

6 September 2019

Ms Susie Black
Director – Coordination and Strategy
Merger & Adjudication Review Division
Level 17 Casselden Place
2 Lonsdale Street, Melbourne 3000

Sent by email to: Theo.Kelly@acc.gov.au

Dear Ms Black

New Energy Tech Consumer Code - AA1000439

The Behind The Meter Working group (the BTMWG), on behalf of the Applicants, has considered the issues raised by the submissions following the ACCC's draft determination on 1 August 2019 to approve the New Energy Tech Consumer Code (NETCC).

We consider there are three key issues that require attention.

1. Clause 24 – Payment and finance
2. Clause 4 – Unsolicited sales
3. Overall level of detail in the Code

Pending views raised at the Pre-Decision Conference, to be held on Monday 9 September 2019, the BTM Working group intends to propose incremental changes to the drafting of Clause 24 and Clause 4.

Clause 24 – Payment and Finance

A number of submissions raised concerns with clause 24(b), which stakeholders considered excluded the ability for signatories to utilise the services of Buy Now Pay Later finance providers. This clause was developed initially following strong representations by Consumer Advocates that unregulated finance products were causing significant detriment to consumers, due to the lack of adequate protections regarding responsible lending, dispute resolution, and hardship. The BTMWG agreed with these concerns, as well as views raised by some stakeholders about competitive neutrality issues created by a requirement for some products to comply with the National Consumer Credit Protection Act (NCCPA), and others not to.

That being said, we understand the concerns of BNPL providers that as BNPL products are exempt from the NCCPA requirements, they would be excluded from the NETCC by type. This wasn't the intent of the BTM WG, rather that consumers received adequate protections when entering finance arrangements with signatories. We understand BNPL providers are intending to develop a code of conduct that, once in place, would provide substantively similar protections to consumers to the NCCPA. The BTMWG support this approach, and as such propose an additional line be included into clause 24(b):

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 BTMWG welcomes comment from stakeholders regarding this approach.

Clause 4 – Unsolicited sales

A number of submissions raised concerns with the lack of prescription in clause 4, particularly with regard to unsolicited sales. Additionally, stakeholders suggested that unsolicited sales for significant purchases such as New Energy Tech was inappropriate, or unnecessary. The BTM WG agrees that unsolicited sales in this context have the potential to cause consumer detriment if not undertaken responsibly. That being said, we are concerned that making a substantial change to the code at this stage of proceedings is inappropriate and might cause concerns with industry. We strongly consider the NETCC should be delivered with a ‘no surprises’ principle.

To ensure that the NETCC continues to deliver good consumer outcomes, the BTMWG intends to include additional drafting in clause 4 requiring the code administrator, once appointed, to publish technical guidance highlighting the concerns regarding unsolicited sales, and to provide additional clarity to signatories regarding the expectations of the NETCC in delivering good customer outcomes. If necessary, the Administrator will be empowered to make mandatory guidelines if it is found that post implementation, consumer detriment is established.

Overall level of the Code

A number of submissions noted that the drafting of the NETCC was too high level, and should be more prescriptive to provide greater certainty to signatories and consumers. The BTM WG notes this issue, however highlights that in order to deliver a code that is technology agnostic and future proof, a principle based approach was necessary. The Code itself is intended to be underpinned by more specific technical guidance, developed by the administrator in consultation with industry. This will be prioritised following appointment of the administrator. Highlighting the relative infancy of some technologies intended to be captured by the NETCC, technical guidelines are intended to be iterative, and only published if there is sufficient agreement between industry and consumer advocates as to what constitutes best practice.

The BTM WG welcomes further views from stakeholders on each of the above matters, and looks forward to finalising and implementing the NETCC in the near future.

Yours sincerely



Kane Thornton
Chief Executive
Sent on behalf of the Applicants