

## 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



DEPUTY REGISTRAR

Dated: 28/02/2020 4:53 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: ACT1 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

**FLEXIGROUP LIMITED**

Applicant

### **APPLICANT'S SUBMISSIONS IN RESPONSE TO APPLICATIONS TO INTERVENE**

#### **OVERVIEW**

1. Three applications for intervention have been filed in the proceeding. These submissions are made by the Applicant (**Flexigroup**) in response to the intervention applications.
2. Flexigroup does not oppose the application for intervention made by the Australian Securities and Investments Commission (**ASIC**). ASIC has a sufficient interest and will be able to adduce evidence which can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application.
3. However, for the reasons set out below, Flexigroup submits that:
  - (a) the determination of the application for intervention by RateSetter Australia RE Limited (**Ratesetter**) should be deferred until it puts on any proposed evidence, which should occur by 3 April 2020 pursuant to paragraph 14 of the directions made by the Tribunal; and
  - (b) the application for intervention by Consumer Action Law Centre (**CALC**) should be refused.
4. Flexigroup does not require a hearing to resolve the applications.

#### **GENERAL PRINCIPLES**

5. Section 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) states:

*The Tribunal may, upon such conditions as it sees fit, permit a person to intervene in proceedings before the Tribunal.*

6. There are a number of relevant considerations in the application of this section, as set out below.

Principles of intervention

7. In *Application by Sea Swift Pty Limited* [2015] ACompT 5 (**Sea Swift**) the Tribunal stated at [8]:

*Earlier decisions of the Tribunal indicate that the proposed intervener should have a "real and substantial interest" in the outcome of the proposed merger, sufficient to warrant the time and cost incurred in the participation of the proposed intervenor: see Qantas Airways Ltd (2003) ATPR 41-972; [2003] ACompT 4 at [4]; Re Fortescue Metals Group Ltd [2006] ACompT 6 at [35]; Application by Independent Contractors Australia [2015] ACompT 1 at [28].*

8. In *Qantas Airways Limited* [2003] ACompT 4 at [4] the Tribunal considered that there had:

*been some divergence of view in relation to the threshold to be overcome. It is variously expressed that there has to be a "real and substantial interest" in the subject matter, that there has to be a "sufficient interest" in the subject matter, or that the interest must be sufficient to justify the cost and inconvenience of having an extra party in the proceeding*

9. In *Application by Fortescue Metals Group Ltd* [2006] ACompT 6 (**Fortescue**) at [35] the Tribunal said:

*an applicant for leave to intervene or participate under s 109(2)...must, as a minimum, be able to establish some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander ...However, the connection should usually be one that discloses that the applicant for leave to intervene has some interest which is ignited by the proceeding, which is an interest other than that found in members of the general community.*

10. In *Application by Independent Contractors Australia* [2015] ACompT 1 (**Independent Contractors**) at [28] the Tribunal proceeded on the basis that there is no "sufficient" or "real and substantial" interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions. However, the Tribunal recognised that:

*it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or the submissions to be made by them, as well as considering how the proposed intervenor might be affected by the Authorisation or the outcome of the application to the Tribunal.*

11. Following *Independent Contractors*, FlexiGroup's position is that the extent to which the proposed intervener can relevantly add to, or supplement, evidence proposed to

be led by the other parties without duplication should be a primary consideration of the Tribunal when deciding to grant leave to intervene.

12. Other factors the Tribunal will consider include whether the applicant for leave will make some distinct contribution as opposed to duplicating the contribution of others,<sup>1</sup> and whether the intervening party has made up its mind about the position it wishes to take in relation to the application.<sup>2</sup>

Other mechanisms by which third parties may advance their interests in the proceeding

13. Interested third parties may be able to sufficiently advance their interests by the making of submissions. Such parties do not need to have the rights of an intervenor in order to do so. This is what occurred in *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1. In that case the Tribunal received submissions from various interested persons (the Public Interest Advocacy Centre, Uniting Care Australia and CHOICE) who did not seek to intervene in the proceedings. It addressed those submissions in its reasons for decision (see [151], [272] and [392] of the decision). This is also how the Tribunal proceeded in *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 where the Tribunal received submissions from a number of interested third parties (see [53]).

Extent to which the proposed intervenor can add to the proposed evidence

14. Leave to be joined as a party to proceedings may be refused if the party's interests would be protected by the existing parties to the proceedings: see, for example, the application by Messrs Ahmed and Zivojinovic in *Application by Michael Jools, President of the NSW Taxi Drivers Association* [2005] ACompT 4 at [46]. This could include the ACCC in carrying out its functions under the Act. Although this was a case where applications made under s 101 of the CCA were refused, the Tribunal has expressed that it treats the question of what an applicant and intervenor must demonstrate as a related question.<sup>3</sup>
15. In *Application by Independent Contractors Australia* [2015] ACompT 1 the Tribunal stated (at [28]), when commenting on the decision of Goldberg J in *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28:

*... it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or*

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<sup>1</sup> *Application by Fortescue Metals Group Ltd* [2006] AComp T 6 at [53].

<sup>2</sup> *Ibid* at [73].

<sup>3</sup> *Application by Independent Contractors Australia* [2015] ACompT 1 at [39].

*supplement, evidence proposed to be led by the parties to the application....*

16. In addition, in exercising its discretion the Tribunal ought to consider the intervener's interest in the proceedings, if any, and weigh it against the cost and inconvenience of having another party to the proceedings. In *Qantas Airways Limited* [2003] ACompT 4 the Tribunal referred to the test (at [4]) as follows:

*There have been a number of cases which have considered the threshold to be overcome in determining whether leave should be given to intervene ...It is variously expressed that there has to be a "real and substantial interest" in the subject matter, that there has to be a "sufficient interest" in the subject matter, or that the interest must be sufficient to justify the cost and inconvenience of having an extra party in the proceeding. (emphasis added)*

Leave to intervene on a limited basis

17. As well as refusing an application for leave to intervene, the Tribunal may allow limited intervention and place restrictions on a party's right to intervene.
18. In *Sea Swift* at [3], The Maritime Union of Australia (**MUA**) applied to intervene in the proceedings on three grounds being that its members employment might be at risk, the proposed merger would worsen the terms and conditions of employees in the Maritime sector, and the proposed merger would increase transport pricing and reduce transport access.: The Tribunal decided that the MUA should be permitted to intervene, limited to the only one issue, namely the employment risks to its members presently employed by Sea Swift and/or Toll. The Tribunal further decided that MUA may make written and oral submissions on the material before the Tribunal on that issue, and it may apply to the Tribunal to adduce such evidence as it may be advised and to cross-examine such other oral evidence as may be adduced at the hearing relating to that issue: at [5].

**RATESETTER'S APPLICATION TO INTERVENE**

19. Flexigroup accepts that Ratesetter has a sufficient interest to seek leave to intervene in the proceeding in the sense that it has a connection or interest which is greater than that of a merely officious bystander.<sup>4</sup>
20. However, Flexigroup submits that the Ratesetter has failed to put on sufficient material to demonstrate that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or ASIC as an intervener.

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<sup>4</sup> *Application by Fortescue Metals Group Ltd* [2006] AComp T 6 at [35].

21. In this regard, we note the following:
- (a) Ratesetter has not provided any affidavit material in support of its application for intervention;
  - (b) Ratesetter's application for intervention describes the evidence which it could put on at a very high level of generality without any assurance about what evidence it will in fact be able adduce (at [17] and [18]). With one exception (see [18(j)]) the matters raised above do not appear to be specific or peculiar to Ratesetter; and
  - (c) to the extent that Ratesetter wishes to make submissions, this can be done in accordance with paragraph 14 of the directions made by the Tribunal without the need for intervention.
22. The intervention of Ratesetter will inevitably increase the costs of the proceedings and means that the proceeding will take additional time. For example, for procedural matters, further time is taken by accommodating a further party. If Ratesetter wishes to adduce evidence or lead/ cross-examine other witnesses or make submissions, it increases the time taken for the hearing.
23. The other procedural issue with Ratesetter's intervention is that it may have the consequence that its content may be required in order to seek to resolve this proceeding by consent under s 101(1A) of the CCA. This a matter which is being explored by Flexigroup particularly in view of the fact that ASIC's review of proposed AFIA Industry Code is due to be received by early March 2020.
24. In the circumstances, and to enable the Tribunal to reach a view about whether or not Ratesetter can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties and should be given leave to intervene, Flexigroup submits that Ratesetter should first put on its proposed evidence in the proceeding. This should be done 3 April 2020 (in accordance with paragraph 14 of the directions). The determination of Ratesetter's application should be adjourned until after that occurs.
25. Alternatively, if the Tribunal is minded to grant leave to Ratesetter to intervene in the proceeding, Flexigroup submits that the Tribunal should do so on a limited basis to file submissions, and evidence limited to paragraph 18(j) of its submissions, with a right to apply to take any other step in the proceeding. Flexigroup also submits that in order to facilitate any resolution of the proceeding, the grant of leave to intervene should be on the further condition is that Ratesetter is taken not to be an intervenor for the purpose of s 101(1A) of the CCA.

## CALC'S APPLICATION TO INTERVENE

26. Flexigroup submits that CALC has no greater interest in the proceeding than an officious public bystander. Nor do any of the groups or persons whose interests CALC contends it would be representing in the proceeding.
27. Where an applicant for intervention is a consumer interest group, the group's prior involvement in the ACCC's process does not of itself confer a sufficient interest to warrant a grant of leave to intervene and participate in the Tribunal's proceeding.<sup>5</sup> They need to demonstrate some other interest and have the ability to make some distinct contribution as opposed to duplicating the contribution of others.
28. In *Fortescue*, a decision relating to an intervention application by Rio Tinto under s 109(2), the Tribunal considered *Re Application by Orica IC Assets Limited* [2004] AComptT 2 (**Orica**). In *Orica* two consumer interest groups applied to the Tribunal for review of a decision of the Minister for Industry, Tourism and Resources to revoke coverage of a portion of the Moomba to Sydney gas pipeline. The standing of the consumer interest groups to make the application to the Tribunal depended upon whether each body was "adversely affected" by the decision. In the process of the Minister's original decision, the two consumer groups were able to participate up until the point of the Minister's decision. The Tribunal found the right of participation ended at the point of the Minister's decision and it did not follow that a person who played some role in these processes should be able to challenge the result.
29. In *Fortescue*, the Tribunal held that the reasons in *Orica* provide an analogy for the application of the principles under s 109(2) and demonstrate that different considerations will arise when considering who should have the opportunity to participate in the review of an earlier decision where there was no limitation on who might be able to have input into the earlier decision.<sup>6</sup>
30. CALC's prior participation in the ACCC authorisation process does not confer on it a sufficient interest in the proceeding. Moreover, CALC has not identified any evidence that it intends to file that can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application. CALC's submissions at [16] baldly assert that CALC is able to adduce relevant evidence without any endeavour to explain what the evidence will be or whether it would go beyond the material CALC provided to the ACCC or would be addressed by ASIC.

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<sup>5</sup> Ibid at [77] although the intervener (Rio Tinto) was given leave on other grounds, particularly relating to their role in the iron ore industry.

<sup>6</sup> Ibid at [44] and [46].

31. Like Ratesetter, to the extent that CALC wants to make submissions to the Tribunal, this can be done in accordance with paragraph 14 of the directions made by the Tribunal on 4 February 2020 without the need for intervention. This ability provides an adequate mechanism to enable CALC to protect any interest it has in this proceeding, particularly any interest arising from its prior involvement in the Code.
32. In the circumstances, and having regard to the additional cost and inconvenience of having another party to the proceedings, Flexigroup submits CALC's proposed intervention in the proceeding should be refused.
33. Alternatively, if the Tribunal is minded to grant leave to CALC to intervene, Flexigroup submits that it is appropriate to grant leave on the same conditions referred to above – that is, a limited basis to file submissions and evidence on specified matters, with a right to apply to take any other step in the proceeding and CALC is taken not to be an intervenor for the purpose of s 101(1A) of the CCA.

28 February 2020

N De Young  
C van Proctor