Australian Competition
&
Consumer Commission

PRE-DECISION CONFERENCE

Minutes

Authorisation AA1000439
lodged by

Australian Energy Council
Clean Energy Council
Smart Energy Council
Energy Consumers Australia

in respect of

The New Energy Tech Consumer Code

9 September 2019

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-decision conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Pre-Decision Conference: Authorisation A1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council, Energy Consumers Australia

9 September 2019
Hotel Grand Chancellor,
131 Lonsdale Street, Melbourne VIC 3000

Attendees

Australian Competition and Consumer Commission
Stephen Ridgeway, Commissioner
Joanne Palisi, General Manager, Adjudication
Susie Black, Director, Adjudication
Theo Kelly, Senior Analyst, Adjudication
Kaitlin Hanrahan, Senior Analyst, Adjudication
Helen Anness, Principal Lawyer

Clean Energy Council
Mindy Lim, Code of Conduct Manager
Anna Sexton, Risk and Compliance Manager
Harry Smythe, Senior Code of Conduct Administrator

Australian Energy Council
Ben Barnes, Director – Retail Policy

Energy Consumers Australia
Jacqueline Crawshaw, Associate Director – Advocacy & Communications

Brighte Capital
Katherine McConnell, Chief Executive Officer
Ann Devine, Chief Risk Officer

Solar Naturally
Heuson Bak, General Manager
Richard Clamp, Director

Flexigroup
Timothy Graham, Flexigroup
Elizabeth Minogue, Flexigroup

Australian Securities and Investments Committee
Nick Kavass, Lawyer
Kevin Foo, Senior Manager — Credit, Retail Banking and Payments, Financial Services Group (by phone)

Energy Australia
Lawrence Irlam, Industry Regulation Lead

One Stop Warehouse
Anthony Buckwell, Technical Development Manager

Victorian Department of Environment, Land, Water and Planning
Tim Benjamin, Senior Policy Officer – Distributed Energy Resources Strategy,
Paul J Corkhill, Director – Risk Assurance & Standards, Office of Solar Homes

Ratesetter
Glenn Riddell, Chief Operations Officer

Arise Solar
Jack Patel, Chief Executive Officer

Energy Wise
Michael Berris, Operations Manager (by phone)

Sunboost & National Solar Energy Group
Yudisthra Seomangal, Inhouse Counsel

Minutes of conference

Conference commenced: 10:00 am

Introduction

Commissioner Stephen Ridgeway welcomed attendees, outlined the purpose of the conference, and declared the pre-decision conference open.

Representatives from the parties that requested the conference, Brighte Capital and Solar Naturally, made opening statements.

Introductory comments from businesses that requested a pre-decision conference

Katherine McConnell, Chief Executive Officer, Brighte Capital:

- The New Energy Tech Consumer Code (the **Consumer Code**) will harm Brighte's business and consumers unless it is amended so that buy now pay later finance (**BNPL**) suppliers such as Brighte are not excluded.

- Brighte supports the Applicants' submission of Friday 6 September which proposed amendments to clause 24 of the Code (**proposed BNPL amendments**). BNPL providers are currently developing an industry code of conduct (**BNPL industry code**). The proposed BNPL amendments reflect the best interests of the industry, consumers and ensure healthy competition remains in the finance market.

- Interim arrangements are needed because it may take some time to complete and finalise the BNPL industry code. During an interim period, BNPL would seek to continue to be an approved form of finance.

- Brighte recognises the need for adequate consumer safeguards in the Consumer Code. However, excluding BNPL providers as a whole is disproportionate way of protecting consumers given:

    - Brighte is not regulated under the National Consumer Credit Protection Act (**NCCPA**) because its products are not "credit", however its products are subject to a range of regulations. These include the general consumer protections under the ASIC Act, Privacy Act, the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. Brighte is a member of the Australian Financial Complaints Authority (**AFCA**) and is aware of other BNPL providers who are also AFCA members. Further, Brighte's, and other BNPL, products are subject to intervention by ASIC under Product Intervention Powers (**PIPs**) if ASIC identifies "significant risk of consumer harm".

    - Brighte's products have been used by over 35,000 households to purchase over $300 million worth of new energy tech. Brighte's products are offered at the point of sale by over 1,000 retailers. It has received feedback that BNPL is an essential product for retailers at the point of sale as it provides cost effective and transparent finance.

- BNPL products may be more transparent than NCCPA regulated products. Brighte commissioned a Deloitte survey (**Deloitte survey**) which found that fees and charges expressed as a dollar amount rather than a percentage are easier for consumers to understand.

Heuson Bak, General Manager, Solar Naturally:

- Solar Naturally shares Brighte's and Flexigroup's[1] concerns about the exclusion of BNPL under the Consumer Code. Exclusion of BNPL would result in substantial detriment.

- Solar Naturally has supplied solar products to 12,000 BNPL customers in recent years. Solar Naturally's customers value BNPL: 77% of Solar Naturally's income is derived from sales facilitated through BNPL products.

- BNPL offers cash flow management advantages for Solar Naturally. BNPL providers offer next day settlement compared to 30 day settlement for some other forms of payment.

- There is no real evidence of consumer harm caused by BNPL.

- There are advantages from BNPL - saves consumers money. BNPL facilitates new energy tech purchases which pay for themselves in terms of providing savings on energy. Cash flow management can also help to avoid circumstances where traders become insolvent and then, for example, customers are left without warranty protection. Katherine McConnell of Brighte Capital made comments in support of this statement and Glen Riddell of Ratesetter noted all finance options offer similar cash flow advantages for retailers.

Applicant's comments

Mindy Lim, Code of Conduct Manager, Clean Energy Council:

- CEC has administered the Solar Code since it was authorised by the ACCC in 2013. It has approved 964 applicants. Only a very small number of applicants have made submissions in relation to the proposed authorisation of the New Energy Tech Code.

- It is intended that there will be oversight of the Code administrator by a Code Administration Council. The Council will appoint the Administrator and Steward of the Code.

- CEC has subsidised the Solar Code program in its role as Code Administrator. It has done so out of belief in the benefits of the Solar Code, particularly in providing accountability to retailers and delivering consumer benefit.

During the Conference, the Clean Energy Council addressed several points raised by Sunboost/NSEG (which are outlined below). **Harry Smythe, Senior Code of Conduct Administrator, Clean Energy Council** stated that the $1,600 template price cited by NSEG refers to an optional template. The application fee under the Solar Code is

[1] Flexigroup's concerns outlined below.

currently $200. **Mindy Lim, Code of Conduct Manager, Clean Energy Council** stated:

- While there is no right of appeal for rejected applicants under the Solar Code, the Applicants have made written submissions stating that they are prepared to amend the Consumer Code to allow appeals from rejected applicants.

- CEC takes misuse of its intellectual property seriously. For example, some companies have misrepresented that they are certified when they are not.

- The rationale for an exclusion period for unsuccessful applicants is that, when a voluntary Code is adopted as a requirement for eligibility for government programs/incentives, there is generally a rapid growth in the number of applications. The exclusion period is intended to manage this and ensure that applicants are aware of the obligations they are accepting when they sign up.

- The restriction on 'close family members and shareholders' who have gone into liquidation or received a court judgment is intended to combat phoenixing.

Ben Barnes, Director – Retail Policy, Australian Energy Council (AEC) made comments on behalf of the Behind the Meter Working Group:

- It is important to have a Code Administrator Council to sit above the Code Administrator to effectively oversee the appropriate administration of the Consumer Code. The Code Administration Council Chair has been appointed and is Claire Petrie, former New South Wales Energy and Water Ombudsman, with other roles and seats on the Council yet to be appointed

- The Working Group was formed in an attempt to deliver good customer outcomes. Its mandate includes to be provider and technology agnostic.

- AEC has had discussions with BNPL providers regarding a future BNPL industry code.

- The proposed BNPL amendments are intended to ensure the same customer outcomes for new energy tech purchased using different forms of finance. The AEC notes that there may still need to be some minor tinkering with the precise wording of any amendments to clause 24.

- The Consumer Code is intended to achieve balance between customer protections and competition. It addresses concerns that some finance providers are at a competitive advantage due to having a lower cost base due to offering lower standards of consumer protection. The Code is intended to sit above the legislation to deliver better customer outcomes than would otherwise be achieved.

- The Working Group has been strongly influenced by consumer voices in developing a Consumer Code which is transparent and delivers good customer outcomes. Consumer groups have indicated that a Code delivered in accordance with NCCPA principles would likely be acceptable.

- Some parties have called for a ban on unsolicited sales. The Working Group's view is that, at this late stage, incremental rather than fundamental changes can be made to strengthen the requirements on unsolicited sales.

- The Consumer Code is principles based. There will be technical schedules developed to support this approach. For example, technical standards will specify the best practice in relation to different new energy technologies.

Commissioner Stephen Ridgeway commented that it would be important for it to be clear to signatories what is required of them under the Code; and that it would be helpful if the Applicants developed guidelines. These guidelines should not impose obligations that go beyond the Code, but merely provide explanatory material to help clarify for signatories how the principles in the Code work in practice.

Jacqueline Crawshaw, Associate Director – Advocacy and Communications, Energy Consumer Australia (ECA):

- ECA supports the draft determination and welcomes the Applicants' proposed BNPL amendments. The Consumer Code will assist consumers and provide confidence for them to engage in the market.

- The Code will have good governance and accountability measures – there will be a Code Administration Council which will include consumer groups, and there will be appropriate checks and balances to ensure effective Code administration.

- The Code provides for appropriate flexibility to accommodate new energy tech products as they come to market. Technical details about these products will be contained in technical supplements to the Code.

- ECA will make a written submission following the Conference giving background to the engagement through the Behind the Meter Working Group which led to the development of the Code.

Other comments made during the Conference

Timothy Graham, General Counsel, Flexigroup:

- Flexigroup has facilitated over 190,000 new energy tech systems on roofs with loans valued at over $2 billion.

- Flexigroup supports the intention of the Code, but is deeply concerned by the requirement that finance providers must be regulated under the NCCPA, to the exclusion of those that do not fall under the NCCPA.

- Flexigroup supports the Applicants' proposed BNPL amendments which focus on achieving high standards of consumer protection without excluding BNPL products. Flexigroup's primary concern is about the previous formulation of clause 24.

- The NCCPA does not apply to BNPL. ASIC and a Senate Economics Reference Committee have conducted reviews of the BNPL sector; neither recommended that BNPL's exemption be removed.

- There may be other unintended consequences should BNPL be effectively excluded under the Code. The loss of BNPL may result in each of (a) higher prices for consumers as they are forced to use more expensive forms of finance (b) greater concentration in the new energy tech finance market; and (c) a reduction in the uptake of new energy technologies due to a reduction in approaches to finance new energy tech.

- Without the Applicants' proposed amendment to clause 24, the Consumer Code would have affected the legitimate business activities of Flexigroup.

- Flexigroup is working with the Australian Finance Industry Group Association, which also includes Brighte, to develop a BNPL industry code. The Code would require among other things that BNPL providers be AFCA members, introduce mandatory hardship arrangements, and require disclosure of key requirements to customers.

Further comments by Flexigroup, including in response to Ratesetter submissions (outlined below):

- Flexigroup has had discussions with ASIC about the proposed BNPL industry code and the need to engage with consumer groups in developing the BNPL industry code.

- The BNPL industry code will be fit for purpose to meet the objective of consumer protection.

- Mr Graham did not agree with Ratesetter's comments about the BNPL regulatory environment. The regulatory environment is absolutely adequate to restrain poor behaviour.

- Inflating prices is a breach of Flexigroup's retailer and reseller agreements. Flexigroup deals with sellers identified as inflating prices and terminates merchants where necessary.

- AFCA has sufficient coverage to protect consumers and the capacity to do so in practice. AFCA is developing a 'fairness tool' to assess the conduct of participating institutions. Under the fairness tool, legal compliance will be only one factor.

- Flexigroup has taken on ASIC's feedback in its Report 600 about BNPL and is working with ASIC on a voluntary basis as part of updates to Report 600. ASIC has not expressed anything so far along the lines of the concerns expressed by Ratesetter.

- Under the Solar Code, CEC developed a proforma advising consumers that they did not have alternative dispute resolution rights or recourse in case of hardship. Flexigroup offers both of these things, but was required by CEC to provide the proforma to consumers. The fact sheet has been withdrawn. Consumers did not understand the proforma.

- BNPL providers must offer their services with 'due care and skill'.

- Every major bank is covered by NCCPA, yet that was not sufficient to restrain poor behaviour as shown by the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Elizabeth Minogue, Chief Revenue Officer, Flexigroup stated that Flexigroup consistently achieve high standards of customer satisfaction: its Net Promoter Score is high, and half of its customers in the previous year reported having used Flexigroup's products in the past. Flexigroup is committed to high standards of consumer protection and has a shared interest in ensuring its products are affordable.

Michael Berris, Operations Manager, Energywise:

- If the CEC is appointed to administer the Consumer Code, it will be effectively granted a monopoly to the detriment of solar designers and installers. There are around 6,000 designers and installers who have experienced issues through the CEC's administration of the Solar Code. If CEC is appointed Code Administrator, it will effectively cater towards multinational providers with the finances to exercise control

- The Consumer Code lacks enforcement mechanisms. It only covers retailers, and offers nothing to prevent retailers from continuing to subcontract work out to the cheapest installer who has no concern for quality. The Consumer Code creates another set of red tape and paperwork. Compliance costs will ultimately be paid for by consumers.

Gerard Brody, Chief Executive Officer, Consumer Action Law Centre (CALC):

- CALC supports the ACCC's draft determination. Authorisation of the Consumer Code is an important step to address systemic issues in the new energy tech sector.

- CALC strongly supports the formulation of clause 24 of the Consumer Code before the proposed BNPL amendments. CALC considers that there are a lack of consumer protections offered by BNPL providers. BNPL is a regulatory avoidance mechanism and CALC is aware of significant harm suffered by consumers who have signed up to BNPL arrangements, including Flexigroup and Brighte.

- Last year, BNPL financing was present in over 20% of all insolvencies, according to a Senate Reference Committee.

- Allowing BNPL into the Code impacts competition. ASIC identified BNPL finance as inflating the price of goods to cover high fees charged to merchants who offer BNPL. Inflating the price of goods distorts market pricing.

- CALC would support a ban on unsolicited, high pressure sales of complex solar products. Unsolicited sales are not necessary to support sales of solar systems. Reports to CALC indicate that solar panels are one of the areas where the greatest consumer harm is experienced due to unsolicited sales. Salespeople can coerce consumers to not seek extra information when engaging in unsolicited sales practices.

- If the proposed BNPL amendments are implemented, there must be substantial equivalence with the NCCPA requirements, not just in rule but in the resources committed to monitoring and compliance. The BNPL industry code is being developed without the involvement of consumer groups, in contrast to the extensive consultation undertaken in relation to the Consumer Code.

- CALC's support for the proposed BNPL industry code would depend on the details, including whether it provided substantial equivalence with the consumer protections required under the Consumer Code and the resources that were available for monitoring and compliance with the proposed code.

Glenn Riddell, Chief Operations Officer, Ratesetter:

- Ratesetter is the largest provider of NCCPA licenced credit. It holds an Australian financial services license (AFSL) and credit license. Since 2014, Ratesetter has financed $50 million for new energy tech purchases and has 600 accredited merchants/installers.

- The proposed amendment to clause 24 of the Consumer Code is a late amendment brought and gives rise to a significant risk of poor outcomes for consumers.

- Genuine equivalence with the requirements of the NCCPA is not possible or necessary. ASIC's Product Intervention Powers are not a substitute for genuine regulation offered by the NCCPA. Licensed credit is subject to a regulated regime and ASIC is a good regulator.

- Findings about consumer outcomes when using BNPL for lower value purchases such as clothing cannot be applied to make findings about likely consumer outcomes when using BNPL for larger purchases, like new energy tech. There is greater potential harm from using unregulated credit in relation to the larger, more complex purchase.

- BNPL products result in inflated purchase prices for solar systems. There is insufficient margin on the solar product to cover the 20-30% merchant fee which applies to BNPL products, as such retailers inflate the price.

- Consumers may not be able to detect price inflation. Consumers are offered a bundle of solar and BNPL finance which means that they are unable to shop around for better deals on finance. Ratesetter "mystery shopped" 20 new energy tech retailers and found that all engaged in undisclosed price inflation (inflation varied from 10-51% and was 20% on average). Vulnerable or less financially literate consumers are most at risk. Ratesetter's mystery shopping revealed that some solar retailers use a calculator showing them how to inflate the cost of goods sold using BNPL finance.

- Responsible lending obligations which apply under the NCCPA place licenced credit providers at a structural disadvantage compared to BNPL providers. Allowing BNPL stifles competition compared to a transparent, regulated market. BNPL providers can approve borrowers who Ratesetter would not approve. Licenced credit providers cannot give immediate approval due to the need to perform a credit assessment, and cannot approve certain borrowers.

- AFCA membership does not give consumers effective recourse against BNPL providers. Avenues for redress are limited. Membership of AFCA is irrelevant for BNPL providers as they fall outside AFCA's Terms of Reference. Alternative dispute resolution systems can only intervene in non-interest bearing loan contracts.

- Ratesetter, as an NCCPA regulated provider, accepts direct, primary responsibility for the conduct of its vendors. This creates a strong incentive for Ratesetter to monitor its vendors' conduct and alignment of interests.

- The NCCPA and ASIC already offer a good regulatory regime. There is no need, nor a compelling reason, to have a parallel scheme under the Consumer Code.

- Vendors ignore letters from BNPL finance warning them not to inflate the cost of goods. Flexigroup's and Brighte's acknowledgement that they need to closely monitor retailers' behaviour is an acknowledgement that inflation happens.

- The scope of alternative dispute resolution services is limited as consumers can only raise disputes on narrow grounds. AFCA has jurisdiction to look at disputes under general consumer law, but NCCPA licenced credit must do extra, specific things.

- Ratesetter would accept Brighte's views (that BNPL finance is more transparent than other forms of finance) if the actual cost of BNPL finance was clearly disclosed and not rolled into a single price (bundled finance and goods). That way, the end consumer would be aware that they are paying more than they would otherwise pay.

Yudisthra Seomangal, Inhouse Counsel, Sunboost & National Solar Energy Group (NSEG):

- NSEG is the ultimate holding company of Bell Solar Pty Ltd which trades under the name Sunboost. Mr Seomangal also trades as a sole trader in the new energy tech industry, separate to his role with NSEG.

- NSEG supports the intent of the Consumer Code, but has concerns about CEC as Code Administrator due to previous experience with CEC as administrator of the Solar Code. NSEG referred to the points raised in its submission of 23 August 2019 prepared by Terceiro Legal Consulting. These are as follows:

    - The Solar Code lacks an appeals mechanism for rejected applicants. Applications have been rejected on mistaken or highly technical grounds.

    - The consequences for rejection are high due to CEC's rigid application of an exclusion period where rejected applicants may not re-apply for 3 months, it was previously 6 months. The exclusion period may have a disproportionate burden on small businesses, as would the high compliance costs involved in being a signatory to the Solar Code. Compliance costs may reduce competition as it may result in smaller retailers exiting the market.

    - NSEG cited an instance where an exclusion period was applied due to use of a $1,600 CEC template which had not been paid for. NSEG stated that a more common-sense approach would have been to seek payment for the template.

- There is a heightened need for high standards of code administration where a code is adopted as a mandatory requirement for some government incentives/programs.

- The Solar Code includes irrelevant or too broad considerations, such as rules restricting signatories with shareholders or close family members who have gone into liquidation or received a court judgment in the last 5 years.

- Application fees are high and are non-refundable, resulting in a disproportionate amount of funding to operate the Solar Code coming from unsuccessful applicants.

- The CEC does not always afford signatories natural justice in hearing disputes under the Solar Code

- Obligations under the Solar Code are not always clear. The Consumer Code should spell out obligations rather than give the Code Administrator the ability impose new or discretionary criteria as this creates uncertainty.

- BNPL products are important for retailers and consumers and there is no good reason to exclude BNPL providers under the Consumer Code.

Jack Patel, Chief Executive Officer, Arise Solar:

- Reflecting on a recent example where an application was rejected by the CEC under the Solar Code, there should be an independent body involved in administering an appeal process under the Consumer Code (not the CEC or other industry participants).

- Small businesses have no way of knowing what their application should contain and find it difficult to manage the costs of seeking legal or other advice.

Anthony Buckwell, Technical Development Manager, One Stop Warehouse stated that smaller installers feel like they get lost in the discussion; that in terms of resolving disputes, it comes down to having sufficient financial resources Small companies are some of the most ethical people in the market and will do what they can to assist consumers. Ultimately, the CEC's role as both industry governor and industry advocate is not sustainable.

Ann Devine, Chief Risk Officer, Brighte Capital:

- BNPL industry code development will have broad consultation across the industry, including with consumer groups.

- The BNPL industry code will operate effectively to ensure compliance and monitoring requirements are met. The Code Administrator will be empowered to deal with problems under the Code.

- The vast majority of consumers using BNPL are creditworthy. Many of Brighte's customers are home owners who are credit savvy, mature and responsible.

Brighte understands that CALC's observations are based on its role assisting the most vulnerable consumers.

- Brighte vendors are contractually bound to not engage in product price inflation, surcharge or add costs for the use of its BNPL products. Brighte engages in mystery shopping to detect breaches. ASIC is aware that Brighte has and will stop dealing with vendors.

- Brighte is a member of CEC and SEC.

Nick Kavass, Lawyer, Australian Securities and Investments Commission (ASIC) informed the Conference that ASIC was attending in observer capacity and that ASIC Commissioners are aware of the submissions in relation to this matter. Mr Kavass noted that the discussion at the Conference had been helpful and he would take the information back to his colleagues at ASIC and there would likely be further discussions with parties who attended the Conference on the issues raised.

Commissioner Stephen Ridgeway called for any further comments. No further comments were made. The Deputy Chair closed the conference by noting that the ACCC would be providing a further opportunity for parties to make written submissions in respect of its draft determination and that the ACCC would be writing to those who attended the conference to provide details of how such submissions could be made, as well as to provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed at 12:15pm.