

16 June 2020

Danielle Staltari  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

Sent by email to: adjudication@acc.gov.au

Dear Ms Staltari

**RE: Clean Energy Council – application for revocation of authorisations A91495 and A91496 and substitution of AA1000514 – interested party consultation**

**Background**

We refer to the application for authorisation of the Solar Retailer Code (**SRC**) made by the Clean Energy Council (**CEC**) and the ACCC's invitation for submissions. Flexigroup appreciates the opportunity to provide the following submission on the SRC.

Flexigroup makes this submission as a provider of Buy Now Pay Later (**BNPL**) finance that is not regulated by the *National Consumer Credit Protection Act (Cth)* (**NCCPA**) to solar photovoltaic consumers (**PV consumers**) and as a person that is directly affected by the SRC. It also makes this submission as a person that is itself involved in preparing a Code of Conduct for providers of BNPL products and as the applicant for Australian Competition Tribunal (**ACT**) review of the *New Energy Tech Consumer Code* (**NETCC**). Further relevant background on flexigroup is contained in paragraphs 2 and 3 of flexigroup's submission on the NETCC dated 31 May 2019 which is enclosed as **Schedule 1**.

By way of further background, flexigroup notes that the various relatively complex theories propounded by the CEC and others relating to provision of BNPL finance have last week been the subject of extensive ACT consideration during its review of the NETCC.

Noting that the SRC may operate for only a fleeting period prior to the NETCC coming into operation, flexigroup has a limited submission to make in respect of the SRC.

**1 Misleading and deceptive CEC pro-forma disclosure document**

1.1 Flexigroup submits that clauses 2.1.23 and 2.1.24 of the SRC should be deleted. In addition, the related text in clause 2.1.22 shown below should be deleted:

*To comply with this section 2.1.22, a Signatory may, for example, provide the third party provider with a pro forma to be completed by that provider and attached to the Signatory's contracts, or attach the standard terms of the provider.*

1.2 The corollary reference to "Signatories must comply with additional requirements if the finance provider is not regulated by NCCP Act." contained in the SRC Breach Matrix should also be deleted.

1.3 Flexigroup supports the proposed deletion of clause 2.1.25.

**2 Clauses 2.1.23 and 2.1.24**

- 2.1 Clauses 2.1.23 and 2.1.24 of the SRC are confusing, unnecessary and appear to have caused the CEC to mislead and deceive PV retailers and PV consumers into the belief that PV consumers may not have recourse to the:
- (a) external dispute resolution service provided by the *Australian Financial Complaints Authority*; and
  - (b) consumer hardship arrangements offered by BNPL providers who finance PV.
- 2.2 The basis of clauses 2.1.23 and 2.1.24 is illusory, as all BNPL providers who finance PV are members of AFCA and offer hardship arrangements to their consumers. In **Schedule 2**, we enclose relevant correspondence between flexigroup and the CEC relating to the effect of the CEC "Pro-forma" document (**Pro-forma**). Flexigroup is concerned that under the auspices of the SRC, the CEC has repeatedly sought to compel SRC signatory solar retailers who deal with flexigroup to provide the Pro-forma to their PV consumers, including after flexigroup raised concerns with the CEC about the likely misleading and deceptive effect and legality of the Pro-forma.
- 2.3 Flexigroup rejects the theory that a disclosure that a particular finance contract is not regulated by the NCCPA, as provided in clauses 2.1.23 and 2.1.24 of the SRC is of any meaningful benefit to PV consumers. Rather, as flexigroup has previously described in our letter to the CEC dated 14 March 2019 (enclosed in **Schedule 2**), flexigroup is concerned that the CEC has caused PV consumers to be misled and/or deceived into the false belief that they cannot seek AFCA resolution of complaints and hardship arrangements with their provider.
- 2.4 The Pro-forma and therefore clauses 2.1.23 and 2.1.24 of the SRC have the obvious potential to cause consumer detriment by leading PV consumers who choose to use BNPL finance to believe that when they need help with a complaint or financial hardship they ought not or do not have the right to approach their BNPL provider for assistance and that they cannot approach AFCA.

**3 Alternative replacement clause 2.1.23**

- 3.1 Flexigroup supports the provision of neutral, simple and clear mandatory disclosure text for PV consumers drawing attention to the availability of AFCA if they have complaints and of hardship support if they experience financial hardship. Importantly, it is apparent that both of these avenues are available universally across all relevant providers of PV finance whether or not the finance is regulated by the NCCPA.
- 3.2 As the disclosure contemplated in paragraph 3.1 above does not differentiate between regulatory regimes, the disclosure text would not need to address nuances in the legislative landscape and would thereby not, firstly lead the CEC into error and then secondly, not lead PV consumers into error, as flexigroup submits clauses 2.1.23 and 2.1.24 of the SRC have done to date.

If you have any questions or require additional information in relation to this document, please contact me.

Yours faithfully,



Timothy Graham  
**General Counsel**  
*enclosures*

**Schedule 1: flexigroup's submission on the NETCC dated 31 May 2019**

31 May 2019

Sent by email to: [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au); [david.wang@accc.gov.au](mailto:david.wang@accc.gov.au)

Dear Madam / Sir

**RE: New Energy Tech Consumer Code: Application for authorisation made under section 88(1) of the Competition and Consumer Act 2010.**

We refer to the application for authorisation (the **Application**) of the New Energy Tech Consumer Code (**NETCC**) made under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) by the applicants:

- Australian Energy Council (**AEC**)
- Clean Energy Council (**CEC**)
- Smart Energy Council (**SEC**)
- Energy Consumer Australia (**ECA**) (together, the **Applicants**)

FlexiGroup appreciates the opportunity to provide the following submission in response to the Application and thanks the ACCC for the extension it has provided for FlexiGroup to respond.

FlexiGroup makes this submission as a provider of Buy Now Pay Later (**BNPL**) finance in relation to new energy products and services (**New Energy Tech**) in the solar sector and a person that is directly affected by the proposal that all signatories are licensed under the *National Consumer Credit Protection Act* (2009) (Cth) (**NCCPA**) and the credit which is provided is regulated by the NCCPA and National Consumer Credit Code (**NCC**). It also makes this submission as a person that is itself involved in preparing a Code of Conduct for providers of BNPL products which will be focused on consumer protection like the NETCC.

By way of background, FlexiGroup has not had any input into the NETCC the subject of the Application and only became aware of the Application from industry contacts on or about 15 May 2019. Even with the extension granted by the ACCC, the time available to FlexiGroup to consider the impact of the proposed conduct and to prepare this submission has been relatively short. This submission, therefore, is as comprehensive as possible in the circumstances but it may need to be supplemented with additional information at a later stage. FlexiGroup is, of course, willing to assist the ACCC's assessment of the Application.

## 1. Executive Summary

1.1. FlexiGroup is particularly concerned about the proposed conduct described in paragraphs 22 and 26(b) of the Application and paragraphs 24(a) to (b) of Attachment B to the Application. These parts of the Application relate to the provisions of the proposed NETCC which would require:

- providers of finance for New Energy Tech to be licensed under the NCCPA; and



- for the credit provided to be regulated under the NCCPA and NCC (together, **NETCC Regulatory Provisions**).
- 1.2. FlexiGroup's primary concern is that requiring signatories to the NETCC to use only licensed credit providers and regulated finance products when offering third party finance is not only unfair but anti-competitive. The unfairness arises because legislation does not presently require, and neither ASIC nor a Senate Economics References Committee has recommended, that BNPL providers satisfy the NETCC Regulatory Provisions. It is also anti-competitive because it will remove BNPL products as an option for both providers of BNPL products and consumers and a constraint on other forms of finance. This significant detriment is not outweighed by the claimed public benefits of the proposed conduct in the form of increased regulatory oversight given the current practices of FlexiGroup and the advanced development of a Code of Conduct which will soon apply to providers of BNPL products including FlexiGroup.
- 1.3. Aside from the NETCC Regulatory Provisions, FlexiGroup overall supports the intent of the NETCC in increasing consumer protection. While FlexiGroup has not had any input into the NETCC, as a provider of BNPL products FlexiGroup has itself been actively involved in the development of a Code of Conduct to apply to BNPL products and providers in the future which is similarly focused on consumer protection. The development of that BNPL Code of Conduct is well advanced and is expected to conclude within the next 5 months or so (ie, prior to the ACCC's Final Determination in respect of this Application).
- 1.4. In relation to the NETCC Regulatory Provisions specifically, FlexiGroup submits that these provisions are not appropriate and should not be included in the NETCC or authorised by the ACCC:
- there is no legislation in place which requires BNPL products to satisfy the NETCC Regulatory Provisions (although such products are subject to other forms of regulation);
  - in these circumstances, ACCC authorisation should not be used as a mechanism for requiring all signatories to the NETCC to satisfy the NETCC Regulatory Provisions as a condition of offering finance for New Energy Tech to consumers;
  - the NETCC Regulatory Provisions also constitute a cartel provision or collective boycott conduct<sup>1</sup> because, for example, they will involve NETCC signatories who are competitors agreeing not to offer or supply BNPL products for a substantial purpose or preventing, restricting or limiting the supply of BNPL products to purchasers of New Energy Tech (in particular, solar). While it is not immediately apparent from the way the Application is framed, the NETCC Regulatory Provisions therefore carry significant detriment.
- 1.5. Cartel provisions are automatically unlawful under the CCA unless an exception applies or it is authorised by the ACCC. In their Application the Applicants have not described the NETCC Regulatory Provisions as including potential cartel provisions and instead sought to describe

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<sup>1</sup> Although the Applicants do not characterize the NETCC Regulatory Provisions in this way, instead characterizing them as exclusive dealing under section 47, CCA. "Collective boycott conduct" is defined in s4, CCA

the conduct as a form of exclusive dealing<sup>2</sup> which benefits from the anti-overlap exception to the cartel provisions and so is only unlawful where it has the purpose or likely effect of substantially lessening competition. This has the effect of obscuring the impact and seriousness of the NETCC Regulatory Provisions as including cartel provisions.

- 1.6. Regardless of why the Applicants have characterized the NETCC Regulatory Provisions as exclusive dealing and applied for authorisation of them, FlexiGroup considers that the NETCC Regulatory Provisions have the purpose or likely effect of substantially lessening competition and ought not be authorised because they:
  - will operate to incentivise suppliers of New Energy Tech to exclude BNPL products as a source of finance for New Energy Tech, thereby removing the competitive constraint imposed by those products;
  - will deny consumers the significant benefit of BNPL products as an alternative to more expensive forms of finance such as personal loans, credit cards and home loans which each carry higher interest on repayments and, in the case of home loans, over a lengthy term.
- 1.7. While the NETCC is stated to be voluntary, the Applicants consider that signatories "are expected to be in the many hundreds" and grow over time. FlexiGroup is concerned that in the future the NETCC will be viewed as de facto mandatory by providers of New Energy Tech and that the NETCC Regulatory Provisions will unfairly exclude such providers from offering or supplying BNPL products to consumers in the future. There are also likely to be strong incentives for industry participants to sign-up to the NETCC (as the recent example of Victoria shows where only CEC accredited members are able to access the current Victorian solar rebate scheme).
- 1.8. Even if it is possible for ASIC to issue a licence in respect of the BNPL products offered by providers like FlexiGroup, the process of applying for, obtaining and then maintaining a licence under the NCCPA is a significant exercise which is not lightly undertaken. Once a licence is obtained, the licensee is subject to ongoing compliance and reporting requirements. The NETCC will also require the credit which is provided to be regulated under the NCCPA and NCC. Both of these requirements - that is, the need for a licence and the credit which is provided needing to be a form of regulated credit - add considerable cost and operational complexity to the provision of the credit and providers of BNPL products are unlikely to be incentivized to meet these requirements to sign-up to the NETCC.
- 1.9. Furthermore, in cases where finance needs to be bundled with New Energy Tech to proceed - for example, peer to peer energy trading and micro-grid projects within a housing development - the removal of BNPL products as an option for signatories of the NETCC may mean that such projects do not go ahead. This is because signatories of the NETCC will be precluded from engaging any activity involving the provision of credit (including BNPL products) that is not licensed under the NCCPA, and regulated under the NCCPA and NCC.

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<sup>2</sup> See [20(b)], Application, which states that requiring signatories to use only licensed credit providers and regulated finance products when offering third party products is a form of conduct for which "exemption is sought from section 47".



1.10. In respect of the NETCC Regulatory Provisions, the benefits of the proposed conduct are likely to be minimal given the current practices of FlexiGroup and the regulatory environment in which BNPL products are offered and providers of such products already operate. In particular, the claimed benefits set out in paragraph 22 of the Application are likely to be minimal because the conduct which is said to deliver the benefits will not differ from what already occurs in practice and will further strengthen when the BNPL Code of Conduct is finalized. Any benefits are also likely to be significantly outweighed by the public detriment or loss of competition arising from the removal of BNPL products as a form of finance that signatories to the NETCC are able to offer in respect of New Energy Tech.

## 2. FlexiGroup and BNPL finance

2.1. FlexiGroup is the oldest and one of the largest providers of BNPL finance in Australia. Our product **hum** (formerly Certegy Ezi-Pay) has been providing finance for Australians for two-decades. Although new FinTech players have brought BNPL into the spotlight lately with fast, online finance approvals, this form of financing has been provided in Australia for decades with great benefits for budget conscious consumers.

2.2. Under a conventional BNPL model, the customer enjoys an interest free loan and the retailer bears the majority of the cost of financing. This form of financing is ideally suited to people who want to own a residential solar system outright. **Hum** provides an alternative for everyday Australians by helping them purchase goods and services they need or want at a low and capped cost and with no interest, as an alternative to interest rates seen with conventional finance, for example, up to 20% bank credit cards.

2.3. Having financed the purchase of more than 180,000 solar installations, we estimate that approximately 10% of all installed grid-connected solar systems in Australia have been facilitated by finance provided by FlexiGroup.

2.4. Our BNPL product originated the second climate-certified issue of a bond in Australia and has been described as enabling the *Clean Energy Finance Corporation's* "cornerstone commitment"<sup>3</sup> of a \$20 million investment in our \$50 million climate-certified bond issuance.

## 3. FlexiGroup is an interested party

3.1. As a provider of BNPL products, FlexiGroup is directly affected by the Application, in particular the proposed NETCC Regulatory Provisions which the Applicant addresses in paragraphs 22 and 26(b) of the Application and are contained in paragraphs 24(a) to (b) of the NETCC itself.

3.2. The impact of the proposed NETCC Regulatory Provisions on FlexiGroup is potentially very significant.

3.3. Currently FlexiGroup has about 380 solar seller customers that offer New Energy Tech with a BNPL product offered by FlexiGroup. Of its top 50 solar seller customers, approximately 60% are currently or expected in the next 12 months to become members of one of the Applicants (the CEC primarily). If all of these solar seller customers also sign up to the NETCC, the direct impact is that FlexiGroup may, in a very short period, lose as much as 60% of its top 50 solar

<sup>3</sup> <https://www.cefc.com.au/case-studies/flexigroup-climate-bond-signals-growing-investor-appetite/>

seller customers because of the requirement imposed by paragraph 24(a) to (b) of the NETCC.

- 3.4. FlexiGroup submits that this will have a significant impact on the legitimate business activities of FlexiGroup and likely result in less investment by providers and consumers in New Energy Tech in the future. The NETCC Regulatory Provisions will also have a regulatory impact on the solar sector which is disproportionate in that the same requirements will not apply to sectors which do not offer New Energy Tech. These are public detriments, as it means the full economic and environmental benefits of New Energy Tech will not be realised.
- 3.5. FlexiGroup also wishes to state that it has taken no part in the consultation and design of the NETCC. This may provide some explanation as why it has not been included as an interested party in Attachment D to the Application which includes AEC and CEC members.

#### **4. Proposed conduct**

- 4.1. The Application is stated to be relevant to the proposed conduct described in paragraphs 9, 20 and 24 of the Application.
- 4.2. Those paragraphs described the proposed conduct as follows:
- Paragraph 9: "Some New Energy Tech markets, such as solar photovoltaics (PV), are highly competitive with large numbers of suppliers. In these markets, any number of potential signatories to the Consumer Code may have business relationships with each other or may be direct or indirect competitors (and for this reason exemption is sought from both aspects of section 45). For nascent New Energy Tech products and services such as Virtual Power Plant services, it is however possible that at least initially, there may be one or a small number of dominant suppliers (and for this reason exemption is sought from section 46)."
  - Paragraph 20: "Use only licenced credit providers and regulated finance products when offering third-party finance (and for that reason exemption is sought from section 47)"
  - Paragraph 24: "The Code Administrator's powers include requiring a signatory to rectify issues giving rise to a breach of the Code. Where there is serious non-compliance, the Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled (for this reason exemption from the cartel provisions in section 45AD is sought)."
- 4.3. Paragraph 20 of the Application seeks to frame the NETCC Regulatory Provisions as a form of exclusive dealing which benefits from the anti-overlap exemption to the cartel provisions and so, rather than being automatically illegal as a cartel provision, is only illegal where the proposed conduct has the purpose or likely effect of substantially lessening competition. This obscures the impact and seriousness of the NETCC Regulatory Provisions as including a cartel provision. See paragraphs 1.4 to 1.6 above.
- 4.4. Regardless of whether the NETCC Regulatory Provisions are properly a form of exclusive dealing under the anti-overlap exception, this does not diminish or reduce the anti-competitive detriment or loss of competition which is likely to result from the NETCC Regulatory Provisions. Even assessing the provisions as exclusive dealing, FlexiGroup submits that the



NETCC Regulatory Provisions have the purpose of substantially lessening competition because they are designed to have the effect of removing BNPL products as a form of finance for New Energy Tech.

4.5. The clear public detriments are:

- the loss of BNPL finance as an option for consumers purchasing New Energy Tech which will mean that customers will be forced to consider, if they wish to proceed at all, alternative forms of finance which will have more upfront costs and be more expensive on an ongoing basis;
- further concentration of New Energy Tech finance in the major financial institutions leading to increased finance costs and borrower harm (through more expensive financing of New Energy Tech);
- the substantially increased risk of consumers paying more for New Energy Tech, through higher interest rates charged on personal loans, credit cards and home loans (paid over 30 years) than BNPL finance;
- a reduction in innovative approaches to the financing of New Energy Tech and potential unintended constraints on innovation.

4.6. In relation to public benefits, FlexiGroup submits that customers are already well informed about BNPL products and that the public benefits claimed to arise from requiring the NETCC Regulatory Provisions - being the ability to use existing regulatory frameworks in the areas of financial hardship, capacity to pay assessments and dispute resolution between customers and lenders - will not outweigh the significant detriments which are likely to result from the removal of BNPL finance as a viable, alternative form of finance for consumers. In any event, the practical reality is that these three issues are already being appropriately and adequately dealt with by FlexiGroup, through its own policies, its membership of AFCA and AFIA and the BNPL Code of Conduct which providers of BNPL products intend to finalize and introduce within the next 5 or so months (ie before the final determination in respect of the Application).

## 5. FlexiGroup's BNPL product humm

5.1. FlexiGroup's BNPL product **humm** is an evolution of our long-established Certegy Ezi-Pay product, which we believe provides our customers with an alternative and affordable financing option. **Humm** payment plans offer customers the flexibility to manage their cash flow and expenditure at multiple merchants through agreed periodic payments. **Humm** does not incorporate any interest charges (including on default), and makes sure that the fixed charges associated with the service are disclosed and readily available to customers. **Humm** accredited retailers are charged a transaction fee to make use of this service.

5.2. The NCC (and the various State based credit codes that preceded it) specifies that such forms of continuing credit contracts (where the only charge to customers for providing credit are periodic or fixed fees that do not exceed a specified cap) are not regulated as consumer credit (**Exemption**). FlexiGroup believes this reflects the policy that such fixed low cost facilities offer clear benefits to customers without the prospect of being charged a disproportionate amount to their purchases through uncapped fees or high rates of interest. Such products allow

customers the flexibility of paying for desired goods and services by instalment, but without effectively paying much higher amounts for the same purchase as a result of interest charges, whether up front or at the end of an interest free period. Low-cost options of this kind are only feasible under the Exemption.

- 5.3. The ability of our customers to make repayments without financial hardship and overall customer satisfaction is critical. To achieve these goals, we adopt a number of measures designed to mitigate the sorts of risks and issues which are dealt with by the NCC. One key aspect of this relates to affordability of the product. Unlike many other forms of finance, **hum** does not charge interest or default interest on outstanding balances, and does not hold security over goods financed with **hum** unlike other credit providers that do. We therefore have a stronger commercial imperative for ensuring customer affordability. And because our margin for error is low (given our low fees and no security) we can ill afford taking on customers that are unlikely to make their repayments. Our concern to ensure appropriate practices in this area is reflected in our low loss rates.
- 5.4. Our product provides sectors of the public improved access to a large range of products and services at a genuine low cost. It also offers retailers the flexibility to offer other payment options to customers at no additional cost to them other than set (and capped) fees.

## **6. The current regulatory framework applying to BNPL products is comprehensive**

- 6.1. Both ASIC<sup>4</sup> and the Senate Economics References Committee<sup>5</sup> have recently conducted inquiries into the BNPL sector and both envisage the continued availability of BNPL products within an appropriate regulatory framework. In neither case was a recommendation made to remove the Exemption and bring BNPL products within the NCCPA<sup>6</sup>.
- 6.2. The implication in the Application that providers of BNPL products are not subject to regulation because they benefit from a lawful exemption in the NCCPA is not correct. As BNPL products offer "credit", they are regulated as financial services by Division 2 of Part 2 of the ASIC Act (which relates to unconscionable conduct and consumer protection in relation to financial services) rather than by the equivalent provisions in the Australian Consumer Law (ACL).<sup>7</sup>
- 6.3. Both Division 2 of Part 2 of the ASIC Act and the ACL contain mirror provisions which include prohibitions on misleading or deceptive conduct, false or misleading representations, unconscionable conduct, unfair contracts, bait advertising, referral selling, harassment and coercion, pyramid selling etc.<sup>8</sup> The substance of these prohibitions is the same under both the ASIC Act and the ACL. It also means that, far from there being any regulatory "gap", BNPL providers as well as those that offer New Energy Tech products financed by BNPL products are subject to equivalent laws which ensure that the interests of consumers are protected.

<sup>4</sup> See Report 600 released on 28 November 2018.

<sup>5</sup> See "Credit and financial services targeted at Australians at risk of financial hardship" dated 22 February 2019.

<sup>6</sup> ASIC expressly noted that it had not formed a view that it was necessary for BNPL to be regulated under the NCCPA.

<sup>7</sup> Apart from certain provisions relating to linked credit providers (ACL, ss 278 to 287), the ACL does not apply to the supply or possible supply of financial services or financial products: CCA, s 131A. Consumer protection provisions relating to financial services or financial products can be found in Div 2, Pt 2 of the ASIC Act.

<sup>8</sup> These prohibitions are contained in Chapter 2 and Part 3-1 of the ACL.



6.4. Both ASIC and a Senate Committee have recognized that BNPL products are regulated by consumer protection legislation<sup>9</sup>. ASIC, for example, acknowledged this in an appearance before the Senate Committee, whose representative stated the position on BNPL products as follows:

*Buy now pay later products are generally not credit under the National Consumer Credit Protection Act because that Act defines consumer credit in a particular way and has exemptions for arrangements that meet certain criteria. Buy-now pay later-products generally fall within the exemptions that exist in that piece of legislation. However, buy now pay later products are credit as defined in the ASIC Act, and the ASIC Act contains the general consumer protection provisions that exist, including prohibitions against misleading or deceptive conduct and unconscionable conduct.<sup>10</sup>*

6.5. Following ASIC's recent review of the BNPL sector, it indicated it considered that a product intervention power should apply to BNPL products. ASIC expressed the view that such a power would allow it to act quickly and effectively to address the causes of any problems if ASIC identified significant detriment to consumers that could not be resolved through other actions. ASIC indicated that it would look to intervention that represents the most targeted and appropriate regulatory solution to address the consumer detriment. ASIC expressly noted that it had not formed a view that it was necessary for BNPL to be regulated under the NCCPA - See Report 600.

6.6. Legislation giving ASIC a product intervention power has now been passed and it applies to the BNPL sector (consistent with ASIC's view expressed in Report 600).

6.7. Relevantly, that legislation also includes design and distribution obligations<sup>11</sup> which will also apply, amongst others, to the BNPL sector. This will require:

- a BNPL provider to issue a publicly available target market determination for its BNPL products specifying, amongst other things, the class of retail clients comprising the product's target market and any conditions and restrictions on retail product distribution, and
- issuers and distributors of BNPL products to take reasonable steps to ensure that the distribution of a product is consistent with that target market determination.

6.8. ASIC has indicated that in its view, these design and distributions obligations will bring accountability for issuers and distributors to design, market and distribute financial and credit products that meet consumer needs. Accordingly, the risk of any consumer detriment arising from financial products, including BNPL products, is further reduced by these obligations.

6.9. As a result, there are already clear processes and powers in place to appropriately address any perceived detriment from a BNPL product. In those circumstances, it is neither appropriate

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<sup>9</sup> As products described as New Energy Tech are not a financial service, they are regulated by the consumer protection regime in the ACL.

<sup>10</sup> Mr Michael Saadat, Senior Executive Leader, Deposit Takers, Credit and Insurers, ASIC, *Committee Hansard*, 24 January 2019, p. 13.

<sup>11</sup> These provisions will take effect two years following Royal Assent.

nor warranted to seek to address perceived potential detriments by the anti-competitive means proposed in the NETCC, particularly when the relevant regulator ASIC, after having reviewed the BNPL sector, expressly considered the issue and did not form the view it was necessary for that to occur.

## 7. BNPL Code of Conduct

7.1. In addition to the regulation of BNPL products referred to in section 6 above, FlexiGroup and other providers of BNPL products have recently taken significant steps to self-regulate by developing a Code of Conduct for BNPL products. That Code will focus on additional consumer protection in relation to BNPL product offerings and should be finalized and introduced within the next 5 months (ie before the ACCC's determination in this matter). It is intended that it will comprehensively address each of the claimed public benefits said to arise from the NETCC Regulatory Provisions, namely:

- An obligation to provide BNPL products to people who should be able to repay;
- Ensuring all consumers have access to appropriate financial hardship mechanisms and an obligation to work with consumers in good faith to assist consumers to meet their relevant financial obligations; and
- Prompt and fair resolution of complaints through internal dispute resolution processes and mandatory membership of AFCA for subscribers.

Please see **Schedule 1** for further details of the provisions to be included in the BNPL Code of Conduct, and **Schedule 2** for information of what FlexiGroup already does in the areas of financial hardship, capacity to pay assessments and dispute resolution.

## 8. Further checks and balances

- 8.1. FlexiGroup has robust internal accreditation processes in place, as well as processes for the ongoing and active monitoring of its solar seller base.
- 8.2. Before providing accreditation, amongst other things, FlexiGroup reviews the contract of sale terms and conditions of all prospective solar sellers to ensure that that contract adequately addresses their obligations under the ACL, and FlexiGroup will withhold accreditation to solar sellers if it considers that the contract is inadequate.
- 8.3. It also engages in targeted ongoing and active monitoring of its accredited solar seller base.
- 8.4. These accreditation processes and other related processes are designed to ensure that sellers meet the requirements of the ACL and other applicable laws as well as comply with the terms and conditions of our Retailer Introducer Agreement.
- 8.5. In the event that a solar seller does not meet these requirements, FlexiGroup will not accredit the solar seller until it does so or, if it is already accredited, may suspend or terminate the seller. Through this self-regulation, FlexiGroup therefore ensures that minimum standards of consumer protection, including ACL compliance, are met by its solar seller customers.



## **9. Commitment to continuing improvement and consumer benefit**

9.1. As the residential solar industry has grown rapidly since approximately 2009, FlexiGroup has over time developed robust controls during its initial merchant accreditation phase and separate controls aimed at ensuring solar sellers comply with their obligations under the ACL. For example, FlexiGroup makes proactive compliance calls to consumers to enable the identification and resolution of issues consumers may have with:

- Goods (for example, inverters) and services supplied by solar retailers;
- Solar retailer sales practices;
- Solar retailers' contract of sale; and
- Price (including charges) of the good and services.

9.2. Where issues have been identified, FlexiGroup generally engages directly with its seller to attempt to resolve issues to our customers' satisfaction. This is not merely an aspirational statement and in practice, Certegy Ezi-Pay (now humm) self-regulates to, as appropriate, resolve consumer-related issues for purchasers of its BNPL products.

9.3. Over the past 12 months and during the course of our ongoing discussions with ASIC, we have also completed a review of our consumer terms and conditions to ensure continuing compliance with the unfair contract laws. We have also revised our Internal Dispute Resolution Policy and Process and in November 2018 became a member of the Australian Financial Complaints Authority (AFCA). Our membership of AFCA provides each of our customers (and sellers) the option of referring any complaint they have to external dispute resolution. As a result, the public benefit which is claimed to arise from access to dispute resolution does not arise from the proposed conduct as it is already available.

9.4. As set out above, we have also been actively involved in the development of the BNPL Code of Conduct.

## **10. Market distortion, geographic inconsistencies and quasi-regulation**

10.1. As set out above, FlexiGroup is deeply concerned that if the signatories to the NETCC are required to offer credit provided by licensed credit providers regulated by the NCCPA, BNPL products will not be offered to purchasers of New EnergyTech and many consumers will ultimately pay more for their New Energy Tech. FlexiGroup is further concerned that some consumers will in the absence of BNPL not obtain New Energy Tech at all (itself a public detriment due to the environmental benefits of New Energy Tech). This is because consumer finance options will become limited to, for example:

- Drawing down on or extending their home-loan (if they have one) resulting in higher interest being accrued and repayments over the length of the loan (up to 30 years);
- Obtaining a higher-cost personal loan;
- Using an interest bearing credit card at interest rates up to 20% per annum;
- Renting New Energy Tech under an NCCPA regulated consumer lease.

10.2. FlexiGroup is further concerned that the NETCC will have inconsistent and powerful long lasting impacts on the renewable energy sector in different jurisdictions on an ad hoc basis. This is because, for example, in Victoria, only CEC accredited members<sup>12</sup> are able to access the current Victorian solar rebate scheme. Such state based regulations have the potential to make the NETCC a mandatory force (even though participating in the NETCC is stated to be voluntary).

10.3. Finally, FlexiGroup submits that solar sellers who choose not to become a signatory to the NETCC and who will therefore be able to offer BNPL products (including **hum**) may be prevented from becoming members of the CEC, and will therefore not be able to access the Victorian government incentive scheme. FlexiGroup submits that there is a real risk that at least some of these solar sellers exit the Victorian solar market altogether.

## 11. NETCC and credit regulation as a brake on innovation in the energy sector

11.1. The NETCC Regulatory Provisions will potentially prevent signatories developing emerging technologies that may involve the provision of credit to energy consumers where that credit is *not* regulated by the NCCPA.

11.2. Examples of potentially impacted innovations and technologies include:

- peer-to-peer energy trading including those leveraging blockchain
- virtual power plants
- green-field micro-grid development

11.3. Signatories to the NETCC will be:

- precluded from any activity involving the provision of credit that is not regulated by the NCCPA; and
- compelled to operate within current NCCPA regulated finance paradigms and objectively rigid industry structures arguably created by a handful of major financial institutions operating in a highly concentrated market.

11.4. In response to these issues (and in two short sentences) the Application proposes a vaguely defined “sandbox” environment. The Application states in paragraph 26(c) that a “temporary exemption” regime, presumably to be controlled by the Consumer Code Administrator, could be used. How this would work is entirely unclear as at paragraph 22, the Application states that the Consumer Code Administrator “*will not be a specialist in consumer finance*” and relevantly notes that there is no “*other benchmark*”. It perhaps appears that the Applicants want to have it both ways, that is to fix the barrier in place and then determine how exemptions may be granted on a largely undefined basis and without any relevant benchmark. In summary, the potential impact of the NETCC on innovation is unclear.

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<sup>12</sup> <https://www.solar.vic.gov.au/Latest-news/190503-Register-as-an-approved-Solar-Retailer-on-the-Solar-Victoria-Portal>.



- 11.5. All of this may serve to benefit members of the AEC in particular and the current members of the CEC and the SEC, which generally represent the interests of those using established business models or known technologies (and even including fossil-fuel generators).
- 11.6. The absence of an appropriately considered and independently governed “sandbox” will create a significant barrier to entry for new entrants into the New Energy Tech market, particularly those seeking to develop new technologies and those with inventive ideas about consumer finance. If adopted, the NETCC may ultimately prevent New Energy Tech consumers deriving benefits from new finance technologies.
- 11.7. FlexiGroup is concerned that on one hand, the Application proffers conclusive evidence of consumer detriment, referencing voluminous *Consumer Action Law Centre* submissions, to the exclusion of the published findings of ASIC in Report 600 and those of the Senators who considered all relevant submissions. On the other hand, the Application displays a disconnectedness from the finance industry, even excluding the Clean Energy Finance Corporation, and a fundamental lack of understanding of basic issues underpinning New Energy Tech finance.
- 11.8. We are therefore deeply concerned that the “view on balance” that the Applicants have taken about the consumer benefit provided by excluding BNPL from the NETCC is ill-informed and cannot be correct.

### **Continuing engagement**

FlexiGroup has a demonstrated record of proactive and constructive engagement across its Government, Regulator and Industry relationships and in leading legislative and regulatory change initiatives across a wide range of matters. Please contact Matt Beaman on [REDACTED] or by email: [REDACTED] in the event that you have any further questions or require additional information in relation to this document.

Yours faithfully

[REDACTED]

Matt Beaman

Group General Counsel

FlexiGroup Limited

## Schedule 1 - BNPL Code of Conduct

- 1.1. In paragraph 26(b) of the Application the Applicants state their understanding is that the development of a BNPL Code of Practice “has not yet begun”. The Applicants’ understanding is incorrect. Relevant discussions are well progressed between the relevant providers<sup>13</sup> of BNPL providers and the Australian Finance Industry Association (AFIA). Neither FlexiGroup nor AFIA (as far as FlexiGroup is aware) have been contacted by any of the Applicants to ascertain the progress of the BNPL Code of Conduct.
- 1.2. Our publicly available media release on 25 February 2019 described our views on the preparation of the BNPL Code of Conduct and set out the following areas that we believe the BNPL Code of Practice ought to cover:
- *Setting minimum standards as to honest and ethical behavior and compliance with applicable laws.*
  - *Providing clear, accurate and accessible information in all contract documentation and other disclosure and marketing materials to ensure that consumers can make a properly informed decision about whether to enter into a BNPL product.*
  - *An obligation to provide BNPL products to people who should be able to repay.*
  - *The delivery of a high level of customer service and standards to all consumers and an obligation to have trained and competent staff.*
  - *Ensuring all consumers have access to appropriate financial hardship mechanisms and an obligation to work with consumers in good faith to assist consumers to meet their relevant financial obligations.*
  - *A blanket prohibition on conflicted remuneration structures (e.g. retailer salesperson incentives).*
  - *Prompt and fair resolution of complaints through internal dispute resolution processes and mandatory membership of AFCA for subscribers.*
  - *A general obligation to engage openly and collaboratively with ASIC and Government and regulatory bodies on all relevant matters.*
  - *A proportionate cap on BNPL default fees.*
  - *The development of a fit-for-purpose Privacy Act compliant BNPL database to enable BNPL Code of Practice subscribers to check for concurrent consumer BNPL debts (in the absence of mandatory positive credit reporting for BNPL).*
- 1.3. FlexiGroup considers that it is very likely that the BNPL Code of Practice will be in place and fully operational prior to the Final Determination being made in respect of the NETCC.

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<sup>13</sup> The providers currently involved in the development of the BNPL Code of Conduct are Afterpay Touch Group Limited, Bright Capital Pty Ltd, Zip Co Limited (together with FlexiGroup Limited).



## Schedule 2

### Capacity to pay assessments

**Hum** consumer applications are assessed using FlexiGroup's proprietary algorithm which has been developed over approximately 20 years. FlexiGroup is confident that the assessment of **hum** applications is entirely appropriate, however FlexiGroup is open to the adoption of industry-wide responsible lending checks that include verifying a customer's credit history.

### Financial hardship

All **hum** consumers have access to our hardship program. Although the hardship program is not governed by NCCPA provisions, most relevant concepts set out in the NCCPA are incorporated into it. This ensures that **hum** consumers who experience financial problems are able to negotiate appropriate hardship arrangements.

### Dispute resolution

All **hum** consumers (and sellers) have access to our Internal Dispute Resolution Policy and process. This enables the timely assessment of consumer complaints and ensures appropriate escalation.

In addition to the Internal Dispute Resolution processes, all **hum** consumers (and sellers) are able to complain directly to the Australian Financial Complaints Authority and obtain the benefit of independent external dispute resolution.

**Schedule 2: Relevant correspondence between flexigroup and the CEC relating to the effect of the CEC  
“Pro-forma” document**

14 March 2019

Clean Energy Council  
Attention: Ms. Mindy Lim  
Level 15, 222 Exhibition Street  
MELBOURNE VIC 3000

By email: [REDACTED]

Dear Ms. Lim,

**RE: Supplementary Agreement Pro Forma – Certegy Ezi-Pay Pty Ltd**

We refer to our prior correspondence regarding the Supplementary Agreement Pro Forma (**Pro Forma**) for Certegy Ezi-Pay Pty Ltd (**Certegy Ezi-Pay**) prepared by the Clean Energy Council (**CEC**).

1. We have been notified by a number of our merchants that they have been instructed by the CEC to provide a Pro Forma to retail solar consumers if offering the Certegy Ezi-Pay payment plan as a finance solution. We have enclosed a copy of the Pro Forma for ease of reference.
2. We understand that the Pro Forma is to be signed by the consumer at the time of entering into a '*solar contract*' with our solar merchants. We note that the Pro Forma is intended to assist Code Applicants to comply with sections 2.1.22 – 2.1.25 of the CEC's Solar Retailer Code of Conduct.
3. We have reviewed the Pro Forma and we wish to bring to the CEC's attention our concerns regarding the application of the Pro Forma to Certegy Ezi-Pay. For completeness, we have also included a brief outline of how the Certegy Ezi-Pay payment plan service operates.

#### **4. Certegy Ezi-Pay**

- 4.1. The Certegy Ezi-Pay payment plan service offers consumers the flexibility to manage their cash flow and expenditure at multiple merchants through agreed periodic payments. Certegy Ezi-Pay does not incorporate any interest charges (including on default), and makes sure that the fixed charges associated with the service are disclosed and readily available to consumers. Consumers that sign up to an account will generally have a limit set, which is based on our consideration of their application and as payments are made towards existing purchases, an increased balance becomes available for their continued and ongoing use.
- 4.2. The Certegy Ezi-Pay facility and its readily available balance to be used at the customer's discretion at over 4,200 approved Certegy Ezi-Pay merchants operating 7,100 stores, provides sectors of the public improved access to a large range of products and services at a genuine low cost. It also offers retailers the flexibility to offer other payment offers to customers at no additional cost to them other than Certegy Ezi-Pay's set (and capped) fees.

#### **5. Application of the Supplementary Agreement Pro Forma to Certegy Ezi-Pay**

- 5.1. We would appreciate the opportunity to address our concerns regarding some of the terminology used in the Pro Forma with the CEC. It is our belief that the Pro Forma, in its current form, may mislead, deceive and confuse consumers for the reasons outlined in this letter. We would be grateful if the CEC could provide us with clarification regarding the following terms used in the Pro Forma and we request that the CEC discontinues use of the current Pro Forma in relation to all Certegy Ezi-Pay solar merchants as a matter of urgency.

##### **Supplementary Agreement**

- 5.2. We note that the Pro Forma is titled '*Supplementary Agreement Pro Forma*'. We think that the Pro Forma may be intended by the CEC to be supplementary to the sales agreement entered between the consumers and our solar merchants. We would like the CEC to clarify what the Supplementary Agreement Pro Forma is supposed to be a supplement to.

##### **Comparative cost**

- 5.3. We note that the Pro Forma states the following:

*"Further to the Terms and Conditions provided by Certegy,  
we add the following: The comparative cost of the system if  
it were to be purchased outright  
Cash Price  
Certegy's Price"*

5.4. We advise that Certegy Ezi-Pay does not set or determine merchant prices. Please clarify what is meant by the phrase '*Certegy's price*' because we do not set prices. Additionally, we would like the CEC to clarify what is meant by '*Cash Price*', we assume that means the price for hard cash.

#### **Reference to Certegy**

5.5. The Pro Forma refers to Certegy Ezi-Pay Pty Ltd as "*Certegy*". Please note that we are obliged to refer to Certegy Ezi-Pay Pty Ltd as '*Certegy Ezi-Pay*' due to continuing intellectual property commitments to the owner of "*Certegy*" in the United States and the CEC's reference to "*Certegy*" may expose the CEC to IP infringement claims from the United States.

#### **6. Financial hardship**

6.1. We note that paragraph b. i. of the Pro Forma states the following:

- b. If you have trouble paying the periodic payments required under this Agreement:*
- i. You may not have the right to ask the provider for a hardship variation to help you get through your financial difficulty.*

6.2. We confirm that all Certegy Ezi-Pay consumers have recourse to hardship variation. Accordingly, we are concerned that paragraph b. i. of the Pro Forma may cause our consumers confusion regarding their access to Certegy Ezi-Pay's hardship program. We believe that content may stop consumers seeking hardship arrangements with Certegy Ezi-Pay.

#### **7. External Dispute Resolution ('EDR')**

7.1. Paragraph a. of the Pro Forma states that:

- a. If you have a complaint about the Agreement you may not have access to the services of an external dispute resolution scheme that has been approved by ASIC. This means that you may have to go to court to resolve a dispute with the provider.*



- 7.2. As Certegy Ezi-Pay is a member of the Australian Financial Complaints Authority, we are concerned that paragraph a. of the Pro Forma will mislead and deceive consumers contrary to Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
- 7.3. Section 18(1) of the Australia Consumer Law states that:
- A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
- 7.4. Australian case law indicates that a statement or representation will be regarded as misleading or deceptive if it has a tendency to lead the consumer into error. See, for instance, *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 (12 December 2013).
- 7.5. Obviously, paragraph (a) of the Pro Forma could lead to a reasonable consumer forming the impression that they would not have access to EDR if they entered into a finance agreement with Certegy Ezi-Pay. We are concerned that such a false impression could cause potentially detrimental effects to Certegy Ezi-Pay consumers if they would like to access to EDR but wrongly believe on the basis of CEC's representations that they cannot access EDR.
- 7.6. In view of our concerns expressed in this letter, we request that the CEC discontinue use of the Pro Forma in relation to all Certegy Ezi-Pay solar merchants as a matter of urgency. Taking into consideration the potential harm that could be caused to consumers, we reserve our right to commence legal proceedings against the CEC if the CEC continues to require our solar merchants to use the Pro Forma. We are concerned that consumers who need financial hardship arrangements and/or AFCA may be misdirected into believing that they do not have the options available to them.
- 7.7. You may be aware that the Buy Now, Pay Later (**BNPL**) sector has recently been reviewed by the Senate Economics References Committee. Whilst we understand that the CEC endeavours to advance policy driven objectives and the interests of its members, we believe in a collaborative industry-led approach to the regulation and reform of the BNPL sector. Furthermore, we would expect any regulatory measures to have appropriate and proportionate industry-wide application to all BNPL providers.



If you have any questions or would like to discuss any aspect of this letter, please contact me on

[REDACTED]

Yours faithfully,

[REDACTED]

Tim Graham  
General Counsel

# Supplementary Agreement Pro Forma

This document is to be attached to Certegy's documentation and is to be signed by the customer at the same time they sign their solar contract with you. The aim of this document is to assist Code Applicants with complying with sections 2.1.22 – 2.1.25 of the Clean Energy Council's Solar Retailer Code of Conduct.

Further to the **Terms and Conditions provided by Certegy**, we add the following:

The comparative cost of the system if it were to be purchased outright

Cash Price

Certegy's Price

\$ \_\_\_\_\_

\$ \_\_\_\_\_

Aggregate amount payable over the life of the Agreement's term is \$.....

## **IMPORTANT:**

This Agreement is not regulated by the Commonwealth NCCP Act 2009. As a result:

- a. If you have a complaint about the Agreement you may not have access to the services of an external dispute resolution scheme that has been approved by ASIC. This means that you may have to go to court to resolve a dispute with the provider
- b. If you have trouble paying the periodic payments required under this Agreement:
  - i. You may not have the right to ask the provider for a hardship variation to help you get through your financial difficulty.
  - ii. The provider may take action against you for non-payment without giving you an opportunity to remedy the fault.

Questions and complaints about the Agreement should be directed to the provider, Certegy.

**Customer's signature:**

.....

Date:.....

**Solar Retailer signature:**

.....

Date:.....

**END OF PRO FORMA**

12 April 2019

Mr Tim Graham  
General Counsel  
Certegy Ezi-Pay  
Level 1  
97 Pirie Street  
Adelaide SA 5000

By email to [REDACTED]

Dear Mr Graham,

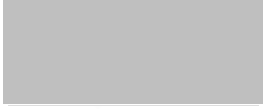
**Clean Energy Council's Approved Solar Retailer program**

We refer to your letter dated 14 March 2019 to Mindy Lim of our office ('your letter').

1. We note comments made in paragraph 5.2 of your letter. We confirm that the pro forma document is designed and intended to be used where a consumer enters into an agreement with a third-party finance provider which is separate to the agreement between the retailer and the consumer for the sale and installation of a solar PV system.
2. The pro forma document has been prepared in accordance with section 2.1.22 of the Solar Retailer Code of Conduct ('the Code'). Section 2.1.22 of the Code was developed in response to submissions made by the Australian Securities and Investments and Commission and consumer advocacy groups in the most recent review of the Code by the Australian Competition and Consumer Commission.
3. We will reconsider the title of the pro forma document.
4. We note comments made in paragraphs 5.3 and 5.4 of your letter. The Clean Energy Council proposes to revisit the drafting of the pro forma document so that it clearly sets out a comparative cost to consumers.
5. We will remove from the pro forma document references to Certegy cited in your letter. We may refer to Certegy Ezi-Pay as an example of a Buy Now, Pay Later provider, given your position in the market.
6. We note comments made in your letter in relation to financial hardship and external dispute resolution. We will review the wording of the pro forma document with a view to clarifying the message that consumers of certain types of financial products and services are not regulated by the *National Consumer Credit Protection Act 2009* ('the NCCPA') and consumers of those products and services may not have the benefit of the dispute resolution mechanisms that the NCCPA provides.

7. We acknowledge the concerns expressed in your letter and will cease using the Supplementary Agreement Pro Forma in its current form.

Sincerely,



Anna Sexton  
Compliance and Risk Manager

