

29 August 2019

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

Sent electronically to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

**Attention:** Susie Black & Theo Kelly

**Further Submission on the New Energy Tech Consumer Code [AA1000439]**

Brighte Capital (**Brighte**) **encloses** a submission to the Australian Competition and Consumer Commission (**ACCC**) in relation to its Draft Determination on the proposed New Energy Tech Consumer Code (**Consumer Code**).<sup>1</sup> As the ACCC is aware, Brighte provided a submission dated 22 May 2019 in relation to the authorisation application for the Consumer Code.

Brighte thanks the ACCC for granting an extension for Brighte to respond to the application.

Brighte provides these further submissions to explain why it is both feasible and desirable to modify the Consumer Code to permit lawful "buy now pay later" (**BNPL**) finance arrangements to be offered by signatories to the Consumer Code. Brighte submits there is no reasonable justification authorising a code that would require signatories to boycott BNPL finance arrangements. To do so would harm both ethical NET suppliers who wish to offer BNPL options to their customers and consumers by restricting consumer choice.

As explained in these submissions:

- Brighte supports the development of a voluntary industry code to improve practices in the new energy technology (**NET**) sector, and the importance of ensuring there are adequate consumer safeguards. Ethical BNPL providers should be allowed to continue to work with NET suppliers to provide a competitive alternative to traditional credit products.
- BNPL products are already subject to consumer regulation and regulatory scrutiny, particularly by the Australian Securities and Investments Commission (**ASIC**) under the *Australian Securities and Investments Commission Act 2001* (Cth). Further, following ASIC's review of BNPL arrangements last year,<sup>2</sup> ASIC's proposed product intervention power will apply to all BNPL products. These are in addition to its already strong powers to investigate potential breaches of the legislation it administers.

In addition, Brighte, like many other BNPL providers, is an ethical provider and holds an Australian Credit Licence. Brighte has implemented a number of consumer safeguards, including policies that ensure that:

- (a) fees and charges are transparently disclosed to customers;

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<sup>1</sup> The Draft Determination is dated 1 August 2019.

<sup>2</sup> ASIC, REPORT 600: Review of buy now pay later arrangements (November 2018).

- (b) internal and external dispute resolution procedures are available to customers;
  - (c) a capacity to pay assessment is conducted before accepting a new customer; and
  - (d) hardship assistance is available.
- Brighte submits that NET suppliers who wish to become a signatory to the Consumer Code should have the ability to work with ethical BNPL providers. If the ACCC believes that additional consumer safeguards are warranted, then Brighte urges the ACCC to, instead of facilitating a complete boycott of BNPL finance arrangements, consider amending the Consumer Code to reflect the protections Brighte has put in place to protect its customers as briefly outlined above and in these submissions.

Brighte welcomes the opportunity to discuss these submissions further with the ACCC and we look forward to participating in the pre-determination conference on 9 September. Please do not hesitate to contact me, or Ann Devine on 0477 009 533 should you wish to do so.

Yours sincerely,

A handwritten signature in blue ink that reads "K. McConnell". The signature is written in a cursive, slightly slanted style.

**Katherine McConnell**

CEO and Founder

## AA1000439 – New Energy Tech Consumer Code – Submission

### NEW ENERGY TECH CONSUMER CODE

Brighte Capital Pty Ltd (**Brighte**) welcomes the opportunity to make a further submission to the Australian Competition and Consumer Commission (**ACCC**) in relation to its Draft Determination to authorise the New Energy Tech Consumer Code (**Consumer Code**) for a period of five years.

#### 1. SUMMARY

- (a) Brighte supports the development of a voluntary industry code to improve practices in the new energy technology (**NET**) sector. However, Brighte is very concerned that the Consumer Code, as currently proposed, would effectively require signatories to boycott "buy now pay later" (**BNPL**) products.
- (b) In Brighte's view, the Consumer Code should facilitate the ongoing growth and uptake of NET products, particularly solar and battery energy storage systems, by promoting fair competition between NET providers. BNPL products have been very important in facilitating that growth by giving consumers an important and highly competitive option to other forms of consumer credit and finance.
- (c) Brighte agrees that encouraging the growth of NET products should not come at the expense of consumers, particularly vulnerable customers or customers experiencing hardship.
- (d) BNPL products offer real benefits to consumers, such as:
  - (i) enabling consumers to make a capital investment in high-value goods which deliver savings on energy bills;
  - (ii) offering a cost-effective source of finance that delivers substantial savings in comparison to the upfront cost of purchasing NET products; and
  - (iii) providing consumers with improved choice and access to financial options that are convenient and easy to use.
- (e) BNPL products are already subject to extensive regulation including under unfair contract terms under the *Australian Securities and Investments Commission Act 2001* (Cth) and the Australian Consumer Law (**ACL**) and are subject to the Australian Securities and Investments Commission's (**ASIC's**) new product intervention powers, including those coming into effect in April 2021. These consumer protections are similar to those under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), and provide suppliers and consumers with an avenue to hold BNPL providers to account.
- (f) Brighte, like many other BNPL providers, holds an Australian Credit Licence. While this is not required for BNPL products, it provides an assurance that Brighte is an organisation of substance that strives to comply with credit regulation. In addition, Brighte has built consumer safeguards into its BrightePay service by implementing policies to ensure the ethical and transparent provision of services including:
  - (i) by disclosing fees and charges to customers up-front in a clear and transparent manner;
  - (ii) by actively engaging with customers in complaint resolution processes (both internal, and external);
  - (iii) by assessing customers' capacity to repay; and

- (iv) by offering flexible payment options and assisting customers experiencing payment difficulties or financial hardship.
- (g) Brighte submits that given the existing regulatory protections, NET providers who wish to sign up to the Consumer Code should not be required to boycott ethical BNPL providers like Brighte. This would harm both NET providers and consumers by reducing the financing options available to consumers. NET providers should have the ability to work with ethical BNPL providers should they wish to do so.
- (h) If the ACCC considers the existing consumer safeguards to be inadequate, then it is both feasible and desirable to amend the Consumer Code to further strengthen existing consumer safeguards, rather than simply boycotting BNPL products, compromising customer choice of financing options and denying customers the significant benefits that BNPL products can provide.
- (i) Accordingly, we submit that the ACCC should not authorise the Consumer Code in its current form and instead require that it be amended to remove the restriction on offering BNPL products and, if the ACCC considers it desirable to do so, include additional consumer protections outlined that would permit NET suppliers to work with ethical BNPL providers such as Brighte.
- (j) Brighte would welcome the opportunity to work with the ACCC and the Applicants, to address any specific concerns about our proposed inclusion of BNPL products in the Consumer Code.

## 2. **Why it is important not to restrict access to BNPL products**

- 2.1 Brighte submits that it is important not to restrict access to BNPL products by effectively requiring signatories to the Consumer Code to boycott them. This is an unnecessary measure, which would deprive consumers of a valuable and competitive alternative to other consumer finance and credit products.
- 2.2 As explained in our previous submission, BNPL products are a popular financing option, particularly within the NET sector. There has been increasing uptake of these services and vigorous competition in that market. Although the BNPL sector is small, it is a growing part of the credit market, and accounted for approximately \$1 billion of outstanding loans in 2018, out of total personal credit of around \$147 billion.<sup>3</sup>
- 2.3 New BNPL providers have recently entered the market or have expressed an intention to do so. These financial services organisations include Klarna, Visa, Kogan/Citibank (partnership) and Sezzle. Rising levels of competition and innovation will deliver benefits to consumers.
- 2.4 The BNPL sector is also growing in overseas markets (eg, Sweden's Klarna, Australia's Afterpay and New Zealand's LayBuy have expanded into the UK and US retail markets).
- 2.5 According to ASIC:<sup>4</sup>
  - (a) BNPL arrangements are commonly used. The number of consumers who used at least one BNPL arrangement has increased about five-fold from 400,000 consumers during the 2015-2016 financial year to **over 2 million consumers** during the 2017-2018 financial year. This represents about 10% of the adult population.
  - (b) 90% of users believed that BNPL arrangements **helped** them manage their spending.

<sup>3</sup> Australian Securities and Investments Commission, Report 600: Review of buy now pay later arrangements (November 2018) <https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>; Reserve Bank of Australia, Other personal credit (March 2019) <https://www.rba.gov.au/statistics/frequency/fin-agg/2019/>;

<sup>4</sup> ASIC Report 600: Review of buy now pay later arrangements, November 2018, Executive Summary, Section 2.

- (c) BNPL products also have **low default rates**.

2.6 [CIC]

### Restriction of Publication of Part Claimed

2.7 In its Draft Determination, the ACCC itself acknowledged that, where they are provided responsibly, some consumers may value BNPL products.<sup>5</sup> The value of BNPL products to customers falls into the following categories:

- (a) **Assistance in purchasing solar products:** BNPL products have a significant and important role in assisting consumers to purchase solar products. The availability of the BrightePay product has brought forward the benefits to these consumers that accrue from switching to energy efficient, renewable-fuel electricity systems.

There has been strong demand for solar energy solutions from Australian households. In 2018, it was estimated around 20% of all Australian households have solar energy equipment of some sort.<sup>6</sup> In Queensland and South Australia, solar uptake has reached one in three households.<sup>7</sup>

Energy efficient products provide cost savings for households by reducing mains electricity consumption. [CIC]

Between 2017 and 2019, Brighte facilitated an estimated \$[CIC] million in energy savings to consumers across the NEM through around [CIC]MW of installed residential rooftop solar systems.

[CIC]

Solar energy products are also high-value goods that are a capital investment for any residence. Consumers who cannot pay for the purchase in full and up front might not be able to access these products without finance. [CIC].

- (b) **Cost-effective source of finance:** Consumers pay less when they have a cost-effective source of finance. Suppliers are contractually prevented from charging consumers a higher rate for using BNPL products, so generally BNPL products have lower repayments (principal + fees + interest) than other loan products – BNPL products have no interest. [CIC].

Further, when using BNPL products of the kind offered by Brighte, the consumer will pay the same price as the cash price. [CIC].

<sup>5</sup> Australian Competition and Consumer Commission, Draft Determination: Application for authorisation AA1000439 lodged by Australian Energy Council (AEC), Clean Energy Council (CEC), Smart Energy Council (SEC) and Energy Consumers Australia (ECA) (together the Applicants) in respect of the New Energy Tech Consumer Code (August 2019) <https://www.accc.gov.au/system/files/public-registers/documents/AA1000439%20-%20New%20Energy%20Tech%20Consumer%20Code%20-%20Draft%20Determination%20-%2001.08.19%20-%20PR.pdf>.

<sup>6</sup> Climate Council, Powering Progress: States Renewable Energy Race (2018) <https://www.climatecouncil.org.au/wp-content/uploads/2018/10/States-Renewable-Energy-Report.pdf>.

<sup>7</sup> Ibid.

### Restriction of Publication of Part Claimed

- (c) **Choice and access:** BNPL provides consumers with an alternative to paying up front with cash or traditional loan products, such as personal loans or credit cards. This enables consumer choice and access to a broader range of financing options.
- (d) **Convenience and ease of use:** BNPL providers generally offer consumers a straightforward indication of whether they can borrow or not, via a mobile app or online. BNPL products offer unique financing features, such as increased availability at the point of sale, speed of application process, greater transparency in relation to fees and obligations, and lower costs due to interest components and fees that do not exceed the low exemption thresholds in the NCCPA.
- (e) **Ease of understanding:** consumers feel that BNPL repayments and terms and conditions are easy to understand, eg because payments are generally expressed in dollars rather than percentage terms. Terms that are shorter and clearer are more likely to be read, and understood, by consumers.
- (f) **Recommendations:** BNPL may be recommended by friends and family, or suppliers. [CIC].

### 3. BNPL products are properly regulated

- 3.1 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.

#### *Protections under the ASIC Act*

- 3.2 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:**
    - (i) Under section 12CA, a person must not engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the written law, from time to time, of the States and Territories; and
    - (ii) Under section 12CB, a person must not in connection with the supply or possible supply of financial services to a person or the acquisition or possible acquisition of financial services from a person, engage in conduct that is, in all the circumstances, unconscionable;
  - (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** - a person must not in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
    - (i) make a false or misleading representation that services are of a particular standard, quality, value or grade;

- (ii) make a false or misleading representation that a particular person has agreed to acquire services;
  - (iii) make a false or misleading representation that purports to be a testimonial by any person related to services;
  - (iv) make a false or misleading representation with respect to the price of the services;
  - (v) make a false or misleading representation concerning the need for any services; or
  - (vi) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;
- (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.

#### *ASIC's investigative powers*

3.3 Under its compulsory information gathering powers under Part 3 of the ASIC Act, ASIC has the power to compel BNPL providers to provide information and documents, and potentially attend an examination to answer questions or provide other assistance. Through the surveillance and investigation abilities that these powers confer on ASIC, it is able to strictly monitor compliance with the regulations mentioned above and take any necessary enforcement action. To further reinforce its investigative powers, ASIC may apply for and execute search warrants to obtain documents that were not revealed when it exercised its information gathering powers. ASIC uses these powers both reactively, in response to complaints or other intelligence, and proactively, to monitor, examine and generally engage with the industry.

3.4 ASIC is also active in enforcing its powers: while not specifically related to BNPL, by way of illustration, between January and June 2019, 103 individuals were removed / restricted from providing financial services or credit as a result of banning orders made by ASIC under sections 920A-920F of the *Corporations Act* (Cth).<sup>8</sup>

#### *Protections under the ACL*

3.5 Also relevant to BNPL providers are the multiple pricing provisions of the ACL (the text of which is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)). The ACL imposes substantially the same protections as the ASIC Act, but in relation to the supply of goods and services offered by the NET supplier to consumers.

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<sup>8</sup> Australian Securities and Investments Commission, Report 625 – ASIC Enforcement Update – January to June 2019 (August 2019) <https://download.asic.gov.au/media/5236808/rep625-published-18-august-2019.pdf>.

### *ASIC's product intervention powers*

- 3.6 ASIC reviewed the BNPL industry and expressed concerns about consumers paying more for goods than they would otherwise have and consumers becoming financially over-committed.<sup>9</sup> The new powers will enable ASIC to take broader, more proactive action to protect at-risk consumers.
- 3.7 The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth), which came into effect in April of this year, gives ASIC powers to intervene in the market on behalf of financial services customers. The power is available for all financial products, including BNPL products regulated by the *Corporations Act 2001* (Cth) and the ASIC Act.
- 3.8 As a result of the amendment, ASIC will be able to make a product intervention order preventing a BNPL provider from engaging in specified conduct where a financial product will, or is likely to result in, "significant detriment" to retail clients.
- 3.9 The design and distribution obligations under the amendment will take effect on 6 April 2021 and will require:
- (a) BNPL providers of regulated financial products to make a target market determination (**TMD**) for financial products. It must specify:
    - (i) the class of retail clients comprising the product's target market;
    - (ii) any conditions or restrictions on distributing the product;
    - (iii) circumstances that reasonably suggest the determination is no longer appropriate ("review triggers");
    - (iv) reasonable review and reporting periods; and
    - (v) the type of information required to enable the creator of the determination to promptly identify review triggers or other events suggesting the determination is no longer appropriate.
  - (b) BNPL providers and distributors of regulated financial products to take reasonable steps to ensure that the distribution of a product is consistent with the TMD; and
  - (c) BNPL providers to maintain records of TMD decisions and conduct and notify ASIC where a significant dealing in a product to a retail client has been issued inconsistently to the TMD.

## 4. **Proposed changes to the Consumer Code to strengthen the ethical and transparent provision of BNPL services**

- 4.1 Brighte is committed to ensuring BNPL products are provided in a **transparent and ethical** manner. Noting the regulatory background discussed above, Brighte has implemented a number of policies to ensure that its customers are offered a fair and affordable product as set out below.
- (a) Brighte is an **Australian Credit Licence holder** and a member of the Australian Financial Complaints Authority (**AFCA**). In order to hold the licence, Brighte was closely vetted by ASIC, including for our ability to comply with licensee obligations and that Brighte is a fit and proper person to engage in credit activities. Brighte is also subject to ongoing obligations, including responsible lending requirements under credit legislation and the obligation to act honestly and fairly. Under the licence,

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<sup>9</sup> Ibid.



Brighte is also required to lodge an annual compliance certificate with ASIC to ensure ongoing compliance.

- (b) Brighte has in place appropriate **dispute/complaint resolution processes**. Note that any internal dispute / complaints resolution process will not prevent consumers from seeking an external and independent dispute resolution process through the Australian Financial Complaints Authority (**AFCA**). AFCA can and does investigate consumer complaints. This option also acts as a fall back for customers in the unlikely event that the customer is not satisfied with Brighte's internal process.
- (c) Brighte has built-in protections for **customers experiencing payment difficulties and hardship** and are therefore unable to meet their repayments. Brighte assesses a customer's financial position prior to offering them BNPL products, to ensure the product is suitable for that consumer and that the consumer has the capacity to repay a BNPL payment arrangement. This care is reflected in the very low default rates experienced by Brighte and is consistent with ASIC's *Regulatory Guide 209: Credit licencing: Responsible lending conduct*,<sup>10</sup> which requires responsible lenders to take these three steps to meet their obligations:
  - (i) conduct reasonable inquiries about the consumer's financial situation, including income and expenses, and their requirements/objectives;
  - (ii) based on these inquiries, make final assessment about whether credit contract or consumer lease is "not unsuitable" for the consumer; and
  - (iii) if requested by the consumer, give the consumer a written copy of the final assessment.

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- (d) Brighte provides consumers with a credit contract which contain **transparent, easy to understand terms** that are compliant with unfair contract term legislation, and clearly disclose repayment amounts, terms and timing of repayments which is provided to the customer in a payment plan summary. [CIC]
- (e) While any potential transparency issues are **not unique to BNPL products**, Brighte and other reputable providers have committed to providing greater transparency in relation to fees and obligations — for example, Brighte's fortnightly fee is disclosed and fixed, and fees for late payments are clear and capped.
- (f) Brighte is taking further steps to offer greater transparency of its terms and conditions for consumers, including:
  - (i) From 8 October 2018, Brighte **simplified the BrightePay fee structure** to a weekly account fee of \$1, and a late payment fee of \$4.99, which Brighte caps at \$49.90 per calendar year.
  - (ii) Brighte provides consumers with: (a) a credit contract which contains transparent, easy to understand terms and that is **compliant** with unfair contract term legislation, (b) **clearly disclosed** repayment amounts, terms and timing of repayments which is provided to the customer in the Payment Plan Summary, and (c) **clearly and transparently disclosed** fees and charges.

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<sup>10</sup> Australian Security and Investment Commission, Credit licencing: Responsible lending conduct, Regulatory Guide 209, November 2014.

- (iii) Brighte has also provided **more information** on its website regarding the terms and conditions, including calling out key terms in text boxes on the website.

4.2 While Brighte itself may be a responsible provider of BNPL products, it recognises that this may not be true of all BNPL providers. Consequently, we suggest that amendments be made to the draft Consumer Code to address any concerns the ACCC may have regarding consumer protections.

### **CONCLUSION**

4.3 In summary, Brighte's processes in relation to its BNPL product provide consumer protections that exceed existing applicable legislative protections. Brighte submits that the existing Consumer Code could be amended to address any of the ACCC's concerns rather than facilitating a complete boycott of BNPL finance arrangements.

4.4 Brighte is keen to work with the ACCC and the Applicants to identify alternative means to ensuring consumers are protected.