

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: 25/03/2020 5:11 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, Energy Consumers Australia in respect of the New Energy Tech Consumer Code

FLEXIGROUP LIMITED

Applicant

RATESETTER'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

PART A: FACTS

1. RateSetter Australia RE Limited (**RateSetter**) is Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products (**New Energy Technology**).
2. Since 2014, RateSetter has facilitated over \$60 million in consumer loans for the purpose of clean energy equipment such as solar panels and batteries. In providing this finance, RateSetter has partnered with over 700 accredited merchants and installers.
3. RateSetter is also the sole administrator of the Home Battery Scheme, a scheme operated by the Government of South Australia in association with the Federal Government's Clean Energy Finance Corporation. In that capacity, RateSetter is to provide subsidies to approximately 40,000 South Australian households to fund the purchase of home battery storage systems.
4. RateSetter holds an Australian Financial Services Licence number 449176 and Australian Credit Licence number 449176 and is the responsible entity of the RateSetter Lending Platform (ARSN 169 500 449). Finance facilitated by RateSetter is regulated

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by the National Consumer Credit Protection Act 2009 (Cth) (**NCCPA**) and the National Credit Code (**NCC**).

The authorisation of the Code and the ACCC's BNPL Conditions

5. On 29 April 2019, Australian Energy Council, Clean Energy Council, Smart Energy Council, Energy Consumers Australia (together, the **Authorisation Applicants**) jointly submitted the New Energy Tech Consumer Code (**Code**) to the Australian Competition and Consumer Commission (**ACCC**) for authorisation pursuant to s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
6. On 1 August 2019, the ACCC published a Draft Determination proposing to grant the Authorisation Applicants and future signatories to the Code.
7. Between 23 August 2019 and 8 November 2019, RateSetter made four separate written submissions to the ACCC in relation to the authorisation of the Code, and in particular the extent to which the Code ought to regulate the offering of financing to consumers to purchase New Energy Tech.
8. On 11 November 2019, following a number of earlier iterations¹, the Authorisation Applicants submitted a final version of the Code (**November Version**) to the ACCC for authorisation.
9. On 5 December 2019, the ACCC published its Determination. The Determination relevantly, imposed conditions on “Buy Now Pay Later” finance (**BNPL Finance**) arrangements which are not regulated by and/or exempt from the NCCPA and NCC (**ACCC's BNPL Conditions**). The ACCC's BNPL Conditions were reflected in amendments to clauses 3(d), 25, A7 and A7A of the Code.

¹ Being the version of the Code submitted on about 29 April 2019 with the application for authorisation and a second version submitted on about 25 September 2019

10. The ACCC's BNPL Conditions permit BNPL Finance to be offered to Residential Customers² only where, in summary:
- a. it is offered through a credit provider which is licensed under the NCCPA and the deferred payment arrangement is regulated by the NCC³; or,
 - b. if the BNPL Finance provider is not licensed under the NCCPA and the deferred payment arrangement is not regulated by, or is exempt from, the NCC and/or the NCCPA, then signatories must only offer BNPL Finance arrangements where:
 - i. the Administrator of the Code has determined that the credit provider is a signatory of an industry code of conduct that requires the credit provider to meet various requirements including undertaking responsible lending assessments⁴; or
 - ii. the Administrator has approved the deferred payment contract and internal policies and processes in accordance with paragraphs A7 and, where applicable, A7A of the Annexure to the Code⁵.
11. The ACCC's BNPL Conditions also prohibit signatories from producing advertisements and promotional material which make unsolicited offers of payment arrangements not regulated by the NCCPA.⁶
12. By application dated 30 December 2019, the Applicant applied to the Tribunal for a review of the ACCC's Determination. The Applicant seeks orders:
- a. removing the ACCC's BNPL Conditions; or

² Defined in Part C of the Code as "A customer that is purchasing New Energy Tech for personal, domestic or household purposes. The term includes an Owners Corporation for a residential strata property and the operator of a retirement village"

³ Clause 25(a)(i) of the Code

⁴ Clause 25(a)(ii)(A) of the Code

⁵ 25(a)(ii)(B) This is an interim measure only, pending the development of an approved code of conduct for the purposes of 25(a)(ii)(A) of the Code

⁶ Clause 3(d) of the Code

- b. alternatively, amending the ACCC's BNPL Conditions with respect to paragraphs 25(a) and 25(c)(iv) of the Code.
13. On 16 March 2020, the Tribunal granted RateSetter leave to intervene in these proceedings, subject to Subject to the Tribunal's power to direct the nature and extent of its participation in the proceeding.

PART B: ISSUES

14. RateSetter agrees with the Authorisation Applicants⁷ that the question for the Tribunal is whether the conduct prescribed (and proscribed) by the November Version of the Code satisfies the statutory criteria set out at s 90(7)(b) of the CCA, in that it:
- a. would result or be likely to result in a benefit to the public; and
 - b. the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

PART C: CONTENTIONS

Public benefit

15. RateSetter contends that the November Version of the Code would result, or be likely to result, in a range of benefits to the public that include:
- a. providing to consumers clearer explanations of NET products and consumers' rights in relation to those products;
 - b. providing for suppliers of NET products to adopt a range of practices and standards of conduct likely to reduce or prevent consumer harm;
 - c. providing a range of measures to protect consumers who acquire BNPL Finance for NET products from harm, similar to protections received by

⁷ See [28] of the Authorisation Applicants' Statement of Facts Issues, and Contentions

consumers who acquire regulated finance for NET products; and

- d. encouraging all suppliers of finance for NET products to comply with similar regulatory requirements, thereby encouraging competitive neutrality, and promoting competition, in the supply of NET products.

Public detriment

16. RateSetter contends that the November Version of the Code would not result, or be likely to result, in any public detriment.
17. In particular, the November Version of the Code would not result, or be likely to result, in a lessening of competition for the supply of finance for NET products (or the other detriments to which Flexigroup refers at [44]-[48] of its SOFIC), for reasons that include:
 - a. barriers to commencing supply of finance for NET products are low;
 - b. the concentration of suppliers of finance for NET products is low;
 - c. cost and other barriers to complying with the conditions in the November Version of the Code concerning the supply of BNPL Finance are low; and
 - d. numerous suppliers of BNPL Finance for NET products already satisfy those conditions in respect of regulated finance products and/or BNPL Finance products they supply.

Disposition

18. For these reasons, RateSetter contends that the November Version of the Code satisfies the net benefit test in s 90(7)(b) of the CCA and, accordingly, that the ACCC's

Determination should be varied by deleting the Conditions set out at paragraphs 5.12 – 5.14 of the Determination.⁸

19. In the alternative, if:

- a. contrary to paragraph 14 above, the Tribunal concludes that the relevant question is whether the conduct prescribed (and proscribed) by the Code as authorized by the ACCC (i.e. with the ACCC's BNPL Conditions) satisfies the net benefit test in s 90(7)(b) of the CCA; or
- b. the Tribunal concludes that the detriments identified by the ACCC in its Determination exist, and outweigh the benefits of the November Version of the Code,

RateSetter contends that the application for review should be dismissed.

Date: 25 March 2020

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Aicken Chambers

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Solicitors for RateSetter

⁸ RateSetter notes that in its application to intervene it said (e.g. at [5]) that the ACCC Determination should stand. It maintains that contention in the alternative to this contention.