



Our ref: AA1000439
Contact officer: Kaitlin Hanrahan
Contact phone: (03) 9290 1917

23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
tel: (02) 6243 1111

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adjudication@acc.gov.au
www.acc.gov.au

By email

Dear Madam/Sir

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

Following the pre-decision conference of 9 September 2019, the Australian Competition and Consumer Commission (the **ACCC**) is continuing its assessment including whether any amendments should be made in respect of certain clauses within the New Energy Tech Consumer Code (the **Code**), prior to making its final determination. The ACCC invites you to comment on its proposed amendments to the Code, which are based on submissions and further information received from interested parties, as well as the proposed amendments made by the Applicants.

Applicants' proposed amendments to the Code

Following the pre-decision conference, the Applicants have provided a further amended version of the Code on 25 September 2019, including:

- Amendment of Clause 24 – Payment and Finance
- Amendment of Clause 2¹ – Unsolicited Sales
- Addition of an appeal mechanism for applicants who are denied membership of the Code.

A copy of the Applicants' proposed amendments is available on the ACCC's website www.acc.gov.au/AuthorisationsRegister.

The Applicants' proposed amendments to Clause 24 (which we note has become Clause 25 in the amended version of the Code) would effectively allow "buy-now-pay-later" (**BNPL**) providers to provide finance in conjunction with signatory retailers if the BNPL provider is a signatory to a regulator approved BNPL industry code that delivers substantively equivalent consumer protections as required under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**).

Alternative proposed amendment to Clause 24

The ACCC's preliminary assessment of the Applicants' proposed amendments is that the current formulation would not provide sufficient certainty and clarity to BNPL providers, signatory retailers or consumers as to what specific consumer protections were required

¹ We note that the clause numbers referred to here are the clause numbers for the Code at draft determination; these clause numbers have changed in the Applicant's amended version of the Code to Clauses 25 and 3 respectively.

under the Code. In addition, there is uncertainty regarding the timing of development and approval of an industry code.

The ACCC has formulated an alternative version of Clause 24, based on information and submissions received following the pre-decision conference and during the course of the ACCC's assessment of this application for authorisation. The ACCC considers that adopting a version of Clause 24 that more explicitly outlines the consumer protections that BNPL providers would be required to provide would give greater clarity and certainty to BNPL providers, signatory retailers and consumers, and would also address any issue of delay that would arise before a BNPL industry code is developed and then considered and approved by ASIC, if it was ultimately approved.

This alternative proposed version of Clause 24 is found at **Attachment A** to this letter.

Request for submissions

The ACCC invites you to make a submission on the proposed amendments outlined at Attachment A. The ACCC also invites any submissions on the amendments as proposed by the Applicants.

If you intend to provide a submission in response to this letter, please do so by **8 November 2019**. Submissions should be emailed to adjudication@acc.gov.au with the subject 'AA1000439 – NETCC – submission'.

Submissions will be placed on the ACCC's public register subject to any request for exclusion.

Timetable

The ACCC's statutory deadline for its final decision is 6 December 2019. In order to provide feedback, please provide any submissions by 8 November 2019. Receiving submissions after this date may affect the ACCC's ability to fully consider them as part of its final assessment.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Kaitlin Hanrahan on (03) 9290 1917 or adjudication@acc.gov.au.

Yours sincerely



Susie Black
Director
Adjudication

Attachment A – Alternative proposed amendments to Clause 24 of the NETCC

24. 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 2.m)), we will ensure that:

- (a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that is either:
- (i) ~~licenced under the National Consumer Credit Protection Act (2009) (Cth) (“NCCPA”)~~NCCPA and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code (“NCC”;
or
 - (ii) a licensee or a related body corporate (as defined in s5 of the NCCPA) of a licensee under the NCCPA and the deferred payment arrangement is exempt from the NCC and:
 - (A) the Code Administrator has determined that the credit provider has policies that require the credit provider to:
 - (I) resolve any complaints you may have using an internal dispute resolution process and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
 - (II) have processes to identify whether you are experiencing payment difficulties due to hardship
 - (III) offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
 - (IV) comply with the following sections of the NCCPA as if the credit provider was a licensee and the credit contract was regulated by the NCCPA and the NCC:
 - s 128 (obligation to assess unsuitability)
 - s 129 (assessment of unsuitability)
 - s 130 (reasonable inquiries about the consumer)
 - s 131 (when the credit contract must be assessed as unsuitable)
 - s 132 (giving the consumer the assessment) and

- s 133 (prohibition on entering, or increasing the credit limit of, unsuitable credit contracts)

- (b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system
- (c) ~~ensure that~~ you receive the following clear and accurate information:
 - (i) the name of the ~~licensed~~ credit provider to whom you will be contracted for the arrangement
 - (ii) a clear statement that the deferred payment arrangement is a voluntary finance option
 - (iii) the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
 - (iv) the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from the NCC, the credit provider's fees and charges, including any merchant fees.
 - (v) whether at the conclusion of the deferred payment arrangement
 - (A) you own any elements of the New Energy Tech, or
 - (B) you have any entitlement to any ongoing services or pricing, and/or
 - (C) you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and
 - (vi) a statement that questions and complaints about the payment arrangement should be directed to the ~~licensed~~ credit provider with whom you will be contracted.