

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: 23/03/2020 5:03 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019
Re: Application for Authorisation AA1000439
Lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code
Applicant: Flexigroup Limited (ACN 122 574 583)

ASIC'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

Date of Document:	23 March 2020		
Filed on behalf of:	Australian Securities and Investments Commission		
Prepared by:	ASIC	Telephone:	(02) 9911 5703
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		Reference:	ACT 1 of 2019

Introduction

- 1 ASIC files this Statement of Facts, Issues and Contentions in respect of its intervention in this proceeding. ASIC adopts the abbreviations used in the Statement of Facts, Issues and Contentions filed by the applicant (**Flexigroup's SFIC**).
- 2 This Statement is structured as follows:
 - (a) Part A sets out the relevant facts, including:
 - i. ASIC's response to the facts set out in Flexigroup's SFIC;
 - ii. further relevant background to ASIC's involvement in the BNPL industry;
 - iii. the present state of regulation of BNPL finance; and
 - iv. the draft BNPL Industry Code.
 - (b) Part B sets out ASIC's position in respect of the issues identified in Flexigroup's SFIC; and
 - (c) Part C sets out ASIC's contentions, including:
 - i. its position in respect of public detriment and public benefit;

- ii. its views as to the necessity and appropriateness of the BNPL conditions; and
- iii. its views on Flexigroup’s proposed variations to the Authorisation.

Part A: Facts

A.1 Background

3 ASIC considers the summary in paragraphs 1 to 23 of Flexigroup’s SFIC to be accurate. To that procedural summary, ASIC adds that:

- (a) on 11 October 2019, it made submissions to the ACCC in respect of the Application;
- (b) in November 2018, it published a detailed review of the BNPL sector;¹
- (c) in November 2018, it made a submission to a Senate Inquiry into credit and financial services targeted at Australians at risk of financial hardship;²
- (d) it appeared before the above-mentioned Senate Inquiry;
- (e) the report of the Senate Inquiry was released on 22 February 2019; and
- (f) it is presently preparing and considering its response to the Report of the Senate Inquiry.

A.2 Regulation of BNPL finance

4 ASIC considers the summary of the regulation of BNPL finance in Flexigroup’s SFIC (paragraph 24 to 36) to be broadly accurate.

5 However, ASIC notes that – contrary to paragraph 30 of Flexigroup’s SFIC – the outcome of ASIC Report 600 was not that ASIC “did not consider it necessary” for BNPL finance to be subject to regulation under the NCCPA and the NCC. Rather, paragraph 72 of ASIC Report 600 stated:

As a further step, it may be that buy now pay later providers should be required to comply with the National Credit Act. ASIC has not yet formed a view that this is necessary. Our ongoing monitoring of this industry ... will help us to assess whether we should advise the Government to consider further law reform.

¹ ASIC Report 600.

² Submission 21.

6 In other words, ASIC has not positively concluded that such regulation is unnecessary;
rather, it has yet to form a view about its necessity.

7 Two further qualifications should be noted in respect of Flexigroup’s summary of
BNPL finance regulation.

8 First, contrary to paragraphs 32 and 33 of Flexigroup’s SFIC, the product intervention
order power contained in s 1023D of the *Corporations Act* does not require a breach of
the *ASIC Act* to be enlivened. Rather, the power may be exercised if ASIC considers
that a financial product is available to “retail clients”, and “has resulted in, or will or is
likely to result in, significant detriment to retail clients”.³

9 Secondly, the design and distribution obligations described in paragraph 34 of
Flexigroup’s SFIC will not come into effect until April 2021.

A.3 The BNPL Industry Code

10 ASIC is currently in the process of reviewing the draft BNPL Industry Code circulated
by AFIA.

11 However, even if ASIC forms the view that the BNPL Industry Code is adequate (about
which this Statement expresses no view), it is not clear that ASIC has the power to
formally approve the BNPL Industry Code (as foreshadowed in paragraph 40 of
Flexigroup’s SFIC).

12 Further, as currently drafted, the BNPL Industry Code does not mandate the
consideration of the factors set out in paragraph 39 of Flexigroup’s SFIC. Paragraph
4.6 of Part B of the BNPL Industry Code (page 8 of the BNPL Industry Code) states
that the Upfront Assessment Process will “include and consider factors, such as”, and
proceeds to list factors connected by the conjunction “and/or”. Those emphasised words
are inconsistent with a contention that each of the relevant factors *will*, or *must*, be
considered.

³ The *Corporations Act* power uses the definition of financial product from the *Corporations Act*: see s 1023B and s 12BAA(7)(k) of the *ASIC Act*. ASIC notes that the product intervention power under the *NCCPA* is in respect of “credit products” directed to “consumers” (rather than the “financial products” directed to “retail clients” under the *Corporations Act*) – see 301D of the *NCCPA*. Of course, BNPL finance is not presently regulated by the *NCCPA*.

Part B: Issues

13 ASIC accepts the issues identified in paragraph 42 of Flexigroup's SFIC.

Part C: Contentions**C.1 Public detriment**

14 ASIC does not seek to comment on the anti-competitive consequences alleged in Flexigroup's SFIC (paragraphs 44 to 48), save that it considers – as it submitted to the ACCC in the Application process – that it remains ASIC's position that an appropriate framework to protect consumers is in the manner proposed in Annexure 1 to ASIC's submission to the ACCC. For the avoidance of doubt, ASIC did not hold the view attributed to the ACCC in paragraph 46 of Flexigroup's SFIC when it made its submission to the ACCC.

C.2 Public benefits of the BNPL Conditions

15 ASIC does not seek to comment on the effects (or non-effects) of the BNPL Conditions on NET selling practices.

16 As to the public benefits of the BNPL conditions, ASIC repeats its contentions set out below in respect of whether the BNPL conditions are necessary or appropriate.

C.3 Whether BNPL conditions are necessary or appropriate

17 As stated above, ASIC is presently preparing its response to the Senate Inquiry into BNPL finance. ASIC cannot, at this stage, foreshadow the content of that response but will provide the response to the Tribunal as soon as it is able to do so.

18 ASIC refers to and repeats a number of the propositions included in its submission to the ACCC and in its Report 600, including:

- (a) some BNPL arrangements result in the price of goods being inflated;
- (b) BNPL arrangements have influenced the spending habits of some consumers;
- (c) over-commitment can be a risk for some consumers;
- (d) ASIC has not yet formed a view as to whether BNPL providers should be required to comply with the NCC; and

(e) ASIC remains concerned that the current regulation of BNPL is not equivalent to the regulation of credit under the NCCPA and NCC. For example, it does not involve regulatory requirements governing:

- i. responsible lending;
- ii. external dispute resolution;
- iii. hardship;
- iv. disclosure; and
- v. licensing of providers.

19 ASIC remains of the view that an appropriate form of protection is that contained in the form of its submission to the ACCC, which is largely the form in which the NETCC was authorised by the ACCC.

C.4 Proposed variation to the Authorisation

20 ASIC opposes the variations proposed in paragraph 60 of Flexigroup's SFIC.

21 The first variation – to remove the ACCC's BNPL Conditions in their entirety – does not adequately protect against some of the risks for consumers associated with BNPL finance.

22 The alternative variation – which essentially provides for regulation by either the NCCPA and NCC, or an industry code that delivers “substantively equivalent consumer protections” to the NCCPA – has its own difficulties.

23 First, given the current absence of any industry code (and in the absence regulation under the NCCPA and NCC), upon the NETCC being adopted, BNPL products would be unable to be offered. To guard against any such lacuna in regulation, transition provisions are necessary.

24 Secondly, and more significantly, ASIC is concerned about the vagueness of the phrase “substantively equivalent consumer protections”. As ASIC submitted to the ACCC, ASIC considers that:

- (a) it is unclear which consumer protection provisions of the NCCPA are required to be “substantively equivalent” in the industry code;

- (b) it is unclear how much – if any – deviation from the NCCPA would be permitted while the code remained “substantively equivalent”. While some provisions of the NCCPA are capable of clear replication, others (such as responsible lending requirements) are more nuanced;
- (c) it is unclear who would judge whether the code provides “substantively equivalent consumer protections”; and
- (d) it is unclear whether the reference to the NCCPA incorporates the NCC (which is a schedule to the NCCPA). If it does, there are various requirements in the NCC which are not readily applicable to a BNPL context.

Conclusion

25 ASIC seeks for Flexigroup’s application to be dismissed, and the NETCC affirmed in the form of the ACCC’s Authorisation.

Dated: 23 March 2020

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