

**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 of Ursula Claire Noye
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



DEPUTY REGISTRAR

Dated: 5/05/2020 4:53 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 OF URSULA CLAIRE NOYE  
RE SOLAR PANEL SURVEY DATA**

Affidavit of: Ursula Claire Noye  
Address: Level 6, 179 Queen Street, Melbourne  
Occupation: Solicitor  
Date: 5 May 2020

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I URSULA CLAIRE NOYE of Level 6, 179 Queen Street Melbourne, in the State of Victoria, Solicitor, do solemnly and sincerely affirm that:

1. I am Special Counsel at Consumer Action Law Centre ("**CALC**") and together with Rex Punshon, Solicitor at CALC, I have care and conduct of this matter on behalf of CALC.

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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	<a href="mailto:ursula@consumeraction.org.au">ursula@consumeraction.org.au</a> / <a href="mailto:rex@consumeraction.org.au">rex@consumeraction.org.au</a>
Address for service (include state and postcode)	Level 6/179 Queen Street, Melbourne, VIC 3000

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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.
3. On 31 March 2020, CALC requested that Maurice Blackburn Lawyers ("**Maurice Blackburn**") collect and collate survey data concerning quotations from solar panel providers, including for buy now pay later ("**BNPL**") finance, for the purpose of preparing this affidavit.

#### **Request for survey data**

4. On 31 March 2020, I made a request to Samuel Habteslassie, Lawyer at Maurice Blackburn, for the following assistance:
  - a. collection of data from a survey of solar panel providers on the provision of options, including BNPL products, to finance the purchase of residential solar panels; and
  - b. collation of that evidence, including:
    - i. the survey data results; and
    - ii. preparation and settling of witness statements from those collecting the survey data.
5. The request also contained guidance on the proposed methodology used to collect and collate the survey data, including that:
  - a. data be collected from at least 12 different solar panel providers, including 4 small providers, 4 medium sized providers and 4 large providers, and we enclosed a reference list of 12 solar panel providers; and
  - b. contact be made with solar panel providers by telephone or using a lead generation website;
  - c. requests for quotes be made using a systematic approach, and we enclosed a draft telephone script for that purpose.
6. On 2 April 2020, I provided a final draft of the telephone script to Mr Habteslassie.
7. On 23 April 2020, Lara Maria Yihui Kuhn, Paralegal at CALC, made a further request to Mr Habteslassie for another solar panel provider, SunEnergy, to be added to the list of solar

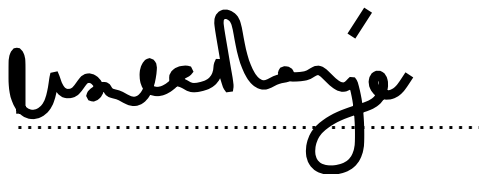
panel providers. This further request was made after receipt of a witness statement by Chantha Lake, SunEnergy's Director of Operations, served by Flexigroup and dated 21 April 2020.

8. The request is contained within the following documents, which together form the CALC brief:
  - a. request;
  - b. telephone script; and
  - c. list of solar panel providers, including SunEnergy.
9. The CALC brief referred to in the paragraphs above is exhibited to this affidavit as follows:
  - a. Exhibit **UCN-11** is a copy of the request to Maurice Blackburn dated 31 March 2020;
  - b. Exhibit **UCN-12** is a copy of the final draft of the telephone script provided to Maurice Blackburn dated 2 April 2020; and
  - c. Exhibit **UCN-13** is a copy of the further request to Maurice Blackburn dated 23 April 2020, re SunEnergy.

#### **Survey data**

10. The survey data is produced in a total of three affidavits, each of which is made by a paralegal or lawyer employed by Maurice Blackburn, and recounts the details of telephone enquiries requesting quotations for the purchase and installation of solar panels, and related email correspondence. The affidavits in question are:
  - a. the affidavit of Katherine Ross dated 4 May 2020;
  - b. the affidavit of Elisa Bolzonello dated 5 May 2020; and
  - c. the affidavit of Karl Shami dated 5 May 2020.

AFFIRMED by the deponent  
at Melbourne on 5 May 2020



.....  
Before me:



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

**Certificate identifying exhibit**

This is the exhibit marked **UCN-11** now produced and shown to Ursula Claire Noye at the time of affirming her affidavit on 5 May 2020.

Before me:

Signature of person taking affidavit

**MEMO**

**To:** Maurice Blackburn

**From:** Ursula Noye

**Date:** 31 March 2020  
Request for pro bono assistance  
Consumer evidence - ACT 1 of 2019

**Re:** Our ref 495916

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**1. Summary**

2. Consumer Action Law Centre (**CALC**) requests your pro bono assistance in the collection and collation of consumer evidence ('shadow shopping') for review and advice from its counsel, and (subject to that review) for filing in support of its intervention in proceeding number ACT 1 of 2019 before the Australian Competition Tribunal (**Tribunal**). We note that the evidence collated, and any other documents prepared for that purpose, ought to be regarded as confidential and subject to legal professional privilege.
3. The proceeding is an application by FlexiGroup Ltd (**FlexiGroup**) to the Tribunal (see **attachment A**) for review of the Australian Competition and Consumer Commission (**ACCC**) Determination to conditionally authorise the New Energy Tech Consumer Code (**Code**) (see **attachment B**).
4. On 16 March 2020, CALC was granted leave to intervene in the proceeding, together with ASIC and Ratesetter, a competitor of Flexigroup (see **attachments C and D**).
5. By orders amended on that date, CALC is due to file its evidence by 21 April 2020 (see **attachments D and E**). We note that given the current climate of responding to COVID-19 (coronavirus), there may be delays in the hearing of the proceeding and consequent deferrals of Tribunal filing dates.

**6. Parties and representatives**

- FlexiGroup Ltd (ACN 122 574 583) - Applicant for review of the Determination – Represented by Clayton Utz

- Australian Competition and Consumer Commission - Author of the Determination – Represented by Australian Government Solicitor
- Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) - Applicants for authorisation of the Code – Represented by Allens
- Australian Securities and Investments Commission (ASIC) – Intervener – Represented in house
- Ratesetter – Intervener – Represented by Johnson Winter & Slattery

## 7. Assistance sought

8. Specifically, Consumer Action seeks your assistance with the following:

- A. Collection of data from a survey of solar panel providers on the provision of options, including BNPL products, to finance the purchase of residential solar panels; and
- B. Collation of that evidence, including:
  - a. the survey data results; and
  - b. preparation and settling of witness statements from those collecting the survey data.

## 9. Proposed methodology

- 10. It is important that a consistent approach to the data collection is maintained. We therefore set out below a guide to its collection and collation.
- 11. In order to provide meaningful data, we request that data be collected from at least 12 different solar providers, including 4 small providers, 4 medium sized providers and 4 large providers. We enclose a list of solar panel providers for your reference (see **attachment F**).
- 12. We also request that addresses for properties be given in Victoria, New South Wales and Queensland in order to understand the impact, if any, of the varying rebate schemes on the provision of finance options.
- 13. This means that, in total, 36 attempts will be made to obtain quotes (4 small, 4 medium and 4 large, in each of 3 states).
- 14. To collect the survey data, we request that staff:

- A. Contact the solar panel provider, either by:
- a. Telephone; or
  - b. By adding a telephone number to the lead generation sites:
    - i. Solar Calculator: <https://solarcalculator.com.au/solar-quotes/>
    - ii. Solar Choice: <https://www.solarchoice.net.au/>
- B. Request a quote for solar panels, using the attached draft script (see **attachment G**).
- C. Record the responses systematically, in a database that is able to be shared with CALC.
15. We understand that you may have difficulty obtaining quotes where an inspection of the property is required. In this case, we do not require that a quote be pursued but do request that this data be recorded for completeness.
16. We note the different rebate schemes in operation in different states and request that details of these rebates be recorded in order that we can obtain a fuller picture of the costs to consumers of purchasing and installing residential solar panels in different states.
17. We request your assistance to prepare and settle witness statements for the persons contacting the solar panel companies detailing their conduct.

## 18. Contact

19. Please advise CALC, contact details as follows:

Ursula Noye, Special Counsel  
Consumer Action Law Centre  
(03) 9670 5088 / 0409 542 314  
[ursula@consumeraction.org.au](mailto:ursula@consumeraction.org.au)

Rex Punshon, Solicitor  
Consumer Action Law Centre  
(03) 9670 5088  
[rex@consumeraction.org.au](mailto:rex@consumeraction.org.au)

## 20. Attachments

21. We attach the following documents for your information:

- A. Application by FlexiGroup Limited for review of the ACCC Determination to conditionally authorise the Code dated 30 December 2019

- B. ACCC Final Determination dated 5 December 2019
- C. CALC application for leave to intervene and attachments dated 21 February 2020
- D. Application by Flexigroup Limited [2020] ACompT 1 dated 16 March 2020
- E. Orders dated 4 February 2020
- F. List of solar panel providers (amended)
- G. Draft script

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 30/12/2019 11:28 AM AEST and has been accepted for lodgment under the Interim Practice Direction dated 8 May 2015. Filing details follow and important additional information about these are set out below.

**Lodgment and Details**

Document Lodged:	Application to Tribunal for Review
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



DEPUTY REGISTRAR

Dated: 30/12/19 at 11:28 AM AEST

**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.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Interim Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Form I

(subregulation 20(1))

### APPLICATION TO TRIBUNAL FOR REVIEW

*Re Application for authorisation AA1000439 lodged by Australian Energy Council (AEC), Clean Energy Council (CEC), Smart Energy Council (SEC) and Energy Consumers Australia (ECA) (together, the **Applicants**) in respect of the New Energy Tech Consumer Code, and the determination made by the ACCC on 5 December 2019*

1. Flexigroup Limited [ACN 122 574 583] (**Flexigroup**) hereby applies to the Australian Competition Tribunal pursuant to section 101 of the Competition and Consumer Act 2010 (Cth) (**CCA**) for a review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated the 5th day of December 2019 (Commission file no. AA1000439) (**Determination**).
2.
  - (a) Flexigroup was not an applicant for the authorisation to which the Determination relates.
  - (b) Flexigroup's interest in the Determination is as follows:
    - (i) Flexigroup is a provider of Buy Now Pay Later (**BNPL**) finance products for new energy products and services (**New Energy Tech**) in the solar sector that is directly affected by the New Energy Tech Consumer Code (**Code**) authorised by the Determination.
    - (ii) Flexigroup's interest in the Determination is that the Code will prevent its signatories from offering lawful BNPL finance products to consumers, thereby reducing consumer and retailer choice, and lessening or hindering competition between different forms of finance and providers in the market(s) in which solar financing is provided. Consequently, the impact of the NETCC as authorised by the ACCC is to
      - A. restrict Flexigroup's ability to offer lawful BNPL finance products to customers,
      - B. increase costs of providing lawful BNPL finance products thereby increasing the costs to consumers and small business,
      - C. restrict consumer and retailer choice, and more broadly competition between different forms of finance and providers within the solar financing market;
    - (iii) Flexigroup has actively participated throughout the consultation conducted by the ACCC since 30 April 2019. It provided four written submissions dated 31 May 2019, 29 August 2019, 26 September 2019 and 8 November 2019 and participated in the Pre-Decision Conference held by the ACCC on 9 September 2019.
3. Flexigroup is dissatisfied with the Determination in the following respects:
  - (a) the imposition of the conditions of authorisation AA1000439 at 'Attachment A' and 'Annexure - Code Administration' to the Determination, being the conditions relating to 'changes to requirements concerning BNPL finance' (the **BNPL Finance Requirement Conditions**) (Determination, 5.12 - 5.14); and
  - (b) the following findings made by the ACCC in the Determination, which are not supported by evidence before the ACCC :
    - (i) that there is uncertainty as to whether governments link supplier access to rebate or incentive schemes, or government tenders to membership of the Consumer Code (Determination, 4.39);

- (ii) that BNPL finance is not subject to applicable legislative and regulatory requirements such that there are potentially greater risks for consumers who enter into BNPL arrangements. (Determination, 4.18);
  - (iii) that the Consumer Code is substantially equivalent to the responsible lending requirements under the NCCPA (Determination, 4.59);
  - (iv) that a timeframe of 24 months is realistic for the development of the proposed BNPL industry code. (Determination, 4.46; 4.60); and
  - (v) That condition 3 of the Consumer Code applies only to unsolicited offers by signatories of BNPL finance, whereas in fact it applies to all offers of BNPL finance, whether unsolicited or not, if the sale of the New Energy Tech product is unsolicited (Determination, 4.66; 5.4).
4. Flexigroup is not dissatisfied with the reporting condition pursuant to paragraph 5.15 (**Reporting Condition**) of the Determination.
5. The determination that Flexigroup is seeking from the Tribunal is as follows:
- (a) that the Determination be varied to:
    - (i) remove the BNPL Finance Requirement Conditions;
    - (ii) remove the factual findings set out in paragraph 3 above; and
    - (iii) add as conditions of authorisation that:
      - A. paragraph 3(d) of the final draft NETCC be deleted;
      - B. paragraph 25(a) of the final draft NETCC be deleted and the following paragraph substituted:

"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"; and
      - C. consequentially, paragraph 25(c)(iv) of the final draft NETCC be deleted and the following paragraph substituted:

"the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from or not regulated by the NCC, information as required by any regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA"; and
  - (b) that the Determination otherwise be affirmed (including the position of the Reporting Condition).
6. Particulars of the facts and contentions upon which Flexigroup intend to rely in support of the application for review, and a statement of the issues as Flexigroup see them, are attached.
7. Flexigroup's address for service for the purpose of regulation 21 of the *Competition and Consumer Regulations 2010* is:

**Flexigroup Limited**  
c/o Kirsten Webb  
Clayton Utz  
[kwebb@claytonutz.com](mailto:kwebb@claytonutz.com)





DX 370  
Level 15  
1 Bligh Street  
Sydney NSW 2000

8. Documents may be served on Flexigroup at [kwebb@claytonutz.com](mailto:kwebb@claytonutz.com).

Dated this 30 day of December 2019.

Signed by/on behalf of the applicant

A handwritten signature in blue ink, appearing to read "Kirsten Webb".

.....

Kirsten Webb

Partner, Clayton Utz

Solicitor for the Applicant

# ATTACHMENT - BACKGROUND, FACTS, CONTENTIONS AND ISSUES FOR THE TRIBUNAL TO CONSIDER

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## 1. The Applicant

1. Flexigroup Limited (**Flexigroup**) is an Australian company listed on the Australian Stock Exchange (**ASX**). The shares in Flexigroup Limited trade under the ASX Code "FXL".
2. Flexigroup is a diversified financial services group with operations in Australia, New Zealand and Ireland across a diverse range of industries including: home improvement, solar energy, fitness, IT, electrical appliances, travel and trade equipment.
3. Flexigroup provides a range of finance products and payment solutions to consumers and businesses through a network of retail and business partners. This includes interest free cards and no interest ever payment plans and business leasing solutions.
4. Flexigroup is the leading provider of no interest ever payment plans to retail customers, through its product 'humm'. humm allows customers to pay off a loan in instalments over their choice of fixed term. humm is available on purchases up to \$30,000 and with payment plans from two weeks to 5 years. Humm is a long established form of Buy Now, Pay Later (**BNPL**) finance products that, although not new, are becoming increasingly prevalent in the consumer finance industry.
5. Flexigroup is the oldest and one of the largest providers of BNPL finance in Australia. Flexigroup's product humm has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia<sup>1</sup>.
6. Almost half of the revenue generated by Flexigroup's humm product is from providing credit for sales of solar panels and other home improvements.<sup>2</sup>
7. Flexigroup works with approximately 380 solar sellers that offer NET to residential and small business consumers. Of the top 50 solar sellers with whom Flexigroup does business, approximately 60% were expected to or have become members of one of the Authorisation applicants, and would therefore also likely become signatories to the Code.

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## 2. Background and status of Applicant

8. Flexigroup was an interested party to the application for authorisation (non-merger) dated 29 April 2019 pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) made by the following parties:
  - (a) Australian Energy Council (**AEC**);
  - (b) Clean Energy Council (**CEC**);
  - (c) Smart Energy Council (**SEC**); and
  - (d) Energy Consumers Australia (**ECA**) (together, **the Applicants**).(**the Application**<sup>3</sup>).
9. Flexigroup actively participated in the ACCC's public consultation in respect of the Application. It provided four written submissions in the periods both before and after the ACCC's draft

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<sup>1</sup> Flexigroup submission to the ACCC dated 31 May 2019, [2.1] and [2.3]

<sup>2</sup> Senate Committee Report referencing Rebecca James, CEO, Flexigroup Limited, para [5.6]

<sup>3</sup> Application for authorisation AA1000439.

determination: on 31 May 2019, 29 August 2019, 26 September 2019 and 8 November 2019. Flexigroup also participated in the Pre-Decision Conference held by the ACCC on 9 September 2019.

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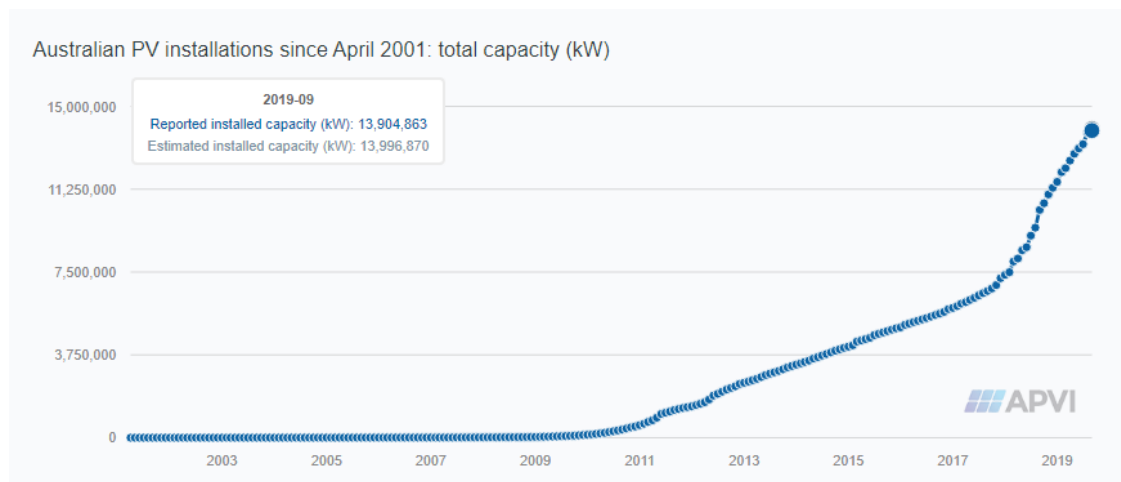
### 3. Impact of the Determination on Flexigroup

10. The Application concerned a new draft code of conduct, entitled "The New Energy Tech Consumer Code" (**NETCC**). The NETCC was prepared by the Applicants in response to a request from the Council of Australian Governments Energy Council (**COAG Energy Council**) to them to develop an industry code for sellers of "behind-the-meter" products and services, including small-scale solar power generation and storage technologies ("new energy technologies" or **NET**). The Application described this request as a request for a consistent approach from industry to improving customer experience in this industry.
11. The draft NETCC prepared by the Applicants and the subject of the Application included, in paragraph 24, limitations on signatories' ability to offer to arrange finance for their customers with suppliers of deferred payment arrangements where the arrangement included an interest component, additional fees or an increased price. Under the draft NETCC, signatories would undertake to ensure that:
  - (a) the payment arrangements would be offered through a credit provider licenced under the *National Consumer Credit Protection Act (2009)* (Cth) (**NCCPA**); and
  - (b) the deferred payment arrangements were regulated by the NCCPA and the National Consumer Code (**NCC**).
12. Adherence to these requirements will prevent signatories from being able to offer BNPL finance products as this form of credit is exempt from the regulatory regime extant under the NCCPA and the NCC. This directly affects the business and commercial affairs of Flexigroup because signatories to the NETCC will not be able to offer Flexigroup's BNPL finance products to consumers.
13. Signatories to the NETCC will include the Applicants and providers of New Energy Tech. The Application stated that those expected to become signatories range in scale from micro businesses to large energy companies with New Energy Tech Lines of Business. Signatories will therefore include persons that currently offer Flexigroup's BNPL finance products to customers seeking to purchase NET products.
14. On 5 December 2019, the ACCC issued its Determination in respect of the Application. The Determination granted authorisation in respect of the NETCC subject to conditions. These conditions are set out in section 5 of the Determination, and specify that
  - (a) clause 25 and clauses A7 and A7A of the NETCC be amended to the effect that:
    - (i) if the credit provider is not licenced under the NCCPA; and
    - (ii) if the deferred payment arrangement is exempt from the NCCPA and the NCC (that is, BNPL finance),then signatories must not offer those finance terms unless the Administrator of the Code had determined that the credit provider was itself a signatory to an industry code of conduct that required the credit provider to, in effect, adhere to standards equating to the NCCPA and NCC regulatory regime; and
  - (b) signatories must not offer customers finance arrangements not regulated by the and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a NET product if the sale of the NET product is unsolicited.
15. A consolidated version of the NETCC as authorised by the ACCC is set out in Annexure [A]. The mark-up shown in this version indicates the conditions imposed by the ACCC in section 5 of the Determination.

16. The NETCC is a voluntary code. However, some state government rebate schemes only offer rebates for installations performed by signatories to a relevant code, and some government tenders require tenderers to be signatories to a relevant code. The effect of these requirements is that that suppliers and installers of NET products are very likely to become signatories to the NETCC, with the consequence that they will not be permitted to offer BNPL finance products.
17. Flexigroup is concerned about the impact that the NETCC as authorised by the ACCC will have on Flexigroup's ability to offer lawful BNPL finance products to customers, and the negative consequences that this will have on consumer and retailer choice, and more broadly competition between different forms of finance and providers within the solar financing market.
18. Flexigroup has a sufficient interest in the Determination to bring this Application.

#### 4. Demand for NET

19. NET, as defined in the NETCC, encompasses a variety of products and services that relate to and include small scale products and systems that generate, store or trade energy away from Australia's main transmission and distribution networks or as distributed energy resources connected to an energy network.<sup>4</sup>
20. The sector is currently dominated by solar photovoltaics (**PV**) which is now being followed by energy storage (mostly batteries).<sup>5</sup>
21. Between 2001 and 2010 the growth in demand for solar PV installations for solar PV was around 15%. A period of extremely rapid growth occurred between 2010 and 2013. The number of monthly installations stabilised through 2014 and 2015, and now appears to be trending slightly upwards in the residential sector, with an increase in the number of larger (commercial and utility-scale) PV systems keeping overall installed capacity high.<sup>6</sup>



(Source: Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019)

22. As of 30 September 2019, there were over 2.2 million PV installations in Australia, with a combined capacity of over 13.9 gigawatts.<sup>7</sup>

<sup>4</sup> NETCC Part C "Definitions"

<sup>5</sup> Application, [10]

<sup>6</sup> Australian PV Institute (<https://pv-map.apvi.org.au/analyses>) accessed 17 December 2019.

<sup>7</sup> Ibid.


23. In the Application, the Applicants submitted that in 2018, the number of solar installations on homes and small businesses increased by 43% on the previous year and that the Clean Energy Regulator expected that growth was likely to continue for at least 10 years.<sup>8</sup>
24. The Australian Finance Industry Associated Limited (**AFIA**) contended that its members (which include Flexigroup) have supported the installation of 200,000 solar panel systems with BNPL finance.<sup>9</sup>
25. Flexigroup alone estimates that it has provided BNPL finance products for approximately 180,000 existing solar installations.

## 5. BNPL finance


### Basic features

26. BNPL finance is an affordable and flexible financing option. It can be cheaper for consumers than other types of credit because consumers are not charged interest and because the fees that are payable are limited and are periodic or other fixed charges.
27. For Flexigroup's product, humm, the fees are known upfront and are published on the humm website:

# How it all breaks down.



**Little things**  
<\$2K



**Big things**  
<\$30k

<b>Time to pay</b>	5 x fortnight	10 x fortnight	6 - 60 months
<b>Monthly fee</b>	-	\$8	\$8
<b>Establishment fee</b>	-	-	\$35 - \$90
<b>Repeat purchase fee</b>	-	-	\$22
<b>Late payment fee</b>	\$6	\$6	\$6

(Source <https://www.shophumm.com.au/how-it-works>, accessed 17 December 2019)

<sup>8</sup> Application, paragraph 10(a).

<sup>9</sup> AFIA submission to ACCC dated 29 August 2019, page 7



## **Regulation - BNPL as "credit"**

28. Section 12BAA(7) of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**) lists the types of arrangements that are **financial products** that are subject to regulation under the ASIC Act.
29. One such financial product is a "credit facility" which is defined by regulation 2B of the *Australian Securities and Investment Commission Regulations 2001* (Cth) (**ASIC Regs**) to include:
- "(1) For paragraph 12BAA(7)(k) of the Act, each of the following is a **credit facility**:
- (a) the provision of credit:
- (i) for any period; and
- (ii) with or without prior agreement between the credit provider and the debtor".
30. "Credit" is defined to mean:
- "a contract, arrangement or understanding:
- (a) under which:
- (i) payment of a debt owed by one person (a debtor) to another person (a credit provider) is deferred; or
- (ii) one person (a debtor) incurs a deferred debt to another person (a credit provider); and
- (b) including any of the following:
- (iii) credit provided for the purchase of goods or services".
31. BNPL finance meets the definition of "credit" and is a "credit facility" under the ASIC Regs. As such, BNPL finance is a financial product subject to regulation under Division 2 of Part 2 of the ASIC Act and subject to regulation and oversight by ASIC. Division 2 of Part 2 of the ASIC Act is concerned with unconscionable conduct and consumer protection in relation to financial services.
32. Accordingly, providers of BNPL finance must not:
- (a) impose standard form contractual terms upon consumers that are unfair (Subdivision BA);
- (b) engage in conduct that is unconscionable within the meaning of the unwritten law or having regard to the specific matters listed in section 12CC (Subdivision C);
- (c) engage in conduct that is misleading or deceptive or likely to mislead or deceive or make false or misleading representations (sections 12DA, 12DB and 12DC);
- (d) engage in bait advertising or referral selling (sections 12DG and 12DH); or
- (e) use physical force or undue harassment or coercion (section 12DJ).
33. The consequences of breach of these prohibitions include:
- (a) In the case of a contravention of the prohibitions outlined in sub-paras (b), (c) (excluding section 12DA), (d) and (e), ASIC may bring civil penalty proceedings against the provider of BNPL finance.
- (b) A contravention of sections 12DA to 12DN other than section 12DA is also an offence.

- (c) Consumers harmed by the conduct of the provider of BNPL finance products have rights to seek financial compensation for losses suffered.
- (d) ASIC is empowered by section 1023D of the *Corporations Act 2001* (Cth) to make a product intervention order when it is satisfied that a product, or class or product, has resulted, will result or is likely to result in "significant consumer detriment". ASIC's product intervention power has been extended to all credit facilities, including BNPL finance. In ASIC Report 600, ASIC stated that it would use the product intervention power to act quickly and effectively to address the causes of problems if ASIC identifies a significant detriment to consumers.
- (e) Section 1023D empowers ASIC to order a ban in respect of a feature of a financial product or, more severely, order a ban in respect of the issue of the product altogether. ASIC can also order that a financial product be offered to specific classes of consumers, order that a financial product be offered through personal advice only, or make an order restricting marketing or prohibiting the distribution of a financial product without prescribed improvements.

34. Relevantly, the legislation effecting this extension also includes design and distribution obligations which will also apply, amongst others, to the BNPL sector. This will require:

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

35. In the event that BNPL finance was found not to be a "credit facility" such that the ASIC Act and Regs do not apply to it as a financial product or service, the *Australian Consumer Law (ACL)* would apply. Providers of BNPL finance would be subject to the regulatory oversight of the ACCC and similar controls to those contained in Division 2 of Part 2 of the ASIC Act by virtue of the fact that the ACL contains almost identical prohibitions directed to all persons engaging in trade or commerce:

<i>Conduct</i>	<i>ASIC Act Part 2 Div 2 section</i>	<i>Corresponding ACL section</i>
Unfair terms	Subdivision BA	Chapter 2, part 2-3 (ss 23 - 28)
Unconscionable conduct	Subdivision C	Chapter 2, part 2-2 (ss 20 - 22)
	12CC	22
Misleading or deceptive conduct	12DA	18
	12DB	29
	12DC	30
Bait advertising	12DG	35
Referral selling	12DH	49
Physical force, undue harassment or coercion	12DJ	50

36. BNPL finance is not subject to further regulation under the NCCPA and the NCC. Section 6 of the NCC excludes a number of types of credit from its scope. Most relevantly for present purposes, section 6(5) states:

*"This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of*

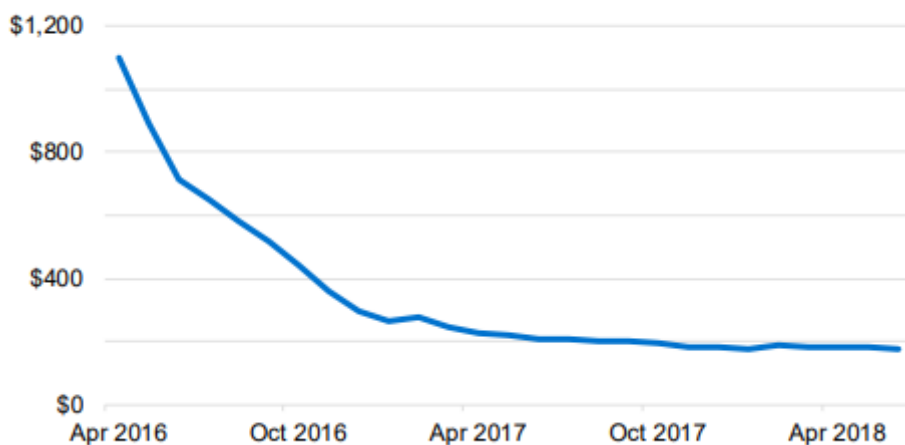
*a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed."*<sup>10</sup>

37. This exclusion is effected by the NCC itself - it is not an exemption identified by ASIC by legislative instrument or otherwise.
38. The exclusion from regulation afforded to BNPL finance reflects the policy that fixed low cost facilities offer clear benefits to consumers without the prospect of being charged an amount that is disproportionate to their purchases through uncapped fees or high rates of interest.
39. Under BNPL finance, no interest is charged on outstanding balances, even if the consumer is in default. The facility is unsecured and the margin for error by the finance provider is low. BNPL providers therefore have a stronger commercial imperative to ensure that customers can afford their credit.
40. Both ASIC and a Senate Committee have recently undertaken a review of BNPL finance. ASIC Report 600 followed extensive engagement with BNPL providers, key stakeholders and consumers. It confirmed that ASIC does not consider that it is necessary to require BNPL providers to comply with the NCCPA.

## 6. BNPL for NET in context

41. In its review culminating in ASIC Report 600, ASIC found that BNPL finance as a whole was a rapidly growing industry, with the number of BNPL transactions each month rising from 50,000 in April 2016 to 1.9 million in June 2018.<sup>11</sup>
42. It is to be noted, however, that ASIC's review, and that of the Senate Committee, considered BNPL finance as a whole, the majority of which is low value, short term arrangements. ASIC found that consumers predominantly used BNPL finance to buy clothing, technology, electronics or software, personal care items, furniture, homewares and appliances although ASIC noted that BNPL finance was also available for more expensive purchases.<sup>12</sup>

**Figure 7: Implied average transaction value**



(Source: ASIC Report 600, Figure 7, page 19)

43. BNPL finance for acquisitions of a solar installation are typically taken over a longer term (2 to 5 years).

<sup>10</sup> The maximum charge for the purposes of section 6(5) of the NCC is \$200 for the first 12 months and \$125 for any subsequent 12 months for the length of the term: Regulation 51 National Consumer Credit Protection Regulations 2010 (Cth)

<sup>11</sup> ASIC Report 600, [25].

<sup>12</sup> ASIC Report 600, [114].



44. Flexigroup's experience of consumers seeking BNPL finance for NET installations is that they are homeowners and typically over 35 years of age. This is corroborated by submissions made by Brighte Capital Pty Ltd (**Brighte**) and Consumer Action Law Centre.<sup>13</sup>
45. ASIC found that providers that offered smaller arrangements experienced a higher proportion of users who had been charged a missed payment fee.<sup>14</sup>
46. The concerns identified by ASIC in ASIC Report 600 with regard to BNPL finance are not readily attributable to the arrangements used to assist consumers to acquire NET for their homes. ASIC did not find that BNPL finance in the context of NET acquisitions gave rise to any greater risk to consumers than any other form of credit that may be available to them.

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## 7. BNPL Code

47. In addition to the regulation of BNPL products under the ASIC Act and by reference to ASIC's new product intervention power, significant steps have been taken towards self-regulate in respect of all purposes for which BNPL finance is taken, by developing a code of conduct for BNPL products which in due course will be approved under ASIC Regulatory Guide 183 (**BNPL Code**).
48. The BNPL Code is being developed by the AFIA, Flexigroup, Afterpay, Brighte, Zip and others, and will be tailored and fit for purpose in its application to the BNPL sector.
49. The current draft of the BNPL Code contains provisions requiring signatories to:
- (a) be fair, honest and ethical;
  - (b) keep consumers properly informed about the products, including strategies to help consumers stay in control and to make informed decisions about purchases;
  - (c) make sure that the product is suitable for the consumer; and
  - (d) deal fairly with complaints and offer hardship assistance.
50. The development of the BNPL Code is now at the stage of seeking engagement with key stakeholders, including Government, industry associations, ASIC and other regulators, consumer advocate groups and members of parliament.
51. Flexigroup expects that the BNPL Code will become operational by 1 July 2020.

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## 8. Conditions imposed in the ACCC's Determination

52. The Determination granted authorised the NETCC subject to conditions. The conduct which the ACCC authorised is set out in paragraph 5.6 of the Determination as follows:

*To enable the Applicants and future signatories to the NETCC to agree, sign up to and comply with (give effect to) provisions of the NETCC:*

- (a) *according to which signatories will commit to abide by minimum standards of good practice as set out in the NETCC, which intended to cover all aspects of the customer experience*
- (b) *for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the NETCC, and, where there is serious non-compliance, the Code Administrator may propose to*

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<sup>13</sup> Brighte submission dated 29 May 2019, [39] to [41]; Consumer Action Law Centre submission dated 7 November 2019, page 2.

<sup>14</sup> ASIC Report 600, [88] and Figure 10.

*the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and*

- (c) *requiring signatories to only offer deferred payment arrangements that are regulated under the NCCPA and the NCC, and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.*

53. The conditions to the grant of authorisation are described in paragraphs 5.11 to 5.18 of the Determination, and set out in Attachment A and the Annexure to the Determination. The conditions relate to clauses 25, A7 and A7A of the NETCC.

53.1 In summary, the conditions are:

- (a) With respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place (paragraph 5.12 of the Determination); and
- (b) Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a NET product if the sale of the NET product is unsolicited (paragraph 5.13 of the Determination); and
- (c) The Code Administrator must provide the ACCC with annual reports in relation to specified categories of information, for publication on the ACCC's public register (paragraph 5.15 of the Determination)

54. Flexigroup considers that the conditions identified in paragraphs 5.12 and 5.13 of the Determination (**the Conditions**) should not have been authorised. Flexigroup considers that authorisation should not be granted to any provisions of the NETCC that have the effect of preventing signatories from offering BNPL products to consumers in any way.

55. The Conditions will curtail the provision of finance where the finance provider is not licenced under the NCCPA because the particular form of credit is not regulated by the NCCPA and the NCC. As a result the Conditions will directly affect BNPL finance providers like Flexigroup because:

- (a) Adherence to these requirements where the sale of the NET product is unsolicited will prevent signatories from being able to offer BNPL finance products, because this form of credit is exempt from the regulatory regime extant under the NCCPA and the NCC. This directly affects the business and commercial affairs of Flexigroup because signatories to the NETCC will not be able to offer Flexigroup's BNPL products to consumers who choose to purchase NET under lawfully originated unsolicited consumer agreements regulated by the ACL. In turn, this may reduce the choices for consumers wishing to enter into unsolicited consumer agreements to purchase NET products reduce the availability of NET products overall; and
- (b) Adherence to the requirements in other circumstances will require the BNPL finance provider be held to disproportionately higher standards than legally required, and potentially different standards to those which the BNPL finance provider is required to meet in respect of all of its other BNPL finance business, even where it has signed up to the BNPL Code. This will increase the costs of providing BNPL finance to purchasers of NET products, potentially to the point where it is not commercially viable to do so. In turn, this will reduce the choice for consumers wishing to access credit in order to facilitate their purchase of NET products and increase the cost to consumers of that credit, potentially to the point where they choose not to purchase the NET product. Ultimately, this could be expected to have a negative effect on the sale of NET products overall.

56. In its Determination, the ACCC found that there would be a likely public detriment from excluding entirely all BNPL finance products from the scope of the NETCC because some customers value

these products<sup>15</sup>. The ACCC also found that there would be a likely public detriment from a loss of consumer choice of finance options under the final draft version of the NETCC put forward Applicants on 11 November 2019 because it required, amongst other things, that a BNPL provider (or its parent) must hold an Australian Credit Licence. The ACCC considered this would exclude BNPL providers who would not be able to obtain a credit licence because they do not offer any regulated products.<sup>16</sup>

57. The ACCC determined that *"the Proposed Conduct [as set out in paragraph 5.6 of the Determination] would be likely to result in a benefit to the public and that the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition. The ACCC considers that imposing conditions will enable the public benefits under the [NETCC] to be fully realised".*<sup>17</sup>
58. Flexigroup contends that the ACCC's imposition of the conditions to the grant of authorisation is not required to realise the substantial public benefits which already arise from the range of additional measures which will apply to signatories of the NETCC. The effect of the conditions will be:
- (a) to unfairly impact:
    - (i) providers of BNPL finance products such as Flexigroup; and
    - (ii) merchants selling those products,in their lawful business and commercial activities;
  - (b) to restrict consumer choice of finance options by reducing the competitive tension which currently exists between different types and providers of finance, including BNPL finance products for NET.
59. By reducing consumer choice, it is likely that the costs of finance and therefore the overall costs of NET installations will increase.
60. In its submission dated 26 September 2019, Flexigroup confirmed its support for the alternative wording suggested by AFIA in its submission of the same date, in relation to the former draft clause 24 of the NETCC. Flexigroup contends that paragraph 25(a) of the NETCC should provide:
- "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".***
61. By this formulation, the public benefits test set out in section 90(7) of the CCA is satisfied. The ACCC should have granted authorisation of the NETCC under section 8 of the CCA subject only to a condition that the non-regulated deferred payment arrangement comply with a regulator approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA.
62. Flexigroup's specific contentions are set out in more detail in the sections 9 and 10 below.

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<sup>15</sup> Determination, page 2 and [4.14]

<sup>16</sup> Determination, page 2

<sup>17</sup> Determination, [5.3]

## 9. Factual and counterfactual

63. Flexigroup contends that the relevant comparison to be made is between the NETCC with paragraphs giving effect to the Conditions and the NETCC adopting the formulation contended for by Flexigroup in paragraph 60 above.
64. If the NETCC contains paragraphs giving effect to the Conditions (**the factual**), then the following will likely occur:
- (a) signatories to the NETCC will be obliged to ensure that they do not engage in inappropriate sales practices, that they have regard to whether the consumer is in circumstances of vulnerability and to make disclosures as to any additional charges arising from finance options as opposed to outright purchase;
  - (b) signatories will be limited in the choice of finance options that they can offer to consumers;
  - (c) some BNPL providers will choose not to seek to comply with additional voluntary consumer standards above those required under existing legislation and regulation or that may be different to the nature and scope of any specific BNPL Code currently under preparation; and
  - (d) other BNPL providers will seek to comply with those additional voluntary consumer standards for NET purchases but will incur additional costs in doing so.
65. The cumulative effect of paragraphs 64 (a) to (d) above is to:
- (a) seek to improve the selling practices of merchants of NET products who are signatories to the NETCC, but to also reduce the breadth of finance choices available to consumers and to increase the cost of BNPL finance to those consumers who choose to access it; and
  - (b) potentially cause fewer merchants who sell NET to consumers and small business to choose to adopt the NETCC and therefore diminish the benefit of improving selling practices such that it is not realised to the degree expected.
66. If the NETCC is authorised adopting the formulation contended for by Flexigroup in paragraph 60 above (**the counterfactual**) then the following is likely to occur:
- (a) signatories to the NETCC will be obliged to ensure that they do not engage in inappropriate sales practices, that they have regard to whether the consumer is in circumstances of vulnerability and to make disclosures as to any additional charges arising from finance options as opposed to outright purchase;
  - (b) signatories will not be so limited in the choice of finance options that they can offer to customers;
  - (c) BNPL providers will
    - (i) continue to compete with other sources of credit and with one another to provide credit to facilitate the purchase and installation of NET products; and
    - (ii) be subject to a single regime of regulatory oversight for all purposes for which BNPL finance is provided;
  - (d) the cumulative effect of (a) to (c) is to improve the selling practices of signatories without change to the availability and cost of credit from any provider.
67. These outcomes in the counterfactual will be further strengthened by the BNPL Code to be introduced by 1 July 2020.

### ***Conditions for competition in the factual and counterfactual***

68. There are competitive detriments associated with the factual as compared with the counterfactual.
69. These arise from clauses 3(d) and 25(a) which will operate to the effectively exclude some BNPL finance providers from being able to offer such finance, because they choose not to or are unable to comply with the additional standards in the NETCC above those required under existing legislation and regulation.
70. In the counterfactual, the conditions for competition with respect to provision of credit or finance will be somewhat changed from the present. BNPL finance providers will have to assess the costs and implications of adopting the BNPL Code on their businesses and if they choose not to adopt it, they will be excluded from being able to offer such finance to consumers purchasing NET products.

### ***Public Benefits and Detriments in the Factual***

71. In both the factual and the counterfactual, the incidence of inappropriate selling strategies by merchants of NET products will be controlled and reduced by the NETCC and, subsequently, further strengthened by the BNPL Code.
72. While there may, in theoretical terms, be some perception of public benefit from the imposition of requirements to implement internal dispute resolution, hardship and responsible lending practices, there is no evidence that the current regulatory regime applying to BNPL finance products is deficient insofar as NET products are concerned. The findings of ASIC set out in ASIC Report 600 were that the incidence of missed payments in respect of larger BNPL transactions was generally low, suggesting that consumers accessing this form of credit for larger purchases, such as NET products, were not vulnerable, in circumstances of financial hardship or otherwise unduly pressured into transactions that were not suitable for their needs.
73. By contrast, the ACCC recognised the public detriments involved in the factual:
  - (a) the consumer protections introduced by paragraphs 3(d) and 25(a) require BNPL finance providers to adhere to additional standards above those they are required to comply with under legislation and regulation;
  - (b) BNPL providers who do not meet these additional standards would be effectively excluded from offering BNPL finance products to consumers of NET and therefore there would be a reduction in the range of available finance providers and competition between them; and
  - (c) signatories may not offer BNPL finance as it is no longer an attractive option, or are only able to offer finance arrangements from a limited number of BNPL finance providers.<sup>18</sup>
  - (d) The NETCC is voluntary. To the extent that merchants of NET products and services consider that the potential damage to their business from the inability to offer credit terms that consumers find valuable and desirable, merchants may choose not to adopt the NETCC.

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## **10. Particular issues with ACCC approach**

### ***Overreach***

74. The signatories to the NETCC will be merchants supplying NET products to consumers and small businesses. It is not contemplated or intended that BNPL finance providers will be signatories to the NETCC.

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<sup>18</sup> Determination, [4.43] and [4.47].

75. The Conditions and the previous formulations of paragraph 24 (or 25 as the context requires) of the draft NETCC unfairly prevent or hinder providers of BNPL finance to offer their lawful products to consumers wishing to purchase NET products.
76. BNPL finance providers do not enjoy any kind of dominance in the provision of finance for the purchase of NET products or services. Consumers are free to access any form of credit they desire from any credit providers, or to pay in full for systems and installation from their own savings. The increasing prevalence of BNPL finance for NET products reflects consumer demand for a type of product that presents a convenient and cheaper alternative to traditional forms of credit. There is no reason why BNPL finance products should not remain a viable alternative form of finance for consumers.
77. BNPL providers' access to consumers is indirect. BNPL providers do not cold call consumers. The unsatisfactory consumer experiences that are reported anecdotally by Consumer Action Law Centre and others were visited upon those consumers by others. In recognition of that, the following provisions of the draft NETCC which was submitted with the Application (and which is at Attachment B to the Determination), are appropriate and were not opposed by any parties which made submissions to the ACCC in respect of the Application:
- (a) Part B,
- (i) paragraph 3(n): *"our advertisements and promotional material will ... be clear about any additional costs for finance or an alternative purchasing arrangement for NET when the cost is being recovered in the overall price (e.g. where the price of financed NET is greater than the price that would apply if immediate payment is made)".*
- (ii) paragraph 4: *"When marketing directly to you, including through a sales agent)...*
- A. *we will explain up-front the purpose of any un-requested ("unsolicited") contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time;*
- B. *we will leave your premises or end the contact immediately if you ask us to do so..."*
- (iii) paragraph 5: *"We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the NET you are considering."*
- (iv) paragraph 6: *"Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (e.g. illness, impairment, a victim of abuse, financial stress)."*
- (v) paragraph 25: *"We may offer you NET 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 ... we will ensure that:*
- C. *you receive the following clear and accurate information:*
- 1) *the proposed cost under the deferred payment arrangement compared with the cost of that same NET product, system or service if you were to purchase it outright on that day."*
78. Flexigroup continues to support these provisions of the NETCC.



### ***No cogent evidence of systemic harm from BNPL finance in NET sector***

79. ASIC in ASIC Report 600 has undertaken a detailed review of the BNPL sector involving engagement with:
- (a) BNPL providers identified based on, amongst others,
    - (i) the market and prominence of providers, and
    - (ii) complaints data from consumer groups and ASIC's own internal systems;
  - (b) key stakeholders, including
    - (i) the Reserve Bank of Australia, the ACCC and APRA;
    - (ii) ASIC approved EDR schemes, namely the Financial Ombudsman Service and the Credit and Investments Ombudsman;
    - (iii) community legal centres and consumer groups;
    - (iv) industry associations; and
  - (c) consumers who had actual experience of using BNPL finance and who were identified through a screening process to ensure accurate representation across all demographics.
80. The outcome of the ASIC Report 600 was that ASIC did not consider it necessary that BNPL finance be subjected to regulation under the NCCPA and the NCC. The Conditions to the NETCC as authorised make BNPL providers subject to this regulation by the back-door, and with serious impact on their business and commercial viability.
81. Further, as noted above, the anecdotal material submitted by Consumer Action Law Centre and others indicated poor practices by those engaged in selling the NET products which can and will be addressed by other parts of the NETCC. This anecdotal evidence is not supported by the findings in ASIC Report 600.

### ***Interference with function of ASIC as regulator of financial products***

82. The Conditions single out one purpose of BNPL finance (i.e. for the acquisition and installation of NET products). This overrides ASIC's position as the financial regulator and undermines the efforts that ASIC has been and is taking to monitor the BNPL finance sector to identify and deal with any systemic issues.
83. As noted above, ASIC has undertaken a far more extensive engagement with the BNPL sector than has been undertaken by the ACCC in the course of reaching its Determination.

### ***Code Administrator not appropriate body to adjudicate on financial product***

84. Although Flexigroup's application for review concerns the Conditions in their totality, it also raises specific opposition to the appointment of the Code Administrator as a body suitable to adjudicate on the sufficiency of any relevant code of conduct to which a BNPL provider has subscribed.
85. There are a number of appropriately qualified bodies experienced in financial services and financial products that are more suitable than the Code Administrator to undertake any such function, if it should be determined that it is necessary, without needing to empower a new quasi-regulator for the specific and narrow purposes of the NET sector.

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## **11. Issues for Tribunal to consider**

86. Flexigroup submits that the Tribunal should consider:



- (a) whether with the Conditions, the public benefits of the NETCC outweigh the anti-competitive detriments
- (b) whether that authorisation could be varied so that it is made without the Conditions or subject to different conditions.

87. Flexigroup submits that the Tribunal should answer "no" to the first issue on the basis that:

- (a) the NETCC with paragraphs 3(d) and 25(a) as provided for in the Conditions will have the effect, or be likely to have the effect of substantially lessening competition; and
- (b) the benefits to the public that would result, or are likely to result, from the NETCC with those paragraphs will not be outweighed by the detriments to the public for the reasons set out in paragraphs 74 to 85 above, such that the statutory test in CCA section 90(7) is not satisfied.

88. Flexigroup submits that the Tribunal should answer "yes" to the second issue.



## **Annexure A to Background, Facts, Contentions and Issues of Flexigroup Limited**

## **Attachment B - New Energy Tech Consumer Code**

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# Part A - Overview

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## Scope

This New Energy Tech Consumer Code (“the Code”) sets good practice standards for providing Residential and Small Business Customers with New Energy Tech products, systems and services. We may extend these protections to other customers if we expressly include this in the contract. New Energy Tech is defined in Part C of the Code to include such things as solar photovoltaic systems, wind turbines, energy storage systems, managing a customer’s energy usage and electric vehicle charging services but does not include some simple, low cost, standard New Energy Tech.

The intention of this Code is to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers.

Providers who have been accepted by the Administrator as Code Signatories (referred to as “we” and “our”) are bound to comply with this Code. Customers protected by this Code are referred to as “you” and “your”.

The Code includes:

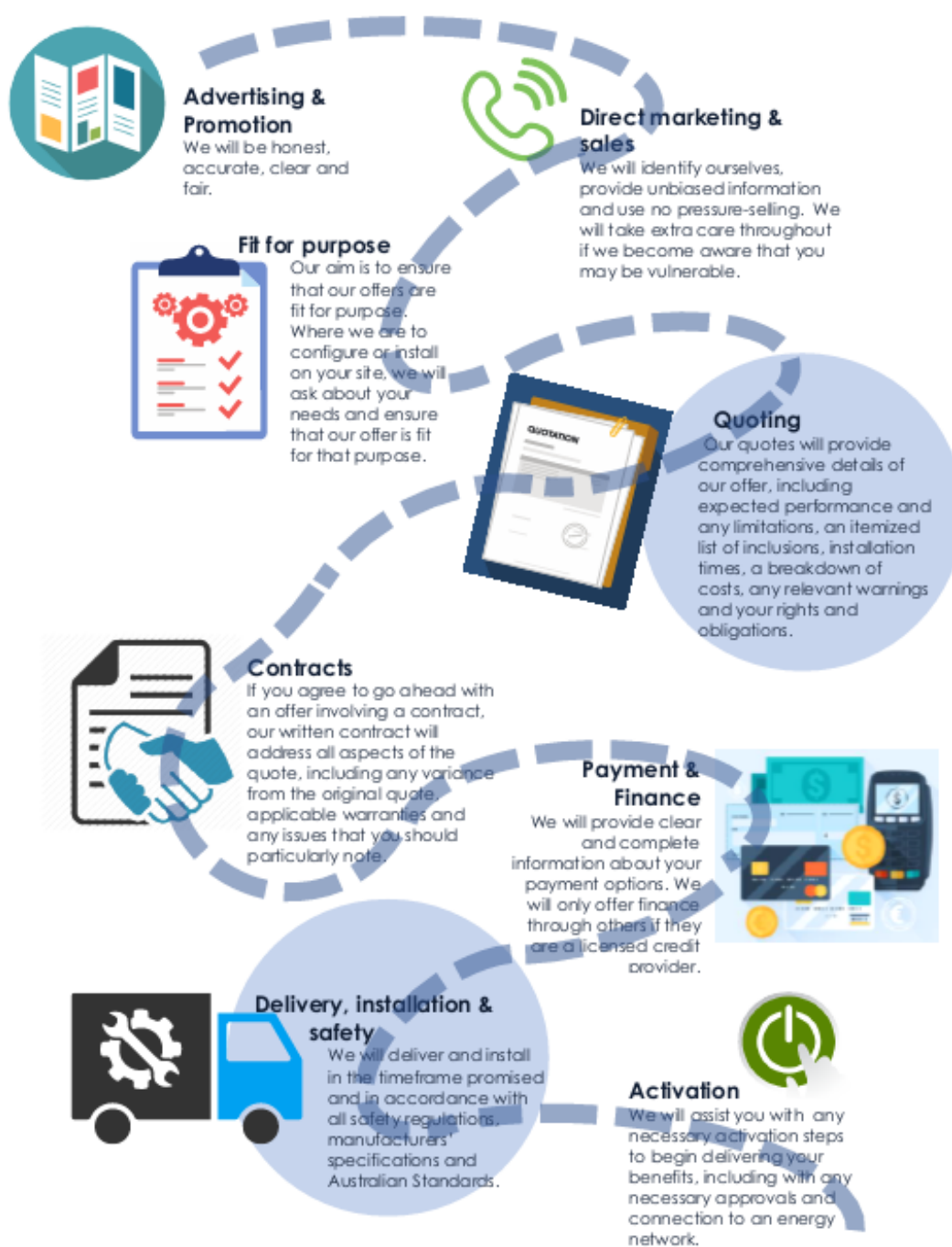
- Part A that provides an overview of the key commitments we make to you
- Part B that sets out our required practices in detail
- Part C that defines key terms (which are Capitalised in the Code) and
- an Annexure setting out how the Code is administered, monitored and enforced, including our obligations to the Administrator and the Code Monitoring and Compliance Panel (“The Panel”).

The Code operates alongside a range of existing legal and regulatory protections. Generally, it does not repeat these protections except as needed to provide you with a complete understanding of what to expect from us.

## Key commitments

1. The key commitments made under this Code are to:
  - a) Provide you with clear, accurate and relevant information to help you make informed choices
  - b) Encourage you to be aware of your rights under the law and the Code
  - c) Ensure that our sales practices are responsible
  - d) Ensure that products, systems, services and documentation provided under the Code are suitable and fit for purpose
  - e) Support staff training and work processes that ensure that we comply with the law and the Code
  - f) Ensure that we will be responsive to your needs and take prompt, appropriate action if you make a complaint.

The Code aims to cover the main steps of your 'customer journey' as illustrated below.





## Part B - Our required practices

### Advertising and promotion

2. We will ensure that we have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers.
3. Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will:
  - a) ensure all relevant incentive schemes (government and non- government) are honestly and accurately represented
  - b) not misrepresent our association with government or falsely claim to be part of a government scheme
  - c) not make any false or misleading claims about the price, value, quality, capacity, output or other performance characteristic of our New Energy Tech, for example, through selective advertising, exaggeration or misleading focus on one or a few aspects only of the New Energy Tech
  - d) [make no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act \(2009\) \(Cth\) \("NCCPA"\)](#)
  - e) use language that is accessible and that avoids industry jargon
  - f) not make any misleading claims about the place of origin (manufacture and assembly) of our products
  - g) not mislead you about the impact our New Energy Tech will have on your energy usage or costs
  - h) ensure that any claims relating to performance and energy cost savings of our New Energy Tech are reasonably based and where available, based on reputable sources
  - i) advertise the total price for our New Energy Tech as prominently as we advertise any component of the price
  - j) provide information that is specific to the state or region in which the promotional activity takes place
  - k) ensure that any disclaimers are clearly outlined and not buried in small print
  - l) only include a statement, promise, prediction or opinion if it is reasonably based
  - m) not include information that is no longer current, for example, quote an offer or financial incentive that is no longer available
  - n) be clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price (e.g. where the price of financed New Energy Tech is greater than the price that would apply if immediate payment is made).



## Direct marketing and sales

4. When marketing directly to you, including through a sales agent (as well as meeting the requirements in paragraph 3):
- a) we will explain up-front the purpose of any un-requested (“unsolicited”) contact by us, in person or by telephone and advise that you can ask us to leave or end the contact at any time
  - b) we will leave your premises or end the contact immediately if you ask us to do so
  - c) we will show you our company-issued identification if an unsolicited contact is in person
  - d) any interactive internet marketing channel that we use will clearly identify for you the company whose New Energy Tech is being promoted
  - e) we will provide you with the address of our local office or showroom, an email or other electronic address and a telephone number where any queries can be answered
  - f) we will provide you with the Administrator approved Consumer Information Product that explains the consumer protection framework that applies under legislation and this Code and sets out other key information. The information may be provided to you in electronic format, however if you request, we will provide you the information in hard copy.
5. We will adhere to responsible marketing practices at all times and avoid high-pressure sales tactics that may induce you to make hasty or uninformed decisions about the New Energy Tech you are considering. High-pressure sales tactics include (for example):
- a) seeking to sell to you if you are unlikely to be able to understand our information and/or our contract (e.g. due to English language difficulties, age, learning difficulties, mental illness or physical disability)
  - b) offering discounts for agreeing to provide testimonials and/or referrals
  - c) claiming special discounts (eg. “community” or bulk-buy discounts) apply, if they don't
  - d) applying psychological pressure to persuade you to make a quick purchase decision (eg. by unfairly appealing to your emotions)
  - e) employing badgering techniques, such as revisiting your premises uninvited or making frequent telephone calls, to pressure you into signing a contract
  - f) other conduct that the Administrator may reasonably identify as high-pressure sales tactics.
6. Throughout our dealings with you, we will take extra care if we become aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress).



## Fit for purpose inquiry

7. As appropriate to the nature, complexity and cost of the new Energy Tech you are considering, we will support you in making a fit-for-purpose choice including:
- a) ask you about your specific circumstances, needs and expectations. This includes the extent to which you plan to use our New Energy Tech to supplement or improve the efficiency of energy use while connected to an Energy Network or be isolated from the Energy Network (also known as “off-grid”) or your expected outcomes from participating in forms of New Energy Tech supply such as virtual power plants or other energy markets.
  - b) enquiring about any need you may have for energy for medical or life-support equipment or services and ensure that our New Energy Tech is suitable for this purpose and that you are made aware of any additional or increased risks.
  - c) ensuring that any offer of New Energy Tech is fit for purpose in light of your circumstances, needs and expectations as you have described them to us (unless we clearly explain to you orally and in writing that it is not fit for that purpose). We will include a brief description of your circumstances, needs and expectations in our quotes and contracts. Where we offer you a New Energy Tech that is intended to work in conjunction with other New Energy Tech that you already have or are obtaining, we will ensure that our offer is compatible with that other New Energy Tech and confirm this in writing in your quote and contract.
8. If you advise us that you are considering operating off the Energy Network, we will provide you with a copy of the Administrator-approved Consumer Information Product that sets out Energy Networks Australia’s Off-Grid Principles.



## Quote – general requirements

9. We will provide you with a written quote that sets out:
- a) our full name, Australian Business Number (if relevant) and physical address, an email or other electronic address and a telephone number where any queries can be answered
  - b) an itemised list of the New Energy Tech to be supplied, including relevant specifications. For products and systems, this will include the manufacturer, model, year, quantities, configuration and performance specifications. For services, this will include the nature and purpose of the services, whether the services are ongoing, scheduled (and if so what frequency) or responsive to your request, the duration of the service commitment and whether the services will be provided remotely or at your premises
  - c) information about how the New Energy Tech operates
  - d) information about any responsibilities you have to facilitate the operation of the New Energy Tech including maintenance and access issues
  - e) information about product, system or service limitations that are likely to be relevant to you (eg. where a battery does not provide a back-up facility)





- f) a performance estimate for the New Energy Tech to be supplied, which will be reasonably based, where available rely on reputable sources and comply with any relevant Administrator guidance
- g) where our offer is for a New Energy Tech product or system to be connected to the Energy Network, information that your energy supply contract may change as a consequence of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to find out about this and whether there are any restrictions to your ability to interact with the Energy Network
- h) our timeframe for supplying and installing products and systems or commencing services to be provided to you (if there are circumstances that are out of our control that may cause delay, we will identify this)
- i) our business terms including the method of making payments
- j) details of any guarantees and warranties that apply. We will specify:
  - i. that your rights under your contractual warranty are in addition to the consumer guarantees under the Australian Consumer Law and that these are not excluded or replaced by your contract
  - ii. the specific details of the guarantee or warranty and how it applies to you
  - iii. for a New Energy Tech product or system - the name and contact details of our supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason you are unable to contact us.
- k) for a New Energy Tech product or system, information about its expected life and what is involved in disposing of it at the end of its life
- l) information about the portability of the proposed New Energy Tech
- m) information about the term of any applicable ongoing agreement and any provisions that may impact on your existing relationship with an Energy Supplier
- n) if the quote is for an installation on a strata title property and requires the approval of the Owners Corporation – the need for you to obtain that written approval and provide it to us before you sign the contract with us
- o) your cooling-off and termination rights (if applicable) under the Australian Consumer Law (including the right to terminate a sales agreement within 10 business days if the sale resulted from an unsolicited contact) and this Code
- p) any licenses, accreditation or certification that we hold that are needed to fulfil the offer we are making to you
- q) that we are bound by this Code
- r) the Administrator-approved Consumer Information Product that explains the benefits of the Code for our Customers and any other important information as applicable.

## Quote – financial disclosure

10. Our quote to you will specify the deposit payable (if any) and the total price of all offered New Energy Tech including any taxes that apply. We will specify the period of time our pricing is valid for (which will be at least 10 business days).
11. Where our offer is of a Power Purchase Agreement, our quote will specify:
  - a) the energy pricing and all associated fees and charges, any rights we have to change any of these and the notice we will provide of any price change
  - b) a reasonable estimate of the aggregate amount payable over the agreement's term based on a stated, reasonable estimate of your energy consumption, including the basis of the calculation and, if applicable, the energy you will export to the Energy Network
  - c) a clear statement that you must pay the stated energy prices for the term of the contract and that this amount may not reflect or be competitive with available prices for energy from the Energy Network.
12. Our quote to you will specify site conditions and circumstances beyond our control that may result in extra chargeable work not covered by the quote (eg. fees for meter exchange/re-configuration, repairs to existing faults, and changing dedicated off-peak control devices if required).
13. Our quote to you will specify the total value of any discounts, regulatory certificates, incentives or rebates (government and non-government) or government relief schemes and how and when these may or may not apply.
14. Where we offer New Energy Tech services and periodic or intermittent charges apply, our quote will specify the amount or method of calculation, any rights we have to vary charges during the term of the contract and the frequency of bills. For example, if there will be charges for software upgrades, we will aim to provide reasonable certainty as to the cost that you will incur.
15. If we make a claim that you are likely to achieve a favourable return on your investment, we will include in our quote a return on investment calculation that is based on reasonable assumptions and where available from reputable sources. Our quote will set out our assumptions including:
  - a) system design, performance and output
  - b) government and non-government financial incentives
  - c) energy prices and usage
  - d) financing costs (if applicable)
  - e) maintenance costs
  - f) end-of-life costs
  - g) any other relevant factors.

We will also clearly state that our calculation is an estimate only and that if our assumptions prove not to be correct you may not achieve the estimated return.
16. If our offer involves us making payments to you (for example, for energy purchased from you), we will clearly specify how payments will be determined, any rights that we have to change the basis on which payments will be calculated and the frequency with which payments will be made.

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## Quote – design

17. If the quote includes New Energy Tech that requires custom configuration or specification and/or physical installation by us or a competent or qualified installer:
- a) we will include as part of the quote:
    - i. a site-specific installation design or plan (a sketch or diagram is acceptable) including any configuration or positioning issues and how the New Energy Tech will integrate with other New Energy Tech you may have
    - ii. a site-specific performance estimate for the New Energy Tech.
  - b) before we enter into a contract to provide New Energy Tech to you, we will complete a site-specific installation design or plan and site-specific performance estimate (both must meet the requirements of paragraph 17a)) for a non-refundable agreed fee, with no obligation on you to proceed to contract with us
  - c) we can provide a site-specific installation design or plan and site-specific performance estimate (both of which will meet the requirements of paragraph 17a)) as an initial deliverable of the contract if:
    - i. we do so before the expiry of your cooling-off period (if applicable)
    - ii. we provide you with a full refund, if within 10 business days of receiving the site-specific installation design or plan and performance estimate you notify us that you do not accept these.

## Quote - connections

18. If our quote is for a New Energy Tech that requires approval from your Energy Supplier for connection to the Energy Network and/ or reconfiguration of your meter, we will also include in our quote:
- a) an offer to arrange this on your behalf and what, if any, charge we will make for doing this
  - b) an explanation of the steps that need to be taken to obtain approval and/ or reconfiguration of your meter and the relevant paperwork that must be completed and submitted prior to installation
  - c) a statement that your Energy Supplier may impose a charge for connection to the Energy Network and/or reconfiguring your meter and may change your existing energy pricing
  - d) a statement that we will support you through these steps if you decide to obtain Energy Network connection approval yourself and whether there will be any non-refundable charge for this assistance.

## Contracts

19. If you accept our quote and agree to purchase our New Energy Tech, we will provide you with a written contract that is clear, uses plain language and is in legible print.
20. Your contract will meet the same requirements as for a quote (and may do this by attaching the quote with any amendments that are necessary). In addition:
- a) your contract will include our undertaking to you to comply with the Code
  - b) your contract will provide you with a standard minimum supplier's warranty period on the operation and performance of the New Energy Tech including workmanship. The period will meet or exceed the period set from time to time by the Administrator, in consultation with stakeholders, for the particular New Energy Tech
  - c) your contract will include information about how to make a complaint and the complaint resolution process including your right to access an external dispute resolution scheme (where applicable), to take a complaint to the Administrator and to take a complaint to a government regulator and
  - d) at the time we provide your contract to you, we will also provide you with any relevant Administrator-approved Consumer Information Product. We may give these to you electronically, but if requested, we will provide them in hard copy.
21. We will not offer you a contract that involves requiring you to purchase energy or services from another supplier (called "third line forcing"), except where this is permitted by the *Competition and Consumer Act 2010 (Cth)* and we have made this clear to you.
22. We will explain the contract to you prior to you entering into the agreement. In particular:
- a) we will draw your attention to any particular requirements of the contract that may cause confusion or disagreement (e.g. where additional fees may arise, early termination fees, end of contract payments or any difference between a verbal quote and the final price)
  - b) we will clearly explain the process for the payment and trade of any government or regulatory certificates, and of any relevant trading facility and any limitations
  - c) we will advise you that your Energy Supply contract may change as a result of purchasing the New Energy Tech and that it is your responsibility to contact your Energy Supplier to check what new pricing may be applied and, after installation of the New Energy Tech, to confirm that the agreed pricing has been applied.
23. Both of us will sign the contract and any amendments. Equivalent methods of legal agreement other than physically signing a written contract in person are also permitted (for example, electronic acceptance).



## Payment and finance

24. We will issue you with a receipt for any deposit or other payment you make under the contract.

25. 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 3.n.), we will ensure that:



- a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that:
  - i. is licenced under the National Consumer Credit Protection Act (2009) (Cth) ("NCCPA") and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("NCC"), or
  - ii. if not licensed under the NCCPA and the deferred payment arrangement is not regulated by, or is exempt from, the NCC and or NCCPA:
    - (A) the Administrator has determined that:
      - a. the credit provider is a signatory to an industry code of conduct that requires the credit provider, on an ongoing basis, to:
        - i. resolve any complaints you may have using an internal dispute resolution process which complies with the standard specified in ASIC Regulatory Guide 165, and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
        - ii. have processes in place which comply with sections 72, 88 and 89A of the NCC to identify whether you are experiencing payment difficulties due to hardship, to respond to your requests for hardship assistance and to make you aware of your rights to dispute the rejection of such requests for assistance
        - iii. offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
        - iv. undertake a responsible lending assessment of the suitability of the loan and your ability to repay the loan, providing substantially equivalent protections to those contained in the following sections of the NCCPA and the NCC:

- [s 128 \(obligation to assess unsuitability\)](#)
- [s 129 \(assessment of unsuitability\)](#)
- [s 130 \(reasonable inquiries about the consumer\)](#)
- [s 131 \(when the credit contract must be assessed as unsuitable\)](#)
- [s 132 \(giving the consumer the assessment\) and](#)
- [s 133 \(prohibition on entering, or increasing the credit limit of, unsuitable credit contracts\); and](#)

b. [this industry code contains mechanisms for:](#)

- i. [the ongoing monitoring and investigation of complaints about potential breaches of the industry code.](#)
- ii. [appropriate remedies to be imposed that have regard to the severity of the breach, including suspension or expulsion of credit providers that are found to be in breach of the code;](#)
- iii. [reporting on breaches of the industry code by credit providers that are approved pursuant to this clause 25; or](#)

(B) [the Administrator has approved the credit provider's deferred payment contract and internal policies and processes in accordance with paragraphs A7 and, where applicable, A7A of the Annexure – Code Administration. \(This paragraph \(B\) is as an interim measure pending the development of an approved code of conduct that will enable paragraph \(A\) to apply. Paragraph \(B\) ceases to apply on 1 January 2022 regardless of whether a regulator approved code of conduct is in operation by that date\).](#)

- b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system
- c) you receive the following clear and accurate information:
  - i. the name of the credit provider to whom you will be contracted for the arrangement
  - ii. a clear statement that the deferred payment arrangement is a voluntary finance option
  - iii. the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day
  - iv. the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt

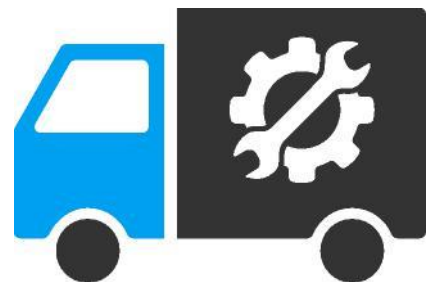
from or not regulated by the NCC, information to assist you in assessing the credit product, including the credit provider's fees and charges

- v. whether at the conclusion of the deferred payment arrangement
  - (A) you own any elements of the New Energy Tech, or
  - (B) you have any entitlement to any ongoing services or pricing, and/or
  - (C) you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and
- vi. a statement that questions and complaints about the payment arrangement should be directed to the credit provider with whom you will be contracted.

- 26. Paragraph 25 does not apply if the finance is provided by a government body.
- 27. Paragraph 25 does not apply if we offer you, as an alternative to full payment on delivery or installation, the opportunity to make progressive instalments to us over a period of not more than 6 months, provided that the total amount to be paid by you does not include an interest component, additional fees or an increased price (see paragraph 3. n.).
- 28. Paragraph 25 does not apply if the Administrator is satisfied that the contract we offer you is a Power Purchase Agreement and our contract includes a commitment to try and assist you if you notify us that you are experiencing financial hardship, including by advising you of any relevant government assistance schemes and by offering you a payment plan.
- 29. Where we are providing an ongoing service to you and the contract allows us to change the price that we charge you, we will advise you as soon as practical and no later than five business days prior to the price change taking effect.
- 30. If your contract requires us to make payments to you (whether by transfer of money or by offset to a payment you make to us), we will make those payments on time in accordance with your contract. If our payments to you are calculated using an undisclosed formula, we will ensure that our payment calculation system is regularly audited by a registered company auditor to ensure that payments are accurately calculated.

## Delivery, installation and safety

- 31. We will arrange delivery and installation (if applicable) of New Energy Tech you purchase from us within the timeframe specified in your contract, unless any delay is because of circumstances that were identified in your contract as outside our control.
- 32. If you purchase New Energy Tech that requires physical installation by us, we will ensure your safety and the safety of our installers. We will install in accordance with all applicable safety standards, manufacturer's specifications, relevant Australian Standards, Energy Network standards, any binding guidance issued by the Code Administrator and good industry practice, using an installer that is trained, competent and where applicable, holds any required qualification or certification to undertake the work.





## Activation



33. If you authorise us to obtain Energy Network connection approval on your behalf for New Energy Tech, we will:
- a) not install or commence the New Energy Tech until approval is provided
  - b) provide you with a full refund if the relevant approvals are not obtained
  - c) prepare and submit within a reasonable timeframe all relevant documentation required by the Energy Supplier for connection to the Energy Network and for reconfiguration of your meter (if relevant)
  - d) respond within a reasonable timeframe to any additional compliance requests from the Energy Supplier (for example, re-submitting incorrect paperwork), and consult with you if necessary
  - e) keep you informed of progress at each step, including any restrictions or limitations that may adversely affect you.
34. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech, we supply to you, we will:
- a) clearly explain to you each step in the process for preparing and submitting the documentation to the Energy Supplier
  - b) provide you with information as to where to find and how to complete and submit paper or on-line forms
  - c) provide you with expected timeframes and any deadlines for each step of the process
  - d) advise you of contact details for queries or following up on progress
  - e) advise of any potential problems that may arise
  - f) provide you with a refund consistent with paragraph 48 if your application is rejected.
35. If you take responsibility for obtaining Energy Network connection approval for New Energy Tech and your application is rejected after you have signed a contract for that New Energy Tech, we will provide you with a refund minus reasonable expenses incurred by us to the point of termination of the contract.
36. If we supply you with New Energy Tech that needs another form of activation in order to provide you with the intended benefit, we will explain to you the steps that need to be taken and who is responsible for these. We will promptly fulfil our responsibilities and keep you informed of progress at each step.



## Operating Information

37. Prior to the activation of the New Energy Tech we are providing you, we will:
- a) provide you with comprehensive information for safe and effective operation, maintenance and optimisation of your New Energy Tech
  - b) explain to you any obligations that you may have to facilitate or enable the New Energy Tech (for example, to maintain an internet connection that we are able to access)
  - c) advise you how to use your New Energy Tech and/or assess the benefit you are deriving from these. The advice will be appropriate to the New Energy Tech we are providing to you and will involve at least one of the following:
    - i. written instructions and a physical or electronically recorded demonstration (for example, an instructional video)
    - ii. providing you either with a measuring or monitoring device that connects to the New Energy Tech or with continuous access to a remote monitoring service (in either case that will facilitate accurate measurement of benefit that is based on objective standards acceptable to the Administrator) together with written instructions as to how to use that device or access that service
    - iii. a commitment to provide you with regular reports that accurately quantify the benefit that you are deriving and that meet any guidelines made by the Administrator in relation to reporting of this kind (for example, in the case of a service that is designed to reduce your energy bills by smart management of your energy consuming products).



The required information will vary depending on the specifics of the New Energy Tech but will meet the Administrator's requirements. The information may be provided to you in electronic format, hard copy or by web link or something similar. If you request, we will provide you the information in hard copy (in which case, we will provide it at least quarterly, namely every three months).

## Performance

38. Our New Energy Tech will meet your reasonable expectations including but not limited to:
- a) meeting your needs as explained to us (see paragraph 7), unless we have clearly explained to you and confirmed in writing that those needs cannot be met
  - b) performing properly
  - c) reflecting any agreed contract and meeting the performance specifications outlined by us to you;
  - d) fulfilling any commitments we make to you (for example, to provide access to an accurate monitoring service or regular reports that accurately quantify the benefit you are gaining)
  - e) New Energy Tech that utilises information and communications technology will be secure
  - f) all our services will be provided with due care and skill.

39. If we become aware that New Energy Tech that we have supplied to you is defective or unsafe, we will promptly tell you and offer to fix the problem if this is possible or otherwise remove the product or system from your premises and provide reasonable compensation to you.
40. If we provide you with New Energy Tech that involves the use of equipment that you own, we will do so in a way that is consistent with the equipment manufacturer's instructions and warranty requirements.

## Move from premises

41. If our contract with you includes a lock-in period and imposes fees if you terminate early, and
- a) the services are not transferrable to another property
  - b) you sell or move from the property to which those services are being provided
  - c) the occupier of the property agrees to take over your contract

we will agree to the occupier of the property substituting for you under the contract and will not charge you early termination fees, unless we have a reasonable basis for refusing to contract with the occupier of your property.

## Warranty claim

42. We will respond promptly to any warranty claim by you and within a reasonable timeframe implement warranty repairs and replacements, remedy service issues or provide compensation.
43. We will provide you with the name and contact details of our New Energy Tech product or system supplier in case you want to pursue your consumer guarantee rights under the Australian Consumer Law against that supplier or if for any reason, you are unable to contact us.
44. In some circumstances, you may not be entitled to a consumer guarantee under Australian Consumer Law, and in that case, you may not be entitled to a remedy, if the claim is due to something that:
- a) someone else said or did (excluding our agents or employees) or
  - b) beyond human control that happened after the goods or services were supplied (for example, an extreme weather event).



## Termination of contract

45. You are entitled to terminate your contract and we will provide you with a full refund if:
- a) your contract is for the supply of New Energy Tech that requires physical installation
  - b) consistent with paragraph 17.b), we provide you with a site-specific installation design or plan and site-specific performance estimate as an initial deliverable under the contract (rather than as part of our quote) \
  - c) within 10 business days of receiving our site-specific installation design plan and performance estimate you notify us that you do not accept these.



46. You are also entitled to terminate your contract and we will provide you with a full refund, if your contract is for the supply of New Energy Tech that requires physical installation and either of the following applies:
- a) we propose to significantly change the New Energy Tech installation design from that previously provided to you (whether provided in our quote or as a first deliverable under your contract) and you are not willing to accept the change or
  - b) site conditions and circumstances beyond our control result in extra chargeable work not within the contract price and we are not willing to bear those additional costs.
47. You are also entitled to terminate your contract for the supply of New Energy Tech, and we will provide you with a full refund, if we fail to meet the timeframe specified in your contract for delivery and installation (if applicable), or commencement of service of any New Energy Tech. This does not apply, however, if the delay was because of circumstances that were identified in your contract as outside our control.
48. If you take responsibility for obtaining Energy Network connection approvals and your application is rejected after you have signed a contract with us (see para 35), you may terminate the contract and we will provide you with a refund minus reasonable expenses incurred by us up to the time of the termination.
49. We will terminate your contract and remove New Energy Tech that we supplied to you and return the site to its former state, if:
- a) you have a strata title property
  - b) you were required by law to obtain the Owners Corporation written consent before installing our New Energy Tech
  - c) you entered into a contract with us to supply the New Energy Tech before obtaining that written consent and
  - d) the Owners Corporation subsequently refuses to give that consent. We will provide a full refund and conduct the removal and restoration at our cost, unless:
  - e) we advised you of the need for written consent under paragraph 9.n) and
  - f) we have proceeded with the installation on your incorrect advice that yours is not a strata title property.
50. Under the Australian Consumer Law, if the sale to you was unsolicited and you are a Residential Customer, you will be given 10 business days after you sign a contract to cancel the contract without penalty (the “cooling-off period”). If you wish to withdraw from a valid contract after the expiry of any cooling-off period, we may apply our own policies regarding fees for cancellation, provided that we specified them in the initial contract. For all Customers protected by this Code, we may only impose cancellation or termination fees that are reasonable and related to the cost incurred by us.

## Customer service

51. We will provide fair terms, clear communication and maintain high standards of customer service at all times and respond courteously and promptly to any contact from you and queries you may have about New Energy Tech supplied by us to you.



52. If we have an ongoing service relationship with you and we are aware that you may be facing vulnerable circumstances (eg. illness, impairment, a victim of abuse, financial stress or needing energy for medical or life-support equipment or

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services), we will take additional care to respond promptly to any related issues arising from the use of our New Energy Tech.

## Complaints

53. If you are dissatisfied with a New Energy Tech we offered or supplied, you can submit a complaint directly to us. A complaint may include, for example, any expression of dissatisfaction with a New Energy Tech offered or provided, with the sales process or salesperson, or with the complaints handling procedure itself.
54. We will handle your complaint in a way that is fair, timely and transparent. This means that:
- a) we will have information readily available for you and our staff about how complaints may be made, how these are handled and available avenues to which you can escalate your complaint if you are not satisfied with our response
  - b) we will acknowledge receipt of your complaint as soon as possible and tell you when we expect to be able to respond to your complaint
  - c) we will log your complaint in a complaint's register and promptly begin investigating the issues
  - d) we will aim to provide you with a response to your complaint within 15 business days of receipt of your complaint. If we do not provide you with a final response by then, we will advise you before 15 business days have passed and provide an update of progress;
  - e) we will provide you with a final response to your complaint within 25 business days of receipt of your complaint, unless we have both agreed to a further extension
  - f) if you are dissatisfied with our response to your complaint, we will provide you with contact details for escalation options including any external dispute resolution (Ombudsman) scheme of which we are a member, the State Consumer Affairs or Fair Trading body and the Administrator
  - g) we will maintain appropriate record keeping of complaints and their outcomes and steps that we take to minimise similar complaints in the future.



## Legal and privacy obligations

55. We will comply with all local, state and federal legislation, relevant Accreditation Guidelines, and regulations including but not limited to:
- a) The Renewable Energy (Electricity) Act 2000 (Cth) which is supported by the Renewable Energy (Electricity) Regulations 2001 (Cth)
  - b) The Do Not Call Register Act 2006 (Cth) and associated telemarketing standards including permitted hours for contacting consumers
  - c) Australian Consumer Law
  - d) Respecting "Do Not Knock" and "No Hawkers" stickers.
56. Even if we are not bound by the Privacy Act 1988 (Cth), we will take reasonable steps to ensure the safety of your personal information and we will only use your personal information:



- a) for the purpose of providing you with a requested quote or carrying out our obligations under your contract (as applicable)
  - b) for future marketing of other related New Energy Tech or providing you with information that you might reasonably expect to receive from us or
  - c) to provide your personal information to a third party if you have given express permission for this.
57. We will not provide you with marketing material unless we also provide a simple, easy way for you to ask not to receive future direct marketing communications and include a clear, prominent opt-out provision in each marketing communication.

## **Training**

58. We will train our sales agents, representatives, contractors and employees about our New Energy Tech and their responsibilities under this Code, so that they can provide you with accurate information and quality services.
59. We will ensure the safety of our installers, subcontractors and employees and demonstrate due diligence in ensuring the safety of persons under our direct or indirect responsibility.
60. Our people will be competent, appropriately qualified and have completed the relevant safety training modules (as specified by the relevant regulator or by the Administrator) appropriate to the work.

## **Compliance with the Code**

61. We agree to comply with this Code as amended from time to time and any mandatory standards published by the Administrator on the Code website that apply to New Energy Tech that we provide. We will also ensure that our employees, contractors, agents, representatives and any other individuals or businesses acting on our behalf do likewise. This includes third parties we engage to undertake direct marketing and sales for us.
62. We will be responsible for all actions governed by this Code, whether taken by our employees, contractors, agents, representatives or any other individuals or businesses acting on our behalf. This includes third parties we engage to undertake direct marketing for us or who we engage to install products or systems we provide to you or to deliver services to you.

## Part C - Definitions

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The definitions for terms used in this Code are as follows.

**Administrator** is the organisation with responsibility for administering the Code as set out in the Annexure – Code Administration.

**Australian Consumer Law** – Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth).  
**Business day** – A day that is not a Saturday, Sunday or public holiday in the relevant location in Australia.

**Customer** – A potential or existing Residential Customer or Small Business Customer. The term also includes other customers if their contract expressly includes that this Code applies.

**Consumer Information Product** – consumer information (hardcopy, web-based, electronic, etc) that is approved by the Administrator to provide independent information to assist a customer or potential customer to make informed choices about New Energy Tech.

**Energy Network** – Any of Australia's principal energy transmission and distribution networks (including South West Interconnected System, North West Interconnected System, Darwin-Katherine Electricity Network, National Electricity Market).

**Energy Supplier** – Any of Australia's public offer energy providers, including retailers and network businesses.

**New Energy Tech** are:

- (a) small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks or as distributed energy resources connected to an Energy Network
- (b) services that support or are closely related to those products and systems
- (c) products, systems and services that monitor or manage a Customer's usage of energy whether on or off an Energy Network
- (d) any other product, system and service that the Administrator is satisfied is appropriately within this Code.

The term does not, however, include simple, low cost or off-the-shelf New Energy Tech that are within a class exemption made by the Administrator in accordance with paragraph 17 of the Annexure – Code Administration.

Examples of New Energy Tech are:

- (a) distributed energy resources owned by or leased to the Customer that are connected to an Energy Network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
- (b) a microgrid that may be connected or fully isolated from the Energy Network
- (c) a power system for a single Customer, whether or not the Customer is also connected to an Energy Network
- (d) energy management products, systems and services supplied to a Customer including home energy management systems and services, battery and other storage products, systems and services
- (e) programs aimed at stabilising the supply of energy including by paying Customers an incentive to reduce their usage during critical peak periods or by shutting down

or restricting the power consumption of Customer appliances during critical peak periods

- (f) a Power Purchase Agreement
- (g) person to person energy trading systems and services
- (h) electric vehicle charging services
- (i) suppliers of repair, maintenance and removal services for New Energy Tech products and systems.

These examples are not intended to limit the scope of the definition. Rather the term has been defined to accommodate new products and services as they enter the Australian market where the nature, complexity and cost is such that the Code protections are appropriate.

**Owners Corporation** – The body (however described) that has legal responsibility for the common property in a strata development.

**Panel** – The independent Code Monitoring and Compliance Panel appointed to oversee the work of the Code Administrator.

**Power Purchase Agreement** - An agreement for a Signatory to supply a customer with energy from New Energy Tech which may be from generation or storage equipment located on the customer's premises or remotely. This is not intended to cover energy purchased through the wholesale electricity or gas markets.

**Residential Customer** – A customer that is purchasing New Energy Tech for personal, domestic or household purposes. The term includes an Owners Corporation for a residential strata property and the operator of a retirement village.

**Small Business Customer** – A customer that is a business or not for profit organisation that employs less than 20 people. Associated entities are taken to be one entity when calculating the number of employees.



## Annexure - Code Administration

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### Introduction

A1 The Code is administered in accordance with the Memorandum of Understanding agreed to on 24 January 2019 by Energy Consumers Australia, Energy Networks Australia, Public Interest Advocacy Centre, Clean Energy Council, Smart Energy Council, Australian Energy Council and Renew (MOU). The MOU provides that the governance, accountability and administration structure of the Code will be guided by the following principles:

- (a) Customer focused
- (b) Fair and not anti-competitive
- (c) Relevant expertise
- (d) Independent and avoiding conflicts of interest
- (e) Inclusive
- (f) Adequately resourced.

A2 The MOU specifies that the Code will be governed and administered by:

- (a) The Council, which must comprise representatives of key stakeholders including industry associations and consumer bodies
- (b) The Steward, appointed by the Council to be the legal entity responsible for the Code, for entering into any contracts related to the Code and funding any shortfall in Code revenue
- (c) The Administrator, appointed by the Council and responsible for day to day administration of the Code
- (d) The Code Monitoring and Compliance Panel (Panel) appointed by the Council and comprising industry and consumer representatives and independent persons with relevant expertise.

This Annexure to the Code expands upon the role of the Administrator and the Panel and may be revised by the Council from time to time, following consultation with stakeholders.

### Applications and renewals

A3 The Administrator is responsible for developing application forms and renewal forms for use by industry participants wanting to become a signatory to the Code (Signatory) or renew their status as a Signatory.

A4 Where an application is made by an industry participant and the application fee is paid, the Administrator must assess whether to admit the applicant as a Signatory. In making this assessment, the Administrator must take into account:

- (a) whether the applicant's processes and documents are sufficient to support compliance by the applicant with the Code (other than a provision of the Code from which the Administrator has exempted the applicant)
- a) whether the key personnel in the applicant's business have had a significant involvement in another business that became insolvent.

A5 Where a Signatory applies to renew their status as a Signatory, the Administrator may take into account any complaints that have been made about the Signatory, whether the Signatory

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has co-operated with the Administrator and Panel in carrying out their responsibilities and any other relevant factors.

- A6 Where an applicant is refused admittance or renewal as a Signatory, the Applicant has a right to appeal the Administrator's decision to the Panel (a fee may be payable by the Applicant).

## Deferred payment arrangement providers

- A7 Where a Signatory requests the Administrator at any time until 31 October 2021 to approve a credit providers' deferred payment contract and internal policies and processes for the purposes of paragraph 25.a).ii.(B), the Administrator must do so if:
- (a) an appropriately qualified person engaged by the Administrator reviews the:
    - (i) deferred payment contract,
    - (ii) internal policies and processes of the credit provider, and
    - (iii) outcomes of any previous findings that the credit provider has not met the consumer protection standards under paragraph 25.a).ii.(A).a and 25.c).(iv) of the Consumer Code that are required to be met by a credit provider for Signatories to offer the credit providers' finance product, including any previous revocations of approval pursuant to clause A7.A, if applicable,

and certifies that:

    - (iv) the contract and the internal policies include an undertaking and processes to require ongoing compliance by the credit provider with all of the consumer protection obligations set out in paragraphs 25.a).ii.(A).a, and 25.c).(iv); and
    - (v) having regard to the review of the factors listed at A7.a).iii, it is appropriate to approve the credit provider.
  - (b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work)
  - (c) where the Administrator is proposing to refuse the request, the Administrator must give the credit provider an opportunity to reply before making a final decision.
- A7A. The Administrator may reassess the approval of a credit provider granted under paragraph A7 if it considers that the credit provider has not met the consumer protection obligations contained in paragraph 25 of the Consumer Code that are required for Signatories to offer the credit providers' finance product. In making this assessment the Administrator may take into account factors including: any breaches by the credit provider of the industry code of conduct referred to at paragraph 25.a.ii of the Consumer Code; instances of the credit provider not meeting the obligations set under paragraph 25 of the Consumer Code; the severity or systemic nature of those breaches; or any AFCA rulings and failure to comply with such rulings. Where the Administrator is proposing to revoke approval, the Administrator must give the credit provider an opportunity to reply before making a final decision.

## Fees

- A8 The Council must, on an annual basis, agree to the fees and contributions required to cover the costs of operating the Council. These shared costs include the costs of the Independent Chair and the Consumer representatives. Industry members of the Council must cover the attendance costs of their own representatives. Council members may volunteer additional

contribution but are not liable for any shortfall in funding to meet the costs of governing and administering the Code.

- A9 The Administrator, on an annual basis, must review the fees payable by applicants and annual and other fees payable by Signatories, with a view to cost recovery including Code governance and administration costs. As part of its annual budgeting process, the Administrator must propose a schedule of fees and contributions to the Council for approval, at least 3 months prior to the intended date of effect.
- A10 If the Council is not willing to endorse the fees proposal, the Steward must engage an independent accountant to review the reasonableness of the fees proposal in light of the budget for the Code and, if relevant, the extent of revenue shortfall that the Steward has indicated it is willing to fund. The Steward must bear the accountant's costs. Fees for the coming year will then be set by the Administrator taking into account any recommendations made by the independent accountant.
- A11 The Administrator must publish details of fees on the Code website. A change in fees is not effective until at least 3 months after publication of the new fee on the Code website.

## **Code promotion and branding**

- A12 The Council and the Administrator must promote the benefits of the Code to customers, to industry participants and to other stakeholders.
- A13 The Council and the Administrator must develop Code brand mark guidelines for Signatories and publish these on the Code website. The Administrator must enforce compliance with these guidelines.
- A14 The Administrator must maintain an easily accessible list of Signatories on the Code website.

## **Supplementary materials**

- A15 The Administrator may develop supplementary materials to assist Signatories to meet the expectations of the Code. These may include written standards, guidelines, approved Consumer Information Products, checklists, templates or training. They may apply to particular technologies or systems or address particular aspects of New Energy Tech that apply across many or all types.
- A16 These materials may include any combination of:
- (a) Mandatory and binding standards which must be followed where they apply
  - (b) Safe harbour guidelines which provide a Signatory with an approved method of complying with an aspect of the Code while allowing for other ways of compliance
  - (c) Non-binding guidance, which may be of assistance to Signatories
  - (d) Independent consumer information, designed to assist consumers to make informed choices
- A17 The Administrator must consult with stakeholders (including consumer representatives, industry and government) in the development of these materials. The period of consultation may vary and must be adequate to the importance and impact of the proposed materials. In the case of materials that are intended to be mandatory and to bind Signatories, the period of consultation must not be less than 3 months and may well be longer.
- A18 Where substantive disagreement emerges in the course of the consultation over mandatory or safe-harbour guidance, the Administrator may refer the proposed material to the Panel for

decision. Where a Signatory makes an application for referral, the Administrator must refer the proposed material to the Panel for decision.

## Exemptions

- A19 A19. If an applicant or a Signatory applies to the Administrator for an exemption from a provision of the Code, the Administrator may agree to an exemption if satisfied that the exemption would not unduly diminish customer protection. For example, an exemption might be sensible if:
- (a) an existing Code requirement was not appropriate to a proposed New Energy Tech or a trial involving new technology or a new offering
  - (b) A product or service is a free additional 'value-added' service that does not materially impact the benefit of the core offering.
- A20 A20. The Administrator, following consultation with stakeholders, may publish a class exemption. This does not require an individual application by a Signatory. A class exemption may set out conditions required for a Signatory to be able to rely on the exemption. (For example, it is intended that the Administrator will issue a class exemption to exempt simple, low-cost or off-the-shelf products or services (say priced below \$199) for which the Code consumer protections are not appropriate. The Administrator may also publish a class exemption that permits temporary customer trials of new offerings.) The Administrator must publish class exemptions on the Code website.
- A21 Any exemption (including a class exemption) must be for a fixed period and may only be extended following review by the Administrator.

## Monitoring and investigations

- A22 The Administrator must monitor compliance with the Code. This might include undertaking regular compliance audits and reviews of Signatories' systems, policies and procedures, mystery shopping, assessing customer satisfaction, analysing customer complaints and investigating repeat instances. For example, the Administrator may conduct audits of sales conducted via direct marketing.
- A23 The Administrator must develop and publish a Complaints Procedure, consistent with Australian Standard AS ISO 10002, setting out the process where an allegation of breach of the Code is made. This must provide that:
- (a) a complaint may be self-reported by a Signatory or made by Customers, another Signatory, regulators or others
  - (b) if a complaint is made by a Signatory's Customer, the Administrator will investigate the complaint and, where appropriate, attempt to negotiate an outcome that is fair for both the Signatory and the Customer
  - (c) where the Administrator is satisfied that a Signatory has breached the Code, the Administrator will determine what, if any, remedial action or sanction is appropriate
  - (d) if the Signatory wishes to do so, the Signatory may ask the Panel to review a decision by the Administrator requiring the Signatory to take remedial action or imposing a sanction on the Signatory in response to a breach.
- A24 The Administrator has the power to require a Signatory to:
- (a) rectify the issues that gave rise to the breach
  - (b) train staff to minimise the likelihood of repeat breaches
  - (c) require sales agents to undertake an assessment and accreditation process

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- (d) appoint an external auditor, at the Signatory's cost, to audit areas of activity relevant to the breach (generally required if there are more than three major breaches in a 12-month period).

The Administrator also has the power to publicise the breach, including the name of the Signatory, on the Code website.

- A25 If the Administrator requires a Signatory to undertake remedial action in accordance with paragraph A24 a. to d., the Administrator must monitor the Signatory's compliance with that requirement.
- A26 If the Administrator considers that a Signatory has breached the Code in a way that may warrant the suspension or expulsion of the Signatory, the Administrator may refer the matter to the Panel for its consideration. For example, the Administrator may do this if the Signatory fails without reasonable excuse to undertake remedial action as required by the Administrator in accordance with paragraph A24 a. to d.
- A27 If the Administrator identifies an issue that may constitute a serious or systemic breach of law, the Administrator may refer the matter to the Panel to decide whether the matter should be referred to the relevant regulator.

## Panel

- A28 The Panel is responsible for:
  - (a) overseeing the monitoring of compliance and enforcement of this Code by the Administrator
  - (b) reviewing a proposed mandatory or safe-harbour standard or guideline referred to it by the Administrator under paragraph A18
  - (c) reviewing a decision made by the Administrator requiring rectification of a breach (under paragraph A24), if the relevant Signatory requests a review
  - (d) reviewing a decision made by the Administrator to refuse admittance or renewal as a Signatory if requested under Paragraph A6
  - (e) deciding matters of suspension or expulsion referred under paragraph A26 to it by the Administrator
  - (f) referring serious or systemic breaches of law to relevant regulators under paragraph A27
  - (g) publishing on-line an annual report about the Code's operation. This must include reporting on Code compliance to enable assessment of the Code's effectiveness and extent to which the Code is promoting the confidence of the community in New Energy Tech. The report must also set out any exemptions from Code requirements agreed to by the Administrator. It must also include each finding of breach by the Administrator or Panel and the remedial action or sanction imposed on the relevant Signatory. This information must only identify the name of the relevant Signatory if the Signatory has been suspended or expelled
  - (h) every 3 years, engaging an independent body to undertake a review of the Code and its governance framework including by seeking the views of stakeholders (the review report must be published on the Code website) and revising the Code in light of that review.

## **Signatories' obligations to Administrator and Panel**

- A29 A Signatory must ensure that it takes all reasonable steps to promote the benefits of this Code to Customers including prominent links to or a display of the latest version of this Code on its online presence.
- A30 A Signatory must promptly pay annual and any other Code-related fees applicable to it.
- A31 A Signatory must comply with the Code and all standards mandated by the Administrator in accordance with the Code.
- A32 A Signatory must co-operate with the Administrator and Panel in their exercise of their powers and responsibilities under the Code.

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 30/12/2019 11:28 AM AEST and has been accepted for lodgment under the Interim Practice Direction dated 8 May 2015. Filing details follow and important additional information about these are set out below.

**Lodgment and Details**

Document Lodged:	Additional documents
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



DEPUTY REGISTRAR

Dated: 30/12/19 at 11:28 AM AEST

**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.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Interim Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



# Determination

Application for authorisation AA1000439

lodged by

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

in respect of

the New Energy Tech Consumer Code

Authorisation number: AA1000439

Commissioners: Sims

Keogh

Rickard

Cifuentes

Court

## Summary

The ACCC has decided to grant conditional authorisation to the Applicants and future signatories to the proposed New Energy Tech Consumer Code (the Consumer Code).

Following extensive consultation, the ACCC considers there would be a net public benefit from the Consumer Code but has decided to grant authorisation subject to conditions to enable the public benefits to be fully realised and to mitigate against likely public detriments. These conditions are in relation to:

- the requirements that “buy now pay later” (BNPL) finance providers must meet in order to provide finance under the Consumer Code
- the prohibition in the Consumer Code on BNPL finance being offered in unsolicited sales of New Energy Tech products
- reporting to the ACCC on the operation of the Consumer Code.

The ACCC considers that with these conditions, the Consumer Code strikes an appropriate balance in providing high standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code and ensuring those public benefits are more fully realised, without imposing unduly burdensome obligations that would ultimately restrict consumer choice and result in greater public detriment than would arise without the conditions.

The conditions are intended to ensure the Consumer Code prohibition on BNPL in unsolicited sales operates as intended and therefore achieves the associated consumer protection benefits. The reporting conditions will also enable the ACCC, and the Applicants, to assess the effectiveness of the Consumer Code, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements.

**The ACCC grants conditional authorisation until 31 December 2024.**

On 30 April, the Applicants lodged an application for authorisation in respect of the New Energy Tech Consumer Code (the **Consumer Code**). The Consumer Code sets minimum standards that suppliers of ‘New Energy Tech’ products (e.g. solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers, including from initial marketing and promotion through to installation and complaints handling. The Consumer Code operates alongside a range of existing legal and regulatory protections.

The ACCC undertook extensive consultation to ensure the final version of the Consumer Code would enable the public benefits to be fully realised and to mitigate against likely public detriments. This involved multiple rounds of consultation and interested party discussion at a pre-decision conference. Key issues raised by interested parties related to the treatment of “buy now pay later” (BNPL) finance arrangements, administration of the Code, and the need for additional consumer protections, including in relation to unsolicited sales of New Energy Tech products.

Under the initial version of the Consumer Code, which the ACCC considered in its draft determination, signatories were entirely prohibited from offering deferred payment arrangements that are exempt from and/or not regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and National Credit Code (**NCC**) (i.e. BNPL products). During the course of this consultation, the Applicants have provided a number of versions of the Consumer Code in response to interested party feedback, including



amendments to allow New Energy Tech suppliers to offer deferred payment arrangements from BNPL providers in certain circumstances. The ACCC considers that there would be a likely public detriment from excluding all BNPL finance entirely as some customers value these products.

The ACCC considers there would also be a likely public detriment from a loss of consumer choice of finance options available for customers purchasing New Energy Tech under the Applicants' final version of the Consumer Code. This is because it proposed, amongst other things, to require that a BNPL provider (or its parent company) must hold an Australian Credit Licence in order to provide finance under the Consumer Code. Some BNPL providers would meet this criterion because they also offer regulated credit products. However other BNPL providers would not be able to obtain a credit licence because they do not offer regulated credit products. This requirement would therefore effectively exclude some BNPL providers. In addition, the ACCC understands that holding a credit licence does not impose any obligations relating to the offer of a BNPL product.

The condition the ACCC imposed removes some of the requirements that BNPL providers have to meet in order to be approved to provide finance under the Consumer Code where this would unnecessarily exclude BNPL providers (such as having to hold a credit licence). Other consumer protection requirements have been strengthened, e.g. in relation to the BNPL providers' internal dispute resolution procedures. This condition reduces the extent of the likely detriment from a loss of consumer choice, by ensuring that BNPL providers are not unnecessarily excluded. It is also intended to ensure the likely public benefits from increased consumer protections are achieved by requiring BNPL providers to meet specified standards designed to protect consumers from entering into finance arrangements that they cannot afford.

Based on information received by the ACCC in the course of consultation, the ACCC has decided to grant authorisation subject to the following conditions:

- retailers can offer BNPL payment arrangements offered by BNPL providers that meet certain minimum requirements, as outlined in the version of clause 25 of the Consumer Code at Attachment A to this Determination,
- signatories must not offer customers BNPL products if the sale of the New Energy Tech product is unsolicited, and
- the Code Administrator provides to the ACCC regular reports on the operation of the Consumer Code, for publishing on the ACCC's public register.

The ACCC considers that with these conditions, the Consumer Code strikes an appropriate balance of providing high standards of consumer protection for all types of finance offered by signatory retailers under the Consumer Code and ensuring those public benefits are more fully realised, without imposing unduly burdensome obligations that would ultimately restrict consumer choice and result in greater public detriment than would arise without the conditions.

The ACCC considers that the public benefits under the authorised Consumer Code stem from higher standards of protection for consumers in their dealings with New Energy Tech vendors and finance providers; the loss of consumer choice is likely only to the extent that BNPL finance providers decide not to offer finance for New Energy Tech products because it would not be commercially viable to comply with the consumer protections required under the amended Consumer Code.

The ACCC further notes that the reporting condition will enable the Applicants to assess whether the Consumer Code is operating as envisioned, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements.

It will also assist the ACCC in assessing the effectiveness of a transition to a relevant industry code for BNPL providers. In the event that the Applicants seek re-authorisation for the Consumer Code, the data from this condition would form part of the ACCC's assessment.

The ACCC has decided to grant authorisation for five years, until 31 December 2024.

## 1. The application for authorisation

- 1.1. On 30 April 2019, the Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **Applicants**) lodged an application for authorisation with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for the provisions in the proposed New Energy Tech Consumer Code (the **Consumer Code**) for five years.<sup>1</sup>
- 1.2. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

### The Applicants

- 1.3. The Applicants are:

- a) **AEC** – is an industry body representing 23 electricity and downstream natural gas businesses operating in wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.
- b) **CEC** – is a not-for-profit, membership-based organisation and peak body for the clean energy industry in Australia. The CEC represents, and works with, over 600 businesses operating in or supporting the development of renewable energy (such as solar, wind, hydro, bioenergy, geothermal and marine) and energy storage, along with more than 4000 solar installers. The CEC currently administers the Solar PV Retailer Code of Conduct (**Solar Code**) and an Accreditation scheme for solar PV installers.
- c) **SEC** – is a not-for-profit peak body for the solar, storage and smart energy industries in Australia. The SEC has been previously known as the Australian Solar Energy Society and the Australian Solar Council, and has been involved in advancing solar energy since 1954. Its membership comprises individual, small and medium businesses as well as many Australian and international companies or organisations as corporate members. It encompasses installers, sales people, engineers, scientists, recruiters, managers and financiers, and some individual consumers; all of whom are in some way involved in the smart energy industry.
- d) **ECA** – is a national voice for residential and small business energy consumers. Established by the Council by Australian Governments (**COAG**) Energy Council in 2015, its objective is to promote the long-term interests of consumers with respect to price, quality, reliability, safety and security of supply.

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<sup>1</sup> This application for authorisation AA1000439 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

## The Proposed Conduct

1.4. The Applicants are seeking authorisation, on behalf of themselves and future signatories to the Consumer Code, to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:

- a) according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience<sup>2</sup>
- b) for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and
- c) requiring signatories to only offer deferred payment arrangements<sup>3</sup> that are regulated under the NCCPA and the NCC, and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.

(the **Proposed Conduct**). A copy of the Consumer Code is at **Attachment B**.

1.5. The Applicants have identified the following sections of the *Competition and Consumer Act 2010* (Cth) (the **Act**) as relevant to their application:

- cartel conduct (s. 45AD) – the Consumer Code provides for powers to enforce the Consumer Code and suspend or expel signatory members<sup>4</sup>
- contracts, arrangements or understandings that restrict dealings or affect competition, including concerted practices (s. 45) – in many cases signatories will be competitors with each other and are agreeing to undertake consistent business practices
- misuse of market power (s. 46) – for some nascent New Energy Tech products and services such as Virtual Power Plant services, it is possible that at least initially, there may be one or a small number of dominant suppliers which will be a signatory to the Consumer Code
- exclusive dealing (s. 47) – the Consumer Code includes requirements for signatories in relation to the offer of deferred payment arrangements.

## 2. Background

### New Energy Tech products and services

2.1. New Energy Tech, as defined for the purposes of the Consumer Code, includes products, systems and services that:

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<sup>2</sup> See for example, the commitments outlined in paragraph 4.7 below.

<sup>3</sup> A 'deferred payment arrangement' under the Consumer Code is a reference to an alternative method of payment to upfront payment upon delivery or installation. The conditions on the offer of a deferred payment arrangement apply when offered to a residential consumer and this arrangement includes an interest component, additional fees or involves an increased purchase price.

<sup>4</sup> Application for ACCC Authorisation - New Energy Tech Consumer Code (April 2019), Attachment B – Draft for ACCC – New Energy Tech Consumer Code, Annexure – Code Administration, Section 24 & 26.

- a) are small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution energy networks or as distributed energy resources connected to an energy network
  - b) are services that support or are closely related to those products or systems
  - c) monitor or manage a customer's usage of energy whether on or off an energy network, and
  - d) the Consumer Code Administrator is satisfied sit appropriately within the Consumer Code, future flexibility and innovation permitting.
- 2.2. The definition under the Consumer Code is not intended to include simple, low cost or off-the-shelf New Energy Tech, such as might be purchased from a whitegoods or hardware store for self-installation.
- 2.3. Examples of New Energy Tech include:
- distributed energy resources connected to an energy network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
  - a microgrid
  - energy management products, systems and services including batteries and other energy storage methods
  - programs aimed at stabilising the supply of energy including those that incentivise or restrict power consumption during critical peak periods
  - a power purchase agreement<sup>5</sup>
  - person to person energy trading systems and services
  - electric vehicle charging services, and
  - associated repair, maintenance or removal services for New Energy Tech products and systems.

## Background to the New Energy Tech Consumer Code

- 2.4. In August 2017, the COAG Energy Council wrote to industry and ECA respectively, requesting that:
- a) industry associations (namely, the AEC, CEC, SEC and Energy Networks Australia) collaborate with the ECA to develop an industry code for behind-the-meter (**BTM**) products and services<sup>6</sup>, and
  - b) ECA develop a range of consumer information products on consumer rights and responsibilities for BTM products and services (the **Consumer Information Products**).
- 2.5. Representatives from other consumer advocacy organisations (the Consumer Action Law Centre (**CALC**), RENEW (previously the Alternative Technology Association) and

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<sup>5</sup> A power purchase agreement can refer to any agreement between a power generator (vendor) and a purchaser(s) for the sale and supply of energy. In more recent times it has been used to refer to arrangements involving the sale of electricity generated from renewable energy such solar panels (eg. a business may form an agreement with a homeowner, whereby the business will install solar panels on the homeowner's roof and sell that electricity to the homeowner).

<sup>6</sup> New Energy Tech products and services are commonly also referred to in the industry as BTM products and services.

the Public Interest Advocacy Centre (**PIAC**)) – joined with the industry associations and ECA to progress this work through the formation of the BTM Working Group.

- 2.6. Since October 2017, the BTM Working Group has met regularly to progress the development of the draft Consumer Code and the Consumer Information Products.
- 2.7. In November 2018, a draft Consumer Code was released for stakeholder consultation and was amended following feedback before being the subject of this application for authorisation.

### **Previous related authorisations**

- 2.8. The ACCC re-authorised the revised Solar Code for five years in 2015.<sup>7</sup>
- 2.9. The CEC currently administers the Solar Code, which requires signatory retailers to meet certain best practice standards that enhance consumer protection. The Solar Code also requires signatories to use installers accredited by the CEC.
- 2.10. Under the Small-Scale Renewable Energy Scheme administered by the Clean Energy Regulator (a government body), installers of solar systems are now required to be a signatory to the Solar Code and accredited by the CEC in order to be eligible to obtain small-scale technology certificates (**STCs**) for installations. STCs have value and can be bought and sold through the open STC market or the STC clearing house.
- 2.11. The Applicants consider current signatories of the Solar Code are likely to transfer to the Consumer Code, if it is authorised by the ACCC.

### **Buy Now Pay Later finance**

- 2.12. “Buy Now Pay Later” (**BNPL**) finance arrangements are commonly used by customers to purchase New Energy Tech products, particularly solar panels.
- 2.13. BNPL is a broad category of finance products that allow customers to purchase a product on the spot but pay for it at a later date, generally in fortnightly repayments over a set time period.<sup>8</sup> BNPL customers may also be charged an upfront fee, periodic fixed fees and/or fees for missed payments.
- 2.14. BNPL providers will usually charge the merchant (e.g. the solar retailer) a fee for this service, and typically have agreements with the merchant that the fee must not be passed on to customers, such that the service is free for consumers. The ACCC understands from submissions made during this authorisation process, that this fee is sometimes passed on to customers (but this is not disclosed) such that the cost of using BNPL is inflated compared to if the customer bought the New Energy Tech product outright or used an alternative finance arrangement.
- 2.15. The majority of BNPL products are exempt from or not regulated by the NCCPA and NCC and BNPL providers are not required to be licensed under the NCCPA in order to offer BNPL products. In addition to the limit on fees, another exemption under which BNPL products operate is that the provider only charges an upfront or periodic fee that is fixed and does not vary depending on the amount of credit provided.

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<sup>7</sup> For further information, please see: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/clean-energy-council-limited-revocation-and-substitution-a91495-a91496>

<sup>8</sup> The ACCC notes the ASIC 600 report on BNPL finance which noted that, given the diversity of the BNPL industry, the term applies to a wide array of businesses offering a variety of loan amounts, terms and business models. The ACCC has adopted the term BNPL consistent with the way the term was used by ASIC in its Report.

- 2.16. As a result of these exemptions, BNPL providers are not required to comply with the requirements of the NCCPA, including those that are aimed at protecting consumers from unsuitable finance products. These requirements include, but are not limited to, specific product information disclosures, responsible lending assessments, access to dispute resolution and hardship arrangements.
- 2.17. However, some BNPL providers offer similar consumer protections and features to those required by the NCCPA and NCC on a voluntary basis.
- 2.18. BNPL products are regulated by Australian Securities and Investments Commission (**ASIC**) under various provisions, including the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) (such as a prohibition on undue coercion and harassment in connection with the supply of a BNPL product and a prohibition on misleading and deceptive conduct), and ASIC's product intervention powers (**PIP**) and upcoming design and distribution obligations (**DDO**).
- 2.19. On 28 November 2018 ASIC released its 'REP 600 Review of buy now pay later arrangements' (**ASIC Report**). In its Report, ASIC stated that it will continue to monitor the BNPL industry, including to determine if BNPL providers should be subject to further regulation. Other relevant findings are discussed in the assessment below.

### 3. Consultation and amendments to the Code

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments arising from the Consumer Code. The ACCC has conducted four rounds of consultation and held a pre-decision conference to discuss the draft determination: initial consultation on the application; consultation on the ACCC's draft determination; consultation in response to the ACCC's pre-decision conference; and consultation on the ACCC's proposed amendments to the Code.
- 3.2. As part of this consultation process the ACCC invited submissions from a range of potentially interested parties including energy companies, New Energy Tech providers, consumer advocacy and representative groups, BNPL providers, finance providers regulated under the NCCPA and NCC, and relevant regulatory bodies.<sup>9</sup>
- 3.3. The ACCC received over 50 submissions from interested parties in relation to the application and seven submissions from the Applicants. The Applicants also provided amended versions of the Consumer Code on 6 September 2019 and on 25 September 2019 and the final amended version of the Consumer Code on 11 November 2019. The 25 September version of the code made the following changes in response to issues raised during the ACCC's consultation process, the first three of which carried through unchanged in the final version of the Consumer Code:
  - a requirement that signatories have adequate systems, policies and processes in place to ensure fair marketing and appropriate sales outcomes for consumers,
  - a prohibition on advertising unsolicited offers of finance arrangements not regulated by the NCCPA. The Applicants also proposed that signatories should not be able to offer finance products during unsolicited sales, unless they hold a credit licence (see paragraph 4.12);

<sup>9</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- a right of appeal to the Code Monitoring and Compliance Panel (the **Panel**) in circumstances where an applicant is refused admittance or renewal as a signatory, and
- allowing deferred payment arrangements that are not regulated by the NCCPA and NCC to be offered by signatory retailers if the relevant credit provider holds a credit licence and complies with a regulator approved code of conduct that delivers substantively equivalent consumer protections to those contained in the NCCPA.

3.4. Broadly, the issues raised in submissions by interested parties fell into the following categories:

- General support for the Consumer Code* – the majority of submissions were in support of the intention of the Consumer Code, in improving business standards across the industry and increasing consumer protections.
- Effective administration of the Consumer Code* – a number of submissions raised concerns regarding the ability of the Consumer Code to be effective and deliver the intended outcomes, particularly if the CEC was appointed as the Code Administrator. This view appears to be based on previous experience with the CEC's administration of the Solar Code. In addition, submissions referenced a lack of specificity in the requirements under the Consumer Code and a lack of an appeals mechanism for decisions made by the Code Administrator as concerns with the original drafting of the Consumer Code. Submissions were generally satisfied with the addition of an appeal mechanism for administrator decisions.
- Finance product offerings* – the ACCC received a large number of submissions relating to the offering of finance products in conjunction with New Energy Tech products. The original drafting of the Consumer Code included a commitment in relation to the offer of deferred payment arrangements, the effect of which was that signatory retailers would not be able to offer finance products not regulated by the NCCPA and NCC (i.e. BNPL products) for purchases of New Energy Tech products. Submissions were received both in support of, and opposition to, the original drafting of the code. The inclusion of BNPL arrangements was a key point of discussion at the pre-decision conference.<sup>10</sup>

Further submissions were received both in support of, and in opposition to, the 25 September version of the code. Submissions in support referenced increased consumer choice, leading to greater access to New Energy Tech products, as a benefit of the amended code. Opposing submissions raised a number of concerns with BNPL products including a lack of consumer protections around responsible lending and effective dispute resolution, which often results in customers experiencing hardship.

Submissions also raised concerns that finance products that must comply with the NCCPA and NCC are operating at a competitive disadvantage to BNPL products not regulated by the NCCPA and NCC. These parties submit that solar retailers pass on to customers the merchant fees charged by the BNPL providers, which amounts to a fee for the provision of credit, and that this means that these providers should be captured by the NCCPA and NCC. Interested parties submit that the passing on of these costs results in price inflation and customers being unable to make an informed comparison between finance options because these costs are not disclosed, and further note that customers

<sup>10</sup> A summary of discussion, and a full list of the attendees, of the pre-decision conference can be found at the ACCC's public register.



may not ask for a comparison because it is quicker and easier to obtain approval for finance products not regulated by the NCCPA and NCC.

- d) *Consumer protections around unsolicited and high pressure sales* – a number of submissions were received in relation to other consumer protections, aside from those in relation to the lack of consumer protections attached to BNPL finance products. Submissions from CALC raised concerns with unsolicited sales and high pressure sales tactics. Some submissions called for the Consumer Code to ban all unsolicited sales. These submissions pointed to a provision of the National Consumer Credit Protection Regulations which requires retailers offering at the point of sale finance products which are regulated by the NCCPA and NCC to hold an Australian Credit Licence to offer such finance if the sale is unsolicited.<sup>11</sup> As BNPL products are not captured by the NCCPA and NCC, there is no equivalent provision requiring retailers to hold a credit licence to offer BNPL finance in an unsolicited sale. Interested parties raised concerns that this disparity creates an incentive and, in many instances, the ability for retailers to only offer BNPL finance in unsolicited sales for New Energy Tech purchases.

Submissions from CALC following the 6 September 2019 code amendment were generally supportive of the banning of deferred payment arrangements being offered in an unsolicited sale as set out in clause 3 of the Consumer Code (“Advertising and Promotion”). Other submissions were received opposing the prohibition on BNPL being offered in unsolicited sales with some interested parties noting that unsolicited sales are lawful, provided the retailer complies with obligations under Australian Consumer Law. Some submissions called for further amendments to clause 3 of the Consumer Code that would allow unsolicited offers of unregulated finance products to be made by credit providers who subscribe to a code of conduct or industry code that delivers the same protections as those contained in the NCCPA.

- e) *Voluntary nature of the Code* – the ACCC received multiple submissions reiterating the importance of the voluntary nature of the code. Submissions raised concerns with instances of state government rebate schemes only offering rebates for installations performed by signatories to a relevant code. Some parties submitted that the relationship between government rebate schemes and relevant industry codes undermines the voluntary nature of the code and forces parties to become signatories to remain in business.

- 3.5. Based on information received during consultation and after consideration of the Applicants’ code amendments, the ACCC proposed and consulted on an alternative version to clause 25, “Payment and Finance” relating to the offer of deferred payment arrangements (see Box 1 below).

#### **Box 1: The ACCC’s amendments to the clause 25**

Following the pre-decision conference, and subsequent consultation, the Applicants proposed to amend clause 25 of the Consumer Code<sup>12</sup> so that BNPL finance arrangements could be offered under the Consumer Code if the BNPL provider is signatory to a “regulator approved code of conduct that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections” as contained in the NCCPA.

<sup>11</sup> National Consumer Credit Protection Regulations 2010, 23 and 23(4) : <https://www.legislation.gov.au/Details/F2019C00090>

<sup>12</sup> The ACCC notes that this is the clause number as at the time of final version in the Consumer Code; the majority of clause numbers have changed following amendments to the Code.



The ACCC considered that this formulation of clause 25 would not provide sufficient certainty to finance providers, vendors or customers, and lacked certainty regarding the timing of implementing such a code of conduct, which would need to be developed and approved.

The ACCC prepared and consulted on an alternative version of this clause which would allow finance providers who are not regulated by the NCCPA and NCC to offer finance under the Consumer Code if the Code Administrator has determined that the finance provider has policies and processes in place that require it to comply with specific obligations contained in the NCCPA and NCC and meet a prescribed level of protections for customers.

These protections included requirements for effective dispute resolution, hardship policies, and specific clauses of the NCCPA relating to responsible lending.

## Consultation on ACCC's proposed alternative clauses under the Code

- 3.6. The ACCC received eight submissions in response to its proposed alternative amendment relating to the offer of deferred payment arrangements, including a further amended version of the Consumer Code from the applicants on 11 November 2019 (see Box 2 below).
- 3.7. Submissions were received from both licensed and unlicensed credit providers, consumer groups and financial industry associations. Some submissions supported the proposed amendment and others did not. Some interested parties also proposed additional or alternative amendments. The key issues raised in submissions were:
- (a) whether BNPL providers (or the relevant parent company) should be required to hold a credit licence in order to allow vendors to offer finance products from those providers under the Consumer Code
  - (b) whether being a signatory to an industry code of conduct is an appropriate mechanism to enforce consumer protections for BNPL providers
  - (c) whether 'adherence to' or alternatively 'substantial compliance with' the NCCPA would achieve the desired consumer protections
  - (d) whether the Code Administrator would have the necessary expertise to assess BNPL providers' procedures and processes to determine if they provide substantial equivalence with the requirements of the NCCPA
  - (e) whether unsolicited sales methods should be restricted based on whether or not a signatory retailer holds a credit licence, and
  - (f) other consumer protection obligations to improve the effectiveness of the Consumer Code, including the extent of disclosure requirements,<sup>13</sup> and hardship and dispute resolution processes.<sup>14</sup>
- 3.8. A number of these issues are discussed further in the 'Conditions' section from 4.54. This section outlines the conditions the ACCC has arrived at and the relevant submissions and issues that informed those conditions.

<sup>13</sup> Submissions suggested that this disclosure requirement was contrary to the intent of the NCC, which was to provide consumers with transparent information on the fees that they are required to pay, not the relationship between merchant and credit provider. Ratesetter submitted that this disclosure requirement should go further to specify the manner, form and timing of disclosure.

<sup>14</sup> CALC identified hardship protections contained in section 72 of the NCC that could develop consumer protections in the Consumer Code. The Australian Financial Complaints Authority (AFCA) supported both the general formulation of the Consumer Code as well as the protections and principles it contained, however suggested that the requirements contained in ASIC's regulatory guideline RG 165 on internal and external dispute resolution may be used to develop dispute resolution processes of Consumer Code signatories: RG 165 Licensing: Internal and external dispute resolution.

## **Box 2: The Applicants' final submission and final proposed code**

On 11 November, the Applicants provided a response to the ACCC's consultation on proposed amendments to the Consumer Code. In their response, the Applicants stated that they agree with the intent of the ACCC's proposed drafting of clause 25 of the Consumer Code, and are comfortable with the proposal to include reference to specific sections of the NCCPA.

However, the Applicants expressed their concern about the burden of requiring the Code Administrator to determine whether a BNPL provider meets the prescribed consumer protection standards. The Applicants submitted that the most efficient mechanism for ensuring the consumer protections standards are met is through the implementation of a robust and enforceable industry code.

To address concerns regarding the timing of implementation of any such industry code, the Applicants submitted that the "Payment and Finance" clause as proposed by the ACCC remain in place as a transitional measure for a period of 12 months. The Applicants submitted that at the end of this transitional period, only BNPL providers who are signatory to an industry code that delivers a specified level of consumer protections would be able to supply finance under the Consumer Code. The Applicants also proposed to retain the credit licensing requirement.

- 3.9. Public submissions made by the Applicants and interested parties, including all versions of the Consumer Code, are available on the Public Register for this matter.

## **4. ACCC assessment**

- 4.1. The ACCC's assessment of the Consumer Code is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for the Proposed Conduct that would or might involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of sections 45 and 46 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In making its assessment of the Consumer Code, the ACCC considered:
- the application and submissions received from interested parties and the Applicants
  - submissions made at the pre-decision conference
  - other relevant information available to the ACCC, including the current regulatory landscape applicable to New Energy Tech finance arrangements.
  - the relevant areas of competition likely to be affected by the implementation of the Consumer Code, which are the supply of:
    - different types of New Energy Tech products and services, and
    - financial products, including particularly deferred payment arrangements, offered with New Energy Tech products and services

- that without the Consumer Code vendors of New Energy Tech products and services will continue to be subject to relevant laws and regulations in their dealings with consumers. Without the Consumer Code, the Solar Code will continue to apply to signatories to that code who supply solar PV products and services, until September 2020 (unless it is re-authorised by the ACCC for a longer period before the current authorisation expires).
- 4.4. The ACCC's assessment is undertaken on the basis of the final version of the Consumer Code (submitted by the Applicants on 11 November 2019). A copy of this version of the Consumer Code is at Attachment B to this Determination.

## Public benefits

- 4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>15</sup>

- 4.6. The ACCC has considered the following public benefits:

- reduced information asymmetry and enhanced consumer ability to make informed choices that better suit their needs
- increased consumer protections arising from key commitments by signatories beyond what is currently explicitly required by the law, and
- increased consumer protections from the requirement that finance arrangements meet certain regulatory obligations and standards.

### **Reduced information asymmetry and enhanced consumer ability to make informed choices that better suit their needs**

- 4.7. The ACCC considers that adoption of the Consumer Code is likely to result in better informed consumers, due to the various commitments agreed to by signatories. These include:

- a) Commitments to take positive actions with respect to advertising and promotion, including:
  - i. using language that is accessible and that avoids industry jargon (clause 3. e))
  - ii. ensuring that any claims relating to performance or energy cost savings are reasonably based and where available, based on reputable sources (clause 3. h))
  - iii. advertising the total price as prominently as any component price (clause 3. i))

<sup>15</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- iv. ensuring that any disclaimers are clearly outlined and not buried in small print (clause 3. k))
  - v. be clear about any additional cost for finance or an alternative purchasing arrangement when the cost is being recovered in the overall price (clause 3. n))
- b) Commitments to educate consumers of their rights when undertaking direct marketing, including:
- i. advising consumers they can ask the sales person to leave or end the contact at any time (clause 4. a))
  - ii. provide the Consumer Information Product that explains the consumer protection framework (clause 4. f))
  - iii. avoiding high-pressure sales tactics (clause 6)
- c) Commitments to provide detailed information disclosures, including:
- i. an itemised list of the New Energy Tech being supplied (clause 9. b))
  - ii. information about how the New Energy Tech operates and how to operate it (clauses 9. c), d) and e))
  - iii. a site specific design plan and performance estimate for the New Energy Tech (clause 17. a))
  - iv. explanations of how to operate and maintain the New Energy Tech (clause 37)
- 4.8. The submissions received from interested parties support the benefits of the Consumer Code in improving consumers' understanding of New Energy Tech products and services and their consumer protection rights. In particular, CALC and Uniting Vic. Tas. made submissions regarding the complexity of energy markets, and how difficult, confusing and risky it was for many consumers to make decisions about their energy supply.
- 4.9. Clause 25 (Payment and Finance) of the Consumer Code requires signatories to ensure that in offering finance to customers, the credit provider (which includes BNPL providers where these arrangements are permitted under the Consumer Code), discloses all fees attached to the provision of credit. This will allow customers to more effectively compare not only New Energy Tech products but also whether the relevant finance arrangements used to purchase the New Energy Tech suits their needs, further reducing information asymmetry in the purchase of New Energy Tech products.
- 4.10. The ACCC accepts that for complex products such as New Energy Tech, the initiatives and commitments under the Consumer Code requiring additional information disclosures are likely to result in public benefits. Where consumers are able to make better and more informed purchasing decisions about the products or services that best meet their needs there may also be some efficiency improvements.

### **Increased consumer protections from key commitments by signatories beyond what is currently explicitly required by the law**

- 4.11. The ACCC considers that adoption of the Consumer Code is likely to result in greater consumer protections, as a result of the commitments adopted by signatories that are

beyond those currently explicitly required under current consumer protection laws. These include:

- a) taking extra care if the signatory becomes aware that the consumer may be facing vulnerable circumstances (clause 5)
- b) making product or service 'fit-for-purpose inquiries', including:
  - i. asking about the potential consumer's specific circumstances, needs and expectations (clause 7. a))
  - ii. ensuring that any offer of New Energy Tech is fit for purpose in light of the consumer's needs and expectations and recording a brief description of the consumer's circumstances, needs and expectations in quotes and contracts (clause 7. c))
- c) providing site-specific installation designs or plans and site-specific performance estimates (clause 17)
- d) facilitating any activation required for the use of products or services (clause 33)
- e) taking responsibility for sales agents, representatives, installers, subcontractors etc. to ensure the accuracy of information provided and safety of installations (clause 58-60), and
- f) improving complaints handling processes (clause 54).

4.12. The original drafting of the Consumer Code attracted submissions from interested parties calling for stronger consumer protections, in particular by banning all unsolicited sales. The final version of the Consumer Code addresses these concerns to some extent by prohibiting signatory retailers from making unsolicited offers of payment arrangements that are not regulated by the NCCPA (i.e. BNPL arrangements) in advertisements and promotional material (clause 3. d)). The Applicants' intended effect of clause 3. d) is that any finance arrangement offered by a signatory to the Consumer Code in an unsolicited sale of New Energy Tech will be regulated by the NCCPA,<sup>16</sup> which is designed to protect consumers from unsuitable finance arrangements. As noted at 3.4(d) of this determination, under the National Consumer Credit Protection Regulations,<sup>17</sup> retailers are required to hold an Australian Credit Licence to offer finance products regulated by the NCCPA and NCC in connection with unsolicited sales. The Applicants are concerned that if signatories are permitted to offer BNPL products in unsolicited sales, they are not likely to offer finance arrangements regulated by the NCCPA in unsolicited sales due to the requirement to hold a credit licence. The Applicants submit that this would be an unacceptable outcome that should be avoided. As explained at 4.66 below, the ACCC considers it necessary to impose a condition to help ensure that this intended effect of clause 3. d) is implemented in practice. These provisions were briefly explored at paragraph 3.4.

4.13. The ACCC considers that these commitments by signatories under the Consumer Code are likely to result in public benefits by providing protections that extend beyond what is currently required by the law to reduce the likelihood and degree of consumer harm that can arise from the kinds of practices sought to be addressed by these provisions.

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<sup>16</sup> See [Applicants to ACCC re amended code](#), 25 September 2019, and [Applicants to ACCC correcting error in correspondence](#), 9 October 2019.

<sup>17</sup> National Consumer Credit Protection Regulations, 23 and 23(4) : <https://www.legislation.gov.au/Details/F2019C00090>

## **Increased consumer protections from the requirement that finance arrangements meet certain regulatory obligations and standards**

- 4.14. In its draft determination, the ACCC recognised that by requiring finance arrangements to be regulated by the NCCPA and NCC, the original drafting of the Consumer Code meant that consumers would benefit from consumer protections and reduced harm that would be caused by entering into unsuitable and/or unregulated finance arrangements. The ACCC also recognised that this benefit would be offset by public detriment to the extent that this requirement of the Consumer Code prevented consumers from accessing finance arrangements, such as BNPL, that they consider valuable.
- 4.15. As discussed, the ACCC received numerous submissions on this point, including during the pre-decision conference held on 9 September 2019. Interested parties in favour of the inclusion of access to BNPL finance submitted that it is a convenient form of finance valued by customers and vendors, is lawfully exempt from the NCCPA and NCC and is sufficiently regulated in other ways. Interested parties opposed to allowing BNPL finance under the Consumer Code submitted the lack of regulation of BNPL products under the NCCPA put consumers at risk of harm from signing up to finance arrangements that they are not able to afford.
- 4.16. The ACCC considers that there is a clear public benefit from the Consumer Code setting high standards of consumer protection required of signatory retailers when offering finance arrangements, which are likely to reduce harm to consumers from unsuitable finance arrangements.
- 4.17. The ACCC notes that the more traditional credit products, such as personal loans and credit cards, which may be used to finance the purchases of New Energy Tech, are offered by credit providers which are licensed under the NCCPA and regulated by the NCC. Accordingly, signatory retailers offering these types of finance products (not BNPL arrangements) to customers to finance their New Energy Tech purchase, are offering a finance product which is already required to meet certain standards. This type of finance is provided by a finance provider that must comply with obligations such as assessing the suitability of a loan, following certain procedures if a customer is experiencing financial hardship and provide access to external dispute resolution as set out in the NCCPA and NCC. This standard of protection was the rationale for initially excluding BNPL providers from the Consumer Code, in recognition that regulated finance product providers, as part of their NCCPA and NCC obligations, were required to provide these greater protections.
- 4.18. Therefore the benefit of setting high standards of consumer protection is likely to be greater when required for finance arrangements that are not regulated by the NCCPA and NCC. BNPL finance provides a type of financial arrangement which is valued by some consumers, but the less restrictive applicable regulations (due to its exemption from the NCCPA and NCC) mean there are potentially greater risks for consumers who enter into BNPL arrangements. For example, CALC submitted that while some BNPL providers are members of external dispute resolution schemes, they do so on a voluntary basis and are not *required* to offer customers access to external dispute resolution. CALC also provided case studies<sup>18</sup> involving customers who appeared to be pressured by retailers/vendors into taking up unregulated finance arrangements which were not suitable and the customer could not afford to repay.

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<sup>18</sup> Referred to in its 'Sunny Side Up' report, April 2019: [https://consumeraction.org.au/wp-content/uploads/2019/06/1904\\_Sunny-Side-Up-Report\\_FINAL\\_WEB\\_NEW-1.pdf](https://consumeraction.org.au/wp-content/uploads/2019/06/1904_Sunny-Side-Up-Report_FINAL_WEB_NEW-1.pdf)

- 4.19. In November 2018, ASIC released its ASIC Report on BNPL arrangements.<sup>19</sup> ASIC found that the BNPL industry is rapidly growing and there is a diverse range of arrangements available. ASIC noted that BNPL arrangements can create some risks for consumers if they take on debt that they may have difficulty paying back. ASIC also found that some providers take steps to help consumers make informed decisions about their purchases and repayments, and noted that these additional safeguards and protections are important. ASIC also found that, in some instances more could be done by BNPL providers. ASIC considered that its proposed product intervention power should be extended to all credit facilities, including BNPL arrangements, regulated under the ASIC Act. ASIC's product intervention powers have since come into force from April 2019.
- 4.20. The ACCC considers that there is a benefit to allowing BNPL finance arrangements to be offered if providers are able to demonstrate that they offer customers adequate protections, encompassing key provisions contained in the NCCPA and NCC around undertaking responsible lending assessments, access to hardship policies, internal and external dispute resolution (including mandatory membership of the Australian Financial Complaints Authority). The ACCC considers it likely that these requirements will require some or all BNPL providers to meet higher standards, and change some of their internal practices and policies in order to meet the requirements to offer finance via signatory retailers under the Consumer Code.
- 4.21. The ACCC also notes concerns raised by some interested parties in relation to surcharging by retailers offering BNPL finance arrangements (discussed at 'BNPL finance' above). Concerns were raised about a lack of transparency in relation to fees and charges that may be passed on to the customer, which inflate the cost of their New Energy Tech purchase and which are not disclosed, such that the customer is unable to make an informed comparison between finance options. The ACCC notes that the final version of the Consumer Code includes a requirement to disclose the credit provider's fees and charges and other information to assist the customer to assess the credit product. The ACCC considers this change may assist customers to make a more informed purchasing decision.
- 4.22. The ACCC notes that ASIC has, in its report, stated more broadly that BNPL finance is an area of ongoing focus and that it will continue to monitor the industry. ASIC further stated this monitoring will assist its assessment of the industry, including considering whether potential further regulation or law reform is required. The ASIC Report notes that ASIC has not reached a view as to whether it is necessary that BNPL providers should be required to comply with the NCCPA.
- 4.23. The ACCC expects that any changes in regulation to BNPL finance will require consideration by the Applicants, and may necessitate further changes to the Consumer Code so that it remains consistent with such regulation. The ACCC likewise notes that a change in regulation may constitute a material change in circumstances, which may allow the ACCC to consider the revocation of authorisation and substitution with a new authorisation in relation to the Consumer Code.<sup>20</sup>
- 4.24. The commensurate burden associated with these increased consumer protection requirements is discussed in the detriments section below.

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<sup>19</sup> Australian Securities and Investment Commission, 'Report 600 – Review of buy now pay later arrangements' (November 2018).

<sup>20</sup> Section 91C(3).

## Effective administration and enforcement of the Consumer Code

- 4.25. Effective administration and enforcement of a voluntary code are crucial to the realisation of the claimed public benefits under the code. A number of interested parties, before and after the draft determination, raised concerns regarding the administration of the Code, including that the identity of appointees to key administration roles won't be decided until after the Consumer Code comes into effect (should authorisation be granted).
- 4.26. The Consumer Code will be administered by a Council (comprised of key stakeholders), a Steward, Code Administrator and Code Monitoring and Compliance Panel (the **Panel**).<sup>21</sup> The Council Chair was appointed during the course of the authorisation process;<sup>22</sup> the remaining Council members, Code Steward, Code Administrator and the Panel positions have not yet been filled.
- 4.27. The ACCC considers that the Consumer Code sufficiently outlines the roles and responsibilities of the Code Administrator and provides a process to ensure the Code Administrator is qualified and performing its duties appropriately.<sup>23</sup> Therefore the ACCC considers it is not necessary that each of these roles be filled prior to Authorisation being granted.
- 4.28. A number of interested parties also raised specific concerns regarding the CEC's ability to effectively administer the Consumer Code, should it be appointed to the role. A number of interested parties also stressed the importance of the Consumer Code containing an appeals mechanism against rejected applications to become signatories. The ACCC notes that, following the draft determination, the Applicants amended the Consumer Code to include an appeals process for unsuccessful applicants.
- 4.29. More broadly, the ACCC considers that there are mechanisms in place to ensure the effective administration and enforcement of the Code. These mechanisms include:
- the Code Administrator is required to consider specific matters when assessing applications from those wishing to become a signatory to the Consumer Code
  - decisions made by the Code Administrator requiring a signatory to rectify a breach are reviewable by the Panel if the signatory requests such a review and matters of expulsion or suspension are to be referred by the Code Administrator to the Panel for decision, and
  - the Panel is required to publish on-line an annual report about the Consumer Code's operation, including information about each finding of breach and the remedial action or sanction imposed.
- 4.30. These reporting requirements, in addition to the appeals mechanism, means that the ACCC considers it is unlikely that the Code Administrator will be able to inappropriately refuse membership or impose improper sanctions on signatories.
- 4.31. The ACCC notes that the Consumer Code also provides for three-yearly independent reviews of its governance framework, including by seeking the views of stakeholders and revising the Consumer Code in light of that review.

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<sup>21</sup> For a fuller explanation of the administration of the Code, see Applicant's original application, 3 April 2019.

<sup>22</sup> See applicants' submission, 25 September 2019.

<sup>23</sup> The Administrator's duties are clearly set out in the Consumer Code, Annexure – Code Administration and include assessing membership applications, annually reviewing the fees payable by signatories, determining whether to grant exemptions to provisions of the Consumer Code, monitoring compliance with the Consumer Code (including through investigating complaints, conducting audits and analysing repeat offences), and determining remedial actions or sanctions for Consumer Code breaches.



## ACCC conclusion on public benefit

4.32. The ACCC considers that adoption of the Consumer Code by signatories is likely to result in the following public benefits:

- the commitments by signatories to provide additional information disclosures reduces information asymmetry. Consumers are more likely to be better informed and better placed to make purchasing decisions suited to their needs
- key commitments by signatories to take proactive steps to ensure products and services are fit for purpose will increase consumer protection beyond what is required under the law. Recording a description of the customers' circumstances and purchase will also make it easier for any consumer guarantees claims to be made under the ACL if product or service failures occur
- the inclusion of BNPL providers that meet certain consumer protection requirements, allowing for greater consumer choice in finance products, and
- increased consumer protections by imposing certain requirements regarding deferred payment offers in conjunction with unsolicited sales.

4.33. The ACCC notes that the Consumer Code does not supersede existing legal consumer protections (i.e. it is additional to existing protections).

4.34. The ACCC is satisfied that provisions in the Consumer Code provide mechanisms to ensure its effective administration and enforcement.

## Public detriments

4.35. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>24</sup>*

4.36. The ACCC has considered the following potential public detriments:

- A lessening of competition in the supply of New Energy Tech products and services.
- A lessening of consumer choice, due to the potential exclusion of some BNPL providers.

## Reduced competition in the supply of New Energy Tech products and services.

*Increased cost of supply for signatories may raise barriers to entry*

4.37. The ACCC considers that costs arising from the additional disclosure commitments and consumer protections, are likely to reflect a corresponding increase in the quality of the goods and services supplied, for example as a result of the additional product information disclosures and requirement for the signatory to provide site design and development plans.

4.38. In relation to the compliance costs for signatories directly resulting from the Consumer Code's implementation and administration, the ACCC considers that the compliance

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<sup>24</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

requirements imposed are necessary in order for the Consumer Code to be effective. The ACCC notes that it is currently unclear what the fees for the Consumer Code will be and agrees with Tesla's submission that these will need to be clearly articulated.

#### *Expulsions and denied membership to the Consumer Code as a barrier to entry*

- 4.39. Membership to the Consumer Code may provide an advantage to suppliers of New Energy Tech products and services over those that choose not to become members because consumers may perceive that signatories uphold better business practices and offer greater consumer protections than non-signatories. This advantage may be further increased if governments link supplier access to rebate or incentive schemes, or government tenders to membership of the Consumer Code. The ACCC notes it is a matter for governments to determine the appropriate eligibility criteria for their programs.
- 4.40. This may make Consumer Code signatories more attractive to consumers than non-signatory suppliers of New Energy Tech products and services. If signatories are inappropriately expelled or suppliers are not accepted as signatories this may impact on their ability to compete to provide New Energy Tech products and services.
- 4.41. The ACCC notes that the Applicants have amended the Consumer Code to include a right of appeal to the Panel in circumstances where an applicant is refused admittance or renewal as a signatory.
- 4.42. The ACCC considers the Consumer Code's administrative framework under the MOU contains sufficient rules, checks and balances to help ensure that the Administrator and the Panel will be sufficiently qualified and will appropriately assess applications for membership, appeals against a rejection of membership, and the level of sanctions against signatories for non-compliance.

#### **Reduced consumer choice for finance arrangements**

- 4.43. As discussed in paragraph 4.16, the ACCC considers there is a public benefit in requiring signatory retailers to comply with a higher standard of consumer protection when offering finance to customers. The ACCC recognises that these consumer protections require BNPL providers to adhere to protection standards above those they are required to comply with under legislation and regulation.
- 4.44. Submissions from BNPL providers on the amendments proposed by the ACCC (which were closely adapted by the Applicants in the final proposed code) expressed concerns regarding the higher standards required of BNPL providers, submitting that the Consumer Code would have the effect of:
- excluding certain BNPL providers from the market, despite those BNPL providers complying with the law and being subject to other regulations and obligations enforced by ASIC<sup>25</sup>; and
  - in turn, that these stricter requirements would have the effect of preventing customers from accessing these finance arrangements.
- 4.45. The ACCC recognises that a key attraction of BNPL arrangements – for customers and vendors – is the relative convenience and speed in obtaining that finance and completing a sale. The ACCC notes that this convenience and speed would be affected by some of the requirements in the Consumer Code, particularly in relation to

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<sup>25</sup> Including, for example: the Australian Securities and Investments Commission Act 2001, ASIC's product intervention powers and the upcoming design and distribution obligations.

requiring strict compliance with the responsible lending obligations set out in the NCCPA, and that this may make BNPL finance less attractive to vendors.

- 4.46. The ACCC also notes that, under the Applicants' final proposed version of clause 25 of the Consumer Code, the BNPL industry code would need to be developed within 12 months of authorisation being granted, after which time, if no industry code is in place, BNPL providers will not be able to provide finance under the Consumer Code. AFIA has submitted that 12 months would be the minimum lead time required for the development of the industry code. The ACCC is concerned that the proposed 12-month deadline may be unrealistic, based on the information provided during consultation especially if regulatory approval is ultimately sought.
- 4.47. The ACCC considers that there is likely to be at least some detriment from preventing consumers from accessing finance arrangements that they find valuable, to the extent that:
- BNPL providers do not consider seeking to meet the standard of protection required under the Consumer Code to be commercially viable therefore reducing the range of available finance providers; or
  - vendors choose not to offer BNPL finance as it is no longer an attractive option, or are able only to offer finance arrangements from a limited number of BNPL providers.

### **ACCC conclusion on public detriment**

- 4.48. The ACCC considers that adoption of the Consumer Code is unlikely to result in public detriment from a lessening of competition in the supply of New Energy Tech products and services.
- 4.49. However, the ACCC does consider that the Consumer Code will result in some public detriment, to the extent that the standards required of BNPL providers could lessen the number of approved BNPL providers offering finance arrangements for the supply of New Energy Tech, which in turn would result in a loss of consumer choice.

### **Balance of public benefit and detriment**

- 4.50. The ACCC considers that adoption of the Consumer Code is likely to result in public benefits in the form of:
- reduced information asymmetry, and
  - increased consumer protections.
- 4.51. The ACCC also considers that there is likely public detriment from the potential loss of consumer choice in relation to the number of finance arrangements that are able to be offered by signatory retailers under the Consumer Code.
- 4.52. The ACCC considers that without the conditions, the requirements on BNPL providers would be at such a level that it would deter BNPL providers from seeking to be allowed to provide finance under the Consumer Code. This would prevent the Proposed Conduct from fully realising the public benefits possible under the Code. The ACCC has decided to address its concerns relating to the Proposed Conduct by imposing conditions to lessen the likely detriment, as well as reporting conditions to help assess whether the Consumer Code is operating in a way that is fully realising the public benefits.

4.53. For the reasons outlined in this Determination, the ACCC is satisfied the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment. The ACCC considers that imposing conditions will enable the public benefits under the Consumer Code to be fully realised.

## Conditions

4.54. The power conferred upon the ACCC to authorise conduct is discretionary.<sup>26</sup> In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.<sup>27</sup>

4.55. The ACCC may specify conditions in an authorisation.<sup>28</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>29</sup>

4.56. The ACCC is concerned to ensure that the level of protection required under the Consumer Code is such that there are adequate obligations to protect customers against being offered finance products that are not appropriate to their situation, but without imposing a disproportionate burden on BNPL providers such that BNPL providers:

- do not seek approval to be allowed to provide finance through signatory retailers under the Consumer Code, or
- are not able to satisfy the requirements under the Consumer Code but would otherwise provide substantially equivalent consumer safeguards to those contained in the NCCPA and NCC.

4.57. Following the final round of consultation, the ACCC considers that appropriate balance would be achieved by:

- removing the requirement that a BNPL provider (or its related body corporate) holds an Australia Credit Licence in order to be allowed to provide finance under the Consumer Code
- requiring that BNPL providers undertake a responsible lending assessment, which provides substantially equivalent protections to those contained in specific sections of the NCCPA, rather than requiring compliance with those sections as if the BNPL provider were regulated under the NCCPA and NCC
- including clearer obligations as to what is required of BNPL providers in relation to hardship and dispute resolution processes, and
- amending the timeframe for transition to an industry code from 12 months to 24 months.

4.58. The ACCC considers that it is not necessary to require BNPL providers to hold a credit licence in order to provide finance under the Consumer Code on the basis that:

- Even if a BNPL provider (or its parent company) holds a credit licence because that BNPL provider also offers regulated finance products and is required to be licensed under the NCCPA, the BNPL provider is not required to apply the protections contained in the NCCPA with respect to the offer of its BNPL product.

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<sup>26</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [106].

<sup>27</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [126]

<sup>28</sup> Section 88(3).

<sup>29</sup> Section 88(3).

- Clause 25 of the Consumer Code contains obligations regarding the key consumer protections that were raised by interested parties as being necessary to minimise the risk of customers ending up with inappropriate finance and experiencing harm. These protections are around access to effective dispute resolution, responsible lending assessments, hardship policies, and fee disclosures.
  - The additional protections for hardship and dispute resolution will provide clearer protections for consumers, and align BNPL policies more closely with those applied to regulated finance providers; and are the key protections for consumers who encounter difficulties after entering into the financial arrangement.
- 4.59. The ACCC also considers that strict compliance with the responsible lending requirements under the NCCPA would impose such a burden on BNPL providers and vendors who use BNPL finance, that it risks some customers being unable to access a convenient form of finance that they value. The ACCC considers a substantially equivalent responsible lending obligation, in concert with the other requirements of clause 25, and the increased protections in clause 3 of the Consumer Code in relation to “Advertising and Promotion”, which is intended to provide restrictions on BNPL finance relating to unsolicited sales, should impose an appropriate level of protection.
- 4.60. Regarding the timeframe for development of the industry code, the ACCC considers that 24 months is a more realistic timeframe for the development and approval of the BNPL industry code, should regulatory approval be sought.
- 4.61. The ACCC has also imposed a condition to require the Code Administrator to report on the operation of the Consumer Code.
- 4.62. The ACCC notes that the Code Administrator is already required under the Consumer Code to publish an annual report on the operation of the Code.<sup>30</sup> The ACCC is imposing a condition to require that this annual report will be provided to the ACCC on or before 31 January on an annual basis for the term of the authorisation, for publication on the ACCC’s public register. The annual report must also include:
- The number of successful applicants (signatories), unsuccessful applicants, and the number and outcome of any appeals against decisions on admittance
  - the number, nature and outcome of complaints, broken down by the type of financial product used in each instance (i.e. regulated under the NCCPA and NCC and not regulated and/or are exempt from the NCCPA and NCC ), and whether the complaint was considered by AFCA and any remedies imposed by AFCA, and
  - the number of BNPL providers that have been assessed as complying with the requirements under clause 25 of the Code.
- 4.63. The ACCC notes that the Applicants are intending to develop a complaints procedure, and that this condition is not intended to limit the development of this complaints procedure.<sup>31</sup>
- 4.64. The ACCC considers that this reporting will enable better assessment on the operation of the Consumer Code, including whether the balance has been appropriately struck with the level of consumer protections required of BNPL providers. It will also serve to help assess whether BNPL providers are being appropriately assessed as meeting the Code requirements. This will assist the Code Administrator in assessing whether alternative or additional consumer protections are required under the Consumer Code.

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<sup>30</sup> Clause A27 of the draft Code.

<sup>31</sup> Consistent with [Australian Standard AS ISO 10002](#)

- 4.65. The ACCC will consider each of these reports to help assess whether the Consumer Code is operating as envisioned, to ensure consumers are reaping the full benefits of it, and have sufficient protections against harms that arise from unsuitable financial arrangements. It will also assist the ACCC in assessing the effectiveness of a transition to a relevant industry code for BNPL providers and in the event the Applicants seek re-authorisation of the Consumer Code.
- 4.66. The ACCC has also imposed a condition to implement the intended operation of clause 3 of the Consumer Code, which currently prohibits advertising and promotional material that makes unsolicited offers of finance not regulated by the NCCPA. The condition requires that signatories must not offer customers BNPL finance (whether unsolicited or not) if the sale of the New Energy Tech product is unsolicited. The ACCC considers this condition will help to ensure the operation of the prohibition in the Consumer Code on unsolicited offers of BNPL finance is sufficiently clear such that the consumer protection benefits of this clause are realised.

## Length of authorisation

- 4.67. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>32</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.68. In this instance, the Applicants seek authorisation for five years.
- 4.69. The ACCC considers this period is appropriate given the evolving nature of the New Energy Tech Sector and the need to test the effectiveness of the administration arrangements and any sanctions taken under the Consumer Code during that period.

## 5. Determination

### The application

- 5.1. On 30 April 2019, the Applicants lodged application AA1000439 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

### The authorisation test

- 5.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct (as outlined in paragraph 1.4 above) is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.3. For the reasons outlined in this Determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition. The ACCC considers that imposing conditions will enable the public benefits under the Consumer Code to be fully realised.

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<sup>32</sup> Subsection 91(1)

- 5.4. The ACCC considers that without the conditions, the requirements on BNPL providers would be at such a level that it would deter BNPL providers from seeking to be allowed to provide finance under the Consumer Code. This would prevent the Proposed Conduct from fully realising the public benefits possible under the Code. The ACCC has decided to address its concerns relating to the Proposed Conduct by imposing conditions to lessen the likely detriment, as well as reporting conditions to help assess whether the Consumer Code is operating in a way that is fully realising the public benefits. The ACCC has also imposed a condition to ensure that the prohibition on unsolicited BNPL finance under the Consumer Code is clear so that signatories are prevented from offering BNPL finance in unsolicited sales of New Energy Tech products, such that the intended consumer protection benefits of clause 3 are realised.
- 5.5. Accordingly, subject to the conditions, the ACCC has decided to grant authorisation.

### Conduct which the ACCC has decided to conditionally authorise

- 5.6. The ACCC has decided to grant authorisation AA1000439 to enable the Applicants and future signatories to the Consumer Code<sup>33</sup> to agree, sign up to and comply with (give effect to) provisions of the Consumer Code:
- a) according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which intended to cover all aspects of the customer experience
  - b) for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code, and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled, and
  - c) requiring signatories to only offer deferred payment arrangements<sup>34</sup> that are regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by BNPL providers only in certain circumstances.
- 5.7. This conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of sections 45 or 46 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act.
- 5.8. This authorisation is limited to the conduct described in paragraph 5.6 above (that is merely agreeing, signing up to and complying with (giving effect to) those provisions of the Consumer Code). The authorisation does not extend to any other conduct, particularly any other conduct that may contravene section 46 or other provisions of Part IV of the Act.
- 5.9. The ACCC has decided to grant authorisation AA1000439 until 31 December 2024.
- 5.10. The authorisation is in respect of the Consumer Code as it stands at the time the authorisation is granted, a copy of which is annexed to the determination (to be read in

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<sup>33</sup> Pursuant to section 88(2) of the Act.

<sup>34</sup> A 'deferred payment arrangement' under the Consumer Code is a reference to an alternative method of payment to upfront payment upon delivery or installation. The conditions on the offer of a deferred payment arrangement applies when offered to a residential consumer and this arrangement includes an interest component, additional fees or involves an increased purchase price.



conjunction with Attachment A as per conditions below). Any changes to the Consumer Code during the term of the authorisation would not be covered by the authorisation.

## Conditions

5.11. The authorisation AA1000439 is subject to the conditions at 5.12-5.13 and 5.15-5.16.

### Changes to requirements concerning BNPL finance

- 5.12. With respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place, as set out in the versions of clause 25 and clauses A7 and A7A of the Annexure to the Consumer Code at Attachment A to this Determination. For the avoidance of doubt, clauses 25, A7 and A7A at Attachment A will replace the corresponding clauses of, and be added to the Consumer Code and its Annexure, as annexed to this Determination.
- 5.13. Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.
- 5.14. The condition outlined at 5.12 above, including the wording found in Attachment A, may be subject to variation where approved by the ACCC in writing and published on the public register.

### Reporting condition

- 5.15. The Code Administrator must provide the ACCC with reports on the dates specified at 5.16 below, for publication on the ACCC's public register, which include the following information regarding the operation of the Consumer Code:
- i. the number of applicants admitted as Signatories to the Consumer Code
  - ii. the number of unsuccessful applications for admittance under the Consumer Code
  - iii. the number of appeals against a decision regarding admittance, and the outcome of those appeals
  - iv. the number of, and a description of, alleged breaches of the Consumer Code by Signatories
  - v. the number and nature of alleged breaches and/or complaints made in relation to Signatories broken down by the type of finance arrangement used by the customer
  - vi. the outcome of complaints and alleged breaches of the Consumer Code by Signatories, including:
    - a. the number of suspensions and identities of suspended Signatories
    - b. the number of expulsions and identity of expelled Signatories
    - c. other remedial actions imposed, and
    - d. whether the complaint or alleged breach was considered by the Australian Financial Complaints Authority and the outcome of those considerations.



- vii. the number and identity of BNPL providers that have been assessed in relation to compliance with clause 25 of the Consumer Code, broken down by:
  - a. those assessed as meeting the requirements of clause 25 of the Consumer Code.
  - b. those assessed as not meeting the requirements of clause 25 of the Consumer Code.

5.16. These reports must be provided to the ACCC on the following dates:

- a. on or before 31 January 2021 for the period 1 January 2020 to 31 December 2020
- b. on or before 31 January 2022 for the period 1 January 2021 to 31 December 2022
- c. on or before 31 January 2023 for the period 1 January 2022 to 31 December 2023
- d. on or before 31 January 2024 for the period 1 January 2023 to 31 December 2023.

5.17. The Code Administrator must:

- a. report to the ACCC the details of BNPL providers that have had their approval under the Consumer Code revoked pursuant to clause A7A of Annexure – Code Administration of the Consumer Code, and
- b. communicate these details to all Signatories

as soon as practicable after the decision to revoke the credit providers' approval is made.

5.18. The reporting condition outlined at 5.15 and 5.16 above may be subject to exemptions or variation, including in relation to confidentiality, where requested by the Applicants in writing and approved by the ACCC in writing and published on the public register.

## 6. Date authorisation comes into effect

6.1. This determination is made on 5 December 2019. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 31 December 2019.

## Attachment A

### Clause 25 Payment and Finance

25. 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 3.n.), we will ensure that:

a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that:

i. is licenced under the *National Consumer Credit Protection Act (2009)* (Cth) (“NCCPA”) and the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code (“NCC”), or

ii. if not licensed under the NCCPA and the deferred payment arrangement is not regulated by, or is exempt from, the NCC and or NCCPA:

(A) the Administrator has determined that:

a. the credit provider is a signatory to an industry code of conduct that requires the credit provider, on an ongoing basis, to:

- i. resolve any complaints you may have using an internal dispute resolution process which complies with the standard specified in ASIC Regulatory Guide 165, and if the complaint remains unresolved, an external dispute resolution process (which must include the scheme operated by the Australian Financial Complaints Authority)
- ii. have processes in place which comply with sections 72, 88 and 89A of the NCC to identify whether you are experiencing payment difficulties due to hardship, to respond to your requests for hardship assistance and to make you aware of your rights to dispute the rejection of such requests for assistance
- iii. offer you alternative and flexible payment options if you are experiencing payment difficulties so that you can meet your repayments
- iv. undertake a responsible lending assessment of the suitability of the loan and your ability to repay the loan, providing substantially equivalent protections to those contained in the following sections of the NCCPA and the NCC:
  - s 128 (obligation to assess unsuitability)
  - s 129 (assessment of unsuitability)
  - s 130 (reasonable inquiries about the consumer)
  - s 131 (when the credit contract must be assessed as unsuitable)
  - s 132 (giving the consumer the assessment) and
  - s 133 (prohibition on entering, or increasing the credit limit of, unsuitable credit contracts); and

b. this industry code contains mechanisms for:

- i. the ongoing monitoring and investigation of complaints about potential breaches of the industry code,
- ii. appropriate remedies to be imposed that have regard to the severity of the breach, including suspension or expulsion of credit providers that are found to be in breach of the code;
- iii. reporting on breaches of the industry code by credit providers that are approved pursuant to this clause 25; or

(B) the Administrator has approved the credit provider's deferred payment contract and internal policies and processes in accordance with paragraphs A7 and, where applicable, A7A of the Annexure – Code Administration. (This paragraph (B) is as an interim measure pending the development of an approved code of conduct that will enable paragraph (A) to apply. Paragraph (B) ceases to apply on 1 January 2022 regardless of whether a regulator approved code of conduct is in operation by that date).

b) the term of the deferred payment contract or lease is no longer than the expected life of the product or system

c) you receive the following clear and accurate information:

(i) the name of the credit provider to whom you will be contracted for the arrangement

(ii) a clear statement that the deferred payment arrangement is a voluntary finance option

(iii) the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system or service if you were to purchase it outright on that day

(iv) the disclosures required under the NCC (if applicable), including in relation to fees and charges, or if the finance arrangement is exempt from or not regulated by the NCC, information to assist you in assessing the credit product, including the credit provider's fees and charges

(v) whether at the conclusion of the deferred payment arrangement

(A) you own any elements of the New Energy Tech, or

(B) you have any entitlement to any ongoing services or pricing, and/or

(C) you have the option to purchase any elements of the new Energy Tech and if so relevant details, including any associated costs, and

(vi) a statement that questions and complaints about the payment arrangement should be directed to the credit provider with whom you will be contracted.

## **Annexure – Code Administration**

### **Deferred payment arrangement providers**

A7. Where a Signatory requests the Administrator at any time until 31 October 2021 to approve a credit providers' deferred payment contract and internal policies and processes for the purposes of paragraph 25.a).ii.(B), the Administrator must do so if:

- a) an appropriately qualified person engaged by the Administrator reviews the:
  - i. deferred payment contract,
  - ii. internal policies and processes of the credit provider, and
  - iii. outcomes of any previous findings that the credit provider has not met the consumer protection standards under paragraph 25.a).ii.(A).a and 25.c).(iv) of the Consumer Code that are required to be met by a credit provider for Signatories to offer the credit providers' finance product, including any previous revocations of approval pursuant to clause A7.A, if applicable,  
and certifies that:
    - iv. the contract and the internal policies include an undertaking and processes to require ongoing compliance by the credit provider with all of the consumer protection obligations set out in paragraphs 25.a).ii.(A).a, and 25.c).(iv); and
    - v. having regard to the review of the factors listed at A7.a).iii, it is appropriate to approve the credit provider.
- b) the provider of the deferred payment arrangement pays the costs of the person engaged by the Administrator to undertake that work (costs to be paid to the Administrator in advance of the performance of the work)
- c) where the Administrator is proposing to refuse the request, the Administrator must give the credit provider an opportunity to reply before making a final decision.

A7A. The Administrator may reassess the approval of a credit provider granted under paragraph A7 if it considers that the credit provider has not met the consumer protection obligations contained in paragraph 25 of the Consumer Code that are required for Signatories to offer the credit providers' finance product. In making this assessment the Administrator may take into account factors including: any breaches by the credit provider of the industry code of conduct referred to at paragraph 25.a.ii of the Consumer Code; instances of the credit provider not meeting the obligations set under paragraph 25 of the Consumer Code; the severity or systemic nature of those breaches; or any AFCA rulings and failure to comply with such rulings. Where the Administrator is proposing to revoke approval, the Administrator must give the credit provider an opportunity to reply before making a final decision.

**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:	Application for leave to intervene
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



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.

## Application for leave to intervene



### IN THE AUSTRALIAN COMPETITION TRIBUNAL

**File No:** ACT 1 of 2019

**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.

**Proposed intervener:** Consumer Action Law Centre

**Address of proposed intervener:** Level 6, 179 Queen Street, Melbourne VIC 3000

1. This application is filed in accordance with paragraph 2 of the Tribunal's orders dated 4 February 2020.
2. The Consumer Action Law Centre (**CALC**) applies to intervene in this review, pursuant to s 109(2) of the *Competition and Consumer Act 2010* (Cth).
3. In light of the matters at paragraphs [8] to [29] of the Affidavit of Gerard Brody dated 21 February 2020 (**Brody Affidavit**), CALC has a real and substantial interest in the subject matter of the proceeding. Among other things, CALC was closely involved in the development and authorisation of the New Energy Tech Consumer Code (**the Consumer Code**), and has conducted substantial legal, policy and advocacy work on the critical issue of Buy-Now-Pay-Later (**BNPL**) finance, both in the solar market and generally.
4. CALC intends to make submissions relating to the grounds of dissatisfaction articulated by Flexigroup in its Application for Review, but which are likely to be substantially different to those which it is anticipated will be put on behalf of the ACCC. In particular, CALC proposes to contend that:
  - (a) the Tribunal should apply different conditions to those imposed by the ACCC,

Filed on behalf of (name & role of party)	Consumer Action Law Centre (applicant for permission to intervene)
Prepared by (name of person/lawyer)	Ursula Noye / Rex Punshon
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
<b>Address for service</b> (include state and postcode)	Level 6 / 179 Queen Street, Melbourne VIC 3000

alternatively that the Tribunal should vary the amended draft code as submitted to the ACCC on 25 September 2019, so that signatories to the Consumer Code are permitted to offer a deferred payment arrangement only if the provider of those deferred payments arrangement is a credit provider licensed under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the deferred payment arrangement is regulated under the National Credit Code (**NCC**) – as was originally proposed by the proponents of the Consumer Code and was reflected in the ACCC's draft determination made on 1 August 2019 (cl 24 of the draft Consumer Code, as submitted by the proponents on 21 April 2019 and as annexed to the draft determination of 1 August 2019); and

- (b) further or alternatively, that the words '*and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)*' should be deleted from the chapeau to cl 25 of the Consumer Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefit.
- 5. CALC intends to file evidence and make submissions to assist 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 New Energy Technology sector. CALC's evidence will include case studies and other data, based on CALC's direct involvement in legal assistance, investigations and advocacy in this sector.
  - 6. CALC's address for service for the purpose of reg 21 of the *Competition and Consumer Regulations 2010* is Level 6, 179 Queen Street, Melbourne VIC 3000 ([ursula@consumeraction.org.au](mailto:ursula@consumeraction.org.au); [rex@consumeraction.org.au](mailto:rex@consumeraction.org.au)).
  - 7. In support of this application, CALC relies on:
    - (a) the Brody Affidavit; and
    - (b) its written submissions dated 21 February 2020.

Dated: 21 February 2020



Signed on behalf of the Consumer Action Law Centre

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

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**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
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DEPUTY REGISTRAR

Dated: 21/02/2020 3:44 PM

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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  
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## 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



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*<sup>1</sup>, 2017 *Knock it off!*<sup>2</sup> and 2016 *Power Transformed*<sup>3</sup> 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.

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

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

<sup>3</sup> 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



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**



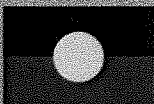
## ABOUT

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.<sup>30</sup>

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).

<sup>30</sup> 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.<sup>31</sup>

One difference between the types of solar issues being seen by Consumer Action and those being observed elsewhere<sup>32</sup> 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.

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

<sup>32</sup> 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)<sup>33</sup> 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.

<sup>33</sup> 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.<sup>34</sup> 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).<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> 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;<sup>38</sup>
- be fit for any purpose a person made known to the trader;<sup>39</sup>
- correspond with the description, sample or demonstration model;<sup>40</sup>
- have spare parts and facilities available for the repair of the goods for a reasonable amount of time after the goods were supplied;<sup>41</sup> and
- where express voluntary warranties are given by the manufacturer or supplier of the goods, that those warranties will be honoured.<sup>42</sup>

The ACL guarantees that *services* will:

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

<sup>34</sup> Competition and Consumer Act 2010 (Cth) s 2.

<sup>35</sup> Competition and Consumer Act 2010 (Cth) s 131A.

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> ACL s 54.

<sup>39</sup> ACL s55.

<sup>40</sup> ACL ss 56- 57.

<sup>41</sup> ACL s 58.

<sup>42</sup> 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.

<sup>43</sup> ACL s 60.

<sup>44</sup> ACL s 61.

<sup>45</sup> 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.<sup>46</sup>

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).<sup>47</sup> 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,<sup>48</sup> solar panels are regularly sold using this sales method.

Unsolicited consumer agreements are ones in which:<sup>49</sup>

- 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.<sup>50</sup>

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;<sup>51</sup>
- as soon as possible and before starting to negotiate a sale, must clearly tell a person of their purpose and identify themselves;<sup>52</sup>
- must leave a property immediately upon request;<sup>53</sup>

<sup>46</sup> 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](https://www.accc.gov.au/system/files/Consumer%20Guarantees%20A%20Guide%20for%20consumers_0.pdf)>.

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

<sup>48</sup> 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>>.

<sup>49</sup> ACL s 69(1).

<sup>50</sup> 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).

<sup>51</sup> ACL s 73.

<sup>52</sup> ACL s 74.

<sup>53</sup> ACL s 75.

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

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;<sup>56</sup>
- the agreement document must clearly set out the seller's name and business details,<sup>57</sup> must be clear and transparent,<sup>58</sup> 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;<sup>59</sup>
- the front page of the agreement must have a clear, obvious and prominent notice informing the person of their right to terminate<sup>60</sup> and must be signed by the consumer,<sup>61</sup> and

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

The termination period or the 'cooling off period' is generally 10 days from the date a person receives a copy of the agreement.<sup>63</sup> 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.<sup>64</sup>

A person is permitted to terminate the agreement within the cooling off period<sup>65</sup> and any related contract or instrument is void.<sup>66</sup> This means the supplier must promptly return any money paid under the agreement and must notify any related credit provider.<sup>67</sup> That being said, the law around a person's termination rights against a third party finance provider are complex and hard to understand.<sup>68</sup>

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.<sup>69</sup>

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).<sup>70</sup> The psychological underpinnings contained

<sup>54</sup> ACL s 76.

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

<sup>56</sup> ACL s 78.

<sup>57</sup> ACL s 79(d).

<sup>58</sup> ACL s 79(e) and (f).

<sup>59</sup> ACL s 79(a).

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

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

<sup>62</sup> ACL s 79(c)(i).

<sup>63</sup> ACL s 82(3).

<sup>64</sup> ACL ss 82(c)-(d).

<sup>65</sup> ACL s 82(1).

<sup>66</sup> ACL s 83(1).

<sup>67</sup> 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>>.

<sup>68</sup> 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.'

<sup>69</sup> 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](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf)>.

<sup>70</sup> 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.<sup>71</sup> These issues were explored in a joint research project conducted by Deakin University and Consumer Action in 2010.<sup>72</sup> Unsolicited selling also occurs where information asymmetry in favour of the seller is more likely.<sup>73</sup>

Unlike in other retail settings, people confronted with unsolicited selling are unlikely to have engaged in product comparisons, sampled the product<sup>74</sup> 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:<sup>75</sup>

- 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.<sup>76</sup>

## Misleading and deceptive sales

The ACL provides both a general protection against misleading or deceptive conduct<sup>77</sup> and specific protections against unfair practices including misleading claims about goods or services.<sup>78</sup>

The general protection prohibits misleading or deceptive representations by traders along with representations that are likely to mislead or deceive.<sup>79</sup> 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:<sup>80</sup>

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

<sup>71</sup> 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> >.

<sup>72</sup> Ibid.

<sup>73</sup> 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](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf) >.

<sup>74</sup> Ibid 466.

<sup>75</sup> 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](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf) >.

<sup>76</sup> 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](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf) >.

<sup>77</sup> ACL ss 18–19.

<sup>78</sup> ACL pt 3.1 div 1.

<sup>79</sup> 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> >

<sup>80</sup> ACL s 29.

<sup>81</sup> ACL ss 29(1)(a)–(b).

<sup>82</sup> ACL s 29(1)(g).

<sup>83</sup> ACL s 29(1)(m).

If the general protection provision is breached, a person can seek monetary<sup>84</sup> or non-monetary compensation orders<sup>85</sup> 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.<sup>86</sup>

## Unconscionable conduct

The ACL prohibits unconscionable conduct in trade or commerce in relation to the supply or possible supply of goods and services.<sup>87</sup> 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.<sup>88</sup> It is also conduct that is more than simply unfair.<sup>89</sup>

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.<sup>90</sup>

People who have fallen victim to unconscionable conduct can seek monetary<sup>91</sup> or non-monetary compensation<sup>92</sup> for any loss and damage caused by the breach and, should the need arise, can enforce their rights at VCAT.<sup>93</sup>

## Unfair contract terms

The ACL protects consumers from unfair contract terms but only those that are not the main subject matter of the contract<sup>94</sup> and those that are contained in standard form contracts.<sup>95</sup> 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:<sup>96</sup>

- 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 unfair<sup>97</sup> and can seek compensation orders for any loss and damage caused by the unfair term.<sup>98</sup> The consumer would generally be able to take their dispute to court or VCAT.

<sup>84</sup> 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).

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

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

<sup>87</sup> ACL, s 20.

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

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

<sup>90</sup> ACL s 22(1).

<sup>91</sup> ACL s 236.

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

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

<sup>94</sup> ACL s 26.

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

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

<sup>97</sup> ACL s 250.

<sup>98</sup> 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 services<sup>99</sup> or where the supplier regularly refers their customers for obtaining finance.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup>

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 legislation<sup>103</sup> 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.<sup>104</sup>

## 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.<sup>105</sup> 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,<sup>106</sup> unconscionable conduct,<sup>107</sup> misleading or deceptive conduct<sup>108</sup> and the specific protections against certain

<sup>99</sup> ACL s 2(a)(iii).

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

<sup>101</sup> ACL s 278(2).

<sup>102</sup> 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.

<sup>103</sup> *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.

<sup>104</sup> 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.

<sup>105</sup> 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').

<sup>106</sup> ASIC Act ss 12BF-12BM.

<sup>107</sup> ASIC Act ss 12CA-12CC.

<sup>108</sup> ASIC Act ss 12DA.

false or misleading claims<sup>109</sup> is almost identical under both laws. The ASIC Act warranty provisions are also fairly similar, in effect, to the ACL guarantee provisions.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup> 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'<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

The NCCPA states that licensed credit providers must be a member of the Australian Financial Complaints Authority (AFCA).<sup>116</sup> 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

<sup>109</sup> ASIC Act s 12DB.

<sup>110</sup> 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.

<sup>111</sup> 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).

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

<sup>113</sup> See generally, NCCPA ch 2.

<sup>114</sup> See generally, NCCPA ch 3.

<sup>115</sup> See generally, NCCPA ch 3.

<sup>116</sup> 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;<sup>117</sup>
- disclosure obligations;<sup>118</sup>
- restrictions on fees, charges and interest for certain credit contracts; and<sup>119</sup>
- the regulation of financial hardship arrangements.<sup>120</sup>

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:<sup>121</sup>

- 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.<sup>122</sup>

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.<sup>123</sup> 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.

<sup>117</sup> See generally, NCC pt 2 divs 1, 5.

<sup>118</sup> See generally, NCC pt 2 divs 1, 5.

<sup>119</sup> See generally, NCC pt 2 divs 3, 4.

<sup>120</sup> See generally, NCC pt 4 div 3, pt 5 div 2.

<sup>121</sup> NCC s 5(1).

<sup>122</sup> NCC s 6(5).

<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> Individuals wishing to enforce their contract law rights against solar panel retailers can make a claim in VCAT or a court.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> The assets of the old company are then transferred to this new company, thereby avoiding the payment of liabilities,<sup>130</sup> 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.

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

<sup>125</sup> 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](https://www.lawhandbook.org.au/2018_07_01_05_breach_of_contract)>.

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

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

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

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

<sup>130</sup> 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.<sup>131</sup> They are a member-based organisation that works with renewable energy, storage and installer businesses.<sup>132</sup>

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 installers<sup>133</sup> and products that meet Australian Standards for design and implementation of solar panels.<sup>134</sup>**

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',<sup>135</sup> and the Commonwealth Government's Small-Scale Renewable Energy Scheme.<sup>136</sup>

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 activities<sup>137</sup> 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,<sup>138</sup> 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.<sup>139</sup> All other retailers will have to be signed up by 1 November 2019.<sup>140</sup>

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 conduct<sup>141</sup> and unsolicited consumer agreements.<sup>142</sup>

<sup>131</sup> 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.

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

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

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

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

<sup>136</sup> 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>>.

<sup>137</sup> *Ibid.*

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

<sup>139</sup> 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/>>.

<sup>140</sup> *Ibid.*

<sup>141</sup> 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>>.

<sup>142</sup> *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.<sup>143</sup> The minimum warranty covers the operation and performance of the whole solar system including its workmanship and products.<sup>144</sup> 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.<sup>145</sup>

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 service<sup>146</sup> 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 sanctions<sup>147</sup> 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 Code<sup>148</sup> and publicising their removal on their website.<sup>149</sup> Being removed as a signatory removes the benefits of being a CEC approved retailer. The benefits include being eligible for certain government tenders<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> To put this in perspective, by the end of 2017 there were nearly 5000 accredited rooftop panel installers around Australia.<sup>154</sup> 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.<sup>155</sup> At the date of writing, this code, the 'New Energy

<sup>143</sup> Ibid cl 2.2.10.

<sup>144</sup> 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).

<sup>145</sup> Ibid cl 2.2.10(b).

<sup>146</sup> Ibid cl 3.1.3.

<sup>147</sup> Ibid cl 3.3.4.

<sup>148</sup> Ibid cls 3.6.4 - 3.6.6.

<sup>149</sup> Ibid cl 3.6.6.

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

<sup>151</sup> 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>>.

<sup>152</sup> Ibid cl 3.6.1.

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

<sup>154</sup> 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>>.

<sup>155</sup> 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

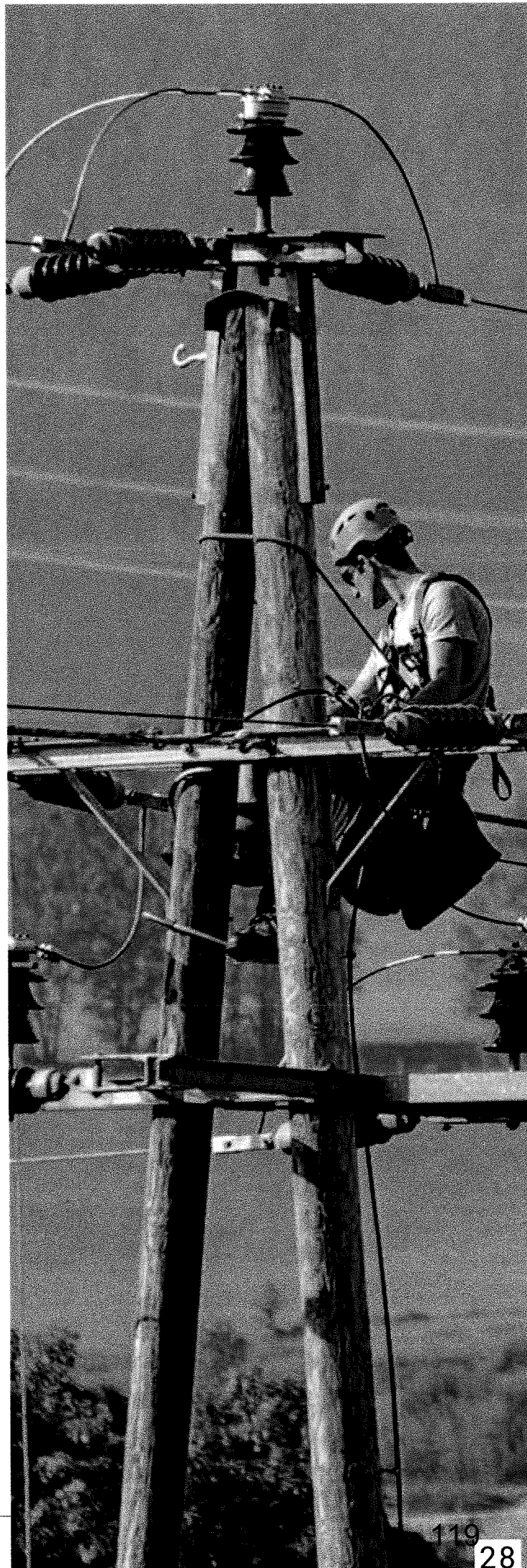
The Smart Energy Council is an industry-membership based, peak body for the solar, storage and smart energy market in Australia.<sup>156</sup> They have created a voluntary industry code, the Solar Energy Storage & Related Services Providers Code of Conduct (**the SEC Code**), for self-regulation of solar PV, energy storage and related services to Australian households.<sup>157</sup> 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.<sup>158</sup> Furthermore, there are also wide 'defences' to breach allegations,<sup>159</sup> which may render it even less effective for individuals.

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

<sup>157</sup> 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>>.

<sup>158</sup> 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](https://www.smartenergy.org.au/sites/default/files/uploaded-content/field_f_content_file/sesrs_consultation_draft.pdf)>.

<sup>159</sup> 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](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.<sup>178</sup>

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.<sup>179</sup>

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

<sup>178</sup> NCC ss 16, 17(c).

<sup>179</sup> 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.<sup>180</sup>

The proposed NET Code has sought to more comprehensively address the issue of unlicensed finance.<sup>181</sup> 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).<sup>182</sup> 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

<sup>180</sup> 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 NCCPA 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.

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

<sup>182</sup> *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.<sup>183</sup> It claims that it does not need to hold a licence because they offer 'no interest ever'<sup>184</sup> finance to people who buy goods through specific Certegy-partnered retailers. Certegy's 'no interest' finance contracts appear as continuing credit contracts,<sup>185</sup> with periodic or fixed charges that do not exceed the modest caps set under the NCC. Continuing credit contract 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.<sup>186</sup> 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.<sup>187</sup> 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,<sup>188</sup> 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.<sup>189</sup>

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.<sup>190</sup> 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

<sup>183</sup> 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>>.

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

<sup>185</sup> 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>>.

<sup>186</sup> *Ibid* 10-11.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid* [71].

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

<sup>190</sup> 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](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.<sup>191</sup> 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.**

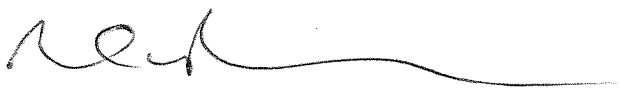
<sup>191</sup> ASIC, *Regulatory Guide 246: Conflicted and other banned remuneration* (December 2017), 68 < <https://download.asic.gov.au/media/4566844/rg246-published-7-december-2017.pdf> >.



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

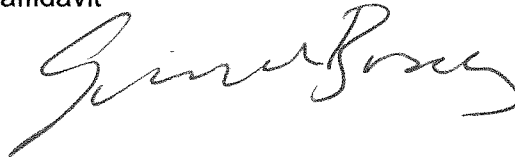
Certificate identifying annexure

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](mailto: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*,<sup>1</sup> 2017 *Knock it off*?<sup>2</sup> and 2016 *Power Transformed*<sup>3</sup> reports have drawn on our assistance work in order to recommend changes to

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

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

<sup>3</sup> 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'<sup>4</sup> 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.

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<sup>4</sup> 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](mailto:jake@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely,

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink, reading "Gerard Brody". The signature is fluid and cursive, with the first name "Gerard" and last name "Brody" clearly distinguishable.

**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](mailto: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 Brighter 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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> 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 sales<sup>3</sup> 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](mailto:jake@consumeraction.org.au) if you have any questions about this submission.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**



Gerard Brody | Chief Executive Officer

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<sup>2</sup> 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/>


<sup>3</sup> 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**

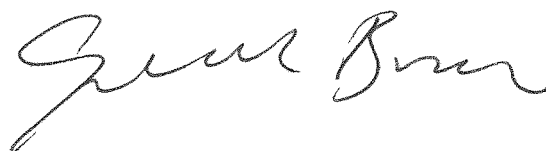
This is the annexure marked **GB-4** now produced and shown to Gerard Brody at the time of affirming his affidavit on 21 February 2020.

Before me:

REX PASCAL PUNSHON  


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

Signature of person taking affidavit



07 November 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— 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 approval<sup>1</sup> 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")*"<sup>2</sup>

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.<sup>3</sup> 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

<sup>1</sup> Consumer Action, 2019. *Submission Re: AA1000439 New Energy Tech Consumer Code*

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

<sup>3</sup> 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.<sup>4</sup> 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*

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<sup>4</sup> 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](mailto:jake@consumeraction.org.au) if you have any questions about this submission.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**



**Gerard Brody** | Chief Executive Officer

**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:	Submissions
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



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.



## Submissions by the Consumer Action Law Centre re application to intervene

### IN THE AUSTRALIAN COMPETITION TRIBUNAL

**File No:** ACT 1 of 2019

**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.

**Proposed intervener:** Consumer Action Law Centre

**Address of proposed intervener:** Level 6, 179 Queen Street, Melbourne VIC 3000

#### A INTRODUCTION

1. The Consumer Action Law Centre (**CALC**) applies to intervene in this review, pursuant to s 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. 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 the energy market. CALC provides financial counselling and legal assistance services to people experiencing disadvantage in Victoria, and policy and advocacy campaigns for the benefit of all Australians.
3. For the reasons developed below, we respectfully submit that CALC ought be granted permission to intervene.

#### B CALC HAS A REAL AND SUBSTANTIAL INTEREST IN THE SUBJECT MATTER

4. In order to obtain leave, an intervener must be able to establish some connection with, or interest in, the subject matter of the proceeding, other than that which is found in members of the general community: *Re Fortescue Metals Group Ltd* [2006] ACompT

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Filed on behalf of (name & role of party)	Consumer Action Law Centre (applicant for permission to intervene)
Prepared by (name of person/lawyer)	Ursula Noye / Rex Punshon
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
<b>Address for service</b> (include state and postcode)	Level 6 / 179 Queen Street, Melbourne VIC 3000

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6, at [35].

5. CALC readily meets this test. CALC has a real and substantial interest in both:
  - (a) the initial development of the New Energy Tech Consumer Code (**the Consumer Code**) and its authorisation by the ACCC; and
  - (b) the particular aspect of the Consumer Code that is the focus of Flexigroup's application in this review – that is, the offering of deferred payment arrangements on a 'Buy Now Pay Later' (**BNPL**) basis. CALC has had extensive involvement in legal, policy and advocacy matters concerning 'Buy Now Pay Later' both specifically in relation to New Energy Technology (**NET**) products, and in relation to consumer finance more generally.
6. CALC's interest in the development and authorisation of the Consumer Code is substantiated in the affidavit of Gerard Brody dated 21 February 2020 (**Brody Affidavit**) at paragraphs [21] to [29]:
  - (a) from August 2017 to about March 2019, CALC was a member of the Behind The Meter Working Group which was tasked by the COAG Energy Council with developing the draft Consumer Code;
  - (b) on 27 November 2018 and 17 December 2018, CALC's CEO, Mr Brody, participated in CEO-led discussions to develop a Memorandum of Understanding regarding the governance, stewardship and administration of the draft Consumer Code;
  - (c) after the proponents of the Consumer Code<sup>1</sup> applied to the ACCC for the authorization of the Consumer Code, CALC made detailed submissions to the ACCC on 21 May 2019, 20 September 2019 and 7 November 2019;<sup>2</sup>
  - (d) Mr Brody also participated in the pre-decision conference on the draft Consumer Code that was convened by the ACCC on 9 September 2019; and
  - (e) each of CALC's submissions, and its participation in the pre-decision conference, addressed the issue of deferred payment arrangements and BNPL finance which is now raised by Flexigroup in this review.
7. CALC's interest in BNPL payment arrangements more broadly is outlined in the Brody Affidavit at paragraphs [8] to [20]:

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<sup>1</sup> The Australian Energy Council, Clean Energy Australia, Energy Consumers Australia and Smart Energy Council (hereafter, the **authorisation applicants**).

<sup>2</sup> Exhibits **GB-2**, **GB-3** and **GB-4** to the Brody affidavit.

- (a) CALC has long campaigned for better consumer protections for consumers using BNPL products, both in the solar market and generally;
  - (b) CALC's legal practice regularly acts for and advises clients with issues arising from the conduct of BNPL providers, including Certegy (a subsidiary of FlexiGroup, now trading as Humm);
  - (c) since 2014, CALC's advocacy work concerning BNPL finance has included complaints to regulators including the ACCC, ASIC and Consumer Affairs Victoria, consultation with ASIC in relation to its *Report 600: Review of Buy Now Pay Later Arrangements*, and submissions to the Senate Economics Reference Committee in its 2019 *Inquiry into the credit and financial services targeted at Australians at risk of financial hardship*; and
  - (d) CALC published three significant reports in 2016, 2017 and 2019<sup>3</sup>, each of which recommended changes to strengthen the consumer protection regime for new energy products, reduce harm caused by door to door sales, and improve trust and confidence in the transforming energy market.
8. More generally, CALC has a strong track record of legal and policy advocacy for consumers. It is an expert and sophisticated voice for consumers in the present proceeding.

**C CALC'S EVIDENCE AND SUBMISSIONS WILL BE SUBSTANTIVELY DIFFERENT TO THOSE OF THE OTHER PARTIES**

9. The second requirement for leave to intervene is that an intervener should show that it will make a "useful or different" contribution to the review, relative to the other parties to the review: *Re Fortescue Metals Group Ltd* [2006] ACompT 6, at [60(c)].
10. CALC intends to confine its submission to the subject-matter of Flexigroup's grounds of dissatisfaction: namely, relating to the Consumer Code provisions and conditions relating to deferred payment arrangements. CALC anticipates that its contentions in the proceeding, and the evidence it will file, will be substantively different from those which it anticipates will be put on behalf of the ACCC and the authorisation applicants, and will be of assistance to the Tribunal.

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<sup>3</sup> Consumer Action Law Centre, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria* (exhibit GB-1); Consumer Action Law Centre, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*; Consumer Action Law Centre, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*

## C1 CALC's Contentions

11. In the Tribunal review, CALC proposes to contend for authorisation of the Consumer Code on different conditions from those determined by the ACCC, and from those for which Flexigroup and the authorisation applicants will contend. In particular, CALC proposes to contend that:
- (a) the Tribunal should apply different conditions than those imposed by the ACCC, alternatively that the Tribunal should vary the amended draft code as submitted to the ACCC on 25 September 2019, so that signatories to the New Energy Tech Consumer Code are permitted to offer a deferred payment arrangement only if the provider of those deferred payments arrangement is a credit provider licensed under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the deferred payment arrangement is regulated under the National Credit Code (**NCC**); and
  - (b) further or alternatively, that the words '*and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)*' should be deleted from the chapeau to cl 25 of the Consumer Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefit.
12. CALC's primary contention is the position that was originally proposed by the authorisation applicants to the ACCC, and reflected in the ACCC's draft determination made on 1 August 2019.<sup>4</sup> However, the authorisation applicants departed from their original position in their amended Credit Code submitted on 25 September 2019, and which was further modified by the ACCC in its final determination.
13. CALC's further contention does not appear to have previously been raised by any of the other participants. Critically, BNPL arrangements typically fall outside of the ambit of regulation under the NCC on the basis that they are not 'credit to which the NCC applies' (NCC, s 5), either because:
- (a) the BNPL provider imposes no charge on the consumer<sup>5</sup> (**No Charge BNPL products**); or
  - (b) the credit has been exempted from regulation by s 6(5) of the NCC: that is, where small amounts are charged to the consumer, but they do not vary

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<sup>4</sup> See cl 24 of the draft Consumer Code, as submitted by the proponents on 21 April 2019 and as annexed to the draft determination of 1 August 2019.

<sup>5</sup> See NCC s 5(1)(c). In these cases, a fee is typically charged to the merchant instead.

according to the amount of credit provided, and are less than \$200 in the first year, and \$125 in subsequent years<sup>6</sup> (**Low Charge BNPL products**).

14. Clause 25 of the Consumer Code, as authorised by the ACCC, is stated to apply only to deferred payment arrangements that include '*an interest component, additional fees or an increased price*'. This appears to be both:
  - (a) self-abnegating, in that those words would operate to exclude No Charge BNPL products from any of the requirements that cl 25 purports to impose; and
  - (b) at least unclear as it applies to Low Charge BNPL products, in that is unclear whether '*additional fees*' is, or is not, intended to encompass fees that are within the low charge exemption that Low Charge BNPL products are designed to take advantage of.
15. Where substantially similar consumer protection concerns arise in relation to both No Charge and Low Charge BNPL products, the full extent of the anticipated public benefit from cl 25 will not be adequately or satisfactorily realised if its operation does not unambiguously encompass both kinds of BNPL finance.

## **C2 CALC's evidence**

16. CALC proposes to lead evidence concerning the nature and extent of the risk to consumers posed by unregulated BNPL finance in the NET sector, including (but not limited to) case studies and other data. That evidence will be based on CALC's direct involvement in legal assistance, investigations and advocacy in this sector, on behalf of financially vulnerable consumers.

## **C3 CALC's role and contribution to the proceeding**

17. CALC's position and its contribution to the proceeding will be different from those of the ACCC and the authorisation applicants.
18. The ACCC's role in a review of an authorisation application is primarily to assist the Tribunal. It is not for the ACCC to fill the role of an advocate for the interests of consumers in the way that CALC is conspicuously well placed to do.
19. The authorisation applicants comprise an amalgam of merchant and consumer interests in the NET sector. CALC's focus in this review is distinct from that of Energy Consumers Australia, which is represented in this review jointly with the other authorisation applicants. ECA's focus has been more directed to advancing the consumer interests in the complex and dynamic energy markets (as to which there

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<sup>6</sup> See *National Consumer Credit Protection Regulations 2010* (Cth), r 51.



appears to be no contest in this Tribunal review); whereas CALC uniquely has substantial experience in relation to consumer credit, including in the household solar and NET sectors.

20. The participation of a consumer advocate will assist in ensuring that the Tribunal's review involves a balanced (rather than asymmetrical, or one-sided) reappraisal of the matters under consideration. In a recent review, the Tribunal endorsed the active participation of a consumer advocate as "particularly helpful": *Re Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [58].

**D PERMITTING CALC TO INTERVENE WILL NOT DISRUPT OR PROLONG THE REVIEW**

21. CALC's intervention will not materially impact on the cost or duration of the proceeding.
22. Firstly, CALC proposed intervention is confined to the central issue that has been raised by Flexigroup, namely the Code provisions and ACCC conditions regarding deferred payment arrangements.
23. Secondly, CALC's position is not a new or unexpected one: it is substantially the same position that the authorisation applicants adopted in their original application, and by the ACCC in its draft determination – and for which CALC continued to contend following the draft determination.
24. Thirdly, CALC will endeavour to expedite the running of the proceeding, and to minimise any impact on its cost or duration, including by seeking not to replicate submissions advanced by any of the other parties. Instead, CALC will seek to supplement them appropriately, within the procedural timetable that the Tribunal has already mapped out. CALC is an experienced litigant and advocate, and the Tribunal ought be assured that, if it is granted leave to intervene, it will do so succinctly and efficiently.

Dated: 21 February 2020

**Tom Clarke**

**Matthew Peckham**



Signed on behalf of the Consumer Action Law Centre

# AUSTRALIAN COMPETITION TRIBUNAL

## Application by Flexigroup Limited [2020] ACompT 1

Review from:	Application for authorisation AA1000439 lodged by Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia in respect of the New Energy Tech Consumer Code
File number:	ACT 1 of 2019
Tribunal:	<b>O'BRYAN J (Deputy President)</b>
Date of Determination:	16 March 2020
Catchwords:	<b>TRADE PRACTICES</b> – application for review of determination made by the Australian Competition and Consumer Commission under s 101 of the <i>Competition and Consumer Act 2010</i> (Cth) – applications for intervention – applications granted
Legislation:	<i>Competition and Consumer Act 2010</i> (Cth) ss 101(1A), 109(2)
Cases cited:	<i>Application by DBNGP (WA) Transmission Pty Ltd (No 3)</i> [2012] ACompT 14 <i>Application by Fortescue Metals Group Ltd</i> [2006] ACompT 6 <i>Application by Independent Contractors Australia</i> [2015] ACompT 1 <i>Application by Sea Swift Pty Limited</i> [2015] ACompT 5 <i>Application by Tabcorp Holdings Ltd</i> [2017] ACompT 1 <i>Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited</i> [2014] ACompT 1 <i>Applications by Tabcorp Holdings Limited</i> [2017] ACompT 5 <i>Geographical Indications Committee v O'Connor</i> (2000) 64 ALD 325 <i>R v Australian Broadcasting Tribunal; Ex parte Hardiman</i> (1980) 144 CLR 13 <i>Re EFTPOS Interchange Fees Agreement</i> [2004] ACompT 7; ASC 155-068; ATPR 41-999 <i>Re Fortescue Metals Group Ltd</i> (2006) 203 FLR 28 <i>Re Independent Contractors Australia</i> (2015) 292 FLR 80

*Re Queensland Cooperative Milling Association Ltd (1976)*  
8 ALR 481; 25 FLR 169; 1 TPC 109

Date of hearing:	13 March 2020
Registry:	Victoria
Category:	Catchwords
Number of paragraphs:	46
Counsel for the Applicant:	Mr N De Young SC
Solicitor for the Applicant:	Clayton Utz
Counsel for the Authorisation Applicants:	Mr D Preston
Solicitor for the Authorisation Applicants:	Allens
Counsel for Australian Competition and Consumer Commission:	Mr C Tran
Solicitor for Australian Competition and Consumer Commission:	Australian Government Solicitor
Counsel for RateSetter Australia RE Limited:	Mr A Barraclough
Solicitor for RateSetter Australia RE Limited:	Johnson Winter & Slattery
Counsel for Consumer Action Law Centre:	Mr T Clarke with Mr M Peckham
Solicitor for Consumer Action Law Centre:	Consumer Action Law Centre

## **IN THE AUSTRALIAN COMPETITION TRIBUNAL**

**ACT 1 of 2019**

**RE:** **RE APPLICATION FOR AUTHORISATION AA1000439  
LODGED BY AUSTRALIAN ENERGY COUNCIL, CLEAN  
ENERGY COUNCIL, SMART ENERGY COUNCIL AND  
ENERGY CONSUMERS AUSTRALIA IN RESPECT OF THE  
NEW ENERGY TECH CONSUMER CODE**

**BY:** **FLEXIGROUP LIMITED**  
Applicant

**TRIBUNAL:** **O'BRYAN J (DEPUTY PRESIDENT)**

**DATE OF** **16 MARCH 2020**  
**DETERMINATION:**

### **THE TRIBUNAL DETERMINES THAT:**

1. The Australian Securities and Investments Commission be granted leave to intervene in the proceeding.
2. Subject to the Tribunal's power to direct the nature and extent of its participation in the proceeding, RateSetter Australia RE Limited be granted leave to intervene in the proceeding.
3. Subject to the Tribunal's power to direct the nature and extent of its participation in the proceeding, the Consumer Action Law Centre be granted leave to intervene in the proceeding.
4. Paragraph 11 of the Directions of the Tribunal dated 4 February 2020 be varied such that each intervener is to file and serve a Statement of Facts, Issues and Contentions on or before Monday, 23 March 2020.
5. Paragraph 12 of the Directions of the Tribunal dated 4 February 2020 be varied such that the Australian Competition and Consumer Commission is to file and serve a Statement of Facts, Issues and Contentions on or before Friday, 27 March 2020.

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

## REASONS FOR DETERMINATION

### Introduction

- 1 On 30 December 2019, Flexigroup Limited (**Flexigroup**) filed an application pursuant to s 101 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for a review of the authorisation of the Australian Competition and Consumer Commission (**ACCC**) dated 5 December 2019 (Commission file no. AA1000439) granted under s 88(1) of the CCA.
- 2 The applicants for the authorisation were the Australian Energy Council (**AEC**), Clean Energy Council (**CEC**), Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together, the **authorisation applicants**). The authorisation concerned a document called the New Energy Tech Consumer Code (**Consumer Code**) which sets minimum standards that suppliers of “New Energy Tech” products (e.g. solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers, including from initial marketing and promotion through to installation and complaints handling. The authorisation granted by the ACCC enables the authorisation applicants and future signatories to the Consumer Code to agree, sign up to and comply with provisions of the Consumer Code:
  - (a) according to which signatories will commit to abide by minimum standards of good practice as set out in the Consumer Code, which are intended to cover all aspects of the customer experience;
  - (b) for monitoring and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Consumer Code and, where there is serious non-compliance, the Code Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled; and
  - (c) requiring signatories to only offer deferred payment arrangements that are regulated under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), and provided by credit providers licensed under the NCCPA, or to offer deferred payment arrangements that are provided by “buy now pay later” (**BNPL**) providers only in certain circumstances.
- 3 The authorisation was granted subject to a number of conditions. Most relevantly, the ACCC imposed conditions concerning BNPL finance. Those conditions were:

- (a) with respect to finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL), signatories will be required to only offer such arrangements from credit providers that have been assessed as having specified consumer safeguards in place, as set out in the versions of clause 25 and clauses A7 and A7A of the Annexure to the Consumer Code at Attachment A to the authorisation;
- (b) signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC (i.e. BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited; and
- (c) the condition outlined at (a) above, including the wording found in Attachment A, may be subject to variation where approved by the ACCC in writing and published on the public register.

4 In its application for review, Flexigroup states that it is a diversified financial services group with operations in, relevantly, Australia across a diverse range of industries including, relevantly, solar energy. It provides a range of finance products and payment solutions to consumers and businesses including interest free cards and no interest ever payment plans. Flexigroup is a provider of no interest ever payment plans to retail customers through its product “hummm” which is a form of BNPL financial product. Flexigroup says that hummm has financed the purchase of more than 180,000 solar installations (approximately 10% of all installations) in Australia and almost half of the revenue generated by Flexigroup’s hummm product is from providing credit for sales of solar panels and other home improvements. Flexigroup says that, of the top 50 solar sellers with whom Flexigroup does business, approximately 60% were expected to or have become members of one of the authorisation applicants and would therefore also likely become signatories to the Consumer Code.

5 By its application, Flexigroup seeks the review of the conditions of authorisation imposed by the ACCC that relate to the provision of BNPL finance. Specifically, Flexigroup contends that the conditions identified in paragraphs 3(a) and (b) above should not have been imposed and that authorisation should not be granted to any provisions of the Consumer Code that have the effect of preventing signatories from offering BNPL products to consumers in any way.

6 Pursuant to directions given by the Tribunal on 4 February 2020, the following entities have applied for leave to intervene in this proceeding pursuant to s 109(2) of the CCA: the Australian



Securities and Investments Commission (**ASIC**), RateSetter Australia RE Limited (**RateSetter**) and the Consumer Law Action Centre (**CALC**).

7 For the reasons that follow, the Tribunal permits intervention by ASIC, RateSetter and CALC.

### **Relevant principles**

8 Section 109(2) provides that the Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal. The section has been considered by the Tribunal on a number of occasions.

9 In *Application by Fortescue Metals Group Ltd* [2006] ACompT 6 (**Fortescue**) (also reported as *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28), the Tribunal made the following observations about s 109(2):

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

...

[35] ... an applicant for leave to intervene or participate under s 109(2) ... must, as a minimum, be able to establish some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander. What the nature of that connection or interest must be, will vary from case to case. It is not necessary that an applicant be required to establish that its business interests or business activities or prospects may be detrimentally affected by the subject matter of the proceeding or its outcome. ... However, the connection should usually be one that discloses that the applicant for leave to intervene has some interest which is ignited by the proceeding, which is an interest other than that found in members of the general community.

...

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

10 Similarly, in *Application by Independent Contractors Australia* [2015] ACompT 1 (also reported as *Re Independent Contractors Australia* (2015) 292 FLR 80), the Tribunal proceeded on the basis that there is no “sufficient” or “real and substantial” interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions. However, the Tribunal recognised that (at [28]):

...it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or the submissions to be made by them, as well as considering how the proposed intervenor might be affected by the Authorisation or the outcome of the application to the Tribunal.

11 Each of the parties adopted those statements of principle.

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

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

13 Similarly, in *Application by Sea Swift Pty Limited* [2015] ACompT 5, the Tribunal limited the intervention of the Maritime Union of Australia to one issue only and to making written and oral submissions only, with the right to apply to the Tribunal to adduce evidence and to cross-examine (at [5]).

14 Flexigroup also noted that interested third parties may be able to advance their interests sufficiently by making submissions to the Tribunal and do not need to have the rights of an intervenor in order to do so, citing as examples the approach taken by the Tribunal in *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (at [151], [272] and [392]) and *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 (at [53]). By directions made on 4 February 2020, the Tribunal has allowed for that possibility.

15 Flexigroup also placed reliance on s 101(1A) of the CCA which provides as follows:

Where a person has, whether before or after the commencement of this subsection,

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

- 16 Flexigroup submitted that there is a possibility that this proceeding may be able to be resolved by consent under s 101(1A). By way of background, Flexigroup explained that the Australian Finance Industry Association (**AFIA**) has released a draft Code of Practice for the BNPL sector and has conducted public consultation on the draft Code. Flexigroup submitted that the draft Code has a number of relevant conditions to regulate BNPL finance. If the Code is adopted, it may have implications for the conditions in the authorisation of the Consumer Code that relate to BNPL finance. Flexigroup submitted that, if RateSetter and CALC were given permission to intervene under s 109(2), their consent would also be required for any determination of this proceeding by consent under s 101(1A). Flexigroup submitted that that would make the achievement of a consent determination more difficult. For that reason, Flexigroup submitted that the Tribunal should defer its decision with respect to the applications for intervention made by RateSetter and CALC until early April 2020, when the position with respect to the AFIA Code of Practice becomes clearer. Alternatively, Flexigroup submitted that the Tribunal should stipulate, as a condition of intervention under s 109(2), that RateSetter and CALC will not be regarded as interveners for the purposes of s 101(1A).
- 17 In my view, Flexigroup's submissions in relation to s 101(1A) suffer from a number of difficulties.
- 18 First, I do not accept that the Tribunal has power under s 109(2) to stipulate, as a condition of intervention, that RateSetter and CALC will not be regarded as interveners for the purposes of s 101(1A). There is nothing in the language of s 109(2) which suggests that the Tribunal may, by the imposition of a condition, override the statutory power conferred by s 101(1A). Section 101(1A) is clear in its terms and empowers the Tribunal to make a consent determination only if the applicant, the ACCC and all interveners consent.
- 19 Second, I do not accept the premise of Flexigroup's submissions that it would be beneficial to defer a decision on intervention so that any consent determination is not "burdened" by the need to receive the consent of the interveners. Indeed, I consider that any such consideration would be inconsistent with the implicit legislative intent of s 101(1A). Section 101(1A) makes clear that any consent determination requires the consent of interveners. The section implicitly

recognises that interveners have an interest in the determination of the proceeding, which interest is protected by requiring their consent to a consent determination. As a corollary, s 101(1A) provides contextual support for the view expressed in *Fortescue* and other decisions of the Tribunal that an applicant for leave to intervene under s 109(2) must, as a minimum, be able to establish some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander.

- 20 One further matter of principle should be mentioned. In my view, it would be wrong to refuse permission to a person to intervene for the reason that the ACCC is able to represent that person's interests in the proceeding. Such an approach would be to misapprehend the role of the ACCC in the proceeding. The ACCC is not a party or protagonist in the proceeding. Its role is to assist the Tribunal in an impartial manner, regardless of any conclusions it may have drawn from its earlier analysis in the matter: *Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7 at [29]; ASC 155-068; ATPR 41-999; *Application by Tabcorp Holdings Ltd* [2017] ACompT 1 at [38]; ATPR 42-550. As the Tribunal observed in *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [36], the manner in which the "Hardiman" principles (*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 especially at 35-36 per Gibbs, Stephen, Mason, Aickin and Wilson JJ) are to be applied in a given case depends upon a number of factors including the presence of a contradictor and the nature of the review proceedings and whether the matter is likely to be remitted to the initial decision maker. In the absence of a contradictor, the ACCC may be required to test the evidence of the applicant, present contrary material and make submissions putting forward an opposing point of view, although none of this should be done in a partisan fashion: *Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481 at 484; 25 FLR 169; 1 TPC 109. In the presence of a contradictor, however, the role of the ACCC should properly be more confined: see for example *Geographical Indications Committee v O'Connor* (2000) 64 ALD 325 at [35]ff.

### **Application for intervention by ASIC**

- 21 ASIC seeks permission to intervene on three primary bases.
- 22 First, ASIC considers it can be of real assistance to the Tribunal in providing context around the submission it made to the ACCC. That context includes ASIC's views regarding the forms

of regulation proposed by the authorisation applicants to the ACCC, by Flexigroup and by any other interveners in the present application for review.

- 23 Second, ASIC submits that it can assist the Tribunal in clarifying the present scope of ASIC's regulatory power over BNPL finance, the relationship between its regulatory powers and those of the ACCC.
- 24 Third, ASIC is best placed to explain the views it has expressed in relation to BNPL finance, including particularly its detailed review of the BNPL sector being ASIC Report 600, and how those views have developed since that report was published.
- 25 Flexigroup does not oppose the application for intervention made by ASIC and accepts that ASIC has a sufficient interest and will be able to adduce evidence which can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application for review. The ACCC supports ASIC's intervention on the same basis. No party opposes the intervention.
- 26 The Tribunal accepts those submissions and will grant leave to ASIC to intervene in the proceeding.

#### **Application for intervention by RateSetter**

- 27 In its application to intervene, RateSetter says that it is Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products (**New Energy Technology**). Since 2014, RateSetter has facilitated over \$60 million in consumer loans for the purpose of clean energy equipment such as solar panels and batteries. RateSetter holds an Australian Financial Services Licence and an Australian Credit Licence. Finance facilitated by RateSetter is regulated by the NCCPA and the NCC.
- 28 RateSetter seeks to intervene in relation to the review of the authorisation. It opposes the variations to the Consumer Code proposed by Flexigroup and will submit that the authorisation should stand.
- 29 RateSetter submitted that, as Australia's largest provider of regulated consumer credit for the purpose of funding New Energy Technology, RateSetter has a significant interest in the ultimate form of the Consumer Code. It referred to the following matters:

- (a) First, in the event that RateSetter is accepted by the Administrator as a Code Signatory, RateSetter intends to become a Signatory and will be bound by the Code.
- (b) Second, the Consumer Code will regulate the conduct of entities with which RateSetter competes (who become signatories to the Code), and the manner in which that competition occurs.
- (c) Third, the Consumer Code will regulate the conduct of entities who supply New Energy Technology that is financed by RateSetter loans, being merchants or suppliers (who become signatories to the Code) and the manner in which that finance is offered to the customers of the merchants or suppliers.
- (d) Fourth, RateSetter has an immediate interest in the substance of Flexigroup's application, which is to seek changes to the BNPL conditions imposed by the ACCC. RateSetter submitted that it is one of the industry participants who will be most affected by the removal of the BNPL conditions, given its position in the market as a major competitor to providers of BNPL finance such as Flexigroup.

30 Reflecting its interest in the authorisation and ultimate form of the Consumer Code, RateSetter submitted three sets of submissions to the ACCC during the authorisation application. RateSetter submitted that it will be in a position to assist the Tribunal by providing evidence and submissions which draw directly on its experience in matters raised by Flexigroup's application, including in respect of the factual findings made by the ACCC with which Flexigroup is dissatisfied, and the likely impact of the BNPL conditions on consumers and competition in the New Energy Technology finance industry. RateSetter submitted that it can provide information that includes:

- (a) the market landscape for the provision of finance for the purchase of New Energy Technology;
- (b) the various forms of finance available to consumers for the purchase of New Energy Technology, ranging from loans regulated under the NCCPA through to "interest-free" finance;
- (c) the method of sale and promotion of New Energy Technology and related point-of-sale finance;
- (d) the relationship between finance companies and the merchants who sell New Energy Technology equipment to consumers;

- (e) information in relation to the experiences of merchants who have recently moved from providing so-called “interest free” finance to regulated loans;
- (f) observed differences in costs passed on to consumers where they obtain regulated finance versus unregulated finance;
- (g) the protections consumers may miss out on if they obtain unregulated finance that does not comply with provisions of the authorisation;
- (h) the likely effect on overall access to New Energy Technology that would result from upholding the authorisation;
- (i) factual matters in the authorisation with which Flexigroup is said to be dissatisfied; and
- (j) the degree to which the competitive constraints that RateSetter faces will be affected by the authorisation.

31 The ACCC supports RateSetter’s application to intervene, essentially on the basis of the submissions made by RateSetter. The ACCC acknowledged that, if given permission to intervene, RateSetter would be a contradictor in the proceeding which would affect the role of the ACCC.

32 Flexigroup accepted that RateSetter has an interest in the proceeding which is greater than that of a merely officious bystander. Flexigroup submitted, however, that RateSetter has failed to demonstrate that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or ASIC as an intervener. It says that the intervention of RateSetter will inevitably increase the costs of the proceeding and means that the proceeding will take additional time. Flexigroup proposed that, in order to determine whether to permit RateSetter to intervene, and the extent of the intervention, RateSetter should first put on its proposed evidence in the proceeding and the determination of its intervention be adjourned until after that occurs. In part, that submission was prompted by Flexigroup’s concern over the impact of RateSetter’s intervention on any consent determination, as discussed above.

33 The Tribunal is satisfied that RateSetter’s interest in the proceeding, and the categories of information that it is able to adduce in the proceeding, justify the Tribunal permitting it to intervene. However, the Tribunal is mindful that, as the number of parties increases, the risk of duplication increases, as do the overall costs of the proceeding to the parties. For that reason, the Tribunal will make a direction in similar terms to the direction given in *Fortescue*, referred to earlier, that RateSetter will be permitted to intervene in the proceeding subject to the

Tribunal's power to direct the nature and extent of its participation in the proceeding. In accordance with the current directions of the Tribunal, RateSetter will be required to file and serve any evidence on which it wishes to rely by 21 April 2020. The Tribunal will retain the discretion to exclude such evidence from the hearing if it does not usefully add to the evidence otherwise before the Tribunal. The right to cross-examine will also be addressed at a time closer to the hearing or at the hearing.

### **Application for intervention by CALC**

- 34 In support of its application to intervene, CALC says that it is an independent, not-for-profit consumer organisation with specialist expertise in consumer credit law and policy, and of the consumer experience in modern markets, including the energy market. CALC provides financial counselling and legal assistance services to people experiencing disadvantage in Victoria, and policy and advocacy campaigns for the benefit of all Australians.
- 35 CALC submitted that it has a real and substantial interest in both the initial development of the Consumer Code and its authorisation by the ACCC and in the offering of deferred payment arrangements on a BNPL basis.
- 36 CALC's interest in the development and authorisation of the Consumer Code is evidenced by the following matters:
- (a) from August 2017 to about March 2019, CALC was a member of the Behind The Meter Working Group which was tasked by the COAG Energy Council with developing the draft Consumer Code;
  - (b) on 27 November 2018 and 17 December 2018, CALC's CEO, Mr Brody, participated in CEO-led discussions to develop a Memorandum of Understanding regarding the governance, stewardship and administration of the draft Consumer Code;
  - (c) after the proponents of the Consumer Code applied to the ACCC for its authorisation, CALC made three detailed submissions to the ACCC;
  - (d) Mr Brody participated in the pre-decision conference on the draft Consumer Code that was convened by the ACCC on 9 September 2019; and
  - (e) each of CALC's submissions, and its participation in the pre-decision conference, addressed the issue of deferred payment arrangements and BNPL finance which is now raised by Flexigroup in this review.



37 CALC's interest in BNPL payment arrangements more broadly is evidenced by the following matters:

- (a) CALC has long campaigned for better consumer protections for consumers using BNPL products, both in the solar market and generally;
- (b) CALC's legal practice regularly acts for and advises clients with issues arising from the conduct of BNPL providers, including Certegy (a subsidiary of Flexigroup, now trading as Humm);
- (c) since 2014, CALC's advocacy work concerning BNPL finance has included complaints to regulators including the ACCC, ASIC and Consumer Affairs Victoria, consultation with ASIC in relation to its Report 600, and submissions to the Senate Economics Reference Committee in its 2019 Inquiry into the credit and financial services targeted at Australians at risk of financial hardship;
- (d) CALC published three significant reports in 2016, 2017 and 2019, each of which recommended changes to strengthen the consumer protection regime for new energy products, reduce harm caused by door to door sales, and improve trust and confidence in the transforming energy market; and
- (e) more generally, CALC has a strong track record of legal and policy advocacy for consumers.

38 CALC anticipates that its contentions in the proceeding, and the evidence it will file, will be substantively different from those which it anticipates will be put on behalf of the ACCC and the authorisation applicants, and will be of assistance to the Tribunal. In the Tribunal's review, CALC proposes to contend for authorisation of the Consumer Code on different conditions from those determined by the ACCC, and from those for which Flexigroup and the authorisation applicants will contend. In particular, CALC proposes to contend that:

- (a) the Tribunal should apply different conditions than those imposed by the ACCC, alternatively that the Tribunal should vary the amended draft Consumer Code as submitted to the ACCC on 25 September 2019, so that signatories to the Code are permitted to offer a deferred payment arrangement only if the provider of those deferred payment arrangements is a credit provider who is licensed under the NCCPA and the deferred payment arrangement is regulated under the NCC; and

- (b) further or alternatively, that the words “and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)” should be deleted from the chapeau to clause 25 of the Consumer Code, in order to ensure that the clause operates unambiguously and effectively to secure the intended public benefit.

39 CALC proposes to adduce evidence concerning the nature and extent of the risk to consumers posed by unregulated BNPL finance in the New Energy Technology sector, including (but not limited to) case studies and other data, based on CALC’s direct involvement in legal assistance, investigations and advocacy in this sector, on behalf of financially vulnerable consumers.

40 CALC submitted that its contribution to the proceeding will be different from those of the ACCC and the authorisation applicants. The ACCC’s role in a review of an authorisation application is primarily to assist the Tribunal and it is not for the ACCC to fill the role of an advocate for the interests of consumers. The authorisation applicants comprise an amalgam of merchant and consumer interests in the New Energy Technology sector. CALC’s focus is consumer credit whereas ECA’s focus is consumer interests in energy markets more broadly.

41 The ACCC supports CALC’s intervention, largely for the reasons advanced by CALC.

42 Flexigroup opposes CALC’s intervention. It submitted that CALC has no greater interest in the proceeding than an officious public bystander and that CALC’s prior involvement in the ACCC’s process does not of itself confer a sufficient interest to warrant a grant of leave to intervene, relying on *Fortescue* at [77]. Flexigroup submitted that CALC has failed to demonstrate some other interest in the proceeding and have the ability to make some distinct contribution as opposed to duplicating the contribution of others.

43 The Tribunal is satisfied that CALC has an interest in the proceeding beyond that of an officious bystander by reason of its work in the area of consumer credit generally and BNPL finance in the New Energy Technology arena more specifically. The Tribunal is also satisfied that, as matters stand at the moment, CALC’s position in the proceeding would differ from other participants. However, as already noted, the Tribunal is mindful that, as the number of parties increases, the risk of duplication increases, as do the overall costs of the proceeding to the parties. The Tribunal is also conscious that consumer interests are already well represented through the authorisation applicants (and specifically the ECA), the ACCC and ASIC. On balance, the Tribunal considers that CALC should be permitted to intervene subject to the same conditions as RateSetter. The permission will be subject to the Tribunal’s power to direct the

nature and extent of CALC's participation in the proceeding, including the power to exclude evidence from the hearing if it does not usefully add to the evidence otherwise before the Tribunal and the power to limit or exclude the right to cross-examine.

### **Conclusion**

44 In conclusion, the Tribunal will permit intervention by ASIC, RateSetter and CALC. No conditions will be attached to ASIC's intervention. In relation to RateSetter and CALC, intervention will be subject to the Tribunal's power to direct the nature and extent of their participation in the proceeding.

45 The Tribunal made directions on 4 February 2020 for the following procedural steps to be taken:

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

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

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

Associate:

Dated: 16 March 2020



**COMMONWEALTH OF AUSTRALIA**  
***Competition and Consumer Act 2010 (Cth)***

**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

File No: ACT 1 of 2019  
Re: Re Application for authorisation  
AA1000439 lodged by Australian Energy  
Council, Clean Energy Council, Smart  
Energy Council and Energy Consumers  
Australia in respect of the New Energy Tech  
Consumer Code  
Applicant: Flexigroup Limited [ACN 122 574 583]

**DIRECTIONS**

TRIBUNAL: Justice O'Bryan (Deputy President)  
DATE OF ORDER: 4 February 2020  
WHERE MADE: Melbourne

**THE TRIBUNAL DIRECTS THAT:**

1. Any document required to be filed by these orders must also be served on:
  - (a) the Applicant
  - (b) the Australian Energy Council, Clean Energy Council, Smart Energy Council and Energy Consumers Australia (together, the Authorisation Applicants)
  - (c) any intervener  
(the Applicant, the Authorisation Applicants, and interveners are together referred to as the parties)
  - (d) the Australian Competition and Consumer Commission (Commission).



### **Third parties and applications to intervene**

2. Any application for leave to intervene in these proceedings, and any material relied on in support of any application, be filed and served on or before Friday, 21 February 2020.
3. Within 5 days of the date of these Orders, the Commission is to give written notice of this application to all persons who made submissions to the Commission in connection with its Authorisation advising them of the terms of Order 2.
4. Any submissions responding to an application to intervene be filed and served (including on the applicant for intervention) on or before Friday, 28 February 2020.
5. The Tribunal will determine on the papers any application made under Order 2, unless any person notifies the Tribunal by 4:00pm on Wednesday, 4 March 2020 that they require a hearing to resolve the application.

### **Information given to Commission**

6. The Commission is to file and serve an index and copies of all non-confidential versions of submissions made to the Commission in connection with the making of its Authorisation Determination on or before Friday 14 February 2020.
7. The matter be listed for any application by a third party for any confidentiality order in respect of submissions, or parts of submissions, made to the Commission and excluded from the public register in connection with the making of its Authorisation Determination at 9am on Tuesday, 25 February 2020.
8. Subject to any further order, the Commission is to file and serve a consolidated index of submissions and copies of all, or parts of submissions, made to the Commission and excluded from the public register in connection with the making of its Authorisation Determination by Tuesday, 3 March 2020.



### **Statement of Facts, Issues and Contention**

9. The Applicant is to file and serve a Statement of Facts, Issues and Contention on or before Friday, 14 February 2020.
10. The Authorisation Applicants are to file and serve a Statement of Facts, Issues and Contention on or before Friday, 6 March 2020.
11. Each intervener is to file and serve a Statement of Facts, Issues and Contention on or before Friday, 13 March 2020.
12. The Commission is to file its Statement of Facts, Issues and Contention on or before Friday, 20 March 2020.

### **Issues list**

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

### **Interested Third Party materials**

14. Interested third parties are to file and serve any submissions and supporting material to which the Tribunal may have regard on or before Friday, 3 April 2020.

### **Further Information**

15. The Commission has leave to provide the Tribunal at any time up to Thursday, 30 April 2020 details of any information the Commission suggests the Tribunal seek from the parties or any other person pursuant to ss 90(6) and 102(1) of the *Competition and Consumer Act 2010* (Cth), such requests to be notified to all parties.



## **Evidence**

16. The Applicant is to file and serve any proposed evidence on or before Tuesday, 7 April 2020.
17. The Authorisation Applicants are to file and serve any proposed evidence on or before Tuesday, 21 April 2020.
18. Each intervener is to file and serve any proposed evidence on or before Tuesday, 21 April 2020.
19. The Commission is to file and serve any proposed evidence on or before Tuesday, 28 April 2020.
20. The Applicant is to file and serve any proposed evidence in reply on or before Tuesday, 5 May 2020.
21. The Authorisation Applicants are to file and serve any proposed evidence in reply on or before Tuesday, 5 May 2020.
22. The Applicant is to serve a draft Hearing Book Index listing all documents proposed to be relied upon at the hearing on or before Friday, 8 May 2020.
23. The Authorisation Applicants and any intervener are to serve a list of proposed amendments to the Hearing Book Index on or before Tuesday, 12 May 2020.
24. The Commission is to serve any proposed amendment to the Hearing Book Index on or before Friday, 15 May 2020.
25. The Applicant must file and serve the Hearing Book (including its contents) on or before Tuesday, 19 May 2020.
26. On or before Friday, 22 May 2020, the parties and the Commission file an agreed document which identifies:
  - (a) any witnesses to be cross-examined; and
  - (b) any objection to evidence, with objections being identified with precision.

### **Submissions and authorities**

27. On or before Wednesday, 13 May 2020, the Applicant is to file and serve an outline of submissions with a list of authorities.
28. On or before Friday, 22 May 2020, the Authorisation Applicants are to file and serve an outline of submissions with a list of authorities.
29. On or before Friday, 22 May 2020, any intervener is to file and serve outlines of submissions with a list of authorities.
30. On or before Thursday, 28 May 2020, the Commission is to file and serve any outline of submissions with any list of authorities.

### **Hearings**

31. The proceeding be listed for a second case management conference at 9am on Thursday, 7 May 2020.
32. The proceeding be listed for a third case management conference at 9am on Tuesday, 26 May 2020.
33. The proceeding be listed for hearing in Melbourne commencing no earlier than Monday, 1 June 2020 with an estimate of no more than 3 hearing days.

### **Other Matters**

34. The parties, the Commission, and any interested person have liberty to apply for further directions.



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

REGISTRAR

Australian Competition Tribunal



**List of 12 Australian solar providers:**

1	Energy Matters
2	Oz Smart Energy
3	Nemco
4	SunBoost
5	Instyle Solar
6	NRG7
7	Solargain
8	Arise Solar
9	Hello Solar
10	More Green Energy
11	Your Choice Solar
12	Fair Value Energy

Additional solar providers in the event that any of the above cease to exist:

13	Solar Naturally
14	Sun Power
15	Alliance Solar
16	Sun Opt

### Draft script

- “Looking to get just a rough quote for solar panels for my house”
- “It is something new that my partner and I are looking into so that we can get an idea of how much it will cost us/ if we can afford it”
- They may then ask: How much do you spend per quarter on electricity?
  - Reply: “About \$540 per quarter”
- They will generally then ask: What is your address?
  - Reply: “I only want a rough quote for now before proceeding further and therefore am not comfortable providing specific address.”
- At this point, they may try to push for a street address so it may be useful to say to them:
  - “I’ve done some research and I want to know about a 5kw inverter and 6.6kW solar panels”
    - Alternatively, you can also add that “your friend” who has a similar house has a unit that is of those specifications
  - Other details that might be good to share here:
    - 1 phase connection
    - Single storey house
    - North facing roof
    - Tiled roof
- They will then give you a quote, usually a wide range; they may also mention that it depends on what you want
  - “What I want depends on how much it costs; maybe something mid-range?”
- When they provide you with a quote, they may mention the solar rebate.
  - If they don’t, ask about whether the price includes the rebate
  - They may run through whether you are eligible for the rebate with you
- Next, ask about how you can pay:
  - “So... that is a lot of money. Do I have to pay upfront? Or is there something like Afterpay for solar panels?” / “Can I pay by instalments?”
  - If they say yes, then find out more details like:
    - Do you guys go through a finance provider? (e.g. Humm, Brighte)
    - Do I need to pay interest?
    - If they say it is interest free, ask whether it costs the same as when you pay upfront (in a subtle way). Generally, if you ask to pay by instalments they may tell you that the price they just quoted you will be different. Then they may ask you about how you want to pay (e.g. fortnightly for 3 years/ in 4 instalments...), \*sound unsure\* then ask whether they can provide you with written quotes for different amounts so that you can “discuss with your partner what we can afford”.

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

**Certificate identifying exhibit**

This is the exhibit marked **UCN-12** now produced and shown to Ursula Claire Noye at the time of affirming her affidavit on 5 May 2020.

Before me:

Signature of person taking affidavit

## Solar Panel Secret Shopping

### Draft script

- “Looking to get just a rough quote for solar panels for my house”
- “It is something new that my partner and I are looking into so that we can get an idea of how much it will cost us/ if we can afford it”
- They may then ask: How much do you spend per quarter on electricity?
  - Reply: “About \$540 per quarter”
- They will generally then ask: What is your address?
  - Reply: “I only want a rough quote for now before proceeding further and therefore am not comfortable providing specific address.”
- At this point, they may try to push for a street address so it may be useful to say to them:
  - “I’ve done some research and I want to know about a 5kw inverter and 6.6kW solar panels”
    - Alternatively, you can also add that “your friend” who has a similar house has a unit that is of those specifications
  - Other details that might be good to share here:
    - 1 phase connection
    - Single storey house
    - North facing roof
    - Tiled roof
- They will then give you a quote, usually a wide range; they may also mention that it depends on what you want
  - “What I want depends on how much it costs; maybe something mid-range?”
- When they provide you with a quote, they may mention the solar rebate.
  - If they don’t, ask about whether the price includes the rebate
  - They may run through whether you are eligible for the rebate with you
- Next, ask about how you can pay:
  - “So... that is a lot of money. Do I have to pay upfront? OR Can I pay by instalments?”
  - If they say yes, then find out more details like:
    - Do you guys go through a finance provider? (e.g. Humm, Brighte)
    - Do I need to pay interest?
    - If they say it is interest free, ask whether it costs the same as when you pay upfront (in a subtle way). Generally, if you ask to pay by instalments they may tell you that the price they just quoted you will be different. Then they may ask you about how you want to pay (e.g. fortnightly for 3 years/ in 4 instalments...), \*sound unsure\* then ask whether they can provide you with written quotes for different amounts so that you can “discuss with your partner what we can afford”.

**Commented [UN1]:** If pushed, provide a street and suburb in the proximity of the business address the caller is using

**Commented [UN2]:** This information ought only be given if pressed and in the context that it was information passed on by a friend or that the caller saw online

**Commented [UN3]:** This information ought only be given if pressed and in the context that it was information passed on by a friend or that the caller saw online

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

**Certificate identifying exhibit**

This is the exhibit marked **UCN-13** now produced and shown to Ursula Claire Noye at the time of affirming her affidavit on 5 May 2020.

Before me:

Signature of person taking affidavit

## Ursula Noye

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**From:** Lara Kuhn  
**Sent:** Thursday, 23 April 2020 10:00 AM  
**To:** Samuel Habteslassie  
**Cc:** Ursula Noye; Rex Punshon  
**Subject:** Re: Check in on secret shopper evidence - Flexigroup (ACT 1 of 2019 [MBC-VIC.FID3408312])

**ActionName:** Rep CALC v Flexigroup  
**Assigned (Actionstep):** 495916  
**Organization (Actionstep):** calc19

Hi Sam,

Thank you for your reply.

We look forward to receiving the more comprehensive document tomorrow.

Also, Flexigroup filed their evidence yesterday which included a statement from the Director of Operations of [SunEnergy](#) (I believe operating in both QLD and SA). If possible, we would really appreciate if your team could make calls and obtain quotes from SunEnergy too?

Ursula and I are happy to discuss this further.

Regards,  
Lara