

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: Issues List

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



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]

ISSUES LIST

PURPOSE OF THIS DOCUMENT

1. This Issues List has been prepared by the ACCC pursuant to Order 4 of the Directions made by the Tribunal on 4 February 2020 as amended on 16 March 2020.
2. The purpose of this Issues List is to assist interested third parties to make a submission to the Tribunal in the proceedings, should they wish to do so.
3. The ACCC has sought to identify issues for inclusion in this Issues List by reviewing the statements of facts, issues and contentions filed by those parties and interveners involved in the proceedings.
4. This Issues List is not intended to be the final list of issues to be considered by the Tribunal in these proceedings, nor does it represent the Tribunal's view of the issues that do or may arise. It reflects only the view of the ACCC as to the issues that the Tribunal may consider.

SHORT BACKGROUND TO THIS PROCEEDING

5. This proceeding concerns an application by Flexigroup Limited (**Flexigroup**) for review of a determination by the ACCC under s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to authorise the making and implementation of The New Energy Tech Consumer Code (sometimes described as the **NETCC**, the **Consumer Code** or the **Code**).
6. The Clean Energy Council, the Australian Energy Council, the Smart Energy Council and Energy Consumers Australia (together the **Authorisation Applicants**) applied for that authorisation, which was granted by the ACCC subject to conditions (**ACCC Determination**).
7. The application for authorisation related to conduct to enable the Authorisation Applicants and future signatories of the Consumer Code to agree, sign up to and comply with (in other words, give effect to) provisions of the Consumer Code:

- 7.1. 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;
 - 7.2. 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;
 - 7.3. requiring signatories to offer only deferred payment arrangements that are regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**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**).
8. Authorisation was granted in respect of the Consumer Code, as submitted to the ACCC on 11 November 2019, subject to conditions that, in summary terms, relate to:
- 8.1. variations to the requirements that 'Buy Now Pay Later' (**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**);
 - 8.2. the prohibition of unsolicited offers of BNPL finance in clause 3(d) of the Consumer Code (the **Clarification on Unsolicited Offers Condition**); and
 - 8.3. a requirement to report to the ACCC on the operation of the Consumer Code (the **Reporting Condition**).
9. Subsequently, Flexigroup applied to the Tribunal for a review of the ACCC Determination.
10. In this proceeding the ACCC's function is to assist the Tribunal to reach, in the public interest, the correct or preferable decision.

ISSUES

A. The Role of the Tribunal in the review

11. The Tribunal's statutory function in this proceeding is to undertake a rehearing of the matter. The Tribunal's task is not to review whether the ACCC Determination was right or wrong on the material before it.
12. It does not appear to be disputed by the participants in the proceeding that the test to be applied by the Tribunal is that identified in s 90(7)(b) of the CCA.
13. In applying the statutory test for authorisation, it is useful to compare: (a) the likely future with the conduct for which authorisation is sought, with (b) the likely future without such conduct. Flexigroup suggests that the Tribunal should compare the Consumer Code with the conditions imposed by the ACCC against the Consumer Code without these conditions

or with different conditions.¹ The ACCC's position is that the Tribunal should compare the likely future with the conduct the subject of the authorisation with the likely future without such conduct.

Issue 1: How should the Tribunal properly exercise its function in this review?

14. This issue is ultimately a legal question about how the Tribunal is to perform its statutory function in re-hearing the matter.
15. Interested parties may wish to comment upon how the Tribunal should properly exercise its function, including:
 - 15.1. What is the relevant test for the Tribunal to apply in assessing the conduct for which authorisation is sought?
 - 15.2. In comparing the likely future with and without the conduct, what is the relevant conduct the Tribunal should have regard to?

B. Relevant Market(s)

Issue 2: What is the relevant market for the purpose of the Tribunal's assessment?

16. In the Determination, the ACCC identified the following as relevant areas of competition likely to be affected by the Proposed Conduct:
 - 16.1. the supply of different types of New Energy Tech (**NET**) products and services; and
 - 16.2. financial products, including particularly deferred payment arrangements, offered with NET products and services.
17. It does not appear that these have been disputed by the parties participating in this proceeding.
18. Interested parties may wish to comment on whether the areas of competition identified above are relevant for the purpose of assessing this matter, and whether any other areas of competition are relevant.

C. Potential public benefits and detriments

19. Section 90(7)(b) of the CCA requires the ACCC, and the Tribunal in this review, to consider the public benefits and the public detriments that would result, or be likely to result, from the Proposed Conduct.

C.1 Potential public benefits

Issue 3: What, if any, are the likely public benefits of the Proposed Conduct?

¹ Flexigroup SOFIC at [43], Authorisation Applicants' SOFIC at [31].

20. Some potential public benefits upon which interested parties may wish to comment include the following.
21. Under the Consumer Code, signatory retailers can offer BNPL finance arrangements provided that certain requirements are met. For example, a requirement is that a BNPL provider, or its related body corporate, hold an Australian Credit Licence.² Another is that, where the finance product offered by the BNPL provider is not regulated under the NCC, the Consumer Code administrator is satisfied that the credit provider is a signatory to an industry code of conduct which includes certain standards of consumer protection.³
- 21.1. Is there a public benefit arising from the requirement that signatories to the Consumer Code offer BNPL finance arrangements only under certain conditions?
- 21.2. What effect would this requirement have on consumers who use BNPL finance in their purchase of NET products?
- 21.3. What is the risk of harm to consumers in accessing BNPL finance in the absence of the requirements imposed by the Consumer Code?
22. Clause 3(d) of the Consumer Code prohibits retailers from making unsolicited offers of payment arrangements that are not regulated by the NCCPA (including BNPL finance) in advertisements and promotional material.
- 22.1. What level of harm is experienced by consumers through unsolicited offers of BNPL finance in relation to NET products and services? If there is consumer harm, does it increase where the sale of the NET product itself is unsolicited?
- 22.2. If there is consumer harm to consumers when purchasing NET products/services, how would the prohibition in clause 3(d) of the Consumer Code affect that risk of harm?
- 22.3. Is BNPL finance able to be offered more easily in unsolicited sales compared with credit products that are regulated under the NCCPA and NCC? Why/why not?
23. The Consumer Code imposes other consumer protection obligations on signatory retailers beyond what is required by the general law.⁴ For example, taking extra care if a signatory becomes aware that a consumer may be facing vulnerable circumstances and providing site-specific installation plans and performance estimates.
- 23.1. To what degree would these obligations help in addressing any risk of harm to consumers purchasing NET products or services?
- 23.2. What is the level of protection that will be offered by retailers absent the Consumer Code? Is this level of protection likely to be the same as that offered under the Consumer Code?

² Clause 25(a)(ii) of the Consumer Code, 11 November 2019.

³ Clause 25(a)(ii)(A) of the Consumer Code, 11 November 2019.

⁴ See, for example: clauses 5, 7, 17, 33, 54 and 58-60 of the Consumer Code, 11 November 2019.

24. One of the claimed public benefits of the Consumer Code is that it will lead to better informed consumers, due to obligations on signatory retailers in relation to disclosure, advertising and communicating to consumers their rights.⁵
- 24.1. Are NET products particularly complex such that consumers require more information to be provided to them in order that they can fully understand their purchase?
- 24.2. Is there information asymmetry for consumers in selecting the appropriate NET products and finance arrangements used to fund their purchases of NET products?
- 24.3. To what extent is this information asymmetry likely to be addressed by the Consumer Code?
25. Are there other benefits flowing from the Consumer Code?

C.2 Potential Public Detriments

Issue 4: What, if any, are the likely public detriments of the Proposed Conduct?

26. Some possible public detriments upon which interested parties may wish to comment include the following.
27. The Consumer Code proposes to impose on signatories higher standards of consumer protections, above those that are required under the current law.⁶ These increased obligations may result in a loss of consumer choice, to the extent that businesses are unable to, or decide that it is not commercially viable to, offer these higher standards. This may in turn lead to a reduction in competition.
28. For example, under the Consumer Code, signatory retailers may only offer BNPL finance if BNPL providers meet certain requirements, such as holding an Australian Credit Licence and strict compliance with responsible lending and disclosure of information requirements equivalent to those in the NCCPA and NCC.⁷
- 28.1. Is there likely to be a loss of consumer choice of finance arrangements available as a result of the requirements imposed on signatories under the Consumer Code to offer BNPL finance arrangements only under certain conditions? To what extent do suppliers of BNPL finance products and suppliers of regulated credit products compete for customers seeking finance for NET products/services? Would such competition be affected by the requirements imposed on signatories with respect to the offering of BNPL finance under the Consumer Code?
- 28.2. What would be the cost to BNPL providers of adhering to the additional obligations required under the Consumer Code?
- 28.3. Is there an anti-competitive detriment arising out of the restrictions imposed on the offering of BNPL finance in the Consumer Code?

⁵ See, for example: clauses 3, 4, 6, 9, 17 and 37 of the Consumer Code, 11 November 2019.

⁶ See, for example: clauses 5, 7, 17, 33, 54 and 58-60 of the Consumer Code, 11 November 2019.

⁷ Clause 25(a) of the Consumer Code, 11 November 2019.

29. Under the Consumer Code, signatory retailers may only offer BNPL finance if the Consumer Code administrator has determined that the credit provider is a signatory to an industry code of conduct that requires the credit provider to adhere to certain standards, including certain sections of the NCCPA.⁸ The Code also provides an interim period of 12 months for the development of such an industry code of conduct.⁹ If such an industry code were not to be developed in those 12 months, signatory retailers would not be able to offer BNPL products under the Consumer Code.
- 29.1. What would be an appropriate timeframe for the development of such an industry code?
30. Clause 3(d) of the Consumer Code states that signatory retailers must not make unsolicited offers of payment arrangements that are not regulated by the NCCPA in advertisements and promotional material.
- 30.1. What is the practical effect of clause 3(d) for consumers, for NET signatory retailers and for finance providers?
- 30.2. Is there a loss of consumer choice or other consumer harm in relation to the offering of finance arrangements for consumers of NET products/services stemming from the operation of clause 3(d)?
- 30.3. What is the difference in the risk of consumer harm, if any, between prohibiting unsolicited offers of BNPL finance and prohibiting offering BNPL finance in unsolicited sales of NET products?
- 30.4. Would a prohibition on NET retailers offering BNPL finance during unsolicited sales result in fewer of them seeking to become signatories under the Consumer Code? What would the resulting effect be?
- 30.5. Would a prohibition in relation to unsolicited sales result in fewer signatory retailers seeking to offer BNPL finance in 'solicited' sales?
- 30.6. Is there an anti-competitive detriment arising from clause 3(d) of the Consumer Code?
- 30.7. Is there a public detriment in allowing signatories to the Consumer Code to agree and give effect to consistent business practices?
- 30.8. What effect on competition, if any, is likely to result from implementation of the Consumer Code?
31. In its application for review, Flexigroup notes that some state government rebate schemes only offer rebates for installations performed by signatories of relevant codes, or require tenderers for government tenders to be signatory to a relevant code.¹⁰ If governments do link rebates to the Consumer Code in such a way, retailers may have a commercial

⁸ Clause 25(a)(ii) of the Consumer Code, 11 November 2019.

⁹ Clause 25(a)(ii)(B) of the Consumer Code, 11 November 2019.

¹⁰ Flexigroup SOFIC at [11].

incentive to become signatories, and may suffer harm if they are excluded from the Consumer Code.

31.1. To what extent is membership of the Consumer Code likely to confer a competitive advantage on signatory retailers over those retailers which are not signatories?

31.2. What is the risk of harm to retailers excluded from the Consumer Code?

31.3. What effect does state governments linking rebate schemes to being a signatory of a relevant code have on retailers?

31.4. Are there sufficient mechanisms in the Consumer Code to mitigate against the risk of signatories being inappropriately expelled from or applicants being denied membership of the Code?

32. Are there other detriments flowing from the Consumer Code?

Issue 5: Is the net public benefits test in s 90(7)(b) met by the Proposed Conduct? Would the Proposed Conduct result or be likely to result in a benefit to the public, and would the benefit outweigh the detriment to the public that would result or be likely to result from the conduct?

33. How should the Tribunal assess the likely public benefits against the likely public detriments, having regard to:¹¹

33.1. the weight to be attributed to claimed benefits that benefit only the authorisation applicants or certain members of the public;

33.2. the nature and extent of the public benefit, whether it is enduring and of substance, and the likely magnitude of the benefit; and

33.3. whether the public benefit is a consequence of the proposed conduct for which authorisation is sought or is it likely to occur in the future without that conduct?

D. Conditions

34. Section 88(3) of the CCA provides that the ACCC, and the Tribunal in this proceeding, may specify conditions in the authorisation.

Issue 6: In exercising its discretion to authorise the Proposed Conduct, should the Tribunal impose conditions? If so, what form should these conditions take?

35. Interested parties may wish to comment on the following questions regarding this issue:

35.1. In what circumstances can the Tribunal exercise its discretion to specify conditions?

35.2. Is a condition necessary to enhance or increase the likelihood of public benefits arising from the Proposed Conduct?

¹¹ *Qantas Airways Ltd* [2004] ACompT 9.

35.3. Are any or all of the conditions imposed by the ACCC, or alternative conditions proposed by the participants in these proceedings, necessary or appropriate in the circumstances having regard to the likely benefits and detriments arising from the Proposed Conduct?

35.4. Are there any other conditions which, if imposed, would make the benefits more likely to be realised or to mitigate the likely public detriment?

35.5. What if any conditions should be imposed?

E. Length of Authorisation

36. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period.

Issue 7: If authorisation is granted, what is the appropriate period of authorisation?

37. The ACCC granted authorisation for 5 years.

37.1. What is an appropriate period of authorisation for the Tribunal to consider?