

**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: Third Statement of Taras Mysak

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: 09/06/2020 12:06 AM

**Important information**

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



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code

**FLEXIGROUP LIMITED**

Applicant

### **THIRD STATEMENT OF TARAS MYSAK**

1. I have prepared two statements in these proceedings which I signed on 24 April 2020 (**First Statement**) and 20 May 2020 (**Second Statement**) respectively (together, the **Statements**). This statement supplements the Statements. I make this statement based on my own knowledge and the documents of flexigroup referred to below, save where otherwise stated.
2. Exhibited to me at the time of signing this statement and marked '**Confidential Exhibit TM-5**' is a bundle of documents which contains information that is commercially sensitive and confidential to flexigroup. Each of those documents is numbered with a unique document ID. When I refer to a document in this statement, I set out the document's name and document ID, and the document hyperlinked to **Confidential Exhibit TM-5**.

### **ASIC correspondence on surcharging**

3. I have read the public version of the Second Statement of Daniel Robert Foggo signed 25 May 2020 (**Second Foggo Statement**).
4. The Second Foggo Statement addresses the extent to which Mr Foggo considers NET suppliers offer a higher retail price for the relevant NET product when the consumer is to acquire the BNPL product with BNPL finance rather than cash (ie, payment by credit card or bank transfer). This issue is commonly described as "merchant surcharging".
5. Between 2018 and 2020, flexigroup received correspondence from the Australian Securities and Investments Commission (**ASIC**) in relation to merchant surcharging

and other matters. A copy of this correspondence as it relates to how flexigroup addresses surcharging together with flexigroup's responses is contained at **tabs 1 to 48 of Confidential Exhibit TM-5 [FXL.001.008.0202], [FXL.001.008.0221], [FXL.001.008.0230], [FXL.001.008.0298], [FXL.001.008.0300], [FXL.001.008.0304] [FXL.001.008.0305], [FXL.001.008.0323], [FXL.001.008.0343], [FXL.001.008.0377] [FXL.001.008.0398], [FXL.001.008.0417], [FXL.001.008.0463], [FXL.001.008.0469] [FXL.001.008.0505], [FXL.001.008.0001], [FXL.001.008.0175], [FXL.001.008.0003] [FXL.001.008.0182], [FXL.001.008.0016], [FXL.001.008.0005], [FXL.001.008.0008] [FXL.001.008.0028], [FXL.001.008.0124], [FXL.001.008.0133], [FXL.001.008.0535] [FXL.001.008.0186], [FXL.001.008.0195], [FXL.001.008.0540], [FXL.001.008.0047] [FXL.001.008.0137], [FXL.001.008.0527], [FXL.001.008.0086], [FXL.001.008.0529] [FXL.001.008.0104], [FXL.001.008.0109], [FXL.001.008.0118], [FXL.001.008.0117] [FXL.001.008.0115], [FXL.001.008.0172], [FXL.001.008.0190], [FXL.001.008.0547] [FXL.001.008.0173], [FXL.001.009.0068], [FXL.001.009.0040], [FXL.001.009.0079] [FXL.001.009.0088] and [FXL.001.009.0095].**

6. I have read the correspondence referred to in paragraph 5 above. I was not involved in preparing that correspondence.
7. In its letter to ASIC dated 4 November 2019 at **tab 41 of Confidential Exhibit TM-5 [FXL.001.008.0190]**, flexigroup set out the measures that flexigroup has taken to address surcharging by merchants, when selling products financed by humm including:
  - (a) the issuing of a Warning Letter to merchants about surcharging. A copy of that Warning letter, which was co-signed by the ACCC, is at **tab 39 of Confidential Exhibit TM-5 [FXL.001.008.0115]**.
  - (b) reinforcing the clear and express provisions of flexigroup's agreements with merchants banning surcharging, in particular through clauses 2(e) to (h) of humm's Retailer Introducer Agreement Terms and Conditions dated March 2019. A copy of that Retailer Introducer Agreement appears at **tab 42 of Confidential Exhibit TM-5 [FXL.001.008.0547]** at [FXL.001.008.0559]. An example of a current humm Retailer Agreement for solar merchants appears at **tab 4 of Exhibit TM-1** to my first statement, at [FXL.001.002.0267].
  - (c) adding additional text to the credit schedule which forms part of humm's consumer terms and conditions which I referred to in paragraph 27 of my

first statement, including: "If a Merchant indicates that you will have to pay more or tries to charge you more (for example by charging you a higher price for the good or service, not applying a discount or rebate or by charging or bundling additional fees or charges), we want to know about it. So please tell us by contacting us (08) 8232 2828". flexigroup is in the process of changing this phone number to a 1800 number;

- (d) implementing revised Advertising Guidelines and a supplementary document incorporating more detailed guidance regarding potential surcharging by merchants. Copies of those Advertising Guidelines are contained at **tab 49 and 50 of Confidential Exhibit TM-5 [FXL.001.008.0574] and [FXL.001.008.0579]**;
- (e) engaging a third party independent market research company called Colmar Brunton to undertake a shadow shopping analysis to detect potential surcharging by merchants offering humm.
- (f) hiring a new Senior Manager - Operational Risk and Compliance on 28 October 2019, and recruiting an additional staff member into flexigroup's Investigations and Compliance Department, to oversee pricing and quotes to better identify potential surcharging;
- (g) reviewing humm's hardship policies to implement a revised policy. The current humm Hardship Policy is contained in **tab 4 of Confidential Exhibit TM-2 [FXL.001.004.0001]** referred to in paragraph 22(d) of my first statement.

8. I am also informed, by Tim Graham of flexigroup, and believe that:

- (a) he and flexigroup's Group General Counsel and Group Head of Operational Risk and Compliance, Matthew Beaman, met with representatives of ASIC on 11 December 2019, to discuss the previous correspondence; and
- (b) since 11 December 2019, flexigroup has provided further information to ASIC in relation to ASIC's review of buy now pay later arrangements and/or merchant surcharging in correspondence dated between 28 January 2020 and 11 May 2020. Copies of that correspondence appear at **tabs 44 to 48 of Confidential Exhibit TM-5 [FXL.001.009.0068]**,

**[FXL.001.009.0040], [FXL.001.009.0079], [FXL.001.009.0088] and [FXL.001.009.0095].**

9. Further to paragraph 7(e) above, I am informed by Tim Graham and believe:
- (a) Colmar Brunton provided flexigroup with a proposal to partner with humm on or about 14 August 2019 (**Proposal**). A copy of the Proposal appears at **tab 51 of Confidential Exhibit TM-5 [FXL.001.009.0007]**. On or about 19 August 2019 flexigroup engaged Colmar Brunton to undertake the work described in the Proposal and since that engagement, Colmar Brunton has integrated its operations with another company, Kantar, such that the work under the Proposal is now being performed by Kantar/Colmar Brunton. For convenience, I refer to Kantar/Colmar Brunton as Colmar Brunton in this statement.
  - (b) Colmar Brunton prepared a questionnaire to issue to customers of flexigroup that purchased a product from a flexigroup merchant using flexigroup's BNPL finance product humm. A copy of the questionnaire appears at **tab 52 of Confidential Exhibit TM-5 [FXL.001.009.0003]**.
  - (c) Colmar Brunton issued the questionnaire to customers that purchased a product from a flexigroup merchant using humm in various product categories in the period 20 January 2020 to 4 June 2020 (**Period**).
  - (d) Colmar Brunton has made available to flexigroup the results of all responses it received to the questionnaire across all product categories in in the Period, in the form of a summary dashboard available on a secure weblink. A copy of the dashboard for the Period appears at **tab 53 of Confidential Exhibit TM-5 [FXL.001.009.0001]**;
  - (e) Colmar Brunton provided to flexigroup a spreadsheet setting out the individual customer responses to each of the questions in the questionnaire in the Period. A copy of that spreadsheet appears at **tab 55 of Confidential Exhibit TM-5 [FXL.001.009.0002\_N]**. A copy of a letter to flexigroup from Colmar Brunton attaching the spreadsheet appears at **tab 54 of Confidential Exhibit TM-5 [FXL.001.009.0078]**.
  - (f) That spreadsheet shows that 5 out of 43 customers who purchased an NET product from a flexigroup merchant and responded to the questionnaire answered "yes" to question 2 "*Were any additional fees or*

*charges applied to your purchase as a result of using humm? This could have been referred to as a "humm" fee or "interest" and "no" to question 2a "Would this additional fee have been charged if you paid via cash, debit card or a credit card?";*

- (g) That spreadsheet also shows the names of the merchants from whom those customers purchased a NET product. I am informed by Tim Graham and believe that flexigroup's legal and compliance team is investigating these merchants in accordance with the policies and processes referred to in paragraphs 22 and 50 of my first statement.

10. I have re-read my first statement and make two corrections:

- (a) in paragraph 13, the word Certegy Ezy-Pay in the final sentence should read "Certegy Ezi-Pay"; and
- (b) in paragraph 46(b), the figure of "\$1000" should read "\$10,000".

Dated: 8 June 2020

Signed:  Taras Mysak

---