Energy Efficient Finance

18th September 2019

Australian Competition and Consumer Commission
Clean Energy Council & Ors application for authorisation of New Energy Tech Consumer Code [AA1000439]

By email: adjudication@accc.gov.au

Attention: David Wang

New Energy Tech Consumer Code – submission from Energy Efficient Finance Pty Ltd

Introduction and credentials

We are a broker of regulated credit products for new energy technology. Over the past four years, we have assisted over 1,500 customers to purchase $6 million of residential and small business new energy technology.

As responsible providers of credit, all finance facilitated by us and my end-financiers for new energy technology is regulated by the National Consumer Credit Protection Act ("NCCP Act") and the National Credit Code ("NCC"). Our finance offering assist purchasers of new energy technology products to responsibly spread the cost of their purchase over time, and also assists vendors of new energy technology with their cash flow.

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.

We oppose the Applicants' late amendment on three grounds:

1. In our experience, so-called 'interest free' finance is almost always associated with illegal price inflation, which causes significant consumer harm;
2. So-called 'interest free' finance deprives consumers of important protections available under the NCCP Act and the NCC, for which there is no equivalent regulatory regime; 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 our concerns in further detail below.

1. So-called 'interest-free' finance is almost always associated with illegal price inflation, which causes significant consumer harm

Based on our observations over many years of commercial operations, we believe that new energy technology vendors offering so-called 'interest free' finance almost always undertake what we believe is the illegal conduct of inflating the financed prices of goods (that is, charging customers more for

'interest free' finance compared with the cash price of the goods) to pay the merchant fees charged by interest free financiers.

This practice is endemic in our industry, and causes significant consumer harm as:

i. **It is deceptive:** 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;
ii. **It costs more than finance should:** providers such as us who offer products regulated by the NCCP Act can offer finance at significantly lower cost to customers. However, interest free offerings may be preferred by vendors because they do not need to comply with NCCPA protections, meaning greater approval rates (typically to customers who should not be offered credit), and faster approval times (at the expense of proper credit underwriting);
iii. **We believe that it 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 which is as much as 35% over a 5-year period. If there is a charge for providing credit, the credit product becomes 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;
iv. **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 by as much as 35%. 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 other significant purchase or investment;
v. **Vendors' inability to offer a discount for cash**: The customer who is aware of the hidden inflation of interest-free is forced is unable to request a discount on the for goods when using cash (or uses their credit card) which simply provides an additional profit margin of up to 35% to the vendor which would have otherwise been paid as a merchant fee to cover the amount deferred interest to the interest-free provider.
vi. **ACCC Purpose: "Making markets work for consumers, now and in the future" and we understand that the ACCCs employs the following strategies to achieve that purpose:**
    a. **Maintaining and promoting competition;**
    b. **Protecting the interests and safety of consumers, and supporting fair trading in markets affecting consumers and small business.**

    We would contend that allowing a sector of the market to sell a product that has an inbuilt and hidden profit margin of up to 35%, whilst not affording any consumer protections under the NCCP Act is not in the interests of consumers and is at odds with the stated purpose of the ACCC.

Additionally, we disagree with finance to the new energy technology industry being grouped with other buy now pay later ("BNPL") finance offerings. Generally, BNPL arrangements are for goods valued under $1,000 and where the vendor is able to absorb the cost charged by the finance provider as the finance period is 3 or 4 months which typically equates to 1-2% of the cost of the goods, such that there is no material differential in price between a good purchased with cash or purchased under the BNPL arrangement. This is akin to a credit card provider charging a fee which the vendor either

absorbs or passes on. So-called 'interest-free' finance offerings in the new energy technology sector are typically for higher amounts and financed over a longer period of generally five years, such that the cost of finance cannot be fully absorbed by the vendor. Again, these margins are as high as 35% to cover 5 years of deferred interest.

As with most providers of NCCP Act finance products, we have been repeatedly requested to provide so-called 'interest free' finance by vendor partners, as these products may offer us the ability to offer credit more rapidly and to people who do not satisfy the unsuitability assessment we are required to undertake as part of our NCCP Act obligations. However, we have not provided so-called 'interest free' finance, as we believe that it inevitably results in illegal price inflation, breaches of the NCCP Act, and serious consumer harm due to unaffordable credit and lack of relevant protections.

2. So-called 'interest free' finance deprives consumers of important protections available under the NCCP Act and the National Credit Code

In their written submissions, two prominent providers of so-called 'interest free' finance – Brighte and Flexigroup – refer to the ASIC Act and proposed Product Intervention Powers (PIPs) as creating an equivalent regulatory regime to the NCCP Act and the NCC. We believe that this is a regulatory strawman. Although the ASIC Act and PIPs, as well as general consumer law, provide some protections against misleading and deceptive conduct, the facts are clear: there is no regulatory equivalence in any other legislation or regulation for the important protections in the NCCP Act or the NCC that we are required to comply with, including:

i. Transparency of costs and terms via prescribed disclosure documents and standard form loan contracts;
ii. Responsible lending obligations, including the obligation for the finance provider to conduct an unsuitability assessment prior to making an offer of credit;
iii. Mandatory dispute resolution scheme membership;
iv. Important hardship variation requirements;
v. Loan enforcement obligations (including conduct requirements related to collections activity); and
vi. Vendor supervision and oversight requirements.

Further, although the ASIC Act and the PIPs may provide some minimal conduct obligations, unlike the NCCP Act and the NCC they do not seek to address the specific risks to consumers entering into credit contracts, being:

i. Understanding the cost of credit (this additionally has significant competition considerations) and who stands to benefit, and in what respect, from the origination of the credit contract;
ii. Understanding the nature of the repayment obligation and the consequences for failing to repay credit as required;
iii. Entering into a loan that is unsuitable and/or unaffordable; and
iv. Suffering financial and mental harm following the event of hardship or loan default

With regards to vendor conduct obligations, our vendors rely on the 'Point of Sale' exemption (regulation 23 of the NCCP Regulations), which specifies that as an Authorised Credit Representative of an ACL holder we are directly and primarily liable for the conduct of their conduct in relation to the selling of credit. This creates a strong incentive for us to impose adequate supervision and monitoring

on our vendors and their conduct throughout the credit lifecycle. Providers of so-called 'interest free' finance do not incur such an obligation, creating further risk of significant consumer harm.

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

As outlined above, we are required to undertake substantial and complex activities to offer NCCP Act compliant finance products. These activities – and the oversight and monitoring requirements that we are required to maintain to ensure their correct operation – come at a significant cost. These costs are in addition to the potentially significant product features that so-called 'interest-free' finance providers can offer by virtue of not being required to comply with the NCCP Act, including immediate approvals and approvals to people who would not satisfy an unsuitability assessment (and whom we would argue should not be extended credit). The outcome is that lenders that have chosen to comply with the law and offer regulated finance offerings operate at a competitive disadvantage.

Separately, regarding erosion of competition due to the hidden costs of so-called 'interest free' finance, we are also concerned that an anti-competitive situation could emerge in which interest free providers are able to extend significant amounts of credit without undertaking NCCP obligations, whereas providers of NCCP Act regulated credit will be required to follow these obligations. We do not consider, given the potential for consumer harm, 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 (but this cost is hidden), should have no bearing on the obligations the financier must follow before extending credit.

Finally, the implicit rate of interest that so-called 'interest-free' providers charge, when the merchant fee is amortised over a 5-year term, is typically higher than 14% pa. The finance we offer to consumers, inclusive of fees is generally in the order of 9-11% pa. See worked example below using identical goods with a price of $10,000, financed over 5 years:

	Interest free	Interest-bearing	Difference
Price of goods	$ 10,000	$ 10,000	$ -
Merchant fee	$ 3,514	$ -	-$ 3,514
Total price	$ 13,514	$ 10,000	-$ 3,514
Establishment fee	$ 75.00	$ 220.00	
Monthly fees	$ 9.98	$ 3.50	
Repayment	**$ 236.45**	**$ 220.68**	**-$15.77**
Implicit interest rate	**14.7%**	**10.7%**	**-4.0%**

Hence the 'so-called interest free' provider is actually charging relatively high interest rates than true interest-bearing providers and customers would pay $15.77 more per month, or $946 over the 5-year loan term. We understand that the so-called 'interest-free' providers need to charge the higher rates because the lack of credit checks means there are customers being provided finance that arguably

should not and as a result their credit defaults and losses are higher. Hence we have the perverse situation where consumers with good credit subsidise those with poor credit, which we would contend is anti-competitive.

Conclusion

We thank the ACCC for the opportunity to submit. We believe that where there significant, ongoing consumer harm, the ACCC is right to act: to protect consumer welfare, and to promote competition in finance for new energy technology. Given ongoing consumer harm, there is no meaningful deprivation of choice in the unamended draft code. The unamended draft code will significantly improve choice by allowing a fair, apples for apples comparison of new energy tech finance that is currently obscured by hidden charges and unequal obligations on financiers.

Yours sincerely,

James Garrett
Director
Energy Efficient Finance Pty Ltd
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