

8 November 2019

Sent by email to: adjudication@acc.gov.au; david.wang@acc.gov.au

Dear Madam / Sir

RE: New Energy Tech Consumer Code: FXL Submission on Further Amended Code and ACCC Letter

We refer to the ACCC's invitation for submissions on the further amended version of the New Energy Tech Consumer Code (**Amended Code**) published on 25 September 2019 and the ACCC's letter dated 22 October 2019 (**ACCC Letter**).

We maintain our positions set out in our previous submissions dated 31 May 2019, 29 August 2019 and 26 September 2019 and set out our further submissions in this document in relation to the Amended Code and the ACCC Letter.

1 Unsolicited offers of payment arrangements

1.1 The content proposed to be inserted as paragraph 3(d) of the Amended Code provides that signatories will:

“make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act (2009) (Cth) (“NCCPA”)”

1.2 Section 1 of The *Australian Consumer Law (ACL)* provides that the ACL applies to the extent provided by Part XI of the *Competition and Consumer Act 2010 (Cth) (CCA)*.

1.3 Section 131A(1) in Part XI provides that the ACL does not apply “to the supply, or possible supply, of services that are *financial services*, or of *financial products*” other than in respect of:

- (a) Division 3A of Part 3-2;
- (b) Division 3A of Part 4-2; and
- (c) Part 5-5.

1.4 Because any *credit facility*, relevantly including those not regulated by the NCCPA, is excluded from regulation under the ACL, the content proposed to be inserted in paragraph 3(d) of the Amended Code is arguably not capable of informing sensible interpretation.

1.5 For example, it is clear that, section 77 of the ACL (which regulates *unsolicited consumer agreements*) does not cover offers of *financial services* or *financial products*. And it is also clear that section 95 of the ACL provides that the unsolicited agreements prohibitions in the ACL do not

apply to the conduct covered by, for example, sections 736, 992A or 992A of the *Corporations Act 2001* (Cth) (**Corporations Act**) (which relate to hawking of *securities* and *financial products*).

- 1.6 The late inclusion of such apparently restrictive content raises a concern that the technical interpretation and practical application of the newly proposed content is not properly understood. Specifically, the content relating to “unsolicited offers” of *financial services* or *financial products* will:
- (a) ostensibly impose restrictions inconsistent with the intention reflected in the relevant provisions of the CCA, the ACL and the Corporations Act;
 - (b) negatively impact the legitimate activities of photo-voltaic retailers who have not been properly consulted in respect of paragraph 3(d);
 - (c) not be able to be sensibility interpreted and applied by reference to the relevant legislative regimes; and
 - (d) be redundant.

2 Code Administrator

- 2.1 Paragraph 22 of the Applicants original application for authorisation in relation to the proposed New Energy Tech Consumer Code dated 29 April 2019 (**Original Application**) provides:

“Furthermore, the Consumer Code Administrator will be able to rely on the licensing decisions of the Australian Securities and Investments Commission (ASIC) to ensure a level of consumer protection when assessing signatories, noting that it itself will not be specialist in consumer finance.”

- 2.2 Paragraph 25(b) of the Amended Code provides:

“...the deferred payment arrangement is either regulated by the NCCPA and the National Consumer Code (“NCC”) or complies with a regulator approved code of conduct (such as those meeting ASIC RG 183) that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections”

- 2.3 The effect of these changes is to propose that the Administrator ought to have the power to scrutinise and ratify the decisions of ASIC without:
- (a) providing any detail as to what the “verification” process the Administrator is proposed to undertake is to involve;
 - (b) addressing the fact that the Applicants have previously said that the Administrator “**itself will not be specialist in consumer finance**”; or
 - (c) explaining how the Administrator will be able to make any meaningful assessment as to what constitutes “**delivering substantively equivalent consumer protections**”.

3 Concerns

3.1 Generally, we are concerned that these latest changes:

- (a) indicate that the technical interpretation and practical application of the relevant content has not been properly considered;
- (b) have not been subject to properly informed consultation with industry in respect of the ways in which unsolicited consumer agreements are originated and regulated by the ACL and other matters;
- (c) ostensibly provide the Administrator with the power to manage a regime properly regulated by ASIC.

FlexiGroup supports the consumer protection objectives within the NETCC and believes these objectives can be achieved without excluding BNPL providers from offering their products to customers of NETCC subscribers or effectively requiring BNPL providers to comply with, for example, responsible lending provisions of the NCCPA which is not fit for purpose in this emerging market. FlexiGroup proposes clause 24 be reverted to the amended content set out in Annexure 1 of AFIA's submission dated 26 September 2019 and that the changes proposed to clause 3 be removed.

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

Kind regards



Timothy Graham
General Counsel