

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 30/12/2019 11:28 AM AEST and has been accepted for lodgment under the Interim Practice Direction dated 8 May 2015. Filing details follow and important additional information about these are set out below.

**Lodgment and Details**

Document Lodged: Additional documents

File Number: ACT1 of 2019

File Title: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code and the determination made by the ACCC on 5 December 2019

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

DEPUTY REGISTRAR

Dated: 30/12/19 at 11:28 AM AEST

**Important information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Interim Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



# Determination

Application for authorisation AA1000439

lodged by

Australian Energy Council (AEC), Clean Energy Council (CEC), Smart Energy Council (SEC) and Energy Consumers Australia (ECA) (together **the Applicants**)

in respect of

the New Energy Tech Consumer Code

Authorisation number: AA1000439

Commissioners: Sims

Keogh

Rickard

Cifuentes

Court

## Summary

The ACCC has decided to grant conditional authorisation to the Applicants and future signatories to the proposed New Energy Tech Consumer Code (the Consumer Code).

Following extensive consultation, the ACCC considers there would be a net public benefit from the Consumer Code but has decided to grant authorisation subject to conditions to enable the public benefits to be fully realised and to mitigate against likely public detriments. These conditions are in relation to:

- the requirements that “buy now pay later” (BNPL) finance providers must meet in order to provide finance under the Consumer Code
- the prohibition in the Consumer Code on BNPL finance being offered in unsolicited sales of New Energy Tech products
- reporting to the ACCC on the operation of the Consumer Code.

The ACCC considers that with these conditions, the Consumer Code strikes an appropriate balance in providing high standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code and ensuring those public benefits are more fully realised, without imposing unduly burdensome obligations that would ultimately restrict consumer choice and result in greater public detriment than would arise without the conditions.

The conditions are intended to ensure the Consumer Code prohibition on BNPL in unsolicited sales operates as intended and therefore achieves the associated consumer protection benefits. The reporting conditions will also enable the ACCC, and the Applicants, to assess the effectiveness of the Consumer Code, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements.

**The ACCC grants conditional authorisation until 31 December 2024.**

On 30 April, the Applicants lodged an application for authorisation in respect of the New Energy Tech Consumer Code (the **Consumer Code**). The Consumer Code sets minimum standards that suppliers of ‘New Energy Tech’ products (e.g. solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers, including from initial marketing and promotion through to installation and complaints handling. The Consumer Code operates alongside a range of existing legal and regulatory protections.

The ACCC undertook extensive consultation to ensure the final version of the Consumer Code would enable the public benefits to be fully realised and to mitigate against likely public detriments. This involved multiple rounds of consultation and interested party discussion at a pre-decision conference. Key issues raised by interested parties related to the treatment of “buy now pay later” (BNPL) finance arrangements, administration of the Code, and the need for additional consumer protections, including in relation to unsolicited sales of New Energy Tech products.

Under the initial version of the Consumer Code, which the ACCC considered in its draft determination, signatories were entirely prohibited from offering deferred payment arrangements that are exempt from and/or not regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and National Credit Code (**NCC**) (i.e. BNPL products). During the course of this consultation, the Applicants have provided a number of versions of the Consumer Code in response to interested party feedback, including

amendments to allow New Energy Tech suppliers to offer deferred payment arrangements from BNPL providers in certain circumstances. The ACCC considers that there would be a likely public detriment from excluding all BNPL finance entirely as some customers value these products.

The ACCC considers there would also be a likely public detriment from a loss of consumer choice of finance options available for customers purchasing New Energy Tech under the Applicants' final version of the Consumer Code. This is because it proposed, amongst other things, to require that a BNPL provider (or its parent company) must hold an Australian Credit Licence in order to provide finance under the Consumer Code. Some BNPL providers would meet this criterion because they also offer regulated credit products. However other BNPL providers would not be able to obtain a credit licence because they do not offer regulated credit products. This requirement would therefore effectively exclude some BNPL providers. In addition, the ACCC understands that holding a credit licence does not impose any obligations relating to the offer of a BNPL product.

The condition the ACCC imposed removes some of the requirements that BNPL providers have to meet in order to be approved to provide finance under the Consumer Code where this would unnecessarily exclude BNPL providers (such as having to hold a credit licence). Other consumer protection requirements have been strengthened, e.g. in relation to the BNPL providers' internal dispute resolution procedures. This condition reduces the extent of the likely detriment from a loss of consumer choice, by ensuring that BNPL providers are not unnecessarily excluded. It is also intended to ensure the likely public benefits from increased consumer protections are achieved by requiring BNPL providers to meet specified standards designed to protect consumers from entering into finance arrangements that they cannot afford.

Based on information received by the ACCC in the course of consultation, the ACCC has decided to grant authorisation subject to the following conditions:

- retailers can offer BNPL payment arrangements offered by BNPL providers that meet certain minimum requirements, as outlined in the version of clause 25 of the Consumer Code at Attachment A to this Determination,
- signatories must not offer customers BNPL products if the sale of the New Energy Tech product is unsolicited, and
- the Code Administrator provides to the ACCC regular reports on the operation of the Consumer Code, for publishing on the ACCC's public register.

The ACCC considers that with these conditions, the Consumer Code strikes an appropriate balance of providing high standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code and ensuring those public benefits are more fully realised, without imposing unduly burdensome obligations that would ultimately restrict consumer choice and result in greater public detriment than would arise without the conditions.

The ACCC considers that the public benefits under the authorised Consumer Code stem from higher standards of protection for consumers in their dealings with New Energy Tech vendors and finance providers; the loss of consumer choice is likely only to the extent that BNPL finance providers decide not to offer finance for New Energy Tech products because it would not be commercially viable to comply with the consumer protections required under the amended Consumer Code.

The ACCC further notes that the reporting condition will enable the Applicants to assess whether the Consumer Code is operating as envisioned, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements.

It will also assist the ACCC in assessing the effectiveness of a transition to a relevant industry code for BNPL providers. In the event that the Applicants seek re-authorisation for the Consumer Code, the data from this condition would form part of the ACCC's assessment.

The ACCC has decided to grant authorisation for five years, until 31 December 2024.

## 1. The application for authorisation

- 1.1. On 30 April 2019, the Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **Applicants**) lodged an application for authorisation with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for the provisions in the proposed New Energy Tech Consumer Code (the **Consumer Code**) for five years.<sup>1</sup>
- 1.2. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

### The Applicants

- 1.3. The Applicants are:
  - a) **AEC** – is an industry body representing 23 electricity and downstream natural gas businesses operating in wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.
  - b) **CEC** – is a not-for-profit, membership-based organisation and peak body for the clean energy industry in Australia. The CEC represents, and works with, over 600 businesses operating in or supporting the development of renewable energy (such as solar, wind, hydro, bioenergy, geothermal and marine) and energy storage, along with more than 4000 solar installers. The CEC currently administers the Solar PV Retailer Code of Conduct (**Solar Code**) and an Accreditation scheme for solar PV installers.
  - c) **SEC** – is a not-for-profit peak body for the solar, storage and smart energy industries in Australia. The SEC has been previously known as the Australian Solar Energy Society and the Australian Solar Council, and has been involved in advancing solar energy since 1954. Its membership comprises individual, small and medium businesses as well as many Australian and international companies or organisations as corporate members. It encompasses installers, sales people, engineers, scientists, recruiters, managers and financiers, and some individual consumers; all of whom are in some way involved in the smart energy industry.
  - d) **ECA** – is a national voice for residential and small business energy consumers. Established by the Council by Australian Governments (**COAG**) Energy Council in 2015, its objective is to promote the long-term interests of consumers with respect to price, quality, reliability, safety and security of supply.

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<sup>1</sup> This application for authorisation AA1000439 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

## The Proposed Conduct

- 1.4. The Applicants are seeking authorisation, on behalf of themselves and future signatories to the Consumer Code, to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:
- a) according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience<sup>2</sup>
  - b) for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and
  - c) requiring signatories to only offer deferred payment arrangements<sup>3</sup> that are regulated under the NCCPA and the NCC, and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.

(the **Proposed Conduct**). A copy of the Consumer Code is at **Attachment B**.

- 1.5. The Applicants have identified the following sections of the *Competition and Consumer Act 2010* (Cth) (the **Act**) as relevant to their application:
- cartel conduct (s. 45AD) – the Consumer Code provides for powers to enforce the Consumer Code and suspend or expel signatory members<sup>4</sup>
  - contracts, arrangements or understandings that restrict dealings or affect competition, including concerted practices (s. 45) – in many cases signatories will be competitors with each other and are agreeing to undertake consistent business practices
  - misuse of market power (s. 46) – for some nascent New Energy Tech products and services such as Virtual Power Plant services, it is possible that at least initially, there may be one or a small number of dominant suppliers which will be a signatory to the Consumer Code
  - exclusive dealing (s. 47) – the Consumer Code includes requirements for signatories in relation to the offer of deferred payment arrangements.

## 2. Background

### New Energy Tech products and services

- 2.1. New Energy Tech, as defined for the purposes of the Consumer Code, includes products, systems and services that:

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<sup>2</sup> See for example, the commitments outlined in paragraph 4.7 below.

<sup>3</sup> A 'deferred payment arrangement' under the Consumer Code is a reference to an alternative method of payment to upfront payment upon delivery or installation. The conditions on the offer of a deferred payment arrangement apply when offered to a residential consumer and this arrangement includes an interest component, additional fees or involves an increased purchase price.

<sup>4</sup> Application for ACCC Authorisation - New Energy Tech Consumer Code (April 2019), Attachment B – Draft for ACCC – New Energy Tech Consumer Code, Annexure – Code Administration, Section 24 & 26.

- a) are small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution energy networks or as distributed energy resources connected to an energy network
  - b) are services that support or are closely related to those products or systems
  - c) monitor or manage a customer's usage of energy whether on or off an energy network, and
  - d) the Consumer Code Administrator is satisfied sit appropriately within the Consumer Code, future flexibility and innovation permitting.
- 2.2. The definition under the Consumer Code is not intended to include simple, low cost or off-the-shelf New Energy Tech, such as might be purchased from a whitegoods or hardware store for self-installation.
- 2.3. Examples of New Energy Tech include:
- distributed energy resources connected to an energy network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
  - a microgrid
  - energy management products, systems and services including batteries and other energy storage methods
  - programs aimed at stabilising the supply of energy including those that incentivise or restrict power consumption during critical peak periods
  - a power purchase agreement<sup>5</sup>
  - person to person energy trading systems and services
  - electric vehicle charging services, and
  - associated repair, maintenance or removal services for New Energy Tech products and systems.

## Background to the New Energy Tech Consumer Code

- 2.4. In August 2017, the COAG Energy Council wrote to industry and ECA respectively, requesting that:
- a) industry associations (namely, the AEC, CEC, SEC and Energy Networks Australia) collaborate with the ECA to develop an industry code for behind-the-meter (**BTM**) products and services<sup>6</sup>, and
  - b) ECA develop a range of consumer information products on consumer rights and responsibilities for BTM products and services (the **Consumer Information Products**).
- 2.5. Representatives from other consumer advocacy organisations (the Consumer Action Law Centre (**CALC**), RENEW (previously the Alternative Technology Association) and

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<sup>5</sup> A power purchase agreement can refer to any agreement between a power generator (vendor) and a purchaser(s) for the sale and supply of energy. In more recent times it has been used to refer to arrangements involving the sale of electricity generated from renewable energy such solar panels (eg. a business may form an agreement with a homeowner, whereby the business will install solar panels on the homeowner's roof and sell that electricity to the homeowner).

<sup>6</sup> New Energy Tech products and services are commonly also referred to in the industry as BTM products and services.

the Public Interest Advocacy Centre (**PIAC**)) – joined with the industry associations and ECA to progress this work through the formation of the BTM Working Group.

- 2.6. Since October 2017, the BTM Working Group has met regularly to progress the development of the draft Consumer Code and the Consumer Information Products.
- 2.7. In November 2018, a draft Consumer Code was released for stakeholder consultation and was amended following feedback before being the subject of this application for authorisation.

### **Previous related authorisations**

- 2.8. The ACCC re-authorised the revised Solar Code for five years in 2015.<sup>7</sup>
- 2.9. The CEC currently administers the Solar Code, which requires signatory retailers to meet certain best practice standards that enhance consumer protection. The Solar Code also requires signatories to use installers accredited by the CEC.
- 2.10. Under the Small-Scale Renewable Energy Scheme administered by the Clean Energy Regulator (a government body), installers of solar systems are now required to be a signatory to the Solar Code and accredited by the CEC in order to be eligible to obtain small-scale technology certificates (**STCs**) for installations. STCs have value and can be bought and sold through the open STC market or the STC clearing house.
- 2.11. The Applicants consider current signatories of the Solar Code are likely to transfer to the Consumer Code, if it is authorised by the ACCC.

### **Buy Now Pay Later finance**

- 2.12. “Buy Now Pay Later” (**BNPL**) finance arrangements are commonly used by customers to purchase New Energy Tech products, particularly solar panels.
- 2.13. BNPL is a broad category of finance products that allow customers to purchase a product on the spot but pay for it at a later date, generally in fortnightly repayments over a set time period.<sup>8</sup> BNPL customers may also be charged an upfront fee, periodic fixed fees and/or fees for missed payments.
- 2.14. BNPL providers will usually charge the merchant (e.g. the solar retailer) a fee for this service, and typically have agreements with the merchant that the fee must not be passed on to customers, such that the service is free for consumers. The ACCC understands from submissions made during this authorisation process, that this fee is sometimes passed on to customers (but this is not disclosed) such that the cost of using BNPL is inflated compared to if the customer bought the New Energy Tech product outright or used an alternative finance arrangement.
- 2.15. The majority of BNPL products are exempt from or not regulated by the NCCPA and NCC and BNPL providers are not required to be licensed under the NCCPA in order to offer BNPL products. In addition to the limit on fees, another exemption under which BNPL products operate is that the provider only charges an upfront or periodic fee that is fixed and does not vary depending on the amount of credit provided.

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<sup>7</sup> For further information, please see: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/clean-energy-council-limited-revocation-and-substitution-a91495-a91496>

<sup>8</sup> The ACCC notes the ASIC 600 report on BNPL finance which noted that, given the diversity of the BNPL industry, the term applies to a wide array of businesses offering a variety of loan amounts, terms and business models. The ACCC has adopted the term BNPL consistent with the way the term was used by ASIC in its Report.



- 2.16. As a result of these exemptions, BNPL providers are not required to comply with the requirements of the NCCPA, including those that are aimed at protecting consumers from unsuitable finance products. These requirements include, but are not limited to, specific product information disclosures, responsible lending assessments, access to dispute resolution and hardship arrangements.
- 2.17. However, some BNPL providers offer similar consumer protections and features to those required by the NCCPA and NCC on a voluntary basis.
- 2.18. BNPL products are regulated by Australian Securities and Investments Commission (**ASIC**) under various provisions, including the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) (such as a prohibition on undue coercion and harassment in connection with the supply of a BNPL product and a prohibition on misleading and deceptive conduct), and ASIC's product intervention powers (**PIP**) and upcoming design and distribution obligations (**DDO**).
- 2.19. On 28 November 2018 ASIC released its 'REP 600 Review of buy now pay later arrangements' (**ASIC Report**). In its Report, ASIC stated that it will continue to monitor the BNPL industry, including to determine if BNPL providers should be subject to further regulation. Other relevant findings are discussed in the assessment below.

### 3. Consultation and amendments to the Code

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments arising from the Consumer Code. The ACCC has conducted four rounds of consultation and held a pre-decision conference to discuss the draft determination: initial consultation on the application; consultation on the ACCC's draft determination; consultation in response to the ACCC's pre-decision conference; and consultation on the ACCC's proposed amendments to the Code.
- 3.2. As part of this consultation process the ACCC invited submissions from a range of potentially interested parties including energy companies, New Energy Tech providers, consumer advocacy and representative groups, BNPL providers, finance providers regulated under the NCCPA and NCC, and relevant regulatory bodies.<sup>9</sup>
- 3.3. The ACCC received over 50 submissions from interested parties in relation to the application and seven submissions from the Applicants. The Applicants also provided amended versions of the Consumer Code on 6 September 2019 and on 25 September 2019 and the final amended version of the Consumer Code on 11 November 2019. The 25 September version of the code made the following changes in response to issues raised during the ACCC's consultation process, the first three of which carried through unchanged in the final version of the Consumer Code:
  - a requirement that signatories have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers,
  - a prohibition on advertising unsolicited offers of finance arrangements not regulated by the NCCPA. The Applicants also proposed that signatories should not be able to offer finance products during unsolicited sales, unless they hold a credit licence (see paragraph 4.12);

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<sup>9</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- a right of appeal to the Code Monitoring and Compliance Panel (the **Panel**) in circumstances where an applicant is refused admittance or renewal as a signatory, and
- allowing deferred payment arrangements that are not regulated by the NCCPA and NCC to be offered by signatory retailers if the relevant credit provider holds a credit licence and complies with a regulator approved code of conduct that delivers substantively equivalent consumer protections to those contained in the NCCPA.

3.4. Broadly, the issues raised in submissions by interested parties fell into the following categories:

- General support for the Consumer Code* – the majority of submissions were in support of the intention of the Consumer Code, in improving business standards across the industry and increasing consumer protections.
- Effective administration of the Consumer Code* – a number of submissions raised concerns regarding the ability of the Consumer Code to be effective and deliver the intended outcomes, particularly if the CEC was appointed as the Code Administrator. This view appears to be based on previous experience with the CEC’s administration of the Solar Code. In addition, submissions referenced a lack of specificity in the requirements under the Consumer Code and a lack of an appeals mechanism for decisions made by the Code Administrator as concerns with the original drafting of the Consumer Code. Submissions were generally satisfied with the addition of an appeal mechanism for administrator decisions.
- Finance product offerings* – the ACCC received a large number of submissions relating to the offering of finance products in conjunction with New Energy Tech products. The original drafting of the Consumer Code included a commitment in relation to the offer of deferred payment arrangements, the effect of which was that signatory retailers would not be able to offer finance products not regulated by the NCCPA and NCC (i.e. BNPL products) for purchases of New Energy Tech products. Submissions were received both in support of, and opposition to, the original drafting of the code. The inclusion of BNPL arrangements was a key point of discussion at the pre-decision conference.<sup>10</sup>

Further submissions were received both in support of, and in opposition to, the 25 September version of the code. Submissions in support referenced increased consumer choice, leading to greater access to New Energy Tech products, as a benefit of the amended code. Opposing submissions raised a number of concerns with BNPL products including a lack of consumer protections around responsible lending and effective dispute resolution, which often results in customers experiencing hardship.

Submissions also raised concerns that finance products that must comply with the NCCPA and NCC are operating at a competitive disadvantage to BNPL products not regulated by the NCCPA and NCC. These parties submit that solar retailers pass on to customers the merchant fees charged by the BNPL providers, which amounts to a fee for the provision of credit, and that this means that these providers should be captured by the NCCPA and NCC. Interested parties submit that the passing on of these costs results in price inflation and customers being unable to make an informed comparison between finance options because these costs are not disclosed, and further note that customers

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<sup>10</sup> A summary of discussion, and a full list of the attendees, of the pre-decision conference can be found at the ACCC’s public register.

may not ask for a comparison because it is quicker and easier to obtain approval for finance products not regulated by the NCCPA and NCC.

- d) *Consumer protections around unsolicited and high pressure sales* – a number of submissions were received in relation to other consumer protections, aside from those in relation to the lack of consumer protections attached to BNPL finance products. Submissions from CALC raised concerns with unsolicited sales and high pressure sales tactics. Some submissions called for the Consumer Code to ban all unsolicited sales. These submissions pointed to a provision of the National Consumer Credit Protection Regulations which requires retailers offering at the point of sale finance products which are regulated by the NCCPA and NCC to hold an Australian Credit Licence to offer such finance if the sale is unsolicited.<sup>11</sup> As BNPL products are not captured by the NCCPA and NCC, there is no equivalent provision requiring retailers to hold a credit licence to offer BNPL finance in an unsolicited sale. Interested parties raised concerns that this disparity creates an incentive and, in many instances, the ability for retailers to only offer BNPL finance in unsolicited sales for New Energy Tech purchases.

Submissions from CALC following the 6 September 2019 code amendment were generally supportive of the banning of deferred payment arrangements being offered in an unsolicited sale as set out in clause 3 of the Consumer Code (“Advertising and Promotion”). Other submissions were received opposing the prohibition on BNPL being offered in unsolicited sales with some interested parties noting that unsolicited sales are lawful, provided the retailer complies with obligations under Australian Consumer Law. Some submissions called for further amendments to clause 3 of the Consumer Code that would allow unsolicited offers of unregulated finance products to be made by credit providers who subscribe to a code of conduct or industry code that delivers the same protections as those contained in the NCCPA.

- e) *Voluntary nature of the Code* – the ACCC received multiple submissions reiterating the importance of the voluntary nature of the code. Submissions raised concerns with instances of state government rebate schemes only offering rebates for installations performed by signatories to a relevant code. Some parties submitted that the relationship between government rebate schemes and relevant industry codes undermines the voluntary nature of the code and forces parties to become signatories to remain in business.

3.5. Based on information received during consultation and after consideration of the Applicants’ code amendments, the ACCC proposed and consulted on an alternative version to clause 25, “Payment and Finance” relating to the offer of deferred payment arrangements (see Box 1 below).

#### **Box 1: The ACCC’s amendments to the clause 25**

Following the pre-decision conference, and subsequent consultation, the Applicants proposed to amend clause 25 of the Consumer Code<sup>12</sup> so that BNPL finance arrangements could be offered under the Consumer Code if the BNPL provider is signatory to a “regulator approved code of conduct that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections” as contained in the NCCPA.

<sup>11</sup> National Consumer Credit Protection Regulations 2010, 23 and 23(4) : <https://www.legislation.gov.au/Details/F2019C00090>

<sup>12</sup> The ACCC notes that this is the clause number as at the time of final version in the Consumer Code; the majority of clause numbers have changed following amendments to the Code.

The ACCC considered that this formulation of clause 25 would not provide sufficient certainty to finance providers, vendors or customers, and lacked certainty regarding the timing of implementing such a code of conduct, which would need to be developed and approved.

The ACCC prepared and consulted on an alternative version of this clause which would allow finance providers who are not regulated by the NCCPA and NCC to offer finance under the Consumer Code if the Code Administrator has determined that the finance provider has policies and processes in place that require it to comply with specific obligations contained in the NCCPA and NCC and meet a prescribed level of protections for customers.

These protections included requirements for effective dispute resolution, hardship policies, and specific clauses of the NCCPA relating to responsible lending.

## Consultation on ACCC's proposed alternative clauses under the Code

- 3.6. The ACCC received eight submissions in response to its proposed alternative amendment relating to the offer of deferred payment arrangements, including a further amended version of the Consumer Code from the applicants on 11 November 2019 (see Box 2 below).
- 3.7. Submissions were received from both licensed and unlicensed credit providers, consumer groups and financial industry associations. Some submissions supported the proposed amendment and others did not. Some interested parties also proposed additional or alternative amendments. The key issues raised in submissions were:
- (a) whether BNPL providers (or the relevant parent company) should be required to hold a credit licence in order to allow vendors to offer finance products from those providers under the Consumer Code
  - (b) whether being a signatory to an industry code of conduct is an appropriate mechanism to enforce consumer protections for BNPL providers
  - (c) whether 'adherence to' or alternatively 'substantial compliance with' the NCCPA would achieve the desired consumer protections
  - (d) whether the Code Administrator would have the necessary expertise to assess BNPL providers' procedures and processes to determine if they provide substantial equivalence with the requirements of the NCCPA
  - (e) whether unsolicited sales methods should be restricted based on whether or not a signatory retailer holds a credit licence, and
  - (f) other consumer protection obligations to improve the effectiveness of the Consumer Code, including the extent of disclosure requirements,<sup>13</sup> and hardship and dispute resolution processes.<sup>14</sup>
- 3.8. A number of these issues are discussed further in the 'Conditions' section from 4.54. This section outlines the conditions the ACCC has arrived at and the relevant submissions and issues that informed those conditions.

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<sup>13</sup> Submissions suggested that this disclosure requirement was contrary to the intent of the NCC, which was to provide consumers with transparent information on the fees that they are required to pay, not the relationship between merchant and credit provider. Ratesetter submitted that this disclosure requirement should go further to specify the manner, form and timing of disclosure.

<sup>14</sup> CALC identified hardship protections contained in section 72 of the NCC that could develop consumer protections in the Consumer Code. The Australian Financial Complaints Authority (AFCA) supported both the general formulation of the Consumer Code as well as the protections and principles it contained, however suggested that the requirements contained in ASIC's regulatory guideline RG 165 on internal and external dispute resolution may be used to develop dispute resolution processes of Consumer Code signatories: RG 165 Licensing: Internal and external dispute resolution.

## **Box 2: The Applicants' final submission and final proposed code**

On 11 November, the Applicants provided a response to the ACCC's consultation on proposed amendments to the Consumer Code. In their response, the Applicants stated that they agree with the intent of the ACCC's proposed drafting of clause 25 of the Consumer Code, and are comfortable with the proposal to include reference to specific sections of the NCCPA.

However, the Applicants expressed their concern about the burden of requiring the Code Administrator to determine whether a BNPL provider meets the prescribed consumer protection standards. The Applicants submitted that the most efficient mechanism for ensuring the consumer protections standards are met is through the implementation of a robust and enforceable industry code.

To address concerns regarding the timing of implementation of any such industry code, the Applicants submitted that the "Payment and Finance" clause as proposed by the ACCC remain in place as a transitional measure for a period of 12 months. The Applicants submitted that at the end of this transitional period, only BNPL providers who are signatory to an industry code that delivers a specified level of consumer protections would be able to supply finance under the Consumer Code. The Applicants also proposed to retain the credit licensing requirement.

3.9. Public submissions made by the Applicants and interested parties, including all versions of the Consumer Code, are available on the Public Register for this matter.

## **4. ACCC assessment**

4.1. The ACCC's assessment of the Consumer Code is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The Applicants have sought authorisation for the Proposed Conduct that would or might involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of sections 45 and 46 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

4.3. In making its assessment of the Consumer Code, the ACCC considered:

- the application and submissions received from interested parties and the Applicants
- submissions made at the pre-decision conference
- other relevant information available to the ACCC, including the current regulatory landscape applicable to New Energy Tech finance arrangements.
- the relevant areas of competition likely to be affected by the implementation of the Consumer Code, which are the supply of:
  - different types of New Energy Tech products and services, and
  - financial products, including particularly deferred payment arrangements, offered with New Energy Tech products and services

- that without the Consumer Code vendors of New Energy Tech products and services will continue to be subject to relevant laws and regulations in their dealings with consumers. Without the Consumer Code, the Solar Code will continue to apply to signatories to that code who supply solar PV products and services, until September 2020 (unless it is re-authorised by the ACCC for a longer period before the current authorisation expires).

4.4. The ACCC's assessment is undertaken on the basis of the final version of the Consumer Code (submitted by the Applicants on 11 November 2019). A copy of this version of the Consumer Code is at Attachment B to this Determination.

## Public benefits

4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>15</sup>

4.6. The ACCC has considered the following public benefits:

- reduced information asymmetry and enhanced consumer ability to make informed choices that better suit their needs
- increased consumer protections arising from key commitments by signatories beyond what is currently explicitly required by the law, and
- increased consumer protections from the requirement that finance arrangements meet certain regulatory obligations and standards.

### **Reduced information asymmetry and enhanced consumer ability to make informed choices that better suit their needs**

4.7. The ACCC considers that adoption of the Consumer Code is likely to result in better informed consumers, due to the various commitments agreed to by signatories. These include:

- a) Commitments to take positive actions with respect to advertising and promotion, including:
  - i. using language that is accessible and that avoids industry jargon (clause 3. e))
  - ii. ensuring that any claims relating to performance or energy cost savings are reasonably based and where available, based on reputable sources (clause 3. h))
  - iii. advertising the total price as prominently as any component price (clause 3. i))

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<sup>15</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- iv. ensuring that any disclaimers are clearly outlined and not buried in small print (clause 3. k))
  - v. be clear about any additional cost for finance or an alternative purchasing arrangement when the cost is being recovered in the overall price (clause 3. n))
- b) Commitments to educate consumers of their rights when undertaking direct marketing, including:
- i. advising consumers they can ask the sales person to leave or end the contact at any time (clause 4. a))
  - ii. provide the Consumer Information Product that explains the consumer protection framework (clause 4. f))
  - iii. avoiding high-pressure sales tactics (clause 6)
- c) Commitments to provide detailed information disclosures, including:
- i. an itemised list of the New Energy Tech being supplied (clause 9. b))
  - ii. information about how the New Energy Tech operates and how to operate it (clauses 9. c), d) and e))
  - iii. a site specific design plan and performance estimate for the New Energy Tech (clause 17. a))
  - iv. explanations of how to operate and maintain the New Energy Tech (clause 37)
- 4.8. The submissions received from interested parties support the benefits of the Consumer Code in improving consumers' understanding of New Energy Tech products and services and their consumer protection rights. In particular, CALC and Uniting Vic. Tas. made submissions regarding the complexity of energy markets, and how difficult, confusing and risky it was for many consumers to make decisions about their energy supply.
- 4.9. Clause 25 (Payment and Finance) of the Consumer Code requires signatories to ensure that in offering finance to customers, the credit provider (which includes BNPL providers where these arrangements are permitted under the Consumer Code), discloses all fees attached to the provision of credit. This will allow customers to more effectively compare not only New Energy Tech products but also whether the relevant finance arrangements used to purchase the New Energy Tech suits their needs, further reducing information asymmetry in the purchase of New Energy Tech products.
- 4.10. The ACCC accepts that for complex products such as New Energy Tech, the initiatives and commitments under the Consumer Code requiring additional information disclosures are likely to result in public benefits. Where consumers are able to make better and more informed purchasing decisions about the products or services that best meet their needs there may also be some efficiency improvements.

**Increased consumer protections from key commitments by signatories beyond what is currently explicitly required by the law**

- 4.11. The ACCC considers that adoption of the Consumer Code is likely to result in greater consumer protections, as a result of the commitments adopted by signatories that are

beyond those currently explicitly required under current consumer protection laws. These include:

- a) taking extra care if the signatory becomes aware that the consumer may be facing vulnerable circumstances (clause 5)
- b) making product or service ‘fit-for-purpose inquiries’, including:
  - i. asking about the potential consumer’s specific circumstances, needs and expectations (clause 7. a))
  - ii. ensuring that any offer of New Energy Tech is fit for purpose in light of the consumer’s needs and expectations and recording a brief description of the consumer’s circumstances, needs and expectations in quotes and contracts (clause 7. c))
- c) providing site-specific installation designs or plans and site-specific performance estimates (clause 17)
- d) facilitating any activation required for the use of products or services (clause 33)
- e) taking responsibility for sales agents, representatives, installers, subcontractors etc. to ensure the accuracy of information provided and safety of installations (clause 58-60), and
- f) improving complaints handling processes (clause 54).

4.12. The original drafting of the Consumer Code attracted submissions from interested parties calling for stronger consumer protections, in particular by banning all unsolicited sales. The final version of the Consumer Code addresses these concerns to some extent by prohibiting signatory retailers from making unsolicited offers of payment arrangements that are not regulated by the NCCPA (i.e. BNPL arrangements) in advertisements and promotional material (clause 3. d)). The Applicants’ intended effect of clause 3. d) is that any finance arrangement offered by a signatory to the Consumer Code in an unsolicited sale of New Energy Tech will be regulated by the NCCPA,<sup>16</sup> which is designed to protect consumers from unsuitable finance arrangements. As noted at 3.4(d) of this determination, under the National Consumer Credit Protection Regulations,<sup>17</sup> retailers are required to hold an Australian Credit Licence to offer finance products regulated by the NCCPA and NCC in connection with unsolicited sales. The Applicants are concerned that if signatories are permitted to offer BNPL products in unsolicited sales, they are not likely to offer finance arrangements regulated by the NCCPA in unsolicited sales due to the requirement to hold a credit licence. The Applicants submit that this would be an unacceptable outcome that should be avoided. As explained at 4.66 below, the ACCC considers it necessary to impose a condition to help ensure that this intended effect of clause 3. d) is implemented in practice. These provisions were briefly explored at paragraph 3.4.

4.13. The ACCC considers that these commitments by signatories under the Consumer Code are likely to result in public benefits by providing protections that extend beyond what is currently required by the law to reduce the likelihood and degree of consumer harm that can arise from the kinds of practices sought to be addressed by these provisions.

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<sup>16</sup> See [Applicants to ACCC re amended code](#), 25 September 2019, and [Applicants to ACCC correcting error in correspondence](#), 9 October 2019.

<sup>17</sup> National Consumer Credit Protection Regulations, 23 and 23(4) : <https://www.legislation.gov.au/Details/F2019C00090>



## **Increased consumer protections from the requirement that finance arrangements meet certain regulatory obligations and standards**

- 4.14. In its draft determination, the ACCC recognised that by requiring finance arrangements to be regulated by the NCCPA and NCC, the original drafting of the Consumer Code meant that consumers would benefit from consumer protections and reduced harm that would be caused by entering into unsuitable and/or unregulated finance arrangements. The ACCC also recognised that this benefit would be offset by public detriment to the extent that this requirement of the Consumer Code prevented consumers from accessing finance arrangements, such as BNPL, that they consider valuable.
- 4.15. As discussed, the ACCC received numerous submissions on this point, including during the pre-decision conference held on 9 September 2019. Interested parties in favour of the inclusion of access to BNPL finance submitted that it is a convenient form of finance valued by customers and vendors, is lawfully exempt from the NCCPA and NCC and is sufficiently regulated in other ways. Interested parties opposed to allowing BNPL finance under the Consumer Code submitted the lack of regulation of BNPL products under the NCCPA put consumers at risk of harm from signing up to finance arrangements that they are not able to afford.
- 4.16. The ACCC considers that there is a clear public benefit from the Consumer Code setting high standards of consumer protection required of signatory retailers when offering finance arrangements, which are likely to reduce harm to consumers from unsuitable finance arrangements.
- 4.17. The ACCC notes that the more traditional credit products, such as personal loans and credit cards, which may be used to finance the purchases of New Energy Tech, are offered by credit providers which are licensed under the NCCPA and regulated by the NCC. Accordingly, signatory retailers offering these types of finance products (not BNPL arrangements) to customers to finance their New Energy Tech purchase, are offering a finance product which is already required to meet certain standards. This type of finance is provided by a finance provider that must comply with obligations such as assessing the suitability of a loan, following certain procedures if a customer is experiencing financial hardship and provide access to external dispute resolution as set out in the NCCPA and NCC. This standard of protection was the rationale for initially excluding BNPL providers from the Consumer Code, in recognition that regulated finance product providers, as part of their NCCPA and NCC obligations, were required to provide these greater protections.
- 4.18. Therefore the benefit of setting high standards of consumer protection is likely to be greater when required for finance arrangements that are not regulated by the NCCPA and NCC. BNPL finance provides a type of financial arrangement which is valued by some consumers, but the less restrictive applicable regulations (due to its exemption from the NCCPA and NCC) mean there are potentially greater risks for consumers who enter into BNPL arrangements. For example, CALC submitted that while some BNPL providers are members of external dispute resolution schemes, they do so on a voluntary basis and are not *required* to offer customers access to external dispute resolution. CALC also provided case studies<sup>18</sup> involving customers who appeared to be pressured by retailers/vendors into taking up unregulated finance arrangements which were not suitable and the customer could not afford to repay.

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<sup>18</sup> Referred to in its 'Sunny Side Up' report, April 2019: [https://consumeraction.org.au/wp-content/uploads/2019/06/1904\\_Sunny-Side-Up-Report\\_FINAL\\_WEB\\_NEW-1.pdf](https://consumeraction.org.au/wp-content/uploads/2019/06/1904_Sunny-Side-Up-Report_FINAL_WEB_NEW-1.pdf)

- 4.19. In November 2018, ASIC released its ASIC Report on BNPL arrangements.<sup>19</sup> ASIC found that the BNPL industry is rapidly growing and there is a diverse range of arrangements available. ASIC noted that BNPL arrangements can create some risks for consumers if they take on debt that they may have difficulty paying back. ASIC also found that some providers take steps to help consumers make informed decisions about their purchases and repayments, and noted that these additional safeguards and protections are important. ASIC also found that, in some instances more could be done by BNPL providers. ASIC considered that its proposed product intervention power should be extended to all credit facilities, including BNPL arrangements, regulated under the ASIC Act. ASIC's product intervention powers have since come into force from April 2019.
- 4.20. The ACCC considers that there is a benefit to allowing BNPL finance arrangements to be offered if providers are able to demonstrate that they offer customers adequate protections, encompassing key provisions contained in the NCCPA and NCC around undertaking responsible lending assessments, access to hardship policies, internal and external dispute resolution (including mandatory membership of the Australian Financial Complaints Authority). The ACCC considers it likely that these requirements will require some or all BNPL providers to meet higher standards, and change some of their internal practices and policies in order to meet the requirements to offer finance via signatory retailers under the Consumer Code.
- 4.21. The ACCC also notes concerns raised by some interested parties in relation to surcharging by retailers offering BNPL finance arrangements (discussed at 'BNPL finance' above). Concerns were raised about a lack of transparency in relation to fees and charges that may be passed on to the customer, which inflate the cost of their New Energy Tech purchase and which are not disclosed, such that the customer is unable to make an informed comparison between finance options. The ACCC notes that the final version of the Consumer Code includes a requirement to disclose the credit provider's fees and charges and other information to assist the customer to assess the credit product. The ACCC considers this change may assist customers to make a more informed purchasing decision.
- 4.22. The ACCC notes that ASIC has, in its report, stated more broadly that BNPL finance is an area of ongoing focus and that it will continue to monitor the industry. ASIC further stated this monitoring will assist its assessment of the industry, including considering whether potential further regulation or law reform is required. The ASIC Report notes that ASIC has not reached a view as to whether it is necessary that BNPL providers should be required to comply with the NCCPA.
- 4.23. The ACCC expects that any changes in regulation to BNPL finance will require consideration by the Applicants, and may necessitate further changes to the Consumer Code so that it remains consistent with such regulation. The ACCC likewise notes that a change in regulation may constitute a material change in circumstances, which may allow the ACCC to consider the revocation of authorisation and substitution with a new authorisation in relation to the Consumer Code.<sup>20</sup>
- 4.24. The commensurate burden associated with these increased consumer protection requirements is discussed in the detriments section below.

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<sup>19</sup> Australian Securities and Investment Commission, 'Report 600 – Review of buy now pay later arrangements' (November 2018).

<sup>20</sup> Section 91C(3).

## Effective administration and enforcement of the Consumer Code

- 4.25. Effective administration and enforcement of a voluntary code are crucial to the realisation of the claimed public benefits under the code. A number of interested parties, before and after the draft determination, raised concerns regarding the administration of the Code, including that the identity of appointees to key administration roles won't be decided until after the Consumer Code comes into effect (should authorisation be granted).
- 4.26. The Consumer Code will be administered by a Council (comprised of key stakeholders), a Steward, Code Administrator and Code Monitoring and Compliance Panel (the **Panel**).<sup>21</sup> The Council Chair was appointed during the course of the authorisation process;<sup>22</sup> the remaining Council members, Code Steward, Code Administrator and the Panel positions have not yet been filled.
- 4.27. The ACCC considers that the Consumer Code sufficiently outlines the roles and responsibilities of the Code Administrator and provides a process to ensure the Code Administrator is qualified and performing its duties appropriately.<sup>23</sup> Therefore the ACCC considers it is not necessary that each of these roles be filled prior to Authorisation being granted.
- 4.28. A number of interested parties also raised specific concerns regarding the CEC's ability to effectively administer the Consumer Code, should it be appointed to the role. A number of interested parties also stressed the importance of the Consumer Code containing an appeals mechanism against rejected applications to become signatories. The ACCC notes that, following the draft determination, the Applicants amended the Consumer Code to include an appeals process for unsuccessful applicants.
- 4.29. More broadly, the ACCC considers that there are mechanisms in place to ensure the effective administration and enforcement of the Code. These mechanisms include:
- the Code Administrator is required to consider specific matters when assessing applications from those wishing to become a signatory to the Consumer Code
  - decisions made by the Code Administrator requiring a signatory to rectify a breach are reviewable by the Panel if the signatory requests such a review and matters of expulsion or suspension are to be referred by the Code Administrator to the Panel for decision, and
  - the Panel is required to publish on-line an annual report about the Consumer Code's operation, including information about each finding of breach and the remedial action or sanction imposed.
- 4.30. These reporting requirements, in addition to the appeals mechanism, means that the ACCC considers it is unlikely that the Code Administrator will be able to inappropriately refuse membership or impose improper sanctions on signatories.
- 4.31. The ACCC notes that the Consumer Code also provides for three-yearly independent reviews of its governance framework, including by seeking the views of stakeholders and revising the Consumer Code in light of that review.

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<sup>21</sup> For a fuller explanation of the administration of the Code, see Applicant's original application, 3 April 2019.

<sup>22</sup> See applicants' submission, 25 September 2019.

<sup>23</sup> The Administrator's duties are clearly set out in the Consumer Code, Annexure – Code Administration and include assessing membership applications, annually reviewing the fees payable by signatories, determining whether to grant exemptions to provisions of the Consumer Code, monitoring compliance with the Consumer Code (including through investigating complaints, conducting audits and analysing repeat offences), and determining remedial actions or sanctions for Consumer Code breaches.

## ACCC conclusion on public benefit

4.32. The ACCC considers that adoption of the Consumer Code by signatories is likely to result in the following public benefits:

- the commitments by signatories to provide additional information disclosures reduces information asymmetry. Consumers are more likely to be better informed and better placed to make purchasing decisions suited to their needs
- key commitments by signatories to take proactive steps to ensure products and services are fit for purpose will increase consumer protection beyond what is required under the law. Recording a description of the customers' circumstances and purchase will also make it easier for any consumer guarantees claims to be made under the ACL if product or service failures occur
- the inclusion of BNPL providers that meet certain consumer protection requirements, allowing for greater consumer choice in finance products, and
- increased consumer protections by imposing certain requirements regarding deferred payment offers in conjunction with unsolicited sales.

4.33. The ACCC notes that the Consumer Code does not supersede existing legal consumer protections (i.e. it is additional to existing protections).

4.34. The ACCC is satisfied that provisions in the Consumer Code provide mechanisms to ensure its effective administration and enforcement.

## Public detriments

4.35. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>24</sup>*

4.36. The ACCC has considered the following potential public detriments:

- A lessening of competition in the supply of New Energy Tech products and services.
- A lessening of consumer choice, due to the potential exclusion of some BNPL providers.

## Reduced competition in the supply of New Energy Tech products and services.

*Increased cost of supply for signatories may raise barriers to entry*

4.37. The ACCC considers that costs arising from the additional disclosure commitments and consumer protections, are likely to reflect a corresponding increase in the quality of the goods and services supplied, for example as a result of the additional product information disclosures and requirement for the signatory to provide site design and development plans.

4.38. In relation to the compliance costs for signatories directly resulting from the Consumer Code's implementation and administration, the ACCC considers that the compliance

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<sup>24</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

requirements imposed are necessary in order for the Consumer Code to be effective. The ACCC notes that it is currently unclear what the fees for the Consumer Code will be and agrees with Tesla's submission that these will need to be clearly articulated.

#### *Expulsions and denied membership to the Consumer Code as a barrier to entry*

- 4.39. Membership to the Consumer Code may provide an advantage to suppliers of New Energy Tech products and services over those that choose not to become members because consumers may perceive that signatories uphold better business practices and offer greater consumer protections than non-signatories. This advantage may be further increased if governments link supplier access to rebate or incentive schemes, or government tenders to membership of the Consumer Code. The ACCC notes it is a matter for governments to determine the appropriate eligibility criteria for their programs.
- 4.40. This may make Consumer Code signatories more attractive to consumers than non-signatory suppliers of New Energy Tech products and services. If signatories are inappropriately expelled or suppliers are not accepted as signatories this may impact on their ability to compete to provide New Energy Tech products and services.
- 4.41. The ACCC notes that the Applicants have amended the Consumer Code to include a right of appeal to the Panel in circumstances where an applicant is refused admittance or renewal as a signatory.
- 4.42. The ACCC considers the Consumer Code's administrative framework under the MOU contains sufficient rules, checks and balances to help ensure that the Administrator and the Panel will be sufficiently qualified and will appropriately assess applications for membership, appeals against a rejection of membership, and the level of sanctions against signatories for non-compliance.

#### **Reduced consumer choice for finance arrangements**

- 4.43. As discussed in paragraph 4.16, the ACCC considers there is a public benefit in requiring signatory retailers to comply with a higher standard of consumer protection when offering finance to customers. The ACCC recognises that these consumer protections require BNPL providers to adhere to protection standards above those they are required to comply with under legislation and regulation.
- 4.44. Submissions from BNPL providers on the amendments proposed by the ACCC (which were closely adapted by the Applicants in the final proposed code) expressed concerns regarding the higher standards required of BNPL providers, submitting that the Consumer Code would have the effect of:
- excluding certain BNPL providers from the market, despite those BNPL providers complying with the law and being subject to other regulations and obligations enforced by ASIC<sup>25</sup>; and
  - in turn, that these stricter requirements would have the effect of preventing customers from accessing these finance arrangements.
- 4.45. The ACCC recognises that a key attraction of BNPL arrangements – for customers and vendors – is the relative convenience and speed in obtaining that finance and completing a sale. The ACCC notes that this convenience and speed would be affected by some of the requirements in the Consumer Code, particularly in relation to

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<sup>25</sup> Including, for example: the Australian Securities and Investments Commission Act 2001, ASIC's product intervention powers and the upcoming design and distribution obligations.

requiring strict compliance with the responsible lending obligations set out in the NCCPA, and that this may make BNPL finance less attractive to vendors.

- 4.46. The ACCC also notes that, under the Applicants' final proposed version of clause 25 of the Consumer Code, the BNPL industry code would need to be developed within 12 months of authorisation being granted, after which time, if no industry code is in place, BNPL providers will not be able to provide finance under the Consumer Code. AFIA has submitted that 12 months would be the minimum lead time required for the development of the industry code. The ACCC is concerned that the proposed 12-month deadline may be unrealistic, based on the information provided during consultation especially if regulatory approval is ultimately sought.
- 4.47. The ACCC considers that there is likely to be at least some detriment from preventing consumers from accessing finance arrangements that they find valuable, to the extent that:
- BNPL providers do not consider seeking to meet the standard of protection required under the Consumer Code to be commercially viable therefore reducing the range of available finance providers; or
  - vendors choose not to offer BNPL finance as it is no longer an attractive option, or are able only to offer finance arrangements from a limited number of BNPL providers.

### **ACCC conclusion on public detriment**

- 4.48. The ACCC considers that adoption of the Consumer Code is unlikely to result in public detriment from a lessening of competition in the supply of New Energy Tech products and services.
- 4.49. However, the ACCC does consider that the Consumer Code will result in some public detriment, to the extent that the standards required of BNPL providers could lessen the number of approved BNPL providers offering finance arrangements for the supply of New Energy Tech, which in turn would result in a loss of consumer choice.

### **Balance of public benefit and detriment**

- 4.50. The ACCC considers that adoption of the Consumer Code is likely to result in public benefits in the form of:
- reduced information asymmetry, and
  - increased consumer protections.
- 4.51. The ACCC also considers that there is likely public detriment from the potential loss of consumer choice in relation to the number of finance arrangements that are able to be offered by signatory retailers under the Consumer Code.
- 4.52. The ACCC considers that without the conditions, the requirements on BNPL providers would be at such a level that it would deter BNPL providers from seeking to be allowed to provide finance under the Consumer Code. This would prevent the Proposed Conduct from fully realising the public benefits possible under the Code. The ACCC has decided to address its concerns relating to the Proposed Conduct by imposing conditions to lessen the likely detriment, as well as reporting conditions to help assess whether the Consumer Code is operating in a way that is fully realising the public benefits.

4.53. For the reasons outlined in this Determination, the ACCC is satisfied the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment. The ACCC considers that imposing conditions will enable the public benefits under the Consumer Code to be fully realised.

## Conditions

4.54. The power conferred upon the ACCC to authorise conduct is discretionary.<sup>26</sup> In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.<sup>27</sup>

4.55. The ACCC may specify conditions in an authorisation.<sup>28</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>29</sup>

4.56. The ACCC is concerned to ensure that the level of protection required under the Consumer Code is such that there are adequate obligations to protect customers against being offered finance products that are not appropriate to their situation, but without imposing a disproportionate burden on BNPL providers such that BNPL providers:

- do not seek approval to be allowed to provide finance through signatory retailers under the Consumer Code, or
- are not able to satisfy the requirements under the Consumer Code but would otherwise provide substantially equivalent consumer safeguards to those contained in the NCCPA and NCC.

4.57. Following the final round of consultation, the ACCC considers that appropriate balance would be achieved by:

- removing the requirement that a BNPL provider (or its related body corporate) holds an Australia Credit Licence in order to be allowed to provide finance under the Consumer Code
- requiring that BNPL providers undertake a responsible lending assessment, which provides substantially equivalent protections to those contained in specific sections of the NCCPA, rather than requiring compliance with those sections as if the BNPL provider were regulated under the NCCPA and NCC
- including clearer obligations as to what is required of BNPL providers in relation to hardship and dispute resolution processes, and
- amending the timeframe for transition to an industry code from 12 months to 24 months.

4.58. The ACCC considers that it is not necessary to require BNPL providers to hold a credit licence in order to provide finance under the Consumer Code on the basis that:

- Even if a BNPL provider (or its parent company) holds a credit licence because that BNPL provider also offers regulated finance products and is required to be licensed under the NCCPA, the BNPL provider is not required to apply the protections contained in the NCCPA with respect to the offer of its BNPL product.

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<sup>26</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [106].

<sup>27</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [126].

<sup>28</sup> Section 88(3).

<sup>29</sup> Section 88(3).

- Clause 25 of the Consumer Code contains obligations regarding the key consumer protections that were raised by interested parties as being necessary to minimise the risk of customers ending up with inappropriate finance and experiencing harm. These protections are around access to effective dispute resolution, responsible lending assessments, hardship policies, and fee disclosures.
  - The additional protections for hardship and dispute resolution will provide clearer protections for consumers, and align BNPL policies more closely with those applied to regulated finance providers; and are the key protections for consumers who encounter difficulties after entering into the financial arrangement.
- 4.59. The ACCC also considers that strict compliance with the responsible lending requirements under the NCCPA would impose such a burden on BNPL providers and vendors who use BNPL finance, that it risks some customers being unable to access a convenient form of finance that they value. The ACCC considers a substantially equivalent responsible lending obligation, in concert with the other requirements of clause 25, and the increased protections in clause 3 of the Consumer Code in relation to “Advertising and Promotion”, which is intended to provide restrictions on BNPL finance relating to unsolicited sales, should impose an appropriate level of protection.
- 4.60. Regarding the timeframe for development of the industry code, the ACCC considers that 24 months is a more realistic timeframe for the development and approval of the BNPL industry code, should regulatory approval be sought.
- 4.61. The ACCC has also imposed a condition to require the Code Administrator to report on the operation of the Consumer Code.
- 4.62. The ACCC notes that the Code Administrator is already required under the Consumer Code to publish an annual report on the operation of the Code.<sup>30</sup> The ACCC is imposing a condition to require that this annual report will be provided to the ACCC on or before 31 January on an annual basis for the term of the authorisation, for publication on the ACCC’s public register. The annual report must also include:
- The number of successful applicants (signatories), unsuccessful applicants, and the number and outcome of any appeals against decisions on admittance
  - the number, nature and outcome of complaints, broken down by the type of financial product used in each instance (i.e. regulated under the NCCPA and NCC and not regulated and/or are exempt from the NCCPA and NCC ), and whether the complaint was considered by AFCA and any remedies imposed by AFCA, and
  - the number of BNPL providers that have been assessed as complying with the requirements under clause 25 of the Code.
- 4.63. The ACCC notes that the Applicants are intending to develop a complaints procedure, and that this condition is not intended to limit the development of this complaints procedure.<sup>31</sup>
- 4.64. The ACCC considers that this reporting will enable better assessment on the operation of the Consumer Code, including whether the balance has been appropriately struck with the level of consumer protections required of BNPL providers. It will also serve to help assess whether BNPL providers are being appropriately assessed as meeting the Code requirements. This will assist the Code Administrator in assessing whether alternative or additional consumer protections are required under the Consumer Code.

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<sup>30</sup> Clause A27 of the draft Code.

<sup>31</sup> Consistent with [Australian Standard AS ISO 10002](#)



- 4.65. The ACCC will consider each of these reports to help assess whether the Consumer Code is operating as envisioned, to ensure consumers are reaping the full benefits of it, and have sufficient protections against harms that arise from unsuitable financial arrangements. It will also assist the ACCC in assessing the effectiveness of a transition to a relevant industry code for BNPL providers and in the event the Applicants seek re-authorisation of the Consumer Code.
- 4.66. The ACCC has also imposed a condition to implement the intended operation of clause 3 of the Consumer Code, which currently prohibits advertising and promotional material that makes unsolicited offers of finance not regulated by the NCCPA. The condition requires that signatories must not offer customers BNPL finance (whether unsolicited or not) if the sale of the New Energy Tech product is unsolicited. The ACCC considers this condition will help to ensure the operation of the prohibition in the Consumer Code on unsolicited offers of BNPL finance is sufficiently clear such that the consumer protection benefits of this clause are realised.

## Length of authorisation

- 4.67. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>32</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.68. In this instance, the Applicants seek authorisation for five years.
- 4.69. The ACCC considers this period is appropriate given the evolving nature of the New Energy Tech Sector and the need to test the effectiveness of the administration arrangements and any sanctions taken under the Consumer Code during that period.

## 5. Determination

### The application

- 5.1. On 30 April 2019, the Applicants lodged application AA1000439 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

### The authorisation test

- 5.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct (as outlined in paragraph 1.4 above) is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.3. For the reasons outlined in this Determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition. The ACCC considers that imposing conditions will enable the public benefits under the Consumer Code to be fully realised.

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<sup>32</sup> Subsection 91(1)

- 5.4. The ACCC considers that without the conditions, the requirements on BNPL providers would be at such a level that it would deter BNPL providers from seeking to be allowed to provide finance under the Consumer Code. This would prevent the Proposed Conduct from fully realising the public benefits possible under the Code. The ACCC has decided to address its concerns relating to the Proposed Conduct by imposing conditions to lessen the likely detriment, as well as reporting conditions to help assess whether the Consumer Code is operating in a way that is fully realising the public benefits. The ACCC has also imposed a condition to ensure that the prohibition on unsolicited BNPL finance under the Consumer Code is clear so that signatories are prevented from offering BNPL finance in unsolicited sales of New Energy Tech products, such that the intended consumer protection benefits of clause 3 are realised.
- 5.5. Accordingly, subject to the conditions, the ACCC has decided to grant authorisation.

### Conduct which the ACCC has decided to conditionally authorise

- 5.6. The ACCC has decided to grant authorisation AA1000439 to enable the Applicants and future signatories to the Consumer Code<sup>33</sup> to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:
- a) according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which intended to cover all aspects of the customer experience
  - b) for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and
  - c) requiring signatories to only offer deferred payment arrangements<sup>34</sup> that are regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.
- 5.7. This conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of sections 45 or 46 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act.
- 5.8. This authorisation is limited to the conduct described in paragraph 5.6 above (that is merely agreeing, signing up to and complying with (giving effect to) those provisions of the Consumer Code). The authorisation does not extend to any other conduct, particularly any other conduct that may contravene section 46 or other provisions of Part IV of the Act.
- 5.9. The ACCC has decided to grant authorisation AA1000439 until 31 December 2024.
- 5.10. The authorisation is in respect of the Consumer Code as it stands at the time the authorisation is granted, a copy of which is annexed to the determination (to be read in

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<sup>33</sup> Pursuant to section 88(2) of the Act.

<sup>34</sup> A 'deferred payment arrangement' under the Consumer Code is a reference to an alternative method of payment to upfront payment upon delivery or installation. The conditions on the offer of a deferred payment arrangement applies when offered to a residential consumer and this arrangement includes an interest component, additional fees or involves an increased purchase price.

conjunction with Attachment A as per conditions below). Any changes to the Consumer Code during the term of the authorisation would not be covered by the authorisation.

## Conditions

5.11. The authorisation AA1000439 is subject to the conditions at 5.12-5.13 and 5.15-5.16.

### Changes to requirements concerning BNPL finance

- 5.12. With respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place, as set out in the versions of clause 25 and clauses A7 and A7A of the Annexure to the Consumer Code at Attachment A to this Determination. For the avoidance of doubt, clauses 25, A7 and A7A at Attachment A will replace the corresponding clauses of, and be added to the Consumer Code and its Annexure, as annexed to this Determination.
- 5.13. Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.
- 5.14. The condition outlined at 5.12 above, including the wording found in Attachment A, may be subject to variation where approved by the ACCC in writing and published on the public register.

### Reporting condition

- 5.15. The Code Administrator must provide the ACCC with reports on the dates specified at 5.16 below, for publication on the ACCC's public register, which include the following information regarding the operation of the Consumer Code:
- i. the number of applicants admitted as Signatories to the Consumer Code
  - ii. the number of unsuccessful applications for admittance under the Consumer Code
  - iii. the number of appeals against a decision regarding admittance, and the outcome of those appeals
  - iv. the number of, and a description of, alleged breaches of the Consumer Code by Signatories
  - v. the number and nature of alleged breaches and/or complaints made in relation to Signatories broken down by the type of finance arrangement used by the customer
  - vi. the outcome of complaints and alleged breaches of the Consumer Code by Signatories, including:
    - a. the number of suspensions and identities of suspended Signatories
    - b. the number of expulsions and identity of expelled Signatories
    - c. other remedial actions imposed, and
    - d. whether the complaint or alleged breach was considered by the Australian Financial Complaints Authority and the outcome of those considerations.

- vii. the number and identity of BNPL providers that have been assessed in relation to compliance with clause 25 of the Consumer Code, broken down by:
  - a. those assessed as meeting the requirements of clause 25 of the Consumer Code.
  - b. those assessed as not meeting the requirements of clause 25 of the Consumer Code.

5.16. These reports must be provided to the ACCC on the following dates:

- a. on or before 31 January 2021 for the period 1 January 2020 to 31 December 2020
- b. on or before 31 January 2022 for the period 1 January 2021 to 31 December 2022
- c. on or before 31 January 2023 for the period 1 January 2022 to 31 December 2023
- d. on or before 31 January 2024 for the period 1 January 2023 to 31 December 2023.

5.17. The Code Administrator must:

- a. report to the ACCC the details of BNPL providers that have had their approval under the Consumer Code revoked pursuant to clause A7A of Annexure – Code Administration of the Consumer Code, and
- b. communicate these details to all Signatories

as soon as practicable after the decision to revoke the credit providers' approval is made.

5.18. The reporting condition outlined at 5.15 and 5.16 above may be subject to exemptions or variation, including in relation to confidentiality, where requested by the Applicants in writing and approved by the ACCC in writing and published on the public register.

## 6. Date authorisation comes into effect

6.1. This determination is made on 5 December 2019. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 31 December 2019.

## Attachment A

### Clause 25 Payment and Finance

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) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that:

i. is licenced under the *National Consumer Credit Protection Act (2009)* (Cth) (“NCCPA”) and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code (“NCC”), or

ii. if not licensed under the NCCPA and the deferred payment arrangement is not regulated by, or is exempt from, the NCC and or NCCPA:

(A) the Administrator has determined that:

a. the credit provider is a signatory to an industry code of conduct that requires the credit provider, on an ongoing basis, to:

i. resolve any complaints you may have using an internal dispute resolution process which complies with the standard specified in ASIC Regulatory Guide 165, 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 in place which comply with sections 72, 88 and 89A of the NCC to identify whether you are experiencing payment difficulties due to hardship, to respond to your requests for hardship assistance and to make you aware of your rights to dispute the rejection of such requests for assistance

iii. offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments

iv. undertake a responsible lending assessment of the suitability of the loan and your ability to repay the loan, providing substantially equivalent protections to those contained in the following sections of 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); and

- b. this industry code contains mechanisms for:
  - i. the ongoing monitoring and investigation of complaints about potential breaches of the industry code,
  - ii. appropriate remedies to be imposed that have regard to the severity of the breach, including suspension or expulsion of credit providers that are found to be in breach of the code;
  - iii. reporting on breaches of the industry code by credit providers that are approved pursuant to this clause 25; or

(B) the Administrator has approved the credit provider's deferred payment contract and internal policies and processes in accordance with paragraphs A7 and, where applicable, A7A of the Annexure – Code Administration. (This paragraph (B) is as an interim measure pending the development of an approved code of conduct that will enable paragraph (A) to apply. Paragraph (B) ceases to apply on 1 January 2022 regardless of whether a regulator approved code of conduct is in operation by that date).

b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system

c) you receive the following clear and accurate information:

(i) the name of the 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 or not regulated by the NCC, information to assist you in assessing the credit product, including the credit provider's fees and charges

(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 credit provider with whom you will be contracted.

## Annexure – Code Administration

### Deferred payment arrangement providers

A7. Where a Signatory requests the Administrator at any time until 31 October 2021 to approve a credit providers' deferred payment contract and internal policies and processes for the purposes of paragraph 25.a).ii.(B), the Administrator must do so if:

- a) an appropriately qualified person engaged by the Administrator reviews the:
  - i. deferred payment contract,
  - ii. internal policies and processes of the credit provider, and
  - iii. outcomes of any previous findings that the credit provider has not met the consumer protection standards under paragraph 25.a).ii.(A).a and 25.c).(iv) of the Consumer Code that are required to be met by a credit provider for Signatories to offer the credit providers' finance product, including any previous revocations of approval pursuant to clause A7.A, if applicable,  
and certifies that:
    - iv. the contract and the internal policies include an undertaking and processes to require ongoing compliance by the credit provider with all of the consumer protection obligations set out in paragraphs 25.a).ii.(A).a, and 25.c).(iv); and
    - v. having regard to the review of the factors listed at A7.a).iii, it is appropriate to approve the credit provider.
- b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work)
- c) where the Administrator is proposing to refuse the request, the Administrator must give the credit provider an opportunity to reply before making a final decision.

A7A. The Administrator may reassess the approval of a credit provider granted under paragraph A7 if it considers that the credit provider has not met the consumer protection obligations contained in paragraph 25 of the Consumer Code that are required for Signatories to offer the credit providers' finance product. In making this assessment the Administrator may take into account factors including: any breaches by the credit provider of the industry code of conduct referred to at paragraph 25.a.ii of the Consumer Code; instances of the credit provider not meeting the obligations set under paragraph 25 of the Consumer Code; the severity or systemic nature of those breaches; or any AFCA rulings and failure to comply with such rulings. Where the Administrator is proposing to revoke approval, the Administrator must give the credit provider an opportunity to reply before making a final decision.