

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: 03/06/2020 7:02 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**

APPLICATION FOR DIRECTIONS REGARDING THE PROVISION OF INFORMATION BY FLEXIGROUP

A DIRECTIONS SOUGHT

1. RateSetter Australia RE Limited (**RateSetter**) seeks a direction from the Tribunal pursuant to r 22(1)(a) of the *Competition and Consumer Regulations 2010 (Cth)* that:

*“At or by noon on Friday, 5 June, Flexigroup provide to each of the parties the correspondence referred to in Category 3.4 and 3.6 of Flexigroup’s Response to the Notice issued by the Tribunal to Flexigroup on 18 May 2020 (the **Information**).”*

B BACKGROUND

2. On or about 28 May 2020, flexigroup Limited (**Flexigroup**) produced information responsive to a notice under sections 90(6)(c) and 101(2) of the *Competition and Consumer Act 2010 (Cth)* (**Response**). The notice was issued by the Australian Competition Tribunal pursuant to order 4 of the Tribunal’s directions dated 18 May 2020 (**Notice**).

Filed on behalf of (name & role of party)	RateSetter Australia RE Limited, Intervener		
Prepared by (name of person/lawyer)	Aldo Nicotra		
Law firm (if applicable)	Johnson Winter & Slattery		
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Address for service	Level 25, 20 Bond Street Sydney NSW 2000		

Category 3.4 of the Response to the Notice

3. Category 3.4 of the Notice required Flexigroup to produce the number of complaints, queries and disputes concerning price inflation as a result of fees and charges being passed on to NET merchants. Flexigroup's Response refers to 27 "escalated" complaints.

Category 3.6 of the Response to the Notice

4. Category 3.6 of the Notice required that Flexigroup produce the details of any instructions and/or guidance provided to NET retailers regarding the calculation or review of upfront or base price of NET products in light of applicable merchant fees relating to finance, including a description of the instructions or guidance, how they should be used and/or applied, and their purpose. Flexigroup's Response refers to two letters and includes no further details.

C BASIS FOR SEEKING THE DIRECTIONS

5. *Category 3.4:* The 27 complaints or queries to which Flexigroup refers in respect of Category 3.4 of the Notice are likely to disclose details of the relevant price inflation including the amount of the inflation and the number of instances in which it occurred, both of which are relevant to the issues the Tribunal will decide. The complaints or queries are also likely to disclose the identity of the relevant merchants, which will enable assessment of the extent to which Flexigroup does, in fact, suspend and/or terminate merchants that engage in "surcharging" (as Mr Mysak says at paragraph 31 of his second statement).
6. *Category 3.6:* Flexigroup has not provided the information the Tribunal requested. The Tribunal sought "*details*" of the instructions and/or guidance that Flexigroup has provided to NET retailers regarding the calculation or review of upfront or base prices of NET products in light of merchant fees, including a "*description*" of the relevant instructions of guidance. Flexigroup has simply referred to two letters. Presumably, the relevant information is contained in the letters. The letters should therefore be produced.
7. Shortly before 3:00pm on Monday, 1 June 2020, RateSetter requested that Flexigroup provide this information. As at the date of this application, RateSetter has not received a substantive response from Flexigroup to its request.

Date: 3 June 2020

JWS