

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Outline of Opening Submissions

File Number: ACT1 of 2019

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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

DEPUTY REGISTRAR

Dated: 02/06/2020 12:33 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
Applicant: Flexigroup Limited (ACN 122 574 583)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

OUTLINE OF OPENING SUBMISSIONS

A. Introduction

- 1 The Australian Securities and Investments Commission (**ASIC**) intervenes in the proceeding in order to assist the Tribunal in respect of the regulation of buy now pay later (**BNPL**) finance, and to provide its views on some of the issues raised by the competing positions advanced by Flexigroup Limited (**Flexigroup**), the Australian Competition and Consumer Commission (**ACCC**) and the other intervening parties.
- 2 ASIC has filed a witness statement dated 5 May 2020 of Kevin Foo, a senior manager in ASIC's Credit, Retail Banking and Payments team (**Foo Statement**). The Foo Statement exhibits a number of reports and submissions which are relevant to ASIC's work in respect of BNPL finance.
- 3 In summary, ASIC submits that:
 - (a) the conditions to the New Energy Tech Consumer Code (**NETCC**) imposed by the ACCC are appropriate and necessary; and
 - (b) the variations proposed by Flexigroup, especially insofar as they rely on a regulator-approved code of conduct or an industry code of conduct, will result in negative consumer outcomes by reason of inadequate consumer protections and significant uncertainty.

4 ASIC does not express any concluded view about whether the form of regulation contained in the NETCC is the only or most appropriate form of regulation available. However, ASIC submits that the conditions imposed by the ACCC satisfy the public benefits test contained in s 90(7)(b) of the *Competition and Consumer Act 2010* (Cth) (CCA), or alternatively should be imposed by the Tribunal using its power contained in s 88(3) of the CCA, in order to increase the likelihood that the consumer protection benefits contained in the NETCC will be realised.

5 These submissions are structured as follows:

- (a) Part B addresses ASIC's regulation of BNPL finance;
- (b) Part C summarises ASIC's engagement with the BNPL industry;
- (c) Part D addresses the draft BNPL Code proposed by the Australian Finance Industry Association (AFIA), including ASIC's capacity to approve the code; and
- (d) Part E addresses unsolicited sales.

B. ASIC's ability to regulate BNPL finance

B.1 The present state of regulation of BNPL finance

6 BNPL finance is not subject to regulation under the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA), including the National Credit Code (NCC).¹ That is because of the business models employed by BNPL providers:

- (a) BNPL providers who do not charge consumers for providing credit are not subject to regulation by reason of s 5 of the NCC; and
- (b) BNPL providers whose fees do not exceed \$200 in the first year and \$125 in each subsequent year are not subject to regulation by reason of s 6(5) of the NCC and Regulation 51 of the *National Consumer Credit Protection Regulations 2010*, which sets out those monetary limits.

¹ NCCPA, Schedule 1.

- 7 In the New Energy Tech (**NET**) sector, Flexigroup Limited (**Flexigroup**) and Bright Capital Pty Ltd both rely on the latter model in order to not be subject to regulation by the NCCPA.
- 8 One of the practical effects of not being regulated under the NCCPA is that BNPL products are not required to comply with the various consumer protections in the NCCPA.² Those protections include a prohibition on a credit provider entering into, or increasing, a credit contract with a customer which is unsuitable for the customer.³ The prohibition against that conduct obliges a credit provider to make reasonable enquiries about, and verify, a customer's financial situation, which are the essential elements of the responsible lending regime.⁴
- 9 Although BNPL finance is not regulated under the NCCPA and NCC, it is subject to some regulation under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). That regulation arises because BNPL finance is a "credit facility" for the purposes of the ASIC Act.⁵ By virtue of being a "credit facility", BNPL finance is a financial product for the purposes of the ASIC Act.⁶
- 10 By reason of being subject to regulation under the ASIC Act, a person providing a credit facility (for present purposes, BNPL finance):
- (a) may have any unfair term in a standard form contract declared void;⁷
 - (b) may not engage in conduct which is unconscionable within the meaning of the unwritten law;⁸

² In particular, responsible lending requirements in Chapter 3 of the NCCPA and the consumer protections in the NCC.

³ NCCPA, s 134.

⁴ NCCPA, s 130(1).

⁵ Regulation 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 (**a debtor**) to another (**a creditor**) is deferred or under which one person (**a debtor**) incurs a deferred debt to another person (**a credit provider**)". The definition goes on to specify that credit includes certain types of arrangements, including: "any form of financial accommodation", "a hire purchase agreement", and "credit provided for the purchase of goods or services".

⁶ Section 12BAA(7)(k) of the ASIC Act provides that certain things – including credit facilities as defined under the Regulations – are financial products.

⁷ ASIC Act, s 12BF.

⁸ ASIC Act, s 12CA.

- (c) may not engage in conduct which is unconscionable in all of the circumstances;⁹
- (d) may not engage in conduct which is misleading or deceptive or likely to mislead or deceive;¹⁰
- (e) may not make false or misleading representations;¹¹
- (f) may not engage in bait advertising;¹²
- (g) may not engage in referral selling;¹³ and
- (h) may not engage in harassment or coercion.¹⁴

11 There are two further sources of regulation which apply, or will soon apply, to BNPL finance.

12 First, effective from April 2019, the *Corporations Act 2001* (Cth) (**Corporations Act**) was amended to provide ASIC with a power to make product intervention orders when it is “satisfied that a financial product” or “class of financial products” is “likely” to be available to retail clients and “has resulted in, or will or is likely to result in, significant detriment to retail clients”.¹⁵

13 Secondly, effective from 5 October 2021,¹⁶ the Corporations Act will oblige BNPL finance providers to issue “target market determinations” and take reasonable steps to distribute the product consistently with the determination.¹⁷

B.2 *The possibility of future reform to ASIC’s regulatory powers*

14 ASIC cannot comment on the likelihood of future reform to its regulatory powers, nor on the scope or content of any such reform. However, it can be noted that if the

⁹ ASIC Act, s 12CB.

¹⁰ ASIC Act, s 12DA; s 12DF.

¹¹ ASIC Act, s 12DB.

¹² ASIC Act; s 12DG.

¹³ ASIC Act, s 12DH.

¹⁴ ASIC Act, s 12DJ.

¹⁵ Corporations Act, s 1023D.

¹⁶ On 8 May 2020, ASIC announced that these obligations (which were due to commence by 5 April 2021) would be deferred to 5 October 2021 by reason of the COVID-19 pandemic.

¹⁷ *Treasury Laws (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth), which will insert ss 994A – 994E into the Corporations Act.

Government determined to regulate BNPL finance as credit under the NCCPA, such regulation would require:

- (a) legislative amendment (so as to remove or alter the present exemptions to regulation); and
- (b) the referral of power by the States (credit regulation is generally a responsibility of the States, and the Commonwealth is given its power to regulate under the NCCPA and NCC by State referrals pursuant to placitum 51(xxxvii) of the Constitution: see, for example, *Credit (Commonwealth Powers) Act 2010* (Qld)).

C. ASIC's engagement with BNPL issues

15 ASIC has engaged extensively with BNPL issues over the last few years. The Foo Statement exhibits three reports or submissions which ASIC has prepared in respect of BNPL issues, namely:

- (a) its Review of Buy Now Pay Later Arrangements prepared in November 2018 (**Report 600**);
- (b) its submission to the Senate's inquiry into the Credit and financial services targeted at Australians at risk of financial hardship, prepared in November 2018 (**Senate Submission**); and
- (c) its submission to the ACCC in respect of the NETCC dated 11 October 2019 (**ACCC Submission**).

16 ASIC continues to focus on the BNPL industry. ASIC has been preparing a further report (being both a follow up report to Report 600, and a response to the Senate Inquiry Report), but the finalisation and release of that follow-up report has been delayed because of COVID-19 issues.¹⁸

¹⁸ Foo Statement, [27].

17 A number of common issues and themes arise from each of Report 600, the Senate Submission and the ACCC Submission. In particular, ASIC's work revealed the following:

- (a) in the 2017-18 financial year, 60% of BNPL users were 18-34 years old;¹⁹
- (b) 44% of consumers reported an annual income of less than \$40,000, and 39% reported an annual income between \$40,000 and \$100,000;²⁰
- (c) over 50% of consumers agreed that BNPL finance allowed them to buy items that would otherwise have been out of reach, and 64% of consumers believed that BNPL finance allowed them to spend more than they normally would;²¹
- (d) consumers of BNPL finance reported negative financial impacts in making a scheduled repayment, including becoming overdrawn (8%), delaying paying bills (7%) and having to borrow money from family and friends (5%);²²
- (e) some BNPL providers should have done more to act fairly with consumers;²³
- (f) some BNPL providers included potentially unfair terms in their standard contracts with consumers;²⁴ and
- (g) anecdotally, some merchants may have charged consumers significantly higher prices for using BNPL finance.²⁵

D. The BNPL Code

18 AFIA has released a draft BNPL Industry Code (**BNPL Code**), which is due to be launched on 1 January 2021.²⁶

¹⁹ Report 600, p 25.

²⁰ Report 600, p 26.

²¹ Report 600, p 30-31.

²² Report 600, p 35. Note that these figures are not "mutually exclusive", and consumers could be affected by more than one of the impacts.

²³ Report 600, p 37.

²⁴ Report 600, p 39.

²⁵ Report 600, p 10.

²⁶ Mysak Statement II, [11].

D.1 Content of the BNPL Code

- 19 ASIC has not provided its formal feedback to AFIA on the draft BNPL Code. However, for the purposes of this proceeding, a number of matters can be observed about the BNPL Code.
- 20 First, given the current absence of any industry code (and in the absence of regulation under the NCCPA and NCC), if the NETCC were authorised with Flexigroup’s proposed amendment, BNPL products would be unable to be offered, as no code (approved or otherwise) would be in place. To guard against any such lacuna in regulation, transitional provisions are necessary.
- 21 Secondly, and more significantly, ASIC is concerned about the vagueness of the phrase “substantively equivalent consumer protections”. As ASIC submitted to the ACCC, ASIC considers that:
- (a) it is unclear which consumer protection provisions of the NCCPA are required to be “substantively equivalent” in the industry code;
 - (b) it is unclear how much – if any – deviation from the NCCPA would be permitted while the code remained “substantively equivalent”. While some provisions of the NCCPA are capable of clear replication, others (such as responsible lending requirements) are more nuanced. Indeed, the difficulties with Flexigroup’s position are highlighted in paragraph 95 of Flexigroup’s opening submissions, where it contends that the BNPL Code “delivers substantially equivalent consumer protections to those contained in the NCCPA” while at the same time acknowledges that the BNPL Code does not demand compliance with the responsible lending provisions of the NCCPA;
 - (c) it is unclear who would judge whether the code provides “substantively equivalent consumer protections”; and
 - (d) it is unclear whether the reference to the NCCPA incorporates the NCC (which is a schedule to the NCCPA). If it does, there are various requirements in the NCC which are not readily applicable to a BNPL context.
- 22 Thirdly, the “Upfront Assessment Process” set out in the BNPL Code is vague, and might conceivably give rise to adverse consumer outcomes. For example, the “factors”

to be considered by a BNPL provider, referred to in clause 4.6 of the BNPL Code, do not expressly include a reference to the borrower's financial situation, or income, or expenses. Pursuant to clause 4.9, even for loans over \$3,000 or with a term of over 2 years, the only mandatory consideration for a BNPL provider is to consider "one or more of" certain customer characteristics (so that it is not mandatory to consider a customer's income or expenses). Accordingly, the Upfront Assessment Process is not "substantively equivalent" or even comparable with responsible lending obligations.

- 23 Fourthly, clause 4.10(c) of the BNPL Code allows BNPL providers to adjust future spending limits based on a consumer's repayment history with that provider. This suggests providers will increase consumers' spending limits if they make repayments on time. There is no indication that any suitability assessment beyond repayment history (except when a consumer is in arrears) prior to adjusting spending limits.
- 24 This ability can be contrasted with licensed credit providers who provide credit card contracts – such providers are prohibited from sending credit limit increase invitations to consumers. The prohibition ensures that consumers actively choose whether their credit limit, rather than being prompted to do so by their credit provider.
- 25 Fifthly, the BNPL Code does not contain any sanctions for breaches akin to the NCCPA or Corporations Act.
- 26 Sixthly, while the internal dispute resolution provisions of the BNPL Code refer to the provision of an "initial response" within ten days,²⁷ there is no commitment to finalising a complaints within a certain maximum timeframe.²⁸
- 27 Seventhly, in relation to external dispute resolution, the BNPL Code does not specify that providers will ensure they give reasonable assistance to AFCA in resolving complaints, and will give effect to any determination made by AFCA in relation to a complaint.
- 28 Eighthly, in respect of hardship, the BNPL Code does not contain some of the protections that are present in the NCC. For example, the NCC provides specific

²⁷ BNPL Code, clause 6.

²⁸ This may be contrasted with the position under RG 165 for licensed credit providers.

timeframes with which licensed credit providers must abide when responding to hardship notices. If the provider decides not to change the credit contract, they must respond with reasons why they have not agreed to do so, the name and contact details of AFCA and the debtor's rights under that scheme. By contrast, the BNPL Code does not contain clear response timelines or an obligation to give reasons given to consumers, especially in the circumstances where their hardship application has been declined and the consumer may have AFCA review the decision.

- 29 Ninthly, the BNPL Code does not contain any direct assurance that BNPL providers will act against merchant surcharging, or set out the avenues available to consumers if they consider they have paid more for goods or services because they chose to pay using a BNPL arrangement. Report 600 observed that merchant surcharging conduct was more likely to occur in relation to higher-value purchases or where the price of goods or services were less transparent and 'negotiable'.²⁹
- 30 Tenthly, while the BNPL Code provides that it will be 'regularly reviewed', with the first review to take place within two years, it does not specify how regularly reviews must be conducted after the initial review.³⁰
- 31 Eleventhly, the BNPL Code does not include any of the contract enforcement protections that are contained in the NCCPA. The NCC requires credit providers to comply with certain requirements before commencing enforcement proceedings, including serving a default notice and following procedures where the debtor has a current or recent hardship notice.³¹
- 32 Twelfthly, although certain provisions in the BNPL Code (in particular, clauses 1.1, 9.2 and 9.3 in Part B) set out commitments of BNPL providers to ensure training of staff,

²⁹ Report 600, p 10.

³⁰ Regulatory Guide 183 *Approval of financial services sector codes of conduct* sets out ASIC's code approval process under s 1101A of the Corporations Act and standards for a code of conduct. One condition for ASIC approval is that a code provides for regular, independent reviews at intervals of no more than three years (see RG 183.82–RG 183.85).

³¹ NCC, ss 72, 88 and 89A.

agents and representatives, these do not go as far as the robust legislative requirements imposed on credit licensees.³²

33 Thirteenthly, under the NCCPA, credit licensees are required to maintain adequate consumer compensation and insurance arrangements, specifically professional indemnity insurance.³³ There is no equivalent or similar requirement in the BNPL Code.

34 Fourteenthly, under the NCCPA, credit licensees are required to have adequate financial, technological and human resources to engage in credit activities, as well as adequate risk management systems.³⁴ The BNPL Code does not expressly cover having adequate resources. The code appears only to consider data breach risks and it is unclear if it considers financial risk.

35 By reason of each of the above matters, ASIC submits that that the BNPL Code does not provide “substantively equivalent” protections to the NCCPA. The practical effect of this failure to provide substantively equivalent protections means that there would no compliant code which would enable BNPL to be provided under the terms of the NETCC.

D.2 ASIC’s capacity to approve the BNPL Code

36 Flexigroup submits that “[i]t is contemplated that [the BNPL Code] will be approved under ASIC Regulatory Guide 183”.³⁵

37 It is by no means clear that ASIC is capable of approving the BNPL Code. ASIC’s power to approve codes of conduct is contained in s 241 of the NCCPA and s 1101A of the Corporations Act.

38 Section 241(1) of the NCCPA provides:

³² NCCPA, s 47(1)(f) and (g). ASIC’s Regulatory Guide 206 Credit licensing: Competence and training sets out ASIC’s minimum expectations for demonstrating organisational competence under NCCPA.

³³ NCCPA, s 48.

³⁴ NCCP, s 47(1)(l).

³⁵ Flexigroup’s Opening Submissions, [47].

(1) ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:

(a) licensees; or

(b) credit representatives;

being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.

39 It can be seen that in order for ASIC's approval power under the NCCPA to be enlivened, there must be activities of "licensees" or "credit representatives". A "licensee" is someone who holds an Australian credit licence.³⁶ A "credit representative" is a person who is authorised by a licensee to engage in specified credit activities.³⁷

40 By reason of the foregoing, as most BNPL providers do not hold Australian credit licences, insofar as the BNPL Code concerns their conduct, ASIC has no power to approve the BNPL Code.

41 Similarly, s 1101A(1) of the Corporations Act provides:

(1) ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:

(a) financial services licensees; or

(b) authorised representatives of financial services licensees; or

(c) issuers of financial products;

being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.

42 Most BNPL providers are not financial services licensees, nor authorised representatives of such licensees. Further, BNPL providers are not issuers of financial

³⁶ See definition in s 5 of the NCCPA.

³⁷ See s 64 of the NCCPA.

products, as one of the arrangements which are specifically excluded as “financial products” are “a credit facility within the meaning of the regulations”.³⁸ As a result, ASIC does not have power under the Corporations Act to approve the BNPL Code.

43 There is, at least, very serious doubt about whether ASIC has the power to approve the BNPL Code, leaving aside the question of whether it suffers from the deficiencies set out above.³⁹

E. Unsolicited sales

44 ASIC submits that the limitation on offering BNPL finance as part of unsolicited sales of NET , as contained in clause 3(d) of the NETCC, is appropriate.

45 The limitation in respect of unsolicited sales essentially mirrors an equivalent prohibition that is imposed by regulation 23 of the *National Consumer Credit Protection Regulations 2010* (Cth). That regulation essentially exempts a person who is engaged in point-of-sale credit from the requirement to hold a credit licence. However, the exemption does not apply (that is, the person must hold a licence, be appointed a credit representative of a licensee or rely on other more limited exemptions) if the sale is an unsolicited sale.⁴⁰ Clause 3(d) of the NETCC therefore places BNPL providers in a position consistent with licensed credit providers.

³⁸ Corporations Act, s 765A(1)(h)(i). The relevant regulation (reg 7.1.06(1)(a) of the *Corporations Regulations 2001* (Cth)) has the effect of including BNPL finance as a “credit facility”. It provides:

- (1) For subparagraph 765A(1)(h)(i) 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; and
 - (iii) whether or not both credit and debit facilities are available; and
 - (iv) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
 - (v) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (bb), (f), (g), (h) or (j) of the Act; and
 - (vi) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit...

In turn, reg 7.1.06(3) defines “credit” as including in the same terms as the NCCPA Regulations referred to in footnote 5 above.

³⁹ It can also be observed that Flexigroup’s suggestion that ASIC’s RG 183 would be the basis of any code approval is misconceived, as RG 183 applies to Australian Financial Services Licensees.

⁴⁰ For completeness, ASIC notes that the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that the point of sale exemption should be removed (recommendation 1.7). While this recommendation was due to be implemented by 30 June 2020, on 8 May 2020, the Commonwealth Treasurer announced that there would be a six-month deferral on implementation of most reforms of the Royal Commission as a result of COVID-19. There is no indication when recommendation 1.7 will be implemented.

F. Conclusion

46 For the foregoing reasons, ASIC submits that the Tribunal should affirm the ACCC's determination.

Dated: 2 June 2020

M.D. Tehan