

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: Amended Statement of Facts, Issues and Contentions

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: 21/04/2020 5:44 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

FLEXIGROUP LIMITED

Applicant

**AUTHORISATION APPLICANTS' AMENDED STATEMENT OF FACTS, ISSUES
AND CONTENTIONS**

PART A: BACKGROUND FACTS

The Authorisation Applicants

1. The Clean Energy Council (**CEC**) is a not-for-profit organisation which acts as the peak body for the clean energy industry in Australia. It represents over 600 businesses operating in, or supporting, the development of renewable energy (including solar, wind, hydro, bioenergy, geothermal and marine) and energy storage, as well as more than 6000 solar installers.
2. The Australian Energy Council (**AEC**) is the industry body representing 23 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.
3. The Smart Energy Council (**SEC**) is the peak body for the solar, storage and smart energy industry in Australia. The SEC is a not-for-profit, membership organisation committed to clean, efficient, cheap and smart energy solutions for all Australians. Its membership encompasses installers, sales people, engineers, scientists, recruiters, managers and financiers; all of whom are in some way involved in the smart energy industry.

4. Energy Consumers Australia (**ECA**) is a body established by the Council of Australian Governments' (**COAG**) Energy Council in 2015. Its objective is to promote the long-term interests of consumers with respect to the price, quality, reliability, safety and security of energy supply.

The Development of the Code

5. In August 2017, the then Minister for the Environment and Energy (on behalf of the COAG Energy Council) wrote to the CEC, AEC, SEC and ECA requesting that industry develop a Code of Conduct to govern the supply of "behind the meter" electricity services and products (i.e. products acquired directly by consumers and operated/controlled by consumers). The request for an industry led Code of Conduct followed a review by the COAG Energy Council into consumer protections for "behind the meter" energy products and services. This review identified concerns that increases in the range of energy products and services on offer to consumers could lead to greater complexity and a risk that consumers might acquire products that do not meet their needs or which offer poor value.
6. A working group – known as the "Behind the Meter Working Group" - was established to develop a code of conduct. The working group members included representatives of the CEC, AEC, SEC, ECA, Consumer Action Law Centre (**CALC**) and others.
7. In November 2018, and following a period of extensive consultation, a draft proposed voluntary industry code, which came to be known as the New Energy Tech Consumer Code (**Code**), was released for discussion.
8. Public workshops were held in January 2019 and submissions were received by the working group over the course of February/March 2019.
9. It is anticipated that signatories to the Code will include providers of New Energy Tech (as defined in the Code), ranging in scale from micro businesses to large energy companies with New Energy Tech lines of business. Signatories are expected to number in the many hundreds.

10. The Code is designed to establish consistent minimum standards of conduct by participants in the New Energy Tech sector, with a view to providing consumers with an improved ability to make informed decisions when acquiring New Energy Tech and also enhancing consumer protection.
11. New Energy Tech is extensively defined in the Code, but includes products and systems that generate, store or trade energy away from Australia's main energy transmission and distribution networks (including solar photovoltaic and micro-grids), as well as related goods and services.
12. The principal concern of the Authorisation Applicants has, at all times, been in ensuring the introduction of consistent minimum standards, designed to benefit consumers.

The Application for Authorisation and the treatment of Buy Now Pay Later finance

13. On 29 April 2019, the CEC, AEC, SEC, ECA (**Authorisation Applicants**) jointly submitted the Code to the ACCC for Authorisation, pursuant to s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
14. Relevantly, the Code initially provided (at paragraph 24 of the draft Code submitted to the ACCC in April 2019) that where New Energy Tech is to be supplied to a residential customer under a deferred payment arrangement (i.e. subject to finance) which included "*an interest component, additional fees or an increased price*", the supplier of the New Energy Tech would ensure that:
 - a. the finance would be offered through a credit provider licensed under the *National Consumer Credit Protection Act* (Cth) 2009 (**NCCPA**); and¹
 - b. the finance arrangement would be regulated by the NCCPA and the National Credit Code (**NCC**)².

¹ The original version of the Code does not clearly state that these criteria were cumulative, but they were intended to be.

² Mistakenly referred to, throughout the material and the ACCC process, as the *National Consumer Code*.

15. One effect of the language of paragraph 24 of the Code, was that finance of the kind known as “buy now, pay later” finance (**BNPL**) would not be able to be offered in conjunction with the sale of New Energy Tech, by signatories to the Code.
16. This effect arose as a result of the operation of clause 6 of the NCC, which relevantly provides that the NCC does not apply to the provision of credit if, under the credit contract:
- “...the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided.”³*
17. The description at s6(5) captures the manner in which BNPL finance operates.
18. BNPL providers, similarly, do not need to be licensed under the NCCPA⁴ (although some BNPL providers are licensed under the NCCPA by reason of their offering other financial products which do require a license and which are regulated under the NCC).
19. On 1 August 2019, the ACCC published a Draft Determination proposing to grant Authorisation to the Authorisation Applicants and future signatories to the Code, but identified some specific matters (including the substance of paragraph 24), as requiring further consideration.
20. On 25 September 2019, the Authorisation Applicants submitted an amended draft of the Code to the ACCC for its approval (**September Version**).
21. Relevantly, the September Version of the Code:
- a. proposed alternatively drafted sub-paragraphs 24(a) and (b), which no longer sought to exclude the offering of BNPL finance in connection with New Energy Tech goods or services. The amended sub-paragraphs 24(a) and (b) provided that, in cases where finance was offered in association with New

³ Section 6(5) of the NCC

⁴ Section 5 of the NCCPA defines “credit” by reference to the definition at s3 of the NCC (as modified by the operation of s6(5) of the Code).

Energy Tech goods or services, signatories to the September Code would ensure that:

- (i) the finance would be offered by a credit provider licensed under the NCCPA; ~~and~~⁵
- (ii) the finance was either regulated by the NCCPA and the NCC or “...*complies with a regulator approved code of conduct...*”, verified by the Administrator as delivering substantially equivalent consumer protections; and⁶

b. introduced, for the first time, paragraph 3(d), which prohibited signatories from making any unsolicited offer of finance not regulated by the NCCPA.

22. On 22 October 2019, the ACCC sought further feedback from interested parties with respect to both paragraphs 3(d) and 24 in the September Version of the Code. The ACCC indicated that its preliminary assessment was that the formulation of paragraph 24 in the September Version of the Code was inadequate, and the ACCC proposed an alternative formulation for comment, a copy of which is set out at **Annexure A** to this Statement.

23. On 11 November 2019, the Authorisation Applicants wrote to the ACCC and, relevantly, accepted the ACCC’s 22 October 2019 formulation of paragraph 24 (by then, paragraph 25), subject to the suggestion that that paragraph 24(a)(ii)(A) be amended, with the effect as reflected below:

“The Code Administrator has determined that the credit provider *-is a signatory to an industry code of practice that requires the credit*

~~⁵ While sub-paragraphs 24(a) and (b) were not clearly stated to be cumulative, this was the intent, and is supported by correspondence between the Authorisation Applicants and the ACCC on 6 September and 25 September 2019 which indicates that the intent of the redrafted sub-paragraph 24(b) was to permit BNPL to be provided by parties who were not licensed or regulated under the NCCPA and NCC.~~

⁶ While the terms of sub-paragraphs 24(a) and (b) appear to operate cumulatively, it was always the intent of the Authorisation Applicants that the amendments to the Code would enable BNPL finance to be offered by a provider, subject only to their compliance with a regulator approved code of conduct that delivered substantially equivalent consumer protections to those provided under the NCCPA framework. This intent is clearly reflected in correspondence between the Authorisation Applicants and the ACCC on 6 September and 25 September 2019.

provider to...". (emphasis and mark-up for ease of reference, but not in the original)

(November Version)

24. That amendment was designed to ensure that the practical responsibility for assessing compliance with the terms of paragraph 24(a)(ii)(A) of the Code would be undertaken by an appropriately qualified third party, being the Administrator of a BNPL industry code, rather than the Administrator of the Code, whose role would be limited (in that respect) to ensuring that the BNPL provider was a signatory to the BNPL industry code.

25. This suggested amendment was ultimately accepted by the ACCC.

26. On 5 December 2019, the ACCC published its Determination in respect of the Application for Authorisation, granting conditional authorisation to the Code (being the November Version), subject to various conditions, relevantly including the conditions that:

- a. the operation of paragraph 3(d) was extended to prevent the offering of BNPL finance in any circumstances where the New Energy Tech goods and services were the subject of an unsolicited offer;⁷ and
- b. BNPL finance was only permitted to be offered in conjunction with the supply of New Energy Tech goods and services if the BNPL provider satisfied the ACCC's further amended paragraph 25, which required the BNPL provider to, *inter alia*, adhere to a BNPL industry code which imposed several express obligations on signatories.

(together with (a) above, **the ACCC's BNPL Conditions**).

27. By Application dated 30 December 2019, the Applicant applied to the Tribunal for a review of the ACCC's Determination.

PART B: ISSUES

⁷ Whereas the previous formulation permitted this conduct, and only prohibited the unsolicited offering of BNPL finance.

28. The principal issue before the Tribunal is whether the conduct prescribed (and proscribed) by the Code satisfies the statutory criteria set out at s90(7)(b) of the CCA, in that it:
- a. would result, or be likely to result, in a benefit to the public; and
 - b. the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

PART C: CONTENTIONS

29. Pursuant to s101 of the CCA, the Application for a Review is a *de novo* rehearing of the application for Authorisation.
30. The version of the Code to be assessed by the Tribunal for the purposes of the rehearing is the November Version of the Code, being the final version submitted to the ACCC for authorisation.
31. The Authorisation Applicants contend that the relevant factual is the conduct set out in the November Version of the Code (i.e. without the ACCC's BNPL Conditions). The relevant counterfactuals include the November Version of the Code with different conditions (whether those proposed by the ACCC or any other party).
32. The role of the Tribunal is to assess whether the conduct contemplated by the November Version of the Code satisfies the statutory test under s90(7) of the CCA; not whether the Tribunal identifies a variation to the Code which might *also* satisfy the statutory test.
33. It is only if the Tribunal concludes that the relevant conduct fails to satisfy the statutory test, that the Tribunal should consider any alternative proposals put before it by other parties.
34. It does not appear to be a matter of dispute that the Code introduces many consumer benefits which are designed to, amongst other things, enhance the protections already provided to consumers under the CCA, the *Corporations Act*

2001 (Cth) and/or the *Australian Securities and Investments Commission Act* 2001 (Cth) (**ASIC Act**).

35. Rather, the principal area of dispute is whether paragraphs 3(d) and 25 of the Code (as drafted in the November Version of the Code) have the effect of causing the November Version of the Code to fail to satisfy the net public benefit test set out at s90(7)(b) of the CCA.

36. Regardless of the relatively narrow area of dispute (having regard to the broader context of the Code), the Tribunal must engage in a rehearing of the authorisation application in the fullest sense, reaching its own conclusions on the material before it.⁸

Public benefit

37. Extensive public benefits arise from the November Version of the Code, including the provision to consumers of:

- a. clearer explanations about New Energy Tech products and services, thereby allowing consumers to make more informed choices with respect to the acquisition of those products and services; and
- b. minimum standards of conduct on the part of suppliers of New Energy Tech products and services, that extend beyond that currently required by relevant consumer legislation.

38. Examples of these benefits include:

- a. signatories and consumers being made aware of their rights and obligations under the Code and relevant consumer legislation;
- b. signatories being required to comply with detailed guidelines relating to the advertising and promotion of New Energy Tech, as well as have adequate systems, policies and procedures in place to ensure compliance with these obligations;⁹

⁸ *Qantas Airways Ltd* (2005) ACompT 9 at [136]

⁹ Paragraphs 2 – 3 (advertising and promotion), 58 – 60 (training) and 61 – 62 (compliance)

- c. signatories being required to comply with minimum business practice standards for direct marketing and sales,¹⁰ which exceed the minimum requirements of relevant consumer legislation;
- d. the clear elaboration of factors to be taken into account by signatories in considering whether New Energy Tech goods or services are fit for purpose for each consumer;¹¹
- e. the minimum requirements for the details to be provided when quoting for the supply of New Energy Tech goods or services;¹²
- f. detailed provisions dealing with payment and finance terms;¹³
- g. clear guidance in relation to warranties;¹⁴
- h. an explanation of consumers' entitlements to terminate the contract with the New Energy Tech supplier;¹⁵ and
- i. signatories having a clear and transparent complaints handling process.¹⁶

39. The effect of these provisions (and others in the Code) is to generate a significant public benefit.

Public detriment

40. With the exception of paragraphs 3(d) and 25, there is no suggestion of any other provision of the November Version of the Code giving rise to any matter relevant to the assessment of any public detriment.

41. Paragraph 3(d) of the November Code prevents Code signatories (including suppliers of tech acting as representatives of BNPL providers) from making any unsolicited offer of a payment arrangement not regulated by the NCCPA. As

¹⁰ Paragraphs 4 - 6

¹¹ Paragraphs 7-8

¹² Paragraphs 9 - 18

¹³ Paragraphs 24 - 30

¹⁴ Paragraphs 42 - 44

¹⁵ Paragraphs 45 – 50

¹⁶ Paragraphs 53 - 54

BNPL credit is not a regulated payment arrangement under the NCCPA, no unsolicited offer of BNPL credit may be made by any Code signatory.

42. However, this restriction is no more onerous – in a practical sense – than the obligations already imposed on representatives of suppliers of regulated credit, who are prohibited from offering goods or services to a consumer as a result of unsolicited contact with the consumer, unless they hold a licence under the NCCPA.¹⁷
43. In essence, the effect of paragraph 3(d) of the Code is to ensure that New Energy Tech suppliers offering a payment arrangement not regulated under the NCCPA (i.e. BNPL), are treated no more favourably than other New Energy Tech suppliers seeking to offer regulated credit to consumers.
44. In this sense, paragraph 3(d) of the Code has the twofold effect of:
- a. introducing competitive neutrality with respect to the supply of payment arrangements, not currently present; and
 - b. ensuring that unsolicited offers of payment arrangements are only made in a context where they are subject to the various consumer focused obligations contained in the NCCPA.
45. To the extent that paragraph 25 of the November Code is likely to impose additional costs and obligations upon providers of BNPL finance which are not otherwise imposed by existing legislation, these obligations strike an appropriate balance between the efficient and effective provision of finance to consumers for

¹⁷ Section 29 of the NCCPA prohibits a person from engaging in a credit activity if the person does not hold a licence authorising the person to do so. Regulation 23 of the *National Consumer Credit Protection Regulations 2010 (NCCPA Regulations)* has the effect of exempting a person from the proscription in s29, in certain specified circumstances. One exemption applies where a supplier of goods or services acts on behalf of a relevant credit provider and the credit is wholly or predominantly to be used to pay for goods or services supplied by the supplier (r23(3)). However, this exemption does not apply if the supply of goods or services is as a result of unsolicited contact with the consumer (r23(4)). The effect of r23 of the NCCPA Regulations is that, while regulated credit may be offered following unsolicited contact with a consumer, it may **only** be offered by a party licensed under Part 2 of the NCCPA, thereby subjecting the supplier of the regulated credit (including the supplier of goods or services, as representative of the credit provider) to the various obligations imposed under the NCCPA. The Authorisation Applicants are not aware of any significant suppliers of New Energy Tech goods or services possessing a relevant licence.

New Energy Tech products and services, and consumer welfare outcomes. That is, given that New Energy Tech products are often high-cost products, the risk of significant harm to consumers is heightened in circumstances where they might otherwise enter into finance arrangements that they cannot afford.

Net public benefit

46. To the extent that the restrictions imposed by paragraphs 3(d) and 25 of the November Code generate some form of public detriment, it is the Authorisation Applicants' contention that any public detriment is outweighed:
- a. by the public benefits created by the Code overall; or, alternatively
 - b. by the public benefits associated with the restrictions imposed by those provisions.
47. In the circumstances, it is the Authorisation Applicants' contention that the November Version of the Code satisfies the net public benefit test set out at s90(7)(b) of the CCA.
48. The fact that the imposition of some conditions (or variation to some paragraphs of the Code) may also produce a net public benefit, is irrelevant if the Tribunal is satisfied that the November Version of the Code satisfies the statutory test.
49. That is, it is only if the Tribunal concludes that the November Version of the Code fails to satisfy the statutory test for authorisation, that the Tribunal should consider what conditions or variation sought with respect to the November Version of the Code are required in order to satisfy the statutory test.
50. In those circumstances, the Authorisation Applicants submit that the Tribunal should adopt the version of paragraph 25 proposed at paragraph 51(b) of this statement which is similar to the version proposed by FlexiGroup, being a version which is largely consistent with that proposed by the Authorisation Applicants in the September Version of the Code, and which the Authorisation Applicants consider also satisfies the statutory test for authorisation.

Orders sought from the Tribunal

51. The Authorisation Applicants seek:

a. a declaration that the November Version of the Code satisfies the net public benefit test at s90(7)(b) of the CCA and the ACCC's determination be varied so as to delete the Conditions set out at paragraphs 5.12 – 5.14 of the ACCC's determination; or

b. alternatively, that the ACCC's determination be varied so as to:

(i) add as conditions of the authorisation that:

(A) in lieu of paragraph 25(a) of the ACCC's BNPL Conditions:

"the deferred payment arrangement is regulated by the NCCPA and the National Credit Code (NCC) or complies with a regulator-approved Code of Conduct (the BNPL Code), as determined by the administrator of that BNPL Code"; and

(B) in lieu of paragraph 25(c)(iv) of the ACCC's BNPL Conditions:

"the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from or not regulated by the NCC, information as required by ~~any regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA~~ the BNPL Code".

(ii) delete section "Deferred payment arrangement providers" of the Annexure – Code Administration.

Dated: ~~6 March~~ 21 April 2020

D Preston

Owen Dixon Chambers West

Allens

Solicitors for the Authorisation Applicants