

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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

Lodgment and Details

Document Lodged: Application for Directions

File Number: ACT1 of 2019

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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

DEPUTY REGISTRAR

Dated: 4/05/2020 10:03 AM

Important information

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



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

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

Applicant: Flexigroup Ltd (ACN 122 574 583)

**APPLICATION FOR DIRECTIONS
REGARDING THE PROVISION OF INFORMATION BY ASIC
(BY ASIC'S CONSENT)**

A DIRECTIONS SOUGHT

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

1. By **Friday 8 May 2020**, ASIC provide to each of the parties:
 - (a) details of consumer complaints received about buy-now-pay-later (**BNPL**) credit providers in connection with the sale of:
 - (i) any consumer products; and
 - (ii) new energy tech (solar) products;(differentiating between each of the two categories) between the period 1 January 2016 and 30 April 2020, including:
 - (iii) the date of the complaint;
 - (iv) the type and source of the complaint (consumer, consumer rights organisation, external dispute resolution scheme / regulator, etc);

Filed on behalf of (name & role of party)	Consumer Action Law Centre (intervener)		
Prepared by (name of person/lawyer)	Ursula Noye		
Law firm (if applicable)	Consumer Action Law Centre		
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Address for service (include state and postcode)	Level 6 / 179 Queen Street, Melbourne VIC 3000		

- (v) the BNPL provider the subject of the complaint;
- (vi) a brief description of the conduct complained about; and
- (vii) the details of ASIC's response to the complaint.

B BASIS FOR SEEKING THE DIRECTIONS

2. A direction may be sought for the purpose of '*securing... that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal*': r 22.
3. CALC requested the above information by letter sent to ASIC on 16 April 2020 (**Annexure A**).
4. On 30 April 2020, ASIC responded to CALC's request, providing some (but not all) of the information requested (**Annexure B**). In the letter, ASIC stated at [4]:

If CALC seeks further or more detailed complaints data, or the identity of the reporters of misconduct or the subject of the reports, CALC may choose to seek a summons from the Australian Competition Tribunal.
5. ASIC has indicated that it is obliged to keep the above information confidential and that, in the absence of a direction from the Tribunal, it has power to release this information subject to a requirement to provide procedural fairness. Given the nature and number of complaints, ASIC has indicated that it does not expect to be able to complete this process consistently with the timeframe required by the Tribunal's directions for the filing of evidence.
6. ASIC has indicated that it would consent to a direction in the terms stated, and that such a direction would facilitate the additional information being provided promptly, in keeping with the Tribunal's directions.
7. In assessing the respective public benefits to be obtained, on the one hand, from the availability of unregulated buy-now-pay-later (**BNPL**) credit for solar and new energy technology consumers, and on the other hand, by protecting those consumers from predatory or unfair practices associated with the provision of unregulated BNPL finance, it is necessary to examine the number, extent and subjects of complaints made to ASIC by consumers, and how, and to what extent, ASIC is able to address and respond to those complaints. That is the subject matter of the information now sought.

Dated: 4 May 2020

Consumer Action Law Centre
Signed on behalf of the Consumer Action Law Centre

Our Ref: 495916

Contact: Ursula Noye

16 April 2020

James Walker
Senior Specialist
Administrative Law Team, Chief Legal Office
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email only: James.Walker@asic.gov.au; kevin.foo@asic.gov.au

Dear Mr Walker

Application by Flexigroup Ltd - Australian Competition Tribunal Proceeding No 1 of 2019 ("the Proceeding")

Request for consumer complaints data

1. CALC is of the view that the Australian Competition Tribunal ("**the Tribunal**") would be assisted if it had consumer complaints data regarding the provision of credit to purchasers generally and of New Energy Tech (solar) in particular.
2. Relevant external dispute resolution schemes – the Energy and Water Ombudsman Victoria ("**EWOV**") and the Australian Financial Complaints Authority ("**AFCA**") – and regulators – ASIC and Consumer Affairs Victoria ("**CAV**") – may have data of that kind.
3. We have written separately to EWOV, CAV and AFCA seeking information from them about consumer complaints.
4. The purpose of this letter is to seek information about consumer complaints data that ASIC may have. We have copied this request to Kevin Foo, Senior Manager - Credit, Retail Banking and Payments, who we would ordinarily direct enquiries of this nature to. Given your carriage of the Proceeding, however, we have directed our request to you.
5. We would be grateful if ASIC could provide responses to the questions listed below by **24 April 2020**, given that CALC is required to file its evidence with the Tribunal by 5 May 2020.



6. The questions are as follows:
- a. If able to do so, please provide details of consumer complaints received about BNPL providers in connection with the sale of (a) any consumer products and (b) new energy tech (solar) products between the period 1 January 2016 and the present, including –
 - i. the date of the complaint;
 - ii. the type and source of the complaint (consumer, consumer rights organisation, EDR scheme/regulator, etc.);
 - iii. the BNPL provider the subject of the complaint;
 - iv. the conduct complained of; and
 - v. the details of the response to the complaint.
 - b. Are there any jurisdictional limits on ASIC’s ability to consider and/or investigate or respond to complaints against Humm?
 - c. Are there any jurisdictional limits on ASIC’s ability to consider and/or investigate or respond to complaints against RateSetter?
 - d. Do the total number of complaints referred to in question (a) consist of all complaints which consumers have made to ASIC against BNPL providers in the new energy tech (solar) industry, or only those complaints which have been accepted by ASIC as within its jurisdiction?
 - e. If the answer to question (d) is that the number of complaints refers only to those complaints which have been accepted by ASIC as within jurisdiction, does ASIC have any data about the number of complaints against BNPL providers which ASIC has excluded due to lack of jurisdiction? (If yes, please advise how many additional complaints have been excluded.)
 - f. Are there any other matters that you believe would assist in our – and the Tribunal’s – understanding and consideration of this data?
7. Given the current division of jurisdiction between (a) external dispute resolution providers for consumer complaints about solar products (eg CAV and EWOV), and (b) consumer complaints about the related provision of finance (eg AFCA), we also seek your insight into the existence and nature of any challenges posed for consumers in resolving consumer disputes about either or both of the solar product and the finance for that product.
8. If you are of the view that our request above would be better facilitated by way of an order from the Tribunal pursuant to r 22(2) of the *Competition and Consumer Regulations 2010* (Cth), or by any other means within the Proceeding, please advise without delay, or call us if you wish to discuss.
9. Please direct any queries to Ursula Noye by telephone to 0409 542 314 or email at ursula@consumeraction.org.au.



10. We look forward to your response.

Yours faithfully,

CONSUMER ACTION LAW CENTRE



Ursula Noye
Special Counsel





ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Our Reference: ACT 1 of 2019
Your Reference: 495916

By email only: ursula@consumeraction.org.au

30 April 2020

Dear Ursula

ACT 1 of 2019 - Application by FlexiGroup Limited

1. We refer to your letter dated 16 April 2020 and the teleconference between ASIC and CALC on 24 April 2020 in relation to the above matter.
2. In response to paragraph 6(a) of your letter, please find enclosed a spreadsheet containing de-identified complaints (also referred to as reports of misconduct) to ASIC for the period 1 January 2016 to 20 April 2020. This data is released by ASIC pursuant to s 127(1A) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) as "summaries of information" from which "information relating to any particular person cannot be found out".
3. We explain the spreadsheet as follows:
 - a. The data contained in the spreadsheet was gathered through entity searches on ASIC's database. The entities searched were selected on the basis that they are the main BNPL providers known to ASIC.
 - b. With the exception of CALC, all reporters of misconduct have been de-identified. Equally, the spreadsheet does not identify the subject(s) of the complaints, other than indicating if the BNPL provider is known to offer BNPL finance for new energy technology (**NET**) products.

- c. The column *NET product* flags whether the complaint specifically concerns a NET product purchased using BNPL finance. In some cases, the report of misconduct does not contain sufficient information to conclude whether or not it concerns a NET product.
 - d. The column *Complaint Description* provides a relevant key word summary of each report of misconduct. The descriptions do not intend to reproduce the detail of each complaint. This column does not include any information about ASIC's views or responses to a report of misconduct.
 - e. As CALC's request is confined to consumer complaints in connection with the sale of consumer or NET products, we have removed complaints received from persons other than consumers and consumer representatives.
4. If CALC seeks further or more detailed complaints data, or the identity of the reporters of misconduct or the subject of the reports, CALC may choose to seek a summons from the Australian Competition Tribunal (**the Tribunal**).
 5. In response to paragraph 6(b) of your letter, by 'Humm' we take this to be a reference to the Humm product issued by Certegy Ezi-Pay Pty Ltd (**Certegy**).
 - a. In Report 600: *Review of buy now pay later arrangements* (**REP 600**) ASIC described how 'buy now pay later' arrangements the subject of that review were and remain generally exempt from the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**): see paragraph 21.
 - b. At Table 2 of REP 600 we identify Certegy as a provider that relies on the 'continuing credit exemption'. Where Certegy acts in compliance with the continuing credit exemption, the provisions of the National Credit Act, including the National Credit Code, do not apply to them and ASIC generally will not have jurisdiction to investigate reports of misconduct that relate to matters covered by the Act and the Code (for example, responsible lending, disclosure of key terms and enforcement and recovery rules).
 - c. The Humm product is a 'credit facility' under the ASIC Act and we have jurisdiction to investigate reports of misconduct in relation to (alleged) contraventions of the ASIC Act (for example, misleading and deceptive conduct, unconscionable conduct and unfair contract terms). Similarly, because Humm is an ASIC

Act credit facility it is open to ASIC to consider the use of its product intervention power in relation to Humm.

6. In response to paragraph 6(c) of your letter, where complaints about Ratesetter are in relation to the provision of consumer credit, ASIC has jurisdiction both under the National Credit Act and the ASIC Act.
7. In response to paragraph 6(d) of your letter, the attached spreadsheet contains all reports of misconduct in respect of the main BNPL providers, regardless of the underlying product purchased using the BNPL arrangement.
8. We anticipate ASIC will comment on jurisdictional issues like the ones raised in your letter in its submissions to the Tribunal.

Yours sincerely



James Walker
Senior Specialist
Australian Securities and Investments Commission