

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Affidavit

File Number: ACT1 of 2019

File Title: Re Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code and the determination made by the ACCC on 5 December 2019

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

DEPUTY REGISTRAR

Dated: 21/02/2020 3:44 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

AFFIDAVIT

Affidavit of: Gerard Brody
Address: Level 6, 179 Queen Street, Melbourne
Occupation: Chief Executive Officer
Date: 21 February 2020

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I GERARD BRODY of Level 6, 179 Queen Street Melbourne, in the State of Victoria, Chief Executive Officer, do solemnly and sincerely affirm that:

1. I am Chief Executive Officer of the Consumer Action Law Centre ("CALC"). I make this affidavit in support of CALC's application for leave to intervene in this proceeding.
2. I make this affidavit on the basis of my own knowledge, except where indicated. Where I depose to matters on information and belief, I set out the basis of my belief and I believe such matters to be true.

Filed on behalf of (name & role of party) Consumer Action Law Centre
Prepared by (name of person/lawyer) Ursula Noye
Law firm (if applicable) Consumer Action Law Centre
Tel 03 9670 5088 Fax 03 9629 6898
Email ursula@consumeraction.org.au / rex@consumeraction.org.au

Address for service Level 6/179 Queen Street, Melbourne, VIC 3000
(include state and postcode)

[8099782: 26064973_1]

AB
1

About CALC

3. CALC is an independent, not-for profit consumer organisation with specialist expertise in consumer credit law and policy and of the consumer experience in modern markets, including with respect to energy. CALC works for a just marketplace, where people have power and business plays fair. CALC is based in Melbourne and provides financial counselling and legal assistance services to people experiencing disadvantage in Victoria and policy and campaigns work to all Australians.

Role and qualifications

4. I have been the Chief Executive Officer at CALC since March 2013. Prior to this, I was the Director Policy and Campaigns at CALC between June 2011 and March 2013.
5. As Chief Executive Officer, I am responsible for the development, execution and review of strategy, policy and plans, as well as the organisational leadership and control of major functions relating to the operation and administration of the organisation. I oversee an annual budget of around \$4.5 million and a staff of over 40.
6. I have also been the Chairperson of the Consumers' Federation of Australia since November 2015.
7. I have the following qualifications:
 - a. Bachelor of Laws (Hons)/Bachelor of Arts (Hons) from the University of Melbourne; and
 - b. Master of Public Policy and Management from the University of Melbourne.

CALC's involvement in solar/new energy tech and buy now pay later

8. Energy is an essential service and the energy system is rapidly transitioning to new technologies. Coupled with the growth in the range of finance options for investment in non-traditional energy sources, it is CALC's experience that consumers are finding it increasingly complex, confusing and risky to make decisions about their energy supply.

Campaigns and legal advocacy

9. CALC has long campaigned for better consumer protections for consumers using deferred payment options - buy now pay later ("**BNPL**") products - in the solar market. The campaign



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includes assisting individuals in their disputes with BNPL providers and solar panel suppliers, making complaints to regulators on behalf of individuals harmed, and making submissions to the regulator and government on the harm caused by BNPL providers and solar panel suppliers.

10. Between 2016 and 2019, CALC's legal practice represented 27 clients with issues arising from the conduct of BNPL provider Certegy (a subsidiary of FlexiGroup now trading as Humm). In 2018 alone, CALC provided legal advice to 33 consumers experiencing harm caused by Certegy.

Complaint to the Australian Securities and Investments Commission

11. In 2013, CALC made a detailed complaint to the Australian Securities and Investments Commission ("**ASIC**") that Certegy was providing credit and therefore ought to be regulated under the *National Consumer Credit Protection Act 2009* ("**NCCPA**") and the National Credit Code ("**NCC**").
12. In 2015, CALC provided four client case studies exhibiting the consumer harm caused by the conduct of Certegy to ASIC for consideration.
13. In 2016 and 2017, CALC consulted with the ACCC and ASIC about the consumer harm being caused by Certegy.
14. In 2018, CALC supplied client case studies to ASIC upon request as part of its Report 600: Review of Buy Now Pay Later Arrangements published on 28 November 2018. Four of those case studies were published in that report, two of which related to Certegy. CALC's case studies were the only case studies published in that report.

Complaint to Consumer Affairs Victoria

15. In 2016, CALC made a complaint to Consumer Affairs Victoria ("**CAV**") about nine solar panel providers using Certegy.
16. In 2018, CALC sent a list of the 78 enquiries we received about solar panel issues in 2017-2018 to CAV for consideration. Many of these enquiries related to solar panel providers using Certegy.



Submission to the Senate Economics References Committee

17. In 2019, CALC wrote to the Senate Economics References Committee in its *Inquiry into the Credit and financial services targeted at Australians at risk of financial hardship* detailing the consumer harm caused by the unsolicited sale of solar panels and Certegy finance to a client.

Legal advocacy work and complaints regarding Brighte

18. In addition to Certegy, CALC has also provided advice to consumers and community workers, represented clients and made complaints to regulators regarding the conduct of Brighte Capital Pty Ltd ("**Brighte**"). Based on CALC's experience, Certegy (now Humm) and Brighte are the two primary providers of BNPL products in the solar market. Since 2019, CALC has represented three clients in disputes with Brighte and made one complaint to ASIC and one complaint to CAV and the ACCC.

Reports

19. CALC's 2019 *Sunny Side Up*¹, 2017 *Knock it off!*² and 2016 *Power Transformed*³ reports have drawn on CALC's legal assistance work in order to recommend changes to strengthen the consumer protection regime for new energy products, reduce harm caused by door to door sales and improve trust and consumer outcomes in the transforming energy market.
20. **Exhibit GB-1** includes extracts of CALC's most recent report, *Sunny Side Up*, as relevant to risks to consumers that arise from the offering of unregulated BNPL in connection with the marketing and sale of residential solar panels.

CALC's participation in authorisation of the New Energy Tech Consumer Code

21. In August 2017, CALC joined with industry associations, Energy Consumers Australia ("**ECA**") and consumer advocacy organisations to form the Behind The Meter Working Group ("**Working Group**"), which was tasked by the COAG Energy Council to develop an industry code for new energy tech.

¹ Consumer Action Law Centre, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*.

² Consumer Action Law Centre, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*

³ Consumer Action Law Centre, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*



22. Between October 2017 and March 2019, the Working Group met regularly to progress the development of a draft Code with a focus on better consumer outcomes. The Working Group agreed that the Code would, among other things, clearly set out commitments to consumers, follow the typical customer journey, be principles-based and focus on good customer outcomes and be a mechanism to deliver Consumer Information Products to allow customers to make informed decisions.
23. In November 2018, the Working Group produced a draft Code for consultation.
24. On 27 November 2018 and 17 December 2018, I participated in the CEO-led group from the Working Group to develop a Memorandum of Understanding (MOU) about how the governance, stewardship and administration of the draft Code could be managed.
25. At the same time, CALC participated in the consultation on the draft Code and provided written feedback to improve the effectiveness of the Code and consumer protection, namely that:
 - a. the name of the code should be readily understood by the public;
 - b. the code should promote consumer protection as a means to ensuring innovation benefits consumers;
 - c. the code should prohibit all forms of unsolicited selling, or require an 'opt-in' model for unsolicited selling;
 - d. the code should require signatories to only deal with credit providers that are appropriately regulated; and
 - e. the sanctions available for breach of the code should be robust and the code should not unduly limit their application.
26. In March 2019, the Working Group produced a further and extensively revised draft Code following the consultation process.
27. In April 2019, the draft Code was sent by the Australian Energy Council, Clean Energy Council, ECA and Smart Energy Council (together, the "**Authorisation Applicants**") to the ACCC for authorisation.
28. Between May and November 2019, CALC made several submissions to the ACCC on the authorisation of the draft Code.
 - a. Exhibit **GB-2** is a copy of CALC's submission made on 21 May 2019.

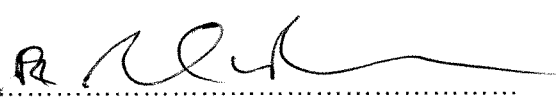



- b. Exhibit **GB-3** is a copy of CALC's submission made on 20 September 2019.
 - c. Exhibit **GB-4** is a copy of CALC's submission made on 7 November 2019.
29. During this time, I also participated in the pre-decision conference on the draft Code, on behalf of CALC. At that conference, I reiterated that CALC strongly supported clause 24 of the Code as originally formulated, and that CALC is aware of significant harm suffered by residential solar consumers who have signed up to BNPL arrangements, including with Flexigroup and Brighte.

CALC's intended involvement in the Tribunal review

30. CALC's proposes to submit to the Tribunal that signatories to the Code should be permitted to offer only deferred finance arrangements that are regulated under the NCC and through credit providers that are licenced under the NCCPA, as was originally proposed by the proponents of the Code and was reflected in the ACCC's draft determination made on 1 August 2019. So far as I am aware the outcome for which CALC will contend is different from the outcomes that I understand are likely to be contended for by the ACCC and by the proponents of the Code (should they apply to participate or intervene in this review).
31. CALC seeks to intervene in this application in order to assist the Tribunal by tendering evidence and providing submissions to the Tribunal, principally going to the nature and extent of harm and risk caused to consumers through the widespread offering of unregulated BNPL finance in the household solar market, and of the corresponding benefits that will likely be realised from authorising the Code on terms that would prohibit signatories from offering unregulated BNPL finance in connection with both solicited and unsolicited sales.
32. I consider that CALC will be uniquely placed to provide that evidence and those submissions to the Tribunal, in view of its long experience in acting for, and advocating on behalf of, financially-vulnerable residential solar consumers.

AFFIRMED by the deponent
at Melbourne on 21 February 2020


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Before me: REX PASCAL PUNSHON


.....

IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

Certificate identifying annexure

This is the annexure marked **GB-1** now produced and shown to Gerard Brody at the time of affirming his affidavit on 21 February 2020.

Before me: REX PASCAL PUNSHON



Level 6, 179 Queen Street, Melbourne VIC 3000
An Australian Legal Practitioner within the meaning of the
Legal Profession Uniform Law (Victoria)

Signature of person taking affidavit



April 2019

SUNNY SIDE UP:

**Strengthening the
Consumer Protection
Regime for Solar Panels
in Victoria**

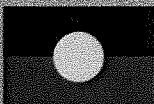
ABOUT

Consumer Action Law Centre (Consumer Action) is an independent, not-for-profit consumer organisation located in Melbourne, Australia. Our purpose is to make life easier for people experiencing vulnerability and disadvantage in Australia. We do this through financial counselling, legal advice, legal representation policy, research and campaigning - enabling us to lead change to policy, laws and industry practice across a range of consumer issues.

ACKNOWLEDGEMENTS

Consumer Action would like to thank the people who assisted us in the production of this report. Our sincerest thanks go to the members of the Sunny Side Up Reference Group for the contribution of their time, ideas and advice. Specifically, we thank: Rob Law of Central Victorian Greenhouse Alliance; Dean Lombard of Renew (formerly the Alternative Technology Association); Janine Rayner of Energy and Water Ombudsman of Victoria; James Clinch of the Essential Services Commission; Mindy Lim of the Clean Energy Council; Jonathan Leake of Solar Victoria, and Sabiene Heindl, previously of Energy Consumers Australia.

We would also like to acknowledge the contribution that our clients have made to this report. Specifically, we would like to thank the clients who shared their stories with us and through this report. Each person that did so expressed a desire to change the system and to prevent injustice and harm being done to other people.



Consumer Action is located on the land of the Kulin Nations. We acknowledge all Traditional Owners of Country throughout Australia and recognise the continuing connection to lands, waters and communities. We pay our respect to cultures; and to Elders past, present and emerging.

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01

EXECUTIVE SUMMARY

There is a growing recognition that the energy market is changing but the regulatory system is not keeping up. Rooftop solar systems and other new energy products and services are growing in popularity and are assuming a critical role in essential service delivery, and yet, little has been done in the way of regulatory reform to ensure that current regulatory frameworks stay relevant to the changing landscape.

The rapid growth of the solar industry, the number of players entering and exiting the industry, government financial incentives, the complexity of the technology being sold along with regulatory gaps are creating an environment in which consumer harm can thrive.

Through our casework, Consumer Action Law Centre (**Consumer Action**) has witnessed this harm impacting the people we help, usually people already experiencing significant vulnerability. But, we are not the only ones seeing it. Others are reporting on the same or very similar issues in the retail solar industry, contributing to a discussion about the need for change. Significantly, in 2017 the Independent Review into the Electricity & Gas Markets in Victoria Report was released recommending a number of changes in order to improve the retail energy market in recognition of the changing landscape in this sector.

Given these factors, now is an opportune time to add to the discussions already underway by doing a deep dive into the current consumer protection regime as it relates to new energy products, consider whether things could be done better and how they could be done better. This report will address these topics, focusing specifically on rooftop solar systems.

The report relies extensively on Consumer Action's casework.

Consumer Action is a consumer advocacy organisation based in Melbourne. The casework relied on in this report has been drawn from our lawyers, who provide consumer and credit law advice services to Victorians, or from our financial counsellors, who provide free financial counselling services to Victorians experiencing financial hardship. Both of these casework services are aimed at assisting people experiencing vulnerability or disadvantage.

From our casework experience, Consumer Action has observed a number of concerning trends in the retail solar industry. The most common and pressing issues we have identified are:

- **failings in solar installations or grid connection;**
- **inappropriate or unaffordable finance being offered to purchase solar systems;**
- **misleading and high-pressure sales tactics in the context of unsolicited sales;**
- **product faults and poor performance;**
- **a lack of affordable dispute resolution;**
- **business closures; and**
- **poorly structured and highly problematic Solar Power Purchase Agreements (Solar PPAs).**

The purpose of this report is to contribute to a discussion, already underway, about possible regulatory solutions to the problems we are seeing in the emerging energy market. By drawing on our casework, this report will identify the common issues faced by people in the new energy market and will also explore possible solutions to these problems. The report will specifically focus on solar panels as an example of a new energy product.

However, it is hoped that the principles drawn out in this report can be applied more broadly to other new energy products and services requiring two or more parties to achieve full and final delivery. The problems we are seeing with solar panels may repeat and manifest themselves in relation to other new and emerging energy technology in Australia unless we take the opportunity to prevent their spread.

This report explores a range of solutions to these problems but ultimately argues that a regulatory response is necessary. Our casework, external reports and corroborative data published by other organisations and the realities of the alternative non-regulatory solutions, together form a significant body of evidence justifying regulatory intervention.

A number of possible regulatory solutions and their likely impacts are explored in this report. However, we argue that the following reforms ought to be preferred:

- **Solar retailers should be responsible for ensuring that solar panels are properly connected to the grid, unless people elect to take responsibility themselves;**
- **The national consumer credit laws should be amended so that all buy now, pay later finance arrangements fall within their ambit;**
- **Unsolicited sales should be banned;**
- **A 10-year statutory warranty applying to the whole solar system should be provided by solar panel retailers;**
- **The jurisdiction of the Energy and Water Ombudsman Victoria (EWOV) should be extended to include the retail sale of new energy products and services;**
- **A solar default fund should be established to provide compensation to those entitled to compensation but unable to access it due to the insolvency of a solar retail business; and**
- **Solar panel purchase agreements should be included within the ambit of any new or extended regulatory regime covering new energy products and services, including the extension of EWOV's jurisdiction to cover all new energy products.**

03

ISSUES OVERVIEW

This is not the first time Consumer Action has reported on the harm being caused through poor business practices of solar retailers. Issues relating to solar products were identified in our report, *Power Transformed*, published in July 2016, focusing on the changing energy market and again in 2017 with our *Knock it Off!* Report, which focused on unsolicited sales.

However, the issues we have previously reported are not going away. Consumer Action continues to receive enquiries related to rooftop solar systems through both of our legal and our financial counselling services. While Consumer Action received more solar related inquiries in 2017 than in 2018, data collected by EWOV indicates that the number of solar related complaints they receive is increasing.³⁰

Distinct from our earlier reports, this report deals exclusively with the issues surrounding the sale and installation of solar panels.

We have identified the following common themes that, in our view, highlight the failings of the current consumer protection regime:

- failings in solar system installations or grid connection;
- inappropriate or unaffordable finance being offered to purchase solar systems;
- misleading and high-pressure sales tactics in the context of the unsolicited sale of solar panels;
- product faults;
- a lack of affordable dispute resolution;
- business closures; and
- poorly structured and highly problematic Solar Power Purchase Agreements (PPAs).

³⁰ For example, in the 2018 July to September quarter, EWOV received 496 solar complaints, 15% more than for the same period in 2017: Energy and Water Ombudsman Victoria, *Res Online 25 - November 2018* (November 2018) <<https://www.ewov.com.au/reports/res-online/201811>>.



Each of these issues and their potential regulatory solutions will be explored in more detail below.

EWOV appears to be seeing similar issues. EWOV reported that for the July to September 2018 quarter, it received a similar set of complaints including: incorrect solar installation; solar power purchase agreements; misleading marketing; faulty inverters; solar installation delays; faulty solar PVs; inappropriate inverters; solar systems not working at full capacity; and failures due to paperwork not being sent to the electricity retailer or distributor.³¹

One difference between the types of solar issues being seen by Consumer Action and those being observed elsewhere³² are issues surrounding 'community run solar farms' and energy storage devices such as batteries. Consumer Action has not received a significant number of complaints relating to these issues. That is not to say that these issues do not exist or will not emerge in our casework, but rather, that they are not being reported to us by our client base. Therefore, these issues will not be addressed in this report. We recognise that these issues may represent a growing area of concern, however, and may require future consideration and research.

³¹ Energy and Water Ombudsman Victoria, *Res Online 25 - November 2018* (November 2018) <<https://www.ewov.com.au/reports/res-online/201811>>.

³² Energy and Water Ombudsman Victoria, *Res Online 25 - November 2018* (November 2018) <<https://www.ewov.com.au/reports/res-online/201811>>.

THE CURRENT CONSUMER PROTECTION LANDSCAPE

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4.1. Overview

In this section of the report, we briefly summarise the consumer protection laws and non-legal regimes currently available to households experiencing problems with solar panels.

Currently, the main consumer protections for people who purchase solar panels is the Australian Consumer Law (ACL)³³ and to a lesser extent the voluntary industry codes. The most relevant codes are those produced by the Clean Energy Council (CEC) and Smart Energy Council (SEC). Both the ACL and the codes contain quality assurance provisions and protection from or prohibition of certain unfair sales practices.

Where transactions include credit or other arrangements to finance the purchase of rooftop solar, the general consumer laws relating to credit and finance apply. They are the NCCPA, NCC and/or the ASIC Act. The ASIC Act largely mirrors the consumer protections contained in the ACL. The NCC and the NCCPA contain unique but very important protections around unaffordable credit contracts, financial hardship, and disclosure. Unfortunately, however, most finance arrangements we see associated with the purchase of rooftop solar systems are structured in a way to avoid NCC and NCCPA regulation. The CEC and SEC industry codes also try to address issues relating to finance but only go some way towards solving the problem.

³³ Contained within the *Competition and Consumer Act 2010 (Cth)* as a schedule.

GENERAL CONSUMER AND CREDIT LAWS

(Applicable to Rooftop Solar Transaction)

Non-financial Products and Services

ACL

- quality assurance
- protection from certain unfair sales practices
- consumer guarantees

Financial Products and Services

ASIC

- offers consumer protection similar to ACL but for financial products and services

Credit Product

NCCPA & NCC

- mandatory licensing regime for 'credit activities'
- protects people from irresponsible lending
- mandatory membership of AFCA
- disclosure requirements

OTHER

(Applicable to Rooftop Solar Transaction)

Contract Law

- breach of terms of solar agreements
- breach of voluntary warranties

Corporations Law

- relevant when solar panel retail businesses that have closed down or are in the process of closing down
- regulates the opening and closing of business
- sets out what a company's legal responsibilities and liabilities are when they close down

LAWS REGULATING THE TRADITIONAL ENERGY MARKET

(Limited Application to Rooftop Solar Transactions)

Victorian

- *Electricity Industry Act 2000 (Vic)*
- *Electricity Safety Act 1998 (Vic)*
- *National Electricity (Victoria) Act 2005 (Vic)*
- *Essential Services Commission Act 2001 (Vic)*

Federal laws applicable to Victoria

- National Electricity Law (NEL)

Federal laws not adopted in Victoria

- National Energy Retail Law (NERL)

Voluntary Industry Codes

The CEC Code

- created by the Clean Energy Council (CEC)
- membership-based peak body representing the renewable energy industry in Australia
- standard 5 year warranty
- × provides for warnings but doesn't disallow unregulated credit providers
- × allows unsolicited selling
- × limited role in dispute resolution

The SEC Code

- created by the Solar Energy Council (SEC)
- membership-based peak body for the solar, storage and smart energy market in Australia
- × not authorised by ACCC
- × less effective consumer protection standards
- × wide 'defences' to breach allegations

4.2 Competition and Consumer Act 2010 (Cth) (CCA) and the Australian Consumer Law (ACL)

The ACL is contained within the CCA. The aims of the CCA are to enhance the welfare of Australians through the promotion of competition and fair trading and to provide for consumer protection.³⁴ These protections are generally available to all consumers in their disputes with traders about domestic or household goods and services but do not apply to financial products (such as loans or credit cards) and services (such as financial advice).³⁵

The ACL is divided into five sections. The first section contains an introduction. The second section deals with general consumer protections such as the prohibition against misleading or deceptive conduct. The third section contains specific consumer protections such as the consumer guarantees which, amongst other things, assure people of the quality and performance of goods and services they buy. The fourth section creates several criminal offences relating to safety and unfair practices.³⁶ The fifth section deals with enforcement and remedies such as who can be found legally responsible for breaches of the ACL and what entitlements people have when they suffer harm because of an ACL breach. The sections of the ACL that are most relevant to the issues under consideration in this report are identified in the remainder of this section.

Consumer guarantees

The ACL provides automatic guarantees when a person buys non-financial goods and services. These guarantees exist regardless of any other additional voluntary warranties provided by a supplier, retailer, manufacturer or installer.³⁷ The guarantees are divided into those that apply to services and those that apply to goods.

The guarantees provide that all *goods* must:

- be of acceptable quality;³⁸
- be fit for any purpose a person made known to the trader;³⁹
- correspond with the description, sample or demonstration model;⁴⁰
- have spare parts and facilities available for the repair of the goods for a reasonable amount of time after the goods were supplied;⁴¹ and
- where express voluntary warranties are given by the manufacturer or supplier of the goods, that those warranties will be honoured.⁴²

The ACL guarantees that *services* will:

- be performed with due care and skill;⁴³
- will be fit for any particular purpose or intended result made known by a person to the supplier;⁴⁴ and
- will be supplied within a reasonable time.⁴⁵

³⁴ *Competition and Consumer Act 2010 (Cth)* s 2.

³⁵ *Competition and Consumer Act 2010 (Cth)* s 131A.

³⁶ Consumers generally cannot start a court case for redress under these offence provisions and therefore they will not be discussed any further in this report.

³⁷ Although once warranties are voluntarily given, the ACL then creates an additional guarantee that warranties will be adhered to. This means that if the supplier or manufacturer gives additional warranties in relation to their products, consumers can take legal action both under the ACL and under contract law in cases of warranty breach.

³⁸ ACL s 54.

³⁹ ACL s55.

⁴⁰ ACL ss 56- 57.

⁴¹ ACL s 58.

⁴² ACL s 59. There are also a number of guarantees that provide assurances to consumers that the goods they purchase will be theirs to possess, sell or dispose of as they choose and that the goods are free from securities or other encumbrances: ACL ss 51 - 53.

⁴³ ACL s 60.

⁴⁴ ACL s 61.

⁴⁵ ACL s 62.

Generally speaking, these guarantees will apply to rooftop solar retailers, solar installers and some may apply to the manufacturer of the panels.

While the consumer guarantees will also apply to electricity retailers, such as AGL, they only apply in relation to the goods and services supplied by the electricity retailer, meaning the supply of electricity to their customers. Because electricity retailers and distributors are not involved in the retail supply of solar panels or their installation, they will not ordinarily be found to have breached the ACL guarantees.

If the consumer guarantees are breached, the ACL creates several remedies depending on the degree of the breach and the circumstances of the case. They include repair, replacement, refund and compensation.⁴⁶

Should a disagreement arise about a person's entitlement to one of these remedies, people can enforce their rights by taking the supplier of the goods or services to court or to the Victorian Civil and Administrative Tribunal (VCAT).⁴⁷ While Consumer Affairs Victoria (CAV) provides some conciliation services, there is no dedicated alternative dispute resolution body for breaches of the ACL.

Unsolicited consumer agreements

The ACL contains specific protections around unsolicited consumer agreements. As highlighted in several reports published by Consumer Action,⁴⁸ solar panels are regularly sold using this sales method.

Unsolicited consumer agreements are ones in which:⁴⁹

- the agreement is made by telephone or at a place other than the supplier's place of business;
- the person did not invite the salesperson to come to the place or make a telephone call; and
- the price of the goods and services were over \$100 or the price was not ascertainable when the agreement was made.⁵⁰

Put simply, unsolicited consumer agreements are made between individuals and uninvited door-to-door salespeople or through cold call telemarketing. They also include circumstances where a person is approached by a trader at an unusual location or public place, away from the trader's place of business. This could include a supermarket or a car park. However, as discussed in this report will also use the term 'unsolicited sales' or 'unsolicited selling' to refer to unsolicited consumer agreements of the kind defined by the ACL.

Assuming the type of sale meets the legal definition of an 'unsolicited consumer agreement,' the ACL places a number of obligations on the seller when negotiating the agreement. They include that an unsolicited seller:

- must not call on a person on a Sunday, a public holiday or before 9am or after 6pm on any other day;⁵¹
- as soon as possible and before starting to negotiate a sale, must clearly tell a person of their purpose and identify themselves;⁵²
- must leave a property immediately upon request;⁵³

⁴⁶ Australian Competition and Consumer Commission, *Consumer Guarantees: A Guide for Consumers* (2013), 13 <https://www.accc.gov.au/system/files/Consumer%20Guarantees%20A%20guide%20for%20consumers_0.pdf>.

⁴⁷ *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7–8, 184; ACL ss 259, 267, 271.

⁴⁸ Consumer Action Law Centre, Loddon Campaspe Community Legal Centre and Westjustice, *Knock it off!* (November 2017) <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>>; Consumer Action Law Centre, *Power Transformed* (July 2016) <<https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>>.

⁴⁹ ACL s 69(1).

⁵⁰ The agreement must also: occur in trade or commerce; be an agreement for the supply of goods or services to a consumer; and be made as a result of negotiations between a dealer and a consumer: ACL s69(1).

⁵¹ ACL s 73.

⁵² ACL s 74.

⁵³ ACL s 75

- must tell people about their right to terminate the agreement;
- must tell people how they can terminate;⁵⁴ and
- written information must also be given about a person's termination rights in a form prescribed by the law.⁵⁵

Once the agreement is made, the ACL provides people with a right to terminate the agreement within a certain time. This is often referred to as the cooling off period.

In relation to the contract document, the ACL also requires that:

- the seller must give the person a copy of the agreement immediately, or, if the agreement was negotiated over the phone, within 5 business days;⁵⁶
- the agreement document must clearly set out the seller's name and business details,⁵⁷ must be clear and transparent,⁵⁸ and must contain all of the terms including the total price to be paid to the consumer or how the total price is to be calculated;⁵⁹
- the front page of the agreement must have a clear, obvious and prominent notice informing the person of their right to terminate⁶⁰ and must be signed by the consumer,⁶¹ and

- the agreement must contain a form that can be used by a person to terminate the agreement.⁶²

The termination period or the 'cooling off period' is generally 10 days from the date a person receives a copy of the agreement.⁶³ However, if the ACL provisions relating to unsolicited consumer agreements are breached by the seller, the termination period increases to 3 or 6 months, depending on the type of breach.⁶⁴

A person is permitted to terminate the agreement within the cooling off period⁶⁵ and any related contract or instrument is void.⁶⁶ This means the supplier must promptly return any money paid under the agreement and must notify any related credit provider.⁶⁷ That being said, the law around a person's termination rights against a third party finance provider are complex and hard to understand.⁶⁸

The objectives of these unsolicited consumer agreements provisions are to provide additional consumer protection in situations where people might experience additional vulnerability or disadvantage due to the nature of the sales process.⁶⁹

The additional protections recognise that the risk of high pressure sales are greatest in situations of unsolicited selling because people do not expect to be approached by a trader, they do not have the option of walking away or it may be unclear that they are entering into a contract (as can occur over the phone).⁷⁰ The psychological underpinnings contained

⁵⁴ ACL s 76.

⁵⁵ See: ACL s 77(b)-(d); *Competition and Consumer Regulations 2010* (Cth), reg 84.

⁵⁶ ACL s 78.

⁵⁷ ACL s 79(d).

⁵⁸ ACL s 79(e) and (f).

⁵⁹ ACL s 79(a).

⁶⁰ ACL s 79(b); *Competition and Consumer Regulations 2010* (Cth), reg 85.

⁶¹ ACL ss 79(b)(iii); *Competition and Consumer Regulations 2010*, reg 86.

⁶² ACL s 79(c)(i).

⁶³ ACL s 82(3).

⁶⁴ ACL ss 82(c)-(d).

⁶⁵ ACL s 82(1).

⁶⁶ ACL s 83(1).

⁶⁷ Australian Competition & Consumer Commission, *Telemarketing & door-to-door sales* <<https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales#your-consumer-rights>>.

⁶⁸ If the finance is credit regulated by the NCC and the provider is a 'linked credit provider' (as defined by the NCC), s 135 provides purchasers with an entitlement to terminate a tied loan or tied continuing credit contract. If the finance is not regulated credit, s 83 of the ACL states that any related contract is void. Whether finance is regulated by the NCC is a complex question based on a series of legal definitions related to the concept of 'credit.'

⁶⁹ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 465-466 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

⁷⁰ *Ibid.*

within the in home sale context and the emotional manipulations employed by some in-home sellers may also negatively impact upon a person's decision making abilities.⁷¹ These issues were explored in a joint research project conducted by Deakin University and Consumer Action in 2010.⁷² Unsolicited selling also occurs where information asymmetry in favour of the seller is more likely.⁷³

Unlike in other retail settings, people confronted with unsolicited selling are unlikely to have engaged in product comparisons, sampled the product⁷⁴ or have had the benefit of shopping around to place downward pressure on prices that the open market place can sometimes offer. It has also been found that the following factors are more likely to be present in cases of unsolicited sales than in other retail settings:⁷⁵

- retailers use moral pressure to try to create an obligation of reciprocity by, for example, providing free gifts;
- the goods are unique, making comparisons more difficult;
- the goods are complex or unfamiliar and so people find it difficult to rely on their own judgement;
- the relationship between the retailer and the people they target is not ongoing because the product is a one-off purchase;
- the consumer is in a situation in which they are vulnerable or disadvantaged.

These factors also increase the risk of unsuitable or high pressure sales and therefore the risk of harm.

In the explanatory memorandum to the ACL, it was also acknowledged that unsolicited selling practices can cause inconvenience and can be perceived as threatening.⁷⁶

Misleading and deceptive sales

The ACL provides both a general protection against misleading or deceptive conduct⁷⁷ and specific protections against unfair practices including misleading claims about goods or services.⁷⁸

The general protection prohibits misleading or deceptive representations by traders along with representations that are likely to mislead or deceive.⁷⁹ The specific protections in the ACL prohibit businesses from engaging in a range of misleading representations, distinctly articulated in the ACL, about goods or services. They include that a business must not:⁸⁰

- make false or misleading representations that goods or services are of a particular standard, quality, value or grade;⁸¹
- make false or misleading representations that goods or services have approval, performance characteristics, uses or benefits;⁸² and
- make false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.⁸³

⁷¹ Paul Harrison et al, 'Shutting the Gates: an analysis of the psychology of in-home sales of educational software' (Research Discussion Paper, Deakin University and Consumer Action Law Centre, March 2010) < <https://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf> >.

⁷² Ibid.

⁷³ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 465 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

⁷⁴ Ibid 466.

⁷⁵ Consumer Affairs Victoria, *Cooling-off periods in Victoria: their use, nature, cost and implications* (15 January 2009) <<https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/cooling-off-periods-in-victoria-their-use-nature-cost-and-implications-2009.pdf>>; Also see, Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 465 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

⁷⁶ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 467 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

⁷⁷ ACL ss 18–19.

⁷⁸ ACL pt 3.1 div 1.

⁷⁹ ACL s 18; Also see, Australian Competition & Consumer Commission, *Tertiary education program: What is misleading or deceptive conduct?* <<https://www.accc.gov.au/about-us/tools-resources/ccca-education-programs/tertiary-education-program/false-or-misleading-advertising-practices/what-is-misleading-or-deceptive-conduct>>

⁸⁰ ACL s 29.

⁸¹ ACL ss 29(1)(a)-(b).

⁸² ACL s 29(1)(g).

⁸³ ACL s 29(1)(m).

If the general protection provision is breached, a person can seek monetary⁸⁴ or non-monetary compensation orders⁸⁵ for any loss and damage caused by the breach. Should a dispute arise about a person's entitlement to one of these remedies, that person can enforce their ACL rights by taking the supplier of the goods or services to court or to VCAT.⁸⁶

Unconscionable conduct

The ACL prohibits unconscionable conduct in trade or commerce in relation to the supply or possible supply of goods and services.⁸⁷ The ACL does not define what is meant by the term unconscionable conduct but it is generally understood to mean conduct that is so harsh that it goes against good conscience.⁸⁸ It is also conduct that is more than simply unfair.⁸⁹

The ACL sets out a number of factors that may be considered by a court when deciding whether conduct is unconscionable or not. They include:

- the bargaining positions of the supplier and consumer;
- whether the customer was able to understand any contract documents;
- whether undue influence, pressure or unfair tactics were used;
- the amount, and circumstances under which, a person could have acquired similar goods or services;
- any industry code; and
- the terms of the contract.⁹⁰

People who have fallen victim to unconscionable conduct can seek monetary⁹¹ or non-monetary compensation⁹² for any loss and damage caused by the breach and, should the need arise, can enforce their rights at VCAT.⁹³

Unfair contract terms

The ACL protects consumers from unfair contract terms but only those that are not the main subject matter of the contract⁹⁴ and those that are contained in standard form contracts.⁹⁵ The ACL gives the word 'unfair' a particular legal definition. In relation to consumer contracts for the supply of goods or services, unfair terms are ones that:⁹⁶

- cause significant imbalance between the consumer and the supplier;
- are not reasonably necessary to protect the interests of the supplier; and
- cause a detriment to the consumer.

If there is a dispute about whether the supplier has breached the unfair contract provisions of the ACL, a consumer can apply to a court to have the term declared unfair⁹⁷ and can seek compensation orders for any loss and damage caused by the unfair term.⁹⁸ The consumer would generally be able to take their dispute to court or VCAT.

⁸⁴ ACL s 236. This report uses the term monetary compensation broadly but, note, the ACL refers to 'actions for damages' (s 236) and 'compensation orders etc. for injured persons' (s 237).

⁸⁵ ACL s 237. Non-monetary orders might include voiding a contract or voiding some but not all of a contract's terms.

⁸⁶ ACL ss 236–237, 2 (definition of 'court'); *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7–8, 184.

⁸⁷ ACL, s 20.

⁸⁸ Australian Competition & Consumer Commission, *Unconscionable conduct* <<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>>.

⁸⁹ Australian Competition & Consumer Commission, *Unconscionable conduct* <<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>>.

⁹⁰ ACL s 22(1).

⁹¹ ACL s 236.

⁹² ACL s 237. Non-monetary orders might include voiding a contract or some of its terms.

⁹³ ACL, ss 236–237, 2 (definition of 'court'); *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7–8, 184.

⁹⁴ ACL s 26.

⁹⁵ See, ACL s 23(1). Standard form contracts are contracts that are not negotiated and can include standard terms and conditions

⁹⁶ ACL s 24. Also see ACL s 23(3) (meaning of 'consumer contract').

⁹⁷ ACL s 250.

⁹⁸ ACL ss 237, 243.

Linked credit contracts

As indicated above, the ACL generally does not apply to financial goods and services. There is one exception to this. The ACL makes some credit providers equally responsible for certain breaches of the ACL by a supplier but only where they are a 'linked credit provider.' These provisions are technical, confusing and difficult to navigate. In brief, however, the ACL considers a credit provider and a supplier of goods or services to be 'linked' where they have a business arrangement related to the supply of goods or services⁹⁹ or where the supplier regularly refers their customers for obtaining finance.¹⁰⁰ The ACL says a linked credit contract includes when a person enters into a credit contract for the purpose of buying goods or services from a linked supplier.¹⁰¹

These provisions will cover situations where, for example, a solar panel retailer has an arrangement with a finance provider under which the retailer regularly arranges finance to enable their customers to buy their solar panels. If this situation exists and the supplier breaches one of a specific list of laws, the linked finance provider will be equally responsible for the supplier's breach.

While the effect of these provisions, as described here, may be easy enough to digest, the laws themselves are difficult for the average person to navigate.

A person trying to navigate their way around these laws will face further difficulty in knowing where to take a dispute with a linked credit provider should the need arise. This is because ordinarily VCAT will not hear disputes about financial products, services or credit.¹⁰²

It could be argued, however, that VCAT should hear cases against linked credit providers. The argument would go that because linked credit provisions exist under the ACL and jurisdiction has been conferred on VCAT by Victorian legislation¹⁰³ to hear ACL disputes, then VCAT should be able to hear claims against linked credit providers.

However, this is a fairly nuanced legal argument and one that may very well be lost on the VCAT staff administering complaints.

If VCAT is not available to people with disputes against credit providers, the only dispute resolution option available to them may be the courts.¹⁰⁴

4.3 The Australian Securities and Investments Commission Act 2001 (Cth)

For the most part, the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) provides very similar consumer protections as the ACL. However, unlike the ACL, the consumer protections under the ASIC Act apply to financial products and services.¹⁰⁵ The ASIC Act will therefore only become relevant to the sale of rooftop solar panels when people enter into arrangements to finance the purchase of the panels.

Except for a few deviations, the protections under the ASIC Act largely mirror those of the ACL. In fact, the language relating to unfair contract terms,¹⁰⁶ unconscionable conduct,¹⁰⁷ misleading or deceptive conduct¹⁰⁸ and the specific protections against certain

⁹⁹ ACL s 2(a)(iii).

¹⁰⁰ ACL s 2(b). Note, this is not an exhaustive list of circumstances or contracts which the law considers to be linked credit contracts.

¹⁰¹ ACL s 278(2).

¹⁰² Section 187 of the National Consumer Credit Protection Act 2009 (Cth) omits VCAT from its exhaustive list of courts that can hear a civil dispute under that Act. In contrast, the ASIC Act does contain a provision providing a list of courts or tribunals provision that can hear a claim under the ASIC Act. However, it is nevertheless generally accepted that VCAT does not have jurisdiction to hear claims under the ASIC Act because jurisdiction has not been expressly conferred on VCAT to do so by a Victorian Act of Parliament. Also see: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 40-43, 3 (definition of "enabling enactment" and "enactment"); *Acts Interpretation Act 1984* (Vic) s 38; *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 184(1), 8; ACL s 2 (definitions of "consumer", "goods" and "services"); CCA ss 131, 131A.

¹⁰³ *Australian Consumer Law and Fair Trading Act 2012* (Vic), ss 8, 182. Also, the ACL does not define the word 'credit' either by reference to the NCCPA or at all. So, the distinction between regulated and unregulated credit does not appear to have any implications in this situation.

¹⁰⁴ A person may be able to take their complaint to the Australian Financial Complaints Authority (AFCA). This depends on whether the credit provider is regulated or is a member of AFCA. Consumer Action has observed that many credit providers involved in the finance of rooftop solar panels are not regulated.

¹⁰⁵ See wording of ASIC Act ss 12BF, 12CA, 12CB, 12DA, 12DB. Also see: ASIC Act ss 12BAB (definition of financial service.), 12BAB(1)(a)-(c), 12BAB(1AA), 12BAA (definition of "financial product").

¹⁰⁶ ASIC Act ss 12BF-12BM.

¹⁰⁷ ASIC Act ss 12CA-12CC.

¹⁰⁸ ASIC Act ss 12DA.

false or misleading claims¹⁰⁹ is almost identical under both laws. The ASIC Act warranty provisions are also fairly similar, in effect, to the ACL guarantee provisions.¹¹⁰

From a consumer's perspective, the major difference between the ASIC Act and ACL consumer protection regimes relates to the forums available for dispute resolution. It is generally accepted that VCAT does not have jurisdiction to hear disputes about financial services or products.¹¹¹ If the financial product or service is not regulated by the NCC or NCCPA, the only avenue for redress are the courts. Running a case through court is an expensive, risky, technically challenging and stressful process.

The ASIC Act also does not have comparable unsolicited consumer agreement provisions. However, businesses that solicit 'credit' (as defined in the national credit laws) in door-to-door sale situations are required to hold a licence and comply with the national credit laws.¹¹² These laws are discussed immediately below. This may have the effect that people selling non-financial goods or services, such as solar panels, are unlikely to offer regulated credit because, if they did, it would mean that they (the solar panel retailer) would be legally required to hold a credit licence.

4.4 The National Consumer Credit Protection Act 2009 (Cth) (NCCPA) and the National Credit Code (NCC)

The NCCPA creates a mandatory licensing regime for businesses engaging in 'credit activities'¹¹³ and imposes obligations on these licensees. It also contains the NCC. Both the NCCPA and the NCC provide important provisions to protect people from harmful lending practices. The NCCPA and NCC will not be relevant to all cases involving rooftop solar panels. It will only be triggered in some cases involving the use of particular kinds of finance arrangements to purchase the panels.

Importantly, the NCCPA requires that all licensed credit providers lend responsibly, and ensure that credit contracts are 'not unsuitable' before entered into with the consumer.¹¹⁴ Generally, the responsible lending obligations placed on licensees require that licensees, in determining suitability, make inquiries about and take steps to verify:

- a person's requirements and objectives in obtaining the credit; and
- whether the person can afford the credit without suffering financial hardship.¹¹⁵

The NCCPA states that licensed credit providers must be a member of the Australian Financial Complaints Authority (AFCA).¹¹⁶ AFCA is the external dispute resolution service that recently replaced the Financial Ombudsman Service and the Credit and Investments Ombudsman. AFCA is not a government agency or a regulator. AFCA's dispute resolution service is free for consumers and aims to operate in a way that is accessible, independent, fair, accountable and

¹⁰⁹ ASIC Act s 12DB.

¹¹⁰ Rather than provide a guarantee in relation to the provision of financial services, the ASIC Act's warranty provisions have the effect of creating implied contract terms in contracts for financial services that the services will be rendered with due care and skill and any materials supplied in connection with the services will be reasonably fit for the purpose for which they are supplied; ASIC Act s 12ED.

¹¹¹ Due to the combined interpretation of the following legislative provisions (or omissions): *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 40-43, 3 (definition of "enabling enactment" and "enactment"); *Acts Interpretation Act 1984* (Vic) s 38; jurisdiction has not been expressly conferred by an Act of the Victorian Parliament for VCAT to hear a claim under Part 2 of the ASIC Act; *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 184(1), 8; ACL, s 2 (definitions of "consumer", "goods" and "services"); CCA, ss 131, 131A (financial services excluded from the majority of the ACL).

¹¹² NCCPA s 29; *National Consumer Credit Protection Regulations 2010* (Cth), r 23(4).

¹¹³ See generally, NCCPA ch 2.

¹¹⁴ See generally, NCCPA ch 3.

¹¹⁵ See generally, NCCPA ch 3.

¹¹⁶ NCCPA s 47(i).

efficient. This is an extremely important aspect of the NCCPA from a consumer perspective because a person can utilise AFCA's dispute resolution to enforce their NCC or NCCPA rights instead of going to court.

The NCCPA contains the NCC. The NCC also provides a number of important consumer protections including:

- the required form of a credit contract;¹¹⁷
- disclosure obligations;¹¹⁸
- restrictions on fees, charges and interest for certain credit contracts; and¹¹⁹
- the regulation of financial hardship arrangements.¹²⁰

However, the NCCPA and the NCC do not apply to all credit arrangements. Through a series of interconnected and extremely wordy legislative definitions, the consumer protections afforded by both the NCCPA and NCC are triggered only where the following four elements are met:¹²¹

- a. the debtor is a natural person or a strata corporation; and*
- b. the credit is provided or intended to be provided wholly or predominantly:*
 - (i) for personal, domestic or household purposes; or*
 - (ii) to purchase, renovate or improve residential property for investment purposes; or*
 - (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and*
- c. a charge is or may be made for providing the credit; and*

- d. the credit provider provides the credit in the course of a business of providing credit ... or incidentally to any other business of the credit provider ...*

Even if the above elements are met, the NCC contains a number of exemptions, excluding some kinds of credit from the operation of the NCCPA and NCC. One such exemption is for 'continuing credit contracts' under which the only charge made under the contract is fixed and not interest based.¹²²

Several businesses that we have seen working with rooftop solar retailers have argued that they do not engage in the type of credit activity or provide the type of credit regulated by the NCCPA and NCC. Usually there are two purported bases for this argument.¹²³ The first is that they say they do not make a charge for providing credit and therefore do not meet element (c) listed above. The second is that they fall within the continuing credit exemption in that the only fee they charge is one that is fixed and does not fluctuate based on the amount of credit under a contract. That is, 'interest free' loans. However, under these loans fixed fees can be applied such as establishment, administration, monthly and late fees.

Where finance arrangements do not meet this nuanced legal definition of credit, individuals miss out on basic yet important protections that the NCC and the NCCPA offer. Because it's a finance arrangement, the ACL does not apply (except where the linked credit provisions are met) and so individuals are only left with the ASIC Act for protection. This means that the ACL and VCAT are not available for dispute resolution. The only option available for consumers wishing to enforce the limited legal rights that they do have, is to go to court. Court is a risky, stressful and costly option.

¹¹⁷ See generally, NCC pt 2 divs 1, 5.

¹¹⁸ See generally, NCC pt 2 divs 1, 5.

¹¹⁹ See generally, NCC pt 2 divs 3, 4.

¹²⁰ See generally, NCC pt 4 div 3, pt 5 div 2.

¹²¹ NCC s 5(1).

¹²² NCC s 6(5).

¹²³ ASIC, Report 600: Review of buy now pay later arrangements (November 2018), 7 <<https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>>.

4.5 Other – Contract law, voluntary warranties and corporations law

People buying solar panels may also have rights against solar panel retailers under the contract law if the terms of the contract are breached. Contract law may prove particularly useful where a solar retailer offers a warranty assuring the quality and durability of a solar product, in addition to the guarantees offered in the ACL.¹²⁴

The remedies available for a breach of contract may be one of the following depending on the nature of the breach: damages; specific performance (an order from a court compelling the other party to perform the contract); or termination.¹²⁵ Individuals wishing to enforce their contract law rights against solar panel retailers can make a claim in VCAT or a court.¹²⁶

Certain parts of the corporations law have become relevant to Consumer Action's rooftop solar casework, for example, when our clients have disputes against solar panel retail businesses that have closed down or are in the process of closing down.

The corporation law generally affects our clients in these circumstances in two ways. Firstly, a company is a separate legal entity distinct from the people that run it.¹²⁷ This means when people have disputes against companies, their claim is against the company and generally the persons behind the company are immune from legal claims. When the company is gone, there is no existing legal entity which a person can sue.

Secondly, there are strict rules relating to priority of claims against companies that are winding up or in liquidation. The terms 'winding up' and 'liquidation' are used interchangeably to describe the process of collecting the assets of a company, discharging its debts and distributing any remaining assets.¹²⁸ This is a complex area of law but the most salient

aspect of the law from a consumer's perspective is that any remaining assets of an insolvent company are distributed according to a legally defined list of priorities upon which consumers' legal claims would fall towards the bottom. If the company's liabilities outweigh its assets, a consumer is unlikely to get their claim paid out.

Consumer Action is concerned that some solar retail companies and businesses might also be 'phoenixing.' Phoenixing refers to the fraudulent use of the corporations law through the deliberate liquidation of one company in order to start a new company with virtually the same name.¹²⁹ The assets of the old company are then transferred to this new company, thereby avoiding the payment of liabilities,¹³⁰ such as the payment of legal claims or debts. It is difficult to prove illegal phoenixing conduct because ordinarily there is nothing legally improper about a director of a failed company immediately starting up a new company so long as they have acted in accordance with their director's duties to the first company.

Lastly, the *Do Not Call Register Act 2006* (Cth) regulates telemarketing but not the formation of sales contracts by telephone. The Do Not Call Register is a database where individuals can list their phone numbers to avoid receiving unsolicited telemarketing calls. The Australian Communications and Media Authority (ACMA) is responsible for the register under the Act.

¹²⁴ ACCC, *Warranties* <<https://www.accc.gov.au/consumers/consumer-rights-guarantees/warranties>>

¹²⁵ Evelyn Tadros, Fitzroy Legal Service Inc., *Breach of Contract* (30 June 2017) *The Law Handbook* <https://www.lawhandbook.org.au/2018_07_01_05_breach_of_contract>.

¹²⁶ *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 184.

¹²⁷ Thomson Reuters, *The laws of Australia* (at 25 November 2013) 4 Business Organisations, '1 Introduction' [4.1.240].

¹²⁸ Thomson Reuters, *The laws of Australia* (at 25 November 2013) 4 Business Organisations, '7 Company Winding Up' [4.7.10].

¹²⁹ LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (accessed 15 February 2018) 'phoenix trading'.

¹³⁰ LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (accessed 15 February 2018) 'phoenix trading'.

4.6 Self-Regulation: The Clean Energy Council (CEC), the Smart Energy Council (SEC) and their codes of conduct

The Clean Energy Council (CEC)

The CEC is a peak body representing the renewable energy industry in Australia.¹³¹ They are a member-based organisation that works with renewable energy, storage and installer businesses.¹³²

The CEC runs a number of activities to support improvements to the renewable energy industry. The CEC:

- **maintains a voluntary Solar Retailer Code of Conduct;**
- **administers an accreditation scheme for installers and designers of stand-alone or grid connected solar PV systems; and**
- **maintains a publicly available list of accredited installers¹³³ and products that meet Australian Standards for design and implementation of solar panels.¹³⁴**

The CEC's accreditation scheme focuses on developing technical competence in design and installation of solar systems. It requires participants to complete specific training courses and comply with several codes, guidelines, standards and regulations related to the technical side of installation and design. CEC accreditation is required to access the financial incentives under the Victorian Government

rebate program, 'Solar Homes Package',¹³⁵ and the Commonwealth Government's Small-Scale Renewable Energy Scheme.¹³⁶

The CEC Solar Retailer Code of Conduct (**the CEC Code**) is a voluntary code for retail businesses selling solar systems which has been authorised by the ACCC. It aims to promote best practice in retail sales and marketing activities¹³⁷ by setting standards for pre-sale activities, post-sale activities, documentation and general business (including complaint handling). While there are some government incentives that require recipients of the incentive to be signatories to the CEC code,¹³⁸ at the date of writing, the Victorian Solar Homes Package and the federal Commonwealth Government's Small-Scale Technology Certificate scheme do not have such a requirement. This is due to change in the case of the Victorian Solar Homes Package. On 22 March 2019, the Victorian Government announced that, from 1 July 2019, the major solar retailers participating in the Solar Homes program will have to sign up to the CEC Code of Conduct.¹³⁹ All other retailers will have to be signed up by 1 November 2019.¹⁴⁰

The CEC Code focuses on the retail side of solar and therefore occupies a space distinct from CEC accreditation. The CEC Code reiterates the legal obligations of its signatories but also requires that its signatories comply with certain standards that are not otherwise legally articulated. In reiterating the existing legal requirements, the CEC Code provides an inclusive list of regulation with which signatories must comply and re-states some of the key ACL protections including those relating to misleading and deceptive conduct¹⁴¹ and unsolicited consumer agreements.¹⁴²

¹³¹ For transparency, we note that Consumer Action CEO, Gerard Brody, is the chair of the Clean Energy Council's PV retail code of conduct review panel.

¹³² Clean Energy Council, *About* <<https://www.cleanenergycouncil.org.au/about>>.

¹³³ Clean Energy Council, *About* <<https://www.cleanenergycouncil.org.au/about>>.

¹³⁴ Clean Energy Council, *Products* <<https://www.solaraccreditation.com.au/products.html>>.

¹³⁵ Solar Victoria, Victoria State Government, *Solar Panel (PV) Rebate* <<https://www.solar.vic.gov.au/Solar-rebates/Solar-Panel-Rebate>>.

¹³⁶ Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), 4 <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

¹³⁷ *Ibid.*

¹³⁸ See: Clean Energy Council, *Tender opportunities for Approved Solar Retailers* <<http://www.solaraccreditation.com.au/retailers/tenders.html>>.

¹³⁹ Minister for Solar Homes, Victoria State Government, *Cutting Power Bills with Solar Panels for 650,000 Homes* (22 March 2019) <<https://www.premier.vic.gov.au/solar-retailer-code-of-conduct-to-lift-standards/>>.

¹⁴⁰ *Ibid.*

¹⁴¹ Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.1.1 <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

¹⁴² *Ibid* cls 2.1.1, 2.1.2(b).

Many parts of the CEC Code are otherwise not expressly articulated in the law. For example, it requires signatories to provide a standard minimum warranty period of five years, separate and in addition to the ACL consumer guarantees.¹⁴³ The minimum warranty covers the operation and performance of the whole solar system including its workmanship and products.¹⁴⁴ If the warranty or ACL consumer guarantees are breached, the Code states that the consumer is entitled to a remedy in the form of a repair or replacement, provided within a reasonable time.¹⁴⁵

While the CEC Code provides welcome consumer protections, it has limitations. Common to many voluntary industry codes, the CEC Code does not provide consumers with robust remedies or enforcement mechanisms. The Code Administrator does not offer a dispute resolution service¹⁴⁶ and does not provide support for a comprehensive system of proactive compliance monitoring. That being said, the Code Administrator will investigate reports of code violations by consumers, can apply sanctions¹⁴⁷ and will undertake some proactive monitoring such as audits and signatory visits.

In cases of breach, the most severe sanction available to the Code Administrator is to remove the retailer as a signatory to the Code¹⁴⁸ and publicising their removal on their website.¹⁴⁹ Being removed as a signatory removes the benefits of being a CEC approved retailer. The benefits include being eligible for certain government tenders¹⁵⁰ and the promotion of the retailer on the CEC website as an approved, and therefore implicitly reliable, retailer. However, removal of a retailer as signatory to the Code will only occur upon serious, wilful, systemic or repetitive breaches of the Code.¹⁵¹ Sanctions for less severe

or isolated breaches of the CEC Code include the temporary suspension of Signatories, listing breaches on the CEC website and the provision of a written strategy detailing how the signatory proposes to rectify the breach to the Code Administrator.¹⁵² Breaching the CEC Code does not appear to affect accreditation and therefore, at the date of writing at least, it will not impact the signatory's eligibility to pass on government rebates and financial incentives to its customers. This may change once the proposed changes to the Victorian rebate scheme rolls out from 1 July 2019. However, for existing Code signatories to be denied the benefit of the rebate scheme, they will need to be removed as signatories of the CEC Code by the Code administrator.

Compounding these enforcement issues is the CEC Code's relatively low take up levels across the industry. Although it is gathering momentum, as of 7 January 2019, there were 185 CEC Code Signatories (i.e. Approved Retailers) in Australia, 61 of which operate in Victoria.¹⁵³ To put this in perspective, by the end of 2017 there were nearly 5000 accredited rooftop panel installers around Australia.¹⁵⁴ Information provided to Consumer Action by Clean Energy Council is that while this is only a small proportion of the number of retailers, CEC calculates that, CEC Approved Retailers have installed 28% of rooftop solar by kW volume. So, although the number of signatories is comparatively low, the proportion of the market covered by the CEC Code is significant and growing.

It must be noted that a broader code that will apply to all new energy technologies is currently being developed in response to a request from the Council of Australian Governments (COAG) Energy Council.¹⁵⁵ At the date of writing, this code, the 'New Energy

¹⁴³ Ibid cl 2.2.10.

¹⁴⁴ Ibid cl 2.2.10 (although, arguably, the ACL guarantee as to acceptable quality would operate to require the solar system last at least 5 years).

¹⁴⁵ Ibid cl 2.2.10(b).

¹⁴⁶ Ibid cl 3.1.3.

¹⁴⁷ Ibid cl 3.3.4.

¹⁴⁸ Ibid cfs 3.6.4 - 3.6.6.

¹⁴⁹ Ibid cl 3.6.6.

¹⁵⁰ Clean Energy Council, *Why sign the Solar Retailer Code of Conduct?* <<https://www.solaraccreditation.com.au/retailers/why-sign-the-code-of-conduct.html>>.

¹⁵¹ Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 3.6.4 <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

¹⁵² Ibid cl 3.6.1.

¹⁵³ Clean Energy Council, *Approved Solar Retailers* (accessed on 07 January 2019) <<http://www.solaraccreditation.com.au/retailers/approved-solar-retailers.html>>.

¹⁵⁴ Cole Latimer, 'Unavoidable: Rooftop solar panel installer True Value Solar to close', *The Sydney Morning Herald* (online), 23 November 2018 <<https://www.smh.com.au/business/consumer-affairs/unavoidable-rooftop-solar-panel-installer-true-value-solar-to-close-20181123-p50hvh.html>>.

¹⁵⁵ The COAG Energy Council is a Ministerial forum for the Commonwealth, states and territories and New Zealand, to work together in the pursuit of national energy reforms.

Tech: Consumer Code' (**NET Code**) (previously known as the Behind the Meter Code) was in draft and at the end of the stakeholder consultation phase. We do not expect the CEC Code's current provisions to be wound back by the NET code. If anything, the review process should create scope for more robust protections. Where any proposed changes become relevant to the issues discussed in this report, they will be identified. Otherwise, this report will discuss the CEC Code in its current form.

Smart Energy Council Solar Energy Storage & Related Services Providers Code of Conduct

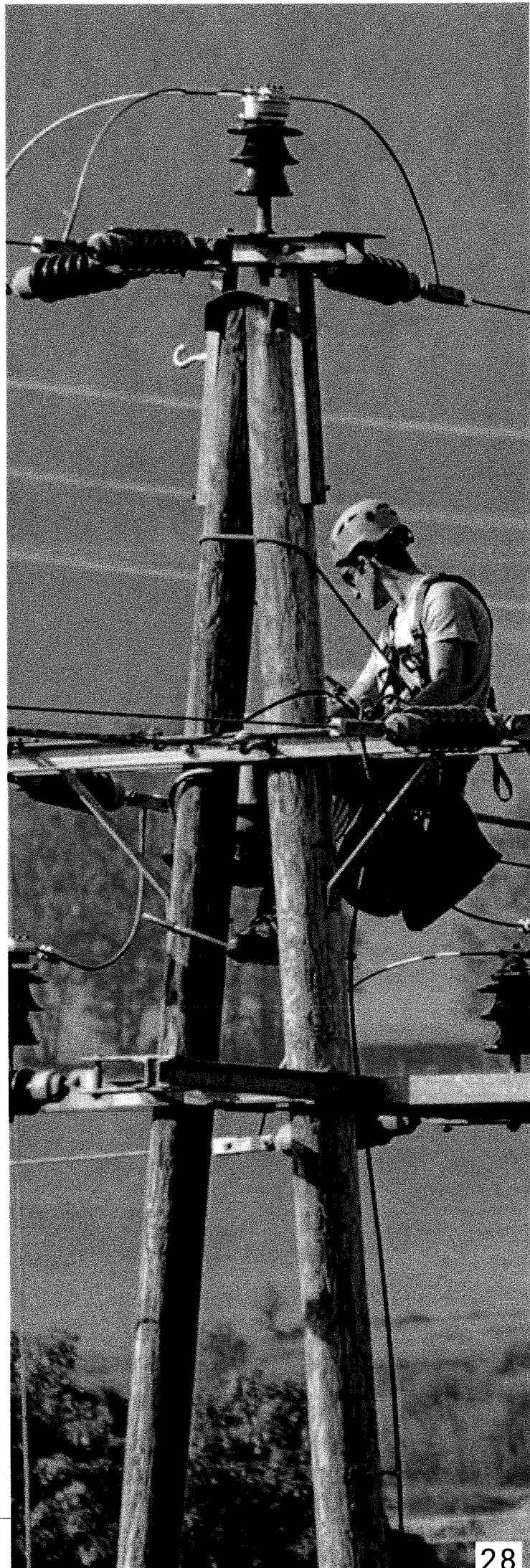
The Smart Energy Council is an industry-membership based, peak body for the solar, storage and smart energy market in Australia.¹⁵⁶ They have created a voluntary industry code, the Solar Energy Storage & Related Services Providers Code of Conduct (**the SEC Code**), for self-regulation of solar PV, energy storage and related services to Australian households.¹⁵⁷ The Code is not authorised by the ACCC. While the Code provides some useful guidance about best practice and how the ACL may apply to the retail solar industry, it does not deal with some of the areas of consumer concern, such as unlicensed finance, unsuitable finance and unsolicited consumer agreements. Like the CEC Code, the most severe sanction that can be issued for breach of the SEC Code is the to revoke approval under the Code.¹⁵⁸ Furthermore, there are also wide 'defences' to breach allegations,¹⁵⁹ which may render it even less effective for individuals.

¹⁵⁶ Smart Energy Council, *Our Story* <<https://www.smartenergy.org.au/our-story>>.

¹⁵⁷ Smart Energy Council, *Solar Energy Storage & Related Services Providers Code of Conduct DRAFT* <<https://www.smartenergy.org.au/resources/solar-energy-storage-related-services-providers-code-conduct-draft>>.

¹⁵⁸ Smart Energy Council, *Solar Energy Storage & Related Services Providers Code of Conduct*, 9 <https://www.smartenergy.org.au/sites/default/files/uploaded-content/field_f_content_file/sesrs_consultation_draft.pdf>.

¹⁵⁹ Smart Energy Council, *Solar Energy Storage & Related Services Providers Code of Conduct*, 9-10 <https://www.smartenergy.org.au/sites/default/files/uploaded-content/field_f_content_file/sesrs_consultation_draft.pdf>.



5.3 Unregulated Finance Arrangements

Through our casework, Consumer Action has developed substantial concern at the prevalence of unregulated credit providers funding solar panel purchases. The case study on the next page illustrates the harm that can be caused by unaffordable finance arrangements.

In this case, along with case study 1 on page 30, the finance providers were not licensed under the NCCPA. These finance providers claim that their products do not meet the definition of 'credit' under the NCCPA and therefore they do not require regulation. This meant that John and Susan did not receive the beneficial protections under the NCC and NCCPA such as:

- an assessment of the suitability of the finance including whether they could afford the repayments without financial hardship;
- the finance provider was not a compulsory member of AFCA so John and Susan could not take their case to a free and informal dispute resolution body alleging inappropriate finance;
- the finance providers were not bound by a regulated hardship process; and
- the finance providers and their agent (in this case the salesperson) were not bound to make pre-contractual disclosure obligations.

In relation to the pre-contractual disclosures, the finance providers were not obliged to:

- provide John and Susan with a statement of statutory rights;
- disclose the total amount of credit to be provided under the contract; and
- disclose the entities to whom the credit was to be paid.¹⁷⁸

Pre contractual information statements given before the supply of regulated credit will provide an itemised list of how the credit will be divided; how much will go to the retailer in the purchase price of the goods and/or services and how much will go to other parties such as commissions. Shockingly, neither the financial service providers nor their agents in the case studies were obliged to give this simple and transparent breakdown of the finance arrangements.

Furthermore, ASIC has limited power to regulate unregulated credit activity and address the lending risks of these activities on individuals.¹⁷⁹

The ASIC Act does provide an alternative source of rights for people with unregulated finance products. However, these are more limited and less targeted at the issue of inappropriate or unaffordable finance. Unlike the NCCPA Act, the ASIC Act does not have specific protections against irresponsible lending, does not contain hardship provisions and does not provide for a free alternative dispute resolution scheme. If John or Susan wanted to take legal action against the finance provider about being sold unaffordable finance, the only option that they would have is to make a claim that the finance provider breached the ASIC Act warranty provisions arguing that the financial services and products supplied were not fit for purpose. This would not be an easy legal argument to run and they would have to run it to a court, which is an expensive, stressful and inherently risky option.

It should be noted here that one of the solar finance providers that Consumer Action has acted against on behalf of our clients, Certegy Ezi-Pay (**Certegy**), has recently voluntarily joined AFCA, the external dispute resolution body that regulated credit providers are legally obliged to join. AFCA has both voluntary and mandatory membership. However, while people would now be able to make a complaint against Certegy in AFCA, they could not make a claim against them for breaching the NCC or NCCPA if, as Certegy argues, the NCC and NCCPA does not apply to the type of finance they offer. This means that people like Susan and John could still not make a claim against finance

¹⁷⁸ NCC ss 16, 17(c).

¹⁷⁹ ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018), 4 <<https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>>.

providers like Certegy for irresponsible lending, a type of legal claim that only exists in the NCCPA, or for breaching any of the other protections that only the NCCPA or NCC provide. However, they could make arguments about best practice in the industry or general arguments related to fairness, in accordance with AFCA's terms of reference.

While the industry-driven CEC Code attempts to address some of the issues related to unregulated credit, it does not quite plug this regulation gap and has limitations in any case. Currently, the CEC Code does not prohibit the use of unlicensed credit providers to finance solar transactions but does require people be notified that the finance is unregulated. The contract must contain a clause warning a person that the agreement is not regulated by the NCCPA and that, as a result, the person may not have access to an external dispute resolution service and financial hardship arrangements.¹⁸⁰

The proposed NET Code has sought to more comprehensively address the issue of unlicensed finance.¹⁸¹ The current consultation draft of the NET Code includes the following:

We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 1.m), we will ensure that:

- a. *this payment arrangement is offered through a credit provider (whether ourselves or a third party) licenced under the National Consumer Credit Protection Act (2009) (Cth ("NCCCPA"));*
- b. *the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC");*

- c. *the term of the deferred payment contract or lease is no longer than the expected life of the product or system; and*
- d. *ensure that you receive the following clear and accurate information...*

Consumer Action strongly supports a provision in the proposed NET Code, however, we again note the limitations of the Code. It is voluntary code and therefore does not completely cover the solar retail field. It also lacks meaningful enforcement mechanisms. A regulatory solution is therefore necessary.

Consumer Action believes there are two viable regulatory solutions available. The first is industry specific regulation prohibiting solar retailers from doing business with unlicensed credit providers and prohibiting retailers from offering unregulated credit products to their customers.

Industry specific consumer protections are not uncommon. For example, the motor car industry is regulated by the *Motor Car Trader's Act 1986* (Vic) and specific provisions in the *Australian Consumer Law and Fair Trading Act 2012* (Vic).¹⁸² A second and more relevant example is the traditional energy industry. This industry is regulated by a number of specific laws including the *Electricity Industry Act 2000* (Vic) which, for the reasons set out above, do not apply to rooftop solar and other new energy products.

The second regulatory solution is to broaden the operation of the NCCPA and NCC so that consumer credit providers seeking to exploit loopholes in the current laws are regulated. In Consumer Action's view, this second solution is the superior option. There are two reasons for this: the first and most important reason is that it is the more principled approach and the second reason relates to the current landscape in which discussions about financial law reform are already underway. Before noting the developments

¹⁸⁰ The Code says that the warning must contain the following wording: "This arrangement is not regulated by the National Consumer Credit Protection Act 2009 (Cth) ("the NCCP Act"). As a result: (a) If you have a complaint about the arrangement, 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. *If you have a complaint about the arrangement, 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 the arrangement: (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 default.*

¹⁸¹ In the interest of transparency, we note that Consumer Action was on the NET Code working group and provided submissions and input into same.

¹⁸² *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 63.

and discussions about the sufficiency of the NCC and NCCPA it is worth providing an example of how businesses avoid the NCC and NCCPA.

While there are others with similar business models, the most common company we have seen offer inappropriate financing to purchase solar panels is Certegy. Certegy does not hold an Australian Credit Licence under the NCCPA.¹⁸³ It claims that it does not need to hold a licence because they offer 'no interest ever'¹⁸⁴ finance to people who buy goods through specific Certegy-partnered retailers. Certegy's 'no interest' finance contracts appear as continuing credit contracts,¹⁸⁵ with periodic or fixed charges that do not exceed the modest caps set under the NCC. Continuing credit contracts are exempt from the definition of credit under s 6(5) of the NCC. In other words, Certegy's finance products purport to be 'unregulated' in that they do not trigger the operation of the NCCP and NCC and the protection afforded under those laws. We are concerned that businesses like Certegy may not disclose the true cost of their finance to consumers in order to avoid the NCC and NCCPA. Hidden costs could include, for example, financial arrangements and incentives they have with partnered retailers concealed by increases in the cost of the solar system components above market value. Indeed, ASIC's recent report on 'buy now, pay later' arrangements found that some merchants inflate the costs of goods underlying some of these arrangements, obscuring the actual cost of the agreements.¹⁸⁶ If true in the case of rooftop solar, this would mean that not only are people paying more than they realise for their rooftop solar system but are being unfairly denied rights under the NCCPA and NCC.

There are two recent developments that could offer the momentum needed to change the law to address NCCPA and NCC avoidance. In November 2018, ASIC released a report reviewing the buy now, pay later

arrangements. Arrangements offered by Certegy fell within the ambit of this review.¹⁸⁷ While ASIC did not go as far as recommending to the Government that the buy now pay later providers be required to comply with the NCC,¹⁸⁸ they flagged that they may do so in the future and that, in the meantime, ASIC's product intervention power ought to be extended to address some of the detriment found to be occurring in the report.¹⁸⁹

On 22 February 2019, the Senate Economics References Committee (**the Committee**) released its report of the Senate inquiry into credit and financial services targeted at Australians at risk of financial hardship. During the inquiry process, Consumer Action made submissions arguing that it is imperative that 'no interest finance' providers become subject to the NCC and NCCPA. This would require them to undertake responsible lending checks like other credit providers, including assessment of an individual's capacity to repay. It would also ensure that financial hardship arrangements and proper dispute resolution processes were available to consumers. Equally, we submitted, these obligations should apply to the other types of finance products currently structured to avoid the NCCPA and NCC, including, all buy now pay later, short term credit contracts and deferred bill paying services.

On the issue of buy now pay later arrangements, the Committee recommended that the government give further consideration to the regulation of these arrangements in consultation with industry and consumers.¹⁹⁰ The Committee did not go so far as to recommend, as Consumer Action submitted ought to occur, that responsible lending provisions under the NCC and NCCPA be extended to cover these types of unregulated credit arrangements. While Consumer Action welcomes many of the recommendations made by the Committee as an important step in the

¹⁸³ Although, note, Certegy's parent company does hold a licence: ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018), 7 <<https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>>.

¹⁸⁴ Certegy Ezi-Pay, *About Certegy Ezi-Pay* <<https://www.certegyezipay.com.au/>>.

¹⁸⁵ ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018), 8 <<https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>>.

¹⁸⁶ *Ibid* 10-11.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* [71].

¹⁸⁹ *Ibid* [70]. For the kinds of detriments ASIC found to exist, see summary of findings on pages 9 – 15.

¹⁹⁰ Senate Economics References Committee, Parliament of Australia, *Credit and hardship: report of the Senate inquiry into credit and financial products targeted at Australians at risk of financial hardship* (February 2019) 11. The report is available online from: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report/c05.



right direction, we maintain that the NCC and NCCPA needs to have broader application in order to prevent the kinds of harm evidenced in our submissions and those made by other community organisations.

If these protections were in place for John and Susan in the above case studies, it is likely that they would not have been provided with finance that they could not afford. Or, if they had been provided with the unaffordable finance, they would have had access to a regulated process for seeking a financial hardship arrangement or could have made a claim against the finance providers for breaching the responsible lending provisions of the NCCPA and the pre-contractual disclosure requirements of the NCC.

Extending the NCCPA is the more principled regulatory solution to the issues presented in this report for three reasons. Firstly, there is no principled reason why these providers should be exempt from these basic consumer protections that apply to other consumer credit products. Currently, there is a gap between what the average person considers to be credit and the nuanced version of credit invented by the NCC. The gap creates regulatory loopholes in the NCCPA and NCC that Consumer Action feels are exploited by fringe lenders for no good reason. Secondly, extending the NCCPA laws to all of these finance products will future proof the regulation against other gaps and loopholes that may be exploited by new energy product retailers. Some providers will always look for

canny ways to avoid regulatory oversight and so we should keep the opportunities to do so to a minimum. Lastly, this approach could be complemented by a broad anti-avoidance provision that allows the regulator to crack down on avoidance models. Examples of anti-avoidance models can be found in the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018 (Cth) and the Corporations Act 2001 (Cth). The anti-avoidance provisions under Corporations Act 2001 (Cth), target schemes that appear to have no commercial purpose other than to avoid the application of parts of that Act.¹⁹¹ Persons under such schemes may be liable for a civil penalty if they have breached the anti-avoidance provisions. Similar anti-avoidance provisions would be necessary to ensure the policy intent behind broadening the application of the NCC and NCCPA is achieved.

RECOMMENDATION 2:

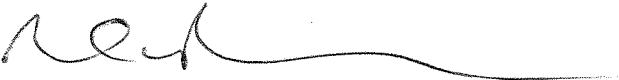
The NCCPA and NCC be amended to broaden their application to all credit products and that this be complimented with broad anti-avoidance provisions.

¹⁹¹ ASIC, *Regulatory Guide 246: Conflicted and other banned remuneration* (December 2017), 68 <<https://download.asic.gov.au/media/4566844/rg246-published-7-december-2017.pdf>>.

IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

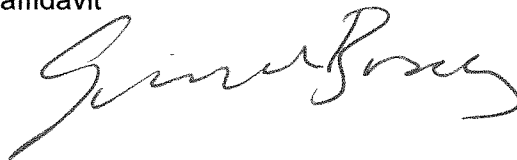
Certificate identifying annexure

This is the annexure marked **GB-2** now produced and shown to Gerard Brody at the time of affirming his affidavit on 21 February 2020.

Before me: REX PASCAL PUNSHON


Level 6, 179 Queen Street, Melbourne VIC 3000
An Australian Legal Practitioner within the meaning of the
Legal Profession Uniform Law (Victoria)

Signature of person taking affidavit



21 May 2019

By email: adjudication@accc.gov.au

Susie Black
Director (A/g) Adjudication Branch
Australian Competition and Consumer Commission

Dear Ms Black,

Re: AA1000439 New Energy Tech Consumer Code

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the application for authorisation of the New Energy Consumer Code. Energy is an essential service and the energy system is rapidly transitioning to new technologies. Householders are finding it increasingly complex, confusing and risky to make decisions about their energy supply so industry initiatives like this Code are welcome.

The New Energy Consumer Code (**The Code**) must incorporate appropriate consumer protections. We strongly support the requirements that those that join the Code only offer finance arrangements through providers that are licenced under the *National Consumer Credit Protection Act 2009* (**NCCPA**). However, the code must also go further and ban all unsolicited sales and require an 'opt-in' protection period following off premises sales for those that join the code.

Consumer Action's previous work demonstrates how a lack of regulatory protections are leading to abysmal consumer outcomes in the new energy technology market, particularly in relation to the installation of solar panels. Such conduct risks eroding consumer trust in new energy technology and the businesses that provide this technology. Such risks impact the viability of new entrants as well as the viability of markets that would otherwise deliver great benefits for consumers and our environment.

Consumer Action's legal practice regularly hears reports from, or provides assistance to, vulnerable and disadvantaged people with issues arising from the conduct of solar retailers. Residential Solar PV systems are the first wave of New Energy Products that have been sold to households. Our 2019 *Sunny Side Up*,¹ 2017 *Knock it off!*² and 2016 *Power Transformed*³ reports have drawn on our assistance work in order to recommend changes to

¹ Consumer Action Law Centre, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*.

² Consumer Action Law Centre, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*

³ Consumer Action Law Centre, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*.

strengthen the consumer protection regime for new energy products, reduce harm caused by door to door sales and improve trust and consumer outcomes in the transforming energy market.

We draw on these reports further in our comments below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Solar providers should not facilitate finance with unlicensed businesses

Case Study One – Rose and Leonard

Rose and Leonard (not their real names) receive Disability Support and Carers Pensions. They already had a functioning solar system when they were door knocked by a solar retailer last year. Although they initially stated that they were not interested as they already had solar, on three of the occasions when the salesperson visited the property, the salesperson continued with high pressure sales tactics. Additional panels were installed and are not delivering the returns that Rose and Leonard expected based on what the salesperson told them.

Finance for the panels was provided by an unlicensed credit provider. Repayments on the loan increased without being explained and Rose and Leonard had felt pressured to sign documents that weren't properly explained. The finance company is not required to be a member of an ombudsman scheme or required to provide hardship assistance because it is unlicensed. Rose and Leonard are experiencing financial hardship and they have less reliable options to resolve this than if the finance was provided by a licenced business. Their financial hardship meant they could not afford food at times and could not attend some specialist medical appointments.

As highlighted in case study one, finance arrangements from providers that are not licensed under the NCCPA leave consumers unprotected from poor outcomes. For this reason, we strongly support the code only allowing signatories to offer finance arrangements through providers that are licenced under the NCCPA. Allowing new energy providers to arrange finance from unlicensed providers may also incentivise them to undertake sales practices that are not in the interests of consumers, like the high-pressure sales mentioned in case study one.

Unlicensed finance providers can be predatory lenders when partnered with new energy product providers. Currently new products like solar or batteries often cost above the \$5,000 bankruptcy threshold (especially with the hidden cost of finance built into the price) and are almost always installed in owner-occupied properties as opposed to rentals. If an irresponsible loan is provided in a high-pressure sale where a salesperson makes misrepresentations about the savings a household can make, then the household is easily exposed to hardship when paying back the finance arrangement. They also have the threat of loosing their home and their provider is not required to have internal dispute resolution or provide fair, free and effective external dispute resolution.



Consumer Action's *Sunny Side Up* report found that inappropriate or unaffordable finance is regularly being offered to purchase solar systems and is causing consumer harm in the solar industry. The Code's requirement for NCCPA licensed finance providers may incentivise these problematic lenders to work within national consumer credit laws or cooperate with decision makers to have these laws amended to include their business models in the laws' ambit and protection framework. If it doesn't do this it will still prevent unnecessary consumer harm from the providers who join, facilitate better outcomes for consumers and prevent conduct that will threaten consumer's trust in new energy technology providers as a whole.

Case Study – Robert's not getting what he was promised.

Robert (not his real name) is an older person who lives in an outer suburb of Melbourne and receives Centrelink benefits. He recently contacted Consumer Action's legal service because a solar retailer has left him with a solar system on his roof that, as far as he can tell, is doing absolutely nothing.

Robert recalls being door knocked by a LED lights salesperson who also suggested he get solar. The salesperson set up an appointment for a solar retailer's salesperson to visit a week later. The LED lights installers never returned.

The solar retailer's salesperson sold Robert a 5kW solar system for \$6050. Robert paid the full amount and from what he was told he understood that:

- he would be entitled to the Victorian Solar Homes Rebate and that the paperwork for this would all be arranged by the solar retailer;
- the solar retailer would arrange all the paperwork for him to receive a feed in tariff;
- he would save money as he was told the feed in tariff would mean that his electricity bills would reduce to virtually nothing.

The system was installed by a subcontractor. The paperwork necessary to certify the system is safe to operate and connect to the electricity grid has not been completed. He is not receiving the feed in tariff and it is possible the panels are not providing electricity to his property. Even if they are, he has not received confirmation that they are safe. It is also unlikely Robert meets the requirements of the Victorian Solar Homes rebate despite the representations made to him, which would mean he needs to pay \$2,225 more than he expected. Even if he does receive the feed in tariff, it is very unlikely to reduce his bills as much as he was told.

Robert has contacted the Solar Retailer on several occasions, but they have not resolved his problems. While Consumer Action will represent Robert to assist with this dispute, we are unable to offer representative assistance to many people who contact us with solar issues due to our capacity.

The Solar industry should not conduct unsolicited selling

The requirements around marketing and sales in the code are not strong enough. The requirement that businesses who join the code 'avoid high pressure sales tactics'⁴ is vague and only provides guidance on avoiding problematic sales practices. It does not commit those who join the code to not conduct high-pressure sales.

An additional requirement must be added to the Code, which stipulates that businesses who join will not conduct unsolicited sales. This will prevent circumstances where power imbalance, information asymmetry and high-pressure sales tactics lead to bad outcomes for consumers from arising in the first place. The need to add this requirement is evident from our legal advice and policy work on solar issues.

Our *Sunny Side Up* report identified misleading and high-pressure sales tactics in the context of unsolicited sales as a major systemic issue causing harm in Victoria's solar market. It recommended a ban on unsolicited sales in the solar industry. Almost all new energy technology will be a complex offering like solar and without appropriate protections history will be repeated as new technologies increase in popularity and are sold to consumers.

Require an 'opt in' protection period after off premises sales

The Code should also require that signatories provide an 'opt in' protection period following all off premises sales. Doing so will fill a protection gap by giving consumers rights that are likely to be more effective than cooling-off periods. This will in particular benefit those who face barriers to cancelling a contract following high pressure sales.

Our *Knock it off!* report noted a trend of solar products being prevalent amongst harmful door to door sales. One of the recommendations outlined in the report emphasised that decision makers must give consideration to broadening unsolicited sales protections so that they apply to all 'off-premises' contracts. This is currently the case in the European Union and United Kingdom. The report also pointed to evidence that an 'opt-in' protection period, where consumers must actively contact a business to confirm the sale, is likely to be a more effective protection than 'cooling off period' protections that often fail to prevent harm caused by unsolicited selling. The report recommended trialling 'opt-in' protections in the new energy technology market.

Broadening protections beyond unsolicited sales in the Code would mean that solar retailers that join could not utilise a loophole and leave consumers with less protections where an initial unsolicited approach from a salesperson with vague information sets up an in-home appointment with a second salesperson. This is what happened to Robert in case study two. As a result, he was not covered by additional protections that apply for unsolicited sales.

The Code is voluntary and could therefore allow industry to raise standards in new energy technology sales.

Consumer protections will build people's trust to engage with new tech

Our *Power Transformed* report sets out policy principles aimed to facilitate good outcomes for consumers in the transforming energy market. Consumer protections are identified as essential elements to a successful market where consumers trust suppliers to deliver what is expected and agreed upon. Consumer protections encourage consumers to trust that providers are competent to deliver or that if they are not, there are effective remedies.

⁴ Clean Energy Council, 2019. *RE: Application for authorisation made under sections 88(1) of the Competition and Consumer Act 2010* Appendix B, p.6.

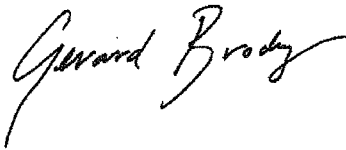
Consumers can therefore engage more, and a market is more likely to thrive and be more attractive to new entrants.

Protecting consumers from arrangements with unlicensed finance providers, unsolicited sales and from high pressure off-premises sales of new energy tech will prevent consumer detriment that leads to overwhelming consumer distrust in new energy technology. New energy technology has the potential to provide many benefits to households, improve efficiency in the energy system and reduce Australia's emissions. These benefits are at risk of being undermined as consumer trust is eroded by detrimental experiences with the sale of new energy technology.

Please contact Jake Lilley on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.


Gerard Brody
Chief Executive Officer

IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

Certificate identifying annexure


This is the annexure marked **GB-3** now produced and shown to Gerard Brody at the time of affirming his affidavit on 21 February 2020.

Before me:

REX PASCAL PUNSHON


Level 6, 179 Queen Street, Melbourne VIC 3000
An Australian Legal Practitioner within the meaning of the
Legal Profession Uniform Law (Victoria)

Signature of person taking affidavit



20 September 2019

By email: adjudication@accc.gov.au

Delia Rickard, Sarah Court, Mick Keogh and Stephen Ridgeway
Commissioners
Australian Competition and Consumer Commission

Dear Commissioners

AA1000439 New Energy Tech Consumer Code Application – responses following pre-decision conference

Consumer Action Law Centre welcomes the opportunity to provide further comments following the pre-decision conference on the AA1000439 New Energy Tech Consumer Code (**The Code**) Application. As in previous submissions we strongly support the proposal to prohibit signatories to The Code offering inappropriate finance arrangements. We also continue to call for The Code to incorporate appropriate protections in relation to unsolicited selling. Including these protections in The Code will address systemic issues and result in a net public benefit from approving The Code.

Our comments are discussed in more detail below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Claims made at the conference

At the pre-decision conference a Brighte representative made comments to the effect that Consumer Action only represents the most vulnerable consumers and that our comments should only be considered on that limited basis. Such a claim fundamentally misunderstands that any consumer can become vulnerable or disadvantaged through a chain of events or change in circumstances. It is necessary to have adequate consumer protections so that all consumers get good outcomes wherever the need arises. Not including the necessary protections will leave all customers of signatories to The Code exposed to potential harm. Where harm is caused it risks eroding all consumers' trust in the new energy technology industry as a whole.

Buy Now Pay Later

At the hearing, there was significant discussion in relation to a drafted amendment to of the provision of The Code that regulates signatories offering deferred payment. We do not support amending the code from what was originally proposed. At the time of the hearing the drafting was as follows (with the change in red):

24b) the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC"), or complies with a regulator approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA.

The industry code being developed for Buy Now Pay Later (BNPL) providers that was discussed at the conference cannot be genuinely equivalent to the National Consumer Credit Protection Act (NCCPA).

First, it is very unlikely that an industry code could have equivalent resources and penalties for enforcement as is the case for the NCCPA. This is because the NCCPA is enforced by ASIC, a well-resourced government regulator whereas an industry code is unlikely to be equivalently resourced with a clear penalty regime.

Second, issues were also raised by RateSetter at the pre-decision conference about practices of inflating the price of financed goods. As previously submitted to the ACCC, ASIC identified that this is sometimes the case where goods cost over \$2,000.¹ An equivalent code would have to ensure signatories disclosed the cost of finance to consumers. In doing so, this would make such deferred payment fall under the definitions of consumer credit under the National Credit Code (NCC) and NCCPA, defeating the purpose of a parallel code as the business would have to comply with the NCCPA. Where this fee is not disclosed as a requirement of the industry code, there will not be equivalence with the NCCPA.

The proposed amendment to The Code therefore poses a risk of inconsistent protections and outcomes between consumers that deal with signatories that use licensed credit providers and those that use BNPL providers. Signatories which arrange finance that complies with the NCCPA and the NCC will be at a disadvantage compared to signatories that arrange unregulated finance. Public detriment will be exacerbated where consumers do not receive information about the difference in protections that apply to different signatories. Consumers would reasonably assume that all signatories abide by the same standard.

RECOMMENDATION 1. Ensure that all deferred payment arrangements offered by code signatories are subject to no less than the NCCPA and NCC consumer protections.

At the pre decision conference Brighte also claimed that interim measures would need to be put in place where The Code was in effect before an equivalent industry code for BNPL was approved and operational. Such interim or transition arrangements would completely undermine the protections in The Code and are therefore unacceptable. There is no guarantee a satisfactory industry code for BNPL would be developed let alone this development being timely. Should the ACCC accept the proposed amendment to The Code then consumers will be exposed to inappropriate finance provision where interim or transition measures are allowed.

RECOMMENDATION 2. Do not allow interim measures where signatories to The Code can offer deferred payment in arrangements that do not meet the NCCPA and NCC.

¹ ASIC, 2018. REP 600 Review of buy now pay later arrangements, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-600-review-of-buy-now-pay-later-arrangements/>

Unsolicited Sales

Throughout this process and at the pre-decision conference we have pointed to how unsolicited sales of new energy technology products are systemic issues that lead to net public detriment.² Further to the discussion at the pre-decision conference, we see it as appropriate that the administrator of the code have the ability to issue mandatory guidance to signatories to not conduct unsolicited sales or to move to 'opt in' or deferred purchase models in order to prevent harm arising from high pressure sales.

We understand that the Applicants may be likely to propose amendments to clauses that will enable the administrator to require signatories to demonstrate that they have auditable processes in place to ensure that high pressure sales do not take place. We support such amendments as this will hold signatories accountable to the higher standards in The Code.

We also understand that the Applicants are likely to propose an amendment to The Code that would prohibit signatories from offering deferred payment arrangements in unsolicited sales. We support such an amendment as it would ensure that the significant harm that has been caused by inappropriate BNPL arrangements being offered in unsolicited sales³ are addressed. This amendment will also 'level the playing field' for competing businesses where one offers NCCPA governed finance providers and therefore cannot conduct unsolicited sales while the other may offer BNPL finance and be able to do so due to current gaps in consumer protections.

RECOMMENDATION 3. Enable The Code administrator to issue mandatory guidance to prohibit signatories from undertaking unsolicited sales or require signatories to undertake a deferred sales method.

RECOMMENDATION 4. Approve any amendments that enable the Administrator to require signatories to demonstrate auditable processes to confirm their compliance with The Code.

RECOMMENDATION 5. Approve amendments that prohibit signatories from offering deferred payment arrangements in unsolicited sales.

Please contact Jake Lilley at **Consumer Action Law Centre** on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

² See for instance Consumer Action, 2019. Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria. Available at: <https://consumeraction.org.au/20190404-sunny-side-up-report/>

³ Ibid and Consumer Action, 2017. Knock it off! Door-to-door sales and consumer harm in Victoria, p.68. Available at: <https://consumeraction.org.au/knock-it-off/>

IN THE AUSTRALIAN COMPETITION TRIBUNAL
APPLICATION BY FLEXIGROUP LIMITED
ACT 1 OF 2019

Certificate identifying annexure

This is the annexure marked **GB-4** now produced and shown to Gerard Brody at the time of affirming his affidavit on 21 February 2020.

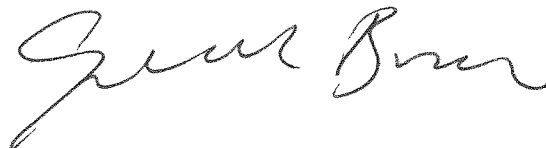
Before me:

REX PASCAL PUNSHON



Level 6, 179 Queen Street, Melbourne VIC 3000
A) Australian Legal Practitioner within the meaning of the
Legal Profession Uniform Law (Victoria)

Signature of person taking affidavit



07 November 2019

By email: adjudication@acc.gov.au

Delia Rickard, Sarah Court, Mick Keogh and Stephen Ridgeway
Commissioners
Australian Competition and Consumer Commission

Dear Commissioners

AA1000439 – New Energy Tech Consumer Code— consultation on proposed amendments to draft Code

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the AA1000439 – *New Energy Tech Consumer Code—consultation on proposed amendments to draft Code (Proposed Amendments)*. Consumer Action has regularly assisted Victorian households to overcome issues with inappropriate finance arrangements in the provision of new energy technology. Our strong preference remains that the ACCC approve the initial code proposal which would require signatories to the New Energy Tech Consumer Code (**NETCC**) to only offer deferred payment through credit providers that are licensed under the National Consumer Credit Protection Act (**NCCPA**) and the National Credit Code (**NCC**). These licensed providers must comply with robust consumer protection requirements, face appropriate consequences for not complying and these protections include well-structured access to dispute resolution for households.

However, the proposed amendments to clause 24 of the NETCC (**Proposed Amendments**) from the ACCC have taken a convoluted path as they require only select clauses from the NCCPA to apply to unregulated finance providers. While this approach may improve protections and outcomes for customers of code signatories, it also presents a number of challenges. Firstly, the clauses are very limited when compared to of the complete legislation and regulation that provide protections to consumers in the NCCPA and NCC. Secondly, this approach places significant strain on the NETCC Code Administrator who will have very limited enforcement powers to ensure compliance with finance issues, let alone assessing which financial providers meet the specified requirements when their expertise should instead be focused on new energy technology.

We explain these comments in more detail below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy

work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Further amendments needed to improve protections

If the ACCC continues to pursue amendments from the initial application, the Proposed Amendments should be strengthened. Consumer Action supports the specific clauses of the NCCPA that have been selected by the ACCC, but the proposals relating to dispute resolution and hardship are too open ended. It is important that the ACCC acknowledge that these arrangements are less than ideal, and that it would be better if Buy Now Pay Later (BNPL) were regulated by the NCCPA and subject to civil and criminal penalties. The inconsistent enforcement regimes that apply to deferred finance providers under the NETCC in the Proposed Amendments may give some providers an unfair competitive advantage. This may also lead to harm to households where there is less risk for some providers associated with non-compliance with consumer protections.

Responsible lending

The Proposed Amendments clearly define responsible lending requirements from the NCCPA that non-licensed deferred payment providers would need to comply with. We support these requirements. Without appropriate lending checks consumers can face significant hardship because they can rapidly find themselves in debt as they are signed up to repayments on new energy technology, such as solar, which they don't need or cannot afford. Our initial submission to the NETCC application for approval¹ and our *Sunny Side Up* report have case studies demonstrating specific consequences Victorian households have faced as a result.

Many new energy technologies are almost exclusively installed in owner-occupier homes as tenants are generally unable to modify dwellings to accommodate installation. The behaviour of finance providers which do not undertake adequate responsible lending checks and loans for such technology can be seen as predatory. This is because these providers could be confident that in most situations where a household is unable to pay, they would ultimately have equity in a home which can be collected against. People should not be at risk of losing their home because they have been the victim of irresponsible lending .

We also consider that proposed clause 3(d) of the NETCC on promotion of finance offerings should also be expanded to capture off premises or non-standard business premises sales in order to provide equivalent protections to the NCCPA. This proposed amendment is currently drafted as follows:

"[In particular, our advertisements and promotional material will:] *make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act (2009)(Cth) ("NCCPA")*"²

Sections 115-120 and 123-124B of the NCCPA contain requirements on parties offering credit assistance or suggesting credit products to hold licenses and complete appropriate checks about the appropriateness of products. If applied to all finance arrangements covered under the NETCC these sections may directly capture vendors of new energy technology.³ While there are exemptions for vendors promoting finance at point of sale, these exemptions do not extend to unsolicited sales or sales in non-standard business premises or off premises sales in places like shopping centres or in a customer's home. This recognises the need to protect households from

¹ Consumer Action, 2019. *Submission Re: AA1000439 New Energy Tech Consumer Code*

² Applicants, 2019. *AA1000439 – New Energy Tech Consumer Code – Amended Code – 25.09.19*. P.5

³ See [RG203](#) pages 18 & 19 for an explanation of credit assistance and suggesting. This regulatory guide makes clear that it is fine to only refer to a finance provider, rather than suggest or provide credit assistance (which is regulated).

pressure to enter into finance arrangements in uninvited or unusual situations or in scenarios where a sales person is incentivised to make a sale.

A case study in Consumer Action's 2016 *Power Transformed* report demonstrates a problematic sale at a non-standard business premises.⁴ We consider that inconsistent requirements on parties involved in facilitating deferred payment arrangements can lead to households being at risk of losing their home. While we view the case study as an unsolicited sale, others have argued that the Australian Consumer Law is vague as to whether an invitation for a quote means a resulting transaction is an unsolicited sale. Expanding this amended clause in the NETCC would ensure that such scenarios are captured. Doing so will ensure that there are consistent protections and consistent regulatory impacts on competing new energy technology providers who offer deferred payments through finance providers that are or are not regulated under the NCCPA.

We would also support this clause being moved to, or referenced, in the 'Payment and finance' clause of the code as this is likely to improve comprehension and recognition of all the requirements that specifically relate to finance arrangements.

RECOMMENDATION 1. Expand the clause which prohibits unsolicited offers of deferred payment that is not licensed under the NCCPA to also cover promotions during off-premises or non-standard business premises sales.

General conduct, competence and training and internal dispute resolution

We support the Proposed Amendments that would require deferred payment arrangement providers to be members of the Australian Financial Complaints Authority (AFCA) scheme. This is a concise requirement that delivers free access to effective dispute resolution when this is required for households. However, the ACCC should expand the Proposed Amendments by applying more clauses of the NCCPA so that AFCA has clear information about requirements that providers should have met where a dispute arises.

To give clear information, the Proposed Amendments should be expanded so that deferred payment providers not licensed under the NCCPA be required to comply with the following clauses and subclauses in Section 47 (1) of the NCCPA:

"47 (1) A licensee must:

- (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and*
- (f) maintain the competence to engage in the credit activities authorised by the licence; and*
- (g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and*
- (h) have an internal dispute resolution procedure that:*
 - (i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and*

⁴ Consumer Action, 2016. *Power Transformed: Unlocking effective competition and trust in the transforming energy market*, p, 22.

(ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and”

The general clause (a) gives a high-level requirement about the conduct that households should be able to expect from deferred payment finance providers. Including this requirement being in the NETCC will give households the ability to resolve a dispute at AFCA where they can rely on this requirement to challenge harm caused by poor business practices that are not fair, honest or efficient.

Requiring a provider to comply with clauses (f) and (g), as though they were licensed under the NCCPA, would mean providers must meet competency and training standards. The Australian Security and Investments Commission (ASIC) Regulatory Guideline 206 Credit licensing: Competence and training provides further detail. Clear standards and guidelines will help ensure providers meet the expectations of households and act as good conduct standards that can be applied by AFCA in dispute resolution.

The Proposed Amendment only requires that deferred payment arrangement providers that are not licensed under the NCCPA have an internal dispute resolution process. Without requiring providers to comply with specific standards for their internal dispute resolution processes, the Proposed Amendments may be too vague. Requiring providers to comply with clause (h) will allow consideration of ASIC Regulatory Guideline 165 Licensing: Internal and external dispute resolution. This would result in households receiving the same standard, whether they use a deferred payment arrangement providers or a licensed credit provider.

RECOMMENDATION 2. If deciding to continue the Proposed Amendments, the ACCC must further define general conduct, competence and training and internal dispute resolution protections by applying more clauses of the NCCPA and NCC.

Hardship assistance

The Proposed Amendments rightly require deferred payment arrangement providers to have processes to identify payment difficulties and offer assistance in such circumstances. However, the high-level drafting of the Proposed Amendments could lead to very inconsistent processes and assistance between providers for consumers who need consistent minimum standards. The ACCC should therefore expand the Proposed Amendments to include a requirement that all providers comply with section 72 of the NCC as though they were licensed under the NCCPA.

Section 72 of the NCC defines consistent timelines that must be met by providers in responding to a request for hardship assistance. The section also ensures that households are notified of the availability of AFCA as a complaint forum where assistance is denied by a provider. Almost any household can experience financial hardship, and often households invest in new energy technology to lower electricity costs but may find themselves unable to keep up with finance payments for these technologies. Defining timelines about companies' responses to requests for assistance and a right to be made aware of rights to dispute the rejection of such assistance are necessary. Such requirements will ensure that there are consistent protections across all forms of finance, whether ASIC-regulated or not.

RECOMMENDATION 3. If deciding to continue the Proposed Amendments, the ACCC should incorporate hardship protections in section 72 of the NCC.

Future arrangements

If the ACCC continues with the Proposed Amendments, as opposed to our preference for code signatories to be prohibited from using unregulated credit providers, then we encourage there being a review period about the

effectiveness of the regime. These Proposed Amendments should have a sunset clause that requires a review at 12-months after implementation.

The Proposed Amendments place a burden on the NETCC Code Administrator to approve and ensure compliance with finance protections. This may be a challenge for the Code Administrator given it is likely to be a body with expertise on the sale of new energy technology, not finance offerings. The Code Administrator is also unlikely to have the resourcing to ensure there are consistent standards applying to deferred payment arrangement providers that are not licensed under the NCCPA. By comparison, for licensed providers, this role is undertaken by ASIC which is a well-resourced government funded regulator with significant powers such as legislated civil and criminal penalty amounts for breaches.

Ideally, buy now pay later providers will be brought into the NCCPA so as to ensure consistent and appropriate consumer protections. Previous amendments proposed by the applicants suggested another approach where complying with a regulator approved industry code that was equivalent to NCCPA protections be a requirement for providing deferred payment arrangements. However, this approach is still flawed given no such code exists. Moreover, a self-regulatory approach is highly unlikely to be able to meet the standards of regulation due to much more limited compliance and enforcement mechanisms. Decision makers must instead work towards closing the loophole that allows finance providers not to be licenced under the NCCPA.

RECOMMENDATION 4. If deciding to continue the Proposed Amendments, the ACCC must add a sunset clause that requires a review of the Proposed Amendments at 12-months after the implementation.

Please contact Jake Lilley at **Consumer Action Law Centre** on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,
CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer