AUSTRALIAN COMPETITION TRIBUNAL

Application by Flexigroup Limited [2020] ACompT 1

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| Review from:  | 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 |
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| File number: |  |
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| Tribunal: | **O'BRYAN J (Deputy President)** |
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| Date of Determination: | 16 March 2020 |
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| Catchwords: | **TRADE PRACTICES –** application for review ofdetermination made by the Australian Competition and Consumer Commission under s 101 of the *Competition and Consumer Act* *2010* (Cth) – applications for intervention – applications granted  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 101(1A), 109(2)  |
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| Cases cited: | *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14*Application by Fortescue Metals Group Ltd* [2006] ACompT 6*Application by Independent Contractors Australia* [2015] ACompT 1*Application by Sea Swift Pty Limited* [2015] ACompT 5*Application by Tabcorp Holdings Ltd* [2017] ACompT 1*Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1*Applications by Tabcorp Holdings Limited* [2017] ACompT 5*Geographical Indications Committee v O’Connor* (2000) 64 ALD 325*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13*Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7; ASC 155-068; ATPR 41-999*Re Fortescue Metals Group Ltd* (2006) 203 FLR 28*Re Independent Contractors Australia* (2015) 292 FLR 80*Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481; 25 FLR 169; 1 TPC 109 |
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| Date of hearing: | 13 March 2020 |
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| Registry: | Victoria |
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| Category: | Catchwords |
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| Number of paragraphs: | 46 |
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**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

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|  | ACT 1 of 2019 |
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| 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 |
| by: | FLEXIGROUP LIMITEDApplicant |

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| TRIBUNAL: | O’BRYAN J (DEPUTY PRESIDENT) |
| DATE OF DETERMINATION: | 16 MARCH 2020 |

THE TRIBUNAL DETERMINES THAT:

1. The Australian Securities and Investments Commission be granted leave to intervene in the proceeding.

2. Subject to the Tribunal’s power to direct the nature and extent of its participation in the proceeding, RateSetter Australia RE Limited be granted leave to intervene in the proceeding.

3. Subject to the Tribunal’s power to direct the nature and extent of its participation in the proceeding, the Consumer Action Law Centre be granted leave to intervene in the proceeding.

4. Paragraph 11 of the Directions of the Tribunal dated 4 February 2020 be varied such that each intervener is to file and serve a Statement of Facts, Issues and Contentions on or before Monday, 23 March 2020.

5. Paragraph 12 of the Directions of the Tribunal dated 4 February 2020 be varied such that the Australian Competition and Consumer Commission is to file and serve a Statement of Facts, Issues and Contentions on or before Friday, 27 March 2020.

6. Paragraph 13 of the Directions of the Tribunal dated 4 February 2020 be varied such that the Australian Competition and Consumer Commission is to file and serve an Issues List on or before Friday, 27 March 2020.

REASONS FOR DETERMINATION

## Introduction

1. On 30 December 2019, Flexigroup Limited (**Flexigroup**) filed an application pursuant to s 101 of the *Competition and Consumer Act* *2010* (Cth) (**CCA**) for a review of the authorisation of the Australian Competition and Consumer Commission (**ACCC**) dated 5 December 2019 (Commission file no. AA1000439) granted under s 88(1) of the CCA.
2. The applicants for the authorisation were the Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **authorisation applicants**). The authorisation concerned a document called the New Energy Tech Consumer Code (**Consumer Code**) which sets minimum standards that suppliers of “New Energy Tech” products (e.g. solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers, including from initial marketing and promotion through to installation and complaints handling. The authorisation granted by the ACCC enables the authorisation applicants and future signatories to the Consumer Code to agree, sign up to and comply with provisions of the Consumer Code:
	1. according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience;
	2. for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled; and
	3. requiring signatories to only offer deferred payment arrangements that are regulated under the *National Consumer Credit Protection Act* *2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by “buy now pay later” (**BNPL**) providers only in certain circumstances.
3. The authorisation was granted subject to a number of conditions. Most relevantly, the ACCC imposed conditions concerning BNPL finance. Those conditions were:
	1. with respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place, as set out in the versions of clause 25 and clauses A7 and A7A of the Annexure to the Consumer Code at Attachment A to the authorisation;
	2. signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited; and
	3. the condition outlined at (a) above, including the wording found in Attachment A, may be subject to variation where approved by the ACCC in writing and published on the public register.
4. In its application for review, Flexigroup states that it is a diversified financial services group with operations in, relevantly, Australia across a diverse range of industries including, relevantly, solar energy. It provides a range of finance products and payment solutions to consumers and businesses including interest free cards and no interest ever payment plans. Flexigroup is a provider of no interest ever payment plans to retail customers through its product “humm” which is a form of BNPL financial product. Flexigroup says that humm has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia and almost half of the revenue generated by Flexigroup’s humm product is from providing credit for sales of solar panels and other home improvements. Flexigroup says that, of the top 50 solar sellers with whom Flexigroup does business, approximately 60% were expected to or have become members of one of the authorisation applicants and would therefore also likely become signatories to the Consumer Code.
5. By its application, Flexigroup seeks the review of the conditions of authorisation imposed by the ACCC that relate to the provision of BNPL finance. Specifically, Flexigroup contends that the conditions identified in paragraphs 3(a) and (b) above should not have been imposed and that authorisation should not be granted to any provisions of the Consumer Code that have the effect of preventing signatories from offering BNPL products to consumers in any way.
6. Pursuant to directions given by the Tribunal on 4 February 2020, the following entities have applied for leave to intervene in this proceeding pursuant to s 109(2) of the CCA: the Australian Securities and Investments Commission (**ASIC**), RateSetter Australia RE Limited (**RateSetter**) and the Consumer Law Action Centre (**CALC**).
7. For the reasons that follow, the Tribunal permits intervention by ASIC, RateSetter and CALC.

## Relevant principles

1. Section 109(2) provides that the Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal. The section has been considered by the Tribunal on a number of occasions.
2. In *Application by Fortescue Metals Group Ltd* [2006] ACompT 6 (***Fortescue***) (also reported as *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28), the Tribunal made the following observations about s 109(2):

[30] There is no “sufficient” or “real and substantial” interest requirement found in s 109(2) and the discretion to grant leave to intervene reposed in that subsection is not limited by the connotation of such expressions. The discretion is not constrained by any limitation and it is not easy, nor is it appropriate, to define or delimit the categories of persons who may be given leave to intervene under s 109(2). It does not follow that in exercising its discretion pursuant to s 109(2) of the Act, there are no limitations or restrictions on the persons who wish to intervene or participate in reviews by the Tribunal.

…

[35] … 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. What the nature of that connection or interest must be, will vary from case to case. It is not necessary that an applicant be required to establish that its business interests or business activities or prospects may be detrimentally affected by the subject matter of the proceeding or its outcome. … 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.

…

[43] Although s 109(2) is not couched in terms of any particular “interest” being required to be demonstrated before leave should be granted, I consider that it is necessary for some connection with the subject matter of the application for review to be demonstrated. Obviously an officious bystander would not be given leave to intervene, but it is necessary to show some particular interest in the subject matter of the application. I do not consider that it is necessary for an applicant for intervention to go as far as to show that it may be affected in some way by the declaration but it is necessary, as I have noted earlier, to show that some interest touching and concerning it can be demonstrated.

1. Similarly, in *Application by Independent Contractors Australia* [2015] ACompT 1 (also reported as *Re Independent Contractors Australia* (2015) 292 FLR 80), 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 (at [28]):

…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.

1. Each of the parties adopted those statements of principle.
2. It should also be noted that, under s 109(2), the Tribunal may permit intervention upon such conditions as the Tribunal thinks fit. In *Fortescue*, the Tribunal exercised that power in relation to Rio Tinto’s intervention, explaining (at [78]):

Rio Tinto will therefore be given leave to participate in the proceeding and the review but not on the basis that it will be at large as to its participation in the review or as to the submissions it may make or as to the material it may place before the Tribunal. The Tribunal wishes to ensure that there is no unnecessary duplication of submissions and evidentiary material placed before it. The order will be that subject to the Tribunal’s power to direct the nature and extent of its participation in the proceeding and the review, Rio Tinto be granted leave to intervene in the proceeding and participate in the review.

1. Similarly, in *Application by Sea Swift Pty Limited* [2015] ACompT 5, the Tribunal limited the intervention of the Maritime Union of Australia to one issue only and to making written and oral submissions only, with the right to apply to the Tribunal to adduce evidence and to cross-examine (at [5]).
2. Flexigroup also noted that interested third parties may be able to advance their interests sufficiently by making submissions to the Tribunal and do not need to have the rights of an intervener in order to do so, citing as examples the approach taken by the Tribunal in *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (at [151], [272] and [392]) and *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 (at [53]). By directions made on 4 February 2020, the Tribunal has allowed for that possibility.
3. Flexigroup also placed reliance on s 101(1A) of the CCA which provides as follows:

Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(7).

1. Flexigroup submitted that there is a possibility that this proceeding may be able to be resolved by consent under s 101(1A). By way of background, Flexigroup explained that the Australian Finance Industry Association (**AFIA**) has released a draft Code of Practice for the BNPL sector and has conducted public consultation on the draft Code. Flexigroup submitted that the draft Code has a number of relevant conditions to regulate BNPL finance. If the Code is adopted, it may have implications for the conditions in the authorisation of the Consumer Code that relate to BNPL finance. Flexigroup submitted that, if RateSetter and CALC were given permission to intervene under s 109(2), their consent would also be required for any determination of this proceeding by consent under s 101(1A). Flexigroup submitted that that would make the achievement of a consent determination more difficult. For that reason, Flexigroup submitted that the Tribunal should defer its decision with respect to the applications for intervention made by RateSetter and CALC until early April 2020, when the position with respect to the AFIA Code of Practice becomes clearer. Alternatively, Flexigroup submitted that the Tribunal should stipulate, as a condition of intervention under s 109(2), that RateSetter and CALC will not be regarded as interveners for the purposes of s 101(1A).
2. In my view, Flexigroup’s submissions in relation to s 101(1A) suffer from a number of difficulties.
3. First, I do not accept that the Tribunal has power under s 109(2) to stipulate, as a condition of intervention, that RateSetter and CALC will not be regarded as interveners for the purposes of s 101(1A). There is nothing in the language of s 109(2) which suggests that the Tribunal may, by the imposition of a condition, override the statutory power conferred by s 101(1A). Section 101(1A) is clear in its terms and empowers the Tribunal to make a consent determination only if the applicant, the ACCC and all interveners consent.
4. Second, I do not accept the premise of Flexigroup’s submissions that it would be beneficial to defer a decision on intervention so that any consent determination is not “burdened” by the need to receive the consent of the interveners. Indeed, I consider that any such consideration would be inconsistent with the implicit legislative intent of s 101(1A). Section 101(1A) makes clear that any consent determination requires the consent of interveners. The section implicitly recognises that interveners have an interest in the determination of the proceeding, which interest is protected by requiring their consent to a consent determination. As a corollary, s 101(1A) provides contextual support for the view expressed in *Fortescue* and other decisions of the Tribunal that an applicant for leave to intervene 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.
5. One further matter of principle should be mentioned. In my view, it would be wrong to refuse permission to a person to intervene for the reason that the ACCC is able to represent that person’s interests in the proceeding. Such an approach would be to misapprehend the role of the ACCC in the proceeding. The ACCC is not a party or protagonist in the proceeding. Its role is to assist the Tribunal in an impartial manner, regardless of any conclusions it may have drawn from its earlier analysis in the matter: *Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7 at [29]; ASC 155-068; ATPR 41-999; *Application by Tabcorp Holdings Ltd* [2017] ACompT 1 at [38]; ATPR 42-550. As the Tribunal observed in *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [36], the manner in which the “Hardiman” principles (*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 especially at 35-36 per Gibbs, Stephen, Mason, Aickin and Wilson JJ) are to be applied in a given case depends upon a number of factors including the presence of a contradictor and the nature of the review proceedings and whether the matter is likely to be remitted to the initial decision maker. In the absence of a contradictor, the ACCC may be required to test the evidence of the applicant, present contrary material and make submissions putting forward an opposing point of view, although none of this should be done in a partisan fashion: *Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481 at 484; 25 FLR 169; 1 TPC 109. In the presence of a contradictor, however, the role of the ACCC should properly be more confined: see for example *Geographical Indications Committee v O’Connor* (2000) 64 ALD 325 at [35]ff.

## Application for intervention by ASIC

1. ASIC seeks permission to intervene on three primary bases.
2. First, ASIC considers it can be of real assistance to the Tribunal in providing context around the submission it made to the ACCC. That context includes ASIC’s views regarding the forms of regulation proposed by the authorisation applicants to the ACCC, by Flexigroup and by any other interveners in the present application for review.
3. Second, ASIC submits that it can assist the Tribunal in clarifying the present scope of ASIC’s regulatory power over BNPL finance, the relationship between its regulatory powers and those of the ACCC.
4. Third, ASIC is best placed to explain the views it has expressed in relation to BNPL finance, including particularly its detailed review of the BNPL sector being ASIC Report 600, and how those views have developed since that report was published.
5. Flexigroup does not oppose the application for intervention made by ASIC and accepts that 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 for review. The ACCC supports ASIC’s intervention on the same basis. No party opposes the intervention.
6. The Tribunal accepts those submissions and will grant leave to ASIC to intervene in the proceeding.

## Application for intervention by RateSetter

1. In its application to intervene, RateSetter says that it is Australia’s largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products (**New Energy Technology**). Since 2014, RateSetter has facilitated over $60 million in consumer loans for the purpose of clean energy equipment such as solar panels and batteries. RateSetter holds an Australian Financial Services Licence and an Australian Credit Licence. Finance facilitated by RateSetter is regulated by the NCCPA and the NCC.
2. RateSetter seeks to intervene in relation to the review of the authorisation. It opposes the variations to the Consumer Code proposed by Flexigroup and will submit that the authorisation should stand.
3. RateSetter submitted that, as Australia’s largest provider of regulated consumer credit for the purpose of funding New Energy Technology, RateSetter has a significant interest in the ultimate form of the Consumer Code. It referred to the following matters:
	1. First, in the event that RateSetter is accepted by the Administrator as a Code Signatory, RateSetter intends to become a Signatory and will be bound by the Code.
	2. Second, the Consumer Code will regulate the conduct of entities with which RateSetter competes (who become signatories to the Code), and the manner in which that competition occurs.
	3. Third, the Consumer Code will regulate the conduct of entities who supply New Energy Technology that is financed by RateSetter loans, being merchants or suppliers (who become signatories to the Code) and the manner in which that finance is offered to the customers of the merchants or suppliers.
	4. Fourth, RateSetter has an immediate interest in the substance of Flexigroup’s application, which is to seek changes to the BNPL conditions imposed by the ACCC. RateSetter submitted that it is one of the industry participants who will be most affected by the removal of the BNPL conditions, given its position in the market as a major competitor to providers of BNPL finance such as Flexigroup.
4. Reflecting its interest in the authorisation and ultimate form of the Consumer Code, RateSetter submitted three sets of submissions to the ACCC during the authorisation application. RateSetter submitted that it will be in a position to assist the Tribunal by providing evidence and submissions which draw directly on its experience in matters raised by Flexigroup’s application, including in respect of the factual findings made by the ACCC with which Flexigroup is dissatisfied, and the likely impact of the BNPL conditions on consumers and competition in the New Energy Technology finance industry. RateSetter submitted that it can provide information that includes:
	1. the market landscape for the provision of finance for the purchase of New Energy Technology;
	2. the various forms of finance available to consumers for the purchase of New Energy Technology, ranging from loans regulated under the NCCPA through to “interest-free” finance;
	3. the method of sale and promotion of New Energy Technology and related point-of-sale finance;
	4. the relationship between finance companies and the merchants who sell New Energy Technology equipment to consumers;
	5. information in relation to the experiences of merchants who have recently moved from providing so-called “interest free” finance to regulated loans;
	6. observed differences in costs passed on to consumers where they obtain regulated finance versus unregulated finance;
	7. the protections consumers may miss out on if they obtain unregulated finance that does not comply with provisions of the authorisation;
	8. the likely effect on overall access to New Energy Technology that would result from upholding the authorisation;
	9. factual matters in the authorisation with which Flexigroup is said to be dissatisfied; and
	10. the degree to which the competitive constraints that RateSetter faces will be affected by the authorisation.
5. The ACCC supports RateSetter’s application to intervene, essentially on the basis of the submissions made by RateSetter. The ACCC acknowledged that, if given permission to intervene, RateSetter would be a contradictor in the proceeding which would affect the role of the ACCC.
6. Flexigroup accepted that RateSetter has an interest in the proceeding which is greater than that of a merely officious bystander. Flexigroup submitted, however, that RateSetter has failed 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. It says that the intervention of RateSetter will inevitably increase the costs of the proceeding and means that the proceeding will take additional time. Flexigroup proposed that, in order to determine whether to permit RateSetter to intervene, and the extent of the intervention, RateSetter should first put on its proposed evidence in the proceeding and the determination of its intervention be adjourned until after that occurs. In part, that submission was prompted by Flexigroup’s concern over the impact of RateSetter’s intervention on any consent determination, as discussed above.
7. The Tribunal is satisfied that RateSetter’s interest in the proceeding, and the categories of information that it is able to adduce in the proceeding, justify the Tribunal permitting it to intervene. However, the Tribunal is mindful that, as the number of parties increases, the risk of duplication increases, as do the overall costs of the proceeding to the parties. For that reason, the Tribunal will make a direction in similar terms to the direction given in *Fortescue*, referred to earlier, that RateSetter will be permitted to intervene in the proceeding subject to the Tribunal’s power to direct the nature and extent of its participation in the proceeding. In accordance with the current directions of the Tribunal, RateSetter will be required to file and serve any evidence on which it wishes to rely by 21 April 2020. The Tribunal will retain the discretion to exclude such evidence from the hearing if it does not usefully add to the evidence otherwise before the Tribunal. The right to cross-examine will also be addressed at a time closer to the hearing or at the hearing.

## Application for intervention by CALC

1. In support of its application to intervene, CALC says that it 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.
2. CALC submitted that it has a real and substantial interest in both the initial development of the Consumer Code and its authorisation by the ACCC and in the offering of deferred payment arrangements on a BNPL basis.
3. CALC’s interest in the development and authorisation of the Consumer Code is evidenced by the following matters:
	1. 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;
	2. on 27 November 20l8 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;
	3. after the proponents of the Consumer Code applied to the ACCC for its authorisation, CALC made three detailed submissions to the ACCC;
	4. Mr Brody participated in the pre-decision conference on the draft Consumer Code that was convened by the ACCC on 9 September 2019; and
	5. 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.
4. CALC’s interest in BNPL payment arrangements more broadly is evidenced by the following matters:
	1. CALC has long campaigned for better consumer protections for consumers using BNPL products, both in the solar market and generally;
	2. 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);
	3. 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, 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;
	4. CALC published three significant reports in 20l6, 2017 and 2019, 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; and
	5. more generally, CALC has a strong track record of legal and policy advocacy for consumers.
5. 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. In the Tribunal’s 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:
	1. the Tribunal should apply different conditions than those imposed by the ACCC, alternatively that the Tribunal should vary the amended draft Consumer Code as submitted to the ACCC on 25 September 2019, so that signatories to the Code are permitted to offer a deferred payment arrangement only if the provider of those deferred payment arrangements is a credit provider who is licensed under the NCCPA and the deferred payment arrangement is regulated under the NCC; and
	2. 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 clause 25 of the Consumer Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefit.
6. CALC proposes to adduce evidence concerning the nature and extent of the risk to consumers posed by unregulated BNPL finance in the New Energy Technology sector, including (but not limited to) case studies and other data, based on CALC’s direct involvement in legal assistance, investigations and advocacy in this sector, on behalf of financially vulnerable consumers.
7. CALC submitted that its contribution to the proceeding will be different from those of the ACCC and the authorisation applicants. The ACCC’s role in a review of an authorisation application is primarily to assist the Tribunal and it is not for the ACCC to fill the role of an advocate for the interests of consumers. The authorisation applicants comprise an amalgam of merchant and consumer interests in the New Energy Technology sector. CALC’s focus is consumer credit whereas ECA’s focus is consumer interests in energy markets more broadly.
8. The ACCC supports CALC’s intervention, largely for the reasons advanced by CALC.
9. Flexigroup opposes CALC’s intervention. It submitted that CALC has no greater interest in the proceeding than an officious public bystander and that CALC’s prior involvement in the ACCC’s process does not of itself confer a sufficient interest to warrant a grant of leave to intervene, relying on *Fortescue* at [77]. Flexigroup submitted that CALC has failed to demonstrate some other interest in the proceeding and have the ability to make some distinct contribution as opposed to duplicating the contribution of others.
10. The Tribunal is satisfied that CALC has an interest in the proceeding beyond that of an officious bystander by reason of its work in the area of consumer credit generally and BNPL finance in the New Energy Technology arena more specifically. The Tribunal is also satisfied that, as matters stand at the moment, CALC’s position in the proceeding would differ from other participants. However, as already noted, the Tribunal is mindful that, as the number of parties increases, the risk of duplication increases, as do the overall costs of the proceeding to the parties. The Tribunal is also conscious that consumer interests are already well represented through the authorisation applicants (and specifically the ECA), the ACCC and ASIC. On balance, the Tribunal considers that CALC should be permitted to intervene subject to the same conditions as RateSetter. The permission will be subject to the Tribunal’s power to direct the nature and extent of CALC’s participation in the proceeding, including the power to exclude evidence from the hearing if it does not usefully add to the evidence otherwise before the Tribunal and the power to limit or exclude the right to cross-examine.

## Conclusion

1. In conclusion, the Tribunal will permit intervention by ASIC, RateSetter and CALC. No conditions will be attached to ASIC’s intervention. In relation to RateSetter and CALC, intervention will be subject to the Tribunal’s power to direct the nature and extent of their participation in the proceeding.
2. The Tribunal made directions on 4 February 2020 for the following procedural steps to be taken:

11. Each intervener is to file and serve a Statement of Facts, Issues and Contention on or before Friday, 13 March 2020.

12. The Commission is to file its Statement of Facts, Issues and Contention on or before Friday, 20 March 2020.

13. To assist interested third parties who may make a submission under Order 14, the Commission is to file and serve an Issues List on or before Friday, 20 March 2020, which the Tribunal will publish on its register, identifying key issues, as identified by the Commission, raised by the Application.

1. It has become necessary to adjust those dates. The date referred to in direction 11 above will be varied to 23 March 2020 and the dates referred to in directions 12 and 13 above will be varied to 27 March 2020.

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| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 16 March 2020