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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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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



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Important information

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IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT1 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

FLEXIGROUP LIMITED

Applicant

APPLICANT'S OPENING SUBMISSIONS

INTRODUCTION

1. The Applicant (**flexigroup**) seeks a review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated 5 December 2019 (Commission file no. AA1000439) (**Determination**), pursuant to section 101 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. The applicants for the authorisation were the Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **Authorisation Applicants**).
3. By the Determination, the ACCC authorised the applicants for authorisation (**Authorisation Applicants**) and future signatories to agree, sign up and comply with (give effect) the New Energy Tech Consumer Code (**NETCC**). The purpose of the NETCC is to set minimum standards that suppliers of 'New Energy Technology' (**New Energy Tech**) (eg. solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers.¹

¹ Determination, at p.1.

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4. The purchase of New Energy Tech, particularly solar panels, is commonly financed by Buy Now Pay Later finance (**BNPL**) arrangements.² BNPL finance is not new. It has been used in Australia for two-decades.³ Using BNPL, customers can purchase a product on the spot but pay for it later in repayments over a set time period. Customers pay an upfront fee and periodic fixed fees with no interest.⁴
5. flexigroup is a major supplier of BNPL finance for New Energy Tech in the solar sector.⁵ It was an interested party to the application for authorisation pursuant to section 88(1) of the CCA. flexigroup's BNPL product is called 'hummm' (formerly known as 'Certegey Ezi-Pay').⁶ The hummm product has low fees and flexible repayment arrangements.⁷ Relevantly for solar products, hummm provides the customer with the ability to obtain finance of up to a maximum of \$30,000 repaid in instalments of up to 60 months for an establishment fee of between \$35-\$90 and monthly fees of \$8 per month.⁸
6. BNPL finance is cheaper and more flexible for consumers than conventional interest-bearing finance arrangements.⁹ This is because consumers are not charged interest and there are limits on the fees that may be charged.¹⁰ For example, for an average solar product, the cost to the consumer of an interest bearing loan is a multiple of the cost of BNPL.¹¹ There is no doubt that BNPL finance is valued by consumers.¹²
7. It is, therefore, hardly surprising that BNPL is very popular with consumers particularly for the purchase of solar products. flexigroup estimates that it financed approximately 9% of all solar installations in Australia with its hummm product since 1 January 2010.¹³ In this regard, unsolicited sales underpin the operating model for a large number of retailers in the solar industry who offer BNPL products.¹⁴

² Mysak Statement I at [35]; Determination at [2.12].

³ Mysak Statement I at [13].

⁴ Determination at [2.13],c[2.15]; Mysak Statement I at [14] (in relation to hummm).

⁵ Mysak Statement I at [35]; Mysak Statement II at [3].

⁶ Mysak Statement I at [13].

⁷ Mysak Statement I at [41]-[42].

⁸ Mysak Statement I at [42]. There are other fees for repeat purchases (\$22) and late payments (\$6).

⁹ Mysak Statement I at [41].

¹⁰ Foo Statement, Annexure KM-1 (ASIC Report 600), [20].

¹¹ Mysak Statement I at [43]. See Tab 11 if Exhibit TM-1.

¹² Determination at [4.18].

¹³ Mysak Statement I at [35]. See also Mysak Statement II at [3].

¹⁴ Mysak Statement I at [55]-[56].

8. BNPL finance is exempt from the regulatory regime under the *National Consumer Credit Protection Act (2009)* (Cth) (**NCCPA**) and the National Credit Code (**NCC**). Section 6(5) of the NCC states:

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

9. 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.¹⁵ These provisions demonstrate the clear intention of the Commonwealth Parliament that the NCCPA does not apply to BNPL finance within section 6(5) of the NCC, and that providers of such finance do not need to comply with the responsible lending provisions in the NCCPA.¹⁶ The Explanatory Memorandum to the *National Consumer Credit Protection Bill 2009* stated in relation to the exemptions found in section 6 of the NCC (including the exemption in relation to BNPL) that "the exemptions reflect the fact that these contracts provide benefits to the debtor (that Code credit does not) and their availability is restricted so that they do not affect competition".¹⁷
10. The NETCC was authorised by the ACCC on the conditions described in paragraphs 5.11 to 5.18 of the Determination and set out in Attachment A and the Annexure to the Determination (**BNPL Conditions**). In making the Determination, the ACCC considered that imposing the following conditions would enable the public benefits of the NETCC to be fully realized:¹⁸
- (a) clause 3(d) and ACCC condition: signatories must not offer finance arrangements not regulated in the NCCPA such as BNPL on unsolicited sales of New Energy Tech;¹⁹ and
 - (b) clause 25(a) and clauses A7 and A7A: signatories must not offer BNPL finance to consumers unless the Code Administrator has determined that the BNPL provider meets certain "minimum requirements" which require BNPL providers in particular to

¹⁵ *National Consumer Credit Protection Regulations (2010)* (Cth), reg 51.

¹⁶ ASIC Report 600, [68].

¹⁷ Explanatory Memorandum, *National Consumer Credit Protection Bill 2009*, 250, 8.37.

¹⁸ Determination at [5.3].

¹⁹ Determination at [5.13].

undertake a responsible lending assessment providing substantially equivalent protections to those contained in the NCCPA.²⁰

11. In this proceeding, flexigroup seeks an order under section 102(1) of the CCA varying Determination so as to remove the BNPL Conditions and add as conditions of authorisation of the NETCC that:²¹

- (a) clause 3(d) of the NETCC be deleted;
- (b) clause 25(a) of the 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;

- (c) clause 25(c)(iv) of the 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”.

12. For the reasons explained below,²² flexigroup submits that:

- (a) the BNPL Conditions of the NETCC will result, or be likely to result, in substantial public detriments, including:
 - (i) a loss of consumer choice in finance for New Energy Tech products;
 - (ii) increased costs of finance arrangements for New Energy Tech products;
 - (iii) preventing retailers of New Energy Tech products (and providers of BNPL finance) from offering lawful BNPL products to consumers wishing to purchase New Energy Tech products;

²⁰ Determination at [5.12].

²¹ Application to Tribunal for Review filed on 30 December 2019, [5].

²² flexigroup’s Amended Statement of Facts, Issues and Contentions, [47] – [59].

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- (iv) a substantial lessening of competition in the market for the retail sale of solar products to consumers and the market for the supply of financial products to consumers of New Energy Tech products; and
 - (v) a progressive reduction in the number of New Energy Tech sold and a concomitant increase in the price of New Energy Tech products;
- (b) in contrast, if the NETCC is authorised without the BNPL Conditions and with the variations sought by flexigroup as referred to in paragraph 11 above (**flexigroup BNPL Conditions**), it will result, or be likely to result, in:
- (i) the public detriments identified in subparagraph (a) above being avoided; and
 - (ii) the additional public benefit of BNPL providers being subject to a single regime of regulatory oversight for all BNPL finance.
- (c) there is no evidentiary basis for the conclusion that the BNPL Conditions will result, or be likely to result, in any real public benefits;²³
- (d) the flexigroup BNPL Conditions are necessary and appropriate under section 88(3) to yield the conclusion that section 90(7)(b) is satisfied in respect of the NETCC and/or having regard to the subject matter, scope and purposes of the CCA.

BACKGROUND

New Energy Tech

13. New Energy Tech, as defined in Part C of 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. It is defined to include solar photovoltaic systems (**solar products**), wind turbines and energy storage systems.²⁴
14. According to the Authorisation Applicants, in 2018, the number of solar product installations on homes and small businesses increased by 43% on the previous year and

²³ Cf. Determination, [4.32], [4.43] and [4.50].

²⁴ Part C of NETCC; Determination at [2.3].

the Clean Energy Regulator expected that growth was likely to continue for at least 10 years.²⁵

BNPL finance

15. Under BNPL finance, no interest is charged on outstanding balances, even if the consumer is in default.²⁶ 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.
16. BNPL finance is a cheap and flexible financing option. It is cheaper for consumers than regulated credit products because consumers are not charged interest and because the fees that are payable are limited and are periodic or other fixed charges.²⁷ Tab 11 of Exhibit TM-1 [FXL.001.002.0063] to the first statement of Mr Mysak sets out a humm BNPL and personal loan product cost comparison, being flexigroup's estimates of costs to consumers of those options.²⁸
17. As explained in part 5 of flexigroup's Amended Statement of Facts, Issues and Contentions and in paragraphs 28 to 35 of that document, BNPL finance is regulated under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).²⁹
18. Accordingly, providers of BNPL finance must not under the ASIC Act:
 - (a) impose standard form contractual terms upon consumers that are unfair (Subdivision BA);

²⁵ Authorisation Applicants' Application for Authorisation to ACCC, 29 April 2019, [10(a)], citing Clean Energy Council's *Clean Energy Australia Report 2019*.

²⁶ Mysak Statement I at [42].

²⁷ Lake Statement at [35].

²⁸ Mysak Statement I at [42]-[43].

²⁹ BNPL is a "financial product" within the meaning of s 12BAA of the ASIC Act. The definition is extensive. It includes "a security" (subs (7)(a)) and "a credit facility (within the meaning of the regulations)" (subs (7)(k)). The meaning of "credit facility" was left to prescription by regulation. By the *Australian Securities and Investments Commission Amendment Regulations 2001 (No 1)* (Cth), the expression "credit facility" was given an expansive operation. It includes the provision of "credit", with "credit" also being defined expansively. Relevantly for present purposes, reg 2B(3) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) defines "credit" to mean "a contract, arrangement or understanding under which payment of a debt owed by one person ... to another ... is deferred or by which one person incurs a deferred debt to another". "Credit" is also defined to include any form of financial accommodation, or a hire purchase agreement. As BNPL finance involves an arrangement for a form of financial accommodation, it is a credit facility and a financial product within the meaning of s 12BAA of the ASIC Act.

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- (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).

19. The consequences of breach of these prohibitions include:

- (a) 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.
- (b) 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.

flexigroup

20. flexigroup is an Australian company listed on the Australian Securities Exchange (**ASX**). The shares in flexigroup trade under the ASX Code "FXL".³⁰ It is the oldest and one of the largest providers of BNPL payment solutions in Australia.³¹

21. flexigroup's 'hummm' (BNPL)³² product allows customers to pay off a loan in instalments over a range of fixed terms. hummm is available on purchases up to \$30,000.³³ The hummm

³⁰ Mysak Statement I at [7].

³¹ Mysak Statement I at [10].

³² Mysak Statement I at [13].

³³ Mysak Statement I at [15].

product has repayment options which allow customers to pay for a product by fixed repayments over a nominated period of time ranging from 10 weeks to 60 months.³⁴

22. flexigroup also has a number of policies which govern its dealings with customers in respect of the humm product, and it is continuously making improvements to these policies.³⁵ As Mr Mysak explains, examples of recent improvements include changes introduced to the Internal Dispute Resolution Process flow in 2018 and changes introduced to the Hardship Policy in 2020.³⁶ flexigroup also became a member of the Australian Financial Complaints Authority from its inception in October 2018, commencing on 1 November 2018.
23. flexigroup provides humm via authorised sellers (or merchants). These authorised sellers (or merchants) must enter into agreements with flexigroup before the seller or merchant may make humm available to customers.³⁷
24. In order to become an authorised seller (or merchant) of humm, the prospective seller (or merchant) must pass an accreditation process conducted by flexigroup, described by Mr Mysak in paragraph 20 of his first statement. The purpose of this process is so that flexigroup can ensure, as far as possible, that its merchants comply with the provisions of the Australian Consumer Law (**ACL**) relating to unsolicited sales practices applying to telemarketing contained in Division 2 of each of Parts 3.1 and 3.2 of the ACL.³⁸
25. flexigroup works with approximately 350 authorised solar sellers that offer New Energy Tech to residential and small business consumers,³⁹ including SunEnergy. Details of the number of NET products financed by humm for the period 2015-2019 are set out in Tab 8 of Confidential Exhibit TM-2 [FXL.001.002.0064] to Mr Mysak's first statement.
26. The humm product is popular with solar product merchants because it offers certainty of repayments. Merchants can inform potential customers of the total amount they will need to pay, and the fixed repayment amount and instalments up front. humm provides certainty to the customer with a fixed fortnightly instalment amount that can be stated

³⁴ Mysak Statement I at [14]-[15]; Lake Statement at [19].

³⁵ Mysak Statement I at [22]-[23].

³⁶ Mysak Statement I at [23].

³⁷ Mysak Statement I at [17]-[18]. An example of a current humm Retailer Agreement for solar merchants appears at Tab 4 of Exhibit TM-1 at [FXL.001.002.0267].

³⁸ Mysak Statement I at [21].

³⁹ Mysak Statement I at [19], [34]. A list of solar sellers and merchants who offered humm in the period 1 April 2019 to 31 March 2020 appears at Tab 7 of Confidential Exhibit TM-2 [FXL.001.002.0065].

upfront. It is simple, quick and clear to convey to customers. Critically, the cost of BNPL products such as humm to consumers is substantially lower than the cost of regulated products for the purchase of solar products.⁴⁰

27. In the period since 1 Jan 2010, flexigroup's product humm has financed the purchase of more than 210,000 solar product installations in Australia, and approximately 9% of all solar installations in Australia.⁴¹ During that period, there have been approximately 2.3 million solar installations in Australia. flexigroup estimates that humm has financed approximately 9% of all such installations in Australia.⁴²
28. The humm application process is described in detail by Mr Mysak⁴³ and by Ms Lake of SunEnergy in her statement.⁴⁴
29. The humm product allows residential customers to obtain solar products with no deposit and zero interest. The customer must pay the agreed repayment amounts over the agreed term. The agreed repayment amounts in total repay the purchase price of the relevant product purchased by the customer. In addition to those repayment amounts, the customer must pay a Monthly Fee of \$8 which applies to payment plans 5 months or greater. For purchases up to \$30,000, an establishment fee of \$35 - \$90 also applies if a customer is new to humm or a \$22 additional purchase fee if the customer has used humm before. If a customer is late with payment, there is a \$6 late payment fee. flexigroup may also charge a \$30 collection fee. These are the only fees that a customer is required to pay. flexigroup's contracts with merchants provide that the merchant must not on charge to customers the merchant service fees the merchant pays to flexigroup.⁴⁵
30. For example, the average cost of a solar purchase is \$8,735. If a customer purchases a solar product with a value of \$8,735 financed over 60 months, the customer would incur the following costs depending on what financing option they obtained:
 - (a) using humm financing, the customer would be required to pay a Monthly Fee of \$8 per month for each month in the 60 month period plus an establishment fee of \$85, in total \$565; and

⁴⁰ Mysak Statement I at [41]-[43], [57].

⁴¹ Mysak Statement II at [3].

⁴² Mysak Statement I at [35].

⁴³ Mysak Statement I at [24]-[43].

⁴⁴ Lake Statement at [13]-[27].

⁴⁵ Mysak Statement I at [42].

(b) using a regulated loan, if the customer obtained a personal loan at an interest rate of 13.42%, the customer would pay interest of \$4,315, and at the cheapest available rate of 4.85%, the customer would pay interest of \$1,832.⁴⁶

31. The flexible repayment structure offered by humm also offers other benefits. The product structure allows merchants to calculate a repayment structure specifically designed so that its customers are able use the money that they would normally spend on a power bill to pay off their NET.⁴⁷ SunEnergy considers that the transparency in respect of repayments that the humm product provides also results in a significant increase in customer understanding of the benefits of NET.⁴⁸

Merchants of New Energy Tech

32. Merchants market and sell New Energy Tech by a number of forms of sales channels including, unsolicited telephone calls.⁴⁹ Unsolicited sales of solar products financed by BNPL underpin the operating model for a large number of merchants in the solar industry, and a significant proportion of sales of flexigroup's merchants originate through some form of unsolicited contact.⁵⁰ The unsolicited sales business model is low cost and effective for merchants of New Energy Tech.⁵¹

33. flexigroup's merchants make unsolicited sales of solar products using BNPL (humm) of approximately **[Confidential to flexigroup]** [REDACTED] per year. This figure comes from the following data in paragraph 56 and Tab 7 of Confidential Exhibit TM-2 of Mr Mysak's first statement **[Confidential to flexigroup]**. flexigroup has set out the calculations in confidential **Annexure A**.

34. To take SunEnergy as an example, it generates approximately **[Confidential to SunEnergy]** [REDACTED] of its business from outbound telemarketing calls.⁵² following the Following the initial outbound call to a prospective customer, SunEnergy prepares a **[Confidential to SunEnergy]** [REDACTED]
[REDACTED]
[REDACTED]

⁴⁶ Mysak Statement I at [43].

⁴⁷ Lake Statement at [22].

⁴⁸ Lake Statement at [30].

⁴⁹ See eg Lake Statement at [13]-[14].

⁵⁰ Mysak Statement I at [55]-[56].

⁵¹ Mysak Statement I at [55]-[56].

⁵² Lake Statement at [13].

[REDACTED]
[REDACTED] The intended result is that a homeowner can install a solar system with no initial deposit and use the money they would normally spend on their fossil fuel power bill to make repayments for the solar system. SunEnergy refer to this as a "Pay As You Save" finance solution, and offer this through flexigroup's 'Buy Now Pay Later' humm product.⁵³

35. Following this process, if a homeowner is interested in installing a solar system and financing the purchase using the humm product, SunEnergy provides them with a sales agreement, humm's terms and conditions, and if they are making a hard copy application as opposed to using the humm online portal, humm's credit schedule document.⁵⁴
36. Merchants such as SunEnergy are required to comply with the consumer law provisions concerning unsolicited consumer contracts,⁵⁵ which apply to the sale of New Energy Tech to consumers.
37. The ACL provisions concerning unsolicited consumer agreements are contained in Division 2 of Part 3-2. In particular:
 - (a) section 76(c) of the ACL provides that a dealer must not make an unsolicited consumer agreement with a person unless (where the agreement is made by telephone) the person is given information about termination rights by telephone and subsequently in writing; and
 - (b) section 76(d) of the ACL provides that the form and way in which the information is given must comply with any requirements prescribed by the Regulations. Regulation 84 provides that the information when given in writing must be attached to the agreement document for the supply of goods or services, transparent and in prominent text.
38. The unsolicited selling provisions are directed to the particular kinds of unscrupulous practices that may occur in the course of direct selling, where the goods or services

⁵³ Lake Statement at [17]. SunEnergy is registered with FlexiGroup as an 'Eligible Merchant': Lake Statement at [21].

⁵⁴ Lake Statement at [18].

⁵⁵ Lake Statement at [31].

concerned are not requested by the consumer and where the selling does not occur in a normal retail environment such as a shop or supermarket.⁵⁶

ASIC Report 600

39. The Australian Securities and Investment Commission (**ASIC**) has a Credit, Retail Banking and Payments team (Credit team) which is responsible for, inter alia, the regulation of responsible lending and ASIC's monitoring and review of consumer outcomes from financial services.⁵⁷ The Credit team is responsible for ASIC's work in relation to BNPL products, including conducting reviews of the BNPL industry.⁵⁸
40. After commencing a review in January 2018, in November 2018 ASIC published Report 600 "Review of buy now pay later arrangements".⁵⁹ The report followed extensive engagement with BNPL providers, key stakeholders and consumers.
41. The review included an examination of 6 BNPL providers (including flexigroup, then known as Certegy Ezi-Pay), independent consumer research, stakeholder consultation and material provided to ASIC by BNPL providers and analysis of data.⁶⁰
42. In ASIC Report 600, ASIC identified that:
 - (a) BNPL arrangements can be cheaper for consumers than some other types of credit because consumers are generally not charged interest and there are limits on the fees than BNPL can charge (plus missed payments fees),⁶¹
 - (b) BNPL can create some risks for consumers if they take on debt that they may have difficulty in paying back.⁶² However, ASIC noted that less than 10% of BNPL users with 5 providers were charged missed payment fees more than once on the same transaction in each quarter. This compares to 19% of credit card holders in Australia who had problematic debt;⁶³

⁵⁶ *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd* (2016) 344 ALR 61 at [122].

⁵⁷ Foo statement at [3].

⁵⁸ Foo statement at [4].

⁵⁹ Foo statement at [6]. A copy of Report 600 is Annexure KF-1.

⁶⁰ Foo statement at [7]-[9].

⁶¹ ASIC Report 600, [20].

⁶² ASIC Report 600, [4].

⁶³ ASIC Report 600, [50].

- (c) whilst the provisions of the NCCPA do not apply to BNPL arrangements which means that BNPL providers do not need to hold an Australian Credit Licence or comply with the responsible lending obligations,⁶⁴ each BNPL provider takes some steps to refuse credit applications. For example, if a consumer misses a scheduled repayment, 5 out of the 6 BNPL providers suspend the consumer's ability to make additional purchases until they have remedied the missed payment. This can help reduce the risk of a consumer taking on additional debt when they may already having trouble making repayments;⁶⁵
- (d) CALC had presented a number of case studies;⁶⁶
- (e) BNPL providers had taken some measures to help consumers stay in control and make informed decisions about their purchases and repayments. All BNPL providers have a detailed written policy for responding to consumer complaints and to requests for hardship assistance. However, BNPL providers could do more in this regard, and each of the providers demonstrated a willingness to work with ASIC to improve how they can act fairly with consumers, and several of the providers had already implemented improvements;⁶⁷ and
- (f) Each provider contractually prevents merchants from charging consumers a higher price for using a BNPL arrangement. However, ASIC had received anecdotal evidence that some merchants may have charged customers significantly higher prices for using BNPL, including where the price of the goods is less transparent and 'negotiable' (eg. solar power products). ASIC is considering the legal position of scenarios where a merchant inflates the cost of the underlying goods if the consumer uses BNPL finance (**merchant surcharging**).⁶⁸

43. The outcome of ASIC Report 600 was that ASIC did not form the view that it was necessary for BNPL products to be subject to the NCCPA and NCC.⁶⁹

⁶⁴ ASIC Report 600, [7], [51].

⁶⁵ ASIC Report 600, [52] – [53].

⁶⁶ ASIC Report 600, [56].

⁶⁷ ASIC Report 600, [57] – [63].

⁶⁸ ASIC Report 600, [34] – [38].

⁶⁹ Foo statement at [13].

44. In ASIC Report 600, ASIC said that its ongoing monitoring of the industry will help assess ASIC to consider its regulatory options and whether ASIC should advise the Government to consider law reform.⁷⁰ The potential harms that ASIC said it would monitor included:
- (a) situations where consumers may be charged more by merchants for using BNPL arrangements;⁷¹ and
 - (b) whether the protections taken by BNPL providers to mitigate the risk of over commitment (such as capping or limiting missed payment fees and preventing consumers from making another purchase using a BNPL arrangement if they have not remedied a missed payment for an existing purchase) are adequate – or whether additional safeguards are required.⁷²
45. Following the release of ASIC Report 600, Parliament extended ASIC’s product intervention power to cover BNPL facilities.⁷³ ASIC obtained that extension rather than bring the BNPL section into the NCC. In this regard, ASIC said:⁷⁴

We think that the extension of product intervention powers to this sector will enable us to intervene and require things to be done in a much more targeted way because it will allow us to address the potential consumer harm more directly...

46. In addition, as stated in ASIC Report 600, ASIC has been conducting ongoing monitoring of the BNPL industry to help assess whether ASIC should recommend any law reform.⁷⁵ ASIC has prepared a draft follow up report but it is not known what ASIC will propose in any final follow up report, or whether or when that report will be released.⁷⁶ ASIC told the ACCC in this matter that the BNPL industry remains an area of ongoing focus for ASIC.⁷⁷

AFIA Code

47. AFIA has released a draft Code of Practice for the BNPL sector and has completed public consultation on the draft Code. AFIA intends to launch the BNPL Code on 1 January

⁷⁰ ASIC Report 600, [72].

⁷¹ ASIC Report 600, [74].

⁷² ASIC Report 600, [75] – [77].

⁷³ Foo Statement [12]. See *Treasury Laws (Design and Distribution Obligations and Product intervention Powers) Act 2019* (Cth).

⁷⁴ Foo Statement, Exhibit KF-3, [5.35].

⁷⁵ Foo Statement at [13].

⁷⁶ Foo Statement at [25]-[28].

⁷⁷ Foo Statement, Exhibit KF-4, [4].

2021.⁷⁸ It is contemplated that it will be approved under ASIC Regulatory Guide 183. ASIC remains a key stakeholder.⁷⁹

48. The draft Code is described in part 6 of flexigroup's Amended Statement of Facts, Issues and Contentions and a copy of the draft Code is set out in Annexure B to that document. It has a number of relevant conditions to regulate BNPL finance. In particular:

WE WILL FOCUS ON CUSTOMERS

[Clause 1.2(a)] To ensure we are providing a service that meets your needs, we will ensure that our BNPL products are suitable for you and we have appropriate safeguards in place while you continue to be our customer...

WE WILL KEEP YOU PROPERLY INFORMED ABOUT OUR PRODUCT OR SERVICE

[Clause 3.1] To help you stay in control and make informed decisions about your BNPL products and repayments:

- (a) Our terms and conditions will be fair, clear and transparent and written in plain language. We will also provide you with a glossary of key terms and provide this information on our and AFIA's website.
- (b) Prior to you becoming a customer, we will provide clear and prominent information about your scheduled repayments obligations.
- (c) We will provide clear and prominent information upfront about the fees we charge.
- (d) We will send you relevant and useful reminders about your repayment obligations.
- (e) If you miss a payment:
 - 1. We will contact you before commencing to charge late fees; or
 - 2. If we do not contact you in accordance with sub-clause (1), we will reverse any late fees we have charged you, if you make a catch-up payment within 2 Days of the missed payment.
- (f) If we charge a late fee, it will be fair, reasonable, and capped.
- (g) We will give you at least 40 Days' notice before introducing new fees or increasing existing fees.
- (h) We will provide notice as soon as is reasonably possible, where we make any other material changes to our terms and conditions.

⁷⁸ Mysak Statement II at [11].

⁷⁹ Mysak Statement II at [12].

...

WE WILL MAKE SURE OUR PRODUCT OR SERVICE IS SUITABLE FOR YOU

Our Upfront Assessment Process

[Clause 4.1] We will assess customers to ensure our product or service will be suitable for them prior to providing it for every new Transaction Amount. We will take into account customers' characteristics based on the common aspects of their objectives, financial situation and needs.

...

[Clause 4.3] Using the information provided to us, we will only provide our products or services to customers who we assess have the ability to pay for the product or service over time.

...

[Clause 4.5] We will not provide any additional products or services or increase the Transaction Amount of the current product or service if you are in arrears at the time of the request for additional products or services or increase in limit.

[Clause 4.6] To promote good customer outcomes and set industry standards, our Upfront Assessment Process will include and consider factors, such as:

- (a) The Transaction Amount;
- (b) The repayment Term of the product or service;
- (c) The amount and frequency of repayments;
- (d) Your repayment history with us;
- (e) Your method of payment, for example, use of direct funds transfer, BPay, or use of a debit or credit card;
- (f) Where and how you are using our product or service;
- (g) The information you supply to us; and/or
- (h) External data sources, for example, we may do a credit check.

[Clause 4.7] The outcome of our Upfront Assessment Process may be that we:

- (a) Approve you for the full amount;
- (b) Approve you for a lower amount;
- (c) Require an initial payment to be made upfront;
- (d) Require an initial payment within 25 Days from approval of the first Transaction Amount or installation of goods or services;

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- (e) Collect and consider more information to ensure you have the ability to pay for the product or service over time; and / or
- (f) Decline to provide our product or service to you if we do not believe it will be suitable for you.

[Clause 4.8] The types of information that we will consider and collect in clause 4.7 (e) will include one (1) or more of the following:

- (a) External data sources, for example, undertaking a credit check;
- (b) Your repayment history with us;
- (c) Information about your income; and / or
- (d) Information about your existing expenses, which may also include existing debts.

[Clause 4.9] We will always apply clause 4.8 if we are providing a Transaction Amount of more than \$3,000 or for Buy Now Pay Later Products or Services with a fixed term of more than 2 years.

...

WE WILL UNDERTAKE AN ONGOING REVIEW OF THE SUITABILITY OF OUR PRODUCTS OR SERVICES

[Clause 5.1] To make sure we are providing our customers with a service that meets our customers' needs on an ongoing basis, we will review our products or services to make sure they remain suitable for them. We will also make sure that our products or services are not being used by customers for whom it is not suitable.

...

WE WILL DEAL FAIRLY WITH COMPLAINTS

[Clause 6] We will handle complaints promptly and fairly and, if we cannot reach agreement, give you information on ways to resolve disputes. As part of this commitment:

Complaints

[Clause 6.1] We will have a complaints policy that is visible and easily accessible from our website and / or the digital platforms that we participate in.

[Clause 6.2] We will work to resolve complaints as quickly as possible.

[Clause 6.3] We will acknowledge all complaints within 3 Days and provide an initial response within 10 Days from the date of the complaint.

AFCA

[Clause 6.1] Even where we are not required by law, we will give you the opportunity to take your complaint to AFCA if you are unhappy with our response.

[Clause 6.7] We will be subject to AFCA's Rules....

WE WILL OFFER FINANCIAL HARDSHIP ASSISTANCE

[Clause 7] We will treat you fairly and respectfully if you are experiencing financial difficulty. As part of this commitment:

...

[Clause 7.3] If we become aware you are having trouble meeting your financial obligations with us, we will discuss your situation and the options available to help you, which may include negotiating a new repayment arrangement.

...

[Clause 7.5] We will not continue normal collection activity while we are considering how to help you. Our late fees will also be frozen during this time.

...

WE WILL SUPPORT AND PROMOTE THIS CODE

[Clause 9.1] We will promote this Code, so you are aware of the protections we provide our customers. Promotion will include making available this Code on our website and / or the digital platforms that we participate in and engaging with key stakeholders, including via AFIA.

[Clause 9.2] We will make sure our staff, agents and representatives are well trained so they can do their work and understand this Code and how to comply with it.

[Clause 9.3] We will review regularly the effectiveness of our training programs for staff, agents and representatives.

- 49. flexigroup remains committed to supporting and developing the BNPL Industry Code, and will be a signatory to the Code when it is finalised.⁸⁰

THE TRIBUNAL'S REVIEW OF THE DETERMINATION

- 50. Section 101 of the CCA provides that a person who is dissatisfied with a determination by the ACCC in relation to, inter alia, an application for an authorisation, may apply to the Tribunal for a review of the determination.
- 51. Section 101(1AA)(b) provides that if the Tribunal is satisfied that the applicant has a sufficient interest, it must review the determination.

⁸⁰ Mysak statement I at [68].

52. In *Application by Wylie Steel Pty Ltd for review of grant of authorisation to Broken Hill Pty Co Ltd* [1980] ATPR 40-170, the Tribunal (Lockhart J, Deputy President and J Shipton and M Brunt, Members) said at 42,345B:

... the Tribunal must be satisfied that the applicant, not being the applicant for the authorisation, has made out a prima facie case that it has a “sufficient interest”. The test is not an unduly high one. If it were, it may involve determining the very questions that will loom large in the hearing on the merits of the determination including the allegations of Wylie Steel to which we have referred. These are hardly matters that fall for determination at this stage. If it emerges during the course of the hearing that the applicant in truth may not have a “sufficient interest” the Tribunal may then review the *locus standi* of the applicant and consider the future course of the application for review.

53. At 42,344B the Tribunal said:

It is not necessary to define the various categories of persons who may have a “sufficient interest”; but they include a person who establishes that his business interests or prospects could be adversely affected by the proposed merger.

54. flexigroup’s commercial interests are directly affected by the Determination. Mr Mysak estimates that the NETCC as authorised will likely result in flexigroup losing sales in the order of \$50 million per annum, as well as increased costs with a corresponding increase in fees to customers.⁸¹ Mr Mysak says that changes required by the NETCC to be made to the humm application process would likely lead to a loss of 25% of humm transactions within the solar industry.⁸²
55. Section 101(2) provides that the review by the Tribunal is a re-hearing of the matter. It is a merits review,⁸³ and requires the determination of an issue afresh on whatever material is placed before the new decision maker.⁸⁴
56. Section 102(1) provides that on a review of a determination, the Tribunal may make a determination affirming, setting aside or varying the determination of the ACCC.
57. The review process requires an application by the Tribunal of the relevant statutory tests to the conduct or proposed conduct in respect of which authorisation is sought.⁸⁵ It is for the Tribunal to assess the applications for authorisation on their merits and by reference to

⁸¹ Mysak Statement I at [63].

⁸² Mysak Statement I at [63].

⁸³ *Application by Independent Contractors Australia* [2015] ACompT 1.

⁸⁴ *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [60]; *Re Appln by Medicines Australia Inc* (2007) ATPR 42-164; [2007] ACompT 4 (**Re Medicines**) at [135].

⁸⁵ *Re Medicines* at [56].

the information and evidence given to the ACCC and any material that the parties wish to put before the Tribunal.⁸⁶

58. Public benefit and public detriment are not defined in the CCA. As noted by the Tribunal:⁸⁷

[42] ... Public benefit is a wide concept and may include anything of value to the community generally so long as there is a causal link between the proposed acquisition and the benefit: see *Re Appln by Medicines Australia Inc* (2007) ATPR 42-164; [2007] ACompT 4 (Medicines Australia) at [107], [118]–[119]. Benefits not widely shared may nevertheless be benefits to the public: *Hospital Benefit Fund of Western Australia Inc v Australian Competition and Consumer Commission* (1997) 76 FCR 369 at 375–377. However, the extent to which the benefits extend to ultimate consumers is a matter to be put in the scales: *Mac Gen* at [168].

[43] A public detriment includes the reduction of competition arising from an acquisition as well as other matters contrary to the goals pursued by society, including the goal of economic efficiency; public detriment may not be confined to competitive detriment: see *Medicines Australia* at [108] and [115]; see also *Re Australian Association of Pathology Practices Incorporated* (2004) 206 ALR 271; ATPR 41-985 at [93]–[94]; and *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120; [2006] ACompT 2 at [66]–[67].

...

[46] For a benefit or detriment to be taken into account, it must “be of substance and have durability”. Any estimate as to their quantification should be robust and commercially realistic. The assumptions underlying the estimates should be spelled out in such a way that they can be tested and verified. Care must be taken to distinguish between one-off benefits and those of a more lasting nature. The options for achieving claimed benefits should be explored and appropriate weighting given to future benefits not achievable in any other less anti-competitive way. The Tribunal must be satisfied that “there is a real chance, and not a mere possibility” of the benefit or detriment eventuating. While it is not necessary to show that the benefits or detriments are certain to occur, or that it is more probable than not that they will occur, claims that are purely speculative in nature should not be given any weight: see *Mac Gen* at [163]–[164] and the cases there cited.

59. However, as the Tribunal observed in *Re Medicines* at [107]:

The range of public benefits which may be considered is limited, in the context of authorisation, by the requirement that the benefit be the result or the likely result of the conduct which is the subject of authorisation *Re QCMA* 8 ALR 481; 25 FLR 169. Thus the public benefit which may be considered under s 90 is confined to the extent that it must be related to classes of conduct amenable to authorisation and causally related to the conduct authorised. Subject to those constraints the range of matters that may be brought to account as benefits is not limited. While economic efficiency will loom

⁸⁶ *Re Medicines* at [138].

⁸⁷ *Application by Sea Swift Pty Limited* [2016] ACompT 9. See also *Application by Tabcorp Holdings* [2017] ACompT5, [28].

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large in many authorisation applications, the Act and its objects do not limit it to such matters.

60. In this regard, there is a public benefit in providing access for a class of consumers to a service that such consumers may not otherwise have, even where the class of consumers is vulnerable and the provision of the service is pursued for profit. In a different context, Beach J observed in *Make It Mine Finance* [2015] FCA 1255 at [19]:

... there is nothing wrong with a commercial operator identifying a commercial opportunity in providing a service to a vulnerable class of consumers and pursuing that opportunity for profit. Such a vulnerable class may then have access to a valuable service that they would not otherwise have. Who can gainsay the direct and indirect potential benefits of such access? But legislation that is protective of such a class who are not able to protect their own interests, or where that is reasonably assumed because of the characteristics of that class, must be complied with by the operator.

61. As to the risk of detriment to the public, in *Re Medicines* at [108], the Tribunal said it covers a wider field than anti-competitive effects and extends to:

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

62. In assessing relevant detriments and public benefits associated with a proposal the subject of an authorisation application, the Tribunal looks to hypothetical futures with and without the proposed conduct: *Re Medicines* at [117]. The test requires a comparison of a future in which the conduct the subject of the authorisation application occurs, with a future in which that conduct does not occur: *Re Medicines* at [120].

63. The ACCC and thus the Tribunal retains a discretion to refuse or impose conditions on an authorisation even where the public benefit 'test' is satisfied: *Re Medicines* at [126]. Accordingly, even if the necessary conditions for authorisation are found to be satisfied because "the public benefit likely to flow from the implementation of the proposed Code outweighs any anti-competitive detriment flowing from it", there remains a question whether in the exercise of its discretion the Tribunal should authorise the proposed conduct.⁸⁸

64. The ACCC may specify that an authorisation is subject to conditions. The power to impose conditions is constrained by the subject matter, scope and purpose of the statute: *Re Medicines* at [129].

⁸⁸ *Re Medicines* at [6].

ISSUES

65. Part 7 of flexigroup's Amended Statement of Facts, Issues and Contentions sets out the issues that are required to be considered by the Tribunal in this proceeding. In particular, flexigroup submits that the Tribunal is required to consider whether:
- (a) the public benefits test set out in section 90(7)(b) of the CCA is satisfied in respect of the Proposed Conduct in respect of the NETCC without the BNPL Conditions or with different conditions; and/or
 - (b) the BNPL Conditions or different conditions are necessary and appropriate under section 88(3) to yield the conclusion that section 90(7)(b) is satisfied in respect of the Proposed Conduct and/or having regard to the subject matter, scope and purposes of the CCA.
66. flexigroup submits that the Tribunal should approach the issues in this case primarily through the lens of section 88(3) in the same way as the ACCC in the Determination. More particularly, this requires the Tribunal to consider the public benefits and public detriments that will result, or be likely to result, with the BNPL Conditions and whether the flexigroup BNPL Conditions or the BNPL Conditions are necessary and appropriate under section 88(3) to yield the conclusion that section 90(7)(b) is satisfied in respect of the Proposed Conduct and/or having regard to the subject matter, scope and purposes of the CCA.⁸⁹
67. In this regard, it appears to be common ground between the parties that the relevant markets are supply of different types of New Energy Tech (such as solar products) and supply of finance offered with New Energy Tech.⁹⁰
68. These issues are best addressed by considering the matter in two related parts. First, the prohibition on unsolicited sales of New Energy Tech using BNPL as provided for in clause 3(d) of the NETCC. Second, the conditions in clause 25(a) of the BNPL Conditions.
69. flexigroup does not agree that the Tribunal should only consider any alternative proposals if it concludes the NETCC fails to satisfy the statutory test.⁹¹ The Tribunal's task is

⁸⁹ ACCC's Issues List, [20] – [35]; Authorisation Applicants' Amended Statement of Facts, Issues and Contentions, [26].

⁹⁰ ACCC's Issues List, [16]; ACCC Amended Statement of Facts, Issues and Contentions, [52].

⁹¹ Authorisation Applicants' Amended Statement of Facts, Issues and Contentions, [32] – [33] and [48] – [49].

focussed on reviewing the ACCC's Determination which in this case was to grant authorisation subject to the BNPL Conditions. In this regard, as the ACCC correctly identify, the ACCC and the Tribunal's power to impose conditions is not limited to circumstances in which the statutory test is not satisfied.⁹²

70. Alternatively, if necessary, flexigroup would contend that, unless varied according the flexigroup BNPL Conditions, the NETCC would not result, or be likely to result, in sufficient public benefits that outweigh those substantial public detriments which satisfy the test in section 90(7)(b) of the CCA. In this analysis, the likely counterfactual to the NETCC should include the AFIA Code (mirrored by the proposed flexigroup BNPL Conditions).

PROHIBITION OF UNSOLICITED SALES OF BNPL

71. The intent of clause 3(d) is to prevent signatories to the NETCC from making any unsolicited offer of a payment arrangement not regulated by the NCCPA such as BNPL.⁹³ Whilst the clause does not entirely achieve this aim (as it only relates to advertising and marketing material), flexigroup is proceeding on the basis of the intent of the clause.
72. In any event, the ACCC imposed a condition of authorisation that signatories must not offer customers BNPL finance "whether unsolicited or not" if the sale of the New Energy Tech is unsolicited.⁹⁴ This condition is confusing. Read literally, it would appear to impose a total probation on BNPL finance for sales of New Energy Tech (ie. "whether unsolicited or not").⁹⁵ However, the ACCC later described the condition without this problem:⁹⁶

Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.

73. flexigroup is proceeding on the basis of the latter description of the condition by the ACCC. Even so, there is still uncertainty about what in fact comprises "unsolicited" sales.
74. In authorising clause 3(d) and imposing this condition, the ACCC appears to have proceeded on the basis of submissions from Authorisation Applicants that:

⁹² ACCC Amended Statement of Facts, Issues and Contentions, [84] and [88].

⁹³ Determination, p. 2, [4.12], [5.13]; ACCC's Amended Statement of Facts, Issues and Contentions, [26]; Authorisation Applicants Statement of Issues Facts and Contentions, [21(b)].

⁹⁴ Determination, [4.66].

⁹⁵ Application to Tribunal for Review filed on 30 December 2019, [3(b)(v)].

⁹⁶ Determination, [5.4].

- (a) clause 3(d) is designed to protect consumers from ‘unsuitable’ finance arrangements; and
- (b) they are concerned that if signatories are permitted to offer BNPL products in unsolicited sales, they are not likely to offer finance arrangements regulated by the NCCPA in unsolicited sales due to a requirement to hold a credit licence. This would be an “unacceptable outcome that should be avoided”.⁹⁷

75. Without being critical of the Authorisation Applicants, these submissions were conclusionary and unhelpful. As explained below, they raised more questions than they answered. This is explicable by reason of the fact that the position advanced by the Authorisation Applicants was made pragmatically in light of strong advocacy from the Consumer Law Action Centre (**CALC**).⁹⁸

76. Based on these submissions, the ACCC concluded that:⁹⁹

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

77. This conclusion does not withstand scrutiny. It fails to grapple with critical questions, including in relation to:

- (a) that Parliament has exempted BNPL providers from the provisions of the NCCPA;
- (b) the existing regulation of unsolicited sales of New Energy Tech using BNPL;
- (c) the policies and procedures put in place by BNPL providers to safeguard against the risk of consumer harm from ‘unsuitable’ finance to consumers;¹⁰⁰
- (d) whether there is any greater risk of such consumer harm through unsolicited sales of New Energy Tech using BNPL when compared with regulated finance and when compared with other industries and other products financed by BNPL; and

⁹⁷ Determination, [4.12].

⁹⁸ Barnes Statement at [37], [52] – [56].

⁹⁹ Determination, [4.13].

¹⁰⁰ Particularly in light of ASIC’s finding in ASIC Report 600 the BNPL providers demonstrated a willingness to work with ASIC to improve how they can act fairly with consumers, and several of the providers had already implemented improvements: ASIC Report 600, [57] – [63].

- (e) that providers of regulated loans can in fact make retailers of New Energy Tech authorised representatives under the NCCPA so as to enable them to make unsolicited sales using regulated loans.
78. Further, the ACCC similarly failed to address the substantial public detriments that would result or likely result from consumers not being able access New Energy Tech products using BNPL via the unsolicited sales channel.¹⁰¹ In this regard, the ACCC did not grapple with the size and importance of this area of the market. Indeed, the ACCC's public detriments analysis fails to mention unsolicited sales at all.¹⁰²
79. When the above matters from paragraph 71 to 78 are considered on the evidence now before the Tribunal, the Tribunal will conclude that the prohibition on unsolicited sales of New Energy Tech with BNPL will, or will be likely to give rise, to substantial public detriments and there is no foundation for the conclusion that it will give rise to any real public benefits.¹⁰³
80. In this regard, the following factual matters are important.
81. First, unsolicited sales of New Energy Tech financed by BNPL is a very important, efficient and large feature of the industry. As indicated at paragraph 33 above, in relation to flexigroup (who financed approximately 9% of all solar installations with BNPL product since 1 January 2010¹⁰⁴), flexigroup's merchants make unsolicited sales of solar products using BNPL (humm) of approximately [**Confidential to flexigroup**] [REDACTED] per year.¹⁰⁵ It is not in doubt that there is substantial public detriment in loss of consumer access to New Energy Tech via BNPL products in this way.¹⁰⁶
82. These public detriments include loss of consumer choice and the effect, or likely effect, of substantially lessening of competition in the market for the retail sale of solar products. Unsolicited sales underpin the operating model for a large number of retailers in the solar industry who offer BNPL products. The BNPL Conditions will remove these vigorous and effective competitors from the market. By way of example, the effect of clause 3(d) of the NETCC would be to prevent SunEnergy from marketing its 'Pay As You Save' finance

¹⁰¹ Lake Statement at [37].

¹⁰² Determination, [4.43] – [4.47].

¹⁰³ See [12] above.

¹⁰⁴ Mysak Statement I at [25]. See also Mysak Statement II at [3].

¹⁰⁵ Mysak Statement I at [55]-[56], Tab 7 of Confidential Exhibit TM-2.

¹⁰⁶ Determination, [4.14].

solution using the humm product, which affects approximately **[Confidential to SunEnergy]** [REDACTED] of its business.¹⁰⁷

83. Secondly, the existing regulation of unsolicited sales financed by BNPL. As explained above at paragraph 36 to 38, the sale of New Energy Tech products financed by BNPL is subject to the restrictions on unsolicited offers and agreements in the ACL. The evidence will not establish any heightened risks of consumer harm from unsolicited selling in respect of New Energy Tech which justify additional protections, particularly in light of the substantial public detriments which will (or will likely) result.
84. Thirdly, providers of regulated finance may in fact make retailers of New Energy Tech authorised representatives to enable them to make unsolicited sales using regulated finance. There is nothing preventing them from doing so.
85. Fourthly, providers of regulated finance can also offer BNPL finance. One of flexigroup's competitors, Brighte, offers a BNPL product for the purchase of New Energy Tech which is not regulated under the NCCPA and also offers a regulated "green loan".¹⁰⁸ Thus, to the extent that providers of regulated finance believe that they are at a "competitive disadvantage"¹⁰⁹, they can move (like Brighte) to supply BNPL.
86. In these circumstances, it is not correct to say that clause 3(d) of the NETCC introduces "competitive neutrality" between BNPL and regulated finance providers in respect of the unsolicited sale of New Energy Tech.¹¹⁰ Indeed, it has the opposite effect. Clause 3(d) and the ACCC conditions puts providers of BNPL at a substantial competitive disadvantage. It is anti-competitive. It puts in place a regulatory barrier which is contrary to Parliament's will that BNPL providers are exempt from the NCCPA. It will prevent BNPL providers like flexigroup from lawfully supplying BNPL for unsolicited sales of solar products by merchants which (as indicated in Annexure A) comprises a very substantial part of the market. As such, it will have the effect, or likely effect of, substantially lessening competition in the market for the supply of finance for solar products.
87. Fifthly, whether there is any evidence of greater risks of consumer harm associated with unsolicited selling of New Energy Tech with BNPL finance, than the risks associated with unsolicited selling of New Energy Tech with regulated finance or in other industries (ie. so

¹⁰⁷ Lake Statement at [13], [34].

¹⁰⁸ Mysak Statement I at [38].

¹⁰⁹ Determination, [3.4(c)].

¹¹⁰ Authorisation Applicants, Amended Statement of Facts, Issues and Contentions, [44(a)].

as to justify enhanced regulation above and beyond that which is already in place). The ACCC assumed "the likelihood and degree of consumer harm" from unsolicited sales of New Energy Tech¹¹¹ and that it "is likely to be greater" than for regulated products,¹¹² but never sought to substantiate, analyse or assess the matter.¹¹³

88. The evidence will show that the risk of consumer harm in the supply of BNPL to fund the purchase of Net Energy Tech is low – both absolutely and relevant to regulated products and other industries. In respect of flexigroup,
- (a) the number of humm solar customers that default is low. For 120 days, the default rate is approximately **[Confidential to flexigroup]** [REDACTED]. Mr Mysak explains why the low number of customers that default on humm solar repayment plans is low in paragraph 46 of his first statement;
 - (b) the number of hardship customers for humm with solar is also low **[Confidential to flexigroup]** [REDACTED].¹¹⁴ The hardship rate pre COVID was approximately **[Confidential to flexigroup]** [REDACTED]. After COVID, it has increased marginally to approximately **[Confidential to flexigroup]** [REDACTED];¹¹⁵
 - (c) the total number of humm solar loans with flexigroup's Internal Dispute Resolution (IDR) enquires is also low.¹¹⁶ The IDR rate is approximately **[Confidential to flexigroup]** [REDACTED]. Moreover, only a fraction of the IDR's related to complaints about financial difficulties from the BNPL.¹¹⁷
89. Mr Mysak explains flexigroup's practice of investigating and resolving any disputes or complaints generally in paragraphs 50 – 52 of his first statement, and addresses specific instances of customer complaints in his second statement.
90. The case study evidence of CALC does not suggest any heightened risk of consumer harm in BNPL in the unsolicited sale of New Energy Tech. CALC has adduced evidence of 3 case studies. Only 2 of those studies involve flexigroup. These case studies show

¹¹¹ Determination, [4.13].

¹¹² Determination, [4.18].

¹¹³ See also Authorisation Applicants, Amended Statement of Facts, Issues and Contentions, [45].

¹¹⁴ Mysak Statement I at [45]; Tab 8 of Confidential Exhibit TM-2 [FXL.001.002.0064] to Mysak Statement I.

¹¹⁵ Mysak Statement I at [49].

¹¹⁶ Mysak Statement I at [47].

¹¹⁷ Mysak Statement I at [45]; Tab 8 of Confidential Exhibit TM-2 [FXL.001.002.0064] to Mysak Statement I.

improper selling by flexigroup's merchant. That risk exists in every industry. What is relevant in this context is flexigroup's response. On both occasions, upon being told of the complaint, flexigroup agreed to cancel the BNPL contract, refund all fees paid by the consumer, and terminated the merchant. This was consistent with flexigroup's policies.¹¹⁸

91. Sixthly, the NETCC also contains enhanced regulation of merchants in respect of unsolicited sales of Net Energy Tech. Clause 5 of the NETCC relevantly provides:

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.

ACCC CODE OF CONDUCT

92. There are two fundamental issues with the ACCC's BNPL Conditions on clause 25:

- (a) whether the Code Administrator should administer compliance with clause 25; and
- (b) whether BNPL providers should be required to achieve substantial compliance with the responsible lending provisions contained in Part 3-2 of the NCCPA in respect of the sale of New Energy Tech.

93. On the first issue, the ACCC's Finance Condition is not practical. As the authorisation applicants correctly point out, this role requires a deep familiarity with the NCCPA and the

¹¹⁸ Mysak Statement I at [50], Mysak Statement II at [4], [19].

NCCA which the Code Administrator does not possess.¹¹⁹ In short, the Code Administrator does not want the role and does not have the expertise to perform the role.

94. In contrast flexigroup's BNPL Conditions do not suffer from this vice. The ACCC considered that this formulation did not provide sufficient certainty regarding the timing of implementing a regulator approved or industry code of conduct.¹²⁰ However, that was before the draft AFIA Code had been released. The draft Code is intended to take effect in January 2021 and is supported by industry participants including flexigroup.
95. flexigroup submits that the draft AFIA code delivers substantially equivalent consumer protections to those contained in the NCCPA and (it is submitted) would comply with the flexigroup's BNPL Conditions.¹²¹ However, the draft Code does not demand compliance with the responsible lending provisions contained in Part 3-2 of the NCCPA and therefore may not comply with clause 25(a)(iv) of the ACCC Finance Conditions.
96. The draft AFIA Code can stand as the industry code for the purposes of clause 25(a) of the flexigroup BNPL Conditions in the meantime by way of transitional provisions. As such, ASIC's assertions that flexigroup's clause 25(a) is vague and uncertain fall away.¹²²
97. The proposition that BNPL providers should be required to achieve substantial compliance with the responsible lending provisions contained in Part 3-2 of the NCCPA in respect of the sale of New Energy Tech has a number of problems.
98. First, it is contrary to the will of Parliament that BNPL providers are exempt from the provisions of the NCCPA. It is a matter for Parliament whether this should change. It is not the role of the ACCC (or this Tribunal) to question the appropriateness of the legislative exemption. The fact is that it is entirely lawful to supply BNPL on an unsolicited basis and that the responsible lending provisions in the NCCPA do not apply to BNPL.
99. Secondly, ASIC is much better placed than the ACCC (and this Tribunal) to form a view about whether to recommend law reform in this regard. As evidenced by ASIC Report 600, the net public benefits analysis associated with this issue is much more complex than the ACCC undertook.¹²³ It involves public policy considerations of weighing up the public benefits of consumer having access to low cost BNPL products (which would be, or would

¹¹⁹ Crawshaw Statement at [120].

¹²⁰ Determination, p.10. See also Determination, [4.60].

¹²¹ See [12(b)] above. Mysak Statement II at [14].

¹²² ASIC's Statement of Facts, Issues and Contentions, [22] – [24].

¹²³ Determination, [4.16]. See also [4.20]

likely be, undermined if BNPL providers were required to undertake responsible lending obligations) against any increased risk of consumer harm posed by BNPL loan without providers having to comply with the responsible lending obligations.

100. As indicated at paragraph 43 above, following a far more extensive engagement with the BNPL industry and after consideration of all relevant matters, ASIC did not consider it necessary that BNPL finance be subjected to regulation under the NCCPA and the NCC. Since that time, ASIC has recommended that its product intervention power be extended to cover BNPL rather than BNPL providers being subject to the NCCPA regime.
101. Further, ASIC has also been carefully monitoring the BNPL industry as part of its follow up work to ASIC Report 600 including for the risk of consumer harm from ‘unsuitable’ (over-commitment) BNPL loans and merchant surcharging (including in the solar industry).¹²⁴ In that regard, ASIC has sent information requests to 6 BNPL providers and 3 major financial institutions seeking qualitative and quantitative data, consulted with a range of other stakeholders and conducted further consumer research.¹²⁵ Despite all of that work and analysis:
- (a) ASIC has not recommended that BNPL finance be subjected to regulation under the NCCPA and the NCC;
 - (b) ASIC has not used its product intervention power in respect of BNPL providers which is broad enough to enable ASIC (if it wished do so so) to impose a requirement on BNPL providers to comply with the responsible lending provisions in Part 3-2 of the NCCPA; and
 - (c) ASIC has not sought to take other regulatory action against BNPL or solar merchants for merchant surcharging.
102. If ASIC decides to use its product intervention powers to require BNPL to do so, or if Parliament decides to revoke the exemption contained in section 6(5) of the NCC, then BNPL providers will be required to comply with the responsible lending provisions in Part 3-2 of the NCCPA. However, the ACCC (or the Tribunal) should not impose this requirement on BNPL providers in the meantime, particularly in the absence of any clear and compelling reasons to do so in the New Energy Tech industry.

¹²⁴ ASIC Report 600, [74] – [77]. See also Foo Statement at [24].

¹²⁵ Foo statement at [25].

103. Thirdly, there is no evidence that there is any heightened risk of ‘unsuitable’ loans in the supply of BNPL for New Energy Tech than in any other way. The evidence points to the contrary: that there is no greater need for regulation of BNPL for New Energy Tech than for the sale of BNPL for any other purpose or within any other industry.
104. In this respect, any evidence about isolated instances of merchants passing on merchant fees is not relevant or compelling. BNPL providers such as flexigroup have monitoring and compliance systems and can suspend or terminate merchants. The evidence will show that these incidents are infrequent, the non-compliant merchants are suspended or terminated and customers are remediated.¹²⁶ In any event, the NETCC already provides for the enhanced regulation in this regard.

[Clause 3(f)] ... our advertising and promotional material will be... clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price (e.g, where the price of financed New Energy Tech is greater than the price that would apply if immediate payment is made).

...

[Clause 4] When marketing directly to you, including through a sales agent)... 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.

...

[Clause 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.

[Clause 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).

[Clause 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:
 - iii 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.

¹²⁶ Mysak Statement II at [4]-[7].

105. Fourthly, as the ACCC acknowledged,¹²⁷ the BNPL Conditions (including the requirement that BNPL providers achieve substantial compliance with the responsible lending provisions) will increase the costs of BNPL providers associated with the provision of BNPL for New Energy Tech. It follows that providers of BNPL for New Energy Tech will, or are likely to, increase the costs of BNPL to consumers and merchants or cease offering BNPL to the New Energy Tech industry. This will have the effect, or likely effect, of substantially lessening competition in the market for the supply of finance for New Energy Tech.¹²⁸ This is likely to have the flow on effect of increasing prices and reducing sales of New Energy Tech.¹²⁹

CONCLUSION

106. In conclusion, flexigroup submits that Tribunal should vary the Determination in the manner sought by flexigroup in circumstances where:

- (a) the substantial public detriments that will result, or be likely to result, from the BNPL Conditions will be avoided with the flexigroup BNPL Conditions;
- (b) there is no evidence to support the notion that BNPL Conditions will result, or be likely to result, in any real public benefit of the avoidance of consumer harm particularly having regard to the safeguards contained in existing laws, practices and policies of BNPL providers, other provisions of the NETCC and the AFIA Code; and
- (c) the BNPL Conditions are not required to realise public benefits otherwise arising from the NETCC and, in contrast, the Flexigroup BNPL Conditions are necessary to avoid substantial public detriments and are appropriate particularly in circumstances where BNPL products are governed by other legislation and other regulators.

107. While the NETCC is a voluntary code, 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 that suppliers and installers of New Energy Tech products are

¹²⁷ Determination, [4.37].

¹²⁸ See [12] above. See also Determination, [4.49].

¹²⁹ Application to Tribunal for Review filed on 30 December 2019, [65].

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very likely to become signatories to the NETCC, with the consequence that they will not be permitted to offer BNPL finance products.¹³⁰

25 May 2020

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C van Proctor

¹³⁰ Mysak statement I at [53].

