

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: 21/02/2020 3:44 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.



Submissions by the Consumer Action Law Centre re application to intervene

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.

Proposed intervener: Consumer Action Law Centre

Address of proposed intervener: Level 6, 179 Queen Street, Melbourne VIC 3000

A INTRODUCTION

1. The Consumer Action Law Centre (**CALC**) applies to intervene in this review, pursuant to s 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. CALC is an independent, not-for-profit consumer organisation with specialist expertise in consumer credit law and policy, and of the consumer experience in modern markets, including the energy market. CALC provides financial counselling and legal assistance services to people experiencing disadvantage in Victoria, and policy and advocacy campaigns for the benefit of all Australians.
3. For the reasons developed below, we respectfully submit that CALC ought be granted permission to intervene.

B CALC HAS A REAL AND SUBSTANTIAL INTEREST IN THE SUBJECT MATTER

4. In order to obtain leave, an intervener must be able to establish some connection with, or interest in, the subject matter of the proceeding, other than that which is found in members of the general community: *Re Fortescue Metals Group Ltd* [2006] ACompT

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6, at [35].

5. CALC readily meets this test. CALC has a real and substantial interest in both:
 - (a) the initial development of the New Energy Tech Consumer Code (**the Consumer Code**) and its authorisation by the ACCC; and
 - (b) the particular aspect of the Consumer Code that is the focus of Flexigroup's application in this review – that is, the offering of deferred payment arrangements on a 'Buy Now Pay Later' (**BNPL**) basis. CALC has had extensive involvement in legal, policy and advocacy matters concerning 'Buy Now Pay Later' both specifically in relation to New Energy Technology (**NET**) products, and in relation to consumer finance more generally.

6. CALC's interest in the development and authorisation of the Consumer Code is substantiated in the affidavit of Gerard Brody dated 21 February 2020 (**Brody Affidavit**) at paragraphs [21] to [29]:
 - (a) from August 2017 to about March 2019, CALC was a member of the Behind The Meter Working Group which was tasked by the COAG Energy Council with developing the draft Consumer Code;
 - (b) on 27 November 2018 and 17 December 2018, CALC's CEO, Mr Brody, participated in CEO-led discussions to develop a Memorandum of Understanding regarding the governance, stewardship and administration of the draft Consumer Code;
 - (c) after the proponents of the Consumer Code¹ applied to the ACCC for the authorization of the Consumer Code, CALC made detailed submissions to the ACCC on 21 May 2019, 20 September 2019 and 7 November 2019;²
 - (d) Mr Brody also participated in the pre-decision conference on the draft Consumer Code that was convened by the ACCC on 9 September 2019; and
 - (e) each of CALC's submissions, and its participation in the pre-decision conference, addressed the issue of deferred payment arrangements and BNPL finance which is now raised by Flexigroup in this review.

7. CALC's interest in BNPL payment arrangements more broadly is outlined in the Brody Affidavit at paragraphs [8] to [20]:

¹ The Australian Energy Council, Clean Energy Australia, Energy Consumers Australia and Smart Energy Council (hereafter, the **authorisation applicants**).

² Exhibits **GB-2**, **GB-3** and **GB-4** to the Brody affidavit.

- (a) CALC has long campaigned for better consumer protections for consumers using BNPL products, both in the solar market and generally;
 - (b) CALC's legal practice regularly acts for and advises clients with issues arising from the conduct of BNPL providers, including Certegy (a subsidiary of FlexiGroup, now trading as Humm);
 - (c) since 2014, CALC's advocacy work concerning BNPL finance has included complaints to regulators including the ACCC, ASIC and Consumer Affairs Victoria, consultation with ASIC in relation to its *Report 600: Review of Buy Now Pay Later Arrangements*, and submissions to the Senate Economics Reference Committee in its 2019 *Inquiry into the credit and financial services targeted at Australians at risk of financial hardship*; and
 - (d) CALC published three significant reports in 2016, 2017 and 2019³, each of which recommended changes to strengthen the consumer protection regime for new energy products, reduce harm caused by door to door sales, and improve trust and confidence in the transforming energy market.
8. More generally, CALC has a strong track record of legal and policy advocacy for consumers. It is an expert and sophisticated voice for consumers in the present proceeding.

C CALC'S EVIDENCE AND SUBMISSIONS WILL BE SUBSTANTIVELY DIFFERENT TO THOSE OF THE OTHER PARTIES

9. The second requirement for leave to intervene is that an intervener should show that it will make a "useful or different" contribution to the review, relative to the other parties to the review: *Re Fortescue Metals Group Ltd* [2006] ACompT 6, at [60(c)].
10. CALC intends to confine its submission to the subject-matter of Flexigroup's grounds of dissatisfaction: namely, relating to the Consumer Code provisions and conditions relating to deferred payment arrangements. CALC anticipates that its contentions in the proceeding, and the evidence it will file, will be substantively different from those which it anticipates will be put on behalf of the ACCC and the authorisation applicants, and will be of assistance to the Tribunal.

³ Consumer Action Law Centre, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria* (exhibit **GB-1**); Consumer Action Law Centre, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*; Consumer Action Law Centre, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*

C1 CALC's Contentions

11. In the Tribunal review, CALC proposes to contend for authorisation of the Consumer Code on different conditions from those determined by the ACCC, and from those for which Flexigroup and the authorisation applicants will contend. In particular, CALC proposes to contend that:
- (a) the Tribunal should apply different conditions than those imposed by the ACCC, alternatively that the Tribunal should vary the amended draft code as submitted to the ACCC on 25 September 2019, so that signatories to the New Energy Tech Consumer Code are permitted to offer a deferred payment arrangement only if the provider of those deferred payments arrangement is a credit provider licensed under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the deferred payment arrangement is regulated under the National Credit Code (**NCC**); and
 - (b) further or alternatively, that the words '*and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)*' should be deleted from the chapeau to cl 25 of the Consumer Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefit.
12. CALC's primary contention is the position that was originally proposed by the authorisation applicants to the ACCC, and reflected in the ACCC's draft determination made on 1 August 2019.⁴ However, the authorisation applicants departed from their original position in their amended Credit Code submitted on 25 September 2019, and which was further modified by the ACCC in its final determination.
13. CALC's further contention does not appear to have previously been raised by any of the other participants. Critically, BNPL arrangements typically fall outside of the ambit of regulation under the NCC on the basis that they are not 'credit to which the NCC applies' (NCC, s 5), either because:
- (a) the BNPL provider imposes no charge on the consumer⁵ (**No Charge BNPL products**); or
 - (b) the credit has been exempted from regulation by s 6(5) of the NCC: that is, where small amounts are charged to the consumer, but they do not vary

⁴ See cl 24 of the draft Consumer Code, as submitted by the proponents on 21 April 2019 and as annexed to the draft determination of 1 August 2019.

⁵ See NCC s 5(1)(c). In these cases, a fee is typically charged to the merchant instead.

according to the amount of credit provided, and are less than \$200 in the first year, and \$125 in subsequent years⁶ (**Low Charge BNPL products**).

14. Clause 25 of the Consumer Code, as authorised by the ACCC, is stated to apply only to deferred payment arrangements that include '*an interest component, additional fees or an increased price*'. This appears to be both:
 - (a) self-abnegating, in that those words would operate to exclude No Charge BNPL products from any of the requirements that cl 25 purports to impose; and
 - (b) at least unclear as it applies to Low Charge BNPL products, in that is unclear whether '*additional fees*' is, or is not, intended to encompass fees that are within the low charge exemption that Low Charge BNPL products are designed to take advantage of.
15. Where substantially similar consumer protection concerns arise in relation to both No Charge and Low Charge BNPL products, the full extent of the anticipated public benefit from cl 25 will not be adequately or satisfactorily realised if its operation does not unambiguously encompass both kinds of BNPL finance.

C2 CALC's evidence

16. CALC proposes to lead evidence concerning the nature and extent of the risk to consumers posed by unregulated BNPL finance in the NET sector, including (but not limited to) case studies and other data. That evidence will be based on CALC's direct involvement in legal assistance, investigations and advocacy in this sector, on behalf of financially vulnerable consumers.

C3 CALC's role and contribution to the proceeding

17. CALC's position and its contribution to the proceeding will be different from those of the ACCC and the authorisation applicants.
18. The ACCC's role in a review of an authorisation application is primarily to assist the Tribunal. It is not for the ACCC to fill the role of an advocate for the interests of consumers in the way that CALC is conspicuously well placed to do.
19. The authorisation applicants comprise an amalgam of merchant and consumer interests in the NET sector. CALC's focus in this review is distinct from that of Energy Consumers Australia, which is represented in this review jointly with the other authorisation applicants. ECA's focus has been more directed to advancing the consumer interests in the complex and dynamic energy markets (as to which there

⁶ See *National Consumer Credit Protection Regulations 2010* (Cth), r 51.

appears to be no contest in this Tribunal review); whereas CALC uniquely has substantial experience in relation to consumer credit, including in the household solar and NET sectors.

20. The participation of a consumer advocate will assist in ensuring that the Tribunal's review involves a balanced (rather than asymmetrical, or one-sided) reappraisal of the matters under consideration. In a recent review, the Tribunal endorsed the active participation of a consumer advocate as "particularly helpful": *Re Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [58].

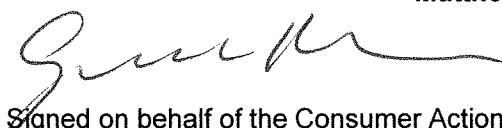
D PERMITTING CALC TO INTERVENE WILL NOT DISRUPT OR PROLONG THE REVIEW

21. CALC's intervention will not materially impact on the cost or duration of the proceeding.
22. Firstly, CALC proposed intervention is confined to the central issue that has been raised by Flexigroup, namely the Code provisions and ACCC conditions regarding deferred payment arrangements.
23. Secondly, CALC's position is not a new or unexpected one: it is substantially the same position that the authorisation applicants adopted in their original application, and by the ACCC in its draft determination – and for which CALC continued to contend following the draft determination.
24. Thirdly, CALC will endeavour to expedite the running of the proceeding, and to minimise any impact on its cost or duration, including by seeking not to replicate submissions advanced by any of the other parties. Instead, CALC will seek to supplement them appropriately, within the procedural timetable that the Tribunal has already mapped out. CALC is an experienced litigant and advocate, and the Tribunal ought be assured that, if it is granted leave to intervene, it will do so succinctly and efficiently.

Dated: 21 February 2020

Tom Clarke

Matthew Peckham



Signed on behalf of the Consumer Action Law Centre