

## NOTICE OF LODGMENT

### AUSTRALIAN COMPETITION TRIBUNAL

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#### Lodgment and Details

Document Lodged: Outline of 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



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DEPUTY REGISTRAR

Dated: 05/06/2020 6:57 PM

#### Important information

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## 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)

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S OUTLINE OF SUBMISSIONS

#### PART I INTRODUCTION

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1. In late March 2019, a working group of bodies representing industry and consumer perspectives finalised a draft voluntary industry code for sellers of new energy technology products and services known as the New Energy Tech Consumer Code (variously described as the **NETCC**, the **Consumer Code**, the **Tech Code** or the **Code**).<sup>1</sup>
2. On 29 April 2019, four members of that working group (the Australian Energy Council, the Clean Energy Council, the Smart Energy Council and Energy Consumers Australia) (the **Authorisation Applicants**) applied to the Australian Competition and Consumer Commission (**ACCC**) for authorisation for the implementation of the NETCC on the basis that giving effect to it may involve a cartel provision within the meaning of Division 1 of Part IV of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), substantially lessen competition within the meaning of ss 45 and 46 of the CCA, and/or constitute exclusive dealing within the meaning of s 47.
3. On 5 December 2019, the ACCC issued its final determination granting authorisation to enable the Authorisation Applicants and future signatories to the NETCC to agree, sign up to and comply with (and thereby give effect to) provisions of the NETCC, subject to conditions (**the Conditions**), until 31 December 2024. The ACCC considered that the net public benefit test would be met without the Conditions, but that the Conditions would enable the public benefits of the NETCC to be more fully realised, reduce the likely detriments and help to assess the ongoing operation of the NETCC.
4. The three Conditions that were imposed concerned the following:

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<sup>1</sup> See Statement of Benjamin Charles Barnes dated 5 May 2020 at [65] [**HB 3:1361**]. See also Authorisation Applicants Opening Submissions at [22]-[28]; CALC Opening Submissions at [56]-[60].

- 4.1. amendments to the requirements that buy now pay later (**BNPL**) finance providers must meet under clause 25 of the NETCC in order for signatories to the NETCC to offer BNPL finance arrangements to consumers (**BNPL Finance Requirement Condition**);
- 4.2. a clarification of the prohibition on unsolicited offers of BNPL finance in connection with the sale of new energy technology products in clause 3(d) of the Code (**Clarification on Unsolicited Offers Condition**);
- 4.3. a requirement that the NETCC administrator report to the ACCC on the operation of the NETCC (**Reporting Condition**).
5. Flexigroup Limited (**Flexigroup**) seeks a review of the ACCC's determination under s 101 of the CCA. Flexigroup was a participant in the ACCC's public consultation in respect of the application for authorisation.
6. All participants in the review agree that authorisation should be granted to permit the Authorisation Applicants and others to agree, sign up to and comply with (give effect to) the provisions of the NETCC. The critical issue before the Tribunal is the conditions, if any, that should be attached to the authorisation.<sup>2</sup> But, because the Tribunal is conducting a fresh review of the matter, and thus deciding for itself whether to grant an authorisation at all, it is necessary to address each of the matters that goes to whether authorisation should be granted.
7. This outline of submissions is structured as follows:
  - 7.1. Part II sets out relevant background to this review and to the NETCC.
  - 7.2. Part III sets out the role of the ACCC and the Tribunal in this review.
  - 7.3. Part IV sets out the statutory scheme and key concepts that the Tribunal is to apply in determining whether to grant an authorisation and whether to impose any conditions upon that authorisation.
  - 7.4. Part V identifies the key issues, the participants' positions on those key issues and the conclusions which the ACCC contends are open to the Tribunal on the material to date.

## **PART II BACKGROUND**

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### **A. New energy technology products**

8. For the purposes of this review, "new energy technology products" are principally:

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<sup>2</sup> See also Authorisation Applicants Opening Submissions at [6]-[7]; CALC Opening Submissions at [7].

- 8.1. small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks<sup>3</sup> or as distributed energy resources connected to an Energy Network;
  - 8.2. services that support or are closely related to those products or systems;
  - 8.3. products, systems and services that monitor or manage a Customer's<sup>4</sup> usage of energy whether on or off an Energy Network.
9. New energy technology products do not include simple, low cost or off-the-shelf new energy technology products that are within a class exemption made by the Administrator in accordance with the Code.

## **B. BNPL finance**

10. Some new energy technology retailers offer finance options for the purchase of new energy technology products. Some provide such finance through deferred payment arrangements known as "buy now pay later" or **BNPL** arrangements.
11. Such arrangements usually involve three contracts:
- 11.1. a contract between the consumer and the new energy technology retailer under which the consumer purchases the product or service from the retailer;
  - 11.2. a contract between the BNPL provider and the retailer under which the provider pays the retailer for the purchase (less any merchant fee charged by the provider); and
  - 11.3. a contract between the consumer and the BNPL provider under which the consumer repays the BNPL provider for their purchase over time.
12. Consumers are not typically charged interest on BNPL arrangements and there are limits on the fees that BNPL providers can charge. As a result, such arrangements can be cheaper than other forms of credit.<sup>5</sup> On the other hand, there are no limits or caps on missed payment fees that consumers can be charged for default on repayments.<sup>6</sup> Further, it is possible that new energy technology retailers pass onto consumers the merchant fees charged by BNPL providers.<sup>7</sup>

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<sup>3</sup> Defined in Part C of the NETCC as: "any of Australia's principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market)."

<sup>4</sup> Defined at Part C of the NETCC as: "a potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies."

<sup>5</sup> See Annexure KF-1 to the Statement of Kevin Foo dated 5 May 2020 (**ASIC Report 600**) at 14 [20] [**HB 4:1610**]

<sup>6</sup> See Annexure KF-4 to the Statement of Kevin Foo dated 5 May 2020 at [67] (**ASIC Submission to ACCC**) [**HB 4:1817**].

<sup>7</sup> See below at paragraph 112.

### C. Regulated credit and BNPL finance<sup>8</sup>

13. The provision of BNPL finance is not subject to regulation under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) or the National Credit Code (**NCC**). Accordingly, BNPL providers are not required to hold an Australian Credit Licence to offer BNPL products or to conduct a responsible lending assessment in accordance with the obligations contained in the NCCPA in offering BNPL finance products.
14. This can be contrasted with the regulation of credit providers who offer products that are subject to such regulation. They must hold an Australian Credit Licence and must conduct a responsible lending assessment in accordance with the obligations contained in the NCCPA in offering finance products. They must also comply with certain dispute resolution and hardship requirements to protect consumers dealing with regulated credit products offered through licensed credit providers.

### D. Unsolicited sales

15. Regulation 23 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**National Credit Regulations**) exempts retailers, including retailers of new energy technology products, who are engaging in a credit activity in certain circumstances, from having to hold an Australian Credit Licence.<sup>9</sup> Regulation 23(4) states that the exemption does not apply “if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer”.<sup>10</sup>
16. Because BNPL products are not regulated by, and/or are exempt from, the NCCPA and the NCC, retailers are not required to hold an Australian Credit Licence in order to offer BNPL finance in an unsolicited sale. If a retailer sought to offer regulated credit products during an unsolicited sale, it would be required to hold an Australian Credit Licence or be appointed as an authorised representative of a licensee, with the attendant obligations that apply to representatives and licensees in such a scenario.<sup>11</sup>
17. Further, in an unsolicited sale where the finance offered is a regulated credit product (i.e., provided by a licenced credit provider), a responsible lending assessment must be undertaken in accordance with the obligations contained in the NCCPA and the NCC, and the assessment must be carried out before finance is made available. Mandatory dispute resolution mechanisms and hardship provisions also apply to such products. By contrast, BNPL finance arrangements can be made immediately without such assessments,<sup>12</sup> and without provisions for mandatory dispute resolution and hardship.

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<sup>8</sup> See generally CALC Opening Submissions at [44]-[46].

<sup>9</sup> Authorisation Applicants ASOFIC [42] [HB 1:126], fn 16 [HB 1:123]. An example of such a credit activity is a retailer, on behalf of a relevant credit provider for a credit contract or proposed credit contract, performing the obligations or exercising the rights of the relevant credit provider in relation to the contract or proposed contract.

<sup>10</sup> *National Consumer Credit Protection Regulations 2010* (Cth) reg 23.

<sup>11</sup> See generally NCCPA ss 47, 64-65, 77-78.

<sup>12</sup> See Statement of Taras Mysak dated 4 April 2020 at [32] [HB 2:347]; Statement of Chantha Lake dated 2 April 2020 at [23]-[26] [HB 2:214-215]. See also Affidavit of Jane Foley dated 29 April 2020 at [9], [13]-[17] [HB 4:1848-1849].

## E. The ACCC's evaluation of the NETCC

18. As will be developed in Part III below, the Tribunal is not engaged in assessing the correctness of the ACCC's assessment of the application to authorise the NETCC. The Tribunal's task is to undertake a fresh consideration of the application for authorisation.
19. Nonetheless, a brief description of the ACCC's approach to the Authorisation Applicants' application for authorisation may assist in situating certain issues that arise afresh in this review.
20. The NETCC aims to set minimum standards of good practice and consumer protection in the supply of new energy technology products. This corresponds with the stated intention of the NETCC "to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers".<sup>13</sup> The NETCC exhibits certain common characteristics of industry codes: a recognition by its proponents that behaviour and standards within an industry should be elevated above minimum legal requirements, and an attempt to lift standards accordingly. Such codes often generate public benefits, by heightening consumer protection standards and reducing information asymmetries. As this Tribunal observed in *Application by Medicines Australia Inc* (French J, Mr Latta, Prof Walsh), it may be the case that:<sup>14</sup>

statutory regulatory systems are not able to provide enforcement coverage in respect of the full range of conduct which is the target of their underlying policy. A voluntary industry code may provide an additional informal low cost complaint and enforcement mechanism covering both the conduct formally addressed by the statutory system and analogous or related conduct which the statutory system does not reach because of legal boundaries or resource limitations. Even if the voluntary enforcement mechanism has gaps and deficiencies the additional coverage it provides may be identified as a public benefit by reason of its capacity to lessen the detriment associated with conduct within the letter or policy of the statutory theme. The relationship between statutory regulation and complementary voluntary codes in such cases is sometimes referred to as "co-regulation".

21. It must then be assessed whether such benefits outweigh any public detriments that arise from allowing competitors in a market to agree to specified minimum standards of conduct, which could, for example, add to signatories' costs of doing business and act as barriers to new entry.
22. In assessing the NETCC, the ACCC's task was not to draft the best code possible.<sup>15</sup> To the extent possible, a code is to be authored by the industry participants who develop it and will subscribe to it. The ACCC engaged with the proponents and industry participants by raising matters for their consideration. Within this consultative process, different iterations of the

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<sup>13</sup> NETCC Part A – Overview (p. 2) [HB 3264].

<sup>14</sup> (2007) ATPR ¶42-164 at [119].

<sup>15</sup> See generally *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,509 [67], 47,524 [134] ("it is not for the ACCC or the Tribunal to use the conditioning power and its discretion in order to construct and impose its ideal or preferred system of self-regulation").

NETCC were produced. Ultimately, the ACCC imposed conditions designed to enable the public benefits of the Code to be more fully realised and to mitigate likely public detriments.

23. The protections afforded to consumers when obtaining finance through signatory retailers to fund their new energy technology purchases were but one aspect of improved consumer safeguards the NETCC aimed to address.
24. The *types* of finance offerings that signatories to the NETCC could make available to consumers to finance their purchase of new energy technology products became a central issue in the authorisation process:
  - 24.1. As initially drafted and submitted for authorisation, the NETCC prohibited signatories from offering deferred payment arrangements provided by finance providers who were not licensed under the NCCPA where the deferred payment arrangement was not regulated by, or was exempt from, the NCC.<sup>16</sup> This effectively excluded signatories from making available BNPL finance arrangements for the purchase of new energy technology products.
  - 24.2. In its draft determination, the ACCC proposed to authorise the NETCC, but sought feedback on whether it was appropriate to allow retailers to offer BNPL finance under the NETCC where it could be demonstrated that the BNPL provider offered sufficient consumer protections.<sup>17</sup> In advancing this possibility, the ACCC was informed by submissions it received on that point from interested parties.
  - 24.3. Following consultation, the Authorisation Applicants amended the NETCC.<sup>18</sup> The version of the Code the ACCC considered for the final determination allowed retailers to offer deferred payments exempt from the NCC (i.e., BNPL) provided that the credit provider, or its related body corporate, held a credit licence and met certain other requirements (notably, that a responsible lending assessment must be carried out in strict compliance with the NCCPA and NCC).
25. In imposing its conditions, the ACCC did not intend to prohibit BNPL finance being made available to consumers in conjunction with purchases of new energy technology products. The ACCC considered it important to preserve this finance option for consumers. Further, it considered that there would be a likely public detriment from excluding it entirely under the NETCC.
26. It is for this reason that, in relation to one of the most contentious aspects of clause 25 (i.e., the responsible lending assessment), the ACCC reduced the standard required of BNPL providers relative to that required under the final version of the NETCC advanced by the Authorisation Applicants on 11 November 2019.
27. Specifically, the BNPL Finance Requirement Condition removed the requirement for a BNPL provider to conduct a responsible lending assessment in *strict* compliance with the obligations contained in the NCCPA and NCC. It instead required the BNPL provider to

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<sup>16</sup> See also Authorisation Applicants Opening Submissions at [37]-[39].

<sup>17</sup> See Authorisation Applicants Opening Submissions at [40].

<sup>18</sup> See Authorisation Applicants Opening Submissions at [41]-[49].

conduct a responsible lending assessment that provides *substantially* equivalent protections to those contained in specified sections of the NCCPA and NCC. In addition, the condition removed the requirement in the NETCC for the BNPL provider, or its related body corporate, to hold a credit licence. Such a requirement would have excluded some BNPL providers with minimal, if any, corresponding consumer protection benefit, as holding of a credit licence is not relevant to the offer of BNPL finance.<sup>19</sup>

28. Further, the BNPL Finance Requirement Condition dealt with a timing issue with an earlier version of clause 25 that was put forward by the Authorisation Applicants (and which is broadly the formulation of clause 25 for which Flexigroup contends<sup>20</sup>). That earlier version would have allowed BNPL finance under the NETCC subject to the provider being a signatory to a regulator approved industry code that delivers substantively equivalent protections, as contained in the NCCPA (the “industry code formulation”). The BNPL Finance Requirement Condition sought to accommodate the uncertainty of when any such industry code would be developed and then approved.<sup>21</sup>
29. The ACCC considered that the final version of clause 25 as advanced by the Authorisation Applicants provides necessary additional clarity and certainty as to the consumer protections that are required of BNPL providers as compared to the industry code formulation. This view was informed by information provided in the ASIC submission, including ASIC’s proposed formulation of clause 25.<sup>22</sup> The BNPL Finance Requirement Condition seeks to strike a balance in standards. In some respects, it imposes appropriately higher standards, and even greater certainty and clarity, as to specific protections to which the BNPL provider must adhere, than the final version of the NETCC. For example, it requires the BNPL provider to comply with ASIC Regulatory Guide 165 in relation to internal dispute resolution processes and sections of the NCC in respect of hardship provisions.<sup>23</sup> In other respects, it lowers the requirements of the final version of the NETCC.
30. Overall, the ACCC considered that the Conditions struck an appropriate balance. In its view, the Conditions provided high standards of consumer protection for all types of finance offered by signatories, congruently with the wider purpose of the NETCC, and ensured that public benefits would be more fully realised. And they did so, in the ACCC’s view, without imposing obligations that would ultimately restrict consumer choice and produce greater public detriment than would arise without the Conditions.
31. In the draft determination, the ACCC also invited further comment on submissions that had suggested that unsolicited sales of new energy technology products be banned. In cases where consumer harm had been experienced in acquiring BNPL finance, the underlying

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<sup>19</sup> See, eg, Devizo Pty Ltd Submission to ACCC dated 30 August 2019 [**HB 6:3426-3428**]; Authorisation Applicants Opening Submissions at [129]-[131].

<sup>20</sup> See Flexigroup Opening Submissions at [11(b)].

<sup>21</sup> See ASIC Submission to ACCC at [41]-[48] [**HB 4:1812-1813**].

<sup>22</sup> See ASIC Submission to ACCC at [41]-[54], [61]-[62] [**HB 4:1812, 1814, 1816**].

<sup>23</sup> This was consistent with a submission from ASIC: ASIC Submission to ACCC at Annexure 1 [**HB 4:1820**]. See also AFIA Submission to ACCC dated 8 November 2019 [**HB 6:3485**]; CALC Submission to ACCC dated 7 November 2019 [**HB 3479**].



purchase of the new energy technology product was often the result of an unsolicited sale.<sup>24</sup> In exploring this issue, a further issue of competitive neutrality, arising from the operation of clauses 23 and 23(4) of the National Credit Regulations, described at paragraphs 15 to 17 above, became apparent and was considered.<sup>25</sup>

32. Once it was proposed that the NETCC would permit BNPL finance to be provided by signatories subject to the BNPL provider meeting certain standards of consumer protection, another issue was enlivened: whether the NETCC should go further and level the playing field between regulated finance providers and BNPL providers in the context of a retailers' ability to offer finance products in unsolicited sales.
33. Under the proposed NETCC, a signatory would not be able to offer a regulated finance product in an unsolicited sale unless the retailer holds an Australian Credit Licence or is an authorised representative of a licensee and conducts a responsible lending assessment as required under the NCCPA, along with providing all of the other consumer protections mandated in the NCCPA and NCC. However, that retailer would be free to offer BNPL finance in an unsolicited sale without meeting the credit licence requirement and corresponding mandated responsible lending assessment.
34. The Authorisation Applicants introduced clause 3(d) of the NETCC as a means of addressing this issue.<sup>26</sup>
35. In its final determination, the ACCC imposed the Clarification On Unsolicited Offers Condition, which was intended to ensure the likely public benefits from increased consumer protections would be achieved, by reducing the risk of consumers entering into unsuitable and/or unaffordable finance arrangements in unsolicited sales of new energy technology products involving BNPL finance.

### **PART III THE ROLE OF THE ACCC AND THE TRIBUNAL**

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36. Division 1 of Part VII of the CCA establishes an authorisation process for conduct that might, but for authorisation, contravene certain provisions of the CCA. Division 1 allows that "certain classes of possibly anti-competitive conduct may be exempted from the prohibitions of the [CCA] if the public benefit deriving from the proposed conduct outweighs its anti-competitive detriment".<sup>27</sup> And it recognises that "the benefits of competition may themselves be in competition with benefits flowing from anti-competitive conduct. It provides an administrative process to remove the risk that proposed beneficial conduct may contravene competition laws".<sup>28</sup>

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<sup>24</sup> See, eg, CALC Submission to ACCC dated 21 August 2019 [HB 6:3378-3383]; CALC Submission to ACCC dated 21 May 2019 [HB 6:3384, 3387]; Uniting Vic Tas Submission to ACCC dated 23 August 2019 [HB 6:3402-3403].

<sup>25</sup> See, eg, Ratesetter Submission to ACCC dated 22 September 2019 [HB 6:3455]; Ratesetter Submission to ACCC dated 4 October 2019 [HB 6:3473-3474].

<sup>26</sup> See Authorisation Applicants Opening Submissions at [50]-[51].

<sup>27</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [105].

<sup>28</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [105].

37. The relevant provisions of Division 1 begin with s 88(1), which empowers the ACCC to grant an authorisation to a person subject to Part VII, “to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply”. The effect of an authorisation is to permit the applicant and certain others to engage in conduct without specified provisions of Part IV of the CCA applying to that conduct (s 88(2)).
38. The tests and principles to be applied in granting authorisation will be addressed in Part IV. What is relevant for present purposes is that s 101(1) of the CCA provides that a “person dissatisfied with a determination by the Commission ... in relation to an application for an authorization ... may ... apply to the Tribunal for a review of the determination”. On such a review, the Tribunal “may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission” (s 102).
39. Section 101(2) clarifies that the review of such an authorisation determination “is a rehearing of the matter”. What this means is that the Tribunal must “undertake a complete rehearing of the authorisation application”, and “make its own findings of fact and reach its own decision as to whether authorisation should be granted or not and, if so, any conditions to which it is to be subject”.<sup>29</sup> That function is not performed by considering “whether the ACCC was right or wrong in the conclusion it reached or whether it could have better formulated its determination”.<sup>30</sup> Rather, the Tribunal must “assess the applications for authorisation on their merits and by reference to the information and evidence given to the ACCC and any material that the parties wish to put before the Tribunal”.<sup>31</sup>
40. Flexigroup’s submission that “[t]he Tribunal’s task is focused on reviewing the ACCC’s Determination which in this case was to grant authorisation subject to the BNPL Conditions” must be treated with caution, and rejected if it was intended to suggest anything contrary to the above statements of principle.<sup>32</sup> The Authorisation Applicants are correct that “the Tribunal must still be satisfied, before authorising the Tech Code (conditionally or otherwise), that the statutory grounds allowing the authorisation are satisfied and that it should exercise its discretion to grant the authorisation”.<sup>33</sup>
41. That said, “[t]he published reasons for determination of the Commission may, in an appropriate case, prove a convenient reference point for defining the matters which are truly in dispute between all or any of the Commission, the applicants, and other parties represented, or interested, in the proceedings”.<sup>34</sup> But any “findings or conclusions which the Commission has expressed in its published reasons for determination should not ... be seen as in any way restricting it either as regards the evidence which it leads or the submissions which it makes upon the hearing of an application for review by the Tribunal”.<sup>35</sup>

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<sup>29</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [135], [138].

<sup>30</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [138].

<sup>31</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [138].

<sup>32</sup> Flexigroup Opening Submissions at [69].

<sup>33</sup> Authorisation Applicants Opening Submissions at [60].

<sup>34</sup> *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 296.

<sup>35</sup> *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 300.

42. Guidance on the Tribunal's function and the performance of that function can be gained from *Re 7-Eleven Stores Pty Ltd*:<sup>36</sup>

In curial proceedings based on the adversarial system, the role of a court is to determine issues identified by the parties, usually in pleadings. Proceedings before the Tribunal are not adversarial in nature, and the role of the Tribunal is not merely to resolve issues in dispute between the parties. It is an administrative tribunal with a much wider role. It is required to determine whether anti-competitive conduct or anti-competitive provisions in a contract, arrangement or understanding that would otherwise be unlawful, should, in the public interest, be authorised because the public benefit outweighs the detriment constituted by any lessening of competition. Determinations of the Tribunal are likely to impact on the commercial interests of many people who are not participants in the proceedings before the Tribunal.

Notwithstanding the positions taken by the parties in this case, the Tribunal in the exercise of its statutory functions, must consider each of the issues arising under s 91(4) [note: this provision has now been repealed] which precede a consideration of the terms and duration of the further authorisation granted by the determinations under review. On these essential steps, the Tribunal must reach its own conclusions. It must make its own assessment of both benefit and detriment.

However, where the applicants and other parties participating in proceedings before the Tribunal agree with findings on factual matters set out in the Commission's published reasons for determination, the Tribunal would ordinarily be justified in treating those findings as common ground which significantly limits the areas of primary fact which the Tribunal is itself required to examine in detail; see *Re Herald & Weekly Times Ltd (Media Council of Australia (No 1))* (1978) ATPR ¶40-058 at 17,601; (1978) 17 ALR 281 at 296 where the Tribunal (Deane J, President, Shipton and Walker, Members) observed that fairness and common sense combine to require that the Tribunal determine an application for review within the context of matters which can properly be seen to be in issue between the parties or which the Tribunal itself raises or indicates that it regards as being at large.

43. The Tribunal described the ACCC's role in this review in its reasons for granting leave to certain entities to intervene as follows (citations omitted):<sup>37</sup>

The ACCC is not a party or protagonist in the proceeding. Its role is to assist the Tribunal in an impartial manner, regardless of any conclusions it may have drawn from its earlier analysis in the matter. As the Tribunal observed in *Application by DBNGP (WA) Transmission Pty Ltd (No 3)*, the manner in which the "Hardiman" principles are to be applied in a given

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<sup>36</sup> [1998] ATPR ¶41-666 at 41,453.

<sup>37</sup> *Application by Flexigroup Ltd* [2020] ACompT 1 at [20].

case depends upon a number of factors including the presence of a contradictor and the nature of the review proceedings and whether the matter is likely to be remitted to the initial decision maker. In the absence of a contradictor, the ACCC may be required to test the evidence of the applicant, present contrary material and make submissions putting forward an opposing point of view, although none of this should be done in a partisan fashion. In the presence of a contradictor, however, the role of the ACCC should properly be more confined.

44. More particularly, in *Re Queensland Co-operative Milling Association Ltd; Re defiance Holdings Ltd*, the Tribunal accepted that the ACCC's role is:<sup>38</sup>
- 44.1. to examine any statement of facts and contentions put before the Tribunal by a party, in order to see if all material facts and conditions are fully and fairly presented, and to submit to the Tribunal the results of each such examination;
  - 44.2. to furnish to the Tribunal such additional information as the ACCC considers to be material to the issues before the Tribunal;
  - 44.3. to assist the Tribunal to evaluate the information furnished to it by such means as are appropriate, including the cross-examination of witnesses and the production of additional information having the effect of correcting, qualifying or contradicting information already supplied; and
  - 44.4. to make submissions to the Tribunal as to the considerations which the ACCC considers material to the hearing before the Tribunal.

## **PART IV THE STATUTORY SCHEME AND KEY CONCEPTS**

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### **A. The statutory scheme**

45. Before either the ACCC or the Tribunal on review can grant authorisation, s 90(7) of the CCA must be satisfied. It provides:

The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless the Commission is satisfied in all the circumstances:

- (a) that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) that:
  - (i) the conduct would result, or be likely to result, in a benefit to the public; and

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<sup>38</sup> (1976) 25 FLR 169 at 173-174.

- (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

46. The ACCC's view is that s 90(7)(a) is of no present relevance, and that it is appropriate to focus only on s 90(7)(b).<sup>39</sup> That is because authorisation was sought, amongst others, in respect of certain provisions in Division 1 of Part IV, and s 90(8) provides that s 90(7)(a) does not apply to the extent that one or more provisions in that Division would apply to the conduct but for an authorisation under section 88. Further, no participant in the review suggests that consideration should be given to s 90(7)(a).
47. Section 90(7) requires the Tribunal to be "satisfied" of these matters. Without importing the legal concept of onus of proof into Tribunal proceedings,<sup>40</sup> this standard entails as a practical matter that the applicant establish the factual basis for the authorisation sought.<sup>41</sup>
48. Even if the Tribunal is satisfied in all the circumstances that the matters in s 90(7)(b) are established, it does not follow that authorisation must be granted. The power to grant authorisation is discretionary.<sup>42</sup> Section 90(7) contains "*necessary* conditions only. Their satisfaction does not require that the ACCC grant authorisation. There is a discretion to refuse authorisation even where the relevant public benefit test is satisfied".<sup>43</sup>
49. Moreover, there is a power in s 88(3) of the CCA to specify conditions in the authorisation. The authorisation will not apply if those conditions are not complied with.

## **B. KEY CONCEPT ONE: PUBLIC BENEFITS AND PUBLIC DETRIMENTS**

50. Section 90(7)(b) uses the concepts of "benefit to the public" and "detriment to the public". These concepts are not defined in the CCA but they have been considered by this Tribunal many times.
51. A benefit to the public includes "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress".<sup>44</sup> This concept should not be given any narrow meaning.
52. A detriment to the public includes "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".<sup>45</sup> This concept should also not be given

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<sup>39</sup> The *Guidelines for Authorisation of Conduct (non-merger)* (March 2019) at 37 [6.6] note that the ACCC will consider parts of the proposed conduct which may breach only the non-per se provisions of the CCA. But no participant in the review has suggested that any such approach should be pursued in this review.

<sup>40</sup> *Re Mortgage Guarantee Insurance Corporation of Australia Ltd* (1984) 73 FLR 304 at 311.

<sup>41</sup> *Re Tooth & Co Ltd; Re Tooheys Ltd* (1979) 39 FLR 1.

<sup>42</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106].

<sup>43</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106].

<sup>44</sup> *Queensland Co-operative Miling Association Ltd* (1976) ATPR 40-012 at 17,242; *Re 7-Eleven Stores* [1994] ATPR 41-357 at 42,677.

<sup>45</sup> *Re 7-Eleven Stores* [1994] ATPR 41-357 at 42,683.

any narrow meaning, although the Tribunal in *Application by Medicines Australia Inc* explained:<sup>46</sup>

Although “detriment” covers a wider field than anti-competitive effects in many cases the important detriments will have that character. The relevant detriment will flow from the anti-competitive effect of the conduct to which authorisation is sought. This does not exclude consideration of other detriments which may be incidental to and therefore detract from a claimed public benefit. To that extent such detriment will be relevant in weighing the public benefit”.

### C. KEY CONCEPT TWO: LIKELIHOOD

53. Section 90(7)(b) requires the Tribunal to consider whether the conduct “would result, or be likely to result,” in public benefits and public detriments.
54. For a benefit or detriment to be taken into account, the Tribunal should be satisfied that the benefit or detriment is at least “likely” to result from the conduct. This requirement that the benefit or detriment be “likely” operates to limit the range of benefits and detriments to be considered.<sup>47</sup>
55. Consistently with the use of the word “likely” in Part IV of the CCA, what “likely” means here is that there is a real chance, and not a mere possibility, of the benefit or detriment occurring as a result of the conduct. Benefits or detriments should not be considered in so far as they are merely speculative or a mere theoretical possibility.<sup>48</sup>

### D. KEY CONCEPT THREE: MARKET ANALYSIS

56. A market is an area or space of close competition between firms or the field of rivalry between them.<sup>49</sup>
57. Market definition is a purposive exercise that focuses analysis, situating alleged contravening conduct in the context of a particular statutory prohibition and an area of competitive activity, by reference to the four dimensions of product, geography, functional level and time.<sup>50</sup>

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<sup>46</sup> [2007] ATPR ¶42-164 at 47,518 [108].

<sup>47</sup> See *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [107].

<sup>48</sup> See *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [109]. See also *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCAFC 77 at [243], [245]-[246].

<sup>49</sup> *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190, referred to with approval in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2002) 215 CLR 374 at 422 [133] (Gleeson CJ and Callinan J), 454-455 [248] (McHugh J); *Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 261 CLR 203 at 227 [66] (Kiefel and Gageler JJ).

<sup>50</sup> *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR ¶42-123 at 45,243 [429] (Allsop J); *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 187 (Mason CJ and Wilson J); *Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd* (2016) 244 FCR 190 at [110] (Dowsett and Edelman JJ).

58. As the ACCC *Guidelines for Authorisation of Conduct (non-merger)* note, “it is often sufficient to identify the relevant areas of competition in which the proposed conduct or its effects will occur, without precisely defining the boundaries of the relevant market”.<sup>51</sup>

#### **E. KEY CONCEPT FOUR: THE FUTURE WITH AND WITHOUT**

59. In assessing public benefits and detriments, “the Tribunal looks to hypothetical futures with and without the proposed conduct”.<sup>52</sup> As the Tribunal has previously explained (in a case where the proposed conduct was an acquisition):<sup>53</sup>

The test is not to compare the present situation with the future situation, were the acquisition to take place: a “before and after” test. Rather the test is to appraise the future, were the acquisition to take place, in light of the alternative outcome, were the acquisition not to take place: the “future with-and-without test”.

60. The Tribunal in *Application by Medicines Australia Inc* explained that:<sup>54</sup>

The so called “future with or without test” is not a comparison of a hypothetical future in which the proposal the subject of the application is authorised against a hypothetical future in which it is not authorised. What the test requires is 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.

This is not the same as comparing a future in which the proposed conduct is authorised against a future in which it is not authorised, because it should not be assumed that the conduct will not occur without authorisation.<sup>55</sup>

61. In applying the future with or without test, it is important to identify the proposed conduct with precision. This is because the process of authorisation results in certain statutory provisions not applying to particular conduct that is specified in the authorisation: see s 88(1), (2). This can be contrasted with the effect of the ACCC’s determination, which was to grant authorisation to the proposed conduct subject to conditions that alter the proposed conduct to the extent of those conditions.

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<sup>51</sup> *Guidelines for Authorisation of Conduct (non-merger)* (March 2019) at 39 [6.17].

<sup>52</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117].

<sup>53</sup> *Qantas Airways Ltd* [2004] ACompT 9 at [151] citing *Re QIW Ltd* (1995) 132 ALR 225 at 276 and quoted in *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117].

<sup>54</sup> [2007] ATPR ¶42-164 at 47,521 [120].

<sup>55</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

## F. KEY CONCEPT FIVE: THE DISCRETION

62. In *Application by Medicines Australia Inc*, the Tribunal described the discretion to refuse authorisation even where the test for authorisation is satisfied as follows:<sup>56</sup>

The discretion is not narrowly confined given the enormous variety of circumstances to which it may have to be applied. It is neither necessary nor desirable to try to define its outer limits. It is sufficient to say that considerations relevant to the objectives of the Act may play a part in the exercise of the discretion even where the public benefit test has been satisfied.

63. The Tribunal illustrated how the discretion might operate in possible cases as follows:

63.1. Where the likelihood of public benefit outweighs the likelihood of a “substantial anti-competitive detriment”, it may be open to refuse authorisation because that anti-competitive detriment is “unacceptable”.<sup>57</sup>

63.2. Where proposed conduct has only limited public detriments and limited public benefits, authorisation might be refused so as not to give sanction to conduct with sufficient but nevertheless weak public benefit.<sup>58</sup> It is open to require that “the conduct yields some substantial measure of public benefit if it is to attract the ACCC’s official sanction. The Tribunal is in a similar position”.<sup>59</sup> As will be explained in Part G below, a condition can be imposed, for example, that requires the conduct to “yield a more substantial public benefit than is required to get over the threshold of the necessary conditions comprising s 90”.<sup>60</sup>

## G. KEY CONCEPT SIX: CONDITIONS

64. Section 88(3) provides that the Tribunal may specify conditions in the authorisation and if any of the conditions are not complied with, the statutory protection from legal action for engaging in the conduct specified in the authorisation does not apply.
65. There is no express limit upon the kind of conditions that may be imposed, but the Tribunal’s power to impose conditions is constrained, like the discretion discussed above, by the subject matter, scope and purpose of the CCA.<sup>61</sup>
66. The Tribunal’s power to impose conditions is not limited to circumstances where the statutory test is not satisfied. The Tribunal may impose a condition in circumstances where, although the net public benefit test is met without the condition, the Tribunal would not be prepared to exercise its discretion in favour of authorisation.<sup>62</sup>

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<sup>56</sup> [2007] ATPR ¶42-164 at 47,522 [126].

<sup>57</sup> [2007] ATPR ¶42-164 at 47,522 [127].

<sup>58</sup> [2007] ATPR ¶42-164 at 47,522 [127].

<sup>59</sup> [2007] ATPR ¶42-164 at 47,522 [128].

<sup>60</sup> [2007] ATPR ¶42-164 at 47,523 [128].

<sup>61</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523 [129].

<sup>62</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522-47,523 [128], 47,523 [133].



67. In *Application by Medicines Australia Inc*, the Tribunal outlined that a condition may be imposed for reasons that include the following:
- 67.1. where there is no, or insufficient, public benefit, such that the conduct does not satisfy the test for authorisation, a condition may be imposed requiring a variation of the proposal which would yield the requisite public benefit. Such a condition may:
    - 67.1.1. reduce the public detriment;
    - 67.1.2. reduce the public detriment which would otherwise cause the claimed public benefit to be discounted;
    - 67.1.3. increase the public benefit such that it would meet the applicable statutory test;
  - 67.2. where a theoretically sufficient public benefit has been identified, a condition may be imposed to vary the proposal so that the likelihood of the benefit resulting is raised to a sufficient level;
  - 67.3. where the public benefit test in s 90 is satisfied, a condition may be imposed, without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation. In this regard, the range of conditions that may be imposed is limited by the range of considerations relevant to the exercise of the discretion.<sup>63</sup>
68. It is appropriate for the Tribunal to have regard to the burden the condition would impose upon the party seeking authorisation.<sup>64</sup>

## **PART V THE REVIEW**

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### **A. The relevant market**

69. The ACCC's determination identified the following areas of competition as relevant to whether authorisation should be granted:
- 69.1. the supply of different types of new energy technology products and services; and
  - 69.2. financial products, including particularly deferred payment arrangements, offered with new energy technology products and services.
70. The Tribunal may wish to proceed on the basis of these areas of competition, having regard to the material before the Tribunal and the fact that no participant to the review has put these areas of competition in dispute.<sup>65</sup> In those circumstances, this issue in this case is of a kind predicted by the Tribunal in *Re Herald & Weekly Times Ltd*.<sup>66</sup>

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<sup>63</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

<sup>64</sup> *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

<sup>65</sup> Flexigroup Opening Submissions at [67]; Authorisation Applicants Opening Submissions at [72].

<sup>66</sup> (1978) 17 ALR 281 at 296.

The published reasons for determination of the Commission may, in an appropriate case, prove a convenient reference point for defining the matters which are truly in dispute between all or any of the Commission, the applicants, and other parties represented, or interested, in the proceedings. In a case where there is a consensus among the Commission and all parties participating in the proceedings that some of the findings and factual matters set out in the Commission's published reasons for determination should be treated by the Tribunal as common ground, the Tribunal might well be persuaded to treat such findings or factual matters as significantly limiting the area of primary fact which the Tribunal is itself required to examine in detail.

## **B. The factual and counterfactual**

71. There is disagreement among review participants as to the proper identification of the factual and the counterfactual.
72. Two possibilities have been put forward to the Tribunal:
  - 72.1. Flexigroup<sup>67</sup> suggests that the factual is the conduct in the NETCC and that the counterfactual includes the NETCC with different or no conditions
  - 72.2. the Authorisation Applicants<sup>68</sup> and the ACCC contend that the factual is the future with the conduct (being signing up to and implementing the NETCC) and the counterfactual is the future without that conduct (being signing up to and implementing the NETCC).
73. None of the other SOFICs and opening submissions filed by the review participants address this issue.
74. The Authorisation Applicant's and the ACCC's identification of the factual and the counterfactual are more consistent with the scheme of the CCA and with the authorities.
75. *First*, the likely future with-and-without the conduct sought to be authorised is relevant to the Tribunal's consideration of whether s 90(7) is satisfied. That question arises anterior to the question of what, if any, conditions to impose upon authorisation. Conditions may be imposed in a manner that affects the weighting of public benefits and detriments, and the separate issues should not be conflated in the way Flexigroup suggests.
76. *Secondly*, as a matter of principle, the future with-and-without test looks to the future with the conduct that is sought to be authorised and compares it with the future without that conduct. As explained in Part E above, "[t]he comparison is between the future with the relevant conduct and the future without the relevant conduct",<sup>69</sup> being here signing up to

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<sup>67</sup> Flexigroup ASOFIC at [43] [HB 1:62]; Flexigroup Opening Submissions at [65].

<sup>68</sup> See Authorisation Applicants Opening Submissions at [71], [146]-[148]; cf Authorisation Applicants ASOFIC at [31] [HB 1:121].

<sup>69</sup> *Re Media Council of Australia Authorisation; Re Australian Consumers' Association's Application* (1987) 88 FLR 1 at 11.

and implementing the NETCC. It confounds the analysis to treat the counterfactual as a future world with the NETCC but with different conditions.

77. *Thirdly, in Application by Medicines Australia*, the Tribunal assessed the future without the code that was sought to be authorised in terms of the future “[a]bsent the Code” entirely, and said that this analysis “does not require the hypothesis of a variety of alternative or lesser codes”.<sup>70</sup>
78. *Fourthly*, by conflating consideration of s 90(7) with the power to impose conditions, there is a risk that the Tribunal will ultimately take too narrow an approach to considering whether and what conditions to impose. That power is not conditioned upon the application of any future with-and-without tool of analysis.

### **C. Approach to identifying public benefits and detriments**

79. In assessing benefits (and indeed, detriments), the Tribunal should consider how the NETCC is likely to operate in practice, rather than focus narrowly or rigidly on the bare terms of the NETCC itself.<sup>71</sup> And in reviewing the terms of the NETCC, it may be relevant to consider how far they go beyond existing law, and how readily they may be enforced having regard to the manner of their drafting.<sup>72</sup>
80. As the ACCC noted in the introduction to these written opening submissions, the critical issue in this review is likely to concern the conditions to be imposed upon any authorisation. No participant in the review contends that authorisation should not be granted. But as the ACCC has also sought to emphasise above, and as the Tribunal observed at the case management hearing on 26 May 2020, it is incumbent upon the Tribunal to satisfy itself that authorisation *is* appropriate. That warrants closer attention to the likely public benefits and detriments than might initially be thought warranted having regard to the issues in dispute between the parties.

### **D. Public benefits**

81. The NETCC may give rise to a number of public benefits.
82. *First and at a general level*, the NETCC imposes requirements on signatories that go beyond existing requirements at law. These requirements pertain to:
- 82.1. the advertising, promotion and direct marketing and sale of new energy technology products;
- 82.2. contractual arrangements with consumers and the financing of purchases;
- 82.3. the installation and operation of new energy technology products; and

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<sup>70</sup> [2007] ATPR ¶42-164 at 47,560 [309]-[310].

<sup>71</sup> *Re Media Council of Australia Authorisation; Re Australian Consumers' Association's Application* (1987) 88 FLR 1 at 11, 33.

<sup>72</sup> See *Re Media Council of Australia Authorisation; Re Australian Consumers' Association's Application* (1987) 88 FLR 1 at 33.

82.4. termination of services and complaints.

83. These requirements enhance the protections provided to consumers in acquiring and operating new energy technology products. Enhancing these protections is clearly a public benefit,<sup>73</sup> and there is no genuine disagreement on this issue between the participants in the review.<sup>74</sup> However, close consideration should be given to the *extent* of the public benefit, and whether the NETCC could better realise these consumer protections through conditions.
84. Important material for the Tribunal to consider includes the following:
- 84.1. Evidence filed on behalf of CALC illustrating the difficulties which can confront consumers without more robust obligations being imposed on suppliers of BNPL arrangements.<sup>75</sup>
- 84.2. Evidence filed on behalf of Flexigroup.<sup>76</sup>
- 84.3. Evidence filed on behalf of Ratesetter.<sup>77</sup>
- 84.4. Material from ASIC.<sup>78</sup>
- 84.5. Evidence filed on behalf of the Authorisation Applicants.<sup>79</sup>
- 84.6. Submissions to the ACCC that are before the Tribunal.<sup>80</sup>

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<sup>73</sup> For some of the issues relating to new energy technology products that these protections can be seen to help to address, see generally Exhibit RPP-25 to the Affidavit of Rex Pascal Punshon affirmed on 4 May 2020 (**CALC Sunny Side Up Report**) [HB 2153-2159]; Affidavit of Ursula Claire Noye affirmed on 4 May 2020 at [11] [HB 5:2264-2265], Exhibit UCN-6 [HB 5:2296-2299], Exhibit UCN-8 [HB 5:2310-2345]; Tab 9 in Exhibit JC-1 to the Statement of Jacqueline Crawshaw dated 5 May 2020 [HB 3:1118, 1136-1137].

<sup>74</sup> Flexigroup ASOFIC at [48] [HB 1:63]; ASIC SOFIC at [25] [HB 1:133]; CALC SOFIC at [23] [HB 1:140]; Ratesetter SOFIC at [19] [HB 1:151]; Authorisation Applicants ASOFIC at [34]-[35] [HB 1:121-122]; Authorisation Applicants Opening Submissions at [78(b)], [87]-[89].

<sup>75</sup> See Affidavit of Jane Foley affirmed on 29 April 2020 at [6]-[7], [13]-[18], p 16 (within Annexure JF4) [HB 4:1847-1849, 1861]; Affidavit of Sue-Anne Thompson affirmed on 1 May 2020 at [8(a), (d)-(e), (g), (j)-(m)], [30] [HB 4:2040-2041, 2046]; Affidavit of Rex Pascal Punshon affirmed on 3 May 2020 at [7], [12], [33]-[40] [HB 4:1873-1877, 1880-1881], Exhibits RPP-9 [HB 4:1884-1885] and RPP-10 [HB 4:1930-1932]; Affidavit of Rex Pascal Punshon affirmed on 4 May 2020 at [24], [33], [43] [HB 4:2095-2096, 2100-2104]; Affidavit of Ursula Noye affirmed on 4 May 2020 at [11]-[12], [22], [32(a)-(c)] [HB 5:2264-2268, 2274-2275].

<sup>76</sup> Statement of Taras Mysak dated 24 April 2020 at [22]-[23], [32], [46]-[52] [HB 2:345, 347, 350-352]; Statement of Taras Mysak dated 20 May 2020 at [4]-[7] [HB 2:730-731].

<sup>77</sup> Statement of Daniel Robert Foggo dated 8 May 2020 at [44]-[45] [HB 5:2715-2716]; Ratesetter Opening Submissions at Part C.7; Ratesetter Submission to ACCC dated 23 August 2019 at [3]-[4] [HB 6:3392].

<sup>78</sup> ASIC Report 600 at [57]-[60] [HB 4:1617], [158] [HB 1638]; Annexure KF-2 (ASIC Submission to Senate Inquiry) at [65] [HB 4:1674]; Annexure KF-3 (Senate Inquiry Report) at [1.57]-[1.58], [1.64] [HB 4:1712-1713]; ASIC Submission to ACCC at [6], [29]-[35], [60] [HB 4:1806, 1809-1811, 1816]. See also complaints data filed by ASIC on 15 May 2020, pursuant to the Tribunal's directions dated 7 May 2020.

<sup>79</sup> Statement of Jacqueline Crawshaw dated 5 May 2020 at [44]-[54], [99], [104]-[107], [126] [HB 3:866-869, 877-878, 881]; Exhibit JF-1 at tab 8 (authorisation application dated April 2019 at [16]-[25]), tab 9 (KPMG report), tab 18 (submission dated 23 September 2019); Statement of Benjamin Barnes dated 5 May 2020 at [44]-[50], [78] [HB 3:1356-1359, 1363]; Exhibit BB-1 at tab 9 (submission dated 6 September 2019 at 1) [HB 3:1375].

<sup>80</sup> CALC Submission to ACCC dated 21 May 2019 [HB 6:3290-3294]; CALC Submission to ACCC dated 7 November 2019 [HB 6:3476-3480]; CALC Submission to ACCC dated 21 August 2019 [HB 6:3377-3390]; Choice Submission to ACCC dated 22 May 2019 [HB 6:3305-3306]; Uniting Vic Tas Submission to ACCC

84.7. Submissions to the Tribunal.<sup>81</sup>

85. The Australian Finance Industry Association Limited (**AFIA**) is working on finalising an industry code of conduct for BNPL providers (**the BNPL Code**). According to a recent media release, AFIA has said that it intends to launch the BNPL Code on 1 January 2021.<sup>82</sup>
86. The Tribunal may consider that the prospect that the BNPL Code will come into force does not mean that the NETCC will not achieve this first public benefit on the basis that the NETCC will not add to what the BNPL Code requires:
- 86.1. The NETCC goes beyond the subject of BNPL finance arrangements.
- 86.2. The BNPL Code has not been finalised and the Tribunal might consider that it cannot be confident as to whether it will be finalised, when it will be finalised, what its precise content will be and whether it will be approved by relevant regulators (if such approval is sought).<sup>83</sup> The Tribunal may wish to note ASIC's concerns about the BNPL Code and its power to approve it.<sup>84</sup>
87. Further, in considering the relevance (if any) of the BNPL Code to this review, it might be useful to recall that authorisations can be varied or revoked and substituted with a new authorisation. Such a course might be appropriate in the future if the BNPL Code comes into force and its operation affects any authorisation granted and conditions specified by the Tribunal in the present review.
88. *Secondly*, there is material before the Tribunal which suggests that unsolicited sales of new energy technology products pose a significant threat to consumer interests.<sup>85</sup> Because responsible lending laws do not apply to BNPL finance arrangements, there is a heightened risk of potential harm to consumers in the provision of this finance generally.<sup>86</sup> This, in

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dated 29 May 2019 [**HB 6:3343-3344**]; Uniting Vic Tas Submission dated 23 August 2019 [**HB 6:3402-3403**]; Ratesetter Submission to ACCC dated 23 August 2019 [**HB 6:391-3394**]; Ratesetter Submission to ACCC dated 4 October 2019 [**HB 6:3471-3474**]; Energy Efficient Finance Submission to ACCC dated 18 September 2019 [**HB 6:3444-3448**]; Brighte Submission to ACCC dated 29 May 2019 [**HB 6:3307-3340**]; Brighte Submission to ACCC dated 8 November 2019 [**HB 6:3491-3495**]; Flexigroup Submission to ACCC dated 29 August 2019 [**HB 6:3404-3406**]; Payright Submission to ACCC dated 30 August 2019 [**HB 6:3426-3436**]; Payright submission to ACCC dated 12 November 2019 [**HB 6:3513-3521**]; Australian Financial Complaints Authority Submission to ACCC dated 12 November 2019 [**HB 6:3504-3512**].

<sup>81</sup> See Brighte Submission to Tribunal dated 3 April 2020 at [3.9] [**HB 6:3058**].

<sup>82</sup> See Statement of Taras Mysak dated 20 May 2020 at [11] [**HB 2:731**], Tab 3 of Exhibit TM-3 [**HB 2:749-750**].

<sup>83</sup> See Statement of Taras Mysak dated 24 April 2020 at [64]-[68] [**HB 2:354-355**]; Statement of Taras Mysak dated 20 May 2020 at [11] [**HB 2:731**]. See also Ratesetter Opening Submissions at [55]-[56].

<sup>84</sup> See ASIC Opening Submissions at [18]-[43]. See also Ratesetter Opening Submissions at [57].

<sup>85</sup> **CALC**: See Affidavit of Jane Foley affirmed on 29 April 2020 at [6], [9]-[14], [18] [**HB 4:1847-1849**], pp 16-17 [**HB 4:1861-1862**]; Affidavit of Sue-Anne Thompson affirmed on 1 May 2020 at [8] [**HB 4:2040-2041**]; Affidavit of Rex Pascal Punshon affirmed on 3 May 2020 at [7] [**HB 4:1873-1876**]; Affidavit of Rex Pascal Punshon affirmed on 4 May 2020 at [17], [33](a)-(e) [**HB 4:2093-2094, 2100-2101**], Exhibits 25-27 [**HB 4:2107-2259**] Affidavit of Ursula Noye, affirmed on 4 May 2020 at [28] [**HB 5:2269-2273**]. **Authorisation Applicants**: Statement of Benjamin Charles Barnes dated 5 May 2020 at [55] [**HB 3:1360**]. **Flexigroup**: Statement of Taras Mysak dated 24 April 2020 at [55]-[56] [**HB 2:352**]. But see also at [20]-[21]; Statement of Chantha Lake dated 22 April 2020 at [13] [**HB 2:211**].

<sup>86</sup> See Statement of Kevin Foo dated 5 May 2020, Annexure KF-2 at [65(a)-(b)] (ASIC submission to Senate Inquiry) [**HB 4:1674**].

combination with the complex<sup>87</sup> and high value nature of new energy technology products<sup>88</sup> and a high pressure sales environment,<sup>89</sup> increases the risk of potential harm to consumers arising from unsolicited sales.<sup>90</sup> The NCC itself recognises that unsolicited sales present higher risks to consumers, in that the credit licence exemption under reg 23 of the National Credit Regulations does not apply where there is an unsolicited contact in relation to the sale of a product or service.

89. The NETCC prohibits signatories from making unsolicited offers of BNPL finance arrangements in advertisements and promotional material (clause 3(d)). It may be open to the Tribunal to find that this clause will reduce the frequency of unsolicited sales, and thus give rise to the public benefit of avoiding risks deriving from such sales. This clause was included following amendments to the initial version of the NETCC to allow signatories to offer BNPL payment options under certain limited conditions,<sup>91</sup> thus recognising a potential heightened risk of consumer harm.
90. However, close consideration might be given to the *extent* of the public benefit. The evidence may ultimately show that the extent of the benefit is small, in that the risks to consumers arise less from unsolicited offers made in advertising and promotional material and more from unsolicited interactions with consumers where a new energy technology product is offered along with a BNPL finance option. Consideration might be given to whether the NETCC could better address any risks associated with unsolicited sales through the imposition of an appropriate condition.
91. *Thirdly*, the NETCC imposes obligations concerning the provision of information to consumers, for example in regulating information that must accompany a quote,<sup>92</sup> the information that must be provided in respect of BNPL arrangements,<sup>93</sup> and information about contracts.<sup>94</sup> These obligations equip consumers with better information to make informed choices about how their own interests are best served. This is important given the complexity of new energy technology products.<sup>95</sup> It is open to the Tribunal to find that this part of the NETCC is likely to give rise to a public benefit in the form of reducing information

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<sup>87</sup> See, eg, CALC Sunny Side Up Report [HB 4:2126, 2148, 2156, 2158-2159]; Statement of Benjamin Charles Barnes at [45] [HB 3:1357-1358]; Statement of Jacqueline Crawshaw at [53] [HB 3:868]. See also Uniting Vic Tas Submission to ACCC dated 29 May 2019 [HB 6:3343-3344, 3402-3403]; CALC Submission to ACCC dated 21 August 2019 [HB 6:3377-3390]; CALC Opening Submissions at [136].

<sup>88</sup> See, eg, Statement of Taras Mysak dated 24 April 2020 at [43] [HB 2:349] (average cost of solar products is \$8735), Tab 7 of Confidential Exhibit TM-2 [HB 2:721].

<sup>89</sup> See, eg, CALC Sunny Side Up Report [HB 4:2125-2126, 2147-2152]; Affidavit of Jane Foley at [6], [10-12] [HB 4:1847-1848]; Affidavit of Sue Anne Thompson at [8 (c) to (e)] [HB 4:2040-2041]; CALC Opening Submissions at [97], [108], [117], [179].

<sup>90</sup> See, eg, CALC Sunny Side Up Report [HB 4:2147-2152]; CALC Submission to ACCC dated 21 August 2019 [HB 6:3382-3383]; Uniting Vic Tas submission to the ACCC (1000439.001.001.0801) [HB 6:3402-3403].

<sup>91</sup> See generally Authorisation Applicants Opening Submissions at [48]-[50]; See statement of Benjamin Barnes at [108]-[114] [HB 3:1368-1369], and Statement of Jacqueline Crawshaw at [105]-[106] [HB 3:878]. See also submission from Authorisation Applicants' to ACCC of 25 September 2019 [annexed at tab 19 of JC-1] [HB 3:1243-1271].

<sup>92</sup> NETCC, clauses 9-18.

<sup>93</sup> NETCC, clause 25(c).

<sup>94</sup> NETCC, clause 22.

<sup>95</sup> See, eg, CALC Sunny Side Up Report [HB 5:2126, 2148, 2156, 2158-2159]; Uniting Vic Tas Submission to ACCC dated 29 May 2019 [HB 6:3343-3344, 3402-3403].

asymmetry between retailers and finance providers, on the one hand, and consumers on the other hand.<sup>96</sup> In evaluating information asymmetry, the Tribunal may wish to consider material about surcharging as an example of information that is hidden from consumers.<sup>97</sup>

92. In considering the extent of these and any other public benefits, the Tribunal may consider whether the NETCC is, and is seen to be, effective in regulating the conduct of signatories. In so far as any of the public benefits depends upon compliance with the NETCC, the extent of the benefit will be affected by consideration of how compliance is to be enforced. The ACCC did not have concerns in this regard in making its determination, but as has been noted it is for the Tribunal to consider the matter for itself.

## **E. Public detriments**

93. The NETCC may give rise to a number of public detriments.
94. *Firstly*, BNPL arrangements can only be offered through a credit provider that holds an Australian Credit Licence or is a related body corporate of a credit provider that holds an Australian Credit Licence. Not all BNPL providers or their related bodies corporate would meet this requirement.<sup>98</sup> Accordingly, signatories may be able to offer fewer financing arrangements to consumers, which reduces consumer choice. The Tribunal might consider whether there is material before it to find that there is a real chance of diminished consumer choice.<sup>99</sup>
95. *Secondly*, the NETCC imposes obligations on signatories in relation to the offer of BNPL arrangements that go beyond the existing law. The Tribunal might consider whether there is material before it to find that these obligations will reduce the number of consumers accessing BNPL arrangements in relation to new energy technology products, and whether this may reduce competition in the supply of financial products for new energy technology products and/or in the supply of new energy technology products, including through a reduction in innovation.<sup>100</sup>

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<sup>96</sup> See also Authorisation Applicants Opening Submissions at [78(a)], [79]-[86].

<sup>97</sup> See below at paragraph 112.

<sup>98</sup> See, eg, Devizo Pty Ltd Submission to ACCC dated 30 August 2019 at p 4 [HB 6:3429]; Payright states that it does not currently hold and is not required to hold an Australian Credit Licence. See also ASIC Report 600 at [7] [HB 4:1607]; Authorisation Applicants Opening Submissions at [105(b)], [108], [129]-[130].

<sup>99</sup> See Devizo Pty Ltd Submission to ACCC dated 12 November 2019 [HB 6:3515-3516]; Authorisation Applicants Opening Submissions at [128]-[133]. Cf Statement of Daniel Robert Foggo dated 8 May 2020 at [24]-[29] [HB 5:2708-2712].

<sup>100</sup> See Statement of Chantha Lake dated 22 April 2020 at [34]-[38] [HB 2:217-218]; Statement of Taras Mysak dated 24 April 2020 at [54]-[63] [HB 2:352-354]. See also Authorisation Applicants Opening Submissions at [105(a)], [107]; Flexigroup Submission to ACCC dated 31 May 2019 at [1.9] [HB 6:3347], [11.1]-[11.6] [HB 6:3355-3356]; Brighte Submission to Tribunal dated 3 April 2020 at [6.7] [HB 6:3062]. Cf Statement of Daniel Robert Foggo dated 8 May 2020 at [18]-[21] [HB 5:2707-2708], [30]-[34] [HB 5:2712-2713], [43] [HB 5:2715], [45] [HB 5:2716]; CALC Submission to ACCC dated 21 August 2019 [HB 6:3380-3381]; Ratesetter Submission to ACCC dated 4 October 2019 [HB 6:3473-3474].

96. *Thirdly*, the NETCC results in signatories adopting consistent minimum standards of conduct that could add to signatories' costs of doing business and act as barriers to entry.<sup>101</sup>
97. *Fourthly*, the Tribunal might consider whether the provisions of the NETCC in relation to new signatories and disciplining signatories are sufficiently clear and regulated so as not to allow the exclusion of providers unfairly from it.<sup>102</sup>
98. *Fifthly*, as the ACCC noted above in the context of how the extent of public benefits might be assessed, the Tribunal may consider whether the NETCC can be effectively enforced as part of its consideration of public detriments. This is an issue raised by CALC, albeit in relation to the BNPL Finance Requirement Condition, in the context of submissions made about the Administrator under the NETCC.<sup>103</sup> A code which purports to regulate the conduct of its members but is not effectively enforced can create an appearance of accountability and an attendant potential for public detriment. Such an appearance may generate public detriments as it:
- 98.1. gives undue confidence to the public that signatories are complying with protections designed to enhance consumer protections and information;
  - 98.2. avoids the scrutiny that might otherwise be directed to the sector; and
  - 98.3. prevents or delays the introduction of more effective voluntary or statutory regulation.<sup>104</sup>

The ACCC did not have concerns in this regard in making its final determination.

## **E. Weighing benefits and detriments**

99. The ACCC submits that it is open to the Tribunal to be satisfied that the public benefits of the conduct sought to be authorised will outweigh its public detriments. It is therefore open to the Tribunal to be satisfied in all the circumstances of the net public benefit test in s 90(7)(b). The Authorisation Applicants,<sup>105</sup> ASIC<sup>106</sup> and Ratesetter<sup>107</sup> contend that the Tribunal can be satisfied of the matters in s 90(7)(b). CALC contends that s 90(7)(b) is satisfied if signatories to the NETCC do not offer BNPL finance arrangements,<sup>108</sup> and it does not contend that the proposed conduct would not satisfy s 90(7)(b).<sup>109</sup> Flexigroup's position

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<sup>101</sup> See, eg, Tab 14 of Exhibit JC-1 to the Statement of Jacqueline Crawshaw dated 5 May 2020 [**HB 1232**]; Tab 8 of Exhibit JC-1 to the Statement of Jacqueline Crawshaw dated 5 May 2020 [**HB 1226, 1231-1232**].

<sup>102</sup> See, eg, Solar Naturally Submission to ACCC dated 23 May 2019 [**HB 6:3341**]; Sunboost and Arise Solar Submission to ACCC dated 23 August 2019 [**HB 6:3395-3398**]. See also Clean Energy Council Submission to ACCC dated 5 September 2019 [**HB 6:3438**]; Tab 14 of Exhibit JC-1 to the Statement of Jacqueline Crawshaw dated 5 May 2020 [**HB 3:1226, 1231-1232**].

<sup>103</sup> See CALC Opening Submissions at [241], [253].

<sup>104</sup> See also CALC Opening Submissions at [31(b)], [220], [279].

<sup>105</sup> Authorisation Applicants ASOFIC at [46]-[47] [**HB 1:125**]; Authorisation Applicants Opening Submissions at [5(a)], [111]-[116].

<sup>106</sup> ASIC SOFIC at [25] (implicitly) [**HB 1:133**]; ASIC Opening Submissions at [4].

<sup>107</sup> Ratesetter Opening Submissions at [5].

<sup>108</sup> CALC Opening Submissions at [31].

<sup>109</sup> CALC Opening Submissions at [32]-[33].



is affected by its proposed approach to the factual and counterfactuals. It should be noted that it contends in the alternative that s 90(7)(b) would not be satisfied unless the conditions which the ACCC imposed are varied in the manner for which Flexigroup contends.<sup>110</sup>

100. The Tribunal may wish to pay close attention to the extent of the public benefit of the conduct, and the extent to which that benefit outweigh the detriments. That consideration may inform whether or not the Tribunal considers it appropriate to specify conditions in the authorisation.

## **F. Conditions**

101. In deciding what if any conditions to specify in the authorisation, the Tribunal may wish to consider:
- 101.1. whether a condition is needed to ensure that the net public interest test is satisfied;
  - 101.2. even if the net public benefit test is satisfied, whether a condition should be imposed to maximise or secure the public benefits to be realised, or to minimise or protect against the public detriments that may be realised.
102. In assessing these matters, the Tribunal may consider it useful to consider the *extent* of any benefits or detriments and the *likelihood* of them eventuating. While there is broad agreement between the participants to the review that the NETCC should be authorised, there is disagreement as to the precise balancing of benefits and detriments that may inform whether any conditions should be imposed and if so in what form.
103. That is, close consideration might be given to the terms of any conditions that could serve to ensure that the NETCC achieves the public benefits that justify its authorisation. Whether such conditions should be imposed may be informed by the nature and extent of any risk of harm to consumers from accessing BNPL finance to purchase new energy technology products. In considering possible conditions, the Tribunal might weigh the extent to which they minimise a risk of harm on the one hand, and the extent to which they burden retailers and BNPL providers and cause anti-competitive detriment and/or a loss of consumer choice on the other.
104. CALC's submissions to the Tribunal summarise the material before the Tribunal in respect of the potential harm of BNPL finance arrangements when purchasing new energy technology products.<sup>111</sup> Also relevant is material from ASIC, in particular the "ASIC complaints information" spreadsheet produced to the Tribunal on 15 May 2020 and the section on "The risk of over-commitment" in ASIC Report 600.<sup>112</sup>

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<sup>110</sup> Flexigroup Opening Submissions at [70].

<sup>111</sup> CALC Opening Submissions at [80]-[83].

<sup>112</sup> ASIC Report 600 at [40]-[43] [HB 4:1614].

105. The participants to the review have proposed a number of options to the Tribunal as to the conditions which it may choose to impose.
- 105.1. One position is to impose the conditions that the ACCC imposed. These are supported by ASIC,<sup>113</sup> and in part by CALC<sup>114</sup> and as an alternative position by Ratesetter.<sup>115</sup>
- 105.2. One position is to impose no conditions. This is the primary position adopted by the Authorisation Applicants<sup>116</sup> and Ratesetter.<sup>117</sup>
- 105.3. More tailored options are offered by CALC,<sup>118</sup> the Authorisation Applicants (if any condition is to be imposed)<sup>119</sup> and Flexigroup.<sup>120</sup>
106. The ACCC notes the following matters.
107. *First*, the only participant in the review which has opposed the Reporting Condition specified by the ACCC is the Authorisation Applicants.<sup>121</sup> The Tribunal may consider it useful to monitor how the NETCC is operating in practice. If so, it is open to it to be satisfied that such a condition is appropriate.
108. *Secondly*, if the Tribunal imposes a condition that permits retailers to offer BNPL finance arrangements from those providers who have signed up to the foreshadowed BNPL Code, or if that Code is in some other way relevant to the Tribunal's authorisation, then the Tribunal may wish to give consideration to transitional arrangements pending that BNPL Industry Code coming into force. The Authorisation Applicants dispute this suggestion,<sup>122</sup> but the ACCC considers that such transitional arrangements will likely be prudent to avoid any gap in the protections afforded to consumers. ASIC has expressed the same view.<sup>123</sup>
109. *Thirdly*, in relation to unsolicited sales, the Tribunal might give consideration to amending clause 3(d) so as to clarify or amplify its operation. There may be three benefits of the Clarification on Unsolicited Offers Condition imposed by the ACCC in this regard.

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<sup>113</sup> ASIC SOFIC at [25]; ASIC Opening Submissions at [3(a)], [4]. See also Statement of Kevin Foo dated 5 May 2020 at [23] [HB 4:1601].

<sup>114</sup> CALC SOFIC at [42] [HB 1:144].

<sup>115</sup> Ratesetter SOFIC at [19] [HB 1:151].

<sup>116</sup> Authorisation Applicants ASOFIC at [49] [HB 1:125]; Authorisation Applicants Opening Submissions at [145].

<sup>117</sup> Ratesetter SOFIC at [18] [HB 1:150-151].

<sup>118</sup> CALC SOFIC at [25] [HB 1:140-141].

<sup>119</sup> Authorisation Applicants ASOFIC at [51] [HB 1:126]; Authorisation Applicants Opening Submissions at [125], [133], [144].

<sup>120</sup> Flexigroup Form I - Application to Tribunal for Review at [5] [HB 1:3]; Flexigroup ASOFIC at [60] [HB 1:65-66]; Flexigroup Opening Submissions at [11]. Flexigroup also sought from the Tribunal a variation to the final determination to remove certain factual findings identified in paragraph 3 of Flexigroup's application. The Tribunal should not seek to vary the ACCC's Determination in that manner, in light of the principles set out in Part III above.

<sup>121</sup> See Authorisation Applicants Opening Submissions at [144]-[145].

<sup>122</sup> See Authorisation Applicants Opening Submissions at [134]-[141].

<sup>123</sup> ASIC Opening Submissions at [20].

- 109.1. The Authorisation Applicants accept that clause 3(d) as drafted is attended by some ambiguity.<sup>124</sup> The ACCC's condition makes the obligation clear.
- 109.2. If signatories to the NETCC cannot offer customers BNPL finance arrangements in connection with an unsolicited sale of a new energy technology product, then providers of such arrangements will be in the same position as providers of regulated credit products.<sup>125</sup> ASIC draws attention to this point in its written submissions.<sup>126</sup>
- 109.3. There is material before the Tribunal suggesting that unsolicited sales can be the occasion for harm to consumers.<sup>127</sup> The Clarification on Unsolicited Offers Condition seeks to avoid any such harm.
110. As against these matters, the Tribunal might consider the burden of this condition upon retailers of new energy technology products, BNPL providers and ultimately consumers. It is upon this consideration that the Authorisation Applicants<sup>128</sup> and Flexigroup place great weight in opposing re-imposition of the Clarification on Unsolicited Offers Condition.
111. *Fourthly*, the Tribunal may consider in what circumstances, if at all, signatories to the NETCC should be able to offer BNPL finance arrangements as presently provided for in clause 25 of the NETCC. The ACCC continues to consider that it is beneficial that BNPL finance arrangements be available for consumers: see also at paragraph 25 above. There is, however, room to enhance consumer protections where such finance arrangements are offered, congruent with the wider purpose of the NETCC and so as to ensure that the public benefits of the NETCC are more fully realised. The Tribunal can anticipate that the precise form of any such condition will be the subject of closing submissions.
112. *Fifthly*, there is material before the Tribunal suggesting that some retailers of new energy technology products pass onto customers the merchant fees charged by BNPL providers.<sup>129</sup> The Tribunal might wish to consider whether any condition should be specified to address such conduct. Evidence of surcharging may also bear upon the Tribunal's assessment of benefits and detriments, notwithstanding that the ACCC has dealt with the issue here in the context of conditions.

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<sup>124</sup> Authorisation Applicants Opening Submissions at [142].

<sup>125</sup> See NCCPA s 29; *National Consumer Credit Protection Regulations 2010* (Cth) reg 23(3)-(4).

<sup>126</sup> ASIC Opening Submissions at [45].

<sup>127</sup> See CALC Opening Submissions at [173]-[181].

<sup>128</sup> Authorisation Applicants Opening Submissions at [143]; Flexigroup Opening Submissions at [7], [32]-[33], [81]-[82].

<sup>129</sup> See ASIC Report 600 at [34]-[38] [**HB 1613-1614**]; ASIC Submission to ACCC at [8], [70]-[77] [**HB 1806, 1817-1819**]; CALC Opening Submissions at [182]-[211]; see second Statement of Taras Mysak dated 20 May 2020 at [22]-[26] [**HB 2:735-736**].

## **G. Length of authorisation**

113. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period. The ACCC granted authorisation for 5 years. The Tribunal may consider it appropriate to do so also, having regard to the following:

113.1. The application for authorisation sought authorisation for a period of 5 years.

113.2. None of the participants in the review has raised any concern with the proposed length of authorisation.

113.3. A finite period of authorisation is appropriate to trigger a review of the conduct that has been authorised to ensure that the balance of public benefits and detriments warrants ongoing authorisation.

113.4. A period of 5 years is consistent with the ACCC *Guidelines for Authorisation of Conduct (non-merger)*.<sup>130</sup>

**Ruth C A Higgins SC**

**Christopher Tran**

5 June 2020

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<sup>130</sup> *Guidelines for Authorisation of Conduct (non-merger)* (March 2019) at 52 [9.10]-[9.11].