

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019
Re: 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)

SUMMARY OF DETERMINATION

TRIBUNAL: Justice O’Bryan (Deputy President)
Dr J Walker (Member)
Ms D Eilert (Member)
DATE: 15 September 2020
WHERE MADE: Melbourne

The determination made by the Tribunal today concerns a proposed industry code of conduct for suppliers of what are referred to as New Energy Technology products (principally solar panels, energy storage systems and other emerging products and services). To assist the public in understanding the Tribunal’s determination, the Tribunal has prepared this brief summary of the determination. The summary is not a substitute for, or a qualification of, the published reasons of the Tribunal.

The proposed code of conduct was developed by the Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia. It sets minimum standards that suppliers of New Energy Technology products must comply with when interacting with customers, from initial marketing and promotion through to installation and complaints handling. The proposed code of conduct is a voluntary code. Suppliers of New Energy Technology products can elect whether they wish to

become signatories. However, once a supplier becomes a signatory, the supplier agrees to comply with the requirements of the code.

The proponents of the code have applied for authorisation under the *Competition and Consumer Act 2010* (Cth). Authorisation provides an exemption from the application of the competition laws in that Act. The Tribunal must only grant authorisation if it is satisfied that the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

The proposed code of conduct is a form of industry self-regulation. While industry codes of practice, as a form of private regulation, have become common place in Australia, they have the potential to generate both public benefits and detriments. Benefits will arise when codes of practice complement public regulation in ways that reflect community attitudes and expectations and deal with market failures (that is, where markets would otherwise fail to result in an efficient allocation of resources). Anti-competitive public detriment will arise when codes of practice give their participants power to bring about market outcomes that differ from competitive market outcomes and result in restrictions on the types of products that may be supplied, the quantity that may be supplied or the methods or channels of supply. Such restrictions substitute collective supplier preference for consumer choice and would only be justified if required to address demonstrable market failure. Absent significant market failure, competition can generally be relied on to promote the interests of consumers and the community at large. Public regulation which imposes restrictions on competition, where those restrictions are seen to be necessary to achieve community benefits, are expressed and scrutinised through the democratic process of government. Private regulation which imposes restrictions on competition has the potential to result in significant public detriment by restricting market access, innovation and the offers available to consumers. The proponents of such restrictions need to demonstrate that they are likely to result in sufficient public benefit to justify exempting the restrictive conduct from the normal application of the Competition and Consumer Act.

Many of the provisions of the proposed code reflect existing consumer protection laws that are applicable to suppliers of New Energy Technology products. The Tribunal has concluded that those provisions generate public benefits because the code is likely to lead to greater compliance with those laws. The code of conduct will be publicised and provided to consumers and the code provides for oversight by an industry body and dispute resolution processes. There are also many provisions of the proposed code that extend or amplify consumer protection laws that apply to suppliers of New Energy Technology products. The Tribunal considers that those provisions also generate net public benefits. Even if the enhanced obligations were to increase supply costs, the Tribunal considers that the obligations reflect community expectations of the standard of commercial conduct by suppliers and the community would therefore accept any associated increase in the cost of supply. The code is also likely to improve the information made available to consumers, enhancing consumers' ability to make informed choices that suit their needs and thereby enhancing competition in the supply of New Energy Technology products. In that way, the code addresses a market failure arising from information asymmetry.

However, the Tribunal has concluded that other provisions of the proposed code are likely to generate significant public detriments. Those provisions concern two topics. The first topic relates to the supply of consumer credit that is not regulated by the National Consumer Credit laws, particularly the supply of "buy now pay later" credit. The second topic relates to provisions of the proposed code that empower the administrator of the code to stipulate mandatory standards with which suppliers must comply.

In relation to unregulated consumer credit (which includes "buy now pay later" products), the proposed code places a number of restrictions on the ability of suppliers of New Energy Technology products to offer such credit in connection with the sale of the New Energy Technology products. The code prohibits the offer of such credit if the New Energy Technology product was sold as a result of the supplier initiating contact with the customer (an unsolicited sale). The code also prohibits the offer of

such credit unless the credit provider has implemented procedures equivalent to the responsible lending obligations under the National Consumer Credit laws.

The Tribunal considers that unregulated consumer credit in the form of “buy now pay later” finance is a significant and popular form of finance used by consumers to acquire New Energy Technology products desired by those consumers and therefore the supply of such finance provides economic benefits. The evidence does not establish that the provision of such finance in connection with the supply of New Energy Technology products generates material consumer harm. The data before the Tribunal indicates that arrears and defaults are significantly lower for all types of finance extended in the New Energy Technology sector compared to other sectors, which is likely due to the nature of the product (which generates energy cost savings) and the demographics of the consumers (older home-owners). To the extent that such finance might facilitate consumer harm which is caused by poor or unlawful selling practices in respect of New Energy Technology products, the risk of such harm should be materially reduced by the consumer protection provisions of the proposed code. The Tribunal considers that most of the proposed restrictions on the supply of “buy now pay later” finance in the proposed code will generate substantial public detriments by reducing the availability of such finance to consumers, thereby reducing consumer access to NET products. ASIC has been actively considering whether the National Consumer Credit laws should be extended to cover “buy now pay later” products. ASIC’s review of the sector will have more evidence before it to consider whether such an extension is warranted.

In relation to the mandatory standards, the Tribunal is concerned about the open ended nature of the provisions in the proposed code, the potential effect of which is uncertain, but which could be used to restrict supply and competition. An agreement between competitors to abide by agreed mandatory standards could be used to restrict innovation and competitive offers by solar panel merchants in the future. This could result in unknown public detriments arising in the future, making it difficult for the Tribunal to be satisfied that the overall balance of public benefits and detriments

arising from the code meets the test for authorisation. The Tribunal has concluded that the code should be amended to remove all references to mandatory standards.

The Tribunal has weighed the overall public benefits of the consumer protection provisions of the code against the public detriments that the Tribunal considers will arise from the provisions of the code concerning unregulated consumer credit and mandatory standards. The Tribunal considers that the latter outweigh the former. In other words, the Tribunal is not satisfied that the code, in its present form, would be likely to result in a net public benefit. Accordingly, the Tribunal is not willing to authorise the code in the form submitted to the Tribunal. However, with amendments to the code that remove the provisions that are likely to cause public detriment (which amendments are set out in Annexure B to the determination), the Tribunal would be satisfied that the code would be likely to result in a net public benefit. Accordingly, the Tribunal is willing to grant authorisation subject to a condition that the code is so amended.