

20 September 2019

By email: adjudication@accc.gov.au

Delia Rickard, Sarah Court, Mick Keogh and Stephen Ridgeway
Commissioners
Australian Competition and Consumer Commission

Dear Commissioners

AA1000439 New Energy Tech Consumer Code Application – responses following pre-decision conference

Consumer Action Law Centre welcomes the opportunity to provide further comments following the pre-decision conference on the AA1000439 New Energy Tech Consumer Code (**The Code**) Application. As in previous submissions we strongly support the proposal to prohibit signatories to The Code offering inappropriate finance arrangements. We also continue to call for The Code to incorporate appropriate protections in relation to unsolicited selling. Including these protections in The Code will address systemic issues and result in a net public benefit from approving The Code.

Our comments are discussed in more detail below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Claims made at the conference

At the pre-decision conference a Brighte representative made comments to the effect that Consumer Action only represents the most vulnerable consumers and that our comments should only be considered on that limited basis. Such a claim fundamentally misunderstands that any consumer can become vulnerable or disadvantaged through a chain of events or change in circumstances. It is necessary to have adequate consumer protections so that all consumers get good outcomes wherever the need arises. Not including the necessary protections will leave all customers of signatories to The Code exposed to potential harm. Where harm is caused it risks eroding all consumers' trust in the new energy technology industry as a whole.

Buy Now Pay Later

At the hearing, there was significant discussion in relation to a drafted amendment to of the provision of The Code that regulates signatories offering deferred payment. We do not support amending the code from what was originally proposed. At the time of the hearing the drafting was as follows (with the change in red):

24b) the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC"), or complies with a regulator approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA.

The industry code being developed for Buy Now Pay Later (**BNPL**) providers that was discussed at the conference cannot be genuinely equivalent to the National Consumer Credit Protection Act (**NCCPA**).

First, it is very unlikely that an industry code could have equivalent resources and penalties for enforcement as is the case for the NCCPA. This is because the NCCPA is enforced by ASIC, a well-resourced government regulator whereas an industry code is unlikely to be equivalently resourced with a clear penalty regime.

Second, issues were also raised by RateSetter at the pre-decision conference about practices of inflating the price of financed goods. As previously submitted to the ACCC, ASIC identified that this is sometimes the case where goods cost over \$2,000.¹ An equivalent code would have to ensure signatories disclosed the cost of finance to consumers. In doing so, this would make such deferred payment fall under the definitions of consumer credit under the National Credit Code (**NCC**) and NCCPA, defeating the purpose of a parallel code as the business would have to comply with the NCCPA. Where this fee is not disclosed as a requirement of the industry code, there will not be equivalence with the NCCPA.

The proposed amendment to The Code therefore poses a risk of inconsistent protections and outcomes between consumers that deal with signatories that use licensed credit providers and those that use BNPL providers. Signatories which arrange finance that complies with the NCCPA and the NCC will be at a disadvantage compared to signatories that arrange unregulated finance. Public detriment will be exacerbated where consumers do not receive information about the difference in protections that apply to different signatories. Consumers would reasonably assume that all signatories abide by the same standard.

RECOMMENDATION 1. Ensure that all deferred payment arrangements offered by code signatories are subject to no less than the NCCPA and NCC consumer protections.

At the pre decision conference Brighte also claimed that interim measures would need to be put in place where The Code was in effect before an equivalent industry code for BNPL was approved and operational. Such interim or transition arrangements would completely undermine the protections in The Code and are therefore unacceptable. There is no guarantee a satisfactory industry code for BNPL would be developed let alone this development being timely. Should the ACCC accept the proposed amendment to The Code then consumers will be exposed to inappropriate finance provision where interim or transition measures are allowed.

RECOMMENDATION 2. Do not allow interim measures where signatories to The Code can offer deferred payment in arrangements that do not meet the NCCPA and NCC.

¹ ASIC, 2018. REP 600 Review of buy now pay later arrangements, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-600-review-of-buy-now-pay-later-arrangements/>

Unsolicited Sales

Throughout this process and at the pre-decision conference we have pointed to how unsolicited sales of new energy technology products are systemic issues that lead to net public detriment.² Further to the discussion at the pre-decision conference, we see it as appropriate that the administrator of the code have the ability to issue mandatory guidance to signatories to not conduct unsolicited sales or to move to 'opt in' or deferred purchase models in order to prevent harm arising from high pressure sales.

We understand that the Applicants may be likely to propose amendments to clauses that will enable the administrator to require signatories to demonstrate that they have auditable processes in place to ensure that high pressure sales do not take place. We support such amendments as this will hold signatories accountable to the higher standards in The Code.

We also understand that the Applicants are likely to propose an amendment to The Code that would prohibit signatories from offering deferred payment arrangements in unsolicited sales. We support such an amendment as it would ensure that the significant harm that has been caused by inappropriate BNPL arrangements being offered in unsolicited sales³ are addressed. This amendment will also 'level the playing field' for competing businesses where one offers NCCPA governed finance providers and therefore cannot conduct unsolicited sales while the other may offer BNPL finance and be able to do so due to current gaps in consumer protections.

RECOMMENDATION 3. Enable The Code administrator to issue mandatory guidance to prohibit signatories from undertaking unsolicited sales or require signatories to undertake a deferred sales method.

RECOMMENDATION 4. Approve any amendments that enable the Administrator to require signatories to demonstrate auditable processes to confirm their compliance with The Code.

RECOMMENDATION 5. Approve amendments that prohibit signatories from offering deferred payment arrangements in unsolicited sales.

Please contact Jake Lilley at Consumer Action Law Centre on [REDACTED] or at [REDACTED] if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

[REDACTED]
Gerard Brody | Chief Executive Officer

² See for instance Consumer Action, 2019. Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria. Available at: <https://consumeraction.org.au/20190404-sunny-side-up-report/>

³ Ibid and Consumer Action, 2017. Knock it off! Door-to-door sales and consumer harm in Victoria, p.68. Available at: <https://consumeraction.org.au/knock-it-off/>