

29 August 2019

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

Dear Madam / Sir

RE: New Energy Tech Consumer Code Draft Determination: FXL Submission

Background

We refer to the ACCC's invitation for further submissions on the Draft Determination on the New Energy Tech Consumer Code (**NETCC**). In this document we set out our interim submission on the Draft Determination ahead of the scheduled pre-decision conference to be held on 9 September 2019. We understand that the ACCC may approve modifications to the NETCC to permit finance arrangements that fall under regulatory regimes other than the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) including Buy Now Pay Later (**BNPL**) finance, if those finance arrangements can be demonstrated to provide equivalent consumer safeguards to the NCCPA.

1 Consumer Protections

- 1.1 In their submissions to the ACCC, Energy Consumers Australia, Clean Energy Council, Australian Energy Council and Smart Energy Council said that signatories to the Consumer Code should be prevented from offering BNPL finance, because BNPL arrangements did not provide consumers with protections relating to:
 - (a) regulated information about credit offers;
 - (b) responsible lending assessments; and
 - (c) the ability to take complaints to external dispute resolution.
- 1.2 The imputation in the Application and particularly the further submission made by the Consumer Action Law Centre, that providers of BNPL finance are not subject to regulation because they are exempted from the NCCPA is patently incorrect. It could not be clearer that BNPL finance is regulated as a financial service under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). The ASIC Act contains provisions relating to both consumer protections and unfair contract terms which are equivalent to the relevant protections available to consumers under the NCCPA and the Australian Consumer Law (**ACL**).
- 1.3 The ASIC Act prohibits misleading or deceptive conduct, false or misleading representations, unconscionable conduct, unfair contracts, bait advertising, referral selling, harassment and coercion, pyramid selling and requires financial services to be provided with due care and skill.
- 1.4 Over the past 12 months we have been actively engaged in discussions with ASIC following on from the November, 2018 release of *ASIC Report 600: Review of buy now pay later arrangements* ("**ASIC Report 600**"), which was a comprehensive review concerned at better understanding the size and scale of the BNPL sector and relevant consumer demographics and to identify potential

risks for consumers arising out of their use of BNPL finance offerings. This review reported on best practice standards by BNPL providers across three key issues:

- (a) communicating information effectively to consumers;
- (b) responding to consumer complaints; and
- (c) assisting consumers in unexpected financial difficulty.

1.5 As a result of our ongoing discussions with ASIC, we have implemented a range of “best practice” recommendations, which aim to promote good consumer outcomes and facilitate confident and informed consumer decision making. This has included an extensive review of our consumer terms and conditions to ensure continuing compliance with the ASIC Act. Further, the information we provide to our consumers and sellers has been subject to ASIC review specifically in relation to the unfair contract term provisions of the ASIC Act. We note that in *ASIC Report 600*, ASIC stated that they have also undertaken similar extensive reviews with other BNPL financiers.

2 Enforcement and Remedies

The ASIC Act provides a range of enforcement powers and remedies that are available to ASIC. These provisions are functionally equivalent to those available to ASIC under the NCCPA. The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) introduced a new governance regime for the design and distribution of financial products and provided ASIC with a new product intervention power. Both these reforms apply to BNPL finance and provide ASIC with a proactive power to intervene when any BNPL finance has resulted, will result or is likely to result in significant detriment to consumers even where there has not been a breach of the law.

3 Dispute resolution and the courts

- 3.1 We have revised our Internal Dispute Resolution Policy and Process and in November 2018 became a member of the Australian Financial Complaints Authority (**AFCA**). In addition to providing our customers (and sellers) the option of referring any complaint they have to external dispute resolution, our membership with AFCA requires us to comply with AFCA’s rules relating to complaint timelines, escalation and disclosure.
- 3.2 flexigroup and all the other major BNPL financiers are members of AFCA. As a result, the public benefit which is claimed to arise from access to dispute resolution does not arise from the proposed NETCC as it is already available.

4 BNPL Code of Conduct

- 4.1 flexigroup and other providers of BNPL products have recently taken significant steps to self-regulate by developing a Code of Conduct for BNPL products. We note that this work is a specific recommendation (Recommendation 10) of the “*Report of the Senate inquiry into credit and financial products targeted at Australians at risk of financial hardship*” which was released in February 2019. Discussions relating to the Code of Conduct are well advanced. The proposed Code of Conduct addresses the scope and key commitments in the NETCC, particularly those elements targeted at ensuring consumers are provided with clear, accurate and relevant

information; improving consumer awareness of their rights under the law; and ensuring sales practices are responsible and ensuring that products, systems and services provided under the Code of Conduct are suitable and fit for purpose.

- 4.2 As outlined in our submission dated 31 May 2019, the Code of Conduct will comprehensively address each of the claimed public benefits said to arise from the NETCC – this will specifically include an obligation for BNPL providers to provide BNPL products to people who should be able to repay; an obligation to work with consumers in good faith and to assist consumers to meet their relevant financial commitments and ensuring all consumers have access to appropriate financial hardship mechanisms.