



Level 2, 789 Toorak Road
Hawthorn East 3123
1300 338 496

12 November 2019

Susie Black
Director - Adjudication
Australian Competition and Consumer Commission
23 Marcus Street
CANBERRA ACT 2601
By email: adjudication@accc.gov.au

Dear Ms Black

Application for authorisation AA1000439 – New Energy Tech Consumer Code – consultation on proposed amendments to draft Code

Payright appreciates the opportunity to provide its comments in relation to the amendments to the draft New Energy Tech Consumer Code (**Code**) proposed by the Clean Energy Council, the Australian Energy Council, the Smart Energy Council and Energy Consumers Australia (together, the **Applicants**) on 25 September 2019, and separately by the ACCC on 22 October 2019.

We support the Australian Finance Industry Association's (**AFIA**) submissions in relation to the proposed amendments, but also wish to respond separately, given the significant impact that the proposed amendments to the Code will have on Payright's business.

As we have indicated in our previous submission, Payright agrees that it is important that consumers who enter into any payment arrangements are adequately protected. Payright also supports the intention of the Code to lift standards in the New Energy Tech sector. However, Payright has significant concerns that the Applicants' and the ACCC's proposals have the effect of excluding certain buy now pay later (**BNPL**) providers that comply fully with their obligations under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) and the National Credit Code (**NCC**).

The proposed amendments to clause 24 of the Code will expressly enable signatories to refuse to offer payment arrangements from providers because they (or a related bodies corporate) do not hold an Australian Credit Licence (**ACL**).¹ However, a number of BNPL providers (including Payright) are not required by law to hold an ACL and, despite significant scrutiny of the BNPL sector, ASIC (as the regulator of consumer credit in Australia) has not recommended extending the NCCP Act to BNPL products.

Accordingly, the Code will enable signatories to exclude Payright and other BNPL providers from the market, even though they comply with the law and all ASIC requirements. This is a poor outcome for consumers, who benefit from being able to choose from a wide range of financing arrangements in a competitive market.

Clause 24 of the Code has been justified on the basis of potential concerns that consumers are being sold unsuitable and unregulated finance arrangements. However, BNPL products are subject to extensive regulation, including ongoing oversight from ASIC. To the extent that there are concerns about consumers

¹ Clause 24 in the initial version of the Code has now been re-numbered as clause 25 in the Applicants' revised version of the Code. For ease of reference, we have continued to refer to this as clause 24 in our submission.



Level 2, 789 Toorak Road
Hawthorn East 3123
1300 338 496

entering into unsuitable finance arrangements, ASIC has recognised that its new product intervention powers are the appropriate and preferred tool (rather than the credit licensing regime) to regulate the BNPL sector.

In addition, Payright's actual experience does not support these apparent concerns. As set out in section 1.4 below, Payright has very low rates of default and complaints amongst its solar financing customers. On this basis, it is far from clear that excluding certain BNPL providers from the market (and providing less choice for consumers) will actually deliver the claimed public benefits. Payright is also a voluntary member of the Australian Financial Complaints Authority (AFCA), which provides an avenue through which consumers can have their complaint externally resolved at no cost to the consumer – and AFCA's determinations are binding on Payright. Accordingly, there is no reason why signatories to the Code should be restricted from working with reputable BNPL providers, if they wish to do so.

The proposed authorisation will also have the effect of overriding ASIC's position on the regulation of BNPL providers, which has been informed by significant and continued engagement with the sector (including with Payright). The authorisation will have broad implications on the BNPL sector, as it will require these providers to obtain an ACL **solely** for the purposes of supplying financing for New Energy Tech, and not for any other products. Accordingly, we are concerned that the proposal will undermine ASIC's efforts to regulate the BNPL sector by creating an inconsistent patchwork of regulation that will inadvertently regulate BNPL providers under the NCCP Act (contrary to ASIC guidance).

On this basis, Payright does not agree with the amendments proposed by the Applicants and the ACCC. Instead, Payright supports imposing an obligation on credit providers (whether they are licensed or not) to subscribe to and maintain continuing compliance with a relevant Code of Conduct or industry code (such as the proposed BNPL Code of Conduct (**BNPL Code**)) that delivers substantively equivalent consumer protections to those contained in the NCCP Act. This includes protections relating to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management. This will ensure that all BNPL providers adopt standards substantially equivalent to those required under the NCC to its business practices.

To the extent that the Applicants and the ACCC have concerns about how the BNPL sector is regulated, it is important that these are considered in more detail. Indeed, ASIC is continuing to monitor issues in this sector. However, Payright does not believe that an ACCC authorisation—which relates to a wide range of conduct, and where the ACCC is subject to strict statutory deadlines—is the appropriate forum for implementing regulation that excludes BNPL providers from the market.

1 Clause 24 will exclude a number of BNPL providers from the New Energy Tech financing sector

1.1 Current regulatory framework for BNPL providers

The NCCP Act does not require Payright to hold an ACL.

Payment arrangements offered by Payright are exempt from the NCC.² As explained in our previous submission, the NCC does not apply to the provision of credit where the only fees charged are upfront or periodic fees that are fixed amounts and which do not vary according to the amount of credit provided, and which are less than amounts prescribed under the *National Consumer Credit Protection Regulations 2010* (Cth) (**NCCP Regulations**).³ This exemption only exists because of a clear legislative decision in the development of the NCCP Act to exclude these arrangements from certain obligations under the NCC.

In recent years, there has been significant governmental and regulatory scrutiny of the BNPL industry – particularly in relation to whether law reform is needed so that BNPL providers are required to obtain an ACL and comply with certain obligations under the NCC. Despite this scrutiny, extensive inquiries undertaken by ASIC and the Senate Economics References Committee have not recommended extending the NCCPA to the BNPL sector.

In particular, ASIC’s review of buy now pay later arrangements (Report 600) in November 2018 did not lead to any finding that BNPL products should be regulated under the NCC. In addition, the Senate Economics References Committee’s February 2019 report into credit and financial services targeted at Australians at risk of financial hardship noted that:

*ASIC argues for the extension of the product intervention power to the buy now pay later sector, rather than bringing the sector into the National Credit Act.*⁴ (emphasis added)

In the context of these very recent reviews, any proposal to extend the NCCP Act to BNPL providers, and override ASIC’s policy position, would be inappropriate without compelling evidence of public detriment.

1.2 The proposed amendments will exclude several BNPL providers from offering services to New Energy Tech customers

We understand that the amendments to clause 24 proposed by the Applicants,⁵ and separately by the ACCC,⁶ will expressly enable signatories to the Code to enter into an agreement to refuse to offer payment arrangements from providers that do not hold an ACL (even if these providers are not required to do so under the NCCP Act).

² National Credit Code, section 6(5).

³ Currently \$200 for the first 12 months of the contract, and \$125 for any subsequent 12 months: NCCP Regulations, regulation 51.

⁴ Senate Economics References Committee, Report into credit and financial services targeted at Australians at risk of financial hardship, 22 February 2019, paragraph 5.35

⁵ Clause 25(a) of the Applicant’s amendments to the Code states that signatories to the Code “will ensure that...this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) licensed under the NCCPA”.

⁶ Clause 24 of the ACCC’s proposal requires the deferred payment arrangement to be offered through a credit provider that is either:

- (i) licensed under the NCCPA and the deferred payment arrangement is regulated by the NCCPA and the NCC; or
- (ii) a licensee or a related body corporate (as defined in s5 of the NCCPA) of a licensee under the NCCPA...

Payright has significant concerns with the impact of this proposal on the ability of consumers to access affordable and transparent financing arrangements offered by BNPL providers. The Code, if authorised, will have the practical effect of excluding several BNPL providers from financing New Energy Tech, in circumstances where these providers are complying with their legal obligations under the NCCP Act.

There are clear public benefits arising from consumers being able to choose from a wide range of financing arrangements in a competitive market. Consumers are increasingly shopping around for alternatives to large banks and traditional credit providers, and are looking towards BNPL providers for affordable and transparent financing arrangements. BNPL providers offer an alternative to consumers who might otherwise seek to obtain higher cost personal loans and credit cards, or draw on equity established against residential property to finance their solar installations. As we discussed in our previous submission, the growth in the number of merchants and customers purchasing solar products using financing from Payright and other BNPL providers illustrates the genuine consumer demand for, and the growing popularity of, BNPL financing arrangements.

Accordingly, the continued presence of BNPL providers in the market will drive competitive outcomes for consumers and, importantly, act as a constraint against higher cost financing arrangements from incumbent financial institutions. However, if the ACCC grants authorisation for clause 24 as proposed by the ACCC or the Applicants, certain BNPL providers will be excluded from offering alternative and innovative financing arrangements to New Energy Tech customers. The reduction in the range of competitive choices available to consumers in the financing of New Energy Tech is a significant public detriment that the ACCC should take into account in its Final Determination. Any move to exclude suppliers (that are supplying their products in accordance with the NCCP Act) also appears to be inconsistent with the ACCC's focus on promoting competition in the financial services sector.

1.3 The proposed amendments appear to contradict ASIC's recommendations in relation to regulating the BNPL sector

As set out in section 1.1 of our submission, there has already been significant work undertaken to understand the appropriate regulatory framework for the BNPL sector. The exclusion of certain BNPL providers does not appear to be necessary from a consumer protection perspective given that ASIC has indicated, **in only January 2019**, that the NCCP Act does not need to be extended to the BNPL sector.

Although clause 24 of the Code is only intended to affect the financing of New Energy Tech, the proposal will have a broad-reaching impact on the BNPL sector. The effect of the authorisation will be that some BNPL providers will be required by the ACCC to hold an ACL **solely** for the purpose of being able to finance New Energy Tech products offered by signatories of the Code (and not for any other product). We are concerned that the proposal will undermine ASIC's efforts to regulate the BNPL sector by creating an inconsistent patchwork of regulation that will inadvertently regulate BNPL providers under the NCCP Act (contrary to ASIC guidance).

Separately, there is also a practical issue that ASIC may not enable exempt credit providers (like Payright) to obtain and maintain an ACL, given that they do not need one for the purposes of the NCCP Act as they do not provide NCC regulated credit products. If this is the case, this would create practical challenges for Payright in complying with the requirements proposed in clause 24 by the Applicant and the ACCC.

Financial regulators have indicated that they are planning to continue to monitor developments in the BNPL sector. In particular, ASIC has indicated that the growth of the BNPL industry will remain an area of

ongoing focus.⁷ Separately, the Senate Economics References Committee recommended that the Government should be responsible for deciding what regulatory framework would be appropriate for the BNPL sector (in consultation with ASIC, consumers and industry).⁸ The Reserve Bank of Australia has also announced that it is intending to review restrictions that are imposed by some BNPL operators on the ability for merchants to apply a surcharge to pass on merchant fees onto their customers.⁹

In contrast to the detailed research undertaken by ASIC into the BNPL industry, the Applicants have only provided a relatively cursory analysis of why they consider that it is necessary to exclude certain BNPL providers simply because they do not—and are not required to—hold an ACL. Accordingly, it is unclear on what basis that the Applicants believe that ASIC’s policy decision should be overridden, or that consumer protection or competition will be protected by excluding new and innovative choices for consumers.

1.4 The BNPL sector is subject to significant regulatory oversight – including ASIC’s new product intervention powers

Clause 24 of the Code has been justified on the basis that there have been concerns that consumers are being sold unsuitable and unregulated finance arrangements. However, far from being unregulated, BNPL products are subject to extensive regulation, including ongoing oversight by ASIC.

In particular, ASIC’s new product intervention powers will enable it to proactively restrict or prevent the supply of a product (or class of products) that has resulted, will result, or is likely to result in a significant detriment to consumers (even if there has not been any breach of the law). These powers have been extended to apply to the BNPL sector (which was supported by the Senate Economics References Committee), and ASIC has expressly indicated that these powers are the appropriate and preferred tool (rather than the credit licensing regime) to regulate the BNPL sector. Accordingly, any consumer protection concerns associated with the supply of BNPL products to New Energy Tech customers would be more appropriately dealt with through ASIC’s express product intervention powers, rather than permitting the Applicants to indirectly regulate certain BNPL providers through the Code.

In addition, the BNPL sector will be subject to ASIC’s new design and distribution obligations, which will require BNPL providers to determine the consumer target market for its products, and take reasonable steps to distribute its products consistently with this determination. These obligations will further mitigate the risk of potential consumer detriment.

Finance arrangements supplied by the BNPL sector will continue to be regulated under the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*, which expressly prohibits misleading or deceptive conduct, false or misleading representations, unconscionable conduct, unfair contract terms, bait advertising, referral selling and harassment. As the regulator of consumer credit in Australia, ASIC will continue to monitor the BNPL sector for compliance with their obligations under the ASIC Act.

We note that codes of conduct have traditionally been implemented to ensure that signatories comply with a standard of conduct that is higher than that required at law (in order to, for example, lift standards in a particular industry). However, it is unusual—in the context of an ACCC application for authorisation—that the

⁷ ASIC, Report 600 *Review of buy now pay later arrangements*, November 2018, paragraph 73.

⁸ Senate Economics References Committee, Report into credit and financial services targeted at Australians at risk of financial hardship, 22 February 2019, paragraph 1.65 (*Recommendation 9*).

⁹ Reserve Bank of Australia, Payment System Board Annual Report 2019, page 33.

ACCC is purportedly seeking to achieve this by requiring *voluntary* signatories to the Code to *compulsorily* exclude certain finance providers that are not themselves signatories to the Code (and are complying with their obligations under law).

1.5 The authorisation will exclude certain BNPLs in the absence of consumer protection concerns

The Applicants appear to suggest that the exclusion of certain BNPL providers is justified on the basis that some consumers have been harmed by unsuitable finance arrangements where they were not afforded adequate protections under the NCCP Act.¹⁰ A number of submissions made in support of the Code, including those made by some of our competitors (who hold an ACL, and seek to benefit from excluding certain BNPL providers from the market), have noted these concerns.

However, the consumer protection concerns raised in submissions to the ACCC do not reflect Payright's actual experience, and—in Payright's view—are largely anecdotal. On this basis, the compliance obligation that the Code would impose on BNPL providers would be disproportionately burdensome relative to the consumer risk that has actually been identified.

[REDACTED]

These very low rates of hardship and disputes amongst Payright's solar financing customers do not support the concerns that customers are being sold unsuitable finance arrangements – and do not justify the conclusion that excluding certain BNPL providers from the market will actually result in the claimed public benefits. Accordingly, the public benefits that have been alleged in some submissions (including in submissions by Payright's competitors) should be tested and scrutinised, given the significant public detriments to consumers arising from excluding certain BNPL providers from the market.

Despite being exempt from the requirement to hold an ACL, Payright is committed to applying standards substantially equivalent to the NCC. In our previous submission, we provided extensive information about how we ensure that we provide customers with clear and transparent disclosure documentation, adopt suitable responsible lending practices, and enable customers to access clear, fair and appropriate internal and external dispute resolution.

Importantly, consumers who have complaints about Payright can have these externally resolved (at no cost to the consumer) by AFCA. AFCA is an external dispute resolution scheme that independently assists consumers and small businesses to make and resolve complaints about financial institutions in the most fair, effective and efficient way possible. In reviewing any complaint, AFCA will consider what is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, good industry practice, and its previous determinations. AFCA's determinations are binding on Payright.

To the extent that the ACCC believes that there are concerns with the BNPL sector more broadly (and that additional regulation is required), we would welcome engagement with the ACCC, in conjunction with our continued engagement with ASIC and AFCA. However, given the broader ramifications on the BNPL industry, it is particularly concerning that the authorisation (if granted) will have the effect of overriding the outcomes of the broader and more in-depth inquiries undertaken by ASIC and the Senate Economics References Committee, and the ongoing work that ASIC is undertaking in the BNPL sector. Having regard to the matters

¹⁰ Submission by the Clean Energy Council, 6 September 2019, page 1.

set out above, it is unclear why the Applicants consider that an application for authorisation is the appropriate forum to ventilate these complex issues. This is especially the case given that the ACCC (who is subject to a statutory deadline) has been given limited time to meaningfully assess the broad reaching effects of excluding certain BNPL providers from the market.

1.6 The amendments proposed give the Code Administrator significant discretion

Payright has concerns about the role of the Code Administrator in the revised version of clause 24 proposed by both the Applicants and the ACCC. In both proposals, the amendments will have the effect of substituting the judgement of ASIC with that of the Code Administrator. It appears unlikely to us that the Code Administrator will be adequately equipped to determine whether certain policies, or the proposed BNPL Code, will contain “*substantially equivalent consumer protections*” as the NCCP Act and the NCC. Indeed, the Applicants acknowledge in their application that the Code Administrator “*itself will not be specialist in consumer finance*”.¹¹

Given the Applicants’ ongoing view that certain BNPL providers should be excluded from the market (despite complying with requirements under the NCCP Act and other financial services laws), Payright has significant concerns about the broad discretion that the Code Administrator will hold in deciding whether or not a credit provider should be permitted to offer financing arrangements to customers of New Energy Tech.

1.7 Payright’s proposed amendments to clause 24 of the proposed Code

Payright agrees with the Applicants that the BNPL Code, which is currently being developed, is an important step towards ensuring that BNPL providers implement policies and procedures that deliver substantially similar consumer protections to those contained in the NCCPA. This includes protections relating to up-front assessment of the consumer’s financial circumstances, dispute resolution and financial hardship management. Even though Payright is exempt from holding an ACL, it is already committed to applying standards substantially equivalent to those required under the NCC. It is anticipated that the BNPL Code will be finalised in 2020, and it is expected that Payright will be a signatory. Further information about the proposed BNPL Code is included in AFIA’s submission.

However, Payright disagrees with several elements of the Applicants’ proposal. In particular, as discussed in this submission, if a credit provider complies with the BNPL Code, Payright does not consider that it is necessary for the provider to also hold an ACL in order to finance customers of New Energy Tech. Payright also has concerns with the role of the Code Administrator in verifying the BNPL Code.

In addition, it is not expected that the BNPL Code will receive ASIC approval (as discussed in AFIA’s submission), as there are concerns that ASIC approval may delay its implementation. However, it is intended that the BNPL Code will be finalised so that it meets ASIC’s expectations (as outlined in Regulatory Guide 183), and ASIC, consumer advocates (including the Consumer Action Law Centre and the Financial Rights Legal Centre) and New Energy Tech industry bodies will be consulted in the development of the BNPL Code. The objective of this is to enable these key external stakeholders to provide insights to shape the final form of the BNPL Code, so that it is finalised at the earliest possible time, for the benefit of BNPL customers.

¹¹ The Applicants, Application for ACCC Authorisation for Proposed Conduct – New Energy Tech Consumer Code, April 2019, page 11.

Payright considers that the consumer protection concerns raised by the Applicants and the ACCC will be adequately addressed by removing subsections 25(a) and (b) in the Applicants' revised version of the Code, and replacing it as follows:

25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n.)), we will ensure that:

a) the deferred payment arrangement is:

- (i) regulated by the NCCPA and the National Credit Code ("NCC"); or*
- (ii) offered by a credit provider, whether licensed under the NCCPA or not, that subscribes to and maintains continuing compliance with a relevant Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA relating to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management.*

Payright believes that this proposal will ensure that consumers will directly benefit from substantially similar protections to those available for NCC regulated finance contracts, without the disproportionate administrative burden associated with obtaining an ACL solely for the purposes of providing financing for New Energy Tech. It will also not exclude from the market a range of finance providers that comply with all applicable laws and provide greater choice for customers.

Payright believes that its proposed amendments to clause 24 would address all of the ACCC's concerns. The ACCC noted that the Applicants' proposal created uncertainty as to what specific consumer protections would be agreed to. The drafting that we have proposed expressly states that the Code of Conduct or industry code requires protections in relation to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management. The proposed Code Compliance Committee of the BNPL Code will be responsible for ensuring that BNPL providers have sufficiently adopted these protections before they are able to become a Code Compliant Member.

We also consider that the ACCC's concerns about the timing for the implementation of the BNPL Code have been resolved, given that it is expected that it will be finalised in 2020.

2 Payright does not support the proposed addition of clause 3(d)

We note that there are currently existing protections in place for consumers exposed to unsolicited sales under the Australian Consumer Law, and it is unclear why this provision is necessary. In Payright's view, the Applicants should identify the particular behaviours or practices that, in their view, create a risk of consumer detriment that is not sufficiently managed under the existing Australian Consumer Law. This will enable Payright (and other BNPL providers) to provide more meaningful feedback to address these specific concerns.

Accordingly, without further information, Payright proposes that this clause should be removed.



Level 2, 789 Toorak Road
Hawthorn East 3123
1300 338 496

In the event that the ACCC is minded retain this, we recommend amending clause 3(d) so that it is consistent with our proposed amendments to clause 24:

d) make no unsolicited offers of payment arrangements that are:

(i) not regulated by the National Consumer Credit Protection Act 2009 (Cth) ("NCCPA"); and

(ii) not offered by a credit provider that subscribes to and maintains continuing compliance with a relevant Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA relating to an up-front assessment of the consumer's financial circumstances, dispute resolution and financial hardship management.

3 Next steps

Payright considers that reputable BNPL providers should not be excluded from working with signatories to the Code, if they wish to do so. There is no sound reason for limiting the ability of consumers to choose from a wide range of financing arrangements in a competitive market by excluding BNPL providers that do not have an ACL (but which comply with all requirements of Australia's financial services regulator) from the market. The current proposals are particularly concerning given that, if authorisation is granted, it will have the effect of overriding ASIC's position on regulating BNPL providers.

We appreciate that the ACCC is subject to a statutory deadline. However, given the potential consequences of the proposed amendments to clause 24, the development of a sensible Code that addresses the impact on consumer choice is a critical issue for Payright's business and requires careful consideration. Accordingly, we would be very happy to engage with the ACCC in order to address any of its concerns.

Payright would be pleased to assist the ACCC with any questions it may have about the impact that the proposed amendments to clause 24 of the Code on the BNPL sector. Please contact me on [REDACTED] or by email [REDACTED] should you have any further questions or require any additional information.

Yours sincerely,

[REDACTED]

Saara Mistry

General Counsel

