

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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

Lodgment and Details

Document Lodged: Application for Directions

File Number: ACT1 of 2019

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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

DEPUTY REGISTRAR

Dated: 30/04/2020 8:13 PM

Important information

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



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

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.

Applicant: Flexigroup Ltd (ACN 122 574 583)

APPLICATION FOR DIRECTIONS

REGARDING THE PROVISION OF INFORMATION BY FLEXIGROUP LTD

A DIRECTIONS SOUGHT

The Consumer Action Law Centre seeks directions from the Tribunal pursuant to r 22(1)(a) of the *Competition and Consumer Regulations 2010* (Cth) that:

1. By **Thursday 14 May 2020**, Flexigroup Ltd provide to each of the parties:
 - (a) details of consumer complaints received in connection with the sale of new energy technology (solar) products, between the period 1 January 2016 and 30 April 2020, including:
 - (i) the date of the complaint;
 - (ii) the name of the merchant in question;
 - (iii) the type and source of the complaint (consumer, consumer rights organisation, external dispute resolution scheme / regulator, etc);
 - (iv) a brief description of the conduct complained about; and
 - (v) the details of the response to the complaint; and
 - (b) details of any merchant whose contract Flexigroup has suspended and/or

Filed on behalf of (name & role of party) Consumer Action Law Centre (intervener)

Prepared by (name of person/lawyer) Ursula Noye

Law firm (if applicable) Consumer Action Law Centre

Tel 03 9670 5088 Fax 03 9629 6898

Email ursula@consumeraction.org.au

Address for service Level 6 / 179 Queen Street, Melbourne VIC 3000
(include state and postcode)

terminated as a consequence of the Merchant Compliance Action Process referred to in paragraph [50] of the Statement of Taras Mysak dated 24 April 2020 (**Mysak Statement**), in connection with the sale of new energy technology (solar) products between the period 1 January 2016 and 30 April 2020, including:

- (i) the date and the nature of the complaint(s) which led to the suspension or termination (the details of which complaint should be provided in accordance with paragraph (a) above);
- (ii) whether the merchant's contract with Flexigroup was suspended, terminated or both; and
- (iii) the date of any suspension or termination.

B BASIS FOR SEEKING THE DIRECTIONS

B1 Consumer complaints data

2. On 17 April 2020, CALC sent a letter to Flexigroup's solicitors, Clayton Utz (**Annexure A**), requesting that it provide the details of consumer complaints data regarding the provision of BNPL credit to purchasers generally, and of New Energy Technology (solar) in particular. It asked for that information to be provided by 24 April 2020, and indicated that in the absence of a satisfactory response, CALC would seek an order that the data be produced. The information requested is substantially that which is set out in paragraph 1(a) above, save that it did not specifically include the name of the merchants in question.
3. The direction that CALC now seeks is narrower than the request made on 17 April 2020, in that CALC seeks the requested information in relation to complaints from purchasers of New Energy Technology (solar) products only, and does not extend to complaints against Flexigroup by purchasers generally.
4. On 23 April 2020, CALC sent a further letter to Clayton Utz (**Annexure B**), following up on the original request (and a separate request made previously on 31 March 2020).
5. On 24 April 2020, Mikhel Wilding of Clayton Utz replied to CALC by email (**Annexure C**), stating that Flexigroup was '*addressing the issue of complaints data in the statement of Taras Mysak which it intends to file today*'.
6. The Mysak Statement deals with the issue of consumer complaints only peripherally and ambiguously, in the spreadsheet produced at tab 8 of Confidential Exhibit TM-2 [FXL.001.002.0064] which is exhibited to paragraph 44 of the Mysak Statement.

Relevantly, the spreadsheet states, for each of the years 2015 to 2019, absolute and percentage figures for:

- (a) the number of Internal Dispute Resolution (IDR) enquiries; and
- (b) a column headed "#IDR enquiries (Specifically CALC + Non-Calc Financial Difficulty complaints)".

7. Contrary to what was foreshadowed in the email from Clayton Utz dated 24 April 2020, the Mysak Statement does **not** supply the details that CALC originally requested on 17 April 2020.
8. Accordingly, and as foreshadowed in CALC's letter of 17 April 2020, CALC seeks a direction from the Tribunal that Flexigroup provide the requested details to the parties.

B2 Merchant Compliance Action Process

9. The Mysak Statement states at paragraph [50]:

Where a dispute or complaint from a customer involves a merchant, flexigroup's practice is to investigate the complaint as set out in the Merchant Compliance Action Process which appears at tab 9 of Confidential Exhibit TM-2 [FXL.001.002.0227]. flexigroup's practice is to consider the nature of the complaint and the profile of the merchant and investigate the merchant's conduct in one of the ways outlined in paragraph 51 below. If flexigroup determines that the fault lies with the merchant, an outcome could be suspension or termination of the merchant's contract with flexigroup.

10. The Mysak Statement does not indicate whether Flexigroup's Merchant Compliance Action Process (or any similar internal process) has ever actually led to Flexigroup suspending or terminating a new energy technology (solar) merchant's contract, and if so, on how many occasions, and in which circumstances. CALC therefore also seeks a direction for Flexigroup to provide further information regarding those matters.

B3 Basis for seeking the direction

11. A direction may be sought for the purpose of '*securing... that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal*': r 22.
12. In assessing the respective public benefits to be obtained, on the one hand, from the availability of unregulated buy-now-pay-later (**BNPL**) credit for solar and new energy technology consumers, and on the other hand, by protecting those consumers from

predatory or unfair practices associated with the provision of unregulated BNPL finance, it is necessary to examine the real world consumer experience, including by reference to the number and details of any consumer complaints. That is the subject matter of paragraph 1(a) above.

13. Similarly, paragraph 1(b) seeks the provision of further details from Flexigroup to test the matters asserted in the Mysak Statement at paragraph [50]. Without that information, the Tribunal and the parties have little capacity to assess whether, and to what extent, the Merchant Compliant Action Process described in the Mysak Statement is meaningfully implemented in practice. As a consequence of the Mysak Statement having described the Merchant Compliance Action Process in general terms, then it is reasonable and proportionate for Flexigroup to now provide the further information requested above.

Dated: 30 April 2020

Consumer Action Law Centre

Signed on behalf of the Consumer Action Law Centre

Our Ref: 495916
Contact: Ursula Noye

17 April 2020

Mihkel Wilding, Special Counsel
Clayton Utz
Level 15
1 Blich Street
Sydney NSW 2000

By email only: mwilding@claytonutz.com

Dear Mr Wilding

Application by FlexiGroup - ACT 1 of 2019 ("the Proceeding") - Request for consumer complaints data

1. CALC is of the view that the Australian Competition Tribunal ("the Tribunal") would be assisted if it had consumer complaints data regarding the provision of BNPL credit to purchasers generally and of New Energy Tech (solar) in particular.
2. The purpose of this letter is to seek information about consumer complaints data that your client FlexiGroup may have.
3. We would be grateful if your client could respond by **24 April 2020**, given that CALC is required to file its evidence with the Tribunal by 5 May 2020.
4. Please provide details of consumer complaints received in connection with the sale of (a) new energy tech (solar) products; and (b) any consumer products more generally; between the period 1 January 2016 and the present, including –
 - a. the date of the complaint;
 - b. the type and source of the complaint (consumer, consumer rights organisation, external dispute resolution scheme/regulator, etc.);
 - c. the conduct complained of; and
 - d. the details of the response to the complaint.
5. Should we not receive a satisfactory response to this request, we will seek an order from the Tribunal pursuant to r 22(2) of the *Competition and Consumer Regulations 2010* (Cth) that this data be produced in the Proceeding.

6. Please direct any queries to Ursula Noye by telephone to 0409 542 314 or email at ursula@consumeraction.org.au.

7. We look forward to your response.

Yours faithfully,

CONSUMER ACTION LAW CENTRE



Ursula Noye
Special Counsel



Our Ref: 495916
Contact: Ursula Noye

23 April 2020

Flexigroup Limited
C/- Mihkel Wilding, Special Counsel
Clayton Utz
Level 15, 1 Bligh Street
Sydney NSW 2000

By email only: mwilding@claytonutz.com

Dear Mr Wilding

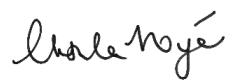
Application by Flexigroup – ACT 1 of 2019 (“the Proceeding”) – Final requests

1. We refer to above Proceeding and to the requests contained in our letters to you dated 31 March 2020 and 17 April 2020 respectively.
2. Specifically, on 31 March 2020, CALC sought your client’s co-operation with respect to adducing evidence before the Tribunal regarding our client’s dispute, now resolved, with your client (Purchase Number 22951860) and requesting your client’s response by 7 April 2020. On 17 April 2020, you confirmed that your client is willing to cooperate with this request. On 20 April 2020, we provided you with details of documents, including copies, on which we will rely. Given your client’s express willingness to co-operate with our request, that we have not heard from you within the requested timeframe nor since, and that we must file and serve evidence on 5 May 2020, we will proceed with preparation of that evidence for the time being on the assumption that these documents and the facts contained therein are admitted by your client and that your client will waive confidentiality over the same.
3. On 17 April 2020, CALC requested information, namely consumer complaints data, from your client by 24 April 2020. We note again the proximity of our filing date and take this opportunity to reiterate that unless we receive a satisfactory response by 24 April 2020, we will seek an order from the Tribunal pursuant to r 22 of the *Competition and Consumer Regulations 2010 (Cth)* that this request be complied with for the purposes of the Proceeding.
4. Our client’s timely preparation of its evidence in the Proceeding is being jeopardised by the delay in your response to our request of 31 March 2020, as well as by the continuing delay in the filing of Flexigroup’s own evidence. We will bring this correspondence to the Tribunal’s attention in the event that it becomes necessary for us to make any application.
5. Please direct any queries to Ursula Noye by telephone to 0409 542 314 or email at ursula@consumeraction.org.au.



Yours faithfully,

CONSUMER ACTION LAW CENTRE



Ursula Noye
Special Counsel



Subject: RE: ACT 1 of 2019 - Final requests [CU-Legal.FID2700600]
Date: Friday, 24 April 2020 at 12:58:22 pm Australian Eastern Standard Time
From: Wilding, Mihkel
To: ursula@consumeraction.org.au, rex@consumeraction.org.au
CC: Webb, Kirsten, Thompson, Doug, Crosby, James, Lara Kuhn
Attachments: image001.jpg, image002.jpg, image003.png, image004.jpg, image005.png, image006.png, image007.jpg

Dear Ursula and Rex

We refer to your email of 20 April 2020, and your subsequent letter of 23 April 2020.

Your email of 20 April 2020 - Stephens

Our client has no objection to you relying in your evidence on the correspondence and documents relating to the Stephens matter which you attached to your email of 20 April 2020 (excluding the draft outline of facts you attached). Our client notes that your email did not attach certain correspondence you intend to rely upon as described below, and so our client has not considered them. Please provide the following documents to us at your convenience:

- Email and telephone correspondence with CALC dated:
 - 29 October, 5 and 7 November, 19 and 20 December 2018; and
 - 3, 4, 14, 17, 23 and 30 January, 20 and 27 February, 7, 18 and 27 March 2019.

Noting that the normal rules of evidence do not apply in the Tribunal, our client is prepared to agree to the fact of the correspondence and documents you attached to your email of 20 April 2020. Our client does not, however, agree to your use of the draft outline of facts your attached to your email and which you assert was drawn from CALC's letter dated 22 November 2018. Our client has no objection to you using that letter itself in your evidence.

Your letter of 23 April 2020 - your request for complaints data

This letter refers to your letter of 17 April 2020 seeking complaints data from our client by 24 April 2020 (today).

Our client is addressing the issue of complaints data in the statement of Taras Mysak which it intends to file today.

Please could you also ensure you include Kirsten Webb, Doug Thompson and James Crosby on all future correspondence (copied).

Your sincerely,

Mihkel Wilding, Special Counsel

Clayton Utz

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Please consider the environment before printing this e-mail

From: Rex Punshon <rex@consumeraction.org.au>
Sent: Thursday, 23 April 2020 8:50 AM
To: Wilding, Mihkel <mwilding@claytonutz.com>
Cc: Ursula Noye <ursula@consumeraction.org.au>; Lara Kuhn <lara@consumeraction.org.au>
Subject: ACT 1 of 2019 - Final requests

Dear Mihkel

Please see the **attached** letter for your attention.

Kind regards

Rex Punshon | Solicitor



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+61 3 9670 5088 (reception) | rex@consumeraction.org.au | Work Hours: Mon-Fri, 9 am-5:30 pm

Get back on track with free financial counselling – contact the [National Debt Helpline](http://www.ndh.org.au) on 1800 007 007.



Consumer Action is located on the land of the Kulin Nations. We acknowledge all Traditional Owners of Country throughout Australia and recognise the continuing connection to lands, waters and communities. We pay our respect to cultures; and to Elders past, present and emerging.

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