

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Outline of Opening Submissions

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: 01/06/2020 9:11 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.



IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

OUTLINE OF RATESETTER'S OPENING SUBMISSIONS

A. INTRODUCTION

1. This proceeding is an application for review, under s 101 of the *Competition and Consumer Act 2010* (Cth) (CCA), of a determination by the Australian Competition and Consumer Commission (ACCC) to authorise conduct referred to in The New Energy Tech Consumer Code (NET Code) as submitted to the ACCC in November 2019.
2. The proceeding is a re-hearing of the matter. The Tribunal is to determine whether the conduct referred to in the NET Code 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 result, or be likely to result, from the conduct.
3. The purpose of the NET Code is to set minimum standards with which suppliers (often referred to as **merchants**) of “new energy technology” (NET) products must comply when interacting with customers. NET products include solar systems, energy storage systems and various other products and services.¹
4. There is no dispute that most of the conduct referred to in the NET Code is likely to result in a net benefit to the public. The only aspects of the NET Code that the applicant (**flexigroup**) says are not likely to result in a net benefit are:
 - (a) cl 3(d), which would prevent signatories from making unsolicited offers of payment arrangements not regulated by the *National Consumer Credit Protection Act* (2009) (Cth) (NCCPA), including buy now pay later (BNPL) finance;²
 - (b) cl 25(a), which would prevent signatories from NET products with finance unless the finance provider, *inter alia*: assesses whether proposed finance is suitable for the

¹ See Part C of the NET Code.

² Clause 3(d) was intended to prevent BNPL finance from being offered in the context of an unsolicited offer of a NET product (unless the offeror or a related body corporate held an Australian Credit Licence): Barnes at [112]-[115]. flexigroup is proceeding on the basis of that intention: flexigroup's submissions at [71]. So too is RateSetter.

consumer; does not provide finance if the consumer cannot meet his or her repayment obligations without suffering substantial hardship; and offers alternative and flexible payment options if the consumer is experiencing payment difficulties; and

(c) cl 25(c)(iv), which would require signatories to ensure that consumers receive the disclosures required under the National Credit Code (NCC), including in relation to fees and charges (regardless of whether the arrangement is regulated by the NCC).

5. For the reasons developed below, RateSetter submits that the conduct referred to in cll 3(d), 25(a) and 25(c)(iv) is not likely to result in any material detriment, and is likely to result in significant public benefits. As such, the Tribunal should authorise the conduct referred to in the NET Code.
6. These submissions identify relevant principles (**Section B**), set out relevant facts and matters (**Section C**) and then address the benefits and detriments likely to result from each of cll 3(d), 25(a) and 25(c)(iv) of the NET Code (**Sections D to F**). Finally, they address the conditions flexigroup proposes be attached to any grant of authorisation (**Section G**).

B. PRINCIPLES

7. Section 101(1) of the CCA relevantly provides that a person dissatisfied with a determination of the ACCC under Division 1 of Part VII in relation to an application for an authorisation may apply to the Tribunal for a review of the determination. The review by the Tribunal is a re-hearing of the matter.³
8. Section 90(7)(b) provides that the Tribunal must not make a determination granting an authorisation unless 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 result, or be likely to result, from the conduct.
9. In performing this exercise, the Tribunal applies a “future with and without test”, which involves appraising the future in which the conduct does take place in light of the alternative outcome, where the conduct does not take place.⁴ If a claimed public benefit exists, in part,

³ Section 101(2) of the CCA.

⁴ See, e.g., *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Ltd* [2014] ACompT 1 (**Mac Gen**) at [169], *Application by Sea Swift Pty Ltd* [2016] ACompT9 (**SeaSwift**) at [44] and *Australian Competition and Consume Commission v Australian Competition Tribunal* [2017] FCAFC 150 (**ACCC v ACT**) at [56].

in a future without the proposal, the weight accorded to the benefit may be reduced appropriately.⁵

10. A “benefit to the public” is “anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress”.⁶
11. A “detriment to the public” includes a reduction in competition as well as other matters contrary to the goals pursued by society, including the goal of economic efficiency.⁷ While the notion of detriment is wider than anti-competitive effect, given the policy of the Act, the most important of potential detriments will normally be anti-competitive effects.⁸
12. The concept of “competition” was described by the Tribunal in *QCMA* as follows:⁹

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

- (1) the number and size distribution of independent sellers, especially the degree of market concentration;
- (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
- (3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
- (4) the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and
- (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

⁵ *SeaSwift* at [42].

⁶ *Re Queensland Co-operative Milling Association Ltd (QCMA)* (1976) 8 ALR 481 at 510; referred to with approval in *Mac Gen* at [161] and *SeaSwift* at [42].

⁷ *Sea Swift* at [43]; *Mac Gen* at [159]; *Tabcorp 1* at [67], referred to and adopted in *Tabcorp 2* at [28].

⁸ *QCMA* at 509.

⁹ At 512.

13. The “public” is the Australian public.¹⁰ Benefits and detriments not widely shared may nevertheless be benefits and detriments to the public.¹¹ However, the more limited the section of the community that receives a benefit or detriment, the less weight it should receive.¹²
14. The Tribunal must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating.¹³ Ephemeral or illusory benefits or detriments should not be given any weight.¹⁴ Nor should benefits or detriments that are purely speculative.¹⁵
15. Application of the future “with and without” test involves a prediction about the future.¹⁶ In the context of s. 50 of the CCA the Full Court has said that while the subject of the prediction must be proved on the balance of probabilities, it is not necessary that each relevant predicted fact be proved on the balance of probabilities.¹⁷ However, predictions about the future with and without will normally be rooted firmly in past and present market conditions, which are observable facts able to be proved in the ordinary way.¹⁸
16. Considering the future with and without potential regulatory change “is often no more than an educated guess”.¹⁹
17. An increase in a supplier’s revenue is not an appropriate measure of public benefit.²⁰ The “underlying source” of an increase in revenue may be an increase in welfare – e.g., an improvement in product offering or quality.²¹ But the change in revenue itself may be no more than a transfer of welfare from one part of the Australian public to another.²²

¹⁰ *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385.

¹¹ *SeaSwift* at [41], *Tabcorp 2* at [28], referring to and adopting *Tabcorp 1* at [65].

¹² *Qantas Airways Limited* [2004] ACompT 9 at [185]; *Mac Gen* at [168]; *SeaSwift* at [42].

¹³ *SeaSwift* at [46]; *Mac Gen* at [164].

¹⁴ *SeaSwift* at [45].

¹⁵ *SeaSwift* at [46]; *Mac Gen* at [164].

¹⁶ *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77 (*ACCC v PN*) at [216] (Middleton and O’Bryan JJ).

¹⁷ *ACCC v PN* at [216] (Middleton and O’Bryan JJ).

¹⁸ *ACCC v PN* at [218] (Middleton and O’Bryan JJ).

¹⁹ *Tabcorp 2* at [141].

²⁰ *Tabcorp 2* at [230], referring to and adopting *Tabcorp 1* at [481], [482], [486].

²¹ *Tabcorp 2* at [230], referring to and adopting *Tabcorp 1* at [482], [483], [486].

²² See similarly *Tabcorp 2* at [230], referring to and adopting *Tabcorp 1* at [485].

C. RELEVANT FACTS AND MATTERS

C.1 NET products and suppliers

18. NET products are defined in Part C of the NET Code. They comprise a range of products and services including solar photovoltaic systems, wind turbines, energy storage systems and electric vehicle charging services, but not “simple, low cost or off-the-shelf” products.²³
19. There is a large number of retail suppliers or merchants of NET products. Approximately 370 have been accredited by flexigroup alone.²⁴ It is unclear on the evidence how many merchants intend to become signatories of the NET Code if it is authorised. flexigroup expects approximately 60% of its accredited merchants to become signatories.²⁵
20. Typically, merchants do not offer a range of finance options. Most provide a single quote or estimate, either for BNPL finance or a “regulated” finance product (i.e. finance to which the NCCPA applies). Some offer a regulated finance product as a “primary” option and BNPL finance as an alternative if the consumer does not meet lending eligibility criteria for the regulated product.²⁶
21. Many merchants make unsolicited sales of NET products.²⁷ Merchants that engage in unsolicited sales usually contact potential customers by telephone. Some engage in door-to-door sales.²⁸ The number of merchants that engage in unsolicited sales and the volume of those sales is unclear. flexigroup estimates that the majority of sales of its top 10 merchants are unsolicited.²⁹
22. Merchants that make unsolicited offers of NET products may offer BNPL finance.³⁰ They do not appear to offer regulated finance. To do so they would need an Australian Credit

²³ See Part C of the NET Code.

²⁴ Mysak 2 at [7]. See also Mysak 1 at [19].

²⁵ flexigroup’s Application at [7].

²⁶ Foggo 1 at [17].

²⁷ Mysak 1 at [55]; flexigroup response to the Tribunal’s information request at p 6.

²⁸ Examples are at Exhibit RRP-25 to Punshon 2 at p 48 and Exhibit RRP-26 to Punshon 2 at pp 128, 133, 134, 136, 137, 141, 142, 143, 146 and 147. See also Mysak 1 at [55] and Confidential Exhibit TM-2 to Mysak 1 [FLX.001.002.0065] which states that [confidential to flexigroup] [REDACTED]

²⁹ Mysak 1 at [56]. See also flexigroup’s response to the Tribunal’s information request at p 6 ([confidential to flexigroup] [REDACTED]).

³⁰ See Mysak 1 at [56].

Licence (ACL).³¹ RateSetter does not permit merchants that offer its loan products to engage in unsolicited sales.³²

C.2 BNPL finance

23. BNPL finance is a form of finance that enables consumers to acquire a product immediately and pay for it over set period of time in regular instalments.³³

24. When consumers acquire a product with BNPL finance they enter into a contract with the merchant (for the acquisition of the relevant product) and a separate contract with the BNPL provider (for the finance). The BNPL provider has a separate contractual relationship with the merchant pursuant to which it pays to the merchant the retail price of the product less any deposit paid by the consumer and fees of the BNPL provider (**merchant fees**).³⁴

25. The supply of BNPL finance can be exempt from the NCCPA. Section 6(5) of the NCC states:

This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.

26. The regulations prescribe a maximum charge of \$200 in the first year and \$125 in each subsequent year (**the Prescribed Maximum**).³⁵

27. flexigroup asserts incorrectly that these provisions demonstrate “clear intention of the Commonwealth Parliament that the NCCPA does not apply to BNPL finance”.³⁶ The effect of the provisions is that *if* the only charge for BNPL providers’ credit is a periodic or other fixed charge, the charge does not vary according to the amount of credit provided and it is no more than the Prescribed Maximum, the NCCPA does not apply to the supply of that

³¹ There is prohibition on persons from offering regulated finance if they do not hold an ACL: s 29(1) NCCPA. NET suppliers are typically exempt from that prohibition: see para 23 of the *National Consumer Credit Protection Regulations 2010 (Regulations)*. However, the exemption does not apply if the supply occurs as a result of unsolicited contact with the consumer: s 23(4) of the Regulations.

³² Foggo 1 at [17].

³³ See ASIC Report 600 at [1], ACCC determination at [2.13].

³⁴ See ASIC Report 600 at [18], [19]; Mysak 1 at [32].

³⁵ See para 51 of the Regulations.

³⁶ flexigroup’s submissions at [9].

credit. Accordingly, if consumers are charged more under the credit contract for BNPL finance than the Prescribed Maximum, Parliament intended that the NCCPA *would* apply.

C.3 Regulated and BNPL providers' fees and charges

28. Providers of regulated finance generate revenue by charging interest and fees to consumers. RateSetter does not charge merchant fees.³⁷ Other providers of regulated finance do not appear to charge merchant fees.
29. Providers of BNPL finance generate revenue by charging fees to consumers and merchant fees. Merchant fees are the predominant source of most BNPL providers' revenue.³⁸ They are substantial. flexigroup's merchant fees are typically more than [confidential to flexigroup] [REDACTED] of the amount financed³⁹ and can be up to [confidential to flexigroup] [REDACTED] of the amount financed.⁴⁰ The amount financed is typically close to [confidential to flexigroup] [REDACTED] of the purchase price of the product.⁴¹
30. Merchant fees therefore constitute a substantial cost for merchants that offer BNPL finance. It is highly unlikely that merchants could "absorb" that cost (i.e. reduce their profits by the amount of the merchant fees). They are likely to seek to recover (part or all of) it by increasing the retail prices of their NET products. That is consistent with the following evidence:
- (a) many of the merchants contacted by the Consumer Action Law Centre (CALC) witnesses to provide a quote for NET products offered a substantially lower price if the product was to be acquired in cash rather than with BNPL finance, including

³⁷ The fees it charges are set out in Foggo 1 at [14], [15].

³⁸ See ASIC Report 600, Appendix 2, [193] and Table 4 (they comprise 94% of Brighte's revenue and 64% of flexigroup's revenue).

³⁹ [Confidential to flexigroup] [REDACTED]; tab 7 of Confidential Exhibit TM-2 [FXL.001.002.0065] to Mysak 1.

⁴⁰ flexigroup's response to the Tribunal's information request at p 7. In the period 1 April 2019 to 30 April 2020, flexigroup generated [confidential to flexigroup] [REDACTED]. flexigroup also charges merchants a range of other fees including [confidential to flexigroup] [REDACTED]

[REDACTED]; flexigroup response to Tribunal's information request at [3.1] on p 7.

⁴¹ See tab 7 of Confidential Exhibit TM-2 [FXL.001.002.0065] to Mysak 1.

Sunboost Solar,⁴² More Green Energy,⁴³ Solar Secure,⁴⁴ Instyle Solar,⁴⁵ Your Choice Solar,⁴⁶ Fair Value Solar⁴⁷ and SunEnergy;⁴⁸

- (b) in the course of the CALC witnesses' communications with those merchants, some merchants made clear that, in their industry, when NET products were offered with BNPL finance, the price of the product was increased to recover the cost of merchant fees. For example:
- (i) according to Instyle Solar: "whilst Humm claims to be interest free, the overall price for the system is more expensive" because "Humm charges a merchant fee which can be an extra \$1,500.00 - \$2,000.00 front loaded on to the consumer";⁴⁹
 - (ii) according to Nemco Solar: "[i]nterest free finance providers, in reality, do charge interest, it is just absorbed into the total price";⁵⁰
 - (iii) according to Solar Gain: "[we] used to go through Certegy Finance but ... the total price to the consumer was more expensive so ... [we] stopped providing this option" and "[t]he overall price of 'interest free' finance providers is more expensive";⁵¹
 - (iv) according to HP Energy / Home Solar Panels: "people pay more money for that type [BNPL] of finance";⁵²
- (c) in mid-2018, RateSetter conducted a "mystery shopper" exercise that involved contacting various merchants that offered BNPL finance and asking for both a cash

⁴² Bolzonello at [63], [67].

⁴³ Bolzonello at [77].

⁴⁴ Bolzonello at [86].

⁴⁵ Bolzonello at [118.c].

⁴⁶ Bolzonello at [128], [132].

⁴⁷ Bolzonello at [27.c].

⁴⁸ Shami at [42], [43].

⁴⁹ Bolzonello at [118.c].

⁵⁰ Bolzonello at [45(c)].

⁵¹ Bolzonello at [145].

⁵² Ross at [111].

price and BNPL price for particular products.⁵³ Merchants quoted substantially higher prices if the consumer was to acquire the product with BNPL finance. The average price increase was [confidential to RateSetter] [REDACTED] and the median price increase was [confidential to RateSetter] [REDACTED];⁵⁴

- (d) for the report that ASIC prepared in respect of the BNPL finance industry in 2018 it received anecdotal evidence of merchants charging significantly higher prices for products acquired with BNPL finance, including “where the price of goods is less transparent and ‘negotiable’ (e.g. solar power products)”;⁵⁵ and
- (e) in the submission ASIC made to the ACCC in respect of the authorisation the subject of this proceeding, ASIC said: “ASIC has received evidence that some merchants are continuing to cause harm to consumers through this practice”⁵⁶ and “[e]vidence that ASIC collected in early 2019 suggests that some solar power merchants are introducing additional surcharges that varied as a percentage increase of the cash price from 2.71% to 46.75% across seven solar merchants”.⁵⁷

31. BNPL providers’ contracts with merchants prohibit merchants from charging different retail prices for NET products depending on the payment method the consumer uses.⁵⁸ For example, cl 2.1(a) of flexigroup’s humm Retailer General Terms states:⁵⁹

You must not set or charge a Purchase Price for goods and/or services using a Payment Plan Product [defined as humm] that is higher than the price that would be, or is charged, if another payment method was used.

32. One apparent purpose of this provision is to seek to ensure that BNPL providers fall within the exemption from application of the NCCPA referred to above (see [25] above).⁶⁰ That exemption may not apply if merchants were to charge higher retail prices for NET products when offering them BNPL finance because the amount by which the price is increased may

⁵³ Foggo 2 at [3]-[8].

⁵⁴ Foggo 2 at [9].

⁵⁵ ASIC Report 600 at [36]. See also [76] (“[s]ome merchants also charge consumers a substantially higher price when they buy goods or services using a buy now pay later arrangement”) and the Senate Economics References Committee Report, Exhibit KF-3 to Foo, p. 174.

⁵⁶ Foo Exhibit at [72], p 222.

⁵⁷ Foo Exhibit KF-4 at [74], p 222.

⁵⁸ ASIC Report 600 at [34].

⁵⁹ See tab 4 of Exhibit TM-1 [FXL.001.002.0267]; flexigroup response to the Tribunal’s information request, p 12.

⁶⁰ As to flexigroup’s purpose, see its response to the Tribunal’s information request, p 12.

constitute a charge for the credit, thereby making the total amount the consumer is charged for the credit greater than the Prescribed Maximum.

33. The evidence referred to in paragraph 30 suggests that often merchants do not comply with this obligation. That is unsurprising. Given the need to recover the cost of merchant fees, merchants have a strong incentive not to comply with it. Doing so would require them to increase both the cash price and BNPL price of their products. That would make them less competitive with respect to consumers who are willing and able to pay for NET products in cash. Consumers who pay cash for NET products would likely be far better off buying the products from NET merchants that do not face the cost of BNPL providers' merchant fees.
34. flexigroup says that it insists on compliance with this obligation.⁶¹ The evidence referred to in paragraph 30 suggests that those efforts are often ineffective. But, if and when they are effective, this contractual prohibition creates a substantial risk of consumer harm. Consumers who do pay cash from merchants that offer BNPL finance are likely to pay a price that has been increased by reason of a product the consumers have not acquired and from which they receive no benefit. That risk is particularly acute in the context of unsolicited sales, where consumers are less likely to "shop around" and compare the cash prices different merchants offer. Notably, [confidential to flexigroup] [REDACTED]

C.4 Cost of BNPL finance compared to regulated finance

35. An important feature of BNPL finance is that it does not require the consumer to pay interest. That is a feature that BNPL providers and merchants rely on heavily when promoting their products. Promotional material commonly contains statements such as:
- (a) *"Live Interest freee forever!"* [sic];
 - (b) *"This isn't a typo. You pay absolutely NO INTEREST"*; and
 - (c) *"0% Interest Payment Plan has helped dreams come true"*.⁶³

⁶¹ Mysak 2 at [31].

⁶² 10% of SunEnergy's sales are in cash: Lake at [22]. In respect of other merchants that offer humm, see tab 7 of Confidential Exhibit TM-2 [FXL.001.002.0065] to Mysak 1, column P ("% sales financed by humm").

⁶³ Hearing Book Part D, tabs 237 and 238. See also Mysak 1 at [41]-[43].

36. BNPL providers also claim that BNPL finance is cheaper than other forms of finance.⁶⁴ For example, at paragraph 43 of his first statement, Mr Mysak sets out a humm and personal loan product cost comparison based on the average cost of a solar product (\$8,375) financed over 60 months. He concludes that acquiring the product with humm is substantially cheaper than with other forms of finance because it is interest free.
37. Mr Mysak's example is based on an assumption that the retail prices of the relevant product will be the same regardless of the payment method the consumer uses. For the reasons submitted above, that assumption will often be wrong.
38. Mr Foggo of RateSetter has performed a similar comparison (i.e. based on a solar product that costs \$8,375 financed over 60 months) without that assumption. Mr Foggo compared the total cost to consumers if they were to acquire the product:
- (a) with humm and the retail price of the product was increased by [confidential to RateSetter] [REDACTED] (i.e. the amount of the median "price inflation" that was identified during RateSetter's mystery shopping exercise); and
 - (b) with RateSetter's green loan and the retail price remained \$8,375.
39. In that scenario, consumers would pay, in total, \$8,375 plus \$3,028.72 with humm, and \$8,375 plus \$2,146.41 with RateSetter's green loan.⁶⁵ That is, the consumer would pay \$882.31 more overall with humm. And this assumes that the customer takes the full 60 months to pay off the RateSetter loan. Early re-payment of RateSetter's green loan would reduce the total amount of the consumer pays; early re-payment of humm finance would not.
40. Accordingly, once the effect of merchant fees is taken into account, it cannot be assumed that consumers will pay substantially less for a NET product with BNPL finance than regulated finance. Acquiring products with BNPL finance may in fact cost the consumer substantially more overall.
41. Mr Mysak's example demonstrates the potential for BNPL finance to cause consumer harm. If a merchant complies with its obligation not to charge different retail prices for NET products depending on the payment method the consumer uses, consumers are likely to assume that the only cost to them of the finance is the fees they pay directly to the BNPL

⁶⁴ Mysak 1 at [41]-[43]. See also Lake at [35].

⁶⁵ Exhibit DF-3 to Foggo 2 at p 2.

provider. Many consumers will not appreciate that the retail price of the product has been inflated to cover the BNPL provider's merchant fees. This creates the potential for consumers to make purchases of substantial size based on an assumption of value that is false.

C.5 Matters relevant to competition for the supply of finance for NET products

Concentration

42. There is a large number of providers of BNPL and regulated finance that compete closely with one another to supply finance for NET products. Mr Mysak of flexigroup identifies 10 separate providers that he considers to be flexigroup's competitors.⁶⁶ Mr Foggo of RateSetter identifies 20 separate providers that he considers to be RateSetter's competitors.⁶⁷

Barriers to entry

43. Barriers to commencing a business to supply finance for NET products are low. Mr Foggo established both RateSetter and a BNPL finance business and explains that:

- (a) funding for loans is readily available to entities that have a credible founding team with consumer lending or related experience, and once a track record has been established, funding can be obtained from a range of sources including banks and superannuation funds;⁶⁸
- (b) the cost of complying with legal and regulatory requirements is relatively low (approximately \$150,000);⁶⁹
- (c) substantial physical premises are not required;⁷⁰
- (d) IT systems can be obtained for around \$250,000;⁷¹ and

⁶⁶ Tab 10 of Exhibit TM-1 [FXL.001.002.0337] of Mysak 1.

⁶⁷ Exhibit DF-1 to Foggo 1 at pp.78-79.

⁶⁸ Foggo 1 at [24(b)].

⁶⁹ Foggo 1 at [24(a)].

⁷⁰ Foggo 1 at [24(c)].

⁷¹ Foggo 1 at [24(d)].

(e) qualified staff are readily available.⁷²

44. Mr Foggo estimates that a regulated finance business can be started in approximately six to 12 months with around \$1 million of equity capital.⁷³

45. Barriers are even lower for businesses that already supply personal loans and seek to expand into the supply of loans for NET products.⁷⁴ Based on RateSetter's experience, doing so costs around \$150,000.⁷⁵ In addition to the major banks, there are over 40 credit unions and at least 10 companies that offer personal loans. Five suppliers of personal or commercial loans, including RateSetter, have expanded into the supply of green loans in this way since 2016.⁷⁶

C.6 Matters referred to in cll 25(a) and 25(c)(iv) of the NET Code and their cost

46. Clause 25(a) of the NET Code would prevent signatories from offering BNPL finance unless the finance provider has certain processes in place in relation to dispute resolution, consumer hardship and assessment of the suitability of proposed finance for consumers. The approximate cost to RateSetter of having those processes is:

(a) for hardship and dispute resolution processes – approximately \$20 per loan funded plus approximately \$5,000 per year in membership of the Australian Financial Complaints Authority (AFCA);⁷⁷

(b) for suitability assessments – approximately \$10 per loan funded.⁷⁸

47. Clause 25(c)(iv) of the NET Code would prevent signatories from offering BNPL finance unless various matters are disclosed to consumers, both before they enter into a contract and in the contract itself.⁷⁹ Specific required disclosures are summarised below. The cost of those disclosures is low. They can be made using templates which can be prepared or

⁷² Foggo 1 at [24(e)].

⁷³ Foggo 1 at [24(f)], [5].

⁷⁴ Foggo 1 at [26].

⁷⁵ Foggo 1 at [26(e)].

⁷⁶ Foggo 1 at [27].

⁷⁷ Foggo 1 at [45].

⁷⁸ Foggo 1 at [45].

⁷⁹ Section 16 NCC.

purchased for approximately \$10,000. The ongoing marginal costs of making these disclosures are very low.⁸⁰

C.7 Defaults and hardship

48. flexigroup contends that the risk of harm to consumers in respect of the supply of BNPL finance for NET products is low, based on its default and hardship rates.⁸¹
49. To date, flexigroup has only provided default rates as at 28 May 2020. It has yet to produce its default rate data for the period requested by the Tribunal (the two years prior to April 2020). However, its default rate in respect of finance for NET products as at 28 May 2020 is more than [confidential to flexigroup and RateSetter] [REDACTED] that of RateSetter around the same time. flexigroup's default rate is [confidential to flexigroup] [REDACTED] of transactions,⁸² RateSetter's default rate (as at April 2020) is [confidential to RateSetter] [REDACTED] of transactions.
50. The number of hardship applications flexigroup received in respect of finance for NET products is also substantially higher than the number received by RateSetter. For the period 1 May 2018 to 30 April 2020, flexigroup received hardship applications in respect of [confidential to flexigroup] [REDACTED] of its transactions.⁸³ Over the period 1 January 2018 to 30 April 2020, RateSetter received hardship applications in respect of [confidential to RateSetter] [REDACTED] of its transactions.⁸⁴
51. The difference in hardship faced by consumers who acquire humm compared to RateSetter's green loan is also evident from amounts the two businesses' have written off. Over the period 1 May 2018 to 30 April 2020, flexigroup has written off [confidential to flexigroup] [REDACTED]. In contrast, for the period 1 April 2018 to 30 April 2020, RateSetter has written off [confidential to RateSetter] [REDACTED].

⁸⁰ Foggo 1 at [43].

⁸¹ flexigroup submissions at [88].

⁸² [Confidential to flexigroup] [REDACTED]. See flexigroup's response to the Tribunal's information request at item 1.12, p 2 and Annexure A, p 17.

⁸³ [confidential to flexigroup] [REDACTED]. See flexigroup's response to the Tribunal's information request at item 1.10, p 1.

⁸⁴ [confidential to RateSetter] [REDACTED]. See RateSetter's response to the Tribunal's information request at item 1.10.

[REDACTED]. On average, flexigroup therefore wrote off [confidential to flexigroup and RateSetter] [REDACTED] the amount RateSetter wrote off per transaction.

52. This data shows that not only the rate but also the extent of hardship is substantially greater for consumers that acquire Flexigroup's BNPL product compared to RateSetter's regulated product.
53. Importantly, data of this type does not account for consumers who meet their contractual obligations but experience considerable hardship to do so. Consumers may sacrifice important expenditure to ensure that they meet a legal obligation, out of a sense of duty, embarrassment or fear of consequences of default. For flexigroup, the number of such consumers may be substantial, given that it is not required to and does not perform suitability assessments.⁸⁵

C.8 Draft BNPL Code of Practice

54. In about February 2020 the Australian Finance Industry Association Limited (AFIA) released a draft Code of Practice for the BNPL sector for comment.⁸⁶ AFIA has since obtained feedback from "stakeholders" and said that work is needed in respect of various aspects of the draft Code.⁸⁷ A working group will now review the feedback that has been received and plan next steps.⁸⁸ AFIA says that due to the different business models in the BNPL market this will take some time. It is "aiming" to launch the Code on 1 January 2021.⁸⁹
55. Two matters may be noted about the draft AFIA Code. First, it is still being developed. AFIA intends to make changes to it and spend over seven months doing so. Those changes will be influenced by the feedback it has received and that feedback is not in evidence. In these circumstances, what (if any) changes will be made over the next seven months is little more than guesswork. It is also unclear:
- (a) when the Code will be finalised – AFIA is "aiming" for January 2021, but the likelihood of it meeting that target is unclear; and

⁸⁵ As to what is involved in suitability assessments, see [74] below.

⁸⁶ Mysak 1 at [65].

⁸⁷ Exhibit TM-3 to Mysak 2.

⁸⁸ Exhibit TM-3 to Mysak 2.

⁸⁹ Exhibit TM-3 to Mysak 2.

- (b) what entities will become signatories – flexigroup says that it will be a signatory, although necessarily that decision may be revisited depending on the final form of the Code. Which other BNPL providers will become signatories is unclear. Further, the supply of BNPL finance is a rapidly growing and changing industry, in which barriers to entry are low. There is a real chance of new entry in the foreseeable future. New entrants would not be required to become signatories.
56. In the circumstances, the Tribunal cannot be satisfied what the final form of the AFIA Code will be, when it will take effect and which entities will become signatories to it.
57. Second, the draft AFIA Code does not contain consumer protection provisions comparable to cl 25(a) and 25(c)(iv) of the NET Code. In particular:
- (a) it does not require BNPL providers to comply with the responsible lending provisions contained in Part 3-2 of the NCCPA⁹⁰ (including the requirements to make reasonable inquiries and take reasonable steps to verify the consumer’s financial situation⁹¹ and refuse to provide finance if it is likely that the consumer will be unable to comply with his or her financial obligations under the contract without substantial hardship⁹²);
- (b) it does not require BNPL providers to offer alternative and flexible payment options to customers experiencing payment difficulties.⁹³ Consumers may “ask” for financial hardship (cl 7.2) and BNPL providers will “discuss” the request and “may” negotiate a new repayment arrangement (cl 7.3) but there is no obligation to negotiate or make a new arrangement; and
- (c) it does not require BNPL providers to provide to debtors pre-contractual statements required by the NCC, which include details of the amount of credit, fees and charges in a common, prescribed form (which facilitates “like-for-like” comparison of

⁹⁰ See cl 25(a)(A)(iv) of the NET Code.

⁹¹ Section 130(1) NCCPA.

⁹² Sections 128, 129, 131(1), 131(2) NCCPA.

⁹³ See cl 25(a)(A)(ii). See also s 74 of the NCC, which enables consumers experiencing hardship to apply to the Court for the credit contract to be changed by order of the Court.

different finance providers' offerings⁹⁴) and details of any commissions paid to or by credit provider for the introduction of credit business.⁹⁵

58. Although the draft Code provides that consumers can make complaints to AFCA in respect of signatories' compliance with the Code, that is of limited utility given the limited benefits the Code would provide to consumers.

D. DETRIMENTS AND BENEFITS OF CL 3(d) OF THE NET CODE

59. As noted above, cl 3(d) of the NET Code would, if authorised, prevent merchants that are signatories to the NET Code and do not have an ACL from offering unsolicited sales of BNPL products.

D.1 Detriments

60. The most important potential detriment for the Tribunal to consider is a lessening of competition.⁹⁶

61. Clause 3(d) of the NET Code is not likely to have any effect on competition for the supply of finance for NET products:

- (a) First, it will not have the effect of reducing the number of suppliers of BNPL finance, the range of products they offer or the prices or other features of those products. If it is authorised, BNPL and regulated providers would continue to compete with and constrain one another. Its only potential effect is to reduce BNPL providers' market share in an area (or through a distribution channel) in which regulated finance products are not provided. That is not likely to remove the constraint that BNPL providers presently impose on other providers of finance. Notably, no provider of BNPL finance has suggested that cl 3(d) would prevent it from being a vigorous and effective competitor.
- (b) Second, in any event, there is a large number of suppliers of finance for NET products. As noted above, Mr Mysak considers flexigroup to have 10 close competitors and Mr Foggo considers that RateSetter has 20. Market concentration

⁹⁴ See Foggo 1 at [38]-[41].

⁹⁵ See [83] below.

⁹⁶ *QCM* at 509.

is sufficiently low that a reduction in the size or market share of some competitors is not likely to affect competition.

- (c) Third, barriers to entry are low. As the Tribunal said in *QCMA*, of all the elements of market structure, no doubt the most important is the condition of entry.⁹⁷ In *Boral v ACCC*,⁹⁸ capital investment of about \$8 million was required for entry and barriers to entry were found to be low. Here, "greenfields" entry can occur with around \$1 million of equity capital and would take six to 12 months.⁹⁹ Businesses that already supply personal loans can expand their offering to include loans for NET products for around \$150,000 in about six weeks.¹⁰⁰ Five have done so since 2016 alone and there are at least 50 other suppliers of personal loans that could also do so.¹⁰¹

62. Clause 3(d) is not likely to result in any other detriments.
63. As noted above, cl 3(d) would not cause any supplier to cease supplying BNPL services. Any consumer who values and wishes to acquire BNPL finance from any BNPL provider would be able to do so. Accordingly, there would be no "loss of choice in finance for New Energy Tech products" as flexigroup contends.¹⁰² The effect of cl 3(d) on consumers would simply be to require those who wish to acquire NET products to *contact* a NET supplier to do so rather than *be contacted*. That is not a material detriment.
64. Importantly, a reduction in BNPL providers' and merchants' revenue is not, of itself, a detriment. The "underlying source" of a change in revenue can be a detriment, e.g. a change in competition or product quality or offering. But a mere reduction in revenue is simply a transfer of money.¹⁰³ Any revenue foregone by BNPL providers and merchants would be retained by consumers or spent with another supplier (of a NET or other product). It would be a transfer of welfare from one part of the Australian public to another.

⁹⁷ *QCMA* at 512.

⁹⁸ [2003] HCA 5 at [29] (Gleeson CJ and Callinan J).

⁹⁹ Foggo 1 at [24], [25].

¹⁰⁰ Foggo 1 at [26], [29].

¹⁰¹ Foggo 1 at [28].

¹⁰² flexigroup submissions at [12(a)(i)].

¹⁰³ See [17] above.

65. Similarly, any reduction in the number of those businesses' employees that might result from a reduction in their revenue is not a detriment to the public.¹⁰⁴ While the individuals that lose employment might suffer a loss (depending on what if any alternative employment they find and when), others will receive a commensurate gain.
66. flexigroup asserts that cl 3(d) would be likely to increase the price of NET products.¹⁰⁵ There is no evidence to support that contention. Its sole basis is an assumption that if unsolicited sales of NET products decrease, the price of NET products will increase. That is a *non sequitur*. The price of NET products will be determined by a range of matters (at different levels of the supply chain), none of which is addressed in the evidence.
67. flexigroup also asserts a detriment of preventing merchants and BNPL providers from offering lawful BNPL products.¹⁰⁶ As noted above, cl 3(d) would not prevent any person from supplying any product. No merchant is required to become signatory to the NET Code; indeed flexigroup expects that 40% of its merchants will choose not to become signatories.¹⁰⁷ flexigroup's submission that cl 3(d) is "contrary to Parliament's will that BNPL providers are exempt from the NCCPA"¹⁰⁸ is also incorrect. The paragraph of the Explanatory Memorandum flexigroup cites in support of that submission is not concerned with BNPL finance.¹⁰⁹ The clear intention of Parliament is that where consumers are charged more under a credit contract than the Prescribed Maximum, the NCCPA *would* apply.¹¹⁰ Where retail prices have been substantially inflated by reason of BNPL providers' merchant fees, and the amount of that price inflation together with the fees BNPL providers charge directly to consumers is greater than the Prescribed Maximum, it is far from clear that Parliament intended BNPL finance to be exempt from the NCCPA. At best, for flexigroup, Parliament has not turned its mind to the question.

¹⁰⁴ Cf. Lake at [34].

¹⁰⁵ flexigroup submissions at [12(a)(v)].

¹⁰⁶ flexigroup submissions at [12(a)(iii)].

¹⁰⁷ flexigroup application at [7].

¹⁰⁸ flexigroup submissions at [86].

¹⁰⁹ See [8.38] ("Credit under a continuing credit contract is *also* exempt under subsection 6(5)", emphasis added): Explanatory Memorandum, *National Consumer Credit Protection Bill 2009*, 250 (EM).

¹¹⁰ See s 6(5) NCC and [8.38] of the EM.

68. In its written opening submissions flexigroup says that cl 3(d) of the NET Code would be likely to substantially lessen competition in the retail market for NET products.¹¹¹ That is a new contention. It is not referred to in flexigroup's Application or Statement of Facts, Issues and Contentions. In any event, there is no evidence to support it. There is no evidence of barriers to entry. There is no evidence relevant to the geographic scope of the market. The number of suppliers in the market (or markets) is unclear: flexigroup has accredited 370 different merchants¹¹² but many merchants offer only regulated finance¹¹³ so the actual number of merchants may be far greater. Further, the only merchant that is being called, SunEnergy, generates [confidential to SunEnergy] [REDACTED] [REDACTED]¹¹⁴ and even it does not suggest that cl 3(d) would cause its business to close. It says only that it believes that its sales volumes would decrease.¹¹⁵ Accordingly, there is no evidence that any merchant would cease supplying NET services, let alone that any increase in concentration that did occur would be likely to affect competition. Indeed, SunEnergy's view is to the effect that cl 3(d) would cause price competition amongst NET suppliers to *increase*.¹¹⁶

D.2 Benefit

69. Clause 3(d) of the Code would be likely to result in the following benefits.
70. First, it would reduce the number of consumers who pay for a NET product in cash in circumstances where the cash price has been inflated because the merchant is seeking to recover the costs of BNPL providers' merchant fees. In other words, it is likely to reduce the number of consumers who pay a price that has been inflated by reason of a product they did not acquire and from which they receive no benefit. As noted above, that is likely to occur whenever merchants that offer BNPL finance comply with their contractual obligation not to charge different prices depending on the payment method the consumer uses.
71. Second, it would be likely to reduce the number of consumers who acquire a NET product with BNPL finance based on an assumption that the retail price of the product has not been

¹¹¹ See flexigroup's submissions at [12a)(iv)], [82], [105].

¹¹² Mysak 2 at [7]. See also Mysak 1 at [19].

¹¹³ Many NET suppliers do not offer both BNPL and regulated finance: see Foggo 1 at [17].

¹¹⁴ Lake at [13].

¹¹⁵ Lake at [35].

¹¹⁶ Lake at [38].

inflated to recover part or all of BNPL providers' merchant fees. As noted above, claims that BNPL finance is interest free and cheaper than other forms of finance without disclosing the effect of merchant fees on the retail price of the products can cause consumers to believe that they will pay far less for a product acquired when acquired with BNPL finance than a regulated loan, when in fact the opposite may be true. This potential harm is particularly acute in the context of unsolicited sales, where consumers are less likely to shop around and compare merchants' offers, and even more so when sales occur in consumers' homes. The potential for consumer harm from door-to-door sales is notorious.¹¹⁷

72. Third, it would be likely to reduce the number of consumers who acquire finance that is not suitable for them (thereby reducing the potential for default and hardship). As noted above, BNPL providers are not required to perform suitability assessments. Consumers who fail suitability assessments have been assessed, following reasonable enquiries, to be unable to comply with their financial obligations under the credit contract. They are necessarily at high risk of harm. Any reduction in the number of consumers that would have failed a suitability assessment but received BNPL finance is a benefit.

E. DETRIMENTS AND BENEFITS OF CL 25(a) OF THE NET CODE

73. Clause 25(a) of the NET Code would have the effect of preventing signatories from offering deferred payment arrangements unless the finance provider has in place systems and processes by which it would:
- (a) resolve complaints using an internal dispute resolution process and, if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by AFCA);
 - (b) have processes to identify whether the consumer is experiencing payment difficulties due to hardship;
 - (c) offer alternative and flexible payment options if the consumer is experiencing payment difficulties; and
 - (d) comply with ss. 128-133 of the NCC.

¹¹⁷ See *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [10].

74. Sections 128-133 of the NCC concern suitability assessments. Providers of finance are required to assess whether or not the proposed finance is unsuitable for the consumer¹¹⁸ and, in performing that assessment, make reasonable inquiries and take reasonable steps to verify the consumer's financial situation.¹¹⁹ The proposed finance must be assessed as unsuitable for the consumer if it is likely that the consumer will be unable to comply with his or her financial obligations under the contract, or could only comply with substantial hardship.¹²⁰ It is presumed that consumers could only comply with substantial hardship if compliance would require the consumer to sell his or her principal place of residence.¹²¹

E.1 Detriments

75. Clause 25(a) of the NET Code would not result in material detriment. flexigroup asserts that its costs would increase but has led no evidence of those costs. Its only relevant evidence is a vague statement by Mr Mysak that, under the Code as authorised by the ACCC, "flexigroup would face increased costs".¹²² Mr Mysak does not explain the amount of those costs or the matters in respect of which they would be incurred.
76. The cost of having the practices and procedures referred to in paragraph 73 in place is likely to be very low. As noted above, RateSetter estimates that performing suitability assessments costs it around \$10 per loan funded¹²³ and dispute resolution processes and hardship provisions cost it around \$20 per loan funded.¹²⁴ Membership of AFCA is approximately \$5,000 per year.¹²⁵
77. Mr Mysak also asserts that if flexigroup faces an increase in its costs, there will be a "corresponding increase in fees to customers".¹²⁶ But whether or the extent to which costs are passed on to customers will depend on a range of matters, including the extent to which it will reduce flexigroup's competitiveness and market share, and its profitability. Notably, BNPL providers such as flexigroup are highly profitable. For example, in the half year to

¹¹⁸ Sections 128, 129 NCCPA.

¹¹⁹ Section 130(1) NCCPA.

¹²⁰ Sections 131(1), 131(2) NCCPA.

¹²¹ Section 131(3) NCCPA.

¹²² Mysak 1 at [63].

¹²³ Foggo at [45].

¹²⁴ Foggo 1 at [45].

¹²⁵ Foggo 1 at [45].

¹²⁶ Mysak 1 at [63].

December 2019, flexigroup's net income from the BNPL segment was \$49.1 million and its profit before income tax was \$10.1 million.¹²⁷ Given the very low cost of having the practices and procedures referred to in paragraph 73 in place, the Tribunal should not be satisfied that it would be passed on to consumers by way of higher prices rather than absorbed by flexigroup.

E.2 Benefits

78. Clause 25(a) is likely to result in three primary benefits.
79. First, by requiring suitability assessments to be performed, cl 25(a) would ensure that finance is only offered to persons who are able to afford it. That is a significant public benefit. As noted above, persons that fail suitability assessments are necessarily at high risk of harm (including of default or hardship) from BNPL (or any) finance.
80. Second, it would ensure that BNPL providers are required to offer alternative and flexible payment options if the consumer is experiencing payment difficulties. On any view, that is a benefit to consumers. Notably, no such obligation exists at present, and none is proposed in the draft AFIA Code.
81. Third, it would ensure that consumers can resolve disputes by way of an external, independent dispute resolution process. At present, there is no obligation on BNPL providers to participate in an external dispute resolution process. This would result in the benefit of giving consumers confidence that any disputes will be resolved fairly and impartially.

F. DETRIMENTS AND BENEFITS OF CL 25(c)(iv) OF THE NET CODE

82. Clause 25(c)(iv) of the NET Code would require merchants to make disclosures required under the NCC including in relation to fees and charges (regardless of whether the arrangement is regulated by the NCC).

¹²⁷ flexigroup Interim Financial Report for the six months to 31 December 2019, p. 18: Hearing Book, Part D, tab 236.

83. The NCC prohibits credit providers from entering into a credit contract unless they have given to the debtor, *inter alia*, a pre-contractual statement setting out various matters¹²⁸ in a form prescribed by the regulations.¹²⁹ The required disclosures relevantly include:
- (a) the amount of credit to be provided and the persons to which it is to be paid (if ascertainable);¹³⁰
 - (b) the amount of the repayments, the number of repayments, when the first payment falls due and the frequency of the repayments;¹³¹
 - (c) the fee and charges that are or may become payable, when they will be payable and in what amount, and the total amount of fees and charges payable (if ascertainable);¹³²
 - (d) if a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract, a statement of that fact, the persons by and to whom the commissions is payable and the amount if ascertainable.¹³³

F.1 Detriments

84. Clause 25(c)(iv) would not result in any material detriment. flexigroup's assertion that it would result in significant increase in costs that would be passed on to consumers should be rejected for the reasons submitted in paragraphs 75 and 77. As noted above, the required disclosures can be prepared or purchased at a cost of approximately \$10,000, and ongoing marginal costs are very low.¹³⁴

F.2 Benefits

85. Clause 25(c)(iv) would be likely to result in two benefits.
86. First, having the information referred to in paragraph 83 in a standard, prescribed form would enable consumers to compare the offers of different finance providers in a "like-for-

¹²⁸ Section 16(1)(a) NCC.

¹²⁹ Section 16(4) NCC.

¹³⁰ Section 17(3) NCC.

¹³¹ Section 17(7) NCC.

¹³² Section 17(8) NCC.

¹³³ Section 17(14) NCC.

¹³⁴ Foggo 1 at [43].

like” way and more easily assess which provides them better value for money.¹³⁵ This may, in turn, increase the extent to which suppliers compete on price.¹³⁶

87. Second, requiring merchants to disclose details of any commissions they receive from BNPL finance providers would ensure that consumers can see whether the merchant has an incentive to offer or promote BNPL finance rather than another finance option that may be cheaper overall for the consumer.¹³⁷ That would enable the consumers to make a more informed assessment of the benefits of products before acquiring them, and increase consumers’ confidence in the value of those products.

G. CONDITIONS

88. None of the conditions that flexigroup proposes be attached to any authorisation should be made. None of cll 3(d), 25(a) or 25(c)(iv) of the NET Code is likely to result in a material detriment and each is likely to result in significant benefits. flexigroup’s proposed conditions would mean that none of the benefits referred to above would be achieved.

Date: 1 June 2020

A Barraclough

¹³⁵ See Foggo 1 at [38]-[41].

¹³⁶ See Foggo 1 at [40], [41].

¹³⁷ See Foggo 1 at [42].