NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Amended application for leave to intervene
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

DEPUTY REGISTRAR

Dated: 25/02/2020 6:24 PM

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.

Commonwealth of Australia

Competition and Consumer Act 2010

In the Australian Competition Tribunal

File No. ACT 1 of 2019

Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council, Energy Consumers Australia in respect of the New Energy Tech Consumer Code

AMENDED APPLICATION FOR LEAVE TO INTERVENE IN A REVIEW BY THE AUSTRALIAN COMPETITION TRIBUNAL

Applicant intervener RateSetter Australia RE Limited

Address for service Johnson Winter & Slattery attn: Aldo Nicotra and Nicholas Briggs
Level 25, 20 Bond Street Sydney NSW 2000

Filed on behalf of RateSetter Australia RE Limited
Prepared by Aldo Nictora
Law firm Johnson Winter & Slattery
Tel (02) 8247 9555 Fax (02) 8274 9500

<u>AMENDED</u> APPLICATION FOR LEAVE TO INTERVENE

1. RateSetter Australia RE Limited (**RateSetter**) hereby applies pursuant to paragraph 2 of the orders of his Honour Justice O'Bryan dated 4 February 2020 and section 109 of the Competition and Consumer Act 2010 (Cth) (**CCA**), for leave to intervene in this review by the Australian Competition Tribunal (**Tribunal**) of the determination by the Australian Competition and Consumer Commission dated 5 December 2019 (**Determination**).

RateSetter

2. RateSetter is Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products (**New Energy Technology**). Since 2014, RateSetter has facilitated over $60 million in consumer loans for the purpose of clean energy equipment such as solar panels and batteries. In providing this finance, RateSetter has partnered with over 700 accredited merchants and installers.

3. RateSetter is also the sole administrator of the Home Battery Scheme, a scheme operated by the Government of South Australia in association with the Federal Government's Clean Energy Finance Corporation. In that capacity, RateSetter is to provide subsidies to approximately 40,000 South Australian households to fund the purchase of home battery storage systems. RateSetter seeks to intervene in this proceeding in its own capacity, however, not on behalf of the Government of South Australia nor the Clean Energy Finance Corporation.

4. RateSetter holds an Australian Financial Services Licence number 449176 and Australian Credit Licence number 449176 and is the responsible entity of the RateSetter Lending Platform (ARSN 169 500 449). Finance facilitated by RateSetter is regulated by the National Consumer Credit Protection Act 2009 (Cth) (**NCCPA**) and the National Credit Code (**NCC**).

Scope of proposed intervention

5. RateSetter seeks to intervene in relation to the review of the Determination. It opposes the variations to the New Energy Tech Consumer Code (**Code**) proposed by Flexigroup Limited (**Flexigroup**) at [4] of its application, and submits that the Determination should stand.

Applicable principles

6. A proposed intervener must establish some connection with or interest in the subject matter of the proceeding which discloses that it is not merely an 'officious bystander'.[1]

7. It is necessary to consider the extent to which the proposed intervener can usefully or relevantly add to, or supplement, proposed evidence or submissions of the parties, as well as how it might be affected by the outcome of the proceeding.[2] It is not necessary for the proposed intervener to show that its business interests or business activities may be detrimentally affected by the outcome of the proceeding.[3]

8. In Application by Sea Swift Pty Ltd [2015] ACompT 5 the Tribunal said (at [8]) that "earlier decisions" of the Tribunal indicate that a proposed intervener should have a "real and substantial interest" in the outcome of the proposed merger sufficient to warrant the time and cost incurred in the participation of the proposed intervenor. But in Application by Independent Contractors Australia [2015] ACompT 1, the Tribunal proceeded on the basis that there is no "sufficient" or "real and substantial" interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions.

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[1] Re Fortescue Metals Group Ltd (2006) 203 FLR 28; [2006] ACompT 6 at [35]; cited in Application by Independent Contractors Australia [2015] ACompT 1 at [28].
[2] Application by Independent Contractors Australia [2015] ACompT 1 at [28].
[3] Re Fortescue Metals Group Ltd (2006) 203 FLR 28; [2006] ACompT 6 at [35].

RateSetter has a real and substantial interest in the outcome of the review

9. As Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products, as set out in paragraph 2, above, RateSetter has a significant interest in the ultimate form of the Code.

10. Firstly, in the event RateSetter is accepted by the Administrator as a Code Signatory, RateSetter intends to become a Signatory and will be bound by the Code.

11. Secondly, the Code will regulate the conduct of entities with which RateSetter competes (who become signatories to the Code), and the manner in which that competition occurs.

12. Thirdly, the Code will regulate the conduct of entities who supply New Energy Technology that is financed by RateSetter loans, being merchants or suppliers (who become signatories to the Code) and the manner in which that finance is offered to the customers of the merchants or suppliers.

13. Fourthly, RateSetter has an immediate interest in the substance of Flexigroup's application, which is to have changes to requirements of Buy Now Pay Later finance (**BNPL Finance**) imposed by the ACCC at paragraphs 5.12 to 5.14 of the Determination (**BNPL Conditions**) removed. RateSetter is one of the industry participants who will be *most* affected by the removal of the BNPL Conditions, given its position in the market as a major competitor to providers of BNPL Finance such as Flexigroup.

14. In particular, RateSetter considers that Flexigroup's proposed amendments to the Code would:

    (a) reduce the protections provided to consumers in respect of finance facilitated via code signatories, specifically finance which would otherwise be subject to the BNPL Conditions, resulting in potential harm to consumers and merchants and undermining public confidence in the New Energy Technology industry;

(b) increase the risks of harm to consumers that arise from unsolicited sales of New Energy Technology (and related finance), by reason of those reduced protections;

(c) create an unequal playing field on which providers of finance for New Energy Technology will compete. This is in circumstances where the credit products provided by RateSetter are regulated by the NCCPA and the NCC, while the BNPL Finance provided by Flexigroup (and others) is not regulated by either the NCCPA or the NCC. The BNPL Conditions address that disparity in regulation;

(d) negatively impact Rate Setter’s prospects for growing its presence in the New Energy Technology market where it has made significant investments, given the differences in regulation between BNPL Finance and other more regulated consumer finance products would remain unaddressed by the Code.

15. Reflecting its interest in the authorisation and ultimate form of the Code, RateSetter has submitted ~~three~~ four sets of submissions to the ACCC during the authorisation application, copies of which are enclosed with this application.

RateSetter’s intervention will usefully and relevantly add to the evidence and submissions of the parties

16. Unlike the Australian Energy Council, Clean Energy Council, Smart Energy Council, Energy Consumers Australia, RateSetter is a participant in the industry and supplies products in competition with Flexigroup. That is, both RateSetter and Flexigroup provide consumer credit services for the purchase of New Energy Technology, which is the subject of the Code.

17. Given its knowledge and experience, RateSetter will be in a position to assist the Tribunal by providing evidence and submissions which draw directly on its experience in matters raised by Flexigroup's application, including in respect of the factual findings made by the ACCC with which Flexigroup is dissatisfied, and

the likely impact of the BNPL Conditions on consumers and competition in the New Tech finance industry.

18. RateSetter can provide information that includes:

    (a) the market landscape for the provision of finance for the purchase of New Energy Technology;
    (b) the various forms of finance available to consumers for the purchase of New Energy Technology, ranging from loans regulated under the NCCP through to so-called “interest-free” finance;
    (c) method of sale and promotion of new energy technology and related point-of-sale finance;
    (d) the relationship between finance companies and the merchants who sell new energy equipment to consumers;
    (e) information in relation to the experiences of merchants who have recently moved from providing so-called “interest free” finance to regulated loans;
    (f) observed differences in costs passed to consumers where they obtain regulated finance versus unregulated finance;
    (g) the protections consumers may miss out of if they obtain unregulated finance that does not comply with provisions of the Determination;
    (h) the likely effect on overall access to New Energy Technology that would result from upholding the ACCC determination;
    (i) factual matters in the Determination which Fleixgroup is said to be dissatisfied with at [3] of its application; and
    (j) the degree to which the competitive constraints that it [RateSetter] faces will be affected by the Determination

Disposition

19. RateSetter respectfully requests that the Tribunal grant permission to RateSetter to intervene on the basis outlined above.

Dated this ~~21~~st 24th day of February 2020

Signed on behalf of the applicant intervener

…………………………………..

Aldo Nicotra

Partner, Johnson Winter & Slattery

Solicitor for the applicant intervener, by his employed solicitor Nicholas Briggs

23 August 2019

BY EMAIL

Australian Competition and Consumer Commission
23 Marcus Street
CANBERRA ACT 2601

Attn: Susie Black

By email: adjudication@accc.gov.au

Dear Ms Black

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

RateSetter Australia RE Limited (**RateSetter**) is pleased to make a submission in relation to the draft determination issued by the ACCC on 1 August 2019 and the proposed New Energy Tech Consumer Code (**NETCC**).

RateSetter has not previously made a submission to the ACCC regarding the NETCC but is an interested party in our capacity as Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products. Since our launch in 2014, RateSetter has facilitated over $45 million in consumer loans for the purchase of clean energy equipment such as solar panels and batteries. In providing this finance, RateSetter has partnered with over 550 accredited merchants and installers.

RateSetter is additionally the exclusive administrator of the Home Battery Scheme, a scheme operated by the Government of South Australia and supported by the Federal Government's Clean Energy Finance Corporation to provide subsidies and finance to ~40,000 South Australian households to facilitate the purchase of home battery storage systems. RateSetter makes this submission in its own capacity and not on behalf of the Government of South Australia nor the Clean Energy Finance Corporation.

RateSetter holds Australian financial service licence (**AFSL**) number 449176 and Australian credit licence (**ACL**) number 449176 and is the responsible entity of the RateSetter Lending Platform (ARSN 169 500 449). Finance facilitated by RateSetter for renewable energy purposes are regulated by the National Consumer Credit Protection Act (**NCCPA**) and National Credit Code (**NCC**).

Improving consumer protections

1. RateSetter strongly supports the ACCC's draft determination, and in particular the proposed section 24 which provides that where a signatory to the NETCC is to offer New Energy Tech to a residential consumer with a deferred payment arrangement, and this arrangement includes an interest component, additional fees or an increased price, the signatory will ensure that:
   a) this payment arrangement is offered through a credit provider licenced under the NCCPA; and
   b) this payment arrangement is regulated by the NCCPA and the NCC

2. We agree with the ACCC that the section 24 requirement, if authorised, would, by reducing or excluding the use of unregulated financing for New Energy Tech, significantly improve consumer welfare. RateSetter has observed, and continues to observe, significant harm caused to consumers arising from unsuitable and/or unregulated finance arrangements for New Energy Tech.

3. In submissions to the ACCC in relation to the NETCC, RateSetter notes that several providers of 'interest free' finance for the purchase of New Energy Tech state that alternative regulations (for example, the ASIC Act, the Australian Consumer Law, product intervention powers, and self-regulation) provide equivalent protections to consumers to those under the NCCPA. RateSetter disagrees with this characterisation and notes that the 'alternative regulations' cited do not provide for a number of important protections available under the NCCPA, including, but not limited to:

    a) transparency of costs via prescribed disclosures which under the NCCPA give consumers clear, standardised information relating to the costs of credit, helping them make an informed and balanced decision relating to their investment in New Energy Tech;

    b) responsible lending obligations which prohibit NCCPA regulated financers from extending credit to consumers which may put them at risk of suffering substantial financial hardship;

    c) mandatory dispute resolution scheme membership, giving free and independent external dispute resolution (EDR) schemes to consumers;

    d) hardship variation requirements to provide payment arrangements to consumers who are suffering temporary financial hardship; and

    e) loan enforcement requirements which mandate specific notices and timeframes to ensure consumers who have defaulted under a loan have an opportunity to put their account in good standing and avoid potentially disruptive and harmful enforcement proceedings.

4. RateSetter also has concerns that even where the ASIC Act and the Australian Consumer Law provide some notional protection for consumers, the absence of a primary regulator charged with their enforcement for the financing of New Energy Tech has led to poor practices and consumer harm. For example, RateSetter has raised with several regulators (including the ACCC via email to Ms Leah Won on 5 March 2019) its observations of price inflation occurring where New Energy Tech is purchased using 'interest free' finance. Whilst RateSetter considers that this practice is illegal and harmful to consumers, no prosecution or enforcement has yet to commenced by a regulator[1].

5. Further, while the recently introduced product intervention powers could be used by ASIC to regulate so-called "interest free" finance offerings, no intervention power has been exercised to date in respect of these offerings, nor has any actual intervention been formally proposed by ASIC. Should these powers be utilised in future to extend the consumer protections in the NCCPA to unregulated providers, it is always open for the Applicants to revise the NETCC to allow for unregulated products subject to an intervention power to be facilitated by code signatories.

6. RateSetter recognises that some so-called "interest free" finance providers are members of EDR schemes provide a form of dispute resolution for consumers. However, RateSetter notes that:

    a) membership for unregulated providers is voluntary and may be withdrawn at any time, potentially leaving existing and future customers without dispute resolution mechanisms on which they have relied; and

    b) the scope of an EDR scheme to assist consumers of so-called "interest free" finance is very limited, as without the application of the NCCPA, consumers have narrow grounds on which

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[1]See RateSetter's public comments in relation to this issue at: https://www.theaustralian.com.au/business/financial-services/interestfree-rorts-need-regulating/news-story/88321571adbbc2acdc8efc3f4e01528a

they can make a complaint regarding an “interest free” finance provider, being the contractual terms of any finance agreement and some aspects of general consumer law.

Availability of credit

7. RateSetter disagrees with submissions relating to the draft code that section 24 requirements will significantly limit the availability of credit for consumers, potentially harming consumers and competition.

8. Given the commercial incentives operating on existing providers of regulated finance and the competitive market in which they operate, RateSetter does not expect a significant decrease in the availability of finance for consumers following the introduction of the NETCC. As an example, RateSetter has significant funding available to provide finance to consumers for the purchase of New Energy Tech and expects to grow its regulated lending activities significantly in the next 24 months.

9. In addition to the existing supply of regulated finance from providers such as RateSetter, existing providers or new entrants may also choose to become regulated under the NCCPA, further increasingly supply. This continued availability of finance means that the adoption of the NETCC is unlikely to cause significant harm to the New Energy Tech industry and its competitiveness.

10. Importantly, RateSetter expects that any reduction in the provision of credit following the authorisation of the NETCC would only affect those consumers who would not be eligible to borrow under the NCCPA, i.e. those applicants who do not meet responsible lending criteria. That consumers who cannot afford a loan are excluded from credit is not a harm and does not constitute an argument as to why unregulated providers should be permitted to provide finance to New Energy Tech consumers.

Effects on competition

11. As set out above, RateSetter does not consider that the section 24 requirements will have a detrimental effect on the competitiveness of New Energy Tech providers or related finance providers.

12. Instead, RateSetter considers that the introduction of the NETCC will stimulate competition amongst finance providers by providing a more level playing field on which they can compete. Under the status quo, unregulated finance providers offering so-called “Interest ‘free” finance to consumers and faster approval processes that are not subject to responsible lending requirements are often at a significant advantage to regulated providers. By removing this advantage (which comes only at the expense of consumer welfare) RateSetter expects increased competition from regulated finance providers, improving pricing and access to credit for all New Energy Tech consumers.

Final remarks

As one of the largest finance providers for New Energy Tech in Australia, RateSetter supports the introduction of the NETCC and in particular the requirements set out in section 24. We believe that this code will have the effect of increasing consumer welfare while improving competition amongst New Energy Tech vendors and finance providers.

If desired, RateSetter would be pleased to meet with the ACCC to provide further information in relation to our perspectives on the draft determination. Please do not hesitate to contact me on 0481085312 or if you would like to meet or discuss our submission in further detail.

Yours truly

Ben Milsom
Director
RateSetter Australia RE Limited

RateSetter

22 September 2019

BY EMAIL

Australian Competition and Consumer Commission
Sydney, NSW 2000

By email: adjudication@accc.gov.au

Dear Ms Kim

RE: AA1000439 – New Energy Tech Consumer Code – Further RateSetter submissions

RateSetter Australia RE Limited (**RateSetter**) is pleased to make a further submission in relation to the draft determination issued by the ACCC on 1 August 2019 on the proposed New Energy Tech Consumer Code (**NETCC**). We previously submitted in relation to ACCC's draft determination on 23 August 2019 and made submissions to the pre-determination conference on 9 September 2019.

Introduction

RateSetter is Australia's leading provider of National Consumer Credit Protection Act (**NCCP Act**) regulated finance for new energy technology. Our finance products assist purchasers of new energy technology products to responsibly spread the cost of their purchase over time, and also assist vendors of new energy technology with their cash flow. However, unlike providers of so-called 'interest free' finance, all finance facilitated by RateSetter for new energy technology is regulated by the NCCP Act and the National Credit Code (**NCC**).

We write to express our opposition to the late submission by the Applicants dated 6 September 2019 requesting an amendment to Section 24 (b) of the draft code. We support the unamended code as published by the ACCC in its draft determination on 1 August 2019.

New energy technology industry participants have over the past two years sought to agree an industry code in relation to the sale of new energy technology. After two years of deliberative and constructive consultation with a range of industry stakeholders, the draft code submitted to the ACCC (and accepted by the ACCC in its draft determination dated 1 August 2019) appropriately required that all finance offered to consumers be regulated under the NCCP Act and the NCC.

However, on Friday 6 September – one business day prior to the ACCC pre-determination conference – the Applicants abruptly requested an amendment to the code to permit non-NCCP Act regulated credit products, including so-called 'interest free' finance (incorrectly referred to in the amendment as 'buy now pay later', or BNPL), so long as the payment arrangement "complies with a regulator approved Code of Conduct or industry code that delivers substantially equivalent consumer protections to those contained in the NCCPA" (**Code Amendment**).

We oppose the Code Amendment on three grounds:

1. So-called 'interest free' finance for new energy technology is entirely dissimilar to BNPL products as it is almost always associated with illegal price inflation, which causes significant consumer harm;
2. The NCCP Act is the appropriate regulatory framework for new energy technology finance given the specific risks associated with the sale and purchase of residential new energy technology; and
3. The relative lack of regulation for so-called 'interest free' finance products, and the unequal obligations imposed on providers of finance regulated under the NCCP Act, raises significant competition concerns.

We set out each of these concerns in further detail below.

RESPONSIBLE ENTITY:
RateSetter Australia RE Limited
ACN: 166 646 635
REGISTERED OFFICE
Level 5, 14 Martin Place,
Sydney NSW 2000
Australia
WEBSITE
www.ratesetter.com.au

1. So-called 'interest free' finance for new energy technology is entirely dissimilar to buy now pay later (BNPL) products as it is almost always associated with illegal price inflation, which causes significant consumer harm

We are deeply concerned by the Code Amendment's conflation of so-called 'interest free' finance for new energy technology with buy now pay later ('BNPL') services. We do not believe that, when considering the potential for consumer harm when purchasing new energy technology, there is any similarity between BNPL services for retail goods and so-called 'interest free' products for new energy technology:

- BNPL services are used by consumers to purchase low value (typically under $250) and easily-understood products in a retail setting, and are repaid in a matter of weeks or months. In contrast, new energy technology products (such as solar and battery systems) can cost upwards of $20,000, are repaid over terms of up to seven years, and are complex products with uncertain benefits often sold via in-house or call-centre based sales processes that may give customers limited time to reflect and consider the sales pitch provided
- With BNPL services, the cost of finance (typically 2-4% of the purchase price) is absorbed by the merchant out of their own margins: regardless of whether the customer wishes to pay by cash or using a BNPL service, their price will be the same (this can be readily verified by examining pricing of products offered under BNPL services on popular retail merchants' websites). In contrast, given the long repayment terms of unregulated interest free finance, merchant fees payable by vendors to financiers can approach 30%: as margins for new energy technology are not sufficient to absorb this cost, the price of the goods is typically illegally inflated

So-called 'interest free' finance is not cost free. Rather, the cost of finance is paid by the vendor of new energy technology to the financier. To recoup this cost, we believe that the illegal practice of price inflation – the practice of requesting a higher price from customers who elect to finance the purchase of the goods by so-called 'interest free' finance, compared to the 'cash' price – is endemic in the new energy technology industry. Customers are rarely aware of this price inflation: in most sales proposal documents and advertisements, customers are presented with a single 'total' price and the related instalment amounts under the so-called 'interest free' repayment plan. It is not disclosed that this total price (or the sum of the instalment amounts) is a higher amount than would be payable as a cash payment.

In its report "REP 600: Review of buy now pay later arrangements" ASIC has acknowledged that it is aware of the practice of price inflation. We understand that significant evidence has been provided to both the ACCC and ASIC regarding the prevalence of this practice. If requested by the ACCC, we are able to provide significant additional contemporary evidence on a commercial-in-confidence basis, all of which has been recently gathered directly from new energy technology retailers.

We believe that illegal price inflation is harmful for four reasons:

i. **It is deceptive:** consumers are misled by believing there is no cost to their finance agreement. In practice, consumers are paying significant undisclosed amounts to vendors and financiers for their so-called 'interest-free' finance. In our experience, very few customers enquire about whether there is a 'discount' for paying cash, and thus do not uncover the existence of price inflation;
ii. **Hidden costs harm competition:** as customers are unaware of price inflation, their ability to bargain between providers of finance is seriously eroded – the cost of finance is effectively hidden, as almost all customers are unaware that the price of their goods has been inflated. As the cost of finance is hidden, customers are unable to easily compare offers between providers of finance, much as they would do when comparing finance for any other significant purchase or investment;
iii. **As competition is impeded, customers pay significantly more for finance than they should:** providers such as RateSetter who offer products regulated by the NCCP Act can offer finance at significantly lower cost to customers. However, so-called 'interest free' products are often selected by new energy technology vendors because the lack of NCCP Act obligations (and in particular the lack of responsible lending requirements)

means higher approval rates (including to customers who should not be offered credit), and faster approval times (at the expense of appropriate credit assessment to ascertain customers' ability to repay). The resulting price inflation means consumers over-pay for finance;

iv. **We believe that price inflation breaches the NCCP Act:** where vendors engage in price inflation to pay a finance merchant fee, this means there is a charge for providing credit. If there is a charge for providing credit, we think there is a strong argument that the credit product is one that is therefore regulated by the NCCP Act. If the credit product is regulated by the NCCP Act, but none of the important obligations related to that regulation are completed, both the vendor and the financier may be committing serious offences.

We believe that, given the scale of the merchant fees required to be paid by vendors to so-called 'interest free' financiers, illegal price inflation in our industry is inevitable (as evidenced by its continued practice, despite the efforts by some financiers to prevent it). We do not believe that any BNPL Code of Conduct, or any other industry code in relation to so-called 'interest free' finance, can meaningfully prevent its occurrence.

2. The NCCP Act is the appropriate regulatory framework for new energy technology finance given the specific risks associated with the sale and purchase of residential new energy technology

New energy technology is often a significant, complex and uncertain investment for a household. The average purchase price for new energy technology financed by RateSetter is approaching $10,000. Further, RateSetter is observing increasing purchase prices, driven by the growing adoption of residential batteries: we are now regularly financing the purchase of new energy technology systems costing in excess of $20,000. So that monthly payments are affordable, customers are typically financing these purchases over long time periods (the average loan term observed by RateSetter is approximately 60 months).

RateSetter considers that the NCCP Act and the NCC protect consumers in a way that is proportionate to the potential harms of financing the purchase of expensive, complex goods over long loan terms. Further, we do not believe that regulation under an alternative regime – such as a proposed ASIC BNPL Code of Conduct – is desirable or appropriate given the already strong protections available under the NCCP Act and the NCC (but not required for so-called 'interest free' finance), including:

i. Transparency of costs via prescribed disclosure documents and standard form loan contracts (including important warnings and disclaimers);
ii. Responsible lending obligations (including the requirement to perform an unsuitability assessment to determine whether offering credit will induce substantial hardship);
iii. Mandatory external dispute resolution scheme membership (and, in our view, stronger protections from AFCA given the frequent reliance in AFCA's terms of reference and associated commentary on the 'legal duties' of financiers, including NCCP Act obligations which do not apply to non-NCCP Act regulated credit);
iv. Hardship variation requirements;
v. Loan enforcement requirements (including collections conduct); and
vi. Vendor monitoring obligations (as under the terms of the NCCP Act 'point of sale' exemption the financier retains primary responsibility for vendor conduct across the finance sales lifecycle).

Contrary to the assertions of some providers of so-called 'interest free' in their submissions to the ACCC, we argue that the above protections are either not required by the ASIC Act or any existing Product Intervention Powers, or are required to a significantly lesser standard (and only in satisfaction of general obligations required under the ASIC Act or Australian Consumer Law).

RateSetter has three further concerns with the Code Amendment:

i. **It is unclear who is responsible for establishing equivalence, and how this will be achieved:** it is unclear from the amendment who will determine the 'equivalence' of consumer protections of any proposed BNPL Code of Conduct with the NCCP Act, and what process will be followed in making that determination. RateSetter considers that determining the equivalence between the protections contained in a BNPL Code of Conduct and those in the NCCP Act is a highly technical task and one that the administrators of the NETCC are not well placed to undertake without significant regulator assistance;

ii. **The existence of an ASIC BNPL code does not imply equivalence with the NCCP Act:** we do not believe that the simple fact that ASIC or any other regulator enacts a BNPL Code of Conduct means that the protections in that code are equivalent to those in the NCCP Act or address the specific harms outlined with so-called 'interest free' finance for the purchase of new energy technology set out above. We would be deeply concerned if the mere existence of a code for BNPL products was to be substantially relied upon by the NETCC administrators to establish equivalence with NCCP Act obligations; and

iii. **We believe that, by definition, any 'BNPL Code' will offer a lesser standard of protection compared with the NCCP Act:** we believe that, by definition, any BNPL Code of Conduct or other industry code sought to be relied on by a so-called 'interest free' provider under the Code Amendment will be one that has lesser consumer protections to those under the NCCP Act and the NCC. This is because if a so-called 'interest free' provider sought to offer a product with the same consumer protections as those under the NCCP Act, they could do so simply by complying with that Act.

3. The relative lack of regulation for so-called 'interest free' finance products, and the unequal obligations imposed on providers of finance regulated under the NCCP Act, raises significant competition concerns

Unlike providers of so-called 'interest free' finance, providers of credit products regulated by the NCCP Act are required to undertake substantial and complex activities across the credit lifecycle to satisfy the regulatory obligations outlined above (among others) which, alongside the oversight and monitoring requirements that are required to ensure their correct operation, come at a significant financial cost to the provider.

These financial costs are compounded by the inherently unequal product features between NCCP Act regulated finance and so-called 'interest free' finance. For example, unregulated credit providers can offer 'instant' credit approvals (which we do not believe that providers of NCCP Act regulated credit are able to offer or advertise while remaining compliant with the NCCP Act and NCC obligations) and higher approval rates (which we believe can only be to customers who would not be able to be offered credit under the NCCP Act without the financier breaching their obligations).

We are concerned that, were the Code Amendment be accepted by the ACCC, these disparities will become entrenched, with significant implications for the competitiveness of NCCP Act regulated finance. We do not consider that this is justifiable. The fact that one type of finance has an interest rate, while the other is 'interest free' but also has a cost to the customer (but this cost is hidden), should have no bearing on the obligations the financier must follow throughout the credit lifecycle, and the costs (both financial and in respect of product features) they should incur for doing so.

Conclusion

Where there observable, significant, ongoing consumer harms such as those arising from price inflation, it is right that the NETCC should respond to those harms: to protect consumer welfare, and to promote competition in finance for new energy technology. Further, it is appropriate that the NETCC demand a high bar for the conduct of vendors and financiers involved in the sale of complex, expensive products to consumers.

RateSetter

There is no deprivation of choice in the unamended draft determination. The unamended draft determination will improve choice for consumers, who will have significantly greater ability to compare finance that is currently obscured by hidden charges and unequal obligations on financiers.

If it would be helpful, RateSetter would be pleased to meet with the ACCC to provide further information in relation to our perspectives on the draft determination, and the Code Amendment, including further contemporary evidence of price inflation. Please do not hesitate to contact me on 0481085312 or if you would like to meet or discuss our submission in further detail.

Yours truly

Benjamin Milsom
Director
RateSetter Australia RE Limited

RateSetter

4 October 2019

BY EMAIL

Australian Competition and Consumer Commission
23 Marcus Street
CANBERRA ACT 2601

Attn: Susie Black

By email: adjudication@accc.gov.au

Dear Ms Black

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

RateSetter Australia RE Limited (**RateSetter**) is pleased to make a further submission in relation to the proposed New Energy Tech Consumer Code (**NETCC**). This submission is to be read in conjunction with our submission to the ACCC in relation to the NETCC dated 23 August 2019.

As previously communicated, RateSetter is Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products. RateSetter has facilitated over $45 million in consumer loans for the purchase of clean energy equipment such as solar panels and batteries. In providing this finance, RateSetter has partnered with ~1,000 accredited merchants and installers.

RateSetter is additionally the exclusive administrator of the Home Battery Scheme, a scheme operated by the Government of South Australia and supported by the Federal Government's Clean Energy Finance Corporation to provide subsidies and finance to ~40,000 South Australian households to facilitate the purchase of home battery storage systems. RateSetter makes this submission in its own capacity and not on behalf of the Government of South Australia nor the Clean Energy Finance Corporation.

RateSetter holds Australian financial service licence (**AFSL**) number 449176 and Australian credit licence (**ACL**) number 449176 and is the responsible entity of the RateSetter Lending Platform (ARSN 169 500 449). All finance offered to consumers by RateSetter for the purchase of renewable energy systems is regulated by the National Consumer Credit Protection Act (**NCCPA**) and National Credit Code (**NCC**).

We wish to communicate several important further considerations to the ACCC:

'Buy-now-pay-later' is not the same as 'interest-free' finance

1. It is important to distinguish buy-now pay-later (**BNPL**) from so-called "interest-free" finance offered to consumers in the renewable energy industry:

    a. BNPL is generally considered to represent short term finance offerings (typically 6 weeks) for low value goods (typically under $600) where the merchant is prepared to absorb the cost charged by the BNPL finance provider (typically 3-5% of the good's price). This is very clearly a payment solution for the consumer;

    b. Unregulated so-called "interest-free" finance offerings in the renewable energy industry are for longer terms (typically 5 or 7 years) for higher value systems (typically around $8,000) where the merchant is unable to absorb the finance costs charged by the finance provider (charged as a merchant fee) so is forced to inflate the price of the good when purchased

with such a finance arrangement. This is very clearly a longer-term credit offering for the consumer.

2. Market surveillance activities undertaken by us and by other regulated lenders shows that for so-called "interest free" finance, the retail cash price is typically inflated by ~25% to pay for the financers costs of providing credit. This cost of credit and related price inflation is an *intrinsic aspect of so-called "interest-free" credit*. Put simply, where there is interest-free finance that is accompanied by a merchant fee charged by the financer, there will always be price inflation, because merchants have no other way to pay for the cost of finance except to pass it on to consumers. **If ACCC does authorise the proposed revised draft code that permits so-called "interest free" finance, it would essentially ensure that illegal, opaque and misleading charging for credit through price inflation would continue for consumers. We do not believe that this is something that consumers, industry or the ACCC wish as an outcome.**

3. ASIC, in its recent *Report 600: Review of buy now pay later arrangements*, specifically notes at paragraphs 34 to 38, that these two different segments of the BNPL/interest-free market exist. Submissions made to the ACCC by other parties in relation to the NETCC have quoted many comments made by ASIC in this report in support of their statements. However, many of the comments identified do not relate to "interest-free" finance, but really to the very different small amount BNPL payment type arrangements.

4. Further, ASIC's report notes that in relation to so-called "interest-free" finance, there is evidence that price inflation does occur, and that this may be misleading and deceptive, and, where the inflation relates to a cost of credit, render so-called "interest-free" finance subject to the NCCPA. Given this, it is possible that many of the so-called "interest free" arrangements previously entered into with customers (or are proposed to be entered into after the authorisation of the amended code) are subject to the NCCPA, but do not comply with that act's requirements. This gives rise to significant legal risk for consumers, vendors and financiers. The ACCC should protect against this risk and not allow for so-called "interest free" products that may be regulated by the NCCPA but fail to comply with the related requirements.

A BNPL code is unlikely to provide sufficient protections to consumers for NET purchases

1. We understand that certain providers of unregulated so-called "interest free" finance to the renewable energy industry are seeking to have their finance offerings legitimised by, firstly seeking to have it fall under the umbrella of BNPL finance, and secondly seeking to have a BNPL self-regulation code established. We support the concept of a BNPL code, however, we do not believe that such a code should apply to the two very different offerings – one a payment solution and the other a longer term credit offering coupled with price inflation – as outlined above.

2. Finance companies that have been offering unregulated finance offerings to renewable energy consumers have been claiming that the BNPL self-regulation code that they seeking to have established, approved by ASIC and apply under the NETCC would provide an equivalence of regulation and the same protections to consumers as the NCCPA. The reality is such a code will not provide an equivalence of regulation nor the same protections to consumers. In this regard, we would highlight:

    a. The key terms of the proposed BNPL code disclosed in NETCC submissions made to the ACCC do not include the same standards of disclosure and transparency for consumers as the NCCPA, either in form or in substance. Consumers currently utilising so-called "interest free" finance offerings where coupled with price inflation do not provide transparency to consumers, and the proposed BNPL code does not sufficiently address this issue and certainly does not provide equivalence with the NCCPA. The consequences

of this shortfall are significant. It is well understood that price and cost transparency is essential for true competition to be fostered in any industry, and such, the existence of the BNPL code in the renewable energy industry could only be detrimental to the level of competition in the industry and detrimental to consumers;

b. The key terms of the proposed BNPL code disclosed in NETCC submissions made to the ACCC do not include any requirements to comply with the same standard of responsible lending laws or regulations as in the NCCPA, requiring only instead that the financier "Ensure the appropriate consideration of a consumer's personal financial situations before credit is extended" – a substantially lower standard than that in the NCCPA. Consequently, any finance provided to consumers under this code has a much greater propensity to result in a consumer falling into financial hardship and/or suffering harm than any regulated finance provided under the NCCPA;

c. The key terms of the proposed BNPL code disclosed in NETCC submissions made to the ACCC do not include any requirement that there be no price inflation at the point-of-sale to cover the cost of the finance provided. We believe it is critical that irrespective of the form of finance offered, consumers seeking to purchase renewable energy equipment must be offered a single price, as they would be in any other industry, so they can effectively make comparisons.

Impact on competition and innovation

1. Finance companies that have been facilitating unregulated finance offerings to consumers have been claiming that restricting finance offerings to NCCP regulated finance would reduce innovation in the renewable energy industry. We would note:

    a. Creating a finance product that pretends not to charge customers for credit and so sits outside the existing credit regulations is not innovation, it is regulatory arbitrage. We and other regulated finance providers are not aware of any other real innovation that BNPL providers have introduced to the industry over recent years. However, regulated finance providers have been able to introduce a number of significant and pro-consumer innovations. For example, RateSetter was the first lender in the industry to allow consumers to gain a personalised interest rate quote, and to allow consumers to gain such a quote without impacting their credit score. This has helped consumers shop around for the best finance deal;

    b. Even if so-called "interest free" finance is innovation, it is innovation that comes at a cost to consumers. Just as we would not say that designing a car that is extremely fast but fails to meet all safety and road standards is valuable innovation for consumers, so too do we think that any innovation provided by so-called "interest free" financiers cannot be valuable innovation. RateSetter believes that the ACCC should not encourage innovation that acts against consumers best interests.

2. Certain finance companies active in the renewable energy industry that have been promoting the BNPL code have claimed that allowing finance to be provided to consumers outside the NCCPA will increase competition amongst finance providers. This cannot be true, as finance offerings provided by companies operating under the proposed BNPL code would not be directly comparable to finance provided under the NCCPA. Both vendors and consumers would be unable to contrast and compare offerings, and accordingly, competition could only be reduced

3. There is ample competition already between providers of regulated finance to the renewable energy industry, with numerous companies focused specifically on the industry, and all financiers implicitly

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also being in competition with mortgage providers, given most homeowners also have the ability to draw on their mortgage to cover the cost of home improvements. If all companies providing finance to the industry were forced to compete on same grounds, rather than regulatory arbitrage conferring an advantage on some providers who elect not to comply with the law, then the level of competition would only increase.

If you wish to discuss any of the submissions made in this letter, please feel free to contact me on [redacted].

Yours truly

[redacted]

Ben Milsom
Director
RateSetter Australia RE Limited

RateSetter

8 November 2019

BY EMAIL

Australian Competition and Consumer Commission
23 Marcus Street
CANBERRA ACT 2601

Attn: Susie Black

By email: adjudication@accc.gov.au

Dear Ms Black

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

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

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

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

Measures to prevent opaque and misleading price inflation

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

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

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

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

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

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

> *(iv) the disclosures required under the NCC (if applicable), including in relation to fees and charges, or;*
> *if the finance arrangement is exempt from the NCC, the credit provider's fees and charges, including any merchant fees, with such information to be provided at the same time, with the same prominence and in the same form as would be required if the credit contract was regulated by the NCCPA and the NCC, including (without limitation) providing the consumer with a 'pre-contractual disclosure' document prior to the consumer entering into a loan contract.*

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

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

b) Definition of 'merchant fee'

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

RateSetter proposes the following definition:

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

c) Advertising disclosures - clause 2(m)

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

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

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

a) Where the advertised deferred payment arrangement is regulated under the NCC, meet the advertising requirements under Parts 9 and 10 of the NCC; or

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

Enforcement of the code

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

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

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

RateSetter again thanks the ACCC for their consideration of the matters raised in this and previous submissions. If you would like to discuss any comments made in this submission, please contact me on 0481085312.

Yours truly

Ben Milsom
Director
RateSetter Australia RE Limited