

## 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: 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



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

DEPUTY REGISTRAR

Dated: 28/02/2020 3:59 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 ACCC'S OUTLINE OF SUBMISSIONS RESPONDING TO  
THE APPLICATIONS FOR LEAVE TO INTERVENE**

**PART I LEGAL PRINCIPLES**

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1. Section 109(2) of the *Competition and Consumer Act 2010* (Cth) states that “[t]he Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal”. In determining the exercise of this discretion, the Tribunal has typically considered:
  - (a) Whether the proposed intervenor can demonstrate “some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander”;<sup>1</sup>
    - (i) This is sometimes described as whether the proposed intervenor “has some interest which is ignited by the proceeding, which is an interest other than that found in members of the general community”;<sup>2</sup>
    - (ii) This is sometimes framed as whether the interest is “sufficient to warrant the time and cost incurred in the participation of the proposed intervenor”;<sup>3</sup>
  - (b) Whether the proposed intervenor “can relevantly add to, or supplement, rather than simply repeat and duplicate, evidence led by, and submissions made by” other participants in the Tribunal proceeding.<sup>4</sup>

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<sup>1</sup> *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [35].

<sup>2</sup> *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [35]; see also *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].

<sup>3</sup> *Application by Sea Swift Pty Ltd* [2015] ACompT 5 at [8]; see also *Qantas Airways Limited* (2003) ATPR 41-972 at [4].

<sup>4</sup> *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [54]; see also *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].

## **PART II ASIC'S APPLICATION**

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2. The Commission supports the Australian Securities and Investments Commission's (**ASIC**) application for leave to intervene.
3. First, ASIC is not just an officious bystander in respect of these proceedings. Not only does ASIC have a special interest in financial product regulation as the national financial regulator, but the Applicant has alleged ACCC interference with ASIC's functions.<sup>5</sup> This connection justifies ASIC's participation as an intervenor.
4. Secondly, ASIC can relevantly add to, or supplement, evidence led by, and submissions made by other participants in the Tribunal proceeding. In particular, ASIC can provide highly relevant information on an impartial basis regarding public benefits and detriments in relation to BNPL finance and its regulatory framework (aspects of this proceeding which have received significant attention<sup>6</sup>). This is largely because ASIC has been engaged in a dedicated examination of the sector as a whole.<sup>7</sup> Furthermore, though the Applicant and Authorisation Applicants may be able to provide some information in this respect, there is no guarantee that they will do so on an impartial basis.<sup>8</sup> ASIC is best placed to explain its own views and findings from the regulatory perspective to the Tribunal, rather than these views be advanced through other parties to the proceedings.

## **PART III CALC'S APPLICATION**

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5. The Commission supports the Consumer Action Law Centre's (**CALC**) application for leave to intervene.
6. First, CALC is not just an officious bystander in respect of these proceedings. The Commission agrees that CALC has a real and substantial interest in the subject matter of the proceeding, due to CALC's close involvement in the development and authorisation of the New Energy Tech Consumer Code, as well as its substantial legal, policy and advocacy work on the issue of BNPL finance.<sup>9</sup>
7. Secondly, CALC is well placed to lead consumer evidence that in the ACCC's submission is likely to be relevant to the Tribunal's determination and substantively different from evidence likely to be led by either the Applicant, the Authorisation Applicants, ASIC or the ACCC.<sup>10</sup>

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<sup>5</sup> Applicant's Application (attachment) at [80], [82]-[83].

<sup>6</sup> Applicant's Application at [3], [5]; Applicant's Application (attachment) at [74]-[81]; Applicant's SOFIC at [44]-[57].

<sup>7</sup> ASIC Intervention Application at [3]-[6].

<sup>8</sup> See, eg, ASIC Intervention Application at [14].

<sup>9</sup> CALC Intervention Application at [3]; CALC Intervention Submissions at [4]-[8]; Affidavit of Gerard Brody dated 21 February at [8]-[29].

<sup>10</sup> CALC Intervention Application at [4]-[5]; CALC Intervention Submissions at [11]-[20].

Date: 28 February 2020



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Matthew Blunn

AGS lawyer

for and on behalf of the Australian Government Solicitor

Lawyer for the Australian Competition and Consumer Commission