

07 November 2019

By email: adjudication@accg.gov.au

Delia Rickard, Sarah Court, Mick Keogh and Stephen Ridgeway
Commissioners
Australian Competition and Consumer Commission

Dear Commissioners

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

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *AA1000439 – New Energy Tech Consumer Code—consultation on proposed amendments to draft Code (Proposed Amendments)*. Consumer Action has regularly assisted Victorian households to overcome issues with inappropriate finance arrangements in the provision of new energy technology. Our strong preference remains that the ACCC approve the initial code proposal which would require signatories to the New Energy Tech Consumer Code (**NETCC**) to only offer deferred payment through credit providers that are licensed under the National Consumer Credit Protection Act (**NCCPA**) and the National Credit Code (**NCC**). These licensed providers must comply with robust consumer protection requirements, face appropriate consequences for not complying and these protections include well-structured access to dispute resolution for households.

However, the proposed amendments to clause 24 of the NETCC (**Proposed Amendments**) from the ACCC have taken a convoluted path as they require only select clauses from the NCCPA to apply to unregulated finance providers. While this approach may improve protections and outcomes for customers of code signatories, it also presents a number of challenges. Firstly, the clauses are very limited when compared to of the complete legislation and regulation that provide protections to consumers in the NCCPA and NCC. Secondly, this approach places significant strain on the NETCC Code Administrator who will have very limited enforcement powers to ensure compliance with finance issues, let alone assessing which financial providers meet the specified requirements when their expertise should instead be focused on new energy technology.

We explain these comments in more detail below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy

work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Further amendments needed to improve protections

If the ACCC continues to pursue amendments from the initial application, the Proposed Amendments should be strengthened. Consumer Action supports the specific clauses of the NCCPA that have been selected by the ACCC, but the proposals relating to dispute resolution and hardship are too open ended. It is important that the ACCC acknowledge that these arrangements are less than ideal, and that it would be better if Buy Now Pay Later (BNPL) were regulated by the NCCPA and subject to civil and criminal penalties. The inconsistent enforcement regimes that apply to deferred finance providers under the NETCC in the Proposed Amendments may give some providers an unfair competitive advantage. This may also lead to harm to households where there is less risk for some providers associated with non-compliance with consumer protections.

Responsible lending

The Proposed Amendments clearly define responsible lending requirements from the NCCPA that non-licensed deferred payment providers would need to comply with. We support these requirements. Without appropriate lending checks consumers can face significant hardship because they can rapidly find themselves in debt as they are signed up to repayments on new energy technology, such as solar, which they don't need or cannot afford. Our initial submission to the NETCC application for approval¹ and our *Sunny Side Up* report have case studies demonstrating specific consequences Victorian households have faced as a result.

Many new energy technologies are almost exclusively installed in owner-occupier homes as tenants are generally unable to modify dwellings to accommodate installation. The behaviour of finance providers which do not undertake adequate responsible lending checks and loans for such technology can be seen as predatory. This is because these providers could be confident that in most situations where a household is unable to pay, they would ultimately have equity in a home which can be collected against. People should not be at risk of losing their home because they have been the victim of irresponsible lending .

We also consider that proposed clause 3(d) of the NETCC on promotion of finance offerings should also be expanded to capture off premises or non-standard business premises sales in order to provide equivalent protections to the NCCPA. This proposed amendment is currently drafted as follows:

*"[In particular, our advertisements and promotional material will:] make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act (2009)(Cth) ("NCCPA")"*²

Sections 115-120 and 123-124B of the NCCPA contain requirements on parties offering credit assistance or suggesting credit products to hold licenses and complete appropriate checks about the appropriateness of products. If applied to all finance arrangements covered under the NETCC these sections may directly capture vendors of new energy technology.³ While there are exemptions for vendors promoting finance at point of sale, these exemptions do not extend to unsolicited sales or sales in non-standard business premises or off premises sales in places like shopping centres or in a customer's home. This recognises the need to protect households from

¹ Consumer Action, 2019. [Submission Re: AA1000439 New Energy Tech Consumer Code](#)

² Applicants, 2019. [AA1000439 – New Energy Tech Consumer Code – Amended Code – 25.09.19](#), P.5

³ See [RG203](#) pages 18 & 19 for an explanation of credit assistance and suggesting. This regulatory guide makes clear that it is fine to only refer to a finance provider, rather than suggest or provide credit assistance (which is regulated).

pressure to enter into finance arrangements in uninvited or unusual situations or in scenarios where a sales person is incentivised to make a sale.

A case study in Consumer Action's 2016 *Power Transformed* report demonstrates a problematic sale at a non-standard business premises.⁴ We consider that inconsistent requirements on parties involved in facilitating deferred payment arrangements can lead to households being at risk of losing their home. While we view the case study as an unsolicited sale, others have argued that the Australian Consumer Law is vague as to whether an invitation for a quote means a resulting transaction is an unsolicited sale. Expanding this amended clause in the NETCC would ensure that such scenarios are captured. Doing so will ensure that there are consistent protections and consistent regulatory impacts on competing new energy technology providers who offer deferred payments through finance providers that are or are not regulated under the NCCPA.

We would also support this clause being moved to, or referenced, in the 'Payment and finance' clause of the code as this is likely to improve comprehension and recognition of all the requirements that specifically relate to finance arrangements.

RECOMMENDATION 1. Expand the clause which prohibits unsolicited offers of deferred payment that is not licensed under the NCCPA to also cover promotions during off-premises or non-standard business premises sales.

General conduct, competence and training and internal dispute resolution

We support the Proposed Amendments that would require deferred payment arrangement providers to be members of the Australian Financial Complaints Authority (AFCA) scheme. This is a concise requirement that delivers free access to effective dispute resolution when this is required for households. However, the ACCC should expand the Proposed Amendments by applying more clauses of the NCCPA so that AFCA has clear information about requirements that providers should have met where a dispute arises.

To give clear information, the Proposed Amendments should be expanded so that deferred payment providers not licensed under the NCCPA be required to comply with the following clauses and subclauses in Section 47 (1) of the NCCPA:

"47 (1) A licensee must:

- (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and*
- (f) maintain the competence to engage in the credit activities authorised by the licence; and*
- (g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and*
- (h) have an internal dispute resolution procedure that:*
 - (i) complies with standards and requirements made or approved by ASIC in accordance with the regulations;*
 - and*

⁴ Consumer Action, 2016. [Power Transformed: Unlocking effective competition and trust in the transforming energy market](#), p, 22.

(ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and"

The general clause (a) gives a high-level requirement about the conduct that households should be able to expect from deferred payment finance providers. Including this requirement being in the NETCC will give households the ability to resolve a dispute at AFCA where they can rely on this requirement to challenge harm caused by poor business practices that are not fair, honest or efficient.

Requiring a provider to comply with clauses (f) and (g), as though they were licensed under the NCCPA, would mean providers must meet competency and training standards. The Australian Security and Investments Commission (ASIC) Regulatory Guideline 206 Credit licensing: Competence and training provides further detail. Clear standards and guidelines will help ensure providers meet the expectations of households and act as good conduct standards that can be applied by AFCA in dispute resolution.

The Proposed Amendment only requires that deferred payment arrangement providers that are not licensed under the NCCPA have an internal dispute resolution process. Without requiring providers to comply with specific standards for their internal dispute resolution processes, the Proposed Amendments may be too vague. Requiring providers to comply with clause (h) will allow consideration of ASIC Regulatory Guideline 165 Licensing: Internal and external dispute resolution. This would result in households receiving the same standard, whether they use a deferred payment arrangement providers or a licensed credit provider.

RECOMMENDATION 2. If deciding to continue the Proposed Amendments, the ACCC must further define general conduct, competence and training and internal dispute resolution protections by applying more clauses of the NCCPA and NCC.

Hardship assistance

The Proposed Amendments rightly require deferred payment arrangement providers to have processes to identify payment difficulties and offer assistance in such circumstances. However, the high-level drafting of the Proposed Amendments could lead to very inconsistent processes and assistance between providers for consumers who need consistent minimum standards. The ACCC should therefore expand the Proposed Amendments to include a requirement that all providers comply with section 72 of the NCC as though they were licensed under the NCCPA.

Section 72 of the NCC defines consistent timelines that must be met by providers in responding to a request for hardship assistance. The section also ensures that households are notified of the availability of AFCA as a complaint forum where assistance is denied by a provider. Almost any household can experience financial hardship, and often households invest in new energy technology to lower electricity costs but may find themselves unable to keep up with finance payments for these technologies. Defining timelines about companies' responses to requests for assistance and a right to be made aware of rights to dispute the rejection of such assistance are necessary. Such requirements will ensure that there are consistent protections across all forms of finance, whether ASIC-regulated or not.

RECOMMENDATION 3. If deciding to continue the Proposed Amendments, the ACCC should incorporate hardship protections in section 72 of the NCC.

Future arrangements

If the ACCC continues with the Proposed Amendments, as opposed to our preference for code signatories to be prohibited from using unregulated credit providers, then we encourage there being a review period about the

effectiveness of the regime. These Proposed Amendments should have a sunset clause that requires a review at 12-months after implementation.

The Proposed Amendments place a burden on the NETCC Code Administrator to approve and ensure compliance with finance protections. This may be a challenge for the Code Administrator given it is likely to be a body with expertise on the sale of new energy technology, not finance offerings. The Code Administrator is also unlikely to have the resourcing to ensure there are consistent standards applying to deferred payment arrangement providers that are not licensed under the NCCPA. By comparison, for licensed providers, this role is undertaken by ASIC which is a well-resourced government funded regulator with significant powers such as legislated civil and criminal penalty amounts for breaches.

Ideally, buy now pay later providers will be brought into the NCCPA so as to ensure consistent and appropriate consumer protections. Previous amendments proposed by the applicants suggested another approach where complying with a regulator approved industry code that was equivalent to NCCPA protections be a requirement for providing deferred payment arrangements. However, this approach is still flawed given no such code exists. Moreover, a self-regulatory approach is highly unlikely to be able to meet the standards of regulation due to much more limited compliance and enforcement mechanisms. Decision makers must instead work towards closing the loophole that allows finance providers not to be licenced under the NCCPA.

RECOMMENDATION 4. If deciding to continue the Proposed Amendments, the ACCC must add a sunset clause that requires a review of the Proposed Amendments at 12-months after the implementation.

Please contact Jake Lilley at **Consumer Action Law Centre** on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer