

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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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



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Important information

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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 and the determination made by the ACCC on 5 December 2019.

FLEXIGROUP LTD (ACN 122 574 583)

Applicant

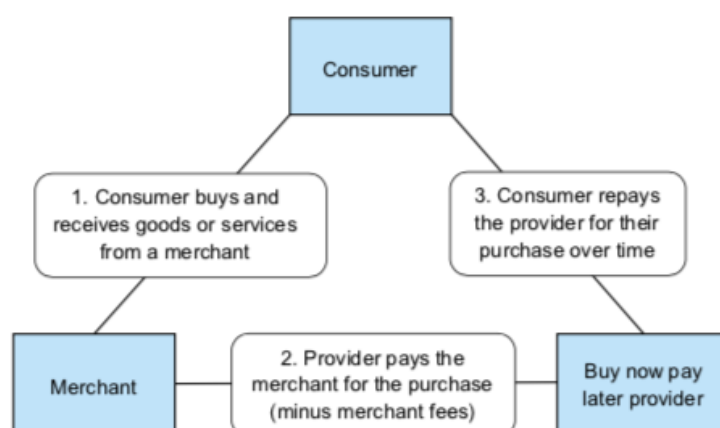
**CONSUMER ACTION LAW CENTRE'S
STATEMENT OF FACTS, ISSUES AND CONTENTIONS**

A FACTS

A1 Basic features of BNPL finance

1. The essential characteristics of Buy-Now-Pay-Later (**BNPL**) finance are that:
 - (a) a consumer buys and receives goods or services from a merchant;
 - (b) the BNPL provider pays the merchant for the purchase, less an amount comprising their payment for the provision of finance (**the merchant fee**);
 - (c) the consumer pays the BNPL provider for the purchase over time, but pays either minimal or no up-front credit charges – rather, the BNPL provider's revenue is derived from merchant fees and late or "missed payment" fees (primarily the former).

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2. This will usually involve:
 - (a) a contract between the consumer and the BNPL provider;
 - (b) a contract between the consumer and the merchant, and
 - (c) a contract between the BNPL provider and the merchant.
3. In some arrangements, the BNPL provider will charge a merchant fee to the merchant, but will not impose any up-front charges on the consumer. This is described below as a **No-Charge BNPL arrangement**.
4. In other cases, the BNPL provider will charge a merchant fee to the merchant, and may also impose a modest up-front charge on the consumer. This is described below as a **Low-Charge BNPL arrangement**.
5. In contrast to more traditional forms of consumer credit, No-Charge and Low-Charge BNPL arrangements are not on their face regulated under the *National Credit Code (NCC)*, and do not require that the credit provider be licensed under the *National Consumer Credit Protection Act 2009 (Cth) (NCCPA)*. This is because:
 - (a) in relation to No-Charge BNPL arrangements, they do not meet the criteria for the application of the NCC, as set out in s 5(1) – specifically, there is no ‘charge for providing the credit’, as specified by s 5(1)(c) of the NCC;
 - (b) in relation to Low-Charge BNPL arrangements, they fall within the exemption provided by s 6(5) of the NCC and r 51 of the *National Consumer Credit Protection Regulations 2010 (Cth) (NCCPR)*, so long as any charges are below the maximum threshold of \$200 in the first year of the arrangement, and \$125 in subsequent years.

A2 The BNPL market

6. BNPL is a diverse, rapidly growing and evolving industry.² It is not limited to low-value

¹ Diagram extracted from ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018) (**ASIC Report 600**), p 6.

² ASIC Report 600, p 9.

purchases, but is available for the purchase of larger household items (including solar panels and NET equipment) up to \$30,000 in price.³ Flexigroup claims that its product, humm, has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia⁴, and that almost half of the revenue generated by humm derives from providing credit for sales of solar panels and other home improvements.⁵

7. For most BNPL providers, the merchant fee comprises their largest single source of revenue, and the majority of their revenue overall.⁶
8. Some BNPL arrangements result in the price of goods being inflated. In particular, such price inflation may occur by differentiated pricing, whereby a surcharge (which may not be clearly advertised, or which may be presented in reverse as a “cash discount”) is added to the price that is payable by consumers using BNPL finance, so as to pass through the cost of the merchant fee to the consumer.⁷
9. ASIC has concluded that the availability of BNPL finance has influenced the spending habits of some consumers, leading them to buy more expensive items that they otherwise could not afford in one payment, to spend more than they normally would, and/or to make more spontaneous purchases.⁸

A3 The market for solar and NET products

10. As at 2019, the Australian solar panel installation industry is a \$1.9 billion market⁹ - this is only a sub-set (although a substantial one) of the market for NET products more broadly. As of December 2016, there were 4,000 to 5,000 solar retailers in Australia. The industry is largely comprised of small to medium-sized businesses, which vary widely in their professionalism, operating style and legal compliance.
11. Solar panels and NET products are regularly sold on the basis of representations that the products will enable the consumers to realise large savings on their electricity bills. These representations trade on consumer anxiety over rising energy costs, and so are apt to have particular appeal to low-income or welfare-dependent consumers.
12. Due to the technical nature of NET products, and financial aspects of the electricity market generally, it is difficult for the average consumer to accurately assess or estimate:
 - (a) the products’ performance;
 - (b) which products, and how many, would be suitable for their needs;

³ ASIC Report 600, p 9.

⁴ Flexigroup’s Statement of Facts, Issues and Contentions, [5].

⁵ Flexigroup’s Statement of Facts, Issues and Contentions, fn 1.

⁶ ASIC Report 600, p 10, figure 2.

⁷ ASIC Report 600, p 10-11.

⁸ ASIC Report 600, p 11-12.

⁹ IBISWorld, *Industry Report OD4042: Solar Panel Installation in Australia* (June 2019), p 24.

- (c) the actual impact on their energy costs, and any likely savings.
- 13. Solar panels are also very frequently sold to consumers with BNPL financing, often described as 'interest-free finance'.

A4 Particular consumer protection issues with BNPL in the solar/NET markets

Responsible lending

- 14. Like all consumer credit, BNPL arrangements create a risk of causing financial hardship for consumers.¹⁰ However, BNPL arrangements are not subject to the obligations under the NCCPA and NCC, which are intended to mitigate that risk.
- 15. The consumer protection obligations which apply to NCC-regulated credit, but not to any unregulated BNPL arrangements, include:
 - (a) responsible lending obligations, contained in Chapter 3 of the NCCPA;
 - (b) disclosure obligations under Part 2, Divisions 1 and 5 of the NCC;
 - (c) restrictions on fees, charges and interest for certain credit contracts, under Part 2, Division 3 of the NCC;
 - (d) obligations concerning financial hardship arrangements, under Part 4, Division 3, and Part 5, Division 2 of the NCC;
 - (e) general conduct obligations on licensees, including obligations to take reasonable steps to ensure that the credit activities are engaged in efficiently, honestly and fairly; to ensure that its representatives are adequately trained; and to have both internal and external dispute resolution procedures in place: NCCPA s 47; and
 - (f) restrictions on unsolicited offers of third party credit by unlicensed merchant parties: see NCCPR r 23(4).

Unsolicited sales

- 16. Since at least 2007, misleading or high-pressure unsolicited sales have been a notable problem in the retail energy sector, including among solar retailers.¹¹
- 17. Many unsolicited sales transactions include one or more of the following features:
 - (a) salespeople conducting unsolicited sales transactions commonly earn commission-based remuneration, which incentivises aggressive sales behaviour and breaches of consumer protection laws (including misleading or deceptive conduct, or in relation to cooling-off periods);

¹⁰ ASIC Report 600, p 12-13.

¹¹ See Consumer Action Law Centre, *Sunny Side Up: Strengthening the Consumer Protection Regime for Solar Panels in Victoria* (April 2019) (***Sunny Side Up***), p 40; Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* (November 2007).

- (b) targeting of the most vulnerable groups in the community, including the elderly, people with linguistically diverse backgrounds, and people who are otherwise disadvantaged; and
 - (c) members of those vulnerable groups targeted are particularly susceptible to the tactics employed by salespeople in unsolicited sales transactions.¹²
18. Any consumer protection concerns raised by unsolicited sales transactions are exacerbated in the context of:
- (a) solar and NET products, where few consumers would have the necessary numeracy or technical knowledge to meaningfully estimate or assess the financial or environmental benefits, and general efficacy, of the products in question, or how they might compare to other available products;¹³ and
 - (b) BNPL arrangements, which are not subject to the consumer protections available for NCC-regulated credit.

Surcharging

19. The BNPL model, by eliminating or minimising any credit charges payable by the consumer to the credit provider, and replacing them with fees payable by the merchant to the credit provider, incentivises merchants to pass this fee on to consumers by inflating the price of goods.
20. In principle, this could occur through any of the following means:
- (a) **general price increases**, so as to distribute the costs of BNPL merchant fees among consumers generally;
 - (b) **formal price differentiation** (ie a clearly-advertised surcharge for BNPL finance or discount for cash purchases – although, in practice, this does not appear to occur¹⁴);
 - (c) **informal price differentiation** (ie a surcharge or discount of the type described above, but without being clearly advertised or expressly disclosed).
21. Many, if not all, BNPL providers require that merchants agree not to impose any surcharge or other differentiated pricing of the type described above. However, as ASIC has observed, whether those contractual obligations as between BNPL provider and NET merchant are capable of effectively preventing the NET merchant and its sales representatives from engaging in informal or covert surcharging, is at least an open question.¹⁵
22. At least in the case of informal price differentiation, the offering of cash discounts on an ad hoc or covert basis may also result in the NET merchant effectively imposing a charge for the

¹² CALC, *Sunny Side Up*, p 40-41.

¹³ CALC, *Sunny Side Up*, p 41.

¹⁴ See Reserve Bank of Australia, *Review of Retail Payments Regulation: Issues Paper* (November 2019) p 31.

¹⁵ ASIC Report 600, p 10-11.

provision of credit, in a way that would require the BNPL finance to be NCC-regulated and the BNPL finance provider to be NCCPA-licensed. In practice, the offering of informal cash discounts may therefore result in effective circumvention of the NCC consumer protections (whether or not the BNPL provider is itself privy to or aware of that conduct).

B ISSUES

23. The controversy before the Tribunal is narrow in compass, relative to the full breadth of matters addressed by the New Energy Tech Consumer Code (the **NET Code**).¹⁶ All of the parties to this review support the authorisation of the NET Code, either on the conditions imposed by the ACCC or on alternative conditions. The matters in contention between the parties relate solely to the terms of the NET Code and the conditions of authorisation that relate to the provision of BNPL in connection with the sale of NET products.
24. In substance, therefore, the question presented to the Tribunal is: what conditions regarding the provision of BNPL should the Tribunal impose:
- (a) in order that the NET Code, as authorised by the Tribunal, will pass the net public benefit test under s 90(7)(b) of the CCA; and
 - (b) in order to enhance or maximise the net public benefits that will flow from the NET Code's authorisation.
25. Two primary issues arise from the terms of the NET Code and the ACCC's proposed conditions in relation to BNPL credit. Those primary issues are as follows, and are expanded upon in Part C below:
- (a) **The Unregulated Credit issue:** Firstly, allowing the provision of unregulated credit (including BNPL) that is not subject to the NCC, but which instead falls to be evaluated and enforced:
 - (i) against the criteria specified under cl 25(a)(ii)(A)-(B) of the NET Code (either in the form submitted to the ACCC in November 2019, or in the form as modified by the ACCC's conditions) – together with the further transitional criteria specified in cl A7 and A7A of Annexure); and
 - (ii) by the proposed NET Code administrator, rather than by ASIC,risks providing consumers with a false degree of assurance, and failing to realise the intended public benefits of the NET Code with respect to responsible lending standards and consumer protection. CALC therefore contends that the Tribunal should impose a condition that would delete cl 25(a)(ii) of the NET Code (and that would in turn make clauses A7 and A7A unnecessary): see section C1 below.
 - (b) **The No-Charge BNPL issue:** Secondly, in its current form, the requirements of

¹⁶ Referring to the Code in the form as submitted to the ACCC on 11 November 2019, unless otherwise indicated.

cl 25(a)-(c) of the NET Code will only apply to BNPL arrangements that are Low-Charge BNPL arrangements, and not to No-Charge BNPL arrangements, where there is no principled reason for the two to be treated differently. CALC therefore contends that the Tribunal should impose a condition that would delete the words *‘and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)’* from the chapeau to cl 25 of the NET Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefits in relation to both kinds of BNPL credit: see section C2 below.

C CONTENTIONS

C1 The Unregulated Credit Issue

26. Under the form of the NET Code that was originally submitted to the ACCC on 29 April 2019, signatories to the NET Code would have been required to ensure that any deferred payment arrangement was regulated by the NCC and provided by an NCCPA-licensed credit provider. As the authorisation applicants submitted to the ACCC, that requirement would ensure that consumers would:
 - (a) benefit from the credit providers being required to make a responsible lending assessment under the NCCPA;
 - (b) be provided with regulated information about the credit offer; and
 - (c) be assured of access both to appropriate internal dispute resolution and to external dispute resolution through AFCA.¹⁷
27. In its draft determination, the ACCC recognised that those protections would likely be beneficial to consumers, by reducing their exposure to, and harm from, unsuitable and unregulated credit arrangements (including BNPL).¹⁸
28. The later forms of the NET Code, as submitted in November 2019 and in the form as modified by the ACCC’s condition of authorisation, attempt to establish similar consumer protections by offering the possibility that, a NET Code signatory may nonetheless offer credit that is “exempt from” NCC regulation (including BNPL) if:
 - (a) The NET Code Administrator has assessed that a (wholly different) industry code of conduct, to which the proposed unregulated credit provider is a signatory, meets certain standards and provides certain protections, including matters specified under the NCCPA, the NCC and ASIC regulatory guides: cl 25(a)(ii)(A); or
 - (b) as an interim arrangement, pending the anticipated establishment of a separate industry code for BNPL credit providers, the NET Code Administrator has evaluated and approved the deferred payment contracts and internal processes and policies of

¹⁷ ACCC, Draft determination, 1 August 2019, at [4.16].

¹⁸ ACCC, Draft determination, 1 August 2019, at [4.19].

the proposed credit provider: cl 25(a)(ii)(B).

29. In reality, the quasi-regulation of BNPL credit that cl 25(a)(ii) seeks to have the NET Code Administrator carry out will not provide a meaningful or adequate substitute for the acknowledged consumer benefits of regulation under the NCC. In particular, the proposed cl 25(a)(ii) very substantially broadens the supervisory responsibilities of the NET Code Administrator into a wholly separate industry (unregulated BNPL consumer credit) which presents a different and additional layer of consumer protection concerns – beyond the NET Code Administrator’s core concern of consumer protection issues as they arise specifically with the sale and provision of NET products.
30. In short, the proposed cl 25(a)(ii) asks the NET Code Administrator, as a “quasi-regulator” of unregulated BNPL credit, to bite off more than it can reasonably be expected to chew – both in terms of expertise and resources. In doing so, it offers the false veneer of NCC-equivalent consumer protections through a complex tangle of provisions, which it is unrealistic to expect that a single industry code administrator will be equipped to rigorously enforce.
31. Deleting cl 25(a)(ii) (and cl A7 and A7A), and reverting substantially to the original form of cl 24(a)-(b)¹⁹ of the original form of the NET Code, provides a simple and straightforward condition that the Tribunal can impose, in order to ensure an appropriate standard of consumer credit protection, that would be properly regulated by ASIC as the specialist regulator, in accordance with existing credit legislation, rather than overly complex and poorly designed quasi-regulation.

C2 The No-Charge BNPL Issue

32. The chapeau to cl 25 of the NET Code states:

We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n), we will ensure that: ...
(emphasis added)

33. As a result of the underlined condition, the obligations under cl 25(a)-(c) of the NET Code:
- (a) will capture the provision of credit that is regulated under NCC (as the NCC generally applies to credit for which a charge is or may be imposed: NCC, s 5(1)(c)); and
 - (b) will capture the provision of Low-Charge BNPL arrangements: that is, credit for which a small charge is made, but which is exempted from the NCC by s 6(5) of the NCC and r 51 of the NCCPR;
 - (c) but will not capture No-Charge BNPL arrangements, which may fall outside the

¹⁹ As originally numbered in the initial version of the NET Code submitted on 29 April 2019.

s 5(1)(c) criterion for NCC regulation.

34. There is no principled reason, and no reason appears to have been presented to the ACCC, why the obligations under cl 25(a)-(c) should not apply equally to No-Charge BNPL arrangements, as they do to Low-Charge BNPL arrangements. In particular, if CALC's contentions on the Unregulated Credit Issue are accepted by the Tribunal, then it is necessary for cl 25 to clearly apply to No-Charge BNPL arrangements, in order for it to effectively prohibit them, and provide a consistent approach to consumer protection.
35. Insofar as Flexigroup or any other BNPL providers presently offer Low-Charge BNPL arrangements to purchasers of NET equipment, there would be nothing in the NET Code to prevent BNPL providers from circumventing the consumer protections that cl 25 is intended to ensure, by the simple expedient of restructuring their Low-Charge BNPL arrangements to No-Charge BNPL arrangements after the NET Code has been authorised by the Tribunal. There is no principled reason why the NET Code should seek to prohibit or regulate the offering of Low-Charge BNPL arrangements only, but not No-Charge arrangements.
36. To authorise the NET Code in a form that would enable the cl 25 protections in respect of consumer credit – which comprise a significant (and the only contentious) component of public benefits of the NET Code – to be so readily avoided and undermined, would not best ensure the effective realisation of that public benefit. In this respect also, to authorise the NET Code with those words retained in the chapeau to cl 25 would offer a false veneer of consumer protection that could (and can realistically be expected to) be circumvented by BNPL providers through the use of No-Charge BNPL arrangements.
37. The straightforward remedy is for the Tribunal to impose a condition that would delete the offending words from the chapeau to cl 25, in order to provide clarity and consistency in its application.

C3 Offering of unregulated credit for unsolicited sales of NET products

38. Clause 3(d) of the NET Code requires NET merchants not to make unsolicited offers of payment arrangements that are not regulated by the NCCPA.²⁰
39. The ACCC's final determination supplemented that provision by the condition of authorisation stated at [5.13] of the final determination, which is that:

Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.
40. The effect of that condition is to broaden the protection that cl 3(d) was intended to confer, by

²⁰ It is unclear whether this term of the NET Code remains in issue before the Tribunal. Compare Flexigroup's application for review at [5(a)(iii)(A)] (seeking deletion of cl 3(d) of the NET Code) with Flexigroup's SFC at [60] (where that relief is not sought).

prohibiting both:

- (a) the unsolicited offering of unregulated BNPL credit; and
- (b) the offering of unregulated BNPL credit in any unsolicited sale of NET products.

- 41. As the ACCC noted, that condition was imposed in order to ensure that the consumer protection benefits of clause 3(d) are realised.²¹
- 42. CALC's primary position (as outlined in section C1) above is that no offerings of NCC-unregulated credit should be permitted. In the alternative, if the Tribunal were to grant authorisation on conditions that permit the offering of unregulated credit to some extent, CALC contends that the condition stated at [5.13] of the final determination should be retained, for the reasons given by the ACCC.

Dated: 23 March 2020

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²¹ ACCC, Final determination, at [4.66].