

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: 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: 27/03/2020 4:16 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.



COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

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

Applicant: Flexigroup Limited [ACN 122 574 583]

THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

PART I FACTS

A. OVERVIEW OF THE PROCEEDING

1. This proceeding is an application for review, under s 101 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), of a determination by the Australian Competition and Consumer Commission (**ACCC**) under s 88(1) to authorise the making and implementation of The New Energy Tech Consumer Code (variously described as the **NETCC**, the **Consumer Code** or the **Code**).
2. The ACCC granted conditional authorisation for the conduct outlined in the Consumer Code, in the form submitted to the ACCC on 11 November 2019, for a period of 5 years.
3. The review to be conducted by the Australian Competition Tribunal (**Tribunal**) is a re-hearing of the matter.
4. The ACCC's function in this proceeding is to assist the Tribunal to reach, in the public interest, the correct or preferable decision in the review.

B. PRINCIPAL PARTIES INVOLVED IN THE PROCEEDING

5. Four bodies collectively applied to the ACCC for authorisation: the Clean Energy Council, the Australian Energy Council, the Smart Energy Council and Energy Consumers Australia (the **Authorisation Applicants**).¹ These bodies are described in the Authorisation Applicants' Statement of Facts, Issues and Contentions at [1]-[4] (**Authorisation Applicants' SOFIC**). The Authorisation Applicants did not apply to the Tribunal for review of the ACCC's determination.

¹ Application AA1000439 lodged on 29 April 2019.

6. The applicant for review is Flexigroup Limited (**Flexigroup**). Flexigroup was a participant in the ACCC's public consultation in respect of the Authorisation Applicants' application to the ACCC. Flexigroup is described in the Applicant's Statement of Facts, Issues and Contentions at [1]-[6] (**Flexigroup SOFIC**).
7. The ACCC is responsible for the enforcement of the CCA. Under s 88 of the CCA, it has the power to determine whether to grant an authorisation to a person to engage in conduct that would or might contravene a provision of Part IV of the CCA. Once a person applies to the Tribunal for review of the ACCC's determination, for the purposes of the review the Tribunal may perform all the functions and exercise all the powers of the ACCC. The ACCC's role is to assist the Tribunal. The scope of that role varies depending on the positions taken by other parties to the review.
8. Three entities have been granted leave to intervene in these proceedings. They are:
 - 8.1. the Australian Securities and Investments Commission (**ASIC**);
 - 8.2. Consumer Action Law Centre (**CALC**), an independent, not-for-profit consumer organisation with specialist expertise in consumer credit law and policy; and
 - 8.3. RateSetter Australia RE Limited (**Ratesetter**), a large Australian provider of regulated consumer credit for the purpose of funding solar and other renewable energy products.

C. INDUSTRY BACKGROUND

9. New Energy Tech (**NET**) products are defined at Part C of the Consumer Code as being:
 - 9.1. small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks² or as distributed energy resources connected to an Energy Network;
 - 9.2. services that support or are closely related to those products or systems;
 - 9.3. products, systems and services that monitor or manage a Customer's³ usage of energy whether on or off an Energy Network;
 - 9.4. any other product, system and service that the Administrator⁴ is satisfied is appropriately within the Code.

² Defined in Part C of the Consumer Code as meaning: "any of Australia's principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market)."

³ Defined at Part C of the Consumer Code as meaning: "a potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies."

⁴ Defined at Part C of the Consumer Code as meaning: "is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration."

10. NET does not include simple, low cost or off-the-shelf New Energy Tech that is within a class exemption made by the Administrator in accordance with the Code.
11. BNPL finance is not subject to regulation under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) or the National Credit Code (**NCC**) where providers operate in accordance with the exemption stated in s 6(5) of the NCCPA.⁵ Accordingly, BNPL providers are not required to hold an Australian Credit Licence to offer BNPL products or to conduct a responsible lending assessment in accordance with the obligations contained in the NCCPA in offering BNPL finance products.⁶
12. By contrast, credit providers offering products that *are* regulated by the NCCPA and the NCC are required to hold an Australian Credit Licence and must conduct a responsible lending assessment in accordance with the obligations contained in the NCCPA in offering finance products. They must also comply with certain dispute resolution and hardship provision requirements to protect consumers dealing with regulated credit products offered through licensed credit providers.⁷
13. Regulation 23 of the *National Consumer Credit Protection Regulations 2010* (Cth) exempts retailers, including NET retailers, who are engaging in a credit activity from having to hold an Australian Credit Licence.⁸ Regulation 23(4) states that the exemption does not apply “if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer”.⁹ “Unsolicited contact” in that context refers to the *unsolicited sale of the goods and services* in question, not the *unsolicited offer of the finance product* used to fund the purchase of the goods and services.
14. Because BNPL products are not covered by the NCCPA and the NCC, retailers are not required to hold an Australian Credit Licence in order to offer BNPL finance in an unsolicited sale. If a retailer sought to offer regulated credit products during an unsolicited sale, it would be required to hold an Australian Credit Licence.
15. In an unsolicited sale where the finance offered is a regulated credit product (i.e. provided by a licenced credit provider), a responsible lending assessment must be undertaken in accordance with the obligations contained in the NCCPA and the NCC. Mandatory dispute resolution mechanisms and hardship provisions also apply.
16. In November 2018, ASIC released its Report 600 review into BNPL arrangements. ASIC stated that “it may be that BNPL providers should be required to comply with the National Credit Act. ASIC has not yet formed a view that this is necessary. [ASIC’s] ongoing monitoring of this industry ... will help [ASIC] to assess whether [it] should advise the

⁵ Flexigroup SOFIC [26]-[27]; Authorisation Applicants’ SOFIC at [16].

⁶ Authorisation Applicants’ SOFIC [18].

⁷ Authorisation Applicants’ SOFIC at [42] and footnote 16.

⁸ Authorisation Applicants’ SOFIC [42] and footnote 16. An example of such a credit activity is a retailer, on behalf of a relevant credit provider for a credit contract or proposed credit contract, performing the obligations or exercising the rights of the relevant credit provider in relation to the contract or proposed contract.

⁹ *National Consumer Credit Protection Regulations 2010* (Cth) reg 23.

Government to consider further law reform".¹⁰ ASIC's SOFIC at [5]-[6] addresses this Report and the position adopted by ASIC therein.

D. THE CONDUCT SOUGHT TO BE AUTHORISED

17. The Authorisation Applicants sought authorisation from the ACCC on the basis that giving effect to the Consumer Code may:
 - 17.1. involve a cartel provision within the meaning of Division 1 of Part IV of the CCA;
 - 17.2. substantially lessen competition within the meaning of ss 45 and 46 of the CCA; and/or
 - 17.3. constitute exclusive dealing within the meaning of s 47 of the CCA.
18. During the ACCC's assessment of the application for authorisation, the Authorisation Applicants provided a number of amended versions of the Consumer Code. They provided a final version of the Consumer Code to the ACCC on 11 November 2019 (**Attachment A**). That identifies the conduct in respect of which the Authorisation Applicants sought authorisation, and it is that version of the Consumer Code that is the subject of this review.¹¹

E. THE ACCC DETERMINATION

E.1 Overview

19. On 5 December 2019, the ACCC issued a final determination in respect of the conduct outlined in the Consumer Code as submitted on 11 November 2019,¹² granting conditional authorisation for a period of 5 years (the **ACCC Determination**).
20. The *conduct* that the ACCC authorised enables the Authorisation Applicants, and future signatories to the Consumer Code, to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:
 - 20.1. according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience;
 - 20.2. for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled;

¹⁰ ASIC's SOFIC at [5].

¹¹ The form in Attachment A is the same as Annexure B to the ACCC's decision, and is the **November Version** to which the Authorisation Applicant's refer: Authorisation Applicants' SOFIC at [23].

¹² Unless otherwise stated, from this page onwards a reference to the Consumer Code and/or its provisions is intended as a reference to the version of the Consumer Code submitted to the ACCC on 11 November 2019.

- 20.3. requiring signatories to offer only deferred payment arrangements that are regulated under the NCCPA and the NCC, and are provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances, (together the **Proposed Conduct**).
21. It is important to identify the Proposed Conduct with precision, because the process of authorisation concerns the granting of permission to a person to engage in particular *conduct*. This can be contrasted with the effect of the ACCC Determination, which was to grant authorisation to the Proposed Conduct subject to conditions that alter the Proposed Conduct to the extent of those conditions.
22. In summary terms, the conditions that were imposed in the ACCC Determination relate to:
- 22.1. variations to the requirements that BNPL finance providers must meet under clause 25 of the Consumer Code in order for signatories to offer finance arrangements to consumers (the **BNPL Finance Requirement Condition**);¹³
- 22.2. the prohibition of unsolicited offers of BNPL finance in clause 3(d) of the Consumer Code (the **Clarification on Unsolicited Offers Condition**);¹⁴
- 22.3. a requirement to report to the ACCC on the operation of the Consumer Code (the **Reporting Condition**).¹⁵

E.2 BNPL Finance Requirement Condition

23. The BNPL Finance Requirement Condition amends the Consumer Code requirements that BNPL providers must satisfy in order for signatory retailers to be able to offer those BNPL finance arrangements to consumers. Some of these amendments reduce, and others raise, the requirements that BNPL providers must satisfy relative to the requirements of the Consumer Code.
24. The BNPL Finance Requirement Condition *reduces* the standards required of BNPL providers under the Consumer Code by:
- 24.1. removing the requirement that BNPL providers must hold an Australian Credit Licence or be a related body corporate of a credit provider licenced under the NCCPA;
- 24.2. requiring BNPL providers to undertake a responsible lending assessment of the suitability of a loan and a customer's ability to repay it, providing *substantially equivalent protections* to specific provisions contained in the NCCPA, rather than strict compliance with those specific provisions in the NCCPA and NCC;
- 24.3. requiring BNPL providers to provide information to assist customers in assessing the BNPL product, including the credit provider's fees and charges, rather than all disclosures that are required of licenced credit providers under the NCC.

¹³ ACCC Determination at [5.12], [5.14] and Attachment A.

¹⁴ ACCC Determination at [5.13].

¹⁵ ACCC Determination at [5.15]-[5.18].

25. The BNPL Finance Requirement Condition *raises* the standards required of BNPL providers by:
- 25.1. requiring a BNPL provider's internal dispute resolution procedure to comply with the standard specified in ASIC Regulatory Guide 165;
 - 25.2. requiring BNPL providers to comply with ss 72, 88 and 89A of the NCC in dealing with customers experiencing hardship.

E.3 The Clarification on Unsolicited Offers Condition

26. The Clarification on Unsolicited Offers Condition imposed in relation to clause 3(d) of the Consumer Code clarifies its intended operation and requires signatories to the Consumer Code not to offer BNPL finance (whether unsolicited or not) if the sale of the NET product is unsolicited.
27. Clause 3 of the Consumer Code as submitted to the ACCC already provided as follows:

Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:

...

- (d) make no unsolicited offers of payment arrangements not regulated by the [NCCPA].

E.4 The Reporting Condition

28. The Reporting Condition requires the Code Administrator to report to the ACCC on the operation of the Consumer Code.

F. THE APPLICATION FOR REVIEW

29. On 30 December 2019, Flexigroup applied to the Tribunal for a review of the ACCC Determination.

PART II ISSUES

A. GENERAL ISSUES

30. The two general issues that arise for determination by the Tribunal are as follows.
31. **Issue One:** Can the Tribunal be satisfied in all the circumstances that:
- 31.1. the Proposed Conduct would result, or be likely to result, in a benefit to the public; and
 - 31.2. such public benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Conduct?

32. This issue arises because the Tribunal cannot, under s 90(7)(b) of the CCA, authorise the Proposed Conduct unless it is so satisfied. (Section 90(7)(a) sets out an alternative basis upon which conduct can be authorised, which is not relevant to this review.)
33. **Issue Two:** If the Tribunal determines to grant an authorisation for the Proposed Conduct, should it attach any condition to the authorisation and, if so, what condition(s)? This issue arises because s 88(3) of the CCA permits the ACCC, and the Tribunal by the operation of s 102 of the CCA, to specify conditions in the authorisation.

B. SPECIFIC ISSUES

34. The following specific issues emerge from the SOFICs filed by the parties.
35. **First**, how does the Tribunal properly exercise its function in this review? For example, is the Tribunal, as Flexigroup suggests, to compare authorisation of the Proposed Conduct with and without certain of the conditions imposed by the ACCC?
36. **Secondly**, in assessing public benefits and detriments, what is the relevant market(s) in which to assess the competitive effects of the Proposed Conduct?
37. **Thirdly**, what are the likely public benefits of the Proposed Conduct?
 - 37.1. Is there likely to be a public benefit in imposing higher standards on BNPL finance arrangements that go beyond what is currently required by the general law?
 - 37.2. Is there likely to be a public benefit in preventing NET retailers from making unsolicited offers of BNPL finance?
 - 37.3. Is there likely to be a public benefit in preventing retailers from offering BNPL finance in unsolicited sales of NET products and services?
 - 37.4. Is there likely to be a public benefit in including additional consumer protection provisions in the Consumer Code beyond those currently required by the general law?
 - 37.5. If any of the public benefits are likely, are these achieved by the provisions of the Consumer Code, and in particular, by clause 3(d)?
 - 37.6. Does clause 3(d) require signatory retailers not to offer BNPL finance during unsolicited sales of NET products and services?
 - 37.7. Does the Consumer Code reduce information asymmetry experienced by consumers and, if so, is reduced information asymmetry a public benefit?
 - 37.8. Are there any other public benefits?
38. **Fourthly**, what are the likely public detriments of the Proposed Conduct?
 - 38.1. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirement imposed on BNPL providers to hold an Australian Credit Licence under the Consumer Code?

- 38.2. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirements to comply strictly with responsible lending and disclosure of information requirements equivalent to those in the NCCPA and NCC, under the Consumer Code?
- 38.3. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirement in clause 3(d) of the Consumer Code?
- 38.4. Is there an anti-competitive detriment arising out of the restrictions imposed on the offering of BNPL deferred payment arrangements in the Consumer Code?
- 38.5. Is there an anti-competitive detriment arising from the conduct outlined in clause 3(d) of the Consumer Code?
- 38.6. Is there a risk of consumer harm, in relation to the offer of BNPL finance in the context of unsolicited sales of NET products and services that is not addressed by clause 3(d) of the Consumer Code?
- 38.7. Is there a public detriment in allowing signatories to the Consumer Code to agree and give effect to consistent business practices?
- 38.8. Is there a public detriment arising from provisions of the Consumer Code allowing for suspensions and expulsions and denied membership under the Consumer Code?
- 38.9. Are there any other public detriments?
39. **Fifthly**, how should the benefits and detriments be balanced? Is the net public benefits test in s 90(7)(b) met by the Proposed Conduct?
40. **Sixthly**, what, if any, conditions should be imposed?
- 40.1. When can or should conditions be imposed (put another way, for what purpose can, or should, conditions be imposed)?
- 40.2. If the likely benefits do not outweigh the likely detriments, are there one or more conditions that may be imposed to vary the conduct for which authorisation is sought sufficient to:
- 40.2.1. yield the requisite public benefit; or
- 40.2.2. increase the likelihood of the public benefit eventuating to a sufficient level?
- If so what are those conditions?
- 40.3. If the likely benefits outweigh the likely detriments, are there one or more conditions that may be imposed without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation? If so, what are those conditions?

40.4. What material must be adduced by any interested party with respect to each of the conditions sought in order to persuade the Tribunal to impose it?¹⁶

41. **Seventhly**, if authorisation is granted, what is the appropriate period of authorisation?

42. **Finally**, based on the answers to the above questions, should the Tribunal affirm, set aside, or vary the determination of the ACCC in respect of the Consumer Code?¹⁷

PART III CONTENTIONS

A. THE TRIBUNAL'S FUNCTION

A.1 Applicable Principles

43. Section 101(2) provides that this review by the Tribunal under s 101(1) is a re-hearing of the matter. In performing this re-hearing function, the Tribunal must apply s 90(7) of the CCA. Section 90(7)(b) provides that authorisation must not be granted unless the Tribunal is satisfied in all the circumstances 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.

44. The power to grant authorisation is discretionary.¹⁸ In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the Act.¹⁹

45. The Tribunal must undertake a complete rehearing of the application for authorisation based on the material before it.²⁰ It is not the Tribunal's role merely to resolve issues in dispute between the parties.²¹ Nor is it the Tribunal's role to engage only in a confined inquiry as to the appropriateness of specific conditions imposed by the ACCC or proposed by a party.²² The Tribunal must engage in a re-hearing in the fullest sense and reach its own conclusions

¹⁶ While technical rules concerning the onus of proof are misplaced in administrative decision-making (*McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356.9, 366.8, 369) questions will arise as to which party must adduce what evidence in order to persuade the Tribunal to make the decision it seeks. This is sometimes framed as the "burden of persuasion" (*Comcare v Power* (2015) 238 FCR 187) or as a "practical onus" (*Brackenreg v Comcare* (2010) 187 FCR 209).

¹⁷ CCA s 102(1).

¹⁸ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106].

¹⁹ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522 [126].

²⁰ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [135], [138].

²¹ *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41,453.

²² While the Tribunal may have regard to any conditions imposed by the Commission or alternative conditions proposed by the parties, the Tribunal has stated that "[t]he necessity for or appropriateness of the ACCC's condition is not a point of departure in the review process": *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [139].

on the material before it,²³ rather than examining factual or other conclusions reached by the ACCC.

46. The Tribunal's review is not a review of whether what the ACCC had determined was right or wrong on the material before it.²⁴ It is the ACCC Determination, not the published reasons, which is the subject of review before the Tribunal.²⁵

A.2 The ACCC's Contentions

47. On the basis of the SOFICs filed, there appears to be no dispute that the Tribunal can be satisfied of s 90(7)(b) in respect of the Proposed Conduct. Identification of the precise benefits and detriments (or *likely* benefits and detriments) of the Proposed Conduct is nonetheless important, because these may influence the Tribunal's consideration of its discretion and the content of any conditions the Tribunal may consider it appropriate to specify.
48. In applying the statutory test for authorisation, the Tribunal compares: (a) the likely future with the conduct for which authorisation is sought, with (b) the likely future without such conduct.²⁶ This is not the same as comparing a future in which the proposed conduct is authorised against a future in which it is not authorised.²⁷
49. Neither Flexigroup nor the Authorisation Applicants adopt the correct comparison. Flexigroup suggests that the Tribunal should compare the NETCC with the BNPL Finance Requirement Condition and the Clarification on Unsolicited Offers Condition against the NETCC without those conditions or with different conditions.²⁸ The Authorisation Applicants suggest that the Tribunal should compare the conduct set out in the NETCC without conditions against that of the NETCC with different conditions.²⁹ The correct comparison is to compare the likely future with the conduct the subject of the authorisation with the likely future without such conduct.

B. THE RELEVANT MARKET

B.1 Applicable Principles

50. A market is an area or space of close competition between firms or the field of rivalry between them.³⁰

²³ CCA s 101(2); *Re Media Council of Australia (No 2)* (1987) 88 FLR 1; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,655; *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [138].

²⁴ *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295-296.

²⁵ *Re Applications by Australasian Performing Right Association Ltd* [1999] ACompT 3 at [27].

²⁶ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117]; *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41-453.

²⁷ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

²⁸ Flexigroup SOFIC at [43], Authorisation Applicants' SOFIC at [31].

²⁹ Authorisation Applicant's SOFIC at [31].

³⁰ *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190, referred to with approval in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2002) 215 CLR 374 at 422 [133] (Gleeson CJ and Callinan J), 454-455 [248] (McHugh J); *Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 261 CLR 203 at 227 [66] (Kiefel and Gageler JJ).

51. Market definition is a purposive exercise that focuses analysis, situating alleged contravening conduct in the context of a particular statutory prohibition and an area of competitive activity, by reference to the four dimensions of product, geography, functional level and time.³¹

B.2 The ACCC's contentions

52. The participants in the review have not disputed the relevant areas of competition identified in the ACCC Determination. The ACCC identified the following as relevant areas of competition likely to be affected by the implementation of the Consumer Code and conduct for which authorisation was sought:

52.1. the supply of different types of NET products and services;

52.2. financial products, including particularly deferred payment arrangements, offered with NET products and services.

C. BENEFITS AND DETRIMENTS

C.1 Applicable Principles

53. In assessing the application for authorisation, the Tribunal applies the net public benefit test under s 90(7)(b). The Tribunal will consider the likely public benefits and detriments flowing from the conduct for which authorisation is sought.

54. The CCA does not define "public benefit". The term should be given its widest possible meaning, and includes "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress".³²

55. The CCA likewise does not define "public detriment". The Tribunal has previously described it as "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency".³³

56. For a benefit or detriment to be taken into account, the Tribunal must be satisfied that the benefit or detriment is "likely" in the sense that there is a real chance, and not a mere possibility, of it eventuating. A speculative or a theoretical possibility will not suffice.³⁴

³¹ *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR ¶42-123 at 45,243 [429] (Allsop J); *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 187 (Mason CJ and Wilson J); *Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd* (2016) 244 FCR 190 at [110] (Dowsett and Edelman JJ).

³² *Queensland Co-operative Milling Association Ltd* (1976) ATPR ¶40-012 at 17,242, cited with approval in *Re 7-Eleven Stores* [1994] ATPR ¶41-357 at 42,677.

³³ *Re 7-Eleven Stores* [1994] ATPR ¶41-357 at 42,683

³⁴ *Qantas Airways Ltd* [2004] ACompT 9 at [156], quoted in *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [109].

C.2 Likely Public Benefits

(a) *Public benefits – Increased consumer protections from requirement that BNPL finance arrangements meet certain standards*

57. CALC contends that, like all consumer credit, BNPL arrangements create a risk of causing financial hardship for consumers. BNPL arrangements are not subject to the obligations under the NCCPA and NCC, which are intended to mitigate that risk.³⁵
58. ASIC contends that it remains concerned that the current regulation of BNPL is not equivalent to the regulation of credit under the NCCPA and NCC, including because it does not involve regulatory requirements governing responsible lending, external dispute resolution, hardship, disclosure and licensing of providers.³⁶
59. The ACCC considers that a public benefit arises from mitigating the risk of consumers entering into unsuitable or unaffordable deferred payment arrangements. The consumer protections in the Consumer Code that permit signatories to offer BNPL finance only where the BNPL finance provider meets additional requirements beyond those imposed by the general law are likely to generate such benefits.
60. In this regard, the following matters are germane:
- 60.1. NET products are often offered with deferred payment arrangements to consumers. Certain NET products (such as solar panels or batteries) may be very expensive;
- 60.2. the intention of the Consumer Code, among other things, is to raise standards of consumer protection in the relevant sector;³⁷
- 60.3. the Consumer Code imposes restrictions on signatories offering deferred payment arrangements to consumers in relation to the sale of NET products where these deferred payment arrangements, including BNPL finance, do not meet certain requirements;
- 60.4. the requirements for BNPL providers under the Consumer Code go beyond what is required by BNPL providers to lawfully supply BNPL finance arrangements.
61. The Australian Finance Industry Association Limited has released for comment a draft industry code of conduct applicable to BNPL providers (the **BNPL Industry Code**). This code is not finalised and is not in force.³⁸ It is not known what final form it will take. There will be a period of time (of uncertain length)³⁹ before any code comes into force, during which time BNPL providers would not be allowed to offer finance under the Consumer Code, unless an interim regime is in place. In addition, the exact form of the BNPL Industry Code

³⁵ CALC SOFIC at [14].

³⁶ ASIC SOFIC at [18(e)].

³⁷ Consumer Code at pg 2. See also Authorisation Applicants' SOFIC at [12].

³⁸ Flexigroup SOFIC at [37]-[41].

³⁹ Flexigroup has stated that the BNPL Industry Code is proposed to become operational by 1 July 2020, but it may not meet that target.

is not known, including the extent of consumer protections it will mandate.⁴⁰ Due to these and other⁴¹ uncertainties, the ACCC considers that any BNPL Industry Code does not reduce to nil any public benefit associated with increased consumer protections under the Consumer Code.

(b) Public benefits – Increased consumer protections relating to unsolicited sales

62. There is a risk that consumers will enter into unsuitable or unaffordable finance arrangements as a result of unsolicited sales of NET products. That risk may be higher in relation to BNPL finance than for regulated credit products provided by licensed credit providers.⁴²
63. CALC contends that, since at least 2007, misleading or high-pressure unsolicited sales have been a notable problem in the retail energy sector, including among solar retailers.⁴³
64. The ACCC considers that a restriction on NET retailers making unsolicited offers of BNPL finance may reduce the risk of consumers entering into unsuitable or unaffordable finance arrangements in the course of unsolicited sales of NET products.
65. It is unclear whether, as contended by the Authorisation Applicants,⁴⁴ prohibiting the unsolicited offers of BNPL finance will also have the practical effect of levelling the playing field with providers of NCC and NCCPA-regulated forms of finance which largely do not offer finance through retailers engaging in unsolicited sales, due to the legal requirement for the retailer to hold an Australian Credit Licence to offer regulated credit products in unsolicited sales.
66. Clause 3(d) of the Consumer Code states that signatory retailers will make no unsolicited offers of payment arrangements not regulated by the NCCPA *in their advertisements and promotional material*. While this goes beyond what is currently legally required in relation to BNPL finance, the intention of clause 3(d) (as understood by the ACCC) was to restrict NET retailers from offering BNPL finance in connection with unsolicited sales of NET products and to introduce competitive neutrality with respect to the supply of finance arrangements in order to achieve increased consumer protections. If that is so, the Clarification on Unsolicited Offers Condition may be regarded as necessary and appropriate because it is unclear whether merely prohibiting unsolicited offers of BNPL finance in advertisements and promotional material alone will achieve consumer protection goals adequately.

(c) Public benefits – Other increased consumer protections from signatory retailers

67. The ACCC considers that additional consumer protections afforded by the Consumer Code, in the form of provisions that impose obligations beyond those currently legally imposed, are likely to give rise to a public benefit. These protections include:

⁴⁰ See ASIC SOFIC at [12].

⁴¹ See ASIC SOFIC at [12].

⁴² See CALC SOFIC at [18(a)-(b)]. See also

⁴³ CALC SOFIC at [17]-[18].

⁴⁴ See Authorisation Applicants' SOFIC at [43]-[44]. See also Ratesetter SOFIC at [15(d)].

- 67.1. taking extra care if a signatory becomes aware that a consumer may be facing vulnerable circumstances (clause 6);
- 67.2. providing site-specific installation plans and performance estimates (clause 17);
- 67.3. making 'fit for purpose' inquiries (clauses 7-8);
- 67.4. improving complaints handling processes (clauses 53-54).

(d) *Public benefits – Reduced information asymmetry from key commitments in Consumer Code*

- 68. The Consumer Code contains provisions directed at reducing information asymmetry between signatories and consumers. The Consumer Code imposes obligations on signatory retailers in relation to disclosure, advertising and communicating to consumers their rights beyond what is required by the general law.
- 69. The ACCC considers that reducing information asymmetry is likely to give rise to a public benefit. The relative complexity of NET products means that consumers require more information to be provided to them in order fully to understand their purchase.⁴⁵

C.3 Likely Public Detriments

(a) *Public detriments – Reduced consumer choice of finance arrangements available under the Consumer Code*

- 70. Clause 25 of the Consumer Code states that, for a signatory retailer to offer BNPL finance, the BNPL finance provider must, among other things, hold, or be a related body corporate of a credit provider that holds, an Australian Credit Licence.
- 71. BNPL providers are not required by law to hold an Australian Credit Licence. Some BNPL providers, or their related bodies corporate, do so. Those that do so offer traditional credit products for which an Australian Credit Licence is required in addition to their BNPL products. Flexigroup falls within this class.
- 72. Other BNPL providers do not currently hold, and would not be able to obtain, an Australian Credit Licence because they do not offer NCC/NCCPA regulated credit products. This may result in a loss of consumer choice to the extent that BNPL providers decide that it is not commercially viable to, or they are not able to, offer the higher standards.

(b) *Public detriment – Lessening of competition in the supply of financial products, particularly deferred payment arrangements, in relation to the offer of NET products and services*

- 73. NET products can be very expensive (e.g., solar panels). NET products are often offered to consumers with deferred payment arrangements. The Consumer Code imposes requirements on signatories in relation to the offer of deferred payment arrangements, including BNPL finance.

⁴⁵ See CALC SOFIC at [12], [18a]; Authorisation Applicants' SOFIC at [37]-[39].

74. These additional requirements may prevent consumers from accessing certain deferred payment arrangements as a result. Consumer choice may thus be limited. This may in turn reduce competition in the market for the supply of finance products in relation to NET product and services.

75. Ratesetter contends⁴⁶ that there is unlikely to be a lessening of competition in the supply of finance for NET products.

(c) *Public detriment – Lessening of competition in the supply of NET products and services*

76. Signatories to the Consumer Code may be competitors in the supply and installation of certain NET products. The Consumer Code is a voluntary code. However, Flexigroup has contended that suppliers and installers are very likely to become signatories, because of the way government rebate schemes and tender requirements operate (for example some state government rebate schemes only offer rebates to consumers for installations performed by signatories to a relevant code).⁴⁷

77. There is likely to be a lessening of competition in allowing signatories, who may be competitors, to agree to adopt consistent business practices rather than competing on their offerings to consumers.

78. In circumstances where government rebate schemes are linked to whether a NET retailer is a signatory of the Consumer Code, public detriment could also arise from signatories being inappropriately expelled or suspended, or applicants being denied membership.

D. THE BALANCE OF BENEFITS AND DETRIMENTS

79. The Tribunal should weigh the public benefits and public detriments and determine whether the net public benefits test is satisfied in respect of the Proposed Conduct.⁴⁸

80. The ACCC considers that the Proposed Conduct would be likely, in all the circumstances, to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public resulting from the Proposed Conduct such that the test in s 90(7)(b) is met. In this regard, the following should be noted.

80.1. the Consumer Code is directed at improving consumer protections for consumers buying NET products and services by setting higher standards of consumer protection for NET retailers. Such standards extend to limiting the offer and form of finance that signatories can offer consumers in certain circumstances. Potential loss of consumer choice and potential anti-competitive detriment should be balanced against the benefits of higher consumer protections and reduced consumer detriment deriving from requirements which in effect are aimed at ensuring that more stringent checks are carried out upfront before finance is arranged, and preventing the unsolicited offering of BNPL finance;

⁴⁶ Ratesetter SOFIC at [17(a)-(d)].

⁴⁷ Flexigroup SOFIC at [11].

⁴⁸ See paragraph [22] above.

- 80.2. there is a balance to be struck between achieving higher standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code, including BNPL finance, without imposing unduly burdensome obligations that would lead to a restriction on consumer choice;
- 80.3. any detriment arising from a loss of competition should be balanced against the benefit to consumers from the adoption of improved business practices by signatories;
- 80.4. the mechanisms and procedures provided for in the Consumer Code's governance framework are likely to mitigate any risk of signatories being inappropriately suspended or expelled from, or denied membership under, the Consumer Code, without being afforded an opportunity to appeal or without sufficient cause.

E. THE TRIBUNAL'S POWER TO IMPOSE CONDITIONS

E.1 Applicable Principles

81. Section 91(3) provides that an authorisation may be expressed to be subject to such conditions as are specified in the authorisation. Section 88(3) provides that the Tribunal may specify conditions in the authorisation and if any of the conditions are not complied with, the statutory protection from legal action for engaging in the conduct specified in the authorisation does not apply.
82. On the basis of the SOFICs filed, the Tribunal's power to impose conditions on an authorisation does not appear to be contentious.⁴⁹ What is contentious is the content of any conditions that should be imposed, and when the Tribunal ought to consider imposing conditions.
83. While there is no express limit upon the kind of conditions that may be imposed under s 91(3), the Tribunal's power to impose conditions is not unlimited. That power is constrained by the subject matter, scope and purpose of the CCA.⁵⁰ The Tribunal may impose a condition in circumstances where, although the net public benefit test is met without the condition, the Tribunal would not be prepared to exercise its discretion in favour of authorisation.⁵¹
84. Furthermore, the Tribunal's power to impose conditions is not limited to circumstances where the statutory test is not satisfied.⁵² That is, even though the Tribunal considers that the net public benefit test in s 90(7)(b) is satisfied, it can still go on to impose conditions. Ratesetter submits that no condition should be imposed merely because the net benefit test is satisfied,⁵³ but this approaches the power to impose conditions too narrowly.
85. In *Application by Medicines Australia Inc*, the Tribunal outlined that a condition may be imposed in various circumstances including:

⁴⁹ See, eg, Applicant's SOFIC at [60]; Authorisation Applicant's SOFIC at [51]; CALC's SOFIC at [37], [42].

⁵⁰ At [129].

⁵¹ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522-47,523 [128].

⁵² Cf the Authorisation Applicants' SOFIC at [48]-[49].

⁵³ Ratesetter SOFIC at [18].

- 85.1. where there is no, or insufficient, public benefit, such that the conduct does not satisfy the test for authorisation, a condition may be imposed requiring a variation of the proposal which would yield the requisite public benefit. Such a condition may:
- 85.1.1. reduce the public detriment for the purposes of s 90(7)(b);
 - 85.1.2. reduce the public detriment which would otherwise cause the claimed public benefit to be discounted;
 - 85.1.3. increase the public benefit such that it would meet applicable statutory test;
- 85.2. where a theoretically sufficient public benefit has been identified, a condition may be imposed to vary the proposal so that the likelihood of the benefit resulting is raised to a sufficient level;
- 85.3. where the public benefit test in s 90 is satisfied, a condition may be imposed, without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation. In this regard, the range of conditions that may be imposed is limited by the range of considerations relevant to the exercise of the discretion.⁵⁴
86. It is appropriate for the Tribunal to have regard to the burden the condition would impose upon the party seeking authorisation.⁵⁵

E.2 The ACCC's Contentions

(a) When conditions can be considered

87. If the net public benefits test is not satisfied, it would be appropriate for the Tribunal to consider whether any condition it could impose would yield the requisite public benefit or increase the likelihood of the public benefit being realised, such as to satisfy the test.
88. If the public benefit test is satisfied, the Tribunal should nonetheless consider whether there are condition(s) without which the Tribunal would not be prepared to exercise its discretion in favour of authorisation.
89. The Tribunal is permitted to consider the conditions imposed by the ACCC in its determination, and the alternative conditions put forward by the parties.

(b) BNPL finance requirements

90. The Tribunal may consider that one or more conditions are necessary to reduce the likelihood of public detriments from a loss of consumer choice or the lessening of competition under the Consumer Code, and to ensure the consumer protection benefits of the Consumer Code are more likely to be realised.
91. The Tribunal may wish to impose a condition similar to the BNPL Finance Requirement Condition. That condition removes some of the barriers to BNPL providers being able to

⁵⁴ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

⁵⁵ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,523-47,524 [133].

comply with these higher consumer protection standards. It makes it more likely that a BNPL provider can meet the standards required for its BNPL finance product to be offered under the Consumer Code. In turn, more BNPL providers are likely to seek to make their financial products available under the Consumer Code and to adhere to a higher standard of consumer protection in the offer of that financial product. Accordingly, consumer protection benefits are more likely to be realised with the BNPL Finance Requirement Condition.

92. The Tribunal may wish to consider the alternative conditions of authorisation proposed by Flexigroup and the Authorisation Applicants to reduce the consumer detriment associated with a loss of consumer choice of finance arrangements under the Consumer Code.
93. However, the Tribunal may consider it is unclear whether these alternative conditions of authorisation are likely to achieve a sufficient level of consumer protections for consumers using BNPL finance arrangements to purchase NET products. So too, the Tribunal may consider that the BNPL Industry Code is unlikely to be operational by 1 July 2020 and that at least transitional provisions should be included in the Consumer Code pending its finalisation.

(c) *Unsolicited sales*

94. The Tribunal may wish to consider a condition similar to the Clarification on Unsolicited Offers Condition (clause 3(d)) to clarify the scope of the clause and/or increase consumer protections with regard to the offering of BNPL finance in unsolicited sales of NET products.
95. The Tribunal may wish to consider the alternative conditions of authorisation proposed by Flexigroup, such as whether to remove clause 3(d) of the Consumer Code. Flexigroup's application for review seeks to have the Tribunal remove clause 3(d) in its entirety as a *condition* of authorisation.

(d) *Reporting*

96. The Tribunal may wish to impose a condition similar to the Reporting Condition, to allow for monitoring of the success of the Consumer Code in providing public benefits.
97. No party has sought that this condition to the ACCC's determination be varied.

F. THE PERIOD OF AUTHORISATION

98. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period. The ACCC granted authorisation for 5 years.
99. Flexigroup, the Authorisation Applicants and the interveners do not raise any concerns about the length of authorisation proposed by the ACCC.

Ruth C A Higgins SC

Christopher Tran

27 March 2020