

New Energy Tech Consumer Code - Consultation

Submission

Australian Financial Complaints Authority

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Overview

The Australian Financial Complaints Authority¹ (AFCA) is the independent external dispute resolution (EDR) scheme for the financial sector. We welcome the opportunity to contribute to the development of the New Energy Tech Consumer Code (Tech Code), which will prescribe the circumstances under which ‘buy now pay later’ services (BNPL) may be used to finance energy tech products supplied by Tech Code subscribers.

This submission² provides feedback on the ‘alternative proposed amendment to Clause 24’ set out in the ACCC’s consultation letter dated 22 October 2019 (Clause 24 Proposal) and includes a simple outline of AFCA’s jurisdiction to consider complaints lodged against BNPL providers.

The submission draws on the experience of AFCA and its predecessors – organisations that have handled financial services complaints for more than 25 years.

Key points

- AFCA considers that the obligations imposed on credit providers under the National Consumer Credit Protection Act (NCCPA) and the National Credit Code (NCC) provide important consumer protections.
- AFCA supports the inclusion in the Tech Code of provisions which seek to ensure that consumers who finance the acquisition of energy tech products under BNPL arrangements have access to substantively equivalent protections to those provided under the NCCPA and NCC.
- AFCA has some suggestions to enhance the protections provided under the Clause 24 Proposal. In particular, we have made suggestions in relation to:
 - > requiring BNPL providers to have mechanisms in place to ensure they comply with the policies they are required to have under clause 24(a)(ii)(A)
 - > requiring BNPL providers’ internal dispute resolution (IDR) processes to meet the standards specified in ASIC’s Regulatory Guide 165³.

¹ The Appendix provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

³ [ASIC’s Regulatory Guide 165](#), *Internal dispute resolution*.

1. Clause 24 Proposal

1.1 References to arrangement 'exempt from the NCC' – clause 24(a)(ii) and 24(c)(iv)

Clause 24(a)(i) provides for the situation where the credit provider is licensed under the NCCPA and the deferred payment arrangement is regulated by the NCC.

Clause 24(a)(ii) describes the alternative situation as being where:

- the credit provider is licensed under the NCCPA (or is a related body corporate of a licensee), and
- the deferred payment arrangement is 'exempt from the NCC'.

We suggest that the phrase 'exempt from the NCC' in clause 24(a)(ii) be replaced with the phrase 'not regulated by or exempt from the NCC'. This would more accurately reflect the range of BNPL arrangements which are currently offered, some of which are not regulated by the NCC, rather than being specifically exempted from its operation.

We also suggest a consistent amendment to clause 24(c)(iv). To cover the range of BNPL arrangements, we suggest it uses the phrase 'not regulated by or exempt from the NCC'.

1.2 Compliance with policies referred to in clause 24(a)(ii)(A)

We support the proposed approach that BNPL providers should have to offer equivalent consumer protections to those provided under the NCCPA and NCC.

Clause 24(a)(ii)(A) requires BNPL providers to satisfy the Code Administrator that they have in place policies addressing the matters set out in clause 24(a)(ii)(A)(I) to (IV).

However, we consider the Clause 24 Proposal could be strengthened by requiring the BNPL provider to also demonstrate that it has processes in place to monitor its ongoing compliance with these policies (and report on any non-compliance).

Our concerns focus on the scenario where:

- A Tech Code subscriber offers energy tech products to a consumer.
- A BNPL provider funds the acquisition of those products under a BNPL arrangement in reliance on clause 24(a)(ii).
- The BNPL provider has the policies referred to in clause 24(a)(ii)(A) in place initially but does not comply with them on an ongoing basis.

1.3 IDR processes referred to in clause 24(a)(ii)(A)(I)

One element of the consumer protections provided under clause 24(a)(ii)(A)(I) is for BNPL providers to resolve complaints using an IDR process. ASIC's Regulatory Guide 165 requires credit licensees to have IDR processes that meet specified standards. These standards ensure that complaints are handled appropriately and, where complaints are not resolved through IDR, complainants are informed of their right to access external dispute resolution.

As currently drafted, the Clause 24 Proposal would not require all BNPL providers to have an IDR process which complies with Regulatory Guide 165 (and therefore is equivalent to that required of credit licensees). This creates a risk that the IDR processes adopted may not provide sufficient protection for consumers.

Accordingly, we suggest that the IDR processes referred to in clause 24(a)(ii)(A)(I) be required to meet the standards specified in Regulatory Guide 165.

2. AFCA's ability to consider 'buy now pay later' complaints

2.1 AFCA's jurisdiction

AFCA's jurisdiction to consider complaints is specified in the [AFCA Rules](#) and explained in our [Operational Guidelines](#).

A complaint is within AFCA's jurisdiction if it meets the requirements set out in Section B of the AFCA Rules, unless the complaint is outside jurisdiction due to a provision in Section C.⁴

Key points that apply to BNPL complaints are noted below with rule and guideline references.⁵

The complainant must be 'eligible'. Individuals and certain small businesses may be eligible to submit complaints to AFCA

Rules: A.4.1; E.1 - definitions of 'Eligible Person' and 'Small Business'
Guidelines: p14

⁴ Also see the 'Quick Guide' at the start of the AFCA Rules and the description of our jurisdiction in Rule A.4.

⁵ References are to the AFCA Rules and Operational Guidelines effective from 1 October 2019.

The complaint must be about a financial firm that is an AFCA member when the complaint is submitted to AFCA

Rules: A.4.2

Guidelines: p15

Some BNPL providers hold Australian credit licences and therefore are required to be members of AFCA. BNPL providers whose businesses are structured in such a way that they do not require an Australian credit licence are not required to be AFCA members. However, a number of BNPL providers have joined AFCA voluntarily, which means that AFCA can consider complaints against them

The complainant must have a relationship of a particular type with the financial firm

AFCA considers that BNPL falls within the definition of 'Financial Product' in the AFCA Rules. Applying this approach, a complaint about the provision of BNPL by an AFCA member can satisfy Rule B.2.1a).⁶

Rules: B.2.1

Guidelines: p118

The complaint must have a sufficient connection with Australia

An example of a complaint with a sufficient connection is a complaint about a contract arising under Australian law.

Rules: B.3

Guidelines: p124

The complaint must be submitted to AFCA within stated time limits

Rules: B.4.2.1; B.4.3.1

Guidelines: p131-135

The complaint must not be excluded from AFCA's jurisdiction

Mandatory exclusions

Examples of mandatory exclusions are:

- complaints already dealt with by a court, AFCA or a predecessor scheme
- certain complaints about levels of fees, charges and interest rates
- complaints in which claims exceed the monetary limits of our jurisdiction.

Rules: C1

Guidelines: p143-152

Discretionary exclusions

AFCA has a discretion to exclude a complaint if it considers this appropriate. However, the discretion will only be exercised where there are compelling reasons to do so.

Examples of situations in which we may consider exercising the discretion include:

- there is a more appropriate forum for the complaint, such as a court
- the complaint relates to the financial firm's practice or policy and does not involve any allegation of either maladministration or inappropriate application of the practice or policy
- the complaint is frivolous, vexatious, misconceived or lacking in substance

Rules: C.2

Guidelines: p164-173

Regardless of the jurisdictional requirements outlined above, AFCA may consider a complaint if all of the parties consent in writing and AFCA agrees

Rules: A.4.7

Guidelines: p21-22

⁶ Applying this approach, AFCA may also handle systemic issues relating to BNPL.

2.2 AFCA's decision making process

When determining a complaint (other than a superannuation complaint), an AFCA decision maker must do what they consider to be fair in all the circumstances, having regard to:

- legal principles
- applicable industry codes or guidance
- good industry practice, and
- previous relevant determinations of AFCA or predecessor schemes (which are not binding).

While the Tech Code would be only binding on subscribers, it is likely AFCA decision makers would have regard to the provisions of clause 24 when considering good industry practice in the context of AFCA members offering BNPL arrangements to finance the acquisition of energy tech products.

AFCA's focus on fairness in complaint resolution bolsters other forms of protection for consumers dealing with BNPL providers – particularly for vulnerable consumers. We note that the Tech Code includes commitments to not engage in high pressure sales tactics including seeking to sell to a consumer if they are unlikely to be able to understand the information or the contract and to take special care with consumers who are facing vulnerable circumstances. AFCA supports these commitments. In our consideration of what is fair in the circumstances of a complaint we will consider the essential elements of fairness by examining questions including:

- Did the parties obey the law?
- Did the parties make promises or representations they did not meet?
- Did the parties act honestly, reasonably and in good faith with their dealings with each other?
- Did one party take unfair advantage of another? Were specific circumstances or vulnerabilities considered?
- Did the financial firm provide the product or service ethically, with reasonable care and skill and in accordance with industry and professional practice?
- Did the financial firm meet the consumer's reasonable expectations about the product or service?
- Did the product or service perform as expected and provide a fair value or benefit?
- When acting for a consumer, did the financial firm act in the interests of the consumer or group of consumers as a whole?
- How did the parties treat each other during their relationship or after concerns were raised?
- What was the impact on the consumer and their experience of the service?

Appendix – About AFCA

AFCA is the new independent EDR scheme for the financial sector replacing the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

AFCA sees its purpose as providing fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services free to consumers, but also by working with its members to improve their processes and drive up industry standards of service, thereby minimising complaints.

More broadly, AFCA plays a key role in restoring trust in the financial services sector. In addition to providing solutions for financial complaints, AFCA has responsibilities⁷ to identify, resolve and report on systemic issues and to notify ASIC, and other regulators, of serious contraventions of the law.

AFCA's service is offered as an alternative to tribunals and courts to resolve complaints consumers and small businesses have with their financial firms. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent.

If a complaint does not resolve between the parties, we will decide an appropriate outcome, including awarding compensation for losses suffered or substituting the trustee's decision in the case of a superannuation complaint.

⁷ See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.