCCPA-regulated credit product requiring EDRS-membership as a pre-cursor to obtaining an ACL and then seeing complaints relating to other products offered (e.g. BNPL product) also able to be considered by AFCA (e.g. a complaint relating to breach of privacy or breach of the ASIC Act).

- Consumers also have rights to seek ASIC’s new Product Intervention Power that are able to be used to take action against a BNPL provider if the product offered is determined to raise risk of consumer harm. The Design and Distribution Obligations will equally apply to the BNPL product as other consumer credit products.
- As recognised by the Senate Committee, self-regulation to provide financial hardship options and up-front serviceability assessments of customers remains an option for BNPL providers, including AFIA members, to address potential areas of consumer risk identified through that inquiry and the ASIC review.
- The value to their customers from that self-regulation will be eroded if the restriction in the NETCC, as currently drafted, continues to prohibit BNPL products being offered to finance New Energy Tech products.
- For these reasons, AFIA recommends that the ACCC seek revision of the finance provisions of the NETCC to adopt an approach that facilitates customer choice and consequently competition while addressing any underlying consumer risk issues. An approach similar to that taken in the version of the Code attached to the Authorisation Application as Attachment E Solar Retailer Code could be used as the base though we would appreciate working with the Applicants on potential revision to the notice to be given by non-NCCPA regulated providers given self-regulatory commitments to having hardship and other processes in place. For ease of reference we have extracted and provide as follows:

*2.1.23 A Signatory must make reasonable enquiries as to whether the arrangement that is to be offered to a consumer (whether by the Signatory or by another business introduced to the consumer by the Signatory or Approved Retailer) is regulated by the National Consumer Credit Protection Act 2009 (Cth) (“the NCCP Act”), such that the provider of the arrangement would need to hold an Australian Credit Licence.*

*If as a result of those enquiries, the Signatory believes that the arrangements will not be regulated by the NCCP Act, the Signatory must ensure that:*

*(a) The relevant contract includes a provision substantially in the form set out in section 2.1.24 below ; and*

*(b) the provision referred to in section 2.1.23(a) is signed by the consumer.*

*Note: If an arrangement is a credit contract or a consumer lease that is regulated by the NCCP Act, the credit provider must hold an Australian Credit Licence. Any business that has a role in introducing the consumer to the credit provider (e.g. the Signatory or the Approved Retailer) may also need to hold a licence or be a credit representative of a licensee. It is a breach of the NCCP Act to engage in activities without holding a required licence or being a credit representative of a licensee. The obligations in this section are in addition to the legal obligations under the NCCP Act. A Signatory or Approved Retailer should obtain advice as to their obligations under the NCCP Act.*

*2.1.24 "This arrangement is not regulated by the National Consumer Credit Protection Act 2009 (Cth) ("the NCCP Act"). As a result:*

*(a) if you have a complaint about the arrangement, you may not have access to the services of an external dispute resolution scheme that has been approved by ASIC. This means that you may have to go to court to resolve a dispute with the provider.*

*(b) if you have trouble paying the periodic payments required under the arrangement:*

*(i) you may not have the right to ask the provider for a hardship variation to help you get through your financial difficulty.*

*(ii) The provider may take action against you for non-payment without giving you an opportunity to remedy the default."*

Further detail to provide the basis for this position follows.

### **AFIA Background**

AFIA is the voice of a diverse Australian finance industry. AFIA supports our members to ensure a fair, equitable and competitive marketplace for customers through representation, insights and connectivity. AFIA is uniquely placed to respond given our broad and diverse membership of over 100 financiers operating in the commercial (including small-medium business and agri-finance) and consumer markets.

AFIA members:

- include banks (major, regional and mutual/community-owned) and non-banks;
- range from ASX-listed public companies through to small businesses providing finance;
- operate via a range of distribution channels including bricks and mortar premises, intermediaries (finance brokers, dealerships, suppliers) through to online providers (commonly badged FinTechs);
- collectively operate across all states and territories in Australia in capital cities through to regional and remote: the majority operating across at least one border;
- have customers from all demographics, all age groups (legally able to borrow) in support of Australia's diverse and multi-cultural community with:
  - commercial entities ranging from sole traders and partnerships through to the more complex corporates (e.g. trusts, major corporates) and government-entities some with no employees through to others with hundreds (if not thousands) of employees
  - consumers ranging from high-income through to low-income earners; some with substantial assets, others with minimal
  - provide a broad range of finance products:
    - consumer: from personal unsecured loans, revolving products (including credit cards and interest free products coupled with lines of credit), loans secured by land or personal property; consumer leases of assets (including household/electrical/IT or cars); and Buy Now Pay Later Products (BNPL);
    - commercial: asset or equipment finance (finance/operating lease, secured loan or hire-purchase agreement or novated leases); working capital solutions (online unsecured loans; debtor and invoice finance; insurance premium funding; trade finance; overdrafts; commercial credit cards) together with more sophisticated finance solutions.

Of most relevance to this submission on the NETCC, are Members who offer BNPL products.

### **BNPL market**

To provide more insight into this market, some of the participants (and our Members) recently took part in the Senate Economics Reference Committee Inquiry '*Credit and financial services targeted at Australians at risk of financial hardship*' and before that participated in ASIC's review which resulted in the release of ASIC Report 600 '*Review of Buy Now Pay Later Arrangements*'.

- The outcomes of the Senate Committee's review were published in February 2019 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Creditfinancialservices/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report)

- Some of the more relevant comments are:
  - Throughout the course of the Inquiry the Committee has been conscious that the financial products are not alike. Like all financial products, they exist on a spectrum of risk and potential harm...That is plainly different from the risk posed by other providers, such as those in the buy now pay later sector, whose products are marketed to a much broader range of Australians;
  - The National Online Retailers Association (NORA) sees these schemes as an improvement on the traditional 'layby' model. They offer huge benefits to the industry, particularly through the reduction or absorption of Card Not Present fraud. The industry sees such innovation as crucial in delivering greater financial control and easing cost-of-living pressures for consumers over the long term;
  - BNPL products do not generally fall within the definition of 'credit' under the National Consumer Credit Protection Act; consequently, that Act does not apply to them. However, this does not mean that these products are not subject to consumer protection legislation. For example, BNPL products meet the definition of 'credit' as defined in the ASIC Act, and consequently are subject to the general consumer protection provisions that exist in that Act, including prohibitions to prevent entities engaging in misleading, deceptive or unconscionable conduct and the unfair contract term provisions.
  - BNPL companies use modern technology to understand a customer's ability to service the repayments and to meet customer expectations in service delivery. In evidence given at the Senate Committee Inquiry noted earlier, ASIC acknowledged that this could work: *...because the responsible lending obligations are about the particular consumer who's applying for credit, it is possible, through technology, for a credit provider to use technology to obtain information about that consumer, whether that's bank account transaction information or other information that's available electronically, and feed that information into an algorithm in order to make a lending decision, so long as the information is about that consumer and is relevant to the lending decision and the credit provider's taken reasonable steps to obtain the relevant information. So, yes, it is possible for algorithms to form part of decision processes that lenders use' [Report at para 5.10].*

In principle, our Members, who provide BNPL products, support the recommendations of the Senate Committee namely that:

- The government consider, in consultation with the Australian Securities and Investments Commission, consumers and industry, what regulatory framework would be appropriate for the BNPL sector;
- The BNPL sector develop an industry code of practice;
- ASIC's product intervention power be extended to cover BNPL products.

Importantly neither ASIC or the Senate Committee found evidence of risk of consumer harm or market failure arising from the BNPL segment that would warrant an immediate regulatory reform response to expand blanket application of the National Consumer Credit Protection Act to the product or its providers.

Both the Senate Committee Report and ASIC Report 600 included recommendations focused on areas where BNPL providers could act to build protections to enhance their product offering to minimise potential consumer risk and give customers greater protection (e.g. providing access to internal and external complaint-resolution; commitment to financial hardship management processes; implementation of a serviceability assessment framework). It was also recognised that ASIC's new powers (Product Intervention + Design/Distribution Obligations) that applies to the BNPL product could be utilised to address future risk should market developments warrant action.

### **NETCC BNPL Exclusion**

- Our members have supported the installation of approximately 200,000 solar panel systems with BNPL finance. We have not received any information or data to date that would indicate that there has been a significant consumer protection problem or market failure with the financing of these systems.
- NETCC Applicants in support of their Code-authorisation request assert that because BNPL finance is not regulated by the National Consumer Credit Protection Act it is not appropriately regulated to fall within the Code.
- As noted earlier, the fact that the NCCPA does not apply does not mean that the BNPL product is 'unregulated'. In fact, the BNPL product is subject to consumer protection regulation, for example:
  - The ASIC Act provides that financial services, including BNPL products, must be provided with due care and skill and that firms must not engage in unconscionable conduct

- All BNPL consumers are protected by the prohibition of misleading and deceptive conduct
- BNPL consumers have the benefit of the prohibition of unfair contract terms,
- BNPL products are also subject to Anti-Money Laundering laws requiring compliance with identity verification requirements.
- In addition, to underscore the adequacy of the current regime, ASIC has its new Product Intervention Power which enables it to make specific orders to prevent any significant detriment to consumers including Energy Tech consumers who use BNPL finance.
- Whilst NETCC Applicants indicate say that BNPL products should be excluded primarily on the grounds that there are not sufficient protections for consumers, as BNPL providers are looking to address the concerns and findings outlined by ASIC in Report 600 and the Senate Economics References Committee on Credit and Hardship Inquiry, including a Code of Practice, we believe this exclusion should be reconsidered as it potentially limits access to finance for various consumer cohorts who would have a demonstrated ability to meet financial commitments and could also be seen as an unnecessary and potentially an inappropriate constraint on innovation in this emerging market – a market which very recently has seen the entry of some mainstream financiers which will further enhance its scale
- Should no change occur, we believe the reduced competition could lead to adverse impacts such as price increases and a reduction in the number of retailers in particular new energy tech market segments.
- As mentioned above, our members are looking to design, develop and implement the Senate's recommendations namely to have Code which will reflect/codify the consumer protections that reputable BNPL providers already adopt and will provide the following key protections:
  - The implementation of a visible and accessible financial hardship management process which is available to customers who get into financial difficulty;
  - A requirement to maintain membership of the Australian Financial Complaints Authority and ensure customers have access to visible and accessible internal and external dispute resolution mechanisms;
  - A customer-centric approach to the design, marketing and distribution of a BNPL product that is affordable and offers value for consumers
  - Ensure consumers are properly informed to better understand terms and provisions prior to entering into agreements;
  - Ensure advertising (including online) is shaped by ASIC's RG 234 Advertising financial products and services (including credit): Good practice guidance;
  - Ensure compliance with relevant laws;



- Ensure the appropriate consideration of a consumer's personal financial situations before credit is extended;
- Ensure merchants or other suppliers act consistently with BNPL provider guidelines on how these arrangements may be promoted and provided to consumers.
- Through delivering these commitments, the objectives of our member BNPL providers are to:
  - be able to continue to service this important segment of the Australian consumer market noting ASIC's Report 600 that the number of transactions had increased to 1.9 million in June 2018, with \$903m in outstanding BNPL balances;
  - offer a product where customer affordability and value are central to its design, marketing and distribution to enhance consumer protection;
  - engage with and support the broader industry to ensure a fair, sustainable and competitive marketplace for the benefit of customers.

### **Conclusion + Next steps**

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

If you have any questions, please contact me at [REDACTED] or Karl Turner, Executive Director, Policy and Risk Management at [REDACTED] or both via [REDACTED].

Kind regards



Helen Gordon  
Chief Executive Officer