

22 September 2019

BY EMAIL

Australian Competition and Consumer Commission
Sydney, NSW 2000

By email: adjudication@acc.gov.au

Dear Ms Kim

RE: AA1000439 – New Energy Tech Consumer Code – Further RateSetter submissions

RateSetter Australia RE Limited (**RateSetter**) is pleased to make a further submission in relation to the draft determination issued by the ACCC on 1 August 2019 on the proposed New Energy Tech Consumer Code (**NETCC**). We previously submitted in relation to ACCC's draft determination on 23 August 2019 and made submissions to the pre-determination conference on 9 September 2019.

Introduction

RateSetter is Australia's leading provider of National Consumer Credit Protection Act (**NCCP Act**) regulated finance for new energy technology. Our finance products assist purchasers of new energy technology products to responsibly spread the cost of their purchase over time, and also assist vendors of new energy technology with their cash flow. However, unlike providers of so-called 'interest free' finance, all finance facilitated by RateSetter for new energy technology is regulated by the NCCP Act and the National Credit Code (**NCC**).

We write to express our opposition to the late submission by the Applicants dated 6 September 2019 requesting an amendment to Section 24 (b) of the draft code. We support the unamended code as published by the ACCC in its draft determination on 1 August 2019.

New energy technology industry participants have over the past two years sought to agree an industry code in relation to the sale of new energy technology. After two years of deliberative and constructive consultation with a range of industry stakeholders, the draft code submitted to the ACCC (and accepted by the ACCC in its draft determination dated 1 August 2019) appropriately required that all finance offered to consumers be regulated under the NCCP Act and the NCC.

However, on Friday 6 September – one business day prior to the ACCC pre-determination conference – the Applicants abruptly requested an amendment to the code to permit non-NCCP Act regulated credit products, including so-called 'interest free' finance (incorrectly referred to in the amendment as 'buy now pay later', or BNPL), so long as the payment arrangement "complies with a regulator approved Code of Conduct or industry code that delivers substantially equivalent consumer protections to those contained in the NCCPA" (**Code Amendment**).

We oppose the Code Amendment on three grounds:

1. So-called 'interest free' finance for new energy technology is entirely dissimilar to BNPL products as it is almost always associated with illegal price inflation, which causes significant consumer harm;
2. The NCCP Act is the appropriate regulatory framework for new energy technology finance given the specific risks associated with the sale and purchase of residential new energy technology; and
3. The relative lack of regulation for so-called 'interest free' finance products, and the unequal obligations imposed on providers of finance regulated under the NCCP Act, raises significant competition concerns.

We set out each of these concerns in further detail below.

1. So-called 'interest free' finance for new energy technology is entirely dissimilar to buy now pay later (BNPL) products as it is almost always associated with illegal price inflation, which causes significant consumer harm

We are deeply concerned by the Code Amendment's conflation of so-called 'interest free' finance for new energy technology with buy now pay later ('BNPL') services. We do not believe that, when considering the potential for consumer harm when purchasing new energy technology, there is any similarity between BNPL services for retail goods and so-called 'interest free' products for new energy technology:

- BNPL services are used by consumers to purchase low value (typically under \$250) and easily-understood products in a retail setting, and are repaid in a matter of weeks or months. In contrast, new energy technology products (such as solar and battery systems) can cost upwards of \$20,000, are repaid over terms of up to seven years, and are complex products with uncertain benefits often sold via in-house or call-centre based sales processes that may give customers limited time to reflect and consider the sales pitch provided
- With BNPL services, the cost of finance (typically 2-4% of the purchase price) is absorbed by the merchant out of their own margins: regardless of whether the customer wishes to pay by cash or using a BNPL service, their price will be the same (this can be readily verified by examining pricing of products offered under BNPL services on popular retail merchants' websites). In contrast, given the long repayment terms of unregulated interest free finance, merchant fees payable by vendors to financiers can approach 30%: as margins for new energy technology are not sufficient to absorb this cost, the price of the goods is typically illegally inflated

So-called 'interest free' finance is not cost free. Rather, the cost of finance is paid by the vendor of new energy technology to the financier. To recoup this cost, we believe that the illegal practice of price inflation – the practice of requesting a higher price from customers who elect to finance the purchase of the goods by so-called 'interest free' finance, compared to the 'cash' price – is endemic in the new energy technology industry. Customers are rarely aware of this price inflation: in most sales proposal documents and advertisements, customers are presented with a single 'total' price and the related instalment amounts under the so-called 'interest free' repayment plan. It is not disclosed that this total price (or the sum of the instalment amounts) is a higher amount than would be payable as a cash payment.

In its report "REP 600: Review of buy now pay later arrangements" ASIC has acknowledged that it is aware of the practice of price inflation. We understand that significant evidence has been provided to both the ACCC and ASIC regarding the prevalence of this practice. If requested by the ACCC, we are able to provide significant additional contemporary evidence on a commercial-in-confidence basis, all of which has been recently gathered directly from new energy technology retailers.

We believe that illegal price inflation is harmful for four reasons:

- It is deceptive:** consumers are misled by believing there is no cost to their finance agreement. In practice, consumers are paying significant undisclosed amounts to vendors and financiers for their so-called 'interest-free' finance. In our experience, very few customers enquire about whether there is a 'discount' for paying cash, and thus do not uncover the existence of price inflation;
- Hidden costs harm competition:** as customers are unaware of price inflation, their ability to bargain between providers of finance is seriously eroded – the cost of finance is effectively hidden, as almost all customers are unaware that the price of their goods has been inflated. As the cost of finance is hidden, customers are unable to easily compare offers between providers of finance, much as they would do when comparing finance for any other significant purchase or investment;
- As competition is impeded, customers pay significantly more for finance than they should:** providers such as RateSetter who offer products regulated by the NCCP Act can offer finance at significantly lower cost to customers. However, so-called 'interest free' products are often selected by new energy technology vendors because the lack of NCCP Act obligations (and in particular the lack of responsible lending requirements)

means higher approval rates (including to customers who should not be offered credit), and faster approval times (at the expense of appropriate credit assessment to ascertain customers' ability to repay). The resulting price inflation means consumers over-pay for finance;

- iv. **We believe that price inflation breaches the NCCP Act:** where vendors engage in price inflation to pay a finance merchant fee, this means there is a charge for providing credit. If there is a charge for providing credit, we think there is a strong argument that the credit product is one that is therefore regulated by the NCCP Act. If the credit product is regulated by the NCCP Act, but none of the important obligations related to that regulation are completed, both the vendor and the financier may be committing serious offences.

We believe that, given the scale of the merchant fees required to be paid by vendors to so-called 'interest free' financiers, illegal price inflation in our industry is inevitable (as evidenced by its continued practice, despite the efforts by some financiers to prevent it). We do not believe that any BNPL Code of Conduct, or any other industry code in relation to so-called 'interest free' finance, can meaningfully prevent its occurrence.

2. The NCCP Act is the appropriate regulatory framework for new energy technology finance given the specific risks associated with the sale and purchase of residential new energy technology

New energy technology is often a significant, complex and uncertain investment for a household. The average purchase price for new energy technology financed by RateSetter is approaching \$10,000. Further, RateSetter is observing increasing purchase prices, driven by the growing adoption of residential batteries: we are now regularly financing the purchase of new energy technology systems costing in excess of \$20,000. So that monthly payments are affordable, customers are typically financing these purchases over long time periods (the average loan term observed by RateSetter is approximately 60 months).

RateSetter considers that the NCCP Act and the NCC protect consumers in a way that is proportionate to the potential harms of financing the purchase of expensive, complex goods over long loan terms. Further, we do not believe that regulation under an alternative regime – such as a proposed ASIC BNPL Code of Conduct – is desirable or appropriate given the already strong protections available under the NCCP Act and the NCC (but not required for so-called 'interest free' finance), including:

- i. Transparency of costs via prescribed disclosure documents and standard form loan contracts (including important warnings and disclaimers);
- ii. Responsible lending obligations (including the requirement to perform an unsuitability assessment to determine whether offering credit will induce substantial hardship);
- iii. Mandatory external dispute resolution scheme membership (and, in our view, stronger protections from AFCA given the frequent reliance in AFCA's terms of reference and associated commentary on the 'legal duties' of financiers, including NCCP Act obligations which do not apply to non-NCCP Act regulated credit);
- iv. Hardship variation requirements;
- v. Loan enforcement requirements (including collections conduct); and
- vi. Vendor monitoring obligations (as under the terms of the NCCP Act 'point of sale' exemption the financier retains primary responsibility for vendor conduct across the finance sales lifecycle).

Contrary to the assertions of some providers of so-called 'interest free' in their submissions to the ACCC, we argue that the above protections are either not required by the ASIC Act or any existing Product Intervention Powers, or are required to a significantly lesser standard (and only in satisfaction of general obligations required under the ASIC Act or Australian Consumer Law).

RateSetter has three further concerns with the Code Amendment:

- i. **It is unclear who is responsible for establishing equivalence, and how this will be achieved:** it is unclear from the amendment who will determine the 'equivalence' of consumer protections of any proposed BNPL Code of Conduct with the NCCP Act, and what process will be followed in making that determination. RateSetter considers that determining the equivalence between the protections contained in a BNPL Code of Conduct and those in the NCCP Act is a highly technical task and one that the administrators of the NETCC are not well placed to undertake without significant regulator assistance;
- ii. **The existence of an ASIC BNPL code does not imply equivalence with the NCCP Act:** we do not believe that the simple fact that ASIC or any other regulator enacts a BNPL Code of Conduct means that the protections in that code are equivalent to those in the NCCP Act or address the specific harms outlined with so-called 'interest free' finance for the purchase of new energy technology set out above. We would be deeply concerned if the mere existence of a code for BNPL products was to be substantially relied upon by the NETCC administrators to establish equivalence with NCCP Act obligations; and
- iii. **We believe that, by definition, any 'BNPL Code' will offer a lesser standard of protection compared with the NCCP Act:** we believe that, by definition, any BNPL Code of Conduct or other industry code sought to be relied on by a so-called 'interest free' provider under the Code Amendment will be one that has lesser consumer protections to those under the NCCP Act and the NCC. This is because if a so-called 'interest free' provider sought to offer a product with the same consumer protections as those under the NCCP Act, they could do so simply by complying with that Act.

3. The relative lack of regulation for so-called 'interest free' finance products, and the unequal obligations imposed on providers of finance regulated under the NCCP Act, raises significant competition concerns

Unlike providers of so-called 'interest free' finance, providers of credit products regulated by the NCCP Act are required to undertake substantial and complex activities across the credit lifecycle to satisfy the regulatory obligations outlined above (among others) which, alongside the oversight and monitoring requirements that are required to ensure their correct operation, come at a significant financial cost to the provider.

These financial costs are compounded by the inherently unequal product features between NCCP Act regulated finance and so-called 'interest free' finance. For example, unregulated credit providers can offer 'instant' credit approvals (which we do not believe that providers of NCCP Act regulated credit are able to offer or advertise while remaining compliant with the NCCP Act and NCC obligations) and higher approval rates (which we believe can only be to customers who would not be able to be offered credit under the NCCP Act without the financier breaching their obligations).

We are concerned that, were the Code Amendment be accepted by the ACCC, these disparities will become entrenched, with significant implications for the competitiveness of NCCP Act regulated finance. We do not consider that this is justifiable. The fact that one type of finance has an interest rate, while the other is 'interest free' but also has a cost to the customer (but this cost is hidden), should have no bearing on the obligations the financier must follow throughout the credit lifecycle, and the costs (both financial and in respect of product features) they should incur for doing so.

Conclusion

Where there observable, significant, ongoing consumer harms such as those arising from price inflation, it is right that the NETCC should respond to those harms: to protect consumer welfare, and to promote competition in finance for new energy technology. Further, it is appropriate that the NETCC demand a high bar for the conduct of vendors and financiers involved in the sale of complex, expensive products to consumers.

There is no deprivation of choice in the unamended draft determination. The unamended draft determination will improve choice for consumers, who will have significantly greater ability to compare finance that is currently obscured by hidden charges and unequal obligations on financiers.

If it would be helpful, RateSetter would be pleased to meet with the ACCC to provide further information in relation to our perspectives on the draft determination, and the Code Amendment, including further contemporary evidence of price inflation. Please do not hesitate to contact me on [REDACTED] or if you would like to meet or discuss our submission in further detail.

Yours truly



Benjamin Milsom
Director
RateSetter Australia RE Limited