

8 November 2019

BY EMAIL

Australian Competition and Consumer Commission
23 Marcus Street
CANBERRA ACT 2601

Attn: Susie Black

By email: adjudication@acc.gov.au

Dear Ms Black

RE: AA1000439 – New Energy Tech Consumer Code – RateSetter Submission

RateSetter Australia RE Limited (**RateSetter**) is pleased to make a further submission in relation to the proposed New Energy Tech Consumer Code (**NETCC**) and specifically on the alternative proposed amendment to Clause 24 of the NETCC as published by the ACCC on 22 October 2019 (**ACCC amendments**). This submission is to be read in conjunction with our submission to the ACCC in relation to the NETCC dated 23 August 2019 and 4 October 2019. References to clauses in this submission are to the clauses in the ACCC amendments unless indicated.

We thank the ACCC for its detailed consideration of RateSetter's submissions throughout the consultation process and in particular concerns raised regarding harms to consumers from so-called "interest-free" finance. The ACCC amendments will deliver important consumer protections in relation to deferred payment arrangements while helping boost competition and improve the standing of the new energy technology industry in the eyes of consumers.

RateSetter makes several further submissions relating to the ACCC amendments to help ensure that the code provides meaningful protection against opaque and misleading price inflation and that the code has sufficient clarity and certainty such that the terms of the NETCC will be adhered to by Code Signatories.

Measures to prevent opaque and misleading price inflation

As noted in previous submissions, RateSetter considers that one of the greatest harms suffered by consumers in relation to so-called "interest free" finance is that the cost of credit (charged to the vendor in the form of a 'merchant fee') is often passed on to consumers through inflating the price of goods above the 'cash' price. Consumers are frequently unaware of this inflation and are thereby misled into thinking that 'interest-free' finance has no impact to the cost of their new energy technology system.

RateSetter supports the ACCC amendments in clause 24 and in particular those provisions which require clear disclosure of the fees or costs relating to credit not regulated by the National Credit Code (**NCC**), including any merchant fee charged by a financier to a vendor. However, RateSetter considers that as drafted, the clauses may not provide sufficiently clear or prominent disclosure such that consumers are aware of these costs and are able to make a fair comparison with other finance offerings.

a) Disclosure of the cost of credit – clause 24(c)(iv)

In respect of finance not regulated by the NCC, clause 24(c)(iv) has the effect that Code Signatories are required to provide "clear and accurate information [...] [of] the credit provider's fees and charges" However, the current drafting does not specify the manner, form or timing of this disclosure.

RateSetter submits that to ensure the code is sufficiently clear and certain, the specific requirements relating to the manner, form and timing of disclosure in relation to non-NCC regulated finance are included in the code. Setting out these requirements will ensure that consumers are provided fee and cost information in a timely manner and in a form that is easily understood and allows for comparison to other finance offerings (whether NCC-regulated or not).

To achieve this, RateSetter suggests that the wording of clause 24(c)(iv) be amended as follows:

- (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, with such information to be provided at the same time, with the same prominence and in the same form as would be required if the credit contract was regulated by the NCCPA and the NCC, including (without limitation) providing the consumer with a 'pre-contractual disclosure' document prior to the consumer entering into a loan contract.

Further, fee and cost information provided to consumers should be in a form that allows for direct comparison between NCC and non-NCC regulated loans. As such, RateSetter supports a further amendment to the code to require that non-NCC regulated finance arrangements describe fees and charges in the same manner as is required under the NCC (and related regulations), and in particular as set out in regulations 28E(3)-(5) of the National Consumer Credit Protection Regulations 2010.

The code should also clarify that for non-NCC regulated loans, where a fee (including a merchant fee) is unascertainable at the time of disclosure, that a reasonable estimate of the maximum amount of the fee is disclosed.

b) *Definition of 'merchant fee'*

To ensure that the calculation of merchant fees under clause 24(c)(iv) are consistent between financiers, and that non-NCC financiers do not seek to use alternative fee or commission structures to avoid the application of this clause, RateSetter submits that the code should include a clear definition of merchant fee. This definition should be broad enough to cover all types of fee that a financier may charge a vendor to recover finance costs, or which are likely to be passed on to consumers through price inflation.

RateSetter proposes the following definition:

Merchant fee means: the total amount paid or expected to be paid by a Code Signatory (or their related party) to a financier (or their related party) in relation to a deferred payment agreement, whether by way of direct payment or setoff, and whether expressed as a flat fee, percentage of financed amount, margin or share of revenue or profit, and regardless of whether the payment of any amount is conditional on some other event (including the effluxion of time). For the avoidance of doubt, any periodic fee paid by a Code Signatory to a financier (or their related parties) that is determined by reference to the volume or number of deferred payment agreements entered into by consumers in any prior period, is considered to be a merchant fee.

c) *Advertising disclosures - clause 2(m)*

RateSetter supports the requirement in clause 2(m) (clause 3(m) in the Applicants' draft code of 25 September 2019) that "advertisements or promotional material [...] will be clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price [...]".

However, to ensure consistency of application of this clause and to assist consumers in comparing NCC and non-NCC regulated finance, further details should be set out in the code as to the content and form of costs disclosure in advertising.

Specifically, clause 2 should specifically require that where an advertisement refers to the cost of any deferred payment agreement (including but not limited to the use of the words “interest free” or “0% interest” or “no interest to pay”) or states a periodic repayment figure:

- a) Where the advertised deferred payment arrangement is regulated under the NCC, meet the advertising requirements under Parts 9 and 10 of the NCC; or
- b) Where the advertised deferred payment arrangement is not regulated under the NCC prominently disclose:
 - a. That the vendor will pay a merchant fee in respect of the new energy technology system advertised; and
 - b. The maximum amount of the merchant fee payable by the vendor in respect of the advertised system, and percentage that amount bears to the price of the system advertised (assuming that deferred payment agreement is for a term of 3 years, if the term is not otherwise stated).

Enforcement of the code

As drafted, the NETCC places the responsibility for compliance with the code with Code Signatories (as supervised by the Administrator), with no separate enforcement or supervision regime for the financiers in their own right.

RateSetter understands that the NETCC is not intended or designed to be a comprehensive regulatory regime in relation to so-called “interest free” finance (and other non-NCC regulated finance), however, as drafted, the lack of enforcement mechanisms that apply directly to financiers may create significant moral hazard, whereby non-compliant financiers are able to transfer responsibility for compliance with the NETCC to vendors via contractual arrangements. This stands in stark contrast to financiers regulated under the NCCPA, whose obligations under the NETCC are in the most part the same as those under the NCCPA and are therefore regulated and enforced by ASIC under the terms of that act.

We would encourage the ACCC to explore further enforcement mechanisms to ensure financiers are held directly accountable for their conduct in relation to NETCC signatories. This may include issuing industry guidance that nominates certain breaches of the NETCC, where they are known of, encouraged or facilitated by financiers as constituting misleading and deceptive conduct, capable of remedy under the Australian Consumer Law (**ACL**) (or similar provisions in the ASIC Act). Similarly, the ACCC should consider and provide commentary on whether non-compliance with an industry code such as the NETCC may create liability for a financier under the linked-credit provider liability regime in the ACL and the ASIC Act.

RateSetter again thanks the ACCC for their consideration of the matters raised in this and previous submissions. If you would like to discuss any comments made in this submission, please contact me on [REDACTED].

Yours truly



Ben Milsom
Director
RateSetter Australia RE Limited