

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: Opening 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: 01/06/2020 4:51 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' OPENING SUBMISSIONS

A. OVERVIEW

1. This proceeding concerns an application by flexigroup to the Tribunal for the review of a decision of the Australian Competition and Consumer Commission (**ACCC**) with respect to an application for authorisation of an industry code pursuant to s88 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. The industry code in question, the New Energy Tech Consumer Code (**Tech Code**), was initially submitted to the ACCC for authorisation in April 2019¹ by:
 - (a) the Clean Energy Council (**CEC**);
 - (b) the Australian Energy Council (**AEC**);
 - (c) the Smart Energy Council (**SEC**); and
 - (d) Energy Consumers Australia (**ECA**).

(Authorisation Applicants).
3. The precise form of the Tech Code was varied at the request of the Authorisation Applicants on a number of occasions throughout the authorisation process, with the

¹ A copy of the application for authorisation and the first draft of the Tech Code appears at Tab 8 of Exhibit JC-1 [ANA.001.001.0506] to Crawshaw Statement dated 5 May 2020 (**Crawshaw Statement**). See also Crawshaw Statement at [44]; Barnes Statement dated 5 May 2020 at [66] (**Barnes Statement**).

form of the Tech Code ultimately submitted to the ACCC for authorisation being the version submitted under cover of the CEC's letter of 11 November 2019.²

4. Conditional authorisation of the Tech Code was granted by the ACCC on 5 December 2019.³
5. These submissions are made in support of the Authorisation Applicants' case that:
 - (a) the version of the Tech Code submitted by them to the ACCC for authorisation satisfies the net public benefit test set out at s90(7)(b) of the CCA;⁴ and
 - (b) the Tribunal should grant authorisation for the proposed conduct for which the authorisation was sought, being the commitment by signatories to the Tech Code to give effect to provisions in the Tech Code:
 - (i) under which they would abide by the minimum standards of practice set out in the Tech Code;
 - (ii) for monitoring and sanctioning non-compliance with the Tech Code; and
 - (iii) requiring signatories to only offer deferred payment arrangements in accordance with the terms of the Tech Code.
6. The focus of the dispute in this proceeding is essentially confined to the question of whether or not the provisions in the Tech Code which relate to buy now pay later (**BNPL**) finance (being cl 3(d), which relates to the unsolicited offer of BNPL finance, and cl 25, which relates to the circumstances in which BNPL finance may be offered in conjunction with the supply of new energy tech goods and services) give rise to any public detriments which warrant their removal or amendment (by way of conditions or otherwise).
7. None of the parties to this proceeding challenge the fact that the Tech Code generates substantial public benefits and, with the exception of the provisions identified above (and some related ancillary provisions), no party or intervener has identified any public detriment associated with the Tech Code. In its Determination, the ACCC observed that the majority of submissions received by it were in support of

² A copy of this letter appears at Tab 14 of Exhibit BB-1 [ANA.001.001.0163] to Barnes Statement.

³ ACCC Final Determination dated 5 December 2019 (**ACCC Determination**).

⁴ Authorisation Applicants' Amended Statement of Facts, Issues and Contentions at [47].

the intention of the Tech Code, in improving business standards across the industry and increasing consumer protection.⁵

8. If the Tribunal concludes – contrary to the Authorisation Applicants’ case – that the provisions of the Tech Code relating to unsolicited sales and BNPL finance *do* give rise to public detriments which warrant their removal or amendment (by way of conditions or otherwise), the Authorisation Applicants submit that the balance of the Tech Code still generates a net public benefit sufficient to warrant the grant of authorisation by the Tribunal.

B. THE AUTHORISATION APPLICANTS

9. The 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.⁶
10. The 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.⁷
11. The 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.⁸
12. ECA is a body established by the Council of Australian Governments’ Energy Council (**COAG EC**) 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.⁹

⁵ ACCC Determination at [3.4(a)].

⁶ Barnes Statement at [24]; Crawshaw Statement at [32].

⁷ Barnes Statement at [11]; Crawshaw Statement at [32].

⁸ Barnes Statement at [24]; Crawshaw Statement at [32].

⁹ Crawshaw Statement at [11]–[12], [14]; Barnes Statement at [24].

C. NEW ENERGY TECH AND THE DEVELOPMENT OF THE TECH CODE

13. The term “new energy tech” is defined at Part C of the Tech Code as:
- (a) 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 or as distributed energy resources connected to an Energy Network;
 - (b) services that support or are closely related to those products and systems;
 - (c) products, systems and services that monitor or manage a customer’s usage of energy whether on or off an Energy Network; and
 - (d) such other product, system and service that the Administrator is satisfied is appropriately within this Code.
14. New energy tech goods are typically located on the consumer’s side of their gas or electricity meter and, as such, are not the responsibility of the relevant energy retailer or distributor.¹⁰
15. New energy tech goods and services are also referred to as “behind the meter” goods and services, as the goods are situated on the consumer’s side of their energy meter(s) and the services relate to those goods.¹¹
16. The most common forms of new energy tech goods are solar panels and battery storage for energy generated by those panels, although other forms of new energy tech include wind turbines, hydro and bioenergy generators.¹²
17. In August 2017, the then Federal Minister for the Environment and Energy separately wrote to each of the Authorisation Applicants on behalf of the COAG EC, requesting them to work with industry to cooperatively develop a single, industry-wide code of conduct for all behind-the-meter electricity supply services and products.¹³

¹⁰ Crawshaw Statement at [27]; Barnes Statement at [16]–[17].

¹¹ Crawshaw Statement at [27]; Barnes Statement at [16]–[17].

¹² Barnes Statement at [30]; Crawshaw Statement at [32].

¹³ A copy of the letter to the ECA appears at Tab 2 of Exhibit JC-1 [ANA.001.001.0329] to Crawshaw Statement. A copy of the letter to the AEC appears at Tab 3 of Exhibit JC-1 [ANA.001.001.0354] to Crawshaw Statement. See also Barnes Statement at [15]; Crawshaw Statement at [26].

18. Prior to the development of the Tech Code (and in the future without the Tech Code), regulation of the marketing and supply of new energy tech goods and services was (and will be) principally governed by the Australian Consumer Law (**ACL**).
19. Currently (and in the future without the Tech Code), finance offered to consumers in conjunction with the supply of new energy tech goods or services:
 - (a) is governed by the relevant provisions of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**) dealing with consumer protection and by the Australian Securities and Investment Commission's (**ASIC**) product and intervention powers; and
 - (b) to the extent that the finance satisfied the definition of credit contained in the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), by the NCCPA and NCC. This is discussed in further detail below.
20. A voluntary solar industry code, the Solar Retailer Code of Conduct (**Solar Code**) also applies to the supply of solar products and services to consumers by its signatories. Subject to authorisation of the Tech Code, it is intended that the Solar Code will cease to operate and signatories will be given the opportunity to transfer to the Tech Code.¹⁴
21. Not only is there no single document which summarises (in user friendly manner or otherwise), the key legal obligations arising in the context of the marketing and supply of new energy tech goods and services, there is also no industry standard which sets out minimum expectations of suppliers when marketing or supplying new energy tech goods or services.¹⁵
22. This was a concern held by governments and industry participants, including consumer advocates, particularly in circumstances where the goods and services in question involved complex new technologies which are often not well understood by consumers.¹⁶

¹⁴ Barnes Statement at [18], [32]; Crawshaw Statement at [47].

¹⁵ Barnes Statement at [44(a)].

¹⁶ Crawshaw Statement at [31]; Tab 2 of Exhibit JC-1 [ANA.001.001.0329] to Crawshaw Statement; Tab 3 of Exhibit JC-1 [ANA.001.001.0354]. See also Uniting Vic.Tas Submission to the ACCC dated 29 May 2019 [1000439.001.001.1103]; Uniting Vic.Tas Submission to the ACCC dated 23 August [1000439.001.001.0801].

23. In October 2017, a working group was formed to develop a code which could give effect to the COAG EC's request.¹⁷ This working group was known as the Behind the Meter Working Group (**BTMWG**). In addition to the Authorisation Applicants, its members included:
- (a) Energy Networks Australia, representing Australia's electricity transmission and distribution and gas distribution networks;
 - (b) Renew, a not-for-profit association that advocates for sustainable living practices (previously known as the Alternative Technology Association);
 - (c) Public Interest Advocacy Centre (**PIAC**). PIAC is an association which focuses on social problems that impact on the lives of Australians;
 - (d) Energy Queensland, which is responsible for the Queensland Government's electricity networks and retail businesses;
 - (e) the Consumer Action Law Centre (**CALC**). CALC advocates on behalf of consumers for changes to policy, laws and industry practices across a range of consumer issues;
 - (f) national electricity generator and retailer, AGL; and
 - (g) energy retailer, Red Energy, which ceased participating in the BTMWG shortly after Mr Barnes moved to the AEC in July 2018.¹⁸
24. Given that the principal focus of the Tech Code was to be on:
- (a) providing guidance to market participants (suppliers and consumers alike) as to consumers' rights under existing consumer laws;¹⁹ and
 - (b) setting minimum standards of conduct by suppliers which exceed the basic legal framework and which were designed to ensure greater consumer protection,²⁰
- the BTMWG comprised several consumer advocacy groups (including ECA, CALC, PIAC and Renew).²¹

¹⁷ Barnes Statement at [15]–[24].

¹⁸ Barnes Statement at [22].

¹⁹ Crawshaw Statement at [41].

²⁰ Barnes Statement at [44]; Crawshaw Statement at [41].

²¹ Barnes Statement at [24]; Crawshaw Statement at [32].

25. While the consumer advocacy groups on the BTMWG represented a range of different constituencies and viewpoints, one group – ECA – was specifically constituted to promote the long-term interests of residential and small business consumers of energy with respect to the price, quality, safety, reliability and security of supply of energy services.²² ECA is unique in that its broad remit means it considers energy related developments with regard to the best long-term interests of all residential and small business consumers, including consumer protection issues.²³
26. Having regard to the initial request from the COAG EC, and the members' own views on consumer issues in relation to new energy tech, the BTMWG resolved that the Tech Code should:
- (a) be technology “agnostic”, i.e. it could apply to all forms of new energy tech;
 - (b) reflect general concepts relevant to consumers of new energy tech, rather than focusing on specific technical requirements;
 - (c) provide guidance to suppliers and consumers with respect to each aspect of the consumer's interaction with new energy tech – from the initial marketing, through the sales process and up until the end of life of the products or services; and
 - (d) ensure that consumers were provided with adequate information in order to enable them to make informed decisions around new energy tech products and services.²⁴
27. A draft Tech Code was developed to reflect these principles, following which stakeholder input was sought, over a period of more than 12 months, via a broad and extensive engagement process, including workshops around Australia and technical fora.²⁵

²² Crawshaw Statement at [14].

²³ Crawshaw Statement at [13]–[16].

²⁴ Barnes Statement at [33].

²⁵ Barnes Statement at [35], [39]–[41]; Crawshaw Statement at [33]–[34], [39].

28. The Tech Code was submitted to the ACCC for authorisation in April 2019²⁶ and specifically addressed the following issues, each of which are described in greater detail below:
- (a) ensuring that Tech Code signatories were aware of their statutory obligations and that consumers were aware of their consumer rights (and that these rights and obligations were conveniently located in a single accessible location and in an easy to understand format);
 - (b) establishing a framework of consumer rights which exceeded those provided to consumers under the existing legal and regulatory framework; and
 - (c) providing details of the process to be utilised in the administration of the Tech Code.

Single accessible location and in an easy to understand format

29. The Tech Code incorporates key legal obligations without technical legal language.²⁷
30. Examples of these are:
- (a) the obligation on suppliers to ensure that advertisements and promotional materials will not include false or misleading claims about the supplier or new energy tech (see cl 3 generally);
 - (b) ensuring that the full price of all goods or services is specified, including any taxes (cl 10);
 - (c) ensuring that any goods or services supplied meet the needs explained to the supplier, perform properly and meet contract specifications (cl 38);
 - (d) ensuring that, where applicable, the appropriate cooling off period for unsolicited sales under the ACL is communicated to consumers (cl 50); and
 - (e) the obligation to broadly comply with the ACL (cl 55).

²⁶ Barnes Statement at [66]; Crawshaw Statement at [44]; Tab 8 of Exhibit JC-1 [ANA.001.001.0506] to Crawshaw Statement.

²⁷ Crawshaw Statement at [53]; Barnes Statement at [44].

Consumer rights which exceed those provided to consumers under the existing legal and regulatory framework

31. Most significantly, the Tech Code introduces a range of minimum standards of behaviour which are required of signatories, compliance with which is monitored and enforced by the Code Administrator.²⁸
32. These standards were designed to exceed the minimum standards required by the applicable consumer legislation.²⁹ These key standards include obligations on signatories to ensure that:
 - (a) their advertising and promotional material will not make unsolicited offers of payment arrangements not regulated by the NCCPA (cl 3(d)) (this is addressed further below);
 - (b) all claims contained in advertising and promotional material relating to the performance of new energy tech products and energy costs savings are based on reputable sources, where available (cl 3(h)). This provision reflects the obligation to justify claims that are made with respect to evolving technologies, where consumers are less likely to be able to make a fully informed assessment of the performance of the goods or services;
 - (c) advertising and promotional material clearly identifies any additional cost for finance or an alternative purchasing arrangement for new energy tech where the cost of that finance is recovered in the overall price of the goods or services (cl 3(n));
 - (d) each signatory acknowledges that their sales' agents will be bound by the terms of the Code (implicitly making the supplier responsible for any conduct by their agents' in contravention of the Code – in the same manner as that liability would exist for contraventions of the law) (cl 4 generally);
 - (e) each consumer is provided with a Consumer Information Product (as defined in the Tech Code) explaining the consumer protection framework that applies both under legislation and under the Tech Code (cl 4(f));

²⁸ Authorisation Applicants' Amended Statement of Facts, Issues and Contentions at [12], [37]; Barnes Statement at [44]; Crawshaw Statement at [41], [45].

²⁹ Barnes Statement at [44], [50]; Crawshaw Statement at [41], [53].

- (f) suppliers commit to avoid using (otherwise legal) high pressure sales tactics, including offering discounts for testimonials, applying psychological pressure to try to make a quick sale and badgering the consumer (cl 5);
- (g) in all dealings with a consumer, extra care is taken if the supplier becomes aware that the consumer may be facing vulnerable circumstances (cl 6);
- (h) each supplier enquires about the customer's specific circumstances and needs with respect to the new energy tech products in question, and then ensures that any products ultimately supplied are fit for that consumer's particular purpose and circumstances (cl 7);
- (i) the value of all government discounts, incentives or rebates, and whether or not these apply in the consumer's specific circumstances, is disclosed to the consumer (cl 13);
- (j) the consumer receives documentation which clearly supports any claim that the consumer will be better off financially as a result of acquiring the relevant goods or services (cl 15);
- (k) any offer to a residential customer of a deferred payment arrangement (which includes interest, fees or involves an increased price) complies with cl 25 of the Tech Code (this is addressed further below);
- (l) prior to activation of the goods or services, the consumer is provided with comprehensive information for the safe and effective operation, maintenance and optimisation of the goods or services (cl 37);
- (m) consumers are provided with a summary of the relevant warranty provisions and their rights in relation to contract termination (cls 42–50);
- (n) the suppliers commit to meeting minimum standards for customer service and complaints management (cls 51–54);
- (o) the supplier undertakes responsibility for the training of sales agents and other representatives with respect to the various obligations imposed at law and under the Tech Code (cl 58);
- (p) suppliers agree to comply with the Tech Code (cl 61); and

- (q) suppliers accept responsibility for all actions governed by the Tech Code, whether those actions were undertaken by the signatory, its employees, contractors, agents or representatives (cl 62).
33. The language and terms of the Tech Code are designed to provide maximum possible transparency:
- (a) to the consumer with respect to the performance, suitability and total cost of new energy tech goods and services;³⁰
 - (b) with respect to consumer's contractual rights and obligations;³¹ and
 - (c) with respect to the supplier's contractual rights and obligations.³²
34. This transparency would, in many instances, not otherwise be required under existing consumer protection legislation. This transparency is enhanced by reason of the plain English drafting of the Tech Code, making it clear and approachable, for suppliers and consumers alike.³³
35. While it was recognised that the generic design of the Tech Code (i.e. being tech-neutral) means that it is not capable of descending into tech-specific detail, the Tech Code contemplated that, in due course, mandatory standards could be developed within the Tech Code framework, which would provide appropriate tech-specific guidance as required to best protect consumers' interests.³⁴ This is addressed at cl 61 of the Tech Code.
36. For ease of reference (both by suppliers and consumers), the Tech Code's provisions have sought to mirror what is referred to as the "consumer journey" (depicted at pages 3 and 4 of the Tech Code).³⁵ This reflects the design purpose of the Tech Code in being easy to follow, providing clear guidance and setting out a generic approach to new energy tech goods and services.³⁶

³⁰ Barnes Statement at [44]; Crawshaw Statement at [41], [51].

³¹ Crawshaw Statement at [41], [53].

³² Crawshaw Statement at [41], [54].

³³ Barnes Statement at [44]; Crawshaw Statement at [53].

³⁴ Barnes Statement at [45].

³⁵ Barnes Statement at [33], [44]; Crawshaw Statement at [48]–[49].

³⁶ Barnes Statement at [33]. See also Crawshaw Statement at [46].

Clause 25 – Restrictions on the supply of BNPL finance

37. The initial draft of the Tech Code submitted to the ACCC for authorisation contained an outright prohibition on the supply of BNPL finance in conjunction with the supply of new energy tech goods or services (then contained at cl 24 of the Tech Code).³⁷
38. This prohibition was included by the BTMWG as a result of representations made by CALC's representative on the working group in support of that prohibition.³⁸ This prohibition was included in the initial draft of the Tech Code, notwithstanding:
- (a) the fact that BNPL finance is a legitimate form of finance;³⁹
 - (b) that following a detailed analysis of BNPL finance and the publishing of a Report 600 on BNPL finance by ASIC,⁴⁰ ASIC has – to date – not recommended the formal regulation of BNPL finance;
 - (c) the fact that BNPL finance has been a source of finance commonly used for new energy tech purchases (particularly, solar tech);⁴¹ and
 - (d) submissions received by the BTMWG in favour of allowing BNPL finance to be offered in conjunction with the supply of new energy tech goods and services.⁴²
39. Ultimately, the key reason for the inclusion of the prohibition in the first draft of the Tech Code was the concerns about the impact of BNPL finance on consumers, given the strong concerns expressed by CALC and no equally strong view on the BTMWG to the contrary.⁴³

D. MODERATION OF THE TECH CODE'S APPROACH TO BNPL

40. In its Draft Determination, published on 1 August 2019,⁴⁴ the ACCC indicated that its provisional position was that authorisation should be granted for the Tech Code.

³⁷ Crawshaw Statement at [43]; Tab 8 of Exhibit JC-1 [ANA.001.001.0506] to Crawshaw Statement at page 12.

³⁸ Barnes Statement at [56].

³⁹ Barnes Statement at [54].

⁴⁰ Annexure KF-1 to Foo Statement dated 5 May 2020 (*Foo Statement*).

⁴¹ Barnes Statement at [52].

⁴² Barnes Statement at [53].

⁴³ Barnes Statement at [61].

⁴⁴ A copy of the Draft Determination appears at Tab 10 of Exhibit JC-1 [ANA.001.001.0278] to Crawshaw Statement.

However, the ACCC identified a number of matters for further consideration, one of which was the Tech Code's approach to BNPL finance.⁴⁵

41. The Authorisation Applicants engaged in extensive further discussions with the other members of the BTMWG in relation to BNPL finance.⁴⁶
42. ECA's representative on the BTMWG (and in relation to the authorisation application), Jacqueline Crawshaw, considered that an amendment to the Tech Code to permit BNPL finance could still accommodate the concerns expressed by CALC, and that BNPL finance could be permitted, as long as the potential consumer harm could be overcome by requiring BNPL providers to meet standards similar to those imposed on regulated finance providers (i.e. those who were obliged to comply with the NCCPA and NCC).⁴⁷
43. Significantly, the ECA considered that if potential consumer detriment was addressed, then access to BNPL finance would be of benefit to consumers and provide consumers with greater choice and control over their energy technology.⁴⁸ This is consistent with ECA's approach and experience in assessing market proposals based on their total consumer benefit and considering matters beyond (but including) consumer protection, such as innovation, consumer choice and efficient investment in energy systems and infrastructure.⁴⁹
44. The AEC's representative on the BTMWG (and in relation to the authorisation application), Ben Barnes, considered that it was appropriate for the initial prohibition to be moderated in light of:
 - (a) the apparent consumer demand for, and support of, BNPL as a method of financing consumer purchases of new energy tech products and services. This had become more apparent as a result of the various public submissions made to the ACCC during the public authorisation process and the ACCC's observations in its Draft Determination; and

⁴⁵ Tab 10 of Exhibit JC-1 [ANA.001.001.0278] to Crawshaw Statement at [4.49]; Barnes Statement at [70].

⁴⁶ Crawshaw Statement at [65], [69]–[75].

⁴⁷ Crawshaw Statement at [76]–[78].

⁴⁸ Crawshaw Statement at [77].

⁴⁹ Crawshaw Statement at [17]–[18].

- (b) the risk of reduced competitive options being available to consumers seeking to purchase new energy tech products and services.⁵⁰
45. Mr Barnes also shared Ms Crawshaw's doubts as to the likely consumer harm associated with BNPL finance when considered in a broad market context and with appropriate safeguards.⁵¹
46. Ms Crawshaw's evidence is that:
- (a) the ECA considers that innovation (and developments which promote innovation) are directly relevant to the price, quality, safety, reliability and security of energy supply;⁵²
- (b) the ECA considers that increased innovation in energy markets is a key desirable outcome for households and small businesses;⁵³ and
- (c) the availability of BNPL finance is likely to enable more consumers to access new technology, which in turn will promote innovation.⁵⁴
47. In light of these matters, both Mr Barnes and Ms Crawshaw supported the moderation of the original prohibition, permitting BNPL finance to be offered in conjunction with the supply of new energy tech goods and services, subject to appropriate consumer safeguards.⁵⁵
48. On 6 September 2019, the CEC wrote to the ACCC, on behalf of the Authorisation Applicants, confirming, among other things, that:
- (a) the intention of the BTMWG in formulating the original BNPL prohibition had been to protect consumers – it had not been to exclude BNPL *per se*; and
- (b) to the extent that the nascent BNPL Industry Code (**BNPL Code**) – which they understood was in development – delivered substantially equivalent consumer protections to those contained in the NCCPA and NCC, the Tech Code should be amended to permit BNPL finance to be offered by signatories to the BNPL Code and that the BNPL Code be approved by ASIC.⁵⁶

⁵⁰ Barnes Statement at [78].

⁵¹ Barnes Statement at [78].

⁵² Crawshaw Statement at [21].

⁵³ Crawshaw Statement at [20].

⁵⁴ Crawshaw Statement at [77].

⁵⁵ Barnes Statement at [78]; Crawshaw Statement at [76]–[78].

⁵⁶ Tab 9 of Exhibit BB-1 [ANA.001.001.0132] to Barnes Statement.

49. On 25 September 2019, the CEC wrote to the ACCC, on behalf of the Authorisation Applicants, attaching an amended version of the Tech Code, incorporating the proposed changes in relation to BNPL finance and also a further change in relation to unsolicited offers of BNPL finance.⁵⁷
50. The additional change in relation to the unsolicited supply of BNPL finance was reflected in cl 3(d) of the Tech Code and was designed to ensure that the Tech Code's approach to BNPL finance mirrored that of the NCCPA and NCC.⁵⁸
51. The introduction of cl 3(d) was motivated by a desire to ensure that providers of BNPL finance were not unfairly advantaged, having regard to a similar restriction imposed on regulated finance providers.⁵⁹
52. Clause 3(d) was introduced into the Tech Code in order to avoid the perverse situation arising where a supplier of new energy tech goods or services would be permitted to offer BNPL finance, but precluded from offering regulated finance.⁶⁰ That is, as BNPL finance is not regulated under the NCCPA and NCC, the prohibition on an unlicensed person offering finance in respect of the supply of goods or services to the consumer as the result of unsolicited contact with the consumer does not apply to BNPL finance.⁶¹
53. This circumstance would have arisen as a result of the operation of Regulation 23 of the *National Consumer Credit Protection Regulations 2010 (NCCP Regs)*, which applies in the following context:
- (a) Section 29 of the NCCPA prohibits a person from engaging in a credit activity without a credit licence;
- (b) a "credit activity" is defined in s6 of the NCCPA and relevantly captures the offering of finance, but excludes most forms of BNPL finance;⁶²

⁵⁷ A copy of this letter appears at Tab 12 of Exhibit BB-1 [ANA.001.001.0134] to Barnes Statement. See also Barnes Statement at Part H; Crawshaw Statement at [100]–[107].

⁵⁸ Barnes Statement at [108]–[114]; Crawshaw Statement at [93]–[95].

⁵⁹ Barnes Statement at [109]–[114]; Crawshaw Statement at [93]–[95]. This concern was also identified by Energy Efficient Finance in its Submission to the ACCC dated 18 September 2019 [1000439.001.001.0875] at pages 4–5.

⁶⁰ Barnes Statement at [113].

⁶¹ Barnes Statement at [110]–[112]; Crawshaw Statement at [93]–[95].

⁶² NCC, s6(5).

(c) Section 110(a) of the NCCPA relevantly provides that:

“The regulations may:

*(a) exempt a person or class of persons from all or specified provisions to which this Part applies.”*⁶³

(d) Regulation 23 of the NCCP Regs provides that a supplier of goods or services is exempt from the obligation to hold a credit licence if they are, effectively, offering credit which is to be wholly or predominantly used to pay for goods or services supplied by that supplier;⁶⁴ and

(e) Regulation 23(4) of the NCCP Regs qualifies this exception and provides that the exemption does not apply if the supply of goods or services to the consumer is as the result of unsolicited contact with the consumer.

E. THE ACCC’S REDRAFT OF CLAUSE 25

54. Following further market consultation, the ACCC published a revised version of cl 25 of the Tech Code on 22 October 2019, for market comment.⁶⁵

55. The principal changes to the version previously submitted by the Authorisation Applicants on 25 September 2019 were that, where the finance to be supplied was exempt finance (i.e. not regulated by the NCCPA and NCC):

(a) the reference to compliance with a **regulator approved** code had been removed;⁶⁶ and

(b) the Tech Code Administrator was responsible for assessing whether a credit provider had policies in place which were designed to protect the consumer and reflect certain provisions of the NCCPA.

56. The Authorisation Applicants subsequently agreed to adopt the ACCC’s draft of cl 25, subject to the inclusion of a further amendment to cl 25(a)(ii)(A), which reinstated a

⁶³ By reason of the operation of s108 of the NCCPA, the power to make an exempting regulation pursuant to s110(1)(a) also includes the licensing obligation under s29 of the NCCPA.

⁶⁴ NCCP Regs, rr23(1), (3)(a)(i), (3)(b)(i), (3)(d).

⁶⁵ This revised version was drafted by the ACCC and a copy of the ACCC’s letter appears at Tab 13 of Exhibit BB-1 [ANA.001.001.0037] to Barnes Statement.

⁶⁶ It appears that this amendment was made in light of ASIC’s submission to the ACCC on 11 October 2019 (Annexure KF-4 to the Foo Statement) that it was unlikely that there would be any approved code in place in time for the likely authorisation of the Tech Code, and that if reference to an industry code was retained, then there should also be a transition period: see [46]–[48].

reference to the BNPL Code, and amended the role of the Tech Code Administrator from one of reviewing the policies of each relevant BNPL provider, to one of ensuring that each relevant BNPL provider was a signatory to a BNPL Code which imposed various obligations on *its* signatories.⁶⁷

F. THE ROLE OF THE TRIBUNAL

57. The present proceeding is in the form of an application pursuant to s101 of the CCA, for a review of the ACCC's Determination in respect of the Authorisation Applicants' application for the authorisation of the Tech Code.
58. As such, this proceeding is a rehearing of the Authorisation Applicants' application for authorisation pursuant to s88 of the CCA.⁶⁸
59. The power conferred on the ACCC (and therefore the Tribunal) to authorise conduct is discretionary, subject to the requirements in s90(7) of the CCA being met.⁶⁹
60. Notwithstanding the fact that there is a large degree of common ground between the parties and interveners as to the existence – and significance – of the various public benefits associated with the Tech Code, 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.⁷⁰
61. Accordingly, the Authorisation Applicants carry the burden of satisfying the Tribunal that the authorisation should be granted.

G. THE APPLICABLE LEGAL PRINCIPLES

62. Section 88 of the CCA provides that:

“Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one of the provisions of Part IV specified in the authorisation would or might apply.”

⁶⁷ Barnes Statement at [122]–[124]; Crawshaw Statement at [115]–[124]. A copy of the letter sent from the CEC to the ACCC proposing this amendment appears at Tab 14 of Exhibit BB-1 [ANA.001.001.0163] to Barnes Statement.

⁶⁸ CCA, s101(2).

⁶⁹ *Application by Medicines Australia Inc* (2007) ATPR 42-164, [106] (**Medicines Australia**).

⁷⁰ *Medicines Australia*, [137].

63. Section 90(7) of the CCA relevantly provides that:

“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:

...

(b) *that:*

(i) *the conduct would result, or be likely to result, in a benefit to the public; and*

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

(net public benefit test)

64. The power under s88 is discretionary, and exists once the necessary applicable pre-conditions in s90 are met. However, the satisfaction of s90(7) does not *require* the grant of authorisation.⁷¹

65. In *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 (**Re 7-Eleven Stores**), the Tribunal stated that the net public benefit test requires the Tribunal to:

“...examine on one hand the anti-competitive aspects of the conduct ... and on the other hand the public benefits arising from it and weigh the two.”⁷²

Likely to eventuate

66. Further, in assessing the relevant public benefits and detriments, the Tribunal must only take into account those benefits and detriments which it considers likely to eventuate.

67. In *Qantas Airways*, the Tribunal held that:

“... for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood

⁷¹ *Medicines Australia*, [106].

⁷² *Re 7-Eleven Stores*, ¶42,654. See also *Qantas Airways Limited* (2005) ATPR 42-065, [149] (**Qantas Airways**).

that [the parties] will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the ... public detriment⁷³.

The counterfactual test

68. In identifying and weighing the public benefits and detriments associated with the conduct for which authorisation is sought, the Tribunal must compare the future with the conduct (the **factual**) and the future without the conduct (the **counterfactual**).⁷⁴
69. The Authorisation Applicants have identified the relevant conduct as the commitment by signatories to sign up to, and comply with, the standards and practices prescribed by the Tech Code.⁷⁵
70. More particularly, the relevant conduct contemplated by the Tech Code includes agreement by its signatories to:
- (a) adhere to the standards of behaviour set out in the Tech Code;
 - (b) adhere to provisions relating to the monitoring of compliance and sanctioning of instances of non-compliance; and
 - (c) only offer deferred payment arrangements (i.e. credit) in circumstances to comply with the provisions of the Tech Code (specifically, cls 3(d) and 25) (**BNPL Finance Provisions**).
71. In the Authorisation Applicants' submission, the relevant factual is the future with the Tech Code, in the form submitted to the ACCC as at November 2019, and the relevant counterfactual is the future without the Tech Code.

Relevant markets

72. For the purposes of applying the net public benefit test, the Authorisation Applicants accept the ACCC's contention that the relevant markets in which the test should be applied are:

⁷³ *Qantas Airways*, [156]; cited with approval by the Tribunal in *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, [164].

⁷⁴ *Qantas Airways*, [151]; *Medicines Australia*, [117], [120].

⁷⁵ See Tab 8 of Exhibit JC-1 [ANA.001.001.0506] to Crawshaw Statement at page 4.

- (a) a market for the supply of different types of new energy tech goods and services;
and
- (b) a market for the supply of financial products, including particularly deferred payment arrangements, offered with the supply of those goods and services.⁷⁶

73. The Authorisation Applicants do not understand that there is any controversy with respect to this approach to market definition.

H. MEANING OF NET PUBLIC BENEFIT

74. A public benefit has been interpreted widely by the Tribunal, as including:

- (a) "... anything of value to the community generally ... the achievement of the economic goals of efficiency and progress";⁷⁷
- (b) "Plainly the assessment of efficiency and progress must be from the perspective of society as a whole...";⁷⁸ and
- (c) "... the extent to which the benefit has an impact on members of the community, that is society".⁷⁹

75. In *Qantas Airways*, the Tribunal observed that if the benefit is of value to the community generally, then the question for the Tribunal is one of determining the weight to be given to that benefit, "*having regard to its nature, characterisation and the identity of the beneficiaries...*".⁸⁰

I. APPLYING THE NET PUBLIC BENEFIT TEST

Public benefits

76. In *Qantas Airways*, the Tribunal observed that:

"The Act does not require an applicant for authorisation to quantify, in precise terms, the benefits claimed to arise if authorisation is granted. However, there

⁷⁶ ACCC's Amended Statement of Facts, Issues and Contentions at [52].

⁷⁷ *Re Queensland Co-Op Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169, 182–183.

⁷⁸ *Re 7-Eleven Stores*, ¶42,677.

⁷⁹ *Qantas Airways*, [188].

⁸⁰ *Qantas Airways*, [188].

*must be a factual basis for concluding that the public benefits are likely to result.*⁸¹

77. In the Authorisation Applicants' submission, this is not a case where there is any difficulty in identifying the nature of the benefits that are likely to arise, and the fact that those benefits are likely to be enjoyed by members of the public, both directly and indirectly.
78. In the Authorisation Applicants' submission, the public benefits of the Tech Code are broadly identifiable by reference to the following categories, each of which is addressed in detail below. The Authorisation Applicants submit that none of these benefits would be likely to arise in a future without the Tech Code:
- (a) the centralisation of key consumer law principles in an approachable and understandable format, such that consumers of new energy tech goods and services can readily understand and be better informed about their existing rights;⁸²
 - (b) the supplementing of existing consumer protection provisions with additional rights for consumers (and obligations on suppliers), designed for the benefit of consumers of new energy tech goods and services. This both provides additional protections for consumers and, together with category (a) above, encourages the uptake of new energy tech goods and services through greater consumer confidence in the sector;⁸³ and
 - (c) the limitation of circumstances in which BNPL finance can be offered to consumers of new energy tech goods and services by signatories of the Tech Code. These restrictions are designed to secure the ongoing availability to new energy tech consumers of the widest range of finance options, while ensuring a level of consumer protection consistent with that offered in respect of credit regulated by the NCCPA and NCC.

⁸¹ *Qantas Airways*, [201].

⁸² The need to improve the consistency and quality of information available to consumers on issues such as their rights and obligations, whether a product is fit for purpose as well as the financial, legal and practical implications of long term contracts, was identified by the COAG Energy Council in its Submission to the Tribunal dated 2 April 2020 at page 2.

⁸³ The value for the new energy tech sector associated with increased consumer confidence was identified in the AGL Submission to the ACCC dated 22 May 2019 [1000439.001.001.1058] at page 1 and the AGL submission to the Tribunal dated 3 April 2020 at page 1. See also Energy & Water Ombudsman Queensland Submission to the ACCC dated 22 May 2019 [1000439.001.001.1056].

Improving transparency of information for consumers

79. In its report on Residential PV, published in December 2016 for ECA, KPMG undertook an analysis of the solar PV market with a view to assessing whether solar customers were achieving the outcomes expected by them from their investment in solar PV, including value for money, quality and performance of their systems.⁸⁴
80. The report observed that, as at 2016, in excess of 1.5 million Australian households had solar panels and, while the report concluded that consumers were generally satisfied with their systems, the report noted that:
- (a) the majority of customers install solar PV to reduce their energy bills or for other financial reasons;⁸⁵
 - (b) access to funds to pay for the upfront costs of installation was a barrier to certain customers being able to take up solar PV;⁸⁶
 - (c) the energy market is a complex market, with battery storage adding an additional dimension to that complexity;⁸⁷ and
 - (d) customers lacked the information and tools necessary to make informed decisions.⁸⁸
81. KPMG's observation that many customers did not understand how their solar system operated, or how to get the most value from their system, is indicative of an information asymmetry between suppliers and consumers.⁸⁹
82. The market complexity, and commensurate risk of consumers acquiring products that do not meet their needs, was also specifically identified as an issue by the COAG EC in its correspondence to the Authorisation Applicants.⁹⁰

⁸⁴ A copy of the KPMG report appears at Tab 9 of Exhibit JC-1 [ANA.001.001.0404] to Crawshaw Statement. See also Crawshaw Statement at [52].

⁸⁵ See Tab 9 of Exhibit JC-1 [ANA.001.001.0404] to Crawshaw Statement at chapter 4.

⁸⁶ While the report only addressed solar PV, this proposition could reasonably apply to other forms of new energy tech goods and services – particularly those with high upfront capital costs.

⁸⁷ Tab 9 of Exhibit JC-1 [ANA.001.001.0404] to Crawshaw Statement at page 4.

⁸⁸ Tab 9 of Exhibit JC-1 [ANA.001.001.0404] to Crawshaw Statement at page 4.

⁸⁹ Tab 9 of Exhibit JC-1 [ANA.001.001.0404] to Crawshaw Statement at chapter 8. This information asymmetry was also identified as a concern in: AGL Submission to the ACCC dated 22 May 2019 [1000439.001.001.1058] at page 1; AGL Submission to the Tribunal dated 3 April 2020 at page 2; COAG Energy Council Submission to the Tribunal dated 2 April 2020 at page 2.

⁹⁰ See, eg, the letter to ECA dated 16 August 2017 at Tab 2 of Exhibit JC-1 [ANA.001.001.0329] to Crawshaw Statement.

83. The ability of customers to reduce their energy bills is directly related to the new energy tech being properly designed to maximise this opportunity and to the consumer obtaining clear advice as to whether:
- (a) the new energy tech is fit for their purposes; and
 - (b) it is likely to produce the outcome sought by the consumer.⁹¹
84. The Tech Code's approach to mandating consistent minimum standards for suppliers is designed to enable these issues of complexity and information asymmetry to be overcome.
85. Examples of how the Tech Code addresses these issues include the obligations on signatories to:
- (a) use language in their advertising and promotional material that is accessible and avoids industry jargon (cl 3(e));
 - (b) advertise the total price as prominently as any component price (cl 3(i));
 - (c) be clear, in any of their advertising and promotional material, about any additional cost for finance, where the cost is contained in the overall price (i.e. where the price is higher than would be the case if payment were made without finance) (cl 3(n)).
- This provision directly addresses concerns raised by ASIC, RateSetter⁹² and Energy Efficient Finance⁹³ (a broker of regulated credit) that interest free finance, such as BNPL, is associated with price inflation. That is, that retail prices may be inflated in order for the supplier to "recover" the cost of finance and that not being disclosed to the consumer. To the extent that this may have occurred historically, cl 3(n) specifically prohibits that conduct;
- (d) provide any details which support any claim that the consumer will achieve a favourable return on their investment (cl 15); and

⁹¹ See Crawshaw Statement at [53]; Barnes Statement at [45].

⁹² Foggo Statement dated 25 May 2020 at [9] (**Second Foggo Statement**).

⁹³ Energy Efficient Finance Submission to the ACCC dated 18 September 2019 [1000439.001.001.0875] at pages 1–3.

(e) provide, as part of any quote, a site-specific installation design or plan, including how the new energy tech will integrate with any other new energy tech already installed at the premises (cl 17).

86. Each of these are public benefits which would not arise in the future without the Tech Code. In its submission to the ACCC, the South Australian Department for Energy and Mining stated that:

*“Often, energy technology is complex and multifaceted, and can be a fraught area for consumers to navigate. The Code is a valuable tool to help consumers understand and protect their own interests, whilst making informed decisions”.*⁹⁴

Supplementing existing consumer protection provisions

87. Not only does the Tech Code reinforce, in a clear and approachable manner, consumer’s rights and obligations, it sets minimum standards that exceed those required by existing consumer protection legislation.⁹⁵

88. Examples of these additional protections include the obligations on signatories to:

- (a) use language in their advertising and promotional material that is accessible and avoids industry jargon (cl 3(e));
- (b) comply with strict requirements in relation to direct marketing and sales (cl 4), including avoiding high pressure sales tactics,⁹⁶ examples of which are contained in the Tech Code (cl 5);
- (c) take extra care if the signatory (or their representative) becomes aware that the consumer may be facing vulnerable circumstances (cl 6);
- (d) ask the consumer about their own particular circumstances, needs and expectations (cl 7);

⁹⁴ South Australian Department for Energy and Mining Submission to the ACCC dated 31 May 2019 [1000439.001.001.1100] at page 1.

⁹⁵ Barnes Statement at [44], [50]; Crawshaw Statement at [41].

⁹⁶ This benefit addresses concerns raised by interested parties during the ACCC authorisation process regarding the use of high pressure sales tactics in relation to new energy tech: see, eg, Uniting Vic.Tas Submission to the ACCC dated 23 August [1000439.001.001.0801]; CALC Submission to the ACCC dated 21 May 2019 [1000439.001.001.1045] at page 5.

- (e) provide information about a system or service limitation that is likely to be relevant to the consumer (cl 9(e));
- (f) clearly set out consumers' and suppliers' rights and obligations in relation to warranties, termination and other contractual matters (see generally, cls 19–50);
- (g) commit to meeting minimum standards for complaints management (cls 53–54);⁹⁷ and
- (h) take responsibility for ensuring the signatory's agents and representatives are appropriately trained as to the obligations imposed by the Tech Code (cl 58).

89. None of these benefits would be likely to arise in the absence of the Tech Code.

Making BNPL available while ensuring consumer protection

90. While the Authorisation Applicants initially sought to prohibit BNPL finance from being offered in conjunction with the supply of new energy tech goods and services:

- (a) the focus of the initial prohibition was on consumer welfare;⁹⁸
- (b) it was never the intention of the BTMWG to prohibit BNPL finance *per se*;⁹⁹
- (c) once the scale of BNPL finance and its significance to the supply of new energy tech goods and services became apparent to the members of the BTMWG, the consensus position of the BTMWG was that BNPL should be permitted, so long as the Tech Code took appropriate steps to mitigate the potential risk to consumers associated with credit that was unregulated by the NCCPA and NCC;¹⁰⁰ and
- (d) the Authorisation Applicants' proposed amendments to the Tech Code sought to include BNPL finance, subject to signatories complying with a BNPL industry code which provided protections substantially equivalent to those contained in the NCCPA and NCC.¹⁰¹

⁹⁷ The need for accessible, simple and affordable complaints and dispute management was identified in COAG Energy Council Submission to the Tribunal dated 2 April 2020 at page 2.

⁹⁸ Barnes Statement at [90]; Crawshaw Statement at [83].

⁹⁹ Barnes Statement at [90]; Crawshaw Statement at [83].

¹⁰⁰ Barnes Statement at [90]; Crawshaw Statement at [83].

¹⁰¹ See Crawshaw Statement at [83]; Barnes Statement at [80]. This amendment addressed concerns raised during the ACCC authorisation process that BNPL deprives consumers of important protections available under the NCCPA and NCC: see, eg, Energy Efficient Finance Submission to the ACCC dated 18 September 2019 [1000439.001.001.0875] at pages 3–4.

91. ECA assesses any regulatory or market development having regard to the manner in which it contributes to, or detracts from, the benefit to small business and residential consumers.¹⁰²
92. Having regard to its mandate and focus, it is a particularly relevant consideration for the Tribunal that, having had the benefit of third party views expressed during the BTMWG consultation and the ACCC authorisation processes, ECA concluded that, while the availability of BNPL finance was beneficial for consumers wishing to acquire new energy tech goods and services, the provision of that finance should only occur subject to appropriate safeguards being in place to manage the risk of consumer harm.¹⁰³
93. ECA considered that the terms of the Tech Code satisfactorily addressed this issue.¹⁰⁴ In particular, the terms of cl 25 of the Tech Code require a provider of BNPL finance to:
- (a) resolve any complaints through an internal process and, if the complaint remains unresolved, through an external process, which must include the scheme operated by the Australian Financial Complaints Authority (**AFCA**);
 - (b) have processes to identify whether a consumer is experiencing payment difficulties due to hardship;
 - (c) offer alternative payment options if a consumer is experiencing payment difficulties; and
 - (d) comply with those provisions in the NCCPA which relate to assessing the suitability of a consumer and prohibit the BNPL finance provider from entering into finance arrangements with a consumer if the contract is unsuitable for the consumer.¹⁰⁵
94. The value of the protections provided by the NCCPA was also identified as a significant public benefit by various parties in their submissions to the ACCC and the Tribunal.¹⁰⁶

¹⁰² Crawshaw Statement at [18].

¹⁰³ Crawshaw Statement at [76]–[77].

¹⁰⁴ Crawshaw Statement at [85], [118], [126].

¹⁰⁵ See NCCPA, ss128–133.

¹⁰⁶ AGL Submission to the ACCC dated 22 May 2019 [1000439.001.001.1058] at page 2; Choice, CALC, COTA Victoria, the Financial & Consumer Rights Council Inc, Financial Rights Legal Centre, Moreland Energy Foundation, Public Interest Advocacy Centre, the Victorian Council of Social Service

95. Clause 3(d) of the Tech Code was introduced to address an issue which only arose once BNPL finance was to be permitted under the Tech Code.¹⁰⁷ That is, the BTMWG wanted to ensure that both BNPL finance and finance regulated under the NCCPA and NCC were treated in the same manner insofar as unsolicited conduct was concerned.¹⁰⁸ This approach was also endorsed by CALC, which noted that, in the absence of cl 3(d), providers of BNPL finance could offer that finance in conjunction with unsolicited sales, whereas finance providers regulated under the NCCPA could not.¹⁰⁹
96. The intention behind the introduction of cl 3(d) was to ensure that, consistent with the NCCPA, finance products could only be offered in conjunction with unsolicited conduct where the person offering the finance held a credit licence.¹¹⁰ The rationale behind cl 3(d) of the Tech Code is also supported by CALC, which expressed concerns about the level of harm associated with the offer of BNPL arrangements in conjunction with unsolicited sales.¹¹¹ Mr Barnes' evidence is that he was aware of potential consumer harm which could arise from unsolicited conduct.¹¹²
97. While some conduct associated with the marketing and offer of BNPL finance is relevantly captured by the CCA and the ASIC Act, BNPL finance is not regulated by the NCCPA and NCC, and neither the CCA or ASIC Act addresses matters such as hardship policies, dispute resolution frameworks and the assessment of the suitability of given finance for the consumer.
98. Matters such as:
- (a) the obligation on a credit licensee to assess whether the credit contract will be unsuitable for a consumer; and
 - (b) the prohibition on a licensee entering into an unsuitable credit contract,
- are not addressed by the ACL or ASIC Act and do not otherwise apply to providers of BNPL finance. This would continue to be the case in the future without the Tech Code.

and the Uniting Church in Australia Synod of Victoria and Tasmania Submission to the ACCC dated 22 May 2019 [1000439.001.001.1107]; AGL Submission to the Tribunal dated 3 April 2020 at page 2.

¹⁰⁷ Barnes Statement at [108]–[111]. See also Crawshaw Statement at [93]–[95].

¹⁰⁸ Barnes Statement at [109]; Crawshaw Statement at [93].

¹⁰⁹ CALC Submission to the ACCC dated 20 September 2019 [1000439.001.001.0884] at page 3.

¹¹⁰ Barnes Statement at [114]; Crawshaw Statement at [95].

¹¹¹ CALC Submission to the ACCC dated 20 September 2019 [1000439.001.001.0884] at page 3.

¹¹² Barnes Statement at [55].

99. However, the absence of any decision by the Government to legislate so as to subject BNPL finance to regulation under the NCCPA and NCC does not mean that it is inappropriate for the Tech Code to take steps which the Authorisation Applicants consider are in the best interests of consumers. It is not an appropriate objection to the Tech Code's approach to this issue, to submit that the burden for addressing these market issues rests solely with Parliament. It is precisely in addressing gaps such as these that voluntary industry codes can deliver a public benefit.¹¹³
100. The value of industry codes as an alternative to further government regulation was considered in *Medicines Australia*,¹¹⁴ with the Tribunal:
- (a) endorsing the proposition that voluntary codes may co-exist with a statutory legal framework and, in doing so, result in increased possibilities for effective norm development;¹¹⁵ and
- (b) concluding that:
- "there is strong public policy support for effective voluntary codes and that such codes can deliver public benefit especially where they complement and extend beyond the reach of statutory regulation in dealing with market failures".*¹¹⁶
101. In the Authorisation Applicants' submission, the Tech Code's approach to making BNPL available while introducing consumer protections is entirely consistent with the delivery of a public benefit in a manner which complements and extends beyond the reach of statutory regulation.¹¹⁷ In this regard, the Authorisation Applicants note that ASIC, the regulator with sector expertise, holds the view that *"an appropriate form of protection is that contained in the form of its submission to the ACCC, which is largely in the form in which the NETCC was authorised by the ACCC"*.¹¹⁸

¹¹³ *Medicines Australia*, [308].

¹¹⁴ *Medicines Australia*, [289]–[308].

¹¹⁵ *Medicines Australia*, [307].

¹¹⁶ *Medicines Australia*, [308].

¹¹⁷ That some form of additional regulation is appropriate is implicit from the Applicant's preparedness to submit to a BNPL Code which seeks to substantially replicate the consumer protections available under the NCCPA and NCC.

¹¹⁸ ASIC's Statement of Facts, Issues and Contentions at [19].

Authorisation Applicants' evidence

102. The evidence provided on behalf of ECA is that the Tech Code provides significant benefits to both consumers and suppliers of new energy tech products and services, through:
- (a) the promotion of new energy tech products in a manner which was likely, in ECA's opinion, to increase market penetration of those products and services;¹¹⁹
 - (b) a likely reduction in energy costs for consumers through the adoption of appropriately tailored new energy tech products and services;¹²⁰
 - (c) the extension of consumer protections not otherwise available to consumers under existing consumer protection legislation;¹²¹
 - (d) the publication of a document which clearly sets out key consumer rights and supplier obligations in the one place and in plain English, making it easily accessible for consumers;¹²²
 - (e) consumers avoiding additional costs which might be passed on by suppliers if the suppliers were subject to a more heavy-handed form of industry regulation;¹²³ and
 - (f) suppliers benefiting from increased sales as a result of greater consumer confidence in the new energy technology market, and reducing the risk of complaints by, or disputes with, consumers.¹²⁴
103. The evidence provided on behalf of the AEC is that:
- (a) the Tech Code demystifies the complexities associated with new energy tech;
 - (b) the Tech Code ensures that, through the imposition of consistent standards on signatories, consumers are better equipped to compare "apples with apples"; and

¹¹⁹ Crawshaw Statement at [53].

¹²⁰ Crawshaw Statement at [53].

¹²¹ Crawshaw Statement at [53].

¹²² Crawshaw Statement at [53].

¹²³ Crawshaw Statement at [53].

¹²⁴ Crawshaw Statement at [54].

(c) the framework established by the Tech Code could enable the code's Administrator to publish mandatory technical guidelines on tech-specific issues, should it become apparent that consumer welfare warranted such an approach.¹²⁵

104. All of the public benefits are benefits directly felt by consumers. However, the Tech Code also provides indirect benefits, through the promotion of new energy tech products in a manner which was likely, in ECA's opinion, to increase market penetration of those products and services, a result that is in the long-term interests of consumers with respect to the price, quality, safety, reliability and security of the supply of energy services.¹²⁶

Public detriments

105. Following a detailed public authorisation process (including a pre-decision conference), the ACCC published its Determination, in which it stated that it had considered the following two public detriments:

(a) a lessening of competition in the supply of new energy tech products; and

(b) a lessening of consumer choice, due to the potential exclusion of some BNPL providers.¹²⁷

106. The Authorisation Applicants have not identified any additional public detriments associated with the Tech Code and, for the reasons set out below, submit that, to the extent that these public detriments arise, neither outweigh the public benefits associated with the Tech Code.

107. While the Authorisation Applicants have not independently assessed the cost of compliance with the standards prescribed by the Tech Code, they:

(a) refer to the evidence filed on behalf of RateSetter, including as to the costs of compliance with the NCC and NCCPA;¹²⁸ and

(b) consider that the public benefits associated with the protection of consumers warrants such costs, regardless of their sum (particularly having regard to the fact

¹²⁵ Barnes Statement at [45].

¹²⁶ Crawshaw Statement at [14], [23], [25], [118].

¹²⁷ ACCC Determination at [4.36]–[4.47].

¹²⁸ Foggo Statement dated 8 May 2020 generally and, in particular, at [43]–[45] (**First Foggo Statement**).

that such costs are incurred by credit providers regulated under the NCCPA and NCC).

108. Even if (which is not evident) some consumers are deprived of the opportunity to benefit (or to benefit to the same extent) from access to BNPL finance in the event that the Tech Code is authorised with the BNPL Finance Provisions, the Authorisation Applicants consider that such detriment is offset by the public benefits to consumers arising from:
- (a) the additional consumer protection provided by the Tech Code;
 - (b) the clarification of consumers' existing rights; and
 - (c) the likely increased consumer confidence in (and therefore support for and uptake of) new energy tech goods and services.
109. The Applicant itself advocates for a form of the Tech Code which adopts a requirement for signatories to comply with a BNPL Code that "*delivers substantially equivalent consumer protections to those contained in the NCCPA*".¹²⁹
110. In his first statement, Mr Mysak addresses the concept of flexigroup being likely to incur additional costs (arising from data capture) as a result of the obligations imposed on it under the Tech Code.¹³⁰ However, it is not clear from Mr Mysak's evidence whether (or to what extent) these costs are likely to inevitably arise as a result of compliance with the BNPL Code, for which flexigroup advocates, and therefore likely to arise in any event in the future *without* the Code (assuming that the Tribunal concludes that the introduction of a BNPL Code which substantially reproduces the consumer protection obligations contained in the NCCPA is likely).

Conclusion in relation to net public benefit

111. Of significant weight in assessing the value of the public benefits provided by the Tech Code is the fact that the BTMWG was comprised of representatives of several significant consumer representative organisations who (with the limited exception of CALC's view on the BNPL Finance Provisions) unanimously support the introduction of the Tech Code and endorse the public benefits that it provides.
112. Further, with the exception of CALC's position in respect of the BNPL Finance Provisions, no consumer representative organisation has identified any public

¹²⁹ Applicant's Application to Tribunal for Review, Form I at [5].

¹³⁰ Mysak Statement dated 24 April 2020 at [60], [63] (***First Mysak Statement***).

detriment associated with the Tech Code (with the exception of the BNPL Finance Provisions) and none of the parties or interveners in this proceeding has identified any form of public detriment associated with the Tech Code).

113. The Authorisation Applicants' principal objective is to ensure a better outcome for consumers of new energy tech products.¹³¹ To the extent that, in the pursuit of that outcome, either:
- (a) BNPL providers incur some additional costs; or
 - (b) some consumers are not made aware of, or able to obtain, BNPL finance,
- the Authorisation Applicants do not consider that either detriment constitutes a public detriment of any magnitude, such that it might outweigh the public benefits provided to consumers under the Tech Code.
114. For the reasons discussed above, the respective benefits and detriments arising as a result of the Tech Code should be compared to those arising in a future without the Tech Code; not any alternative or lesser codes.¹³²
115. When considered in this manner, it is clear that the relevant public benefits are those consumer benefits arising under the Tech Code which either:
- (a) do not arise in the future without the Tech Code (i.e. they are not required under the existing statutory consumer protection frameworks – a non-exhaustive list of these is set out at paragraphs 32, 85 and 88 above); or
 - (b) while provided for under the existing statutory consumer protection frameworks, may not be known by, or clearly communicated to, consumers (similarly, the communication of these consumer rights and supplier obligations would be unlikely to occur in the future without the Tech Code). These are also referred to above.
116. In the Authorisation Applicants' submission, the likely public benefits associated with the Tech Code far outweigh any likely public detriments.

¹³¹ See Barnes Statement at [13], [33]; Crawshaw Statement at [12], [25].

¹³² *Medicines Australia*, [309].

J. TRIBUNAL'S POWER TO IMPOSE CONDITIONS

117. For the reasons set out above, the Authorisation Applicants do not consider that any conditions need to be imposed in order to realise the public benefits associated with the Tech Code.
118. However, the Authorisation Applicants also acknowledge the broad scope of s88(3) of the CCA, which permits an authorisation to be granted subject to conditions.
119. While there is no express limit on the kinds of conditions that may be imposed, this does not mean that there is an unfettered discretion to impose whatever conditions the ACCC or Tribunal considers appropriate. The power is constrained by the matter, scope and purpose of the CCA.¹³³
120. In *Medicines Australia*, the Tribunal identified three categories of case in which it might be appropriate to impose a condition, being:
- (a) where there is no, or insufficient, public benefit;
 - (b) where a theoretical public benefit has been identified, but the condition is designed to increase the likelihood of the public benefit arising; and
 - (c) where the statutory test has been satisfied, but the ACCC (or Tribunal) imposes a condition as part of exercising its inherent discretion.¹³⁴
121. However, the Tribunal observed that, in the case of the broad discretion, the ACCC and Tribunal should not use the conditioning power to impose or construct its ideal or preferred system of self-regulation (although noting that a condition designed to enhance or increase the likelihood of benefits said to flow from a voluntary code is a far cry from redrafting the code).¹³⁵
122. In the Authorisation Applicants' submission, for a condition to enhance a given benefit, there must be some basis for concluding that an enhancement is likely.¹³⁶

¹³³ *Medicines Australia*, [129].

¹³⁴ *Medicines Australia*, [133].

¹³⁵ *Medicines Australia*, [134].

¹³⁶ The test of likelihood – i.e. “real chance” – applies generally to assessing benefits and detriments (*Qantas Airways*, [156]) and there is no reason to suggest that a different approach should be adopted here.

Should the Tribunal impose conditions?

123. In its Determination, the ACCC imposed conditions relating to:
- (a) the terms of cl 25 and the Annexure to the Tech Code (sections A7 and A7A);¹³⁷
 - (b) the offering of BNPL finance in circumstances where the sale of the new energy tech goods or services is unsolicited;¹³⁸ and
 - (c) in relation to reporting obligations imposed on the Administrator of the Tech Code.¹³⁹
124. In the present circumstances, the questions for the Tribunal are:
- (a) whether any conditions are necessary to enhance or increase the likelihood of the achievement of benefits identified as flowing from the Tech Code; and
 - (b) if so, the precise terms of any condition.
125. While the Authorisation Applicants' position is that no conditions are necessary in order for the various public benefits provided by the Tech Code to be fully realised, they do accept that the current draft of the Tech Code is attendant with some degree of ambiguity, and the status and precise terms of the BNPL Code remains uncertain. Each of the matters identified at paragraph 123 above are separately addressed below.
126. The Authorisation Applicants also note that the Tribunal has the benefit of ASIC's sector and regulatory expertise and that the views of ASIC are likely to be of assistance in this regard.

Clause 25

127. Clause 25 of the Tech Code strives to strike an appropriate balance between the benefit of consumers having access to BNPL finance as a method for acquiring new energy tech goods and services (on the one hand), while ensuring the adequate protection of consumers (on the other).¹⁴⁰

¹³⁷ ACCC Determination at [5.12] and [5.14].

¹³⁸ ACCC Determination at [5.13].

¹³⁹ ACCC Determination at [5.15] to [5.18].

¹⁴⁰ Barnes Statement at [82]; Crawshaw Statement at [85].

128. One affected BNPL provider, Payright, made a submission to the ACCC in support of amending cl 25 (which was then cl 24) to allow suppliers of new energy tech goods and services to offer BNPL finance provided by a BNPL provider who did not hold a credit licence (assuming they otherwise complied with the Tech Code).¹⁴¹
129. In its submission, Payright correctly identified an effect of the terms cl 25 as the exclusion of BNPL providers not holding a credit licence (such as itself), from being able to have their BNPL products offered in conjunction with the supply of new energy tech products, even if they otherwise complied with cl 25.¹⁴²
130. This consequence was not foreseen or intended by the Authorisation Applicants.¹⁴³
131. It is the Authorisation Applicants' understanding that, in the context of the supply of BNPL finance, the primary additional consumer benefit directly arising from a BNPL provider being licensed is the potential access by the consumer to the dispute resolution process available through AFCA. However, this is already provided for at cl 25(a)(ii)(A)(i) of the Tech Code submitted for authorisation.
132. The Authorisation Applicants do not consider that sufficient evidence is before the Tribunal to enable it to conclude that the exclusion of unlicensed BNPL providers under cl 25 is likely to contribute to a public detriment.
133. However, the Authorisation Applicants do accept that the public benefits associated with cl 25 might be enhanced through the imposition of an appropriate condition or amendment to cl 25, which would allow Tech Code signatories to be permitted to offer BNPL finance provided by unlicensed BNPL providers to consumers, where that BNPL provider otherwise satisfied the requirements of cl 25.

Annexure to the Code

134. The Authorisation Applicants submit that no condition need be imposed with respect to the Annexure to the Tech Code.
135. Clause A7 of the Annexure to the Code addresses the interim period between authorisation of the Tech Code and the finalisation and publication of the BNPL Code, and makes provision for the Administrator to engage a third party to assess a BNPL

¹⁴¹ Payright Submission to the ACCC dated 12 November 2019 [1000439.001.001.0960].

¹⁴² Payright Submission to the ACCC dated 12 November 2019 [1000439.001.001.0960] at [1.2].

¹⁴³ Barnes Statement at [91]–[93].

provider's contract to ensure that it complies with cl 25 (insofar as cl 25 will apply once the BNPL Code is in effect).

136. At present, that interim period is stated to expire on 30 June 2020. However, a decision to extend the interim period (and amend the Annexure accordingly) can ultimately be made by the Administrator of the Tech Code if it considers it appropriate (having regard to the fact that the Tech Code recognises the relevance and significance of BNPL finance to the new energy tech sector).
137. Imposing a condition to fix a defined term for the interim measures has two risks. The first is that the BNPL Code may not be in effect by that time (in which case a variation would need to be sought to the Authorisation) and the second is that fixing a term deprives the Administrator of the ability to assess the appropriateness of the term, having regard to market dynamics at any point in time (including whether a shorter timeframe might prompt faster development and finalisation of the BNPL Code).
138. In the Authorisation Applicants' submission, extending the interim period gives no incentive to the BNPL industry to finalise the BNPL Code.
139. It is also noted that the Applicant has not raised any concerns about the imminent expiry of the interim provisions set out in the Annexure.
140. In its Determination, the ACCC's condition imposed significant additional obligations on the Administrator (or its agent) to, among other things, undertake tasks in relation to the BNPL provider which are not required once the BNPL Code comes into effect. In light of the fact that such steps will not be required in the "final state" of the Tech Code, the Authorisation Applicants submit that any imposition of such an obligation in the interim period represents an unnecessary burden on the Administrator.
141. The Authorisation Applicants submit that the appropriate approach in the present circumstances is not to impose any conditions in relation to cl 25.

Cl 3(d) and unsolicited conduct

142. In the case of unsolicited sales, the Authorisation Applicants accept that there is some ambiguity in the language of cl 3(d) of the Tech Code. That ambiguity arises in the context of:

Reporting obligations

144. The Authorisation Applicants also submit that reporting conditions are unnecessary, given the independence of the Code Administrator. However, the Authorisation Applicants do not otherwise object to reporting conditions, subject to them not imposing a significant burden on the Tech Code Administrator, as such costs are ultimately likely to be borne by the Tech Code's signatories.
145. For the reasons discussed above, the Authorisation Applicants do not consider that it is necessary for the Tribunal to exercise its discretion to impose conditions on any grant of authorisation.

K. THE APPLICANT'S CONTENTIONS IN RELATION TO THE COUNTERFACTUAL

146. The Applicant contends that the Tribunal is required to consider whether:
- (a) the public benefits test set out in s90(7)(b) of the CCA is satisfied in respect of the Proposed Conduct in respect of the NETCC without the BNPL Conditions or with different conditions; and/or
 - (b) the BNPL Conditions or different conditions are necessary and appropriate under s88(3) to yield the conclusion that s90(7)(b) is satisfied in respect of the Proposed Conduct and/or having regard to the subject matter, scope and purposes of the CCA.¹⁴⁷
147. The Authorisation Applicants contend that the Applicant's approach to stating the task before the Tribunal misstates the relevant legal test in the following ways:
- (a) in circumstances where the proceeding before the Tribunal is a rehearing of the Authorisation Applicants' application for authorisation, the relevant factual to which s90(7) should be applied is the future with the Tech Code in the form submitted for authorisation – not, as suggested by the Applicant,¹⁴⁸ the Tech Code with the BNPL Conditions (being those imposed by the ACCC) or with different conditions. The task is not to apply the net public benefit test to specific clauses or conditions but rather to the conduct overall;
 - (b) contrary to the position put by the Applicant,¹⁴⁹ the appropriate assessment by the Tribunal of whether any conditions should be imposed under s88(3) is whether

¹⁴⁷ Applicant's Opening Submissions at [65].

¹⁴⁸ Applicant's Opening Submissions at [65].

¹⁴⁹ Applicant's Opening Submissions at [66].

any conditions are necessary to enhance or increase the likelihood of the achievement of benefits identified as flowing from the Tech Code; and

- (c) while the increased likelihood of the satisfaction of the net public benefit (s90(7)) *may* be a relevant consideration for the Tribunal, it is not a necessary pre-requisite to the imposition of a condition.

148. To the extent that the Applicant contends that the relevant counterfactual is a future in which the BNPL Code exists, the Authorisation Applicants' response is that:

- (a) the timing of the implementation, and form, of the BNPL Code is uncertain and is a relevant consideration to be taken into account by the Tribunal in assessing the likelihood of that event in the counterfactual; and
- (b) the existence of an interim period of at least several months (given the Applicant's earliest estimate of implementation of the BNPL Code as being 1 January 2021) means that there is, at the very least, a counterfactual in which there would be no similar protection for consumers.

L. CONCLUSION

149. For the reasons set out above, it is the Authorisation Applicants' submission that:

- (a) the Tribunal should authorise the Tech Code submitted for authorisation by the Authorisation Applicants on 11 November 2019, without the need for any amendment, or subject to any conditions; or
- (b) in the alternative, and in the event that the Tribunal concludes that the imposition of conditions would be likely to enhance or otherwise increase the likelihood of the public benefits associated with the Tech Code being realised (including with respect to cls 3(d) and 25), the Tribunal should authorise the Tech Code subject to such conditions that the Tribunal considers achieve that outcome.

1 June 2020

D Preston