

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 leave to intervene

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: 21/02/2020 4:46 PM

Important information

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



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019
Re: Application for Authorisation AA1000439
Lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code
Applicant: Flexigroup Limited (ACN 122 574 583)

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION IN SUPPORT OF APPLICATION FOR PERMISSION TO INTERVENE

Date of Document:	21 February 2020		
Filed on behalf of:	Australian Securities and Investments Commission		
Prepared by:	ASIC	Telephone:	(02) 9911 5703
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		Reference:	ACT 1 of 2019

Introduction

- 1 The Australian Securities and Investments Commission (**ASIC**) seeks permission to intervene in the present proceeding pursuant to s 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
- 2 The proceeding concerns an application by Flexigroup Limited (**Flexigroup**) pursuant to s 101 of the CCA for review of a determination made by the Australian Competition and Consumer Commission (**ACCC**) on 5 December 2019 (**Determination**). The Determination authorised the New Energy Tech Consumer Code (**Code**).

ASIC

- 3 ASIC regulates, inter alia, financial services and consumer credit. In that role, ASIC is intrinsically involved in the regulation of the Buy Now Pay Later (**BNPL**) sector.
- 4 As part of that involvement, ASIC has relatively recently:

- (a) published a detailed review of the BNPL sector;¹
- (b) made a submission to a Senate Inquiry into credit and financial services targeted at Australians at risk of financial hardship;² and
- (c) appeared before the above-mentioned Senate Inquiry.

5 The Senate released its report in February 2019 (Senate Report), and ASIC is presently working on a further public report which will include a response to address the recommendations in the Senate Report.

6 Further, relevantly to the present application, ASIC made a submission to the ACCC as part of the ACCC's consideration of the original application for authorisation.³ At the time the submission was made, ASIC requested that the submission be kept confidential as ASIC was in the early stages of drafting the forthcoming public report. ASIC does not maintain its claim for confidentiality in relation to the submission in the proceedings before the Tribunal.

Relevant principles

7 While s 109 of the CCA contains no express limitation on the Tribunal's discretion to grant permission to intervene, ASIC submits that in order to be granted permission, it should demonstrate that it is more than an officious bystander and has an interest other than that found in members of the general community.⁴

8 Further, although there appears to be a debate about whether it is necessary for an intervener to show a "real and substantial" or "sufficient" interest in order for permission to be granted,⁵ it is unnecessary to resolve that here, as ASIC submits it has a sufficient interest. In any event, ASIC submits that the substance of the question which the Tribunal must address was as summarised by the Tribunal in *Application by Independent Contractors Australia*:⁶

"... it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or

¹ ASIC Report 600. Flexigroup has made reference to this Report in its Application: see paragraphs 79-80 of the Attachment to Flexigroup's application in this proceeding.

² Submission 21.

³ ASIC's submission was made on a confidential basis but, as communicated to the parties on 31 January 2020, ASIC no longer seeks for the submission to be kept confidential.

⁴ *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [35].

⁵ Compare *Application by Sea Swift Pty Ltd* [2015] ACompT 5 at [8], and the cases cited therein, with *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].

⁶ [2015] ACompT 1 at [28].

supplement, evidence proposed to be led by the parties to the application or the submissions to be made by them, as well as considering how the proposed intervenor might be affected by the Authorisation or the outcome of the application to the Tribunal.”

The nature of ASIC’s proposed intervention

- 9 Flexigroup seeks review of the Determination in respect of certain conditions which the Code imposes in relation to BNPL arrangements, and related matters. In particular, it appears that Flexigroup seeks the removal of certain requirements for BNPL finance, and instead the substitution of requirements that deliver “substantively equivalent consumer protections” as those contained in the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**).⁷
- 10 Amongst other matters, Flexigroup contends that:
- (a) BNPL finance is adequately regulated under the provisions of the *Australian Securities and Investments Commission Act 2001* (Cth);⁸
 - (b) significant steps have been taken to develop a code of conduct for BNPL products which, it is contemplated, will in due course be approved under ASIC Regulatory Guide 183;⁹
 - (c) ASIC “did not consider it necessary that BNPL finance be subject to regulation under the NCCPA and the [National Credit Code]” (**NCC**);¹⁰
 - (d) the Determination and the Code overrides ASIC’s position as the financial regulator and undermines the efforts that ASIC has been and is taking to monitor the BNPL finance sector.¹¹
- 11 ASIC seeks permission to intervene on three primary bases.
- 12 First, ASIC considers it can be of real assistance to the Tribunal in providing context around the submission it made to the ACCC. That context includes ASIC’s views regarding the forms of regulation proposed by the applicants to

⁷ See paragraph 3 and 5 of Flexigroup’s application.

⁸ See section 5 of the Attachment to Flexigroup’s application.

⁹ See paragraph 47 of the Attachment to Flexigroup’s application; paragraph 40 of Flexigroup’s statement of facts, issues and contentions in this proceeding.

¹⁰ See paragraph 80 of the Attachment to Flexigroup’s application.

¹¹ See paragraph 82 of the Attachment to Flexigroup’s application.

the ACCC, by Flexigroup, and by any other interveners, in the present application.

- 13 Secondly, ASIC can assist the Tribunal in clarifying the present scope of ASIC's regulatory power over BNPL finance, the relationship between its regulatory powers and those of the ACCC¹².
- 14 Thirdly, ASIC is best placed to explain its own views. ASIC can assist the Tribunal regarding comments on its views, such as those expressed in Report 600, and how those views have developed since that report was published. By way of example, and as noted above, Flexigroup's assertion that ASIC "did not consider it necessary that BNPL be subjected to regulation under the NCCPA and the NCC"¹³ is a paraphrasing of Report 600 which may be liable to mislead: the conclusion ASIC expressed in Report 600 was that "it may be that BNPL providers should be required to comply with the National Credit Act. ASIC has not yet formed a view that this is necessary. Our ongoing monitoring of this industry ... will help us to assess whether we should advise the Government to consider further law reform".¹⁴

Conclusion

- 15 ASIC respectfully requests that the Tribunal grant ASIC permission to intervene in the proceeding.
- 16 If there are any objections to ASIC being granted permission to intervene, ASIC respectfully requests that an oral hearing take place.

Dated: 21 February 2020

M.D. Tehan

Counsel for ASIC

¹² See paragraph 57 of Flexigroup's statement of facts, issues and contentions.

¹³ A similar comment is made in paragraphs 30 and 56 of Flexigroup's statement of facts, issues and contentions.

¹⁴ Emphasis added.