

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

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

**Lodgment and Details**

Document Lodged: Application to Tribunal for Review

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

**Important information**

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

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



## Form I

(subregulation 20(1))

### APPLICATION TO TRIBUNAL FOR REVIEW

*Re Application for authorisation AA1000439 lodged by Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **Applicants**) in respect of the New Energy Tech Consumer Code, and the determination made by the ACCC on 5 December 2019*

1. Flexigroup Limited [ACN 122 574 583] (**Flexigroup**) hereby applies to the Australian Competition Tribunal pursuant to section 101 of the Competition and Consumer Act 2010 (Cth) (**CCA**) for a review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated the 5th day of December 2019 (Commission file no. AA1000439) (**Determination**).
2.
  - (a) Flexigroup was not an applicant for the authorisation to which the Determination relates.
  - (b) Flexigroup's interest in the Determination is as follows:
    - (i) Flexigroup is a provider of Buy Now Pay Later (**BNPL**) finance products for new energy products and services (**New Energy Tech**) in the solar sector that is directly affected by the New Energy Tech Consumer Code (**Code**) authorised by the Determination.
    - (ii) Flexigroup's interest in the Determination is that the Code will prevent its signatories from offering lawful BNPL finance products to consumers, thereby reducing consumer and retailer choice, and lessening or hindering competition between different forms of finance and providers in the market(s) in which solar financing is provided. Consequently, the impact of the NETCC as authorised by the ACCC is to
      - A. restrict Flexigroup's ability to offer lawful BNPL finance products to customers,
      - B. increase costs of providing lawful BNPL finance products thereby increasing the costs to consumers and small business,
      - C. restrict consumer and retailer choice, and more broadly competition between different forms of finance and providers within the solar financing market;
    - (iii) Flexigroup has actively participated throughout the consultation conducted by the ACCC since 30 April 2019. It provided four written submissions dated 31 May 2019, 29 August 2019, 26 September 2019 and 8 November 2019 and participated in the Pre-Decision Conference held by the ACCC on 9 September 2019.
3. Flexigroup is dissatisfied with the Determination in the following respects:
  - (a) the imposition of the conditions of authorisation AA1000439 at 'Attachment A' and 'Annexure - Code Administration' to the Determination, being the conditions relating to 'changes to requirements concerning BNPL finance' (the **BNPL Finance Requirement Conditions**) (Determination, 5.12 - 5.14); and
  - (b) the following findings made by the ACCC in the Determination, which are not supported by evidence before the ACCC :
    - (i) that there is uncertainty as to whether governments link supplier access to rebate or incentive schemes, or government tenders to membership of the Consumer Code (Determination, 4.39);

- (ii) that BNPL finance is not subject to applicable legislative and regulatory requirements such that there are potentially greater risks for consumers who enter into BNPL arrangements. (Determination, 4.18);
- (iii) that the Consumer Code is substantially equivalent to the responsible lending requirements under the NCCPA (Determination, 4.59);
- (iv) that a timeframe of 24 months is realistic for the development of the proposed BNPL industry code. (Determination, 4.46; 4.60); and
- (v) That condition 3 of the Consumer Code applies only to unsolicited offers by signatories of BNPL finance, whereas in fact it applies to all offers of BNPL finance, whether unsolicited or not, if the sale of the New Energy Tech product is unsolicited (Determination, 4.66; 5.4).

4. Flexigroup is not dissatisfied with the reporting condition pursuant to paragraph 5.15 (**Reporting Condition**) of the Determination.

5. The determination that Flexigroup is seeking from the Tribunal is as follows:

(a) that the Determination be varied to:

- (i) remove the BNPL Finance Requirement Conditions;
- (ii) remove the factual findings set out in paragraph 3 above; and
- (iii) add as conditions of authorisation that:

A. paragraph 3(d) of the final draft NETCC be deleted;

B. paragraph 25(a) of the final draft NETCC be deleted and the following paragraph substituted:

"the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC") or complies with a regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA"; and

C. consequentially, paragraph 25(c)(iv) of the final draft NETCC be deleted and the following paragraph substituted:

"the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from or not regulated by the NCC, information as required by any regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA"; and

(b) that the Determination otherwise be affirmed (including the position of the Reporting Condition).

6. Particulars of the facts and contentions upon which Flexigroup intend to rely in support of the application for review, and a statement of the issues as Flexigroup see them, are attached.

7. Flexigroup's address for service for the purpose of regulation 21 of the *Competition and Consumer Regulations 2010* is:

**Flexigroup Limited**  
c/o Kirsten Webb  
Clayton Utz  
[kwebb@claytonutz.com](mailto:kwebb@claytonutz.com)



DX 370  
Level 15  
1 Bligh Street  
Sydney NSW 2000

8. Documents may be served on Flexigroup at [kwebb@claytonutz.com](mailto:kwebb@claytonutz.com).

Dated this 30 day of December 2019.

Signed by/on behalf of the applicant

A handwritten signature in blue ink, appearing to read "Kirsten Webb", is written over a light blue rectangular background.

.....

Kirsten Webb

Partner, Clayton Utz

Solicitor for the Applicant

# ATTACHMENT - BACKGROUND, FACTS, CONTENTIONS AND ISSUES FOR THE TRIBUNAL TO CONSIDER

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## 1. The Applicant

1. Flexigroup Limited (**Flexigroup**) is an Australian company listed on the Australian Stock Exchange (**ASX**). The shares in Flexigroup Limited trade under the ASX Code "FXL".
2. Flexigroup is a diversified financial services group with operations in Australia, New Zealand and Ireland across a diverse range of industries including: home improvement, solar energy, fitness, IT, electrical appliances, travel and trade equipment.
3. Flexigroup provides a range of finance products and payment solutions to consumers and businesses through a network of retail and business partners. This includes interest free cards and no interest ever payment plans and business leasing solutions.
4. Flexigroup is the leading provider of no interest ever payment plans to retail customers, through its product 'humm'. humm allows customers to pay off a loan in instalments over their choice of fixed term. humm is available on purchases up to \$30,000 and with payment plans from two weeks to 5 years. Humm is a long established form of Buy Now, Pay Later (**BNPL**) finance products that, although not new, are becoming increasingly prevalent in the consumer finance industry.
5. Flexigroup is the oldest and one of the largest providers of BNPL finance in Australia. Flexigroup's product humm has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia<sup>1</sup>.
6. Almost half of the revenue generated by Flexigroup's humm product is from providing credit for sales of solar panels and other home improvements.<sup>2</sup>
7. Flexigroup works with approximately 380 solar sellers that offer NET to residential and small business consumers. Of the top 50 solar sellers with whom Flexigroup does business, approximately 60% were expected to or have become members of one of the Authorisation applicants, and would therefore also likely become signatories to the Code.

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## 2. Background and status of Applicant

8. Flexigroup was an interested party to the application for authorisation (non-merger) dated 29 April 2019 pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) made by the following parties:
  - (a) Australian Energy Council (**AEC**);
  - (b) Clean Energy Council (**CEC**);
  - (c) Smart Energy Council (**SEC**); and
  - (d) Energy Consumers Australia (**ECA**) (together, **the Applicants**).(**the Application**<sup>3</sup>).
9. Flexigroup actively participated in the ACCC's public consultation in respect of the Application. It provided four written submissions in the periods both before and after the ACCC's draft

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<sup>1</sup> Flexigroup submission to the ACCC dated 31 May 2019, [2.1] and [2.3]

<sup>2</sup> Senate Committee Report referencing Rebecca James, CEO, Flexigroup Limited, para [5.6]

<sup>3</sup> Application for authorisation AA1000439.

determination: on 31 May 2019, 29 August 2019, 26 September 2019 and 8 November 2019. Flexigroup also participated in the Pre-Decision Conference held by the ACCC on 9 September 2019.

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### 3. Impact of the Determination on Flexigroup

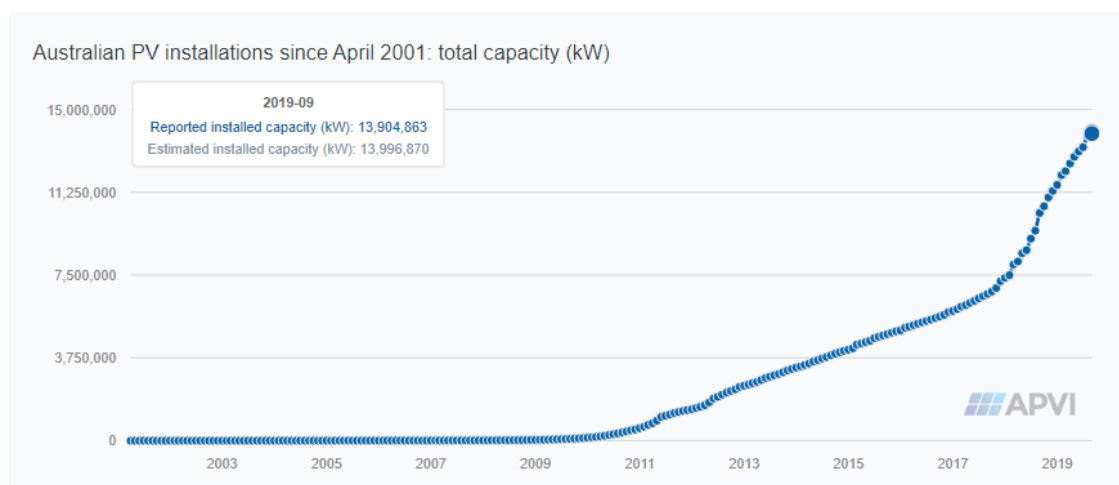
10. The Application concerned a new draft code of conduct, entitled "The New Energy Tech Consumer Code" (**NETCC**). The NETCC was prepared by the Applicants in response to a request from the Council of Australian Governments Energy Council (**COAG Energy Council**) to them to develop an industry code for sellers of "behind-the-meter" products and services, including small-scale solar power generation and storage technologies ("new energy technologies" or **NET**). The Application described this request as a request for a consistent approach from industry to improving customer experience in this industry.
11. The draft NETCC prepared by the Applicants and the subject of the Application included, in paragraph 24, limitations on signatories' ability to offer to arrange finance for their customers with suppliers of deferred payment arrangements where the arrangement included an interest component, additional fees or an increased price. Under the draft NETCC, signatories would undertake to ensure that:
  - (a) the payment arrangements would be offered through a credit provider licenced under the *National Consumer Credit Protection Act (2009)* (Cth) (**NCCPA**); and
  - (b) the deferred payment arrangements were regulated by the NCCPA and the National Consumer Code (**NCC**).
12. Adherence to these requirements will prevent signatories from being able to offer BNPL finance products as this form of credit is exempt from the regulatory regime extant under the NCCPA and the NCC. This directly affects the business and commercial affairs of Flexigroup because signatories to the NETCC will not be able to offer Flexigroup's BNPL finance products to consumers.
13. Signatories to the NETCC will include the Applicants and providers of New Energy Tech. The Application stated that those expected to become signatories range in scale from micro businesses to large energy companies with New Energy Tech Lines of Business. Signatories will therefore include persons that currently offer Flexigroup's BNPL finance products to customers seeking to purchase NET products.
14. On 5 December 2019, the ACCC issued its Determination in respect of the Application. The Determination granted authorisation in respect of the NETCC subject to conditions. These conditions are set out in section 5 of the Determination, and specify that
  - (a) clause 25 and clauses A7 and A7A of the NETCC be amended to the effect that:
    - (i) if the credit provider is not licenced under the NCCPA; and
    - (ii) if the deferred payment arrangement is exempt from the NCCPA and the NCC (that is, BNPL finance),then signatories must not offer those finance terms unless the Administrator of the Code had determined that the credit provider was itself a signatory to an industry code of conduct that required the credit provider to, in effect, adhere to standards equating to the NCCPA and NCC regulatory regime; and
  - (b) signatories must not offer customers finance arrangements not regulated by the and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a NET product if the sale of the NET product is unsolicited.
15. A consolidated version of the NETCC as authorised by the ACCC is set out in Annexure [A]. The mark-up shown in this version indicates the conditions imposed by the ACCC in section 5 of the Determination.

16. The NETCC is a voluntary code. However, some state government rebate schemes only offer rebates for installations performed by signatories to a relevant code, and some government tenders require tenderers to be signatories to a relevant code. The effect of these requirements is that suppliers and installers of NET products are very likely to become signatories to the NETCC, with the consequence that they will not be permitted to offer BNPL finance products.
17. Flexigroup is concerned about the impact that the NETCC as authorised by the ACCC will have on Flexigroup's ability to offer lawful BNPL finance products to customers, and the negative consequences that this will have on consumer and retailer choice, and more broadly competition between different forms of finance and providers within the solar financing market.
18. Flexigroup has a sufficient interest in the Determination to bring this Application.

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#### 4. Demand for NET

19. NET, as defined in the NETCC, encompasses a variety of products and services that relate to and include small scale products and systems that generate, store or trade energy away from Australia's main transmission and distribution networks or as distributed energy resources connected to an energy network.<sup>4</sup>
20. The sector is currently dominated by solar photovoltaics (**PV**) which is now being followed by energy storage (mostly batteries).<sup>5</sup>
21. Between 2001 and 2010 the growth in demand for solar PV installations for solar PV was around 15%. A period of extremely rapid growth occurred between 2010 and 2013. The number of monthly installations stabilised through 2014 and 2015, and now appears to be trending slightly upwards in the residential sector, with an increase in the number of larger (commercial and utility-scale) PV systems keeping overall installed capacity high.<sup>6</sup>



(Source: Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019)

22. As of 30 September 2019, there were over 2.2 million PV installations in Australia, with a combined capacity of over 13.9 gigawatts.<sup>7</sup>

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<sup>4</sup> NETCC Part C "Definitions"

<sup>5</sup> Application, [10]

<sup>6</sup> Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019.

<sup>7</sup> Ibid.



23. In the Application, the Applicants submitted that in 2018, the number of solar installations on homes and small businesses increased by 43% on the previous year and that the Clean Energy Regulator expected that growth was likely to continue for at least 10 years.<sup>8</sup>
24. The Australian Finance Industry Association Limited (**AFIA**) contended that its members (which include Flexigroup) have supported the installation of 200,000 solar panel systems with BNPL finance.<sup>9</sup>
25. Flexigroup alone estimates that it has provided BNPL finance products for approximately 180,000 existing solar installations.

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## 5. BNPL finance

### **Basic features**

26. BNPL finance is an affordable and flexible financing option. It can be cheaper for consumers than other types of credit because consumers are not charged interest and because the fees that are payable are limited and are periodic or other fixed charges.
27. For Flexigroup's product, humm, the fees are known upfront and are published on the humm website:

How it all breaks down.			
	 <b>Little things</b> <\$2K		 <b>Big things</b> <\$30k
<b>Time to pay</b>	5 x fortnight	10 x fortnight	6 - 60 months
<b>Monthly fee</b>	-	\$8	\$8
<b>Establishment fee</b>	-	-	\$35 - \$90
<b>Repeat purchase fee</b>	-	-	\$22
<b>Late payment fee</b>	\$6	\$6	\$6

(Source <https://www.shophumm.com.au/how-it-works>, accessed 17 December 2019)

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<sup>8</sup> Application, paragraph 10(a).

<sup>9</sup> AFIA submission to ACCC dated 29 August 2019, page 7





## **Regulation - BNPL as "credit"**

28. Section 12BAA(7) of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**) lists the types of arrangements that are **financial products** that are subject to regulation under the ASIC Act.
29. One such financial product is a "credit facility" which is defined by regulation 2B of the *Australian Securities and Investment Commission Regulations 2001* (Cth) (**ASIC Regs**) to include:
- "(1) For paragraph 12BAA(7)(k) of the Act, each of the following is a **credit facility**:
- (a) the provision of credit:
- (i) for any period; and
- (ii) with or without prior agreement between the credit provider and the debtor".
30. "Credit" is defined to mean:
- "a contract, arrangement or understanding:
- (a) under which:
- (i) payment of a debt owed by one person (a debtor) to another person (a credit provider) is deferred; or
- (ii) one person (a debtor) incurs a deferred debt to another person (a credit provider); and
- (b) including any of the following:
- (iii) credit provided for the purchase of goods or services".
31. BNPL finance meets the definition of "credit" and is a "credit facility" under the ASIC Regs. As such, BNPL finance is a financial product subject to regulation under Division 2 of Part 2 of the ASIC Act and subject to regulation and oversight by ASIC. Division 2 of Part 2 of the ASIC Act is concerned with unconscionable conduct and consumer protection in relation to financial services.
32. Accordingly, providers of BNPL finance must not:
- (a) impose standard form contractual terms upon consumers that are unfair (Subdivision BA);
- (b) engage in conduct that is unconscionable within the meaning of the unwritten law or having regard to the specific matters listed in section 12CC (Subdivision C);
- (c) engage in conduct that is misleading or deceptive or likely to mislead or deceive or make false or misleading representations (sections 12DA, 12DB and 12DC);
- (d) engage in bait advertising or referral selling (sections 12DG and 12DH); or
- (e) use physical force or undue harassment or coercion (section 12DJ).
33. The consequences of breach of these prohibitions include:
- (a) In the case of a contravention of the prohibitions outlined in sub-paras (b), (c) (excluding section 12DA), (d) and (e), ASIC may bring civil penalty proceedings against the provider of BNPL finance.
- (b) A contravention of sections 12DA to 12DN other than section 12DA is also an offence.

- (c) Consumers harmed by the conduct of the provider of BNPL finance products have rights to seek financial compensation for losses suffered.
- (d) ASIC is empowered by section 1023D of the *Corporations Act 2001* (Cth) to make a product intervention order when it is satisfied that a product, or class or product, has resulted, will result or is likely to result in "significant consumer detriment". ASIC's product intervention power has been extended to all credit facilities, including BNPL finance. In ASIC Report 600, ASIC stated that it would use the product intervention power to act quickly and effectively to address the causes of problems if ASIC identifies a significant detriment to consumers.
- (e) Section 1023D empowers ASIC to order a ban in respect of a feature of a financial product or, more severely, order a ban in respect of the issue of the product altogether. ASIC can also order that a financial product be offered to specific classes of consumers, order that a financial product be offered through personal advice only, or make an order restricting marketing or prohibiting the distribution of a financial product without prescribed improvements.

34. Relevantly, the legislation effecting this extension also includes design and distribution obligations which will also apply, amongst others, to the BNPL sector. This will require:

- a BNPL provider to issue a publicly available target market determination for its BNPL products specifying the class of retail clients comprising the product's target market and any conditions and restrictions on retail product distribution; and
- issuers and distributors of BNPL products to take reasonable steps to ensure that the distribution of a product is consistent with that target market determination.

35. In the event that BNPL finance was found not to be a "credit facility" such that the ASIC Act and Regs do not apply to it as a financial product or service, the *Australian Consumer Law (ACL)* would apply. Providers of BNPL finance would be subject to the regulatory oversight of the ACCC and similar controls to those contained in Division 2 of Part 2 of the ASIC Act by virtue of the fact that the ACL contains almost identical prohibitions directed to all persons engaging in trade or commerce:

<i>Conduct</i>	<i>ASIC Act Part 2 Div 2 section</i>	<i>Corresponding ACL section</i>
Unfair terms	Subdivision BA	Chapter 2, part 2-3 (ss 23 - 28)
Unconscionable conduct	Subdivision C	Chapter 2, part 2-2 (ss 20 - 22)
	12CC	22
Misleading or deceptive conduct	12DA	18
	12DB	29
	12DC	30
Bait advertising	12DG	35
Referral selling	12DH	49
Physical force, undue harassment or coercion	12DJ	50

36. BNPL finance is not subject to further regulation under the NCCPA and the NCC. Section 6 of the NCC excludes a number of types of credit from its scope. Most relevantly for present purposes, section 6(5) 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*

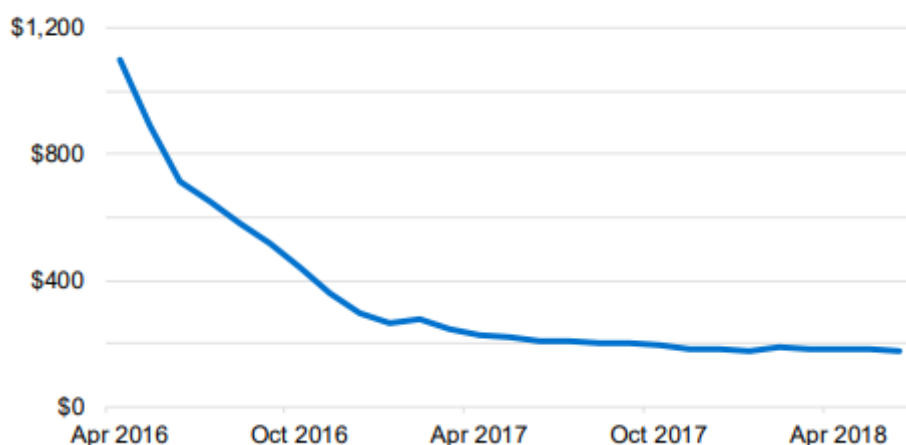
*a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed."*<sup>10</sup>

37. This exclusion is effected by the NCC itself - it is not an exemption identified by ASIC by legislative instrument or otherwise.
38. The exclusion from regulation afforded to BNPL finance reflects the policy that fixed low cost facilities offer clear benefits to consumers without the prospect of being charged an amount that is disproportionate to their purchases through uncapped fees or high rates of interest.
39. Under BNPL finance, no interest is charged on outstanding balances, even if the consumer is in default. The facility is unsecured and the margin for error by the finance provider is low. BNPL providers therefore have a stronger commercial imperative to ensure that customers can afford their credit.
40. Both ASIC and a Senate Committee have recently undertaken a review of BNPL finance. ASIC Report 600 followed extensive engagement with BNPL providers, key stakeholders and consumers. It confirmed that ASIC does not consider that it is necessary to require BNPL providers to comply with the NCCPA.

## 6. BNPL for NET in context

41. In its review culminating in ASIC Report 600, ASIC found that BNPL finance as a whole was a rapidly growing industry, with the number of BNPL transactions each month rising from 50,000 in April 2016 to 1.9 million in June 2018.<sup>11</sup>
42. It is to be noted, however, that ASIC's review, and that of the Senate Committee, considered BNPL finance as a whole, the majority of which is low value, short term arrangements. ASIC found that consumers predominantly used BNPL finance to buy clothing, technology, electronics or software, personal care items, furniture, homewares and appliances although ASIC noted that BNPL finance was also available for more expensive purchases.<sup>12</sup>

**Figure 7: Implied average transaction value**



(Source: ASIC Report 600, Figure 7, page 19)

43. BNPL finance for acquisitions of a solar installation are typically taken over a longer term (2 to 5 years).

<sup>10</sup> The maximum charge for the purposes of section 6(5) of the NCC is \$200 for the first 12 months and \$125 for any subsequent 12 months for the length of the term: Regulation 51 National Consumer Credit Protection Regulations 2010 (Cth)

<sup>11</sup> ASIC Report 600, [25].

<sup>12</sup> ASIC Report 600, [114].

44. Flexigroup's experience of consumers seeking BNPL finance for NET installations is that they are homeowners and typically over 35 years of age. This is corroborated by submissions made by Brighte Capital Pty Ltd (**Brighte**) and Consumer Action Law Centre.<sup>13</sup>
45. ASIC found that providers that offered smaller arrangements experienced a higher proportion of users who had been charged a missed payment fee.<sup>14</sup>
46. The concerns identified by ASIC in ASIC Report 600 with regard to BNPL finance are not readily attributable to the arrangements used to assist consumers to acquire NET for their homes. ASIC did not find that BNPL finance in the context of NET acquisitions gave rise to any greater risk to consumers than any other form of credit that may be available to them.

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## 7. BNPL Code

47. In addition to the regulation of BNPL products under the ASIC Act and by reference to ASIC's new product intervention power, significant steps have been taken towards self-regulate in respect of all purposes for which BNPL finance is taken, by developing a code of conduct for BNPL products which in due course will be approved under ASIC Regulatory Guide 183 (**BNPL Code**).
48. The BNPL Code is being developed by the AFIA, Flexigroup, Afterpay, Brighte, Zip and others, and will be tailored and fit for purpose in its application to the BNPL sector.
49. The current draft of the BNPL Code contains provisions requiring signatories to:
- (a) be fair, honest and ethical;
  - (b) keep consumers properly informed about the products, including strategies to help consumers stay in control and to make informed decisions about purchases;
  - (c) make sure that the product is suitable for the consumer; and
  - (d) deal fairly with complaints and offer hardship assistance.
50. The development of the BNPL Code is now at the stage of seeking engagement with key stakeholders, including Government, industry associations, ASIC and other regulators, consumer advocate groups and members of parliament.
51. Flexigroup expects that the BNPL Code will become operational by 1 July 2020.

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## 8. Conditions imposed in the ACCC's Determination

52. The Determination granted authorised the NETCC subject to conditions. The conduct which the ACCC authorised is set out in paragraph 5.6 of the Determination as follows:

*To enable the Applicants and future signatories to the NETCC to agree, sign up to and comply with (give effect to) provisions of the NETCC:*

- (a) *according to which signatories will commit to abide by minimum standards of good practice as set out in the NETCC, which intended to cover all aspects of the customer experience*
- (b) *for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the NETCC, and, where there is serious non-compliance, the Code Administrator may propose to*

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<sup>13</sup> Brighte submission dated 29 May 2019, [39] to [41]; Consumer Action Law Centre submission dated 7 November 2019, page 2.

<sup>14</sup> ASIC Report 600, [88] and Figure 10.



*the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and*

- (c) *requiring signatories to only offer deferred payment arrangements that are regulated under the NCCPA and the NCC, and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.*

53. The conditions to the grant of authorisation are described in paragraphs 5.11 to 5.18 of the Determination, and set out in Attachment A and the Annexure to the Determination. The conditions relate to clauses 25, A7 and A7A of the NETCC.

53.1 In summary, the conditions are:

- (a) With respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place (paragraph 5.12 of the Determination); and
- (b) Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a NET product if the sale of the NET product is unsolicited (paragraph 5.13 of the Determination); and
- (c) The Code Administrator must provide the ACCC with annual reports in relation to specified categories of information, for publication on the ACCC's public register (paragraph 5.15 of the Determination)

54. Flexigroup considers that the conditions identified in paragraphs 5.12 and 5.13 of the Determination (**the Conditions**) should not have been authorised. Flexigroup considers that authorisation should not be granted to any provisions of the NETCC that have the effect of preventing signatories from offering BNPL products to consumers in any way.

55. The Conditions will curtail the provision of finance where the finance provider is not licenced under the NCCPA because the particular form of credit is not regulated by the NCCPA and the NCC. As a result the Conditions will directly affect BNPL finance providers like Flexigroup because:

- (a) Adherence to these requirements where the sale of the NET product is unsolicited will prevent signatories from being able to offer BNPL finance products, because this form of credit is exempt from the regulatory regime extant under the NCCPA and the NCC. This directly affects the business and commercial affairs of Flexigroup because signatories to the NETCC will not be able to offer Flexigroup's BNPL products to consumers who choose to purchase NET under lawfully originated unsolicited consumer agreements regulated by the ACL. In turn, this may reduce the choices for consumers wishing to enter into unsolicited consumer agreements to purchase NET products reduce the availability of NET products overall; and
- (b) Adherence to the requirements in other circumstances will require the BNPL finance provider be held to disproportionately higher standards than legally required, and potentially different standards to those which the BNPL finance provider is required to meet in respect of all of its other BNPL finance business, even where it has signed up to the BNPL Code. This will increase the costs of providing BNPL finance to purchasers of NET products, potentially to the point where it is not commercially viable to do so. In turn, this will reduce the choice for consumers wishing to access credit in order to facilitate their purchase of NET products and increase the cost to consumers of that credit, potentially to the point where they choose not to purchase the NET product. Ultimately, this could be expected to have a negative effect on the sale of NET products overall.

56. In its Determination, the ACCC found that there would be a likely public detriment from excluding entirely all BNPL finance products from the scope of the NETCC because some customers value

these products<sup>15</sup>. The ACCC also found that there would be a likely public detriment from a loss of consumer choice of finance options under the final draft version of the NETCC put forward Applicants on 11 November 2019 because it required, amongst other things, that a BNPL provider (or its parent) must hold an Australian Credit Licence. The ACCC considered this would exclude BNPL providers who would not be able to obtain a credit licence because they do not offer any regulated products.<sup>16</sup>

57. The ACCC determined that *"the Proposed Conduct [as set out in paragraph 5.6 of the Determination] would be likely to result in a benefit to the public and that the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition. The ACCC considers that imposing conditions will enable the public benefits under the [NETCC] to be fully realised".*<sup>17</sup>
58. Flexigroup contends that the ACCC's imposition of the conditions to the grant of authorisation is not required to realise the substantial public benefits which already arise from the range of additional measures which will apply to signatories of the NETCC. The effect of the conditions will be:
- (a) to unfairly impact:
    - (i) providers of BNPL finance products such as Flexigroup; and
    - (ii) merchants selling those products,in their lawful business and commercial activities;
  - (b) to restrict consumer choice of finance options by reducing the competitive tension which currently exists between different types and providers of finance, including BNPL finance products for NET.
59. By reducing consumer choice, it is likely that the costs of finance and therefore the overall costs of NET installations will increase.
60. In its submission dated 26 September 2019, Flexigroup confirmed its support for the alternative wording suggested by AFIA in its submission of the same date, in relation to the former draft clause 24 of the NETCC. Flexigroup contends that paragraph 25(a) of the NETCC should provide:
- "the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC") or complies with a regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA".*
61. By this formulation, the public benefits test set out in section 90(7) of the CCA is satisfied. The ACCC should have granted authorisation of the NETCC under section 8 of the CCA subject only to a condition that the non-regulated deferred payment arrangement comply with a regulator approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA.
62. Flexigroup's specific contentions are set out in more detail in the sections 9 and 10 below.

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<sup>15</sup> Determination, page 2 and [4.14]

<sup>16</sup> Determination, page 2

<sup>17</sup> Determination, [5.3]



## 9. Factual and counterfactual

63. Flexigroup contends that the relevant comparison to be made is between the NETCC with paragraphs giving effect to the Conditions and the NETCC adopting the formulation contended for by Flexigroup in paragraph 60 above.
64. If the NETCC contains paragraphs giving effect to the Conditions (**the factual**), then the following will likely occur:
- (a) signatories to the NETCC will be obliged to ensure that they do not engage in inappropriate sales practices, that they have regard to whether the consumer is in circumstances of vulnerability and to make disclosures as to any additional charges arising from finance options as opposed to outright purchase;
  - (b) signatories will be limited in the choice of finance options that they can offer to consumers;
  - (c) some BNPL providers will choose not to seek to comply with additional voluntary consumer standards above those required under existing legislation and regulation or that may be different to the nature and scope of any specific BNPL Code currently under preparation; and
  - (d) other BNPL providers will seek to comply with those additional voluntary consumer standards for NET purchases but will incur additional costs in doing so.
65. The cumulative effect of paragraphs 64 (a) to (d) above is to:
- (a) seek to improve the selling practices of merchants of NET products who are signatories to the NETCC, but to also reduce the breadth of finance choices available to consumers and to increase the cost of BNPL finance to those consumers who choose to access it; and
  - (b) potentially cause fewer merchants who sell NET to consumers and small business to choose to adopt the NETCC and therefore diminish the benefit of improving selling practices such that it is not realised to the degree expected.
66. If the NETCC is authorised adopting the formulation contended for by Flexigroup in paragraph 60 above (**the counterfactual**) then the following is likely to occur:
- (a) signatories to the NETCC will be obliged to ensure that they do not engage in inappropriate sales practices, that they have regard to whether the consumer is in circumstances of vulnerability and to make disclosures as to any additional charges arising from finance options as opposed to outright purchase;
  - (b) signatories will not be so limited in the choice of finance options that they can offer to customers;
  - (c) BNPL providers will
    - (i) continue to compete with other sources of credit and with one another to provide credit to facilitate the purchase and installation of NET products; and
    - (ii) be subject to a single regime of regulatory oversight for all purposes for which BNPL finance is provided;
  - (d) the cumulative effect of (a) to (c) is to improve the selling practices of signatories without change to the availability and cost of credit from any provider.
67. These outcomes in the counterfactual will be further strengthened by the BNPL Code to be introduced by 1 July 2020.

### ***Conditions for competition in the factual and counterfactual***

- 68. There are competitive detriments associated with the factual as compared with the counterfactual.
- 69. These arise from clauses 3(d) and 25(a) which will operate to the effectively exclude some BNPL finance providers from being able to offer such finance, because they choose not to or are unable to comply with the additional standards in the NETCC above those required under existing legislation and regulation.
- 70. In the counterfactual, the conditions for competition with respect to provision of credit or finance will be somewhat changed from the present. BNPL finance providers will have to assess the costs and implications of adopting the BNPL Code on their businesses and if they choose not to adopt it, they will be excluded from being able to offer such finance to consumers purchasing NET products.

### ***Public Benefits and Detriments in the Factual***

- 71. In both the factual and the counterfactual, the incidence of inappropriate selling strategies by merchants of NET products will be controlled and reduced by the NETCC and, subsequently, further strengthened by the BNPL Code.
- 72. While there may, in theoretical terms, be some perception of public benefit from the imposition of requirements to implement internal dispute resolution, hardship and responsible lending practices, there is no evidence that the current regulatory regime applying to BNPL finance products is deficient insofar as NET products are concerned. The findings of ASIC set out in ASIC Report 600 were that the incidence of missed payments in respect of larger BNPL transactions was generally low, suggesting that consumers accessing this form of credit for larger purchases, such as NET products, were not vulnerable, in circumstances of financial hardship or otherwise unduly pressured into transactions that were not suitable for their needs.
- 73. By contrast, the ACCC recognised the public detriments involved in the factual:
  - (a) the consumer protections introduced by paragraphs 3(d) and 25(a) require BNPL finance providers to adhere to additional standards above those they are required to comply with under legislation and regulation;
  - (b) BNPL providers who do not meet these additional standards would be effectively excluded from offering BNPL finance products to consumers of NET and therefore there would be a reduction in the range of available finance providers and competition between them; and
  - (c) signatories may not offer BNPL finance as it is no longer an attractive option, or are only able to offer finance arrangements from a limited number of BNPL finance providers.<sup>18</sup>
  - (d) The NETCC is voluntary. To the extent that merchants of NET products and services consider that the potential damage to their business from the inability to offer credit terms that consumers find valuable and desirable, merchants may choose not to adopt the NETCC.

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## **10. Particular issues with ACCC approach**

### ***Overreach***

- 74. The signatories to the NETCC will be merchants supplying NET products to consumers and small businesses. It is not contemplated or intended that BNPL finance providers will be signatories to the NETCC.

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<sup>18</sup> Determination, [4.43] and [4.47].



75. The Conditions and the previous formulations of paragraph 24 (or 25 as the context requires) of the draft NETCC unfairly prevent or hinder providers of BNPL finance to offer their lawful products to consumers wishing to purchase NET products.
76. BNPL finance providers do not enjoy any kind of dominance in the provision of finance for the purchase of NET products or services. Consumers are free to access any form of credit they desire from any credit providers, or to pay in full for systems and installation from their own savings. The increasing prevalence of BNPL finance for NET products reflects consumer demand for a type of product that presents a convenient and cheaper alternative to traditional forms of credit. There is no reason why BNPL finance products should not remain a viable alternative form of finance for consumers.
77. BNPL providers' access to consumers is indirect. BNPL providers do not cold call consumers. The unsatisfactory consumer experiences that are reported anecdotally by Consumer Action Law Centre and others were visited upon those consumers by others. In recognition of that, the following provisions of the draft NETCC which was submitted with the Application (and which is at Attachment B to the Determination), are appropriate and were not opposed by any parties which made submissions to the ACCC in respect of the Application:
- (a) Part B,
- (i) paragraph 3(n): *"our advertisements and promotional material will ... be clear about any additional costs for finance or an alternative purchasing arrangement for NET when the cost is being recovered in the overall price (e.g. where the price of financed NET is greater than the price that would apply if immediate payment is made)".*
- (ii) paragraph 4: *"When marketing directly to you, including through a sales agent)...*
- A. *we will explain up-front the purpose of any un-requested ("unsolicited") contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time;*
- B. *we will leave your premises or end the contact immediately if you ask us to do so..."*
- (iii) paragraph 5: *"We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the NET you are considering."*
- (iv) paragraph 6: *"Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (e.g. illness, impairment, a victim of abuse, financial stress)."*
- (v) paragraph 25: *"We may offer you NET with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price ... we will ensure that:*
- C. *you receive the following clear and accurate information:*
- 1) *the proposed cost under the deferred payment arrangement compared with the cost of that same NET product, system or service if you were to purchase it outright on that day."*
78. Flexigroup continues to support these provisions of the NETCC.

### ***No cogent evidence of systemic harm from BNPL finance in NET sector***

79. ASIC in ASIC Report 600 has undertaken a detailed review of the BNPL sector involving engagement with:
- (a) BNPL providers identified based on, amongst others,
    - (i) the market and prominence of providers, and
    - (ii) complaints data from consumer groups and ASIC's own internal systems;
  - (b) key stakeholders, including
    - (i) the Reserve Bank of Australia, the ACCC and APRA;
    - (ii) ASIC approved EDR schemes, namely the Financial Ombudsman Service and the Credit and Investments Ombudsman;
    - (iii) community legal centres and consumer groups;
    - (iv) industry associations; and
  - (c) consumers who had actual experience of using BNPL finance and who were identified through a screening process to ensure accurate representation across all demographics.
80. The outcome of the ASIC Report 600 was that ASIC did not consider it necessary that BNPL finance be subjected to regulation under the NCCPA and the NCC. The Conditions to the NETCC as authorised make BNPL providers subject to this regulation by the back-door, and with serious impact on their business and commercial viability.
81. Further, as noted above, the anecdotal material submitted by Consumer Action Law Centre and others indicated poor practices by those engaged in selling the NET products which can and will be addressed by other parts of the NETCC. This anecdotal evidence is not supported by the findings in ASIC Report 600.

### ***Interference with function of ASIC as regulator of financial products***

82. The Conditions single out one purpose of BNPL finance (i.e. for the acquisition and installation of NET products). This overrides ASIC's position as the financial regulator and undermines the efforts that ASIC has been and is taking to monitor the BNPL finance sector to identify and deal with any systemic issues.
83. As noted above, ASIC has undertaken a far more extensive engagement with the BNPL sector than has been undertaken by the ACCC in the course of reaching its Determination.

### ***Code Administrator not appropriate body to adjudicate on financial product***

84. Although Flexigroup's application for review concerns the Conditions in their totality, it also raises specific opposition to the appointment of the Code Administrator as a body suitable to adjudicate on the sufficiency of any relevant code of conduct to which a BNPL provider has subscribed.
85. There are a number of appropriately qualified bodies experienced in financial services and financial products that are more suitable than the Code Administrator to undertake any such function, if it should be determined that it is necessary, without needing to empower a new quasi-regulator for the specific and narrow purposes of the NET sector.

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## **11. Issues for Tribunal to consider**

86. Flexigroup submits that the Tribunal should consider:



- (a) whether with the Conditions, the public benefits of the NETCC outweigh the anti-competitive detriments
- (b) whether that authorisation could be varied so that it is made without the Conditions or subject to different conditions.

87. Flexigroup submits that the Tribunal should answer "no" to the first issue on the basis that:

- (a) the NETCC with paragraphs 3(d) and 25(a) as provided for in the Conditions will have the effect, or be likely to have the effect of substantially lessening competition; and
- (b) the benefits to the public that would result, or are likely to result, from the NETCC with those paragraphs will not be outweighed by the detriments to the public for the reasons set out in paragraphs 74 to 85 above, such that the statutory test in CCA section 90(7) is not satisfied.

88. Flexigroup submits that the Tribunal should answer "yes" to the second issue.

## **Annexure A to Background, Facts, Contentions and Issues of Flexigroup Limited**

## **Attachment B - New Energy Tech Consumer Code**

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# Part A - Overview

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## Scope

This New Energy Tech Consumer Code (“the Code”) sets good practice standards for providing Residential and Small Business Customers with New Energy Tech products, systems and services. We may extend these protections to other customers if we expressly include this in the contract. New Energy Tech is defined in Part C of the Code to include such things as solar photovoltaic systems, wind turbines, energy storage systems, managing a customer’s energy usage and electric vehicle charging services but does not include some simple, low cost, standard New Energy Tech.

The intention of this Code is to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers.

Providers who have been accepted by the Administrator as Code Signatories (referred to as “we” and “our”) are bound to comply with this Code. Customers protected by this Code are referred to as “you” and “your”.

The Code includes:

- Part A that provides an overview of the key commitments we make to you
- Part B that sets out our required practices in detail
- Part C that defines key terms (which are Capitalised in the Code) and
- an Annexure setting out how the Code is administered, monitored and enforced, including our obligations to the Administrator and the Code Monitoring and Compliance Panel (“The Panel”).

The Code operates alongside a range of existing legal and regulatory protections. Generally, it does not repeat these protections except as needed to provide you with a complete understanding of what to expect from us.

## Key commitments

1. The key commitments made under this Code are to:
  - a) Provide you with clear, accurate and relevant information to help you make informed choices
  - b) Encourage you to be aware of your rights under the law and the Code
  - c) Ensure that our sales practices are responsible
  - d) Ensure that products, systems, services and documentation provided under the Code are suitable and fit for purpose
  - e) Support staff training and work processes that ensure that we comply with the law and the Code
  - f) Ensure that we will be responsive to your needs and take prompt, appropriate action if you make a complaint.

The Code aims to cover the main steps of your 'customer journey' as illustrated below.







## Part B - Our required practices

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### Advertising and promotion

2. We will ensure that we have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers.
3. Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:
  - a) ensure all relevant incentive schemes (government and non- government) are honestly and accurately represented
  - b) not misrepresent our association with government or falsely claim to be part of a government scheme
  - c) not make any false or misleading claims about the price, value, quality, capacity, output or other performance characteristic of our New Energy Tech, for example, through selective advertising, exaggeration or misleading focus on one or a few aspects only of the New Energy Tech
  - d) [make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act \(2009\) \(Cth\) \("NCCPA"\)](#)
  - e) use language that is accessible and that avoids industry jargon
  - f) not make any misleading claims about the place of origin (manufacture and assembly) of our products
  - g) not mislead you about the impact our New Energy Tech will have on your energy usage or costs
  - h) ensure that any claims relating to performance and energy cost savings of our New Energy Tech are reasonably based and where available, based on reputable sources
  - i) advertise the total price for our New Energy Tech as prominently as we advertise any component of the price
  - j) provide information that is specific to the state or region in which the promotional activity takes place
  - k) ensure that any disclaimers are clearly outlined and not buried in small print
  - l) only include a statement, promise, prediction or opinion if it is reasonably based
  - m) not include information that is no longer current, for example, quote an offer or financial incentive that is no longer available
  - n) 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 (e.g. where the price of financed New Energy Tech is greater than the price that would apply if immediate payment is made).



## Direct marketing and sales

4. When marketing directly to you, including through a sales agent (as well as meeting the requirements in paragraph 3):
- a) we will explain up-front the purpose of any un-requested (“unsolicited”) contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time
  - b) we will leave your premises or end the contact immediately if you ask us to do so
  - c) we will show you our company-issued identification if an unsolicited contact is in person
  - d) any interactive internet marketing channel that we use will clearly identify for you the company whose New Energy Tech is being promoted
  - e) we will provide you with the address of our local office or showroom, an email or other electronic address and a telephone number where any queries can be answered
  - f) we will provide you with the Administrator approved Consumer Information Product that explains the consumer protection framework that applies under legislation and this Code and sets out other key information. The information may be provided to you in electronic format, however if you request, we will provide you the information in hard copy.
5. We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the New Energy Tech you are considering. High-pressure sales tactics include (for example):
- a) seeking to sell to you if you are unlikely to be able to understand our information and/or our contract (e.g. due to English language difficulties, age, learning difficulties, mental illness or physical disability)
  - b) offering discounts for agreeing to provide testimonials and/or referrals
  - c) claiming special discounts (eg. “community” or bulk-buy discounts) apply, if they don't
  - d) applying psychological pressure to persuade you to make a quick purchase decision (eg. by unfairly appealing to your emotions)
  - e) employing badgering techniques, such as revisiting your premises uninvited or making frequent telephone calls, to pressure you into signing a contract
  - f) other conduct that the Administrator may reasonably identify as high-pressure sales tactics.
6. Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress).



## Fit for purpose inquiry

7. As appropriate to the nature, complexity and cost of the new Energy Tech you are considering, we will support you in making a fit-for-purpose choice including:
- a) ask you about your specific circumstances, needs and expectations. This includes the extent to which you plan to use our New Energy Tech to supplement or improve the efficiency of energy use while connected to an Energy Network or be isolated from the Energy Network (also known as “off-grid”) or your expected outcomes from participating in forms of New Energy Tech supply such as virtual power plants or other energy markets.
  - b) enquiring about any need you may have for energy for medical or life-support equipment or services and ensure that our New Energy Tech is suitable for this purpose and that you are made aware of any additional or increased risks.
  - c) ensuring that any offer of New Energy Tech is fit for purpose in light of your circumstances, needs and expectations as you have described them to us (unless we clearly explain to you orally and in writing that it is not fit for that purpose). We will include a brief description of your circumstances, needs and expectations in our quotes and contracts. Where we offer you a New Energy Tech that is intended to work in conjunction with other New Energy Tech that you already have or are obtaining, we will ensure that our offer is compatible with that other New Energy Tech and confirm this in writing in your quote and contract.
8. If you advise us that you are considering operating off the Energy Network, we will provide you with a copy of the Administrator-approved Consumer Information Product that sets out Energy Networks Australia’s Off-Grid Principles.



## Quote – general requirements

9. We will provide you with a written quote that sets out:
- a) our full name, Australian Business Number (if relevant) and physical address, an email or other electronic address and a telephone number where any queries can be answered
  - b) an itemised list of the New Energy Tech to be supplied, including relevant specifications. For products and systems, this will include the manufacturer, model, year, quantities, configuration and performance specifications. For services, this will include the nature and purpose of the services, whether the services are ongoing, scheduled (and if so what frequency) or responsive to your request, the duration of the service commitment and whether the services will be provided remotely or at your premises
  - c) information about how the New Energy Tech operates
  - d) information about any responsibilities you have to facilitate the operation of the New Energy Tech including maintenance and access issues
  - e) information about product, system or service limitations that are likely to be relevant to you (eg. where a battery does not provide a back-up facility)



- f) a performance estimate for the New Energy Tech to be supplied, which will be reasonably based, where available rely on reputable sources and comply with any relevant Administrator guidance
- g) where our offer is for a New Energy Tech product or system to be connected to the Energy Network, information that your energy supply contract may change as a consequence of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to find out about this and whether there are any restrictions to your ability to interact with the Energy Network
- h) our timeframe for supplying and installing products and systems or commencing services to be provided to you (if there are circumstances that are out of our control that may cause delay, we will identify this)
- i) our business terms including the method of making payments
- j) details of any guarantees and warranties that apply. We will specify:
  - i. that your rights under your contractual warranty are in addition to the consumer guarantees under the Australian Consumer Law and that these are not excluded or replaced by your contract
  - ii. the specific details of the guarantee or warranty and how it applies to you
  - iii. for a New Energy Tech product or system - the name and contact details of our supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason you are unable to contact us.
- k) for a New Energy Tech product or system, information about its expected life and what is involved in disposing of it at the end of its life
- l) information about the portability of the proposed New Energy Tech
- m) information about the term of any applicable ongoing agreement and any provisions that may impact on your existing relationship with an Energy Supplier
- n) if the quote is for an installation on a strata title property and requires the approval of the Owners Corporation – the need for you to obtain that written approval and provide it to us before you sign the contract with us
- o) your cooling-off and termination rights (if applicable) under the Australian Consumer Law (including the right to terminate a sales agreement within 10 business days if the sale resulted from an unsolicited contact) and this Code
- p) any licenses, accreditation or certification that we hold that are needed to fulfil the offer we are making to you
- q) that we are bound by this Code
- r) the Administrator-approved Consumer Information Product that explains the benefits of the Code for our Customers and any other important information as applicable.

## Quote – financial disclosure

10. Our quote to you will specify the deposit payable (if any) and the total price of all offered New Energy Tech including any taxes that apply. We will specify the period of time our pricing is valid for (which will be at least 10 business days).
11. Where our offer is of a Power Purchase Agreement, our quote will specify:
  - a) the energy pricing and all associated fees and charges, any rights we have to change any of these and the notice we will provide of any price change
  - b) a reasonable estimate of the aggregate amount payable over the agreement's term based on a stated, reasonable estimate of your energy consumption, including the basis of the calculation and, if applicable, the energy you will export to the Energy Network
  - c) a clear statement that you must pay the stated energy prices for the term of the contract and that this amount may not reflect or be competitive with available prices for energy from the Energy Network.
12. Our quote to you will specify site conditions and circumstances beyond our control that may result in extra chargeable work not covered by the quote (eg. fees for meter exchange/re-configuration, repairs to existing faults, and changing dedicated off-peak control devices if required).
13. Our quote to you will specify the total value of any discounts, regulatory certificates, incentives or rebates (government and non-government) or government relief schemes and how and when these may or may not apply.
14. Where we offer New Energy Tech services and periodic or intermittent charges apply, our quote will specify the amount or method of calculation, any rights we have to vary charges during the term of the contract and the frequency of bills. For example, if there will be charges for software upgrades, we will aim to provide reasonable certainty as to the cost that you will incur.
15. If we make a claim that you are likely to achieve a favourable return on your investment, we will include in our quote a return on investment calculation that is based on reasonable assumptions and where available from reputable sources. Our quote will set out our assumptions including:
  - a) system design, performance and output
  - b) government and non-government financial incentives
  - c) energy prices and usage
  - d) financing costs (if applicable)
  - e) maintenance costs
  - f) end-of-life costs
  - g) any other relevant factors.

We will also clearly state that our calculation is an estimate only and that if our assumptions prove not to be correct you may not achieve the estimated return.
16. If our offer involves us making payments to you (for example, for energy purchased from you), we will clearly specify how payments will be determined, any rights that we have to change the basis on which payments will be calculated and the frequency with which payments will be made.

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## Quote – design

17. If the quote includes New Energy Tech that requires custom configuration or specification and/or physical installation by us or a competent or qualified installer:
- a) we will include as part of the quote:
    - i. a site-specific installation design or plan (a sketch or diagram is acceptable) including any configuration or positioning issues and how the New Energy Tech will integrate with other New Energy Tech you may have
    - ii. a site-specific performance estimate for the New Energy Tech.
  - b) before we enter into a contract to provide New Energy Tech to you, we will complete a site-specific installation design or plan and site-specific performance estimate (both must meet the requirements of paragraph 17a)) for a non-refundable agreed fee, with no obligation on you to proceed to contract with us
  - c) we can provide a site-specific installation design or plan and site-specific performance estimate (both of which will meet the requirements of paragraph 17a)) as an initial deliverable of the contract if:
    - i. we do so before the expiry of your cooling-off period (if applicable)
    - ii. we provide you with a full refund, if within 10 business days of receiving the site-specific installation design or plan and performance estimate you notify us that you do not accept these.

## Quote - connections

18. If our quote is for a New Energy Tech that requires approval from your Energy Supplier for connection to the Energy Network and/ or reconfiguration of your meter, we will also include in our quote:
- a) an offer to arrange this on your behalf and what, if any, charge we will make for doing this
  - b) an explanation of the steps that need to be taken to obtain approval and/ or reconfiguration of your meter and the relevant paperwork that must be completed and submitted prior to installation
  - c) a statement that your Energy Supplier may impose a charge for connection to the Energy Network and/or reconfiguring your meter and may change your existing energy pricing
  - d) a statement that we will support you through these steps if you decide to obtain Energy Network connection approval yourself and whether there will be any non-refundable charge for this assistance.

## Contracts

19. If you accept our quote and agree to purchase our New Energy Tech, we will provide you with a written contract that is clear, uses plain language and is in legible print.
20. Your contract will meet the same requirements as for a quote (and may do this by attaching the quote with any amendments that are necessary). In addition:
- a) your contract will include our undertaking to you to comply with the Code
  - b) your contract will provide you with a standard minimum supplier's warranty period on the operation and performance of the New Energy Tech including workmanship. The period will meet or exceed the period set from time to time by the Administrator, in consultation with stakeholders, for the particular New Energy Tech
  - c) your contract will include information about how to make a complaint and the complaint resolution process including your right to access an external dispute resolution scheme (where applicable), to take a complaint to the Administrator and to take a complaint to a government regulator and
  - d) at the time we provide your contract to you, we will also provide you with any relevant Administrator-approved Consumer Information Product. We may give these to you electronically, but if requested, we will provide them in hard copy.
21. We will not offer you a contract that involves requiring you to purchase energy or services from another supplier (called "third line forcing"), except where this is permitted by the *Competition and Consumer Act 2010 (Cth)* and we have made this clear to you.
22. We will explain the contract to you prior to you entering into the agreement. In particular:
- a) we will draw your attention to any particular requirements of the contract that may cause confusion or disagreement (e.g. where additional fees may arise, early termination fees, end of contract payments or any difference between a verbal quote and the final price)
  - b) we will clearly explain the process for the payment and trade of any government or regulatory certificates, and of any relevant trading facility and any limitations
  - c) we will advise you that your Energy Supply contract may change as a result of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to check what new pricing may be applied and, after installation of the New Energy Tech, to confirm that the agreed pricing has been applied.
23. Both of us will sign the contract and any amendments. Equivalent methods of legal agreement other than physically signing a written contract in person are also permitted (for example, electronic acceptance).





## Payment and finance

24. We will issue you with a receipt for any deposit or other payment you make under the contract.

25. We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n.), we will ensure that:



- a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that:
  - i. is licenced under the National Consumer Credit Protection Act (2009) (Cth) ("NCCPA") and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC"), or
  - ii. if not licensed under the NCCPA and the deferred payment arrangement is not regulated by, or is exempt from, the NCC and or NCCPA:
    - (A) the Administrator has determined that:
      - a. the credit provider is a signatory to an industry code of conduct that requires the credit provider, on an ongoing basis, to:
        - i. resolve any complaints you may have using an internal dispute resolution process which complies with the standard specified in ASIC Regulatory Guide 165, and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
        - ii. have processes in place which comply with sections 72, 88 and 89A of the NCC to identify whether you are experiencing payment difficulties due to hardship, to respond to your requests for hardship assistance and to make you aware of your rights to dispute the rejection of such requests for assistance
        - iii. offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
        - iv. undertake a responsible lending assessment of the suitability of the loan and your ability to repay the loan, providing substantially equivalent protections to those contained in the following sections of the NCCPA and the NCC:



- [s 128 \(obligation to assess unsuitability\)](#)
- [s 129 \(assessment of unsuitability\)](#)
- [s 130 \(reasonable inquiries about the consumer\)](#)
- [s 131 \(when the credit contract must be assessed as unsuitable\)](#)
- [s 132 \(giving the consumer the assessment\) and](#)
- [s 133 \(prohibition on entering, or increasing the credit limit of, unsuitable credit contracts\); and](#)

b. [this industry code contains mechanisms for:](#)

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

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

- b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system
- c) you receive the following clear and accurate information:
  - i. the name of the credit provider to whom you will be contracted for the arrangement
  - ii. a clear statement that the deferred payment arrangement is a voluntary finance option
  - iii. the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
  - iv. the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt

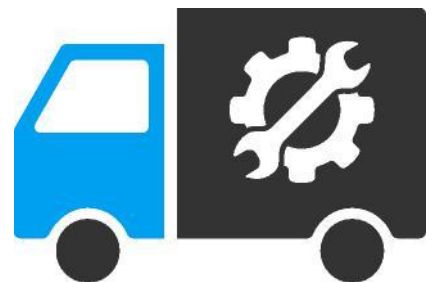
from or not regulated by the NCC, information to assist you in assessing the credit product, including the credit provider's fees and charges

- v. whether at the conclusion of the deferred payment arrangement
  - (A) you own any elements of the New Energy Tech, or
  - (B) you have any entitlement to any ongoing services or pricing, and/or
  - (C) you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and
- vi. a statement that questions and complaints about the payment arrangement should be directed to the credit provider with whom you will be contracted.

- 26. Paragraph 25 does not apply if the finance is provided by a government body.
- 27. Paragraph 25 does not apply if we offer you, as an alternative to full payment on delivery or installation, the opportunity to make progressive instalments to us over a period of not more than 6 months, provided that the total amount to be paid by you does not include an interest component, additional fees or an increased price (see paragraph 3. n.).
- 28. Paragraph 25 does not apply if the Administrator is satisfied that the contract we offer you is a Power Purchase Agreement and our contract includes a commitment to try and assist you if you notify us that you are experiencing financial hardship, including by advising you of any relevant government assistance schemes and by offering you a payment plan.
- 29. Where we are providing an ongoing service to you and the contract allows us to change the price that we charge you, we will advise you as soon as practical and no later than five business days prior to the price change taking effect.
- 30. If your contract requires us to make payments to you (whether by transfer of money or by offset to a payment you make to us), we will make those payments on time in accordance with your contract. If our payments to you are calculated using an undisclosed formula, we will ensure that our payment calculation system is regularly audited by a registered company auditor to ensure that payments are accurately calculated.

## Delivery, installation and safety

- 31. We will arrange delivery and installation (if applicable) of New Energy Tech you purchase from us within the timeframe specified in your contract, unless any delay is because of circumstances that were identified in your contract as outside our control.
- 32. If you purchase New Energy Tech that requires physical installation by us, we will ensure your safety and the safety of our installers. We will install in accordance with all applicable safety standards, manufacturer's specifications, relevant Australian Standards, Energy Network standards, any binding guidance issued by the Code Administrator and good industry practice, using an installer that is trained, competent and where applicable, holds any required qualification or certification to undertake the work.



## Activation



33. If you authorise us to obtain Energy Network connection approval on your behalf for New Energy Tech, we will:
- a) not install or commence the New Energy Tech until approval is provided
  - b) provide you with a full refund if the relevant approvals are not obtained
  - c) prepare and submit within a reasonable timeframe all relevant documentation required by the Energy Supplier for connection to the Energy Network and for reconfiguration of your meter (if relevant)
  - d) respond within a reasonable timeframe to any additional compliance requests from the Energy Supplier (for example, re-submitting incorrect paperwork), and consult with you if necessary
  - e) keep you informed of progress at each step, including any restrictions or limitations that may adversely affect you.
34. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech, we supply to you, we will:
- a) clearly explain to you each step in the process for preparing and submitting the documentation to the Energy Supplier
  - b) provide you with information as to where to find and how to complete and submit paper or on-line forms
  - c) provide you with expected timeframes and any deadlines for each step of the process
  - d) advise you of contact details for queries or following up on progress
  - e) advise of any potential problems that may arise
  - f) provide you with a refund consistent with paragraph 48 if your application is rejected.
35. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech and your application is rejected after you have signed a contract for that New Energy Tech, we will provide you with a refund minus reasonable expenses incurred by us to the point of termination of the contract.
36. If we supply you with New Energy Tech that needs another form of activation in order to provide you with the intended benefit, we will explain to you the steps that need to be taken and who is responsible for these. We will promptly fulfil our responsibilities and keep you informed of progress at each step.

## Operating Information

37. Prior to the activation of the New Energy Tech we are providing you, we will:
- a) provide you with comprehensive information for safe and effective operation, maintenance and optimisation of your New Energy Tech
  - b) explain to you any obligations that you may have to facilitate or enable the New Energy Tech (for example, to maintain an internet connection that we are able to access)
  - c) advise you how to use your New Energy Tech and/or assess the benefit you are deriving from these. The advice will be appropriate to the New Energy Tech we are providing to you and will involve at least one of the following:
    - i. written instructions and a physical or electronically recorded demonstration (for example, an instructional video)
    - ii. providing you either with a measuring or monitoring device that connects to the New Energy Tech or with continuous access to a remote monitoring service (in either case that will facilitate accurate measurement of benefit that is based on objective standards acceptable to the Administrator) together with written instructions as to how to use that device or access that service
    - iii. a commitment to provide you with regular reports that accurately quantify the benefit that you are deriving and that meet any guidelines made by the Administrator in relation to reporting of this kind (for example, in the case of a service that is designed to reduce your energy bills by smart management of your energy consuming products).



The required information will vary depending on the specifics of the New Energy Tech but will meet the Administrator's requirements. The information may be provided to you in electronic format, hard copy or by web link or something similar. If you request, we will provide you the information in hard copy (in which case, we will provide it at least quarterly, namely every three months).

## Performance

38. Our New Energy Tech will meet your reasonable expectations including but not limited to:
- a) meeting your needs as explained to us (see paragraph 7), unless we have clearly explained to you and confirmed in writing that those needs cannot be met
  - b) performing properly
  - c) reflecting any agreed contract and meeting the performance specifications outlined by us to you;
  - d) fulfilling any commitments we make to you (for example, to provide access to an accurate monitoring service or regular reports that accurately quantify the benefit you are gaining)
  - e) New Energy Tech that utilises information and communications technology will be secure
  - f) all our services will be provided with due care and skill.

39. If we become aware that New Energy Tech that we have supplied to you is defective or unsafe, we will promptly tell you and offer to fix the problem if this is possible or otherwise remove the product or system from your premises and provide reasonable compensation to you.
40. If we provide you with New Energy Tech that involves the use of equipment that you own, we will do so in a way that is consistent with the equipment manufacturer's instructions and warranty requirements.

## Move from premises

41. If our contract with you includes a lock-in period and imposes fees if you terminate early, and
- a) the services are not transferrable to another property
  - b) you sell or move from the property to which those services are being provided
  - c) the occupier of the property agrees to take over your contract

we will agree to the occupier of the property substituting for you under the contract and will not charge you early termination fees, unless we have a reasonable basis for refusing to contract with the occupier of your property.

## Warranty claim

42. We will respond promptly to any warranty claim by you and within a reasonable timeframe implement warranty repairs and replacements, remedy service issues or provide compensation.
43. We will provide you with the name and contact details of our New Energy Tech product or system supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason, you are unable to contact us.
44. In some circumstances, you may not be entitled to a consumer guarantee under Australian Consumer Law, and in that case, you may not be entitled to a remedy, if the claim is due to something that:
- a) someone else said or did (excluding our agents or employees) or
  - b) beyond human control that happened after the goods or services were supplied (for example, an extreme weather event).



## Termination of contract

45. You are entitled to terminate your contract and we will provide you with a full refund if:
- a) your contract is for the supply of New Energy Tech that requires physical installation
  - b) consistent with paragraph 17.b), we provide you with a site-specific installation design or plan and site-specific performance estimate as an initial deliverable under the contract (rather than as part of our quote) \
  - c) within 10 business days of receiving our site-specific installation design plan and performance estimate you notify us that you do not accept these.



46. You are also entitled to terminate your contract and we will provide you with a full refund, if your contract is for the supply of New Energy Tech that requires physical installation and either of the following applies:
- a) we propose to significantly change the New Energy Tech installation design from that previously provided to you (whether provided in our quote or as a first deliverable under your contract) and you are not willing to accept the change or
  - b) site conditions and circumstances beyond our control result in extra chargeable work not within the contract price and we are not willing to bear those additional costs.
47. You are also entitled to terminate your contract for the supply of New Energy Tech, and we will provide you with a full refund, if we fail to meet the timeframe specified in your contract for delivery and installation (if applicable), or commencement of service of any New Energy Tech. This does not apply, however, if the delay was because of circumstances that were identified in your contract as outside our control.
48. If you take responsibility for obtaining Energy Network connection approvals and your application is rejected after you have signed a contract with us (see para 35), you may terminate the contract and we will provide you with a refund minus reasonable expenses incurred by us up to the time of the termination.
49. We will terminate your contract and remove New Energy Tech that we supplied to you and return the site to its former state, if:
- a) you have a strata title property
  - b) you were required by law to obtain the Owners Corporation written consent before installing our New Energy Tech
  - c) you entered into a contract with us to supply the New Energy Tech before obtaining that written consent and
  - d) the Owners Corporation subsequently refuses to give that consent. We will provide a full refund and conduct the removal and restoration at our cost, unless:
  - e) we advised you of the need for written consent under paragraph 9.n) and
  - f) we have proceeded with the installation on your incorrect advice that yours is not a strata title property.
50. Under the Australian Consumer Law, if the sale to you was unsolicited and you are a Residential Customer, you will be given 10 business days after you sign a contract to cancel the contract without penalty (the “cooling-off period”). If you wish to withdraw from a valid contract after the expiry of any cooling-off period, we may apply our own policies regarding fees for cancellation, provided that we specified them in the initial contract. For all Customers protected by this Code, we may only impose cancellation or termination fees that are reasonable and related to the cost incurred by us.

## Customer service

51. We will provide fair terms, clear communication and maintain high standards of customer service at all times and respond courteously and promptly to any contact from you and queries you may have about New Energy Tech supplied by us to you.



52. If we have an ongoing service relationship with you and we are aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress or needing energy for medical or life-support equipment or

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services), we will take additional care to respond promptly to any related issues arising from the use of our New Energy Tech.

## Complaints

53. If you are dissatisfied with a New Energy Tech we offered or supplied, you can submit a complaint directly to us. A complaint may include, for example, any expression of dissatisfaction with a New Energy Tech offered or provided, with the sales process or salesperson, or with the complaints handling procedure itself.
54. We will handle your complaint in a way that is fair, timely and transparent. This means that:
- a) we will have information readily available for you and our staff about how complaints may be made, how these are handled and available avenues to which you can escalate your complaint if you are not satisfied with our response
  - b) we will acknowledge receipt of your complaint as soon as possible and tell you when we expect to be able to respond to your complaint
  - c) we will log your complaint in a complaint's register and promptly begin investigating the issues
  - d) we will aim to provide you with a response to your complaint within 15 business days of receipt of your complaint. If we do not provide you with a final response by then, we will advise you before 15 business days have passed and provide an update of progress;
  - e) we will provide you with a final response to your complaint within 25 business days of receipt of your complaint, unless we have both agreed to a further extension
  - f) if you are dissatisfied with our response to your complaint, we will provide you with contact details for escalation options including any external dispute resolution (Ombudsman) scheme of which we are a member, the State Consumer Affairs or Fair Trading body and the Administrator
  - g) we will maintain appropriate record keeping of complaints and their outcomes and steps that we take to minimise similar complaints in the future.



## Legal and privacy obligations

55. We will comply with all local, state and federal legislation, relevant Accreditation Guidelines, and regulations including but not limited to:
- a) The Renewable Energy (Electricity) Act 2000 (Cth) which is supported by the Renewable Energy (Electricity) Regulations 2001 (Cth)
  - b) The Do Not Call Register Act 2006 (Cth) and associated telemarketing standards including permitted hours for contacting consumers
  - c) Australian Consumer Law
  - d) Respecting "Do Not Knock" and "No Hawkers" stickers.
56. Even if we are not bound by the Privacy Act 1988 (Cth), we will take reasonable steps to ensure the safety of your personal information and we will only use your personal information:



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REGULATIONS



STANDARDS



- a) for the purpose of providing you with a requested quote or carrying out our obligations under your contract (as applicable)
  - b) for future marketing of other related New Energy Tech or providing you with information that you might reasonably expect to receive from us or
  - c) to provide your personal information to a third party if you have given express permission for this.
57. We will not provide you with marketing material unless we also provide a simple, easy way for you to ask not to receive future direct marketing communications and include a clear, prominent opt-out provision in each marketing communication.

## **Training**

58. We will train our sales agents, representatives, contractors and employees about our New Energy Tech and their responsibilities under this Code, so that they can provide you with accurate information and quality services.
59. We will ensure the safety of our installers, subcontractors and employees and demonstrate due diligence in ensuring the safety of persons under our direct or indirect responsibility.
60. Our people will be competent, appropriately qualified and have completed the relevant safety training modules (as specified by the relevant regulator or by the Administrator) appropriate to the work.

## **Compliance with the Code**

61. We agree to comply with this Code as amended from time to time and any mandatory standards published by the Administrator on the Code website that apply to New Energy Tech that we provide. We will also ensure that our employees, contractors, agents, representatives and any other individuals or businesses acting on our behalf do likewise. This includes third parties we engage to undertake direct marketing and sales for us.
62. We will be responsible for all actions governed by this Code, whether taken by our employees, contractors, agents, representatives or any other individuals or businesses acting on our behalf. This includes third parties we engage to undertake direct marketing for us or who we engage to install products or systems we provide to you or to deliver services to you.



## Part C - Definitions

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The definitions for terms used in this Code are as follows.

**Administrator** is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration.

**Australian Consumer Law** – Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth).  
**Business day** – A day that is not a Saturday, Sunday or public holiday in the relevant location in Australia.

**Customer** – A potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies.

**Consumer Information Product** – consumer information (hardcopy, web-based, electronic, etc) that is approved by the Administrator to provide independent information to assist a customer or potential customer to make informed choices about New Energy Tech.

**Energy Network** – Any of Australia's principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market).

**Energy Supplier** – Any of Australia's public offer energy providers, including retailers and network businesses.

**New Energy Tech** are:

- (a) small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks or as distributed energy resources connected to an Energy Network
- (b) services that support or are closely related to those products and systems
- (c) products, systems and services that monitor or manage a Customer's usage of energy whether on or off an Energy Network
- (d) any other product, system and service that the Administrator is satisfied is appropriately within this Code.

The term does not, however, include simple, low cost or off-the-shelf New Energy Tech that are within a class exemption made by the Administrator in accordance with paragraph 17 of the Annexure – Code Administration.

Examples of New Energy Tech are:

- (a) distributed energy resources owned by or leased to the Customer that are connected to an Energy Network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
- (b) a microgrid that may be connected or fully isolated from the Energy Network
- (c) a power system for a single Customer, whether or not the Customer is also connected to an Energy Network
- (d) energy management products, systems and services supplied to a Customer including home energy management systems and services, battery and other storage products, systems and services
- (e) programs aimed at stabilising the supply of energy including by paying Customers an incentive to reduce their usage during critical peak periods or by shutting down

or restricting the power consumption of Customer appliances during critical peak periods

- (f) a Power Purchase Agreement
- (g) person to person energy trading systems and services
- (h) electric vehicle charging services
- (i) suppliers of repair, maintenance and removal services for New Energy Tech products and systems.

These examples are not intended to limit the scope of the definition. Rather the term has been defined to accommodate new products and services as they enter the Australian market where the nature, complexity and cost is such that the Code protections are appropriate.

**Owners Corporation** – The body (however described) that has legal responsibility for the common property in a strata development.

**Panel** – The independent Code Monitoring and Compliance Panel appointed to oversee the work of the Code Administrator.

**Power Purchase Agreement** - An agreement for a Signatory to supply a customer with energy from New Energy Tech which may be from generation or storage equipment located on the customer's premises or remotely. This is not intended to cover energy purchased through the wholesale electricity or gas markets.

**Residential Customer** – A customer that is purchasing New Energy Tech for personal, domestic or household purposes. The term includes an Owners Corporation for a residential strata property and the operator of a retirement village.

**Small Business Customer** – A customer that is a business or not for profit organisation that employs less than 20 people. Associated entities are taken to be one entity when calculating the number of employees.

# Annexure - Code Administration

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## Introduction

- A1 The Code is administered in accordance with the Memorandum of Understanding agreed to on 24 January 2019 by Energy Consumers Australia, Energy Networks Australia, Public Interest Advocacy Centre, Clean Energy Council, Smart Energy Council, Australian Energy Council and Renew (MOU). The MOU provides that the governance, accountability and administration structure of the Code will be guided by the following principles:
- (a) Customer focused
  - (b) Fair and not anti-competitive
  - (c) Relevant expertise
  - (d) Independent and avoiding conflicts of interest
  - (e) Inclusive
  - (f) Adequately resourced.
- A2 The MOU specifies that the Code will be governed and administered by:
- (a) The Council, which must comprise representatives of key stakeholders including industry associations and consumer bodies
  - (b) The Steward, appointed by the Council to be the legal entity responsible for the Code, for entering into any contracts related to the Code and funding any shortfall in Code revenue
  - (c) The Administrator, appointed by the Council and responsible for day to day administration of the Code
  - (d) The Code Monitoring and Compliance Panel (Panel) appointed by the Council and comprising industry and consumer representatives and independent persons with relevant expertise.

This Annexure to the Code expands upon the role of the Administrator and the Panel and may be revised by the Council from time to time, following consultation with stakeholders.

## Applications and renewals

- A3 The Administrator is responsible for developing application forms and renewal forms for use by industry participants wanting to become a signatory to the Code (Signatory) or renew their status as a Signatory.
- A4 Where an application is made by an industry participant and the application fee is paid, the Administrator must assess whether to admit the applicant as a Signatory. In making this assessment, the Administrator must take into account:
- (a) whether the applicant's processes and documents are sufficient to support compliance by the applicant with the Code (other than a provision of the Code from which the Administrator has exempted the applicant)
  - a) whether the key personnel in the applicant's business have had a significant involvement in another business that became insolvent.
- A5 Where a Signatory applies to renew their status as a Signatory, the Administrator may take into account any complaints that have been made about the Signatory, whether the Signatory

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has co-operated with the Administrator and Panel in carrying out their responsibilities and any other relevant factors.

- A6 Where an applicant is refused admittance or renewal as a Signatory, the Applicant has a right to appeal the Administrator's decision to the Panel (a fee may be payable by the Applicant).

## Deferred payment arrangement providers

- A7 Where a Signatory requests the Administrator at any time until 31 October 2021 to approve a credit providers' deferred payment contract and internal policies and processes for the purposes of paragraph 25.a).ii.(B), the Administrator must do so if:
- (a) an appropriately qualified person engaged by the Administrator reviews the:
    - (i) deferred payment contract,
    - (ii) internal policies and processes of the credit provider, and
    - (iii) outcomes of any previous findings that the credit provider has not met the consumer protection standards under paragraph 25.a).ii.(A).a and 25.c).iv) of the Consumer Code that are required to be met by a credit provider for Signatories to offer the credit providers' finance product, including any previous revocations of approval pursuant to clause A7.A, if applicable,

and certifies that:

    - (iv) the contract and the internal policies include an undertaking and processes to require ongoing compliance by the credit provider with all of the consumer protection obligations set out in paragraphs 25.a).ii.(A).a, and 25.c).iv); and
    - (v) having regard to the review of the factors listed at A7.a).iii, it is appropriate to approve the credit provider.
  - (b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work)
  - (c) where the Administrator is proposing to refuse the request, the Administrator must give the credit provider an opportunity to reply before making a final decision.

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

## Fees

- A8 The Council must, on an annual basis, agree to the fees and contributions required to cover the costs of operating the Council. These shared costs include the costs of the Independent Chair and the Consumer representatives. Industry members of the Council must cover the attendance costs of their own representatives. Council members may volunteer additional

contribution but are not liable for any shortfall in funding to meet the costs of governing and administering the Code.

- A9 The Administrator, on an annual basis, must review the fees payable by applicants and annual and other fees payable by Signatories, with a view to cost recovery including Code governance and administration costs. As part of its annual budgeting process, the Administrator must propose a schedule of fees and contributions to the Council for approval, at least 3 months prior to the intended date of effect.
- A10 If the Council is not willing to endorse the fees proposal, the Steward must engage an independent accountant to review the reasonableness of the fees proposal in light of the budget for the Code and, if relevant, the extent of revenue shortfall that the Steward has indicated it is willing to fund. The Steward must bear the accountant's costs. Fees for the coming year will then be set by the Administrator taking into account any recommendations made by the independent accountant.
- A11 The Administrator must publish details of fees on the Code website. A change in fees is not effective until at least 3 months after publication of the new fee on the Code website.

## **Code promotion and branding**

- A12 The Council and the Administrator must promote the benefits of the Code to customers, to industry participants and to other stakeholders.
- A13 The Council and the Administrator must develop Code brand mark guidelines for Signatories and publish these on the Code website. The Administrator must enforce compliance with these guidelines.
- A14 The Administrator must maintain an easily accessible list of Signatories on the Code website.

## **Supplementary materials**

- A15 The Administrator may develop supplementary materials to assist Signatories to meet the expectations of the Code. These may include written standards, guidelines, approved Consumer Information Products, checklists, templates or training. They may apply to particular technologies or systems or address particular aspects of New Energy Tech that apply across many or all types.
- A16 These materials may include any combination of:
- (a) Mandatory and binding standards which must be followed where they apply
  - (b) Safe harbour guidelines which provide a Signatory with an approved method of complying with an aspect of the Code while allowing for other ways of compliance
  - (c) Non-binding guidance, which may be of assistance to Signatories
  - (d) Independent consumer information, designed to assist consumers to make informed choices
- A17 The Administrator must consult with stakeholders (including consumer representatives, industry and government) in the development of these materials. The period of consultation may vary and must be adequate to the importance and impact of the proposed materials. In the case of materials that are intended to be mandatory and to bind Signatories, the period of consultation must not be less than 3 months and may well be longer.
- A18 Where substantive disagreement emerges in the course of the consultation over mandatory or safe-harbour guidance, the Administrator may refer the proposed material to the Panel for

decision. Where a Signatory makes an application for referral, the Administrator must refer the proposed material to the Panel for decision.

## Exemptions

- A19 A19. If an applicant or a Signatory applies to the Administrator for an exemption from a provision of the Code, the Administrator may agree to an exemption if satisfied that the exemption would not unduly diminish customer protection. For example, an exemption might be sensible if:
- (a) an existing Code requirement was not appropriate to a proposed New Energy Tech or a trial involving new technology or a new offering
  - (b) A product or service is a free additional 'value-added' service that does not materially impact the benefit of the core offering.
- A20 A20. The Administrator, following consultation with stakeholders, may publish a class exemption. This does not require an individual application by a Signatory. A class exemption may set out conditions required for a Signatory to be able to rely on the exemption. (For example, it is intended that the Administrator will issue a class exemption to exempt simple, low-cost or off-the-shelf products or services (say priced below \$199) for which the Code consumer protections are not appropriate. The Administrator may also publish a class exemption that permits temporary customer trials of new offerings.) The Administrator must publish class exemptions on the Code website.
- A21 Any exemption (including a class exemption) must be for a fixed period and may only be extended following review by the Administrator.

## Monitoring and investigations

- A22 The Administrator must monitor compliance with the Code. This might include undertaking regular compliance audits and reviews of Signatories' systems, policies and procedures, mystery shopping, assessing customer satisfaction, analysing customer complaints and investigating repeat instances. For example, the Administrator may conduct audits of sales conducted via direct marketing.
- A23 The Administrator must develop and publish a Complaints Procedure, consistent with Australian Standard AS ISO 10002, setting out the process where an allegation of breach of the Code is made. This must provide that:
- (a) a complaint may be self-reported by a Signatory or made by Customers, another Signatory, regulators or others
  - (b) if a complaint is made by a Signatory's Customer, the Administrator will investigate the complaint and, where appropriate, attempt to negotiate an outcome that is fair for both the Signatory and the Customer
  - (c) where the Administrator is satisfied that a Signatory has breached the Code, the Administrator will determine what, if any, remedial action or sanction is appropriate
  - (d) if the Signatory wishes to do so, the Signatory may ask the Panel to review a decision by the Administrator requiring the Signatory to take remedial action or imposing a sanction on the Signatory in response to a breach.
- A24 The Administrator has the power to require a Signatory to:
- (a) rectify the issues that gave rise to the breach
  - (b) train staff to minimise the likelihood of repeat breaches
  - (c) require sales agents to undertake an assessment and accreditation process

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- (d) appoint an external auditor, at the Signatory's cost, to audit areas of activity relevant to the breach (generally required if there are more than three major breaches in a 12-month period).

The Administrator also has the power to publicise the breach, including the name of the Signatory, on the Code website.

- A25 If the Administrator requires a Signatory to undertake remedial action in accordance with paragraph A24 a. to d., the Administrator must monitor the Signatory's compliance with that requirement.
- A26 If the Administrator considers that a Signatory has breached the Code in a way that may warrant the suspension or expulsion of the Signatory, the Administrator may refer the matter to the Panel for its consideration. For example, the Administrator may do this if the Signatory fails without reasonable excuse to undertake remedial action as required by the Administrator in accordance with paragraph A24 a. to d.
- A27 If the Administrator identifies an issue that may constitute a serious or systemic breach of law, the Administrator may refer the matter to the Panel to decide whether the matter should be referred to the relevant regulator.

## Panel

- A28 The Panel is responsible for:
  - (a) overseeing the monitoring of compliance and enforcement of this Code by the Administrator
  - (b) reviewing a proposed mandatory or safe-harbour standard or guideline referred to it by the Administrator under paragraph A18
  - (c) reviewing a decision made by the Administrator requiring rectification of a breach (under paragraph A24), if the relevant Signatory requests a review
  - (d) reviewing a decision made by the Administrator to refuse admittance or renewal as a Signatory if requested under Paragraph A6
  - (e) deciding matters of suspension or expulsion referred under paragraph A26 to it by the Administrator
  - (f) referring serious or systemic breaches of law to relevant regulators under paragraph A27
  - (g) publishing on-line an annual report about the Code's operation. This must include reporting on Code compliance to enable assessment of the Code's effectiveness and extent to which the Code is promoting the confidence of the community in New Energy Tech. The report must also set out any exemptions from Code requirements agreed to by the Administrator. It must also include each finding of breach by the Administrator or Panel and the remedial action or sanction imposed on the relevant Signatory. This information must only identify the name of the relevant Signatory if the Signatory has been suspended or expelled
  - (h) every 3 years, engaging an independent body to undertake a review of the Code and its governance framework including by seeking the views of stakeholders (the review report must be published on the Code website) and revising the Code in light of that review.



## **Signatories' obligations to Administrator and Panel**

- A29 A Signatory must ensure that it takes all reasonable steps to promote the benefits of this Code to Customers including prominent links to or a display of the latest version of this Code on its online presence.
- A30 A Signatory must promptly pay annual and any other Code-related fees applicable to it.
- A31 A Signatory must comply with the Code and all standards mandated by the Administrator in accordance with the Code.
- A32 A Signatory must co-operate with the Administrator and Panel in their exercise of their powers and responsibilities under the Code.