

8 November 2019

Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Sent electronically to adjudication@acc.gov.au

Attention: Susie Black and Kaitlin Hanrahan

Final Submission on the New Energy Tech Consumer Code [AA1000439]

Brighte Capital (**Brighte**) encloses its final submission to the Australian Competition and Consumer Commission (**ACCC**) in relation to the draft New Energy Tech Consumer Code (**NETCC**).

Brighte thanks the ACCC for the opportunity to comment on the ACCC's proposed amendments to the NETCC.

Brighte's submission also briefly summarises why it is both feasible and desirable to modify the NETCC to permit signatories to offer lawful buy now pay later (**BNPL**) arrangements to consumers.

Please do not hesitate to contact me, or Ann Devine on [REDACTED] should you wish to do so.

Yours sincerely,

A rectangular grey box redacting the signature of Katherine McConnell.

Katherine McConnell

Chief Executive Officer

AA1000439 – New Energy Tech Consumer Code – Final Submission

AA1000439 - NEW ENERGY TECH CONSUMER CODE - SUBMISSION

1. BACKGROUND

- 1.1 Brighte Capital Pty Ltd (**Brighte**) welcomes the opportunity to comment on the proposed amendments by the Australian Competition and Consumer Commission (**ACCC**) to the New Energy Tech Consumer Code (**Consumer Code**).
- 1.2 Brighte reiterates the points made in its previous submissions to the Behind the Meter Working Group and to the ACCC.
- 1.3 Brighte maintains its support for the development of a voluntary industry code to improve practices in the new energy technology (**NET**) sector. As in previous submissions, Brighte agrees that encouraging the growth of NET products should not pose a risk to consumers, particularly vulnerable consumers or those experiencing hardship.
- 1.4 However, Brighte is concerned that aspects of the ACCC's proposed amendments would effectively:
 - (a) Bring the otherwise exempt BNPL providers under the *National Consumer Protection Act 2009* (**NCCPA**) regime by requiring them to comply with the requirements contained in sections 128 -133; and
 - (b) Ban Buy Now Pay Later (**BNPL**) from being used for NET, denying consumers an appropriate, popular and convenient financing option.

2. The ACCC'S PROPOSED AMENDMENTS

Approval by Code Administrator – Clause 24(a)(ii)(A)

- 2.1 Brighte broadly supports the ACCC's proposed amendment to clause 24(a)(ii)(A), which require a credit provider to have policies in place to ensure adequate protections for customers.
- 2.2 However, Brighte submits that the Code Administrator should not be given the power to determine whether a credit provider meets these requirements. Brighte is concerned that this approach would effectively create a new regulator for the NET sector who would be able to, without any statutory authority and particular expertise in financial services, unilaterally determine which credit providers could provide finance to consumers, a result that would be outside the purpose and remit of the Consumer Code.
- 2.3 Consistent with Brighte's earlier submission, if consumer finance is to be regulated as part of the administration of the Consumer Code, then a consumer finance expert (for example, the Code Compliance Committee of the proposed AFIA Code of Conduct or Compliance Committee of the BNPL Code currently being drafted) should be appointed to review credit providers' policies, rather than imposing an arbitrary prohibition against BNPL products.

Compliance with NCCPA and NCC – Clause 24(a)(ii)(A)(iv)

- 2.4 The ACCC's proposed amendments to clause 24(a)(ii)(A)(iv) go beyond the existing legislation and would require BNPL providers to comply with particular sections of the NCCPA as if they were regulated by the NCCPA and the National Credit Code (**NCC**).
- 2.5 Brighte submits that this provision is not necessary to protect consumers given BNPL products have adequate and similar consumer protections to products regulated by the NCCPA and NCC. BNPL products are regulated by the *Australian Securities and Investments Commission*

Act 2001 (ASIC Act), subject to the Australian Consumer Law (ACL), and are subject to ASIC's new product intervention powers. These additional protections will provide independent regulatory oversight and a further avenue for signatories to hold BNPL providers to account.

- 2.6 As outlined in Brighte's earlier submissions, there is no reasonable justification for outlawing these products in the new energy technology sector. To do so would reduce consumer choice, has the potential to damage innovation and competition in the sector and the uptake of these important products, and would introduce a form of sector-specific regulation out of step with the position in the broader economy, with no corresponding public benefit.
- 2.7 Brighte urges the ACCC to consider carefully any proposal to impose sector-specific regulation on a lawful financing product, and not authorise those aspects of the Consumer Code that would prevent Brighte, and its competitors from offering lawful BNPL products as financing options for consumers.

Adequate protections under the ASIC Act

- 2.8 BNPL providers are subject to the following key consumer protection obligations under the ASIC Act:
- (a) Section 12BF – an unfair contract term of a standard form consumer or small business contract that relates to a financial product or the supply, or potential supply, of a financial service will be void;
 - (b) Sections 12CA and 12CB – prohibitions against unconscionable conduct;
 - (c) Section 12DA – a person must not engage in conduct in relation to financial services that is misleading or deceptive, or is likely to mislead or deceive;
 - (d) Section 12DB – prohibitions against false or misleading representations;
 - (e) Section 12DF – prohibition against misleading the public as to the nature, characteristics, suitability for purpose or quantity of any financial services;
 - (f) Section 12DG – prohibition against advertising financial services at a specified price if there are reasonable grounds for believing the person will not be able to offer those services at that price over a reasonable period and in reasonable quantities having regard to the nature of the market in which the person carries on business and the nature of the advertisement; and
 - (g) Section 12DJ – prohibition against using physical force, or undue harassment or coercion in connection with supply or possible supply of financial services, or the payment for financial services.

Sections 128-133 of the NCCPA

- 2.9 Brighte submits that it is not necessary to require credit providers that are otherwise exempt from the NCC to comply with sections 128-133 of the NCCPA, given the existing protections under the ASIC Act and ACL and the other proposed provisions under clause 24 of the Consumer Code, which provide for extensive consumer protection.
- 2.10 The provisions contained within the ASIC Act, and the internal policies adopted by Brighte, provide substantially the same degree and type of consumer protection as would be provided by the NCCPA.
- 2.11 Before Brighte provides a customer with a BNPL product, Brighte undertakes an upfront assessment of a customer's ability to meet their repayments. The assessment requires customers to provide information about their financial situation.

2.12 Moreover, Brighte's assessment of a customer's suitability is consistent with ASIC's Regulatory Guide 209: Credit licencing: Responsible lending conduct,¹ which requires responsible lenders to take these three steps to meet their obligations:

- (a) conduct reasonable inquiries about the consumer's financial situation, including income and expenses, and their requirements/objectives;
- (b) based on these inquiries, make final assessment about whether credit contract or consumer lease is "not unsuitable" for the consumer; and
- (c) if requested by the consumer, give the consumer a written copy of the final assessment.

Accordingly, this requires substantially the same steps as are provided by the NCCPA. Requiring absolute adherence with the NCCPA in addition to the above provisions would likely prevent consumers from accessing a convenient form of finance.

Internal policies

2.13 In addition to the above, Brighte has implemented a number of policies to ensure that its customers are offered a fair and affordable product and any risks are appropriately addressed.

- (a) Brighte has in place an appropriate internal dispute resolution (IDR) process, as set out in Brighte's terms and conditions and on its website. Brighte is also a member of AFCA which customers can access in addition to, or instead of, Brighte's IDR process. Customers are advised of their ability to submit a complaint to AFCA in the terms and conditions as well as on Brighte's website.
- (b) Brighte has built-in protections for customers experiencing payment difficulties and hardship. As set out above, Brighte assesses a customer's financial position prior to offering them BNPL products, and this care has resulted in very low default and hardship rates.
- (c) Brighte has taken steps to ensure the terms and conditions of its contracts are transparent and easy to understand. Moreover, both the ACL and the relevant provisions of the ASIC Act prohibit Brighte from misleading its customers.

Fees and charges

2.14 Brighte has also taken steps to ensure that its fees and charges do not place its customers at any unreasonable risk of financial hardship:

- (a) Brighte provides consumers with a credit contract which contains transparent and easy to understand terms. Brighte has simple fee structure, with a weekly account fee of \$1 and a late payment fee of \$4.99 capped at \$49.90 per calendar year.
- (b) The simple fee structure makes it easier for customers to understand their financial commitments to Brighte than some traditional forms of credit finance. Brighte submits that consumers better understand financial commitments expressed in dollar amounts, such as Brighte's fees, than they do percentages, as is the case for personal loans and credit cards.
- (c) Moreover, the financial cost of late payment under BNPL products are potentially much lower than traditional forms of credit, due to the 0% interest offered and capped late payment fees on offer. This stands in contrast to the potentially high cost of late payments for a personal loan or credit card.

¹ Australian Security and Investment Commission, Credit licensing: Responsible lending conduct, Regulatory Guide 209, November 2014.

Disclosure of any fees and charges – Clause 24(c)(iv)

- 2.15 It is unclear what the ACCC means by "merchant fees" in the proposed amendments to clause 24(c)(iv). If the ACCC intends to refer to service fees paid by merchants to BNPL providers, Brighte is concerned this would be contrary to the intent of the disclosures required under the NCC.
- 2.16 Consistent with the NCC which requires finance providers to disclose fees and charges that are or may be payable by the customer to the finance provider, Brighte understands that the intent and effect of the ACCC's suggested amendment to clause 24(c)(iv) is to ensure any fees and charges that are or may be payable by the customer (not the underlying arrangements between credit providers and merchants, e.g. the service fees paid by merchants to BNPL providers) should be disclosed to customers.