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 Rex Pascal Punshon
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

COMMONWEALTH OF AUSTRALIA
AUSTRALIA
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 REX PASCAL PUNSHON
RE CALC'S INTERNAL DATA

Affidavit of: Rex Pascal Punshon

Address: Level 6, 179 Queen Street, Melbourne

Occupation: Solicitor

Date: 4 May 2020

Contents

Document	*Description*	*Paragraph*	*Page*
1.	Affidavit of Rex Pascal Punshon re CALC's internal data	1	1
2.	Exhibit **RPP-24** being an extract from CALC's 2018/19 Impact Report	11	17
3.	Exhibit **RPP-25** being CALC's 2019 *Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria* report	18	19
4.	Exhibit **RPP-26** being CALC's 2017 *Knock it Off! Door-to-door sales and consumer harm in Victoria* report	19	90
5.	Exhibit **RPP-27** being the executive summary of CALC's 2016 *Power Transformed: Unlocking effective competition and trust in the transforming energy market* report	19	162

I REX PASCAL PUNSHON of Level 6, 179 Queen Street Melbourne, in the State of Victoria, Solicitor, do solemnly and sincerely affirm that:

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

Filed on behalf of (name & role of party) Consumer Action Law Centre
Prepared by (name of person/lawyer) Ursula Noye
Law firm (if applicable) Consumer Action Law Centre
Tel 03 9670 5088 Fax 03 9629 6898
Email ursula@consumeraction.org.au / rex@consumeraction.org.au
Address for service (include state and postcode) Level 6/179 Queen Street, Melbourne, VIC 3000

2. In March and April 2020, I conducted searches of CALC's internal databases with assistance from Lara Maria Yihui Kuhn, Paralegal at CALC, for the purpose of collating the data set out in this affidavit.

3. 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.

Background to CALC's data

4. CALC's legal practice provides free legal advice and, in some cases, legal representation to Victorian residents ("**consumers**") in relation to consumer, consumer credit, debt-related and insurance law problems.

5. CALC's legal practice also provides legal assistance and professional training to community workers who advocate on behalf of consumers, such as financial counsellors and other community lawyers ("**community workers**").

6. Consumers and community workers may contact CALC's legal practice for assistance through one of its three telephone advice lines (the Legal Help Line, the Koori Help Line and the Worker Line) or online. CALC also undertakes community engagement work as a way of connecting with consumers in disadvantaged communities.

7. Each time a consumer or community worker contacts CALC's legal practice for assistance with a new matter, the lawyer responding to the enquiry creates a new record in CALC's database ("**matter**") and records information about the matter, including the consumer or community worker's personal details, the name of the relevant creditor or trader, the type of consumer product or service to which the matter relates and factual details about the matter (to the extent that this information is available and relevant).

8. Each matter is categorised in CALC's database according to the level of assistance provided by CALC's legal practice:

    a. "no action" matters are matters where no assistance is provided;

    b. "discrete assistance" matters are matters where CALC provides discrete legal and non-legal services to a consumer or community worker. These services typically include one or more of the following:

        i. giving fact-specific legal advice;

ii. undertaking specific legal tasks, such as drafting documents and letters;

iii. providing general information about the law, legal systems and processes; and

iv. providing referrals to other organisations;

c. "ongoing assistance" matters are matters where CALC provides legal assistance to a consumer or community worker on an ongoing basis to assist them to resolve a legal problem, but does not take carriage of the matter in a representative capacity;

d. "representation" matters are matters where CALC takes carriage of the matter in a representative capacity. This may include:

i. negotiating with the creditor or trader;

ii. pursuing internal and external dispute resolution processes; and

iii. undertaking litigation on behalf of the consumer.

9. CALC considers a variety of factors in deciding which matters to take on as representation matters, including whether:

a. the consumer is disadvantaged or vulnerable (for example, because of their age, income or disabilities);

b. the matter falls within CALC's areas of practice;

c. there is legal merit;

d. it is likely that assistance could not be obtained elsewhere; and

e. CALC has the requisite resources available to assist.

10. According to CALC's 2018/19 Impact Report, CALC's legal practice opened 133 representation matters in the 2018/19 financial year. The 2018/19 Impact Report also notes that in the 2018/19 financial year:

a. "irresponsible lending or maladministration" was the fifth most common issue addressed by CALC's legal advice service; and

b. in relation to the issues addressed by CALC's financial counselling service:

i. “credit card debt” was the most common issue;

ii. “utility debt” was the second most common issue;

iii. “personal loans” was the fourth most common issue; and

iv. “household debts” was the fifth most common issue.

11. Exhibit **RPP-24** is an extract from CALC’s 2018/19 Impact Report.

12. In July 2019, CALC adopted a new software platform to record its internal data. This brought about some changes in the way that CALC’s legal practice collects and records data, as set out in this affidavit, though discrete assistance, ongoing assistance and representation matters continue to be categorised as set out above.

Matters involving solar panels and other new energy products

13. In April 2020, Ms Kuhn and I conducted searches of CALC’s internal databases to determine how many discrete matters CALC’s legal practice had opened between 1 January 2016 and 14 April 2020 involving problems with solar panels and other new energy products.

14. This process involved:

a. searching for all matters opened between 1 January 2016 and 30 June 2019 where the consumer product or service had been identified as “solar panels”;

b. searching for all matters opened between 1 July 2019 and 14 April 2020 where the consumer product or service had been identified as “energy – new”;

c. compiling a single list of all these matters;

d. adding to the list other matters involving solar panels or other new energy products, where this had not been identified at the time the matter was opened (these matters were identified in carrying out the process described at paragraph 32 of this affidavit);

e. reviewing the list to identify and delete any duplicate matters (including any instances where substantially the same problem was separately raised by both a community worker and a consumer directly).

15. Based on my review of CALC’s data and information provided to me by Ms Kuhn, I believe that:

a. between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in 192 discrete matters involving problems with solar panels or other new energy products;

b. of these 192 matters, by reference to the action taken:

i. 3 were "no action" matters;

ii. 153 were "discrete assistance" or "ongoing assistance" matters; and

iii. 36 became "representation" matters (some of which remained open as at 14 April 2020).

16. In my experience, due to the volume of enquiries received by CALC's legal practice and constraints on CALC's resources, lawyers responding to new enquiries sometimes do not record the type of consumer product or service to which the matter relates, including where there is more than one product or service. As a result, I believe the number of matters referred to in paragraph 15 likely understates the actual number of requests for assistance received by CALC's legal practice between 1 January 2016 and 14 April 2020 involving problems with solar panels or other new energy products.

17. In response to the significant number of enquiries received by CALC's legal practice involving solar panels and other new energy products in recent years, CALC has campaigned for improved regulation in this area. As part of this campaign, CALC has published three reports:

a. The 2019 *Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria* report ("**the Sunny Side Up Report**"). Part 5.3 of the Sunny Side Up Report sets out CALC's concerns about "unregulated credit providers funding solar panel purchases", while part 5.4 comments on the prevalence of "misleading and high-pressure unsolicited sales" in the solar panel industry. Case studies 1 and 3 both illustrate consumer harm resulting from an unsolicited door-to-door sale of solar panels, in circumstances where the consumer obtained a loan from an unregulated credit provider. (Case study 1 is separately the subject of an affidavit to be filed in the present proceeding.)

b. The 2017 *Knock it Off! Door-to-door sales and consumer harm in Victoria* report ("**the Knock it Off! Report**"). The Knock it Off! Report describes the solar panel industry as "Consumer Harm Hotzone #1" in terms of issues arising from unsolicited sales. 10 of the 19 case studies included in the Knock it Off! Report illustrate consumer harm

resulting from an unsolicited sale of solar panels (case studies 1, 6, 7, 8, 9, 13, 14, 15, 18, 19), eight of which were door-to-door sales.

c. The 2016 *Power Transformed: Unlocking effective competition and trust in the transforming energy market* report ("**the Power Transformed Report**"). The Power Transformed Report states (at p. 6) that CALC is "already witnessing a rise in complaints about solar sales and installations".

18. Exhibit **RPP-25** is a copy of the Sunny Side Up Report.

19. Exhibit **RPP-26** is a copy of the Knock it Off! Report.

20. Exhibit **RPP-27** is a copy of the executive summary of the Power Transformed Report.

Matters involving BNPL providers

21. In April 2020, Ms Kuhn and I conducted searches of CALC's internal databases to determine how many discrete matters CALC's legal practice had opened between 1 January 2016 and 14 April 2020 involving problems with buy-now-pay-later credit providers ("**BNPL providers**").

22. The search was confined to the six BNPL providers that were examined in ASIC's *Report 600: Review of buy now pay later arrangements*:[1]

a. Afterpay Pty Ltd ("**Afterpay**");

b. zipMoney Payments Pty Ltd ("**zipPay**");

c. Certegy Ezi-Pay Pty Ltd, which is a subsidiary of the Applicant in this proceeding (formerly trading as "**Certegy**" until 2019, now trading as "**Humm**");

d. Oxipay Pty Ltd ("**Oxipay**"), which was consolidated with Certegy in April 2019 to form Humm;[2]

e. Brighte Capital Pty Ltd ("**Brighte**");

f. Openpay Pty Ltd ("**Openpay**").

---

1 ASIC, November 2018. *Report 600: Review of buy now pay later arrangements*.
2 Flexigroup Ltd, Annual Report 2019, p. 16.

23. This process involved:

a. searching for all matters opened between 1 January 2016 and 14 April 2020 where the creditor or trader had been identified as:

i. “Afterpay” or “After pay”;

ii. “Zippay”, “Zip pay”, “Zipmoney” or “Zip money”;

iii. “Certegy”;

iv. “Humm”;

v. “Oxipay”;

vi. “Brighte”;

vii. “Openpay” or “Open pay”;

b. compiling a single list of all these matters;

c. reviewing the list to identify and delete any duplicate matters (including any instances where substantially the same problem was separately raised by both a community worker and a consumer directly).

24. Based on my review of CALC’s data and information provided to me by Ms Kuhn, I believe that:

a. between 1 January 2016 and 14 April 2020, CALC’s legal practice received requests for assistance in 146 discrete matters involving problems with one or more of the abovementioned BNPL providers;

b. of these 146 matters, by reference to the provider in question:

i. 21 related to Afterpay;

ii. 16 related to zipPay;

iii. 97 related to Certegy;

iv. 6 related to Humm;

v. 1 related to Oxipay;

vi. 5 related to Brighte;

vii. 5 related to Openpay.

c. of the 146 matters, by reference to the action taken:

i. 2 were “no action” matters;

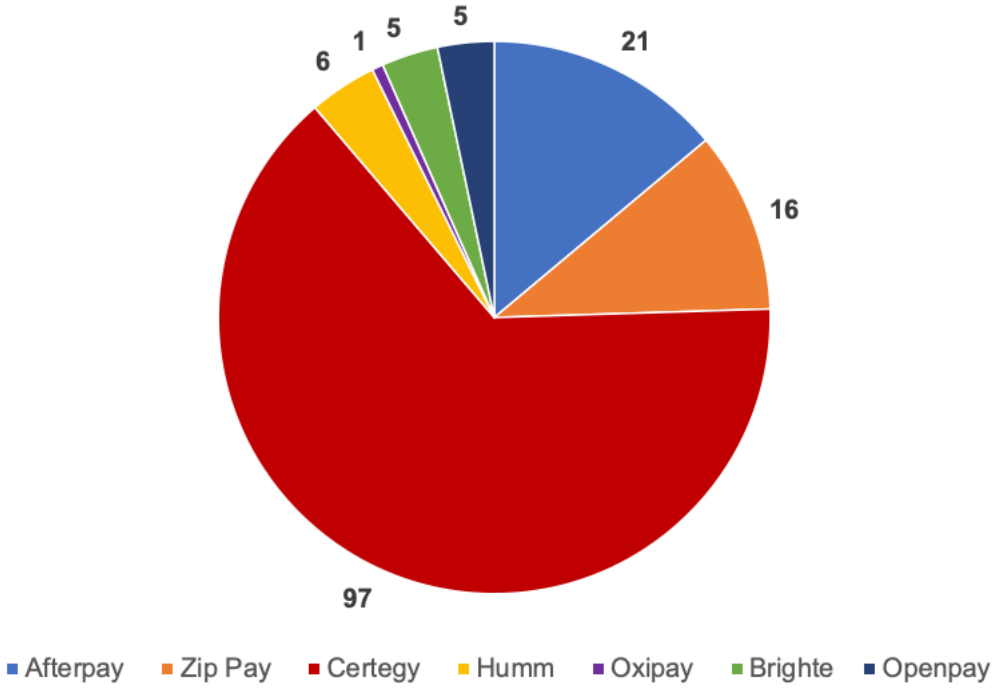
ii. 109 were “discrete assistance” or “ongoing assistance” matters; and

iii. 35 became “representation” matters (some of which remained open as at 14 April 2020).

25. The numbers mentioned in sub-paragraphs 24.b.i - 24.b.vii add up to 151, rather than 146, because there were some matters involving more than one BNPL provider.

26. The pie chart below is an illustration of the data described in sub-paragraphs 24.a and 24.b:

Number of discrete matters opened by CALC’s legal practice between 1 January 2016 and 14 April 2020 involving problems with BNPL providers, broken down by BNPL provider



27. In order to better contextualise this data, I directed Ms Kuhn to identify, if possible, the period for which each of the BNPL providers had been in operation in Australia, and any reported

information regarding their respective numbers of active customers and merchants. I then reviewed the information obtained by Ms Kuhn and conducted some further searches myself.

28. The information obtained by Ms Kuhn and me is set out in the tables below (sources footnoted). Where a table records the value 'N/A', Ms Kuhn informs me that she was not able to identify the information in question and nor was I.

29. I note that most of the information has been drawn from reports relating to the parent companies of the BNPL providers referred to in 22 (with the exception of Brighte). For that reason, where the tables and graphs in sub-paragraphs 29.f – 29.h refer to:

a. "Afterpay", it is a reference Afterpay Touch Group Ltd (the parent company of Afterpay Pty Ltd);

b. "Zip", it is a reference to Zip Co Limited (the parent company of zipMoney Payments Pty Ltd);

c. "Flexigroup", it is a reference to Flexigroup Limited (the parent company of Certegy Ezi-Pay Pty Ltd); and

d. "Openpay", it is a reference to Openpay Group Ltd (the parent company of Openpay Pty Ltd).

e. **Period of operation**

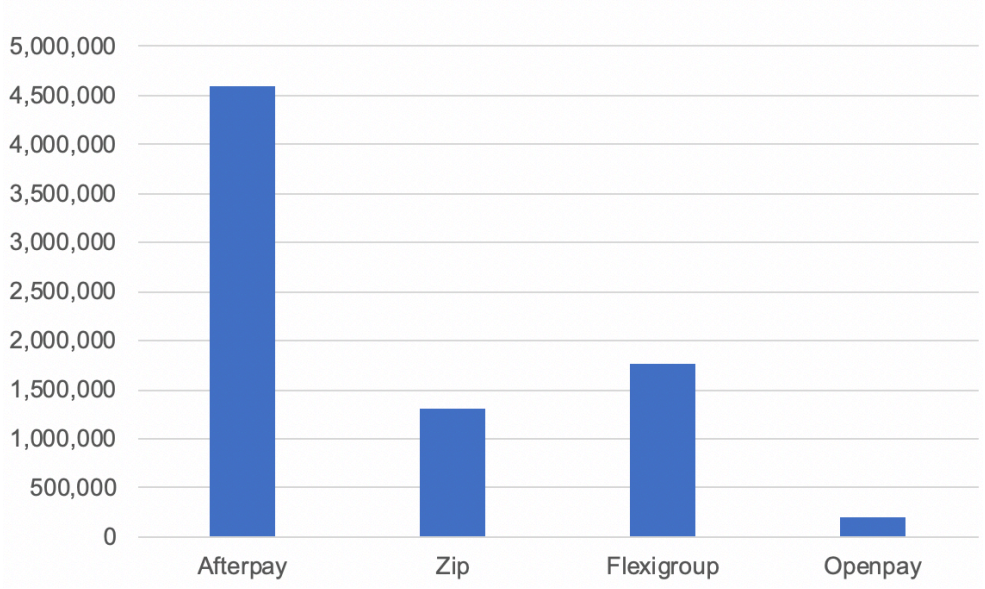
Provider	Year founded	Years of operation
Certegy	1989[3]	30 (up until 2019)
Openpay	2013[4]	7
zipPay	2013[5]	7
Afterpay	2014[6]	6
Brighte	2015[7]	5
Humm	2019[8]	1
Oxipay	N/A	N/A

3 Bloomberg company profile for Certegy Ezi-Pay Pty Ltd: https://www.bloomberg.com/profile/company/0990776D:AU (accessed 2 May 2019).
4 Openpay Group Ltd, Prospectus (November 2019), p. 9.
5 Zip Co Ltd, Annual Report 2019, p. 24.
6 Afterpay Touch Group Ltd, Annual Report 2019, p. 5.
7 Brighte website, 'About Us': https://brighte.com.au/company/ (accessed 2 May 2020).
8 Flexigroup Ltd, Annual Report 2019, p. 1.

f. **Reported active customer base / no of active merchants**

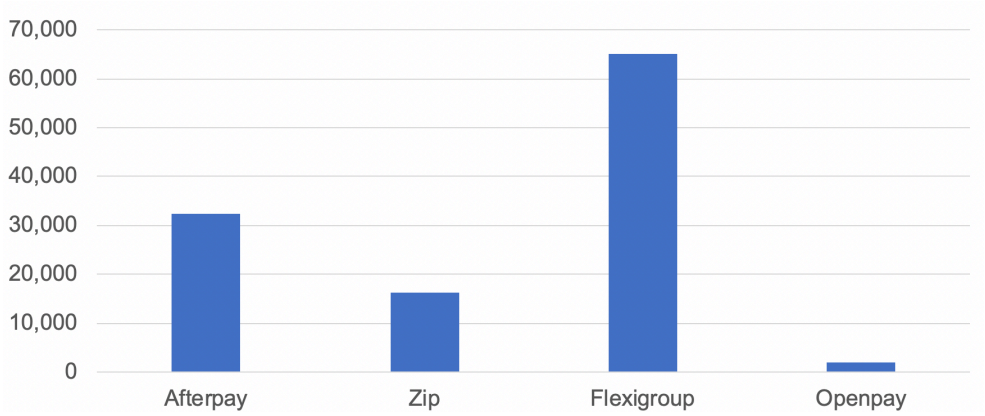
Provider	Active Customer Base (2019)	Active Merchants (2019)
Afterpay	4,600,000[9]	32,300[10]
Zip	1,300,000[11]	16,200[12]
Flexigroup	1,760,000[13]	65,000[14]
Openpay	206,434[15]	1,894[16]
Oxipay	N/A	N/A
Brighte	N/A	N/A

g. **Bar graph of active customer base (reported)**



9 Afterpay Touch Group Ltd, Annual Report 2019, p. 2.
10 Afterpay Touch Group Ltd, Annual Report 2019, p. 2.
11 Zip Co Ltd, Annual Report 2019, p. 18.
12 Zip Co Ltd, Annual Report 2019, p. 18.
13 Flexigroup Ltd, Annual Report 2019, p. 12.
14 Flexigroup Ltd, Annual Report 2019, p. 12.
15 Openpay Group Ltd, Half Year Report (ended 31 Dec 2019), p. 4.
16 Openpay Group Ltd, Half Year Report (ended 31 Dec 2019), p. 5.

h. **Bar graph of active merchants (reported)**



Matters involving solar panels and other new energy products financed by a BNPL provider

30. There is a substantial overlap in the matters mentioned at paragraphs 15 (matters involving problems with solar panels or other new energy products) and 24 (matters involving problems with BNPL providers) of this affidavit. This is because, in CALC's experience, it is common for consumers to purchase solar panels or other new energy products through a loan provided by a BNPL provider.

31. In April 2020, Ms Kuhn and I searched CALC's internal databases to determine how many discrete matters CALC's legal practice had opened between 1 January 2016 and 14 April 2020 involving both solar panels or other new energy products and a BNPL provider.

32. This process involved:

    a. searching for all matters opened between 1 January 2016 and 30 June 2019 where the consumer product or service had been identified as "solar panels";

    b. searching for all matters opened between 1 July 2019 and 14 April 2020 where the consumer product or service had been identified as "energy – new";

    c. reviewing each of the matters referred to in sub-paragraphs 32.a and 32.b to determine whether the consumer or community worker indicated that the solar panels or new energy product had been supplied through a loan provided by a BNPL provider, and deleting those matters where no such indication was given;

    d. searching for all matters opened between 1 January 2016 and 14 April 2020 where the creditor or trader had been identified as "Certegy", "Humm" or "Brighte" (CALC is

unaware of any other BNPL providers providing loans in relation to new energy products);

e. reviewing each of the matters referred to in sub-paragraph 32.d to determine whether the consumer or community worker indicated that the loan provided by the BNPL provider had been used to purchase solar panels or other new energy products, and deleting those matters where no such indication was given;

f. compiling a single list of all these matters;

g. reviewing the list to identify and delete any duplicate matters (including any instances where substantially the same problem was separately raised by both a community worker and a consumer directly).

33. Based on my review of CALC's data and information provided to me by Ms Kuhn, I believe that:

a. between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in 60 discrete matters where consumers were experiencing problems arising from the supply of solar panels or other new energy products through a loan provided by a BNPL provider;

b. of these 60 matters, by reference to the BNPL provider in question:

i. 56 related to Certegy or Humm (54 of the former and 2 of the latter);

ii. 4 related to Brighte;

c. of the 60 matters, by reference to the action taken:

i. 0 were closed as "no action" matters;

ii. 35 were "discrete assistance" or "ongoing assistance" matters; and

iii. 25 became "representation" matters (some of which remained open as at 14 April 2020);

d. in 44 of these 60 matters, the consumer or community worker indicated that the solar panels or new energy product had been supplied to the consumer as the result of an unsolicited sale; and

e. in 35 of these 60 matters, the consumer or community worker indicated that:

i. the loan provided by the BNPL provider was unaffordable for the consumer; and / or

ii. the consumer had experienced, or was experiencing, financial hardship in attempting to make repayments to the BNPL provider.

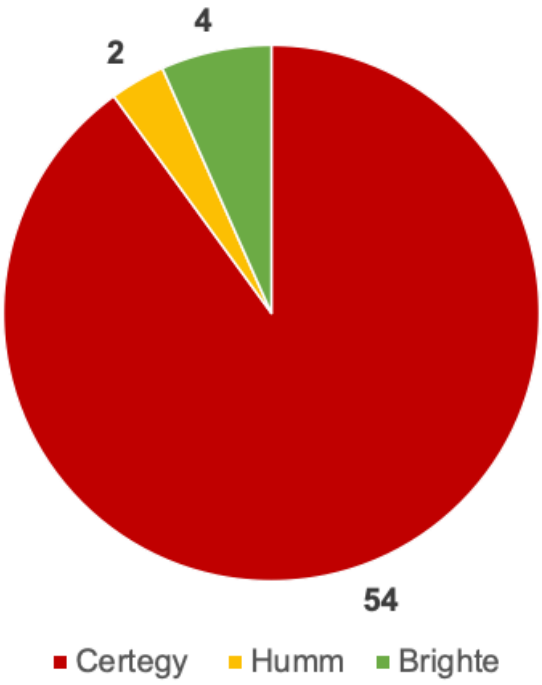
34. When I use the term "unsolicited sale" in sub-paragraph 33.d, I mean a sale in circumstances where the supplier of the product initiated the contact with the consumer. CALC's records indicate that of the 44 matters involving unsolicited sales referred to in sub-paragraph 33.d:

a. in 37 matters, the supplier initiated the contact with the consumer by attending the consumer's premises uninvited (commonly known as a "door-to-door" sale); and

b. in 7 matters, the supplier initiated the contact with the consumer by telephoning the consumer uninvited (commonly known as "cold-calling") and then arranging a visit to the consumer's premises.

35. The pie chart below is an illustration of the data described in sub-paragraphs 33.a and 33.b:

Number of discrete matters opened by CALC's legal practice between 1 January 2016 and 14 April 2020 involving BNPL loans for new energy products, broken down by BNPL provider



Other searches for comparison purposes

36. In April 2020, Ms Kuhn and I searched and reviewed CALC's internal databases from 1 January 2016 to 14 April 2020 to compare:

    a. the number of discrete matters CALC's legal practice had opened involving Certegy Ezi-Pay Pty Ltd trading as Certegy or Humm; with

    b. the number of matters CALC's legal practice had opened involving the four largest credit providers in Australia – the Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group and the National Australia Bank ("**the big four banks**"); and

    c. the number of discrete matters CALC's legal practice had opened involving RateSetter Australia RE Ltd ("**RateSetter**"), an intervener in this proceeding which, according to its Amended Application for Leave to Intervene, is "Australia's largest provider of regulated consumer credit for the purpose of funding solar and other renewable energy products" (at [2]).

37. This process involved searching for all matters opened between 1 January 2016 and 14 April 2020 where the creditor or trader had been identified as:

    a. "Commonwealth Bank" or "CBA";

    b. "Westpac";

    c. "Australia and New Zealand Banking Group" or "ANZ";

    d. "National Australia Bank" or "NAB";

    e. "Ratesetter" or "Rate setter".

38. As stated at sub-paragraphs 24.b.iii, 24.b.iv, 33.b.i and 33.b.i, I believe that between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in:

    a. 97 discrete matters relating to Certegy Ezi-Pay Pty Ltd trading as Certegy, of which 54 involved loans provided for solar panels or other new energy products; and

    b. 6 discrete matters relating to Certegy Ezi-Pay Pty Ltd trading as Humm, of which 2 involved loans provided for solar panels or other new energy products.

39. By comparison, based on my review of CALC's data and information provided to me by Ms Kuhn, I believe between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in:

    a. approximately 821 matters involving one of the big four banks;

    b. approximately 559 matters involving another one of the big four banks;

    c. approximately 432 matters involving another one of the big four banks;

    d. approximately 402 matters involving another one of the big four banks; and

    e. 4 discrete matters involving RateSetter.

40. In relation to matters involving the big four banks, Ms Kuhn and I did not follow the same process described elsewhere in this affidavit (at sub-paragraphs 14.e, 23.c and 32.g) of reviewing the matters to identify duplicates. This is because of the large number of matters identified and limitations on our capacity to review each matter individually. As a result, the number of matters we identified involving each of the big four banks is only an approximate. Based on my experience that duplicate matters are not uncommon (ie in cases where a consumer contacts CALC about a problem on two separate occasions, and that is not initially identified; or where CALC is contacted separately by a consumer and also a community worker on the consumer's behalf), I believe that the numbers are likely to be marginally overstated.

Complaints to regulators

41. In April 2020, Ms Kuhn conducted searches of CALC's internal databases for matters opened between 1 January 2016 and 14 April 2020 to determine how many times CALC's legal practice had submitted formal complaint letters to government regulators – namely ASIC, the ACCC and Consumer Affairs Victoria ("**CAV**") – in relation to consumer harm caused by the supply of solar panels or other new energy products with a BNPL loan ("**regulator complaints**"). Such complaints are generally only made for representation matters.

42. This process involved:

    a. reviewing each of the 25 representation matters referred to in sub-paragraph 33.c.iii to see whether a regulator complaint had been submitted to one of the abovementioned government regulators in connection with the matter; and

b. locating copies of the regulator complaints.

43. Based on my review of CALC's data and information provided to me by Ms Kuhn, I believe that between 1 January 2016 and 14 April 2020:

a. CALC's legal practice submitted 27 regulator complaints in relation to consumer harm caused by the supply of solar panels or other new energy products with a BNPL loan, of which:

i. 7 regulator complaints were submitted to the ACCC;

ii. 12 regulator complaints were submitted to ASIC; and

iii. 8 regulator complaints were submitted to CAV; and

b. these 27 regulator complaints related to 16 discrete matters.

44. More than one regulator complaint may be made in a discrete matter, as matters involving the supply of solar panels or other new energy products through a loan provided by a BNPL provider raise issues falling under the jurisdiction of more than one regulator. As at 14 April 2020, there is no single regulator with jurisdiction to regulate all elements of these transactions – that is, both the supply of solar panels or other new energy products by a supplier and the provision of credit by a BNPL provider.

45. In addition to those referred to in paragraph 43, CALC's internal databases indicate that five further regulator complaints were submitted between 1 January 2016 and 14 April 2020 (two to ASIC and three to CAV). However, final copies of these five regulator complaints could not be located at the time of preparing this affidavit.

AFFIRMED by the deponent
at Brunswick on 4 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 **RPP-24** now produced and shown to Rex Pascal Punshon at the time of affirming his affidavit on 4 May 2020.

Before me:

Signature of person taking affidavit

Assisting & EMPOWERING PEOPLE

Victorians can seek free, independent and confidential advice from Consumer Action's specialist lawyers and dedicated financial counsellors. Our teams provide a vital service to the community, working tirelessly to inform Victorians about their rights and give them the tools they need to obtain a fair outcome with consumer, credit and debt issues.

This year our Legal team provided **4,510 legal support services to consumers** including advice, legal research, document drafting, referrals, progressing matters through dispute resolution services and leading matters through courts and tribunals. People most commonly sought legal advice for **breaches of consumer guarantees** and **breaches or non-performance of contracts** this year.

3,132 referrals were made onto other services where a caller could benefit from additional support from another service.

Our lawyers also took on **133 representation cases**. Their cases are usually complex in nature and require not only advocacy for the clients themselves, but additional effort to achieve systemic outcomes such as through formal complaints to regulatory bodies. We were on record in **19 court and tribunal proceedings** and made complaints to **24 external dispute resolution forums** on our clients' behalf.

Through this work, we were able to achieve over **$3.4 million of savings for our clients**.

Our Financial Counselling team handles roughly **80% of all calls made by Victorians to the National Debt Helpline**. This service is always in very high demand: this year alone, we assisted **11,596 people** with a wide range of issues such as **credit card and utility debts** and **housing arrears**.

Telephone financial counselling advice improves the outlook for people experiencing debt issues. **84% of clients surveyed said they felt confident, better informed, supported, relieved, less anxious, hopeful and optimistic** after speaking to our financial counsellors.

Top 5 consumer issues addressed by our legal advice and financial counselling services

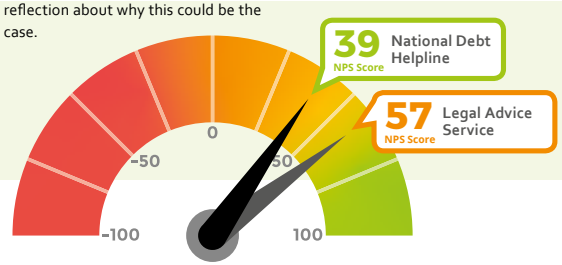
Breaches of consumer guarantees	Breaches / non-performance of contracts	Misleading or deceptive conduct	Used motor vehicles	Irresponsible lending or maladministration
1	2	3	4	5
Credit card debt	Utility debt	Housing arrears	Personal loans	Household debts

How did we do?

Consumer Action uses client feedback to help us analyse the impact of our services.

The results of client surveys encourage us to more closely examine which specific aspects of our services can be enhanced. For example, this year we noticed that while the result for our financial counselling advice service was quite high, it was slightly lower than the other two consumer services we provide. This prompted deeper reflection about why this could be the case.

We learned that the comparatively short amount of time each client has over the phone with our financial counsellors can impact the overall outcome. While our control over the length of these calls is relatively limited, the team can focus on further empowering our clients to achieve better outcomes. This includes making sure clients feel comfortable enough with the options provided to self-advocate and providing referrals to other supports where the client would benefit from additional support.



Greater Outcomes

People experiencing consumer legal issues often have a range of debt issues, and vice-versa. It is for this reason that we have worked this year to enhance our approach to offering integrated financial counselling and legal assistance. While our lawyers have long worked closely with community-based financial counsellors, we now additionally provide financial counselling casework for a limited number of clients where there is also ongoing legal representation.

This approach helps us achieve greater outcomes for the people we assist with significant or complex cases. This year, we obtained **total debt waivers or a significant reduction in debts**, with **over $187,000 worth of waivers, refunds and compensation** awarded.

An integrated approach also helps us identify and highlight where changes to laws or regulations are necessary to prevent further harm to Australian families.

One such case was that of Henry, a man in his early 50s who contacted the National Debt Helpline after dealing with a well-known debt management firm. He needed help juggling over $60,000 in personal loan and credit card debt accrued over seven years when he turned to this firm.

Henry told us that the debt management firm offered him a Part IX debt agreement and that he was not advised of any other options available to him such as speaking with a free financial counselling service. He also said that he was unable to read the full agreement before signing it via a tablet device, he was not advised of his right to a cooling off period until after it had ended and that he was not told all the fees he would need to pay the firm.

In addition to concerns about the debt management firm's methods, we suspected that Henry's creditors had irresponsibly extended finance to him in the first place. The financial counsellor managing his case worked with one of our lawyers to obtain copies of documents from his creditors, and they soon discovered that all of them had not adequately verified his financial situation.

We were able to have creditors waive interest and fees on his accounts and refund amounts that had already been paid. Henry's total debts were subsequently cut in half. He is now paying them off through an affordable payment plan that will see him debt-free in three years.

We also had the debt management firm's fees successfully waived and the agreement ended.

This case helped us demonstrate the need for these 'debt vultures' to be more closely regulated. We supported our client as he spoke about his experience during the *Senate Inquiry into credit and financial services targeted at Australians at risk of financial hardship* hearings in November and December 2018 and subsequent media interviews.

IN THE AUSTRALIAN COMPETITION TRIBUNAL

APPLICATION BY FLEXIGROUP LIMITED

ACT 1 OF 2019

Certificate identifying exhibit

This is the exhibit marked **RPP-25** now produced and shown to Rex Pascal Punshon at the time of affirming his affidavit on 4 May 2020.

Before me:

Signature of person taking affidavit

April 2019

SUNNY SIDE UP:

Strengthening the Consumer Protection Regime for Solar Panels in Victoria

consumer action law centre

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 or 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.

DISCLAIMER: This project was funded by Energy Consumers Australia (www.energyconsumersaustralia.com.au) as part of its grants process for consumer advocacy and research projects for the benefit of consumers of electricity and natural gas. The views expressed in this document do not necessarily reflect the views of Energy Consumers Australia

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.

CONTENTS

01 EXECUTIVE SUMMARY **4**

02 INTRODUCTION The Growth of Solar and New Energy Products **6**

03 ISSUES OVERVIEW **12**

04 THE CURRENT CONSUMER PROTECTION LANDSCAPE **14**

4.1. Overview 14

4.2 *Competition and Consumer Act 2010* (Cth) (**CCA**) and the Australian Consumer Law (**ACL**) 16

4.3 The *Australian Securities and Investments Commission Act 2001* (Cth) 21

4.4 The *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (NCC) 22

4.5 Other – Contract law, voluntary warranties and corporations law 24

4.6 Self-Regulation: The Clean Energy Council (**CEC**), the Smart Energy Council (**SEC**) and their codes of conduct 25

05 ISSUES DISCUSSED **28**

5.1 Overview 28

5.2 Failure to install and/or connect to the grid properly 28

5.3 Unregulated finance arrangements 35

5.4 Misleading and high-pressure unsolicited sales 40

5.5 Product faults and poor performance 46

5.6 Lack of affordable dispute resolution 53

5.7 Business closures 57

5.8 Solar power purchase agreements 62

06 REGULATORY OPTIONS Regulatory instruments and regulator responsibility **66**

07 CONCLUSION **68**

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.**

02 INTRODUCTION
The Growth of Solar and New Energy Products

The growth of solar and new energy products in recent years has been significant, yet the regulatory system has failed to keep up with the pace of change.

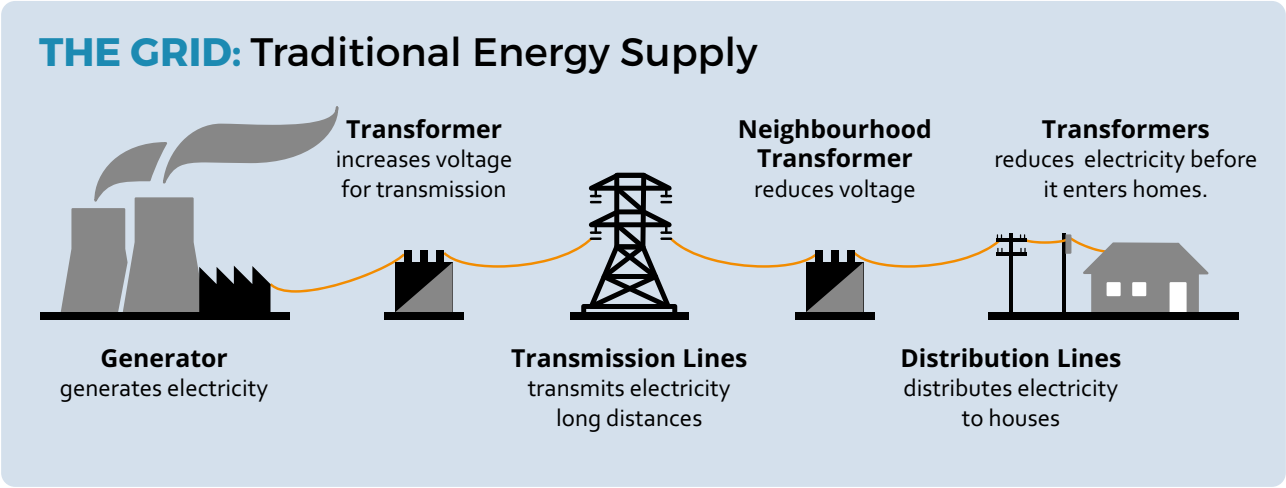
The regulatory gaps created by this discrepancy is contributing to an environment where households and individuals are easily taken advantage of, without an adequate system of redress. The promise and potential benefits of greener energy products and government incentives are thereby undermined along with the trust that people have in the industry.

To put the issues in context it is useful to understand some basic features of the traditional energy market. The traditional energy market is characterised by large power plants used to generate electricity using coal, hydro or gas.[1] Electricity is then fed into a centralised grid from where it is distributed to households. The supply chain is made up of the energy generators, the distributors (who own the wires and poles through which the electricity travels) and the retailer who then sells the energy onto households and businesses. The electricity goes via a wholesale 'spot market' from which energy retailers buy the electricity.

There are five electricity distributors in Victoria, each responsible for a separate region. They are: CitiPower, Jemena, Powercor Australia, AusNet Services, and United Energy Distribution. There are currently over 30 electricity retailers in Victoria[2], including companies like AGL, Red Energy and Energy Australia. While there are several entities involved in the traditional electricity supply chain, an important feature is that electricity travels in a one-way direction from a generator to consumer. This supply chain is illustrated on the next page.

1 Arena Wire, *What are distributed energy resources and how do they work?* (15 March 2018) Arena Wire <https://arena.gov.au/blog/distributed-energy-resources/>.

2 This is figure is based on the number of listed EWOV electricity retail participants: Energy & Water Ombudsman, Electricity companies, *Energy & Water Ombudsman* <https://www.ewov.com.au/companies/electricity-companies>.



This is increasingly not the case. Improvements in technology and a movement towards renewables has led to the development of new energy sources and a diversification of energy distribution. Energy is now being generated from a larger range of sources and being distributed in a two-way flow.

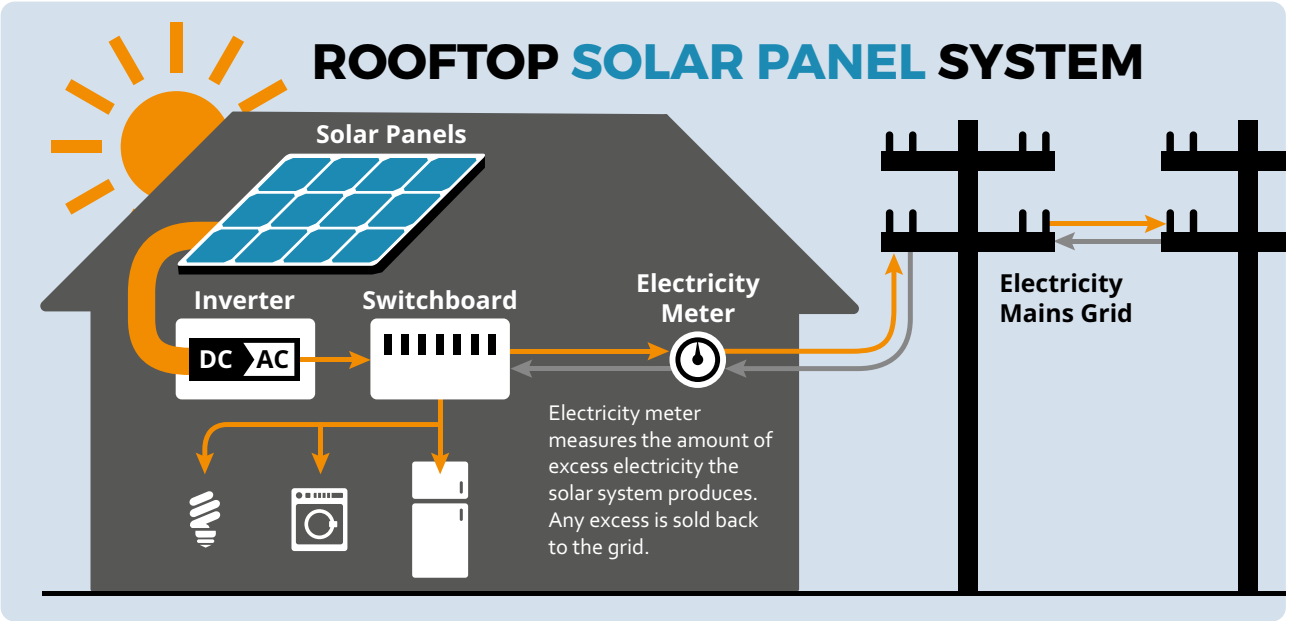
Households are now not only generating their own electricity through products such as rooftop solar panels but are contributing to the energy available in the grid. They do this by selling any excess electricity generated by their rooftop solar panels back to their retailer at a rate knows as a 'feed-in tariff.'[3] The feed-in tariff is offset against an individual's electricity bill. This is why rooftop solar panels and other new energy technologies together form a bundle of products and services known collectively as 'small generation units,' 'distributed energy resources' or DER products.

These products are also sometimes referred to as 'behind the meter' products. Although currently less common, they include batteries and energy storage; electric vehicles; and home energy management systems. The term 'behind the meter' or 'BTM' is used for these types of products because the distributors (who own the poles and wires that make up the distribution system or 'the grid') no longer have any control over the electricity once it hits a household's meter. A household's meter also marks the spot where the traditional energy supply ends as well as where traditional energy regulation seems to ends. This report will refer to this broad collection of products and services as 'new energy products.'

Grid connected solar power systems are made up of several component parts. The sun shines on the solar panels, usually attached to a person's roof, creating electricity. The electricity is fed into an inverter that converts the electricity into a form that can be used by the household. If set up properly and with the appropriate permissions, excess electricity is exported, to the grid via the household's electricity meter.

This report will use the words 'solar panels', 'solar system' and 'rooftop solar' to refer to the entire system unless otherwise specified. This report also uses the phrase 'solar panel retailer' or 'solar retailer' to refer to the entity or business that sells the entire solar system to a consumer. The solar panel retailer and the solar panel installer (the person or business that installs the system onto households) may be the same or may be different entities. However, where they are different entities, it is generally the case that the solar retailer sub-contracts the installation work to the installer and that the consumer does not have a separate and independent relationship with the installer.

3 The feed-in tariffs vary between states and between retailers. In some states, the government regulates a minimum rate. In Victoria, minimum feed-in tariff rates are set annually by the Essential Services Commission (ESC). The rates set by the ESC for the 2018-2019 year were either a single-rate minimum feed-in tariff of 9.9 cents per kilowatt hour (c/kWh) or a time-varying feed-in tariff. All electricity retailers with more than 5,000 customers must offer at least one of these tariffs to their customers: Department of Land, Water and Planning, Victoria State Government, *Victorian feed-in tariff* (30 July 2018) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff>.



It's no secret that the rooftop solar industry is big business in Australia and it continues to grow.[4] In fact, Australians are the most enthusiastic adopters of solar in the world, per capita.[5] By the end of 2017, around 1.8 million Australian households had installed rooftop solar systems.[6] This represented a significant increase from the 14,000 panels reported to have been installed in Australia around 10 years earlier.[7] While this only accounted for 3.4% of Australia's power generation that year,[8] it has been estimated that this might rise to as much as 45% within two decades.[9] Therefore, it is likely that our energy market will continue to tilt away from traditional, centralised generation and towards decentralised energy distribution.

Probable driving factors behind the growing popularity of rooftop solar are the increasing concerns over energy prices, environmental considerations and the financial incentives created by governments. At the federal level, the Commonwealth Government's Small-scale Renewable Energy Scheme aims to reduce emissions and support the achievement of the Government's Renewable Energy Target[10] by creating financial incentives in the form of renewable energy certificates that are created by the installation of small solar systems and sold to corporations that need them to meet their targets. In effect, this creates a discount for purchasers of rooftop solar systems.

An additional scheme exists in Victoria. In August 2018, the Victorian Government announced a $1.24 billion program to subsidise solar panel installations for up to 650,000 households over ten years through their 'Solar Homes Program.'[11] One month after the initiative was announced, the Government had received 11,000 applicants from Victorian homeowners.[12] By 18 January 2019, 7,000 Victorian households had installed solar panels under the package.[13]

4 Naaman Zhou, 'Australia's solar power boom could almost double capacity in a year, analysts say', *The Guardian* (online), 12 February 2018 <https://www.theguardian.com/australia-news/2018/feb/11/australias-solar-power-boom-could-almost-double-capacity-in-a-year-analysts-say>.

5 Ivor Frischknecht, Arena, *Editorial: The Distributed Energy Revolution* (31 July 2018) Arena Wire <https://arena.gov.au/blog/ivor-frischknecht-the-distributed-energy-revolution/>.

6 Australian Energy Council, *Solar Report: January 2018* (January 2018), 3 <https://www.energycouncil.com.au/media/11188/australian-energy-council-solar-report_-january-2018.pdf>.

7 Ivor Frischknecht, Arena, *Editorial: The Distributed Energy Revolution* (31 July 2018) Arena Wire <https://arena.gov.au/blog/ivor-frischknecht-the-distributed-energy-revolution/>

8 Clean Energy Council, *Solar* <https://www.cleanenergycouncil.org.au/resources/technologies/solar-energy>.

9 Ivor Frischknecht, Arena, *Editorial: The Distributed Energy Revolution* (31 July 2018) Arena Wire <https://arena.gov.au/blog/ivor-frischknecht-the-distributed-energy-revolution/>.

10 Clean Energy Regulator, Australian Government, *About the Renewable Energy Target* (31 May 2018) Renewable Energy Target <http://www.cleanenergyregulator.gov.au/RET/About-the-Renewable-Energy-Target>.

11 Minister for Energy, Environment and Climate Change, *Cutting Power Bills with Solar Panels for 650,000 Homes* (19 August 2018) <https://www.premier.vic.gov.au/cutting-power-bills-with-solar-panels-for-650000-homes/>.

12 Victorian Labor, *Media Release: The Hon Daniel Andrews MP (Premier): Time is up for energy retailers ripping off Victoria* (20 November 2018) <https://static1.squarespace.com/static/5b46af5a55b02cea2a648e93/t/5bf31f844fa51a6734933264/1542659978528/181120+-+Time+Is+Up+For+Energy+Retailers+Ripping+Off+Victorians.pdf > .

13 Premier of Victoria, *Thousands of Victorian Homes Save Millions on Solar, Delivering for all Australians* (18 January 2019) < https://www.premier.vic.gov.au/thousands-of-victorian-homes-save-millions-on-solar/>.

Despite their growing popularity, rooftop solar panels along with other behind the meter products fall outside of the energy regulatory system, which was designed to regulate the traditional centralised form of energy distribution.

The word 'regulation' (and derivatives of it) will be used in this report to denote legislation, statutory instruments and any other forms of government intervention. These regulatory instruments can be contrasted with industry codes of conduct.

The traditional energy market is regulated by an interconnected series of, energy specific, Victorian and federal legislative instruments. Victorian regulatory instruments related to electricity include:

- *Electricity Industry Act 2000* (Vic), which regulates the electricity supply industry by, for example, prohibiting the unlicensed generation, transmission, distribution, supply or sale of electricity, unless under exemption.[14] All licences issued under this Act are subject to a condition that the licensee enter a customer dispute resolution scheme approved by the Essential Services Commission (**ESC**).[15] The only ESC approved dispute resolution scheme is Energy and Water Ombudsman (**EWOV**).
- *Electricity Safety Act 1998* (Vic), aimed at ensuring the safe supply and use of electricity.
- *National Electricity (Victoria) Act 2005* (Vic), which regulates the national wholesale electricity market.
- *Essential Services Commission Act 2001* (Vic), which establishes and grants power to the ESC, an independent regulator of Victoria's energy, water and transport sector. The ESC issues licences under the *Electricity Industry Act 2000* (Vic).
- The Energy Retail Code (Vic), which sets out rules that gas and electricity retailers must follow, in accordance with their retail licences, when selling gas or electricity to Victorians.[16]
- Energy Distribution Code (Vic), which regulates the distribution of electricity from distributors to their customers and the connection of customers or embedded electricity generating units (such as solar panels) to the grid.

Victorians can take most of their complaints about their energy retailer or distributor to EWOV, an independent dispute resolution service. While EWOV is not given direct legislative powers (and therefore could be considered as falling outside of the regulatory system), the *Electricity Industry Act 2000* (Vic) requires all electricity retailers to hold a licence[17] and be a member of a dispute resolution service approved by the ESC.[18] The ESC has approved EWOV.[19]

In addition, there are many national regulations. Only some of these apply to Victoria. The national instruments include:

- The National Energy Retail Law (**NERL**) and associated rules which regulate the supply and sale of gas and electricity to retail customers. Victoria has not applied NERL, however, the Victorian Energy Retail Code (listed above) provides similar consumer protections.[20]

14 *Electricity Industry Act 2000* (Vic) ss 16 – 17.

15 *Electricity Industry Act 2000* (Vic) s 28.

16 Essential Services Commission, *Energy Retail Code: Overview*, <https://www.esc.vic.gov.au/electricity-and-gaselectricity-and-gas-codes-guidelines-policies-and-manuals/energy-retail-code>; Essential Services Commission, Energy Retail Code: Version 12 (1 January 2019), cl 3B(2) <https://www.esc.vic.gov.au/sites/default/files/documents/COD%20-%20RR%20-%20Amended%20Energy%20Retail%20Code%20-%20Version%2012%20incorporating%20obligations%20for%20exempt%20sellers%20-%20~%2020180917.pdf>.

17 *Electricity Industry Act 2000* (Vic) s 16.

18 *Electricity Industry Act 2000* (Vic) s 28.

19 Energy and Water Ombudsman Victoria, *Energy and Water Ombudsman (Victoria) Charter* (14 March 2018), cl 2.3 <https://www.ewov.com.au/files/ewov_charter_140318.pdf>.

20 Department of the Environment and Energy, Australian Government, *Energy market legislation* <https://www.energy.gov.au/government-priorities/energy-markets/energy-market-legislation>

- The National Electricity Law (**NEL**) and associated rules regulate the national electricity market (**NEM**). Victoria is connected to the NEM and has adopted, through state legislation, the NEL and associated rules.
- The National Energy Customer Framework (**NECF**) is comprised of a suite of regulatory instruments that regulates the connection, supply and sale of energy to grid-connected customers.[21]

While Victoria has not adopted each element of NECF, an attempt to harmonise Victoria's energy regulation with NECF has been made through the Victorian Energy Retail Code.

This regulation can be seen as recognising energy as an essential service underpinning people's health and wellbeing. This regulation also assists to build confidence in the energy market.[22]

Rooftop solar panels, along with other new energy products, do not fall within the traditional regulatory system. This is because most of the traditional forms of regulation apply only where there is a one-way sale of electricity from a trader to a customer.[23]

The sale of rooftop solar panels is more complex. It usually involves:

- a solar panel retailer who sells the panels, inverter and other products that make up a solar system;
- the installer of solar panels who affixes the panels to a person's rooftop and connects the other parts of the system (and who may or may not be the same as the solar retailer);
- an independent technician to certify that the Australian safety standards have been met;
- the regional distributor who needs to agree to the household using their infrastructure to sell the household's excess electricity back to the grid; and
- a person's retailer who purchases any excess electricity.

Consumer Action also frequently sees finance providers involved in the sale of rooftop solar systems.

Because these transactions go beyond the simple sale of electrons from a retailer to a consumer, rooftop solar transactions usually fall outside of the existing energy-specific regulation.[24] Where the energy regulations do not apply, purchasers of solar panels must rely on the protections offered by the general consumer laws or voluntary industry codes.

Broadly speaking, there are three different general consumer law statutes that might apply to the sale of rooftop solar, depending on the circumstances of the case. The C*ompetition and Consumer Act 2010* (Cth) (**CCA**) and the *Australian Consumer Law* (**ACL**), apply to the sale of non-financial goods and services. The *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**), apply to products and services related to credit but only to the types of credit that meet the complex series of legal definitions of 'credit' under these laws. The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) applies to most financial products or services, whether they meet the NCCPA legal definition of credit or not. Consumer credit products and services that do not fall within the ambit of the NCCPA and NCC are sometimes called 'unregulated

21 Department of the Environment and Energy, Australian Government, *National Energy Customer Framework* <https://www.energy.gov.au/government-priorities/energy-markets/national-energy-customer-framework>.

22 Consumer Action Law Centre, *Power Transformed: Unlocking effective competition and trust in the transforming energy market* (July 2016), 24 and 28 <https://consumeraction.org.au/power-transformed/>.

23 For example, the Energy Retail Code (which all licensed electricity retailers must comply with as a condition of their retail licence), applies to retailers when supplying electricity to their "small customers." It does not apply to reciprocal arrangements, that is, the sale of electricity from small consumers to retailers. In any case, solar panel retailers and installers are not selling electricity or gas per se but rather are selling the technology required for customers to generate their own electricity.

24 Consumer Action Law Centre, *Power Transformed: Unlocking effective competition and trust in the transforming energy market* (July 2016), 28 <https://consumeraction.org.au/power-transformed/>.

credit', 'unregulated finance' or 'unlicensed credit.'[25] This report will use the term 'unregulated credit', while acknowledging that the ASIC Act provides some, more limited, protections around these 'unregulated' financial products and services.

These acts will apply to different elements of a rooftop solar panel transaction. The CCA and ACL will apply to all rooftop solar purchases as they all involve the sale of non-financial products and services. The ASIC Act will apply to any contracts used to finance the purchase of a solar system. The NCCPA and NCC will also apply to the finance of solar systems purchase if the contracts are structured in a certain way that meets the definition of 'credit' under those laws.

Each of these laws is discussed in more detail in the body of the report. In doing so, this report will explore how the application of the general consumer protection regime to the solar retail industry creates an unsatisfactory situation for Victorians. This is the case despite the efforts of the rooftop solar industry and renewables industry in driving the development of their own voluntary codes of conduct (which will also be discussed in more detail) to address some of the damage being done in and to their respective industries.

This unsatisfactory regulatory gap has been recognised, to some degree, but not yet acted upon by lawmakers. For example, around the time it announced their Solar Homes rebate scheme, the Victorian Government also promised to make a number of regulatory reforms related to the retail energy market. These included regulations relating to the price of traditional forms of energy and a number of other reforms that appear to be directed towards giving the Essential Services Commission greater enforcement and compliance power over the traditional energy market.[26]

The Victorian Government has also indicated that it is supporting all 11 recommendations of the Independent Review of the Electricity and Gas Retail Markets in Victoria, which found that intervention was required for a fairer system and recommended a range of measures to help cut power prices.[27]

In publishing this report, we will add to the discussions already underway about energy reform by presenting a consumer perspective, drawn from our casework, about what regulatory solutions are required to prevent further harm from occurring in the retail solar panel industry. This report will not be discussing any proposed reforms aimed at the traditional energy market but rather focusing on those necessary to address the issues manifesting in the new energy market.

Consumer Action brings a valuable perspective to the discussion. We are an independent, not-for profit consumer organisation with deep expertise in consumer and credit laws and policy. Not only this, we also have direct knowledge of people's experience of modern markets which we have gained through the services we provide including free financial counselling services, free legal services, policy work and campaigns. This report builds on our earlier work, primarily reports jointly produced in 2016 and 2017, the Power Transformed[28] and Knock it Off![29] reports.

The remainder of the report will:

- use Consumer Action's casework to identify the common issues experienced by people engaging in the rooftop solar industry;
- briefly examine the consumer protections enlivened by these issues; and
- analyse the issues, suggesting regulatory solutions to the problems identified.

25 We acknowledge that the term 'unlicensed credit' has a particular legal meaning under the NCCPA, referring to situations where credit products meet the NCCPA's definition of credit but the supplier of the credit does not have a licence. By not being licensed when the law says they should be, the unlicensed credit provider will have breached the NCCPA which can lead to both criminal and civil penalties. When this report uses the term 'unlicensed credit' it is not applying this legal definition.

26 Victorian Labor, *Fact Sheet: Cracking Down On Dodgy Energy Retailers – Labor's Energy Fairness Plan* <https://static1.squarespace.com/static/5b46af5a55b02cea2a648e93/t/5bf326z4f21c67ce36dc6f142/1542661716026/CRACKING+DOWN+ON+DODGY+ENERGY+RETAILERS+–+LABOR'S+ENERGY+FAIRNESS+PLAN+%281%29.pdf>.

27 Victorian Labor, *Media Release: The Hon Daniel Andrews MP (Premier): Time is up for energy retailers ripping off Victoria* (20 November 2018) <https://static1.squarespace.com/static/5b46af5a55b02cea2a648e93/t/5bf31f844fa51a6734933264/1542659978528/181120+-+Time+Is+Up+For+Energy+Retailers+Ripping+Off+Victorians.pdf > .

28 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>.

29 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>.

03 ISSUES OVERVIEW

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

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

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

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

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

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

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

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

One difference between the types of solar issues being seen by Consumer Action and those being observed elsewhere[32] are issues surrounding 'community run solar farms' and energy storage devices such as batteries. Consumer Action has not received a significant number of complaints relating to these issues. That is not to say that these issues do not exist or will not emerge in our casework, but rather, that they are not being reported to us by our client base. Therefore, these issues will not be addressed in this report. We recognise that these issues may represent a growing area of concern, however, and may require future consideration and research.

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

04 THE CURRENT CONSUMER PROTECTION LANDSCAPE

IN THIS SECTION

4.1.	Overview	14
4.2	*Competition and Consumer Act 2010* (Cth) (**CCA**) and the Australian Consumer Law (**ACL**)	16
4.3	The *Australian Securities and Investments Commission Act 2001* (Cth)	21
4.4	The *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**)	22
4.5	Other – Contract law, voluntary warranties and corporations law	24
4.6	Self-Regulation: The Clean Energy Council (**CEC**), the Smart Energy Council (**SEC**) and their Codes Of Conduct	25

4.1. Overview

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

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

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

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

Legal Frameworks

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 openign 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 Frameworks

Voluntary Industry Codes

The CEC Code

- created by the Clean Energy Council (**CEC**)
- membership-based peak body representing the renewable energy industry in Australia
- standard 5 year warranty

× provides for warnings but doesn't disallow unregulated credit providers
× allows unsolicited selling
× limited role in dispute resolution

The SEC Code

- created by the Solar Energy Council (**SEC**)
- membership-based peak body for the solar, storage and smart energy market in Australia

× not authorised by ACCC
× less effective consumer protection standards
× wide 'defences' to breach allegations

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

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

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

Consumer guarantees

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

The guarantees provide that all *goods* must:

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

The ACL guarantees that *services* will:

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

34 *Competition and Consumer Act 2010* (Cth) s 2.
35 *Competition and Consumer Act 2010* (Cth) s 131A.
36 Consumers generally cannot start a court case for redress under these offence provisions and therefore they will not be discussed any further in this report.
37 Although once warranties are voluntarily given, the ACL then creates an additional guarantee that warranties will be adhered to. This means that if the supplier or manufacturer gives additional warranties in relation to their products, consumers can take legal action both under the ACL and under contract law in cases of warranty breach.
38 ACL s 54.
39 ACL s55.
40 ACL ss 56- 57.
41 ACL s 58.
42 ACL s 59. There are also a number of guarantees that provide assurances to consumers that the goods they purchase will be theirs to possess, sell or dispose of as they choose and that the goods are free from securities or other encumbrances: ACL ss 51 - 53.
43 ACL s 60.
44 ACL s 61.
45 ACL s 62.

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

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

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

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

Unsolicited consumer agreements

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

Unsolicited consumer agreements are ones in which:[49]

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

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

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

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

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

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

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

49 ACL s 69(1).

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

51 ACL s 73.

52 ACL s 74.

53 ACL s 75

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

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

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

- the seller must give the person a copy of the agreement immediately, or, if the agreement was negotiated over the phone, within 5 business days;[56]
- the agreement document must clearly set out the seller's name and business details,[57] must be clear and transparent,[58] and must contain all of the terms including the total price to be paid to the consumer or how the total price is to be calculated;[59]
- the front page of the agreement must have a clear, obvious and prominent notice informing the person of their right to terminate[60] and must be signed by the consumer;[61] and
- the agreement must contain a form that can be used by a person to terminate the agreement.[62]

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

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

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

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

54 ACL s 76.
55 See: ACL s 77(b)-(d); *Competition and Consumer Regulations 2010* (Cth), reg 84.
56 ACL s 78.
57 ACL s 79(d).
58 ACL s 79(e) and (f).
59 ACL s 79(a).
60 ACL s 79(b); *Competition and Consumer Regulations 2010* (Cth), reg 85.
61 ACL ss 79(b)(iii); *Competition and Consumer Regulations 2010,* reg 86.
62 ACL s 79(c)(i).
63 ACL s 82(3).
64 ACL ss 82(c)-(d).
65 ACL s 82(1).
66 ACL s 83(1).
67 Australian Competition & Consumer Commission, *Telemarketing & door-to-door sales* <https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales#your-consumer-rights>.
68 If the finance is credit regulated by the NCC and the provider is a 'linked credit provider' (as defined by the NCC), s 135 provides purchasers with an entitlement to terminate a tied loan or tied continuing credit contract. If the finance is not regulated credit, s 83 of the ACL states that any related contract is void. Whether finance is regulated by the NCC is a complex question based on a series of legal definitions related to the concept of 'credit.'
69 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 465-466 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.
70 Ibid.

within the in home sale context and the emotional manipulations employed by some in-home sellers may also negatively impact upon a person's decision making abilities.[71] These issues were explored in a joint research project conducted by Deakin University and Consumer Action in 2010.[72] Unsolicited selling also occurs where information asymmetry in favour of the seller is more likely.[73]

Unlike in other retail settings, people confronted with unsolicited selling are unlikely to have engaged in product comparisons, sampled the product[74] or have had the benefit of shopping around to place downward pressure on prices that the open market place can sometimes offer. It has also been found that the following factors are more likely to be present in cases of unsolicited sales than in other retail settings:[75]

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

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

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

Misleading and deceptive sales

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

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

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

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

72 Ibid.

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

74 Ibid 466.

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

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

77 ACL ss 18–19.

78 ACL pt 3.1 div 1.

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

80 ACL s 29.

81 ACL ss 29(1)(a)-(b).

82 ACL s 29(1)(g).

83 ACL s 29(1)(m).

If the general protection provision is breached, a person can seek monetary[84] or non-monetary compensation orders[85] for any loss and damage caused by the breach. Should a dispute arise about a person's entitlement to one of these remedies, that person can enforce their ACL rights by taking the supplier of the goods or services to court or to VCAT.[86]

Unconscionable conduct

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

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

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

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

Unfair contract terms

The ACL protects consumers from unfair contract terms but only those that are not the main subject matter of the contract[94] and those that are contained in standard form contracts.[95] The ACL gives the word 'unfair' a particular legal definition. In relation to consumer contracts for the supply of goods or services, unfair terms are ones that: [96]

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

If there is a dispute about whether the supplier has breached the unfair contract provisions of the ACL, a consumer can apply to a court to have the term declared unfair[97] and can seek compensation orders for any loss and damage caused by the unfair term.[98] The consumer would generally be able to take their dispute to court or VCAT.

84 ACL s 236. This report uses the term monetary compensation broadly but, note, the ACL refers to 'actions for damages' (s 236) and 'compensation orders etc. for injured persons' (s 237).
85 ACL s 237. Non-monetary orders might include voiding a contract or voiding some but not all of a contract's terms.
86 ACL ss 236–237, 2 (definition of 'court'); *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7– 8, 184.
87 ACL, s 20.
88 Australian Competition & Consumer Commission, *Unconscionable conduct* <https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>.
89 Australian Competition & Consumer Commission, *Unconscionable conduct* <https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>.
90 ACL s 22(1).
91 ACL s 236.
92 ACL s 237. Non-monetary orders might include voiding a contract or some of its terms.
93 ACL, ss 236–237, 2 (definition of 'court'); *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 7–8, 184.
94 ACL s 26.
95 See, ACL s 23(1). Standard form contracts are contracts that are not negotiated and can include standard terms and conditions
96 ACL s 24. Also see ACL s 23(3) (meaning of 'consumer contract').
97 ACL s 250.
98 ACL ss 237, 243.

Linked credit contracts

As indicated above, the ACL generally does not apply to financial goods and services. There is one exception to this. The ACL makes some credit providers equally responsible for certain breaches of the ACL by a supplier but only where they are a 'linked credit provider.' These provisions are technical, confusing and difficult to navigate. In brief, however, the ACL considers a credit provider and a supplier of goods or services to be 'linked' where they have a business arrangement related to the supply of goods or services[99] or where the supplier regularly refers their customers for obtaining finance.[100] The ACL says a linked credit contract includes when a person enters into a credit contract for the purpose of buying goods or services from a linked supplier.[101]

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

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

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

It could be argued, however, that VCAT should hear cases against linked credit providers. The argument would go that because linked credit provisions exist under the ACL and jurisdiction has been conferred on VCAT by Victorian legislation[103] to hear ACL disputes, then VCAT should be able to hear claims against linked credit providers.

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

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

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

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

Except for a few deviations, the protections under the ASIC Act largely mirror those of the ACL. In fact, the language relating to unfair contract terms,[106] unconscionable conduct,[107] misleading or deceptive conduct[108] and the specific protections against certain

99 ACL s 2(a)(iii).

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

101 ACL s 278(2).

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

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

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

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

106 ASIC Act ss 12BF–12BM.

107 ASIC Act ss 12CA–12CC.

108 ASIC Act ss 12DA.

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

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

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

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

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

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

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

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

109 ASIC Act s 12DB.

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

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

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

113 See generally, NCCPA ch 2.

114 See generally, NCCPA ch 3.

115 See generally, NCCPA ch 3.

116 NCCPA s 47(i).

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

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

- the required form of a credit contract;[117]
- disclosure obligations;[118]
- restrictions on fees, charges and interest for certain credit contracts; and[119]
- the regulation of financial hardship arrangements.[120]

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

a. *the debtor is a natural person or a strata corporation; and*

b. *the credit is provided or intended to be provided wholly or predominantly:*

   (i) *for personal, domestic or household purposes; or*

   (ii) *to purchase, renovate or improve residential property for investment purposes; or*

   (iii) *to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and*

c. *a charge is or may be made for providing the credit; and*

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

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

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

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

117 See generally, NCC pt 2 divs 1, 5.
118 See generally, NCC pt 2 divs 1, 5.
119 See generally, NCC pt 2 divs 3, 4.
120 See generally, NCC pt 4 div 3, pt 5 div 2.
121 NCC s 5(1).
122 NCC s 6(5).
123 ASIC, Report 600: Review of buy now pay later arrangements (November 2018), 7 <https://download.asic.gov.au/media/4957540/rep600-published-07-dec-2018.pdf>.

4.5 Other – Contract law, voluntary warranties and corporations law

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

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

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

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

Secondly, there are strict rules relating to priority of claims against companies that are winding up or in liquidation. The terms 'winding up' and 'liquidation' are used interchangeably to describe the process of collecting the assets of a company, discharging its debts and distributing any remaining assets.[128] This is a complex area of law but the most salient aspect of the law from a consumer's perspective is that any remaining assets of an insolvent company are distributed according to a legally defined list of priorities upon which consumers' legal claims would fall towards the bottom. If the company's liabilities outweigh its assets, a consumer is unlikely to get their claim paid out.

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

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

124 ACCC, *Warranties* <https://www.accc.gov.au/consumers/consumer-rights-guarantees/warranties>
125 Evelyn Tadros, Fitzroy Legal Service Inc., *Breach of Contract* (30 June 2017) The Law Handbook <https://www.lawhandbook.org.au/2018_07_01_05_breach_of_contract>.
126 *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 184.
127 Thomson Reuters, *The laws of Australia* (at 25 November 2013) 4 Business Organisations, '1 Introduction' [4.1.240].
128 Thomson Reuters, *The laws of Australia* (at 25 November 2013) 4 Business Organisations, '7 Company Winding Up' [4.7.10].
129 LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (accessed 15 February 2018) 'phoenix trading'.
130 LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (accessed 15 February 2018) 'phoenix trading'.

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

The Clean Energy Council (CEC)

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

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

- **maintains a voluntary Solar Retailer Code of Conduct;**
- **administers an accreditation scheme for installers and designers of stand-alone or grid connected solar PV systems; and**
- **maintains a publicly available list of accredited installers[133] and products that meet Australian Standards for design and implementation of solar panels.[134]**

The CEC's accreditation scheme focuses on developing technical competence in design and installation of solar systems. It requires participants to complete specific training courses and comply with several codes, guidelines, standards and regulations related to the technical side of installation and design. CEC accreditation is required to access the financial incentives under the Victorian Government rebate program, 'Solar Homes Package,'[135] and the Commonwealth Government's Small-Scale Renewable Energy Scheme.[136]

The CEC Solar Retailer Code of Conduct (**the CEC Code**) is a voluntary code for retail businesses selling solar systems which has been authorised by the ACCC. It aims to promote best practice in retail sales and marketing activities[137] 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 the CEC code,[138] at the date of writing, the Victorian Solar Homes Package and the federal Commonwealth Government's Small-Scale Technology Certificate scheme do not have such a requirement. This is due to change in the case of the Victorian Solar Homes Package. On 22 March 2019, the Victorian Government announced that, from 1 July 2019, the major solar retailers participating in the Solar Homes program will have to sign up to the CEC Code of Conduct.[139] All other retailers will have to be signed up by 1 November 2019.[140]

The CEC Code focuses on the retail side of solar and therefore occupies a space distinct from CEC accreditation. The CEC Code reiterates the legal obligations of its signatories but also requires that its signatories comply with certain standards that are not otherwise legally articulated. In reiterating the existing legal requirements, the CEC Code provides an inclusive list of regulation with which signatories must comply and re-states some of the key ACL protections including those relating to misleading and deceptive conduct[141] and unsolicited consumer agreements.[142]

131 For transparency, we note that Consumer Action CEO, Gerard Brody, is the chair of the Clean Energy Council's PV retail code of conduct review panel.
132 Clean Energy Council, *About* <https://www.cleanenergycouncil.org.au/about>.
133 Clean Energy Council, *About* <https://www.cleanenergycouncil.org.au/about>.
134 Clean Energy Council, *Products* <https://www.solaraccreditation.com.au/products.html>.
135 Solar Victoria, Victoria State Government, *Solar Panel (PV) Rebate* <https://www.solar.vic.gov.au/Solar-rebates/Solar-Panel-Rebate>.
136 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), 4 <http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>.
137 Ibid.
138 See: Clean Energy Council, *Tender opportunities for Approved Solar Retailers* <http://www.solaraccreditation.com.au/retailers/tenders.html>.
139 Minister for Solar Homes, Victoria State Government, Cutting Power Bills with Solar Panels for 650,000 Homes (22 March 2019) < https://www.premier.vic.gov.au/solar-retailer-code-of-conduct-to-lift-standards/>.
140 Ibid.
141 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.1.1 <http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>.
142 Ibid cls 2.1.1, 2.1.2(b).

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

While the CEC Code provides welcome consumer protections, it has limitations. Common to many voluntary industry codes, the CEC Code does not provide consumers with robust remedies or enforcement mechanisms. The Code Administrator does not offer a dispute resolution service[146] 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[147] 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[148] and publicising their removal on their website.[149] Being removed as a signatory removes the benefits of being a CEC approved retailer. The benefits include being eligible for certain government tenders[150] and the promotion of the retailer on the CEC website as an approved, and therefore implicitly reliable, retailer. However, removal of a retailer as signatory to the Code will only occur upon serious, wilful, systemic or repetitive breaches of the Code.[151] Sanctions for less severe or isolated breaches of the CEC Code include the temporary suspension of Signatories, listing breaches on the CEC website and the provision of a written strategy detailing how the signatory proposes to rectify the breach to the Code Administrator.[152] Breaching the CEC Code does not appear to affect accreditation and therefore, at the date of writing at least, it will not impact the signatory's eligibility to pass on government rebates and financial incentives to its customers. This may change once the proposed changes to the Victorian rebate scheme rolls out from 1 July 2019. However, for existing Code signatories to be denied the benefit of the rebate scheme, they will need to be removed as signatories of the CEC Code by the Code administrator.

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

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

143 Ibid cl 2.2.10.
144 Ibid cl 2.2.10 (although, arguably, the ACL guarantee as to acceptable quality would operate to require the solar system last at least 5 years).
145 Ibid cl 2.2.10(b).
146 Ibid cl 3.1.3.
147 Ibid cl 3.3.4.
148 Ibid cls 3.6.4 - 3.6.6.
149 Ibid cl 3.6.6.
150 Clean Energy Council, *Why sign the Solar Retailer Code of Conduct?* <https://www.solaraccreditation.com.au/retailers/why-sign-the-code-of-conduct.html>.
151 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 3.6.4 <http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>.
152 Ibid cl 3.6.1.
153 Clean Energy Council. *Approved Solar Retailers* (accessed on 07 January 2019) <http://www.solaraccreditation.com.au/retailers/approved-solar-retailers.html>.
154 Cole Latimer, *'Unavoidable': Rooftop solar panel installer True Value Solar to close', The Sydney Morning Herald* (online), 23 November 2018 <https://www.smh.com.au/business/consumer-affairs/unavoidable-rooftop-solar-panel-installer-true-value-solar-to-close-20181123-p50hvh.html>.
155 The COAG Energy Council is a Ministerial forum for the Commonwealth, states and territories and New Zealand, to work together in the pursuit of national energy reforms.

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

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

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

156 Smart Energy Council, *Our Story* <https://www.smartenergy.org.au/our-story>.
157 Smart Energy Council, *Solar Energy Storage & Related Services Providers Code of Conduct DRAFT* <https://www.smartenergy.org.au/resources/solar-energy-storage-related-services-providers-code-conduct-draft >.
158 Smart Energy Council, *Solar Energy Storage & Related Services Providers Code of Conduct*, 9 <https://www.smartenergy.org.au/sites/default/files/uploaded-content/field_f_content_file/sesrs_consultation_draft.pdf>.
159 Smart Energy Council, Solar *Energy Storage & Related Services Providers Code of Conduct*, 9-10 <https://www.smartenergy.org.au/sites/default/files/uploaded-content/field_f_content_file/sesrs_consultation_draft.pdf>.

05 ISSUES DISCUSSED

IN THIS SECTION

5.1	Overview	28
5.2	Failure to install and/or connect to the grid properly	28
5.3	Unregulated finance arrangements	35
5.4	Misleading and high-pressure unsolicited sales	40
5.5	Product faults and poor performance	46
5.6	Lack of affordable dispute resolution	53
5.7	Business closures	57
5.8	Solar power purchase agreements	62

5.1 Overview

In the section that follows, we discuss the issues we have identified through Consumer Action's legal and financial counselling casework. In relation to each issue, we provide at least one de-identified case study. All case studies have been drawn from our casework, except for case study 2. Case study 2 has been reported to us by the person affected, however, the person affected is not a client of Consumer Action. These case studies represent a very small, indicative sample of the issues identified in this report. Our case studies provide a strong indicator of the experiences of people in the Victorian community, particularly those people experiencing vulnerability. It is also safe to assume that there is a high degree of harm being caused to people in the community that do not have the assistance of a community legal centre (**CLC**) such as Consumer Action. Unfortunately, the most vulnerable people in the community are often the least likely to seek assistance.

It is clear from the case studies in this report that there are a number of issues related to the sale, installation and operation of rooftop solar panels causing significant harm to individuals and households. We will analyse the causes behind these issues and propose possible solutions to address them.

5.2 Failure to Install and/or Connect to the Grid Properly

Consumer Action has seen many cases where the solar installation process has been mismanaged, resulting in poor consumer outcomes. Case Study 1 on the next page provides one example.

CASE STUDY 1: "SUSAN"

- **Illustrative of the following issues:**
- **Failure to connect to the grid properly**
- **Unlicensed and unaffordable finance**
- **Poor business practices in the negotiation of unsolicited consumer agreements**

Susan is a disabled elderly pensioner in her early 70's living alone in regional Victoria. Susan struggles financially and has very little in the way of savings. Susan has a number of health issues.

In June 2018, Susan received an unsolicited visit from a door knocker selling solar panels on behalf of a solar retailer. Susan is generally wary of unsolicited salespeople, but on this occasion allowed the salesperson into her home where he successfully sold her a solar panel package.

Susan pressed a number of times for confirmation of the total cost, but the salesperson was evasive, simply stating that 'you won't regret it'. In the end, Susan signed the contract still not knowing what the total cost would be, how the solar system would work or how she was going to pay for it. While the total cost of the solar system was hand written on the contract, Susan was unable to read the carbon copy of the contract she signed. This is because the cost and other details were hand written in faint ink on pink paper and Susan's eyesight is poor.

The salesperson did not tell Susan of her cooling off rights. While the cooling off rights were stated in writing on the contract, they were not in a prominent position and were in small print.

Susan did not appreciate that the forms the salesperson asked her to sign also included an agreement with a Finance Provider.

The Finance Provider was not licensed under the NCC and NCCPA and is one of the finance providers that have claimed and continue to claim that they are not required to have a licence because they do not provide regulated credit.

Neither the Finance Provider nor the solar panel retailer properly assessed whether Susan could afford the finance contract.

Susan also did not understand that in order to obtain the benefits of the solar panels, a "Solar Feed in Tariff Application Form" needed to be sent to the energy retailer, a different company from the solar panel retailer. The solar panel retailer expected Susan to complete and send this form to the energy retailer. However, Susan did not understand the transaction, the difference between the energy retailer and the solar retailer or that she was expected to complete and send the documents required for the panels to operate as promised.

Shortly after Susan received a letter from the Finance Provider advising that she was required to make payments of $69.95 per fortnight (and a monthly account keeping fee) commencing in 2 weeks' time. The letter did not state the total cost of the panels but did state the total number of direct debit payments required to pay off the solar panels. It was not until after Susan made the first payment that she received a statement from the Finance Provider advising that the total balance owing was in excess of $7,000.

Susan cannot afford the payments. Susan's bank account went into default when the first direct debit was made, causing her to incur an overdrawn account fee. After the second payment was debited from her account, Susan was left with little funds for everyday living expenses. Susan immediately contacted her bank to cancel any future direct debits to the Finance Provider.

Soon afterwards, Susan received a letter from the Finance Provider stating that they had sent her account to their collections department.

Susan then received numerous calls from the Finance Provider's collections department, demanding payments. This caused Susan great distress.

Consumer Action is currently representing Susan in her matter.

CASE STUDY 2: "TUI"

Illustrative of the following issues:

- **Failure to connect to the grid properly**
- **Business closures**
- **Lack of affordable dispute resolution**

Tui* works full time and is currently saving for her retirement.

In 2015, Tui purchased a solar system through a scheme involving her local city council. Because it was a not-for-profit scheme run in connection with her local council and because the scheme had gone through a procurement process, Tui believed the solar retailer and solar installer would be reputable and reliable. The solar retailer also happened to be a member of the CEC Solar Retailer Code of Conduct.

Recently, one of Tui's relatives noticed that her electricity bills were not being offset by a feed-in-tariff and subsequently found out that she had never been receiving a feed-in-tariff.

Tui tried to call her council to find out how to fix the problem but no one ever got back to her. Tui's relative helped her follow up and the council's scheme eventually replied with information that Tui needed to progress her enquiries.

Tui called her energy retailer who told Tui that they had not received the necessary paperwork when her solar system was installed more than three years ago. To fix this problem, the energy retailer told Tui that she needed to arrange an electrician to attend to inspect the solar system for the electrician to issue:

- an electrical works request form;
- an embedded generation form; and
- a safety certificate.

Tui tried to call the solar retailer but she could not get through to them.

Tui then called the council scheme who told Tui that her solar retailer was in the process of exiting the Australian market. She was told to keep trying to contact the solar retailer, who was operating on a skeleton staff.

When Tui finally got onto someone from the solar retailer, they advised her that they (the solar retailer) had sent all the necessary paperwork to her energy retailer back in 2015 and that it was the energy retailer's fault for not paying her the feed-in-tariff.

Tui does not know where the responsibility truly lies and her enquiries are still ongoing, with no resolution at this stage.

If the solar retailer had submitted all the necessary paperwork, then Tui might be able to make a complaint to EWOV against her electricity retailer. At EWOV, Tui could try to get compensated for the money she should have been getting for the feed-in-tariff.

However, if, in fact, the solar retailer never submitted the paperwork then Tui will not be able to go to EWOV. This is because under the retail electricity laws, electricity retailers must be licensed and must be members of EWOV but solar retailers are not so required.

Even if the solar retailer is to blame for failing to submit all the paperwork, it is unlikely that Tui will get compensated for the lost feed-in-tariff in any case. There are several reasons for this. Firstly, the solar retailer is exiting the market and their legal liabilities may come to an end. Secondly, even if they were not going out of business, the solar retailer could argue that they are not responsible for submitting the paperwork and therefore cannot be held accountable for the lost income. This argument is open to solar retailers because the law and the CEC Code are not as clear as they should be in relation to who is responsible for submitting the forms.

If the solar retailer were to argue against responsibility, the only cheap dispute resolution available to Tui would be VCAT.

*Tui is not a client of Consumer Action or the National Debt Helpline.

Consumer Action has seen many cases like Susan and Tui where rooftop solar panels are installed but not connected to the grid properly. Whenever systems fail, not only are household finances affected but the environmental objectives of the households, governments and community groups are also undermined.

In cases of installation and grid connection failures, the diffusion of responsibility to the consumer through multiple parties, is a recurring and troubling theme. Many solar retailers include the savings from selling energy back to the grid in their sales pitch to consumers. However, to effectively export excess energy back to the grid, there needs to be effective communication between solar retailers, solar installers, energy retailers and energy distributors. Many people that Consumer Action speak to do not understand what is required for grid connection and are not well placed to articulate why their rooftop solar systems are not operating as promised.

A failure to submit the necessary paperwork is often to blame when individuals fail to receive a feed-in-tariff. Breakdowns usually arise at either the pre-installation or post installation stages when the relevant paperwork is not properly submitted or actioned properly.

Prior to installation, people wishing to install solar panels are usually required to obtain pre-approval from the relevant energy distributor. However, confusingly the requirement for pre-approval can vary depending on where a person lives (and therefore who the relevant distributor is) and the capacity of their proposed solar system.[160] This process may be streamlined with the introduction of new technical guidelines under Energy Networks Australia's National Grid Connection Guidelines[161] for energy distributors but this remains to be seen.

After the solar panels have been installed, there is a problematically large number of documents required to be completed, received and actioned by disparate parties. They include:

- the Clean Energy Regulator requires various forms to process the financial incentives associated with Commonwealth Government's Small-Scale Technology Certificates;
- Solar Victoria requires a Solar Provider Statement, proof of eligibility and a number of other documents, including the certificate of electrical safety, to process the Victorian Government's Solar Home rebate;[162]
- electricity retailers require Electrical Work Request Forms, a Certificate of Electrical Safety (Energy Safe Victoria also requires a copy of this certificate)[163] and a Feed-in Tariff application form;[164] and
- the relevant distributor must receive solar connection forms, a copy of the Electrical Work Request Form, a Certificate of Electrical Safety and a service order request from the relevant retailer.[165]

Most of these forms require more than one person involved in the process to complete different sections of a single form. An issue related to the completion of these documents is that retailers and installers appear to be giving inconsistent advice and information about what stage of the process a solar system can be turned on. Some systems are switched on at installation, while others wait until the independent safety inspector signs off on it. Others, still, are not switched on until after the meter has been reconfigured, a process that can take up to two months after the independent

160 Department of Land, Water and Planning, Victoria State Government, *Solar connection form* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/solar-connection-form>

161 Available: https://www.energynetworks.com.au/national-grid-connection-guidelines

162 Solar Victoria, Victoria State Government, *Apply for a rebate* <https://www.solar.vic.gov.au/Apply-for-a-rebate>

163 Department of Land, Water and Planning, *Electrical work request* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/electrical-work-request>; Department of Land, Water and Planning, Certificate of electrical safety (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/certificate-of-electrical-safety>

164 Department of Land, Water and Planning, *Feed-in Tariff application form* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/feed-in-tariff-application-form>

165 Department of Land, Water and Planning, *Feed-in Tariff application form* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/feed-in-tariff-application-form>

safety inspection has been completed. This is a source of angst for some households who want to be receiving the benefit of their system as soon as possible. Ideally, this situation ought to be clarified.

If any of the steps of the process are not successfully completed, consumers can be left without fully functioning panels and without a clear avenue to remedy. As Consumer Action's 2016 report Power Transformed states:

"When disputes arise in new products and services which may require a network of relationships to deliver, the potential for buck-passing and blame shifting between parties is high."[166]

The first problem experienced by people not receiving a feed in tariff is not knowing whether or not the paperwork was completed and where it ended up. People are often bamboozled by the process. Like Susan and Tui, many do not even realise how many parties need to work together in order to get fully functioning panels. The requirements for grid connection usually become clear if and when people start enquiring about the problem, as each commercial party involved will inevitably deny responsibility for completing the forms and refer the individual to one of the other commercial parties.

The second related issue is a lack of regulation and a lack of clear guidance around whose responsibility it is to ensure the paperwork is successfully completed and actioned.[167] For example, even if a person knew that it was the Solar Connection Form that was not properly completed, would they have a clear case for saying that the solar retailer is responsible and should compensate them for lost income?

It is far from clear whose responsibility it is to complete and submit the necessary paperwork. Information on the Department of Environment, Land, Water and Planning (**DWELP**) website, indicates that while the Solar Connection Form, should 'ideally' be sent to the electricity distributor by a person's solar retailer or installer, they also advise people to ensure that this has happened themselves.[168] Many of Consumer Action's clients do not fully understand the difference between the entities involved in solar installation let alone the documentary requirements to ensure grid connectivity. They are therefore not well placed to ensure connectivity. Furthermore, while the intent is that the state rebate process will be installer led from July 2019 onwards, this will only remove the administrative burden from customers in so far as the Victorian rebate is concerned and will not address the wider issue of grid connectivity.

The CEC Code goes some way to prevent these issues at both pre and post installation stages but, arguably, it does not go far enough. The Code says that before a solar installation contract is signed, a signatory must inform their customer if pre-approval is required from a distributor and what paperwork is required to obtain pre-approval.[169] The Code then goes on to say that if the signatory is authorised to obtain the approval on their customer's behalf, the signatory must not commence installation until approval has been obtained and

166 Consumer Action Law Centre, *Power Transformed: Unlocking effective competition and trust in the transforming energy market* (July 2016), 7 <https://consumeraction.org.au/power-transformed/>.

167 See, for example: the discussion below regarding the CEC Code; Department of Land, Water and Planning, Victoria State Government, *Paperwork required for solar* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/solar-connection-form>

168 Department of Land, Water and Planning, Victoria State Government, *Solar connection form* (9 June 2017) <https://www.energy.vic.gov.au/renewable-energy/victorian-feed-in-tariff/whats-involved-in-going-solar/paperwork-required-for-solar/solar-connection-form>

169 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.1.16 <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>.

must give the customer a full refund if approval is not given.[170] If a customer has taken responsibility for obtaining approval, the customer will be entitled to a refund (minus any of the signatory's reasonable expenses prior to termination) if approval is not given.[171] However, the Code does not explicitly say that the onus is on the solar retailer to raise the issue nor does it say the solar retailer must seek authority to arrange pre-approval. The proposed inclusions in the draft NET Code are written in almost identical terms.[172] Therefore, there is still room for confusion. If neither the signatory nor the customer (who is unlikely to be aware of the issue) raises the issue of pre-approval and pre-approval is not obtained, who then is responsible in so far as the Code is concerned?

After installation, the CEC Code places clear obligations on signatories to explain to their customers what further steps are required to ensure grid connection. But again, the CEC Code does not unambiguously place responsibility on the solar retailer to ensure connection. Under the Code, whether the retailer is responsible for taking the steps for grid connection depends on whether their customers have given them authority to arrange grid connection at the pre-installation phase, discussed above. If customer authority has been given at the pre installation phase, the signatory must prepare and submit the required documents within a reasonable time.[173] They also must inform their customers of the process and when they have completed each step in the process.[174] If the customer has taken responsibility for grid connection themselves, the signatory must still ensure that their customers receive a complete set of documents (listed in the Code)[175] and must clearly explain the process required for grid connection but is not responsible for it.[176] For the reasons stated above, there is room for confusion at the pre installation phase if the Code signatory is not expressly obliged to ask their customers to elect who will be responsible for submitting all of the necessary paperwork. Furthermore, it is not hard to imagine how messy arguments about who said what, when might arise.

The lack of certainty around who has responsibility for grid connectivity can have a flow on effect to the operation of the ACL. Solar retailers can try to deny liability under the ACL consumer guarantees and any voluntary warranties given on the basis that a third party is at fault.[177] While we support the flexibility to allow consumers to organise connection to the grid themselves, a stronger, more explicit default stance should be adopted to protect against the risk that the ACL guarantees can be avoided. A better approach than the one in the CEC Code would be to create a default position under which the solar retailer is responsible for completing and submitting the documents necessary for grid connection, unless their customers ask them not to.

From a consumer perspective, having a default position in which the solar retailer is responsible for the ultimate delivery of a properly operating solar system seems the most logical way to deal with the buck passing we often see when systems have not been connected to the grid. Solar retailers would be responsible for arranging pre-approval from the distributor prior to installation and for ensuring the completion and delivery of the documentation required following installation. This makes sense because the solar retailer is the consumer's point of contact, they have an intimate knowledge of the installation and commissioning process, and they have made representations on which the people have relied when deciding to purchase the system.

While it would be useful for the NET Code to be drafted in a way that clearly places responsibility for

170 Ibid cls 2.1.18 – 2.1.19.

171 Ibid 2.1.17.

172 Clean Energy Council, *Consultation Draft: Behind the Meter Distributed Energy Resources Provider Code* (November 2018), cl B.2.6 <https://assets.cleanenergycouncil.org.au/documents/advocacy-initiatives/btm-code/behind-the-meter-draft-industry-code.pdf>.

173 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.2.7(a) <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>.

174 Ibid cl 2.2.8.

175 Ibid cl 2.3.

176 Ibid cl 2.2.7(b).

177 One of the defences available under the ACL to suppliers of services is where a failure to meet a guarantee occurred because of an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier: ACL s 267(1)(c).

grid connection on the solar retailer, we see the need for regulatory intervention as the CEC Code does not and the NET Code will not cover the field of solar retailers. It is a voluntary code that does not offer much to consumers in terms of dispute resolution, enforcement and remedies.

An additional safeguard that could be put in place is to have payment for the panels conditional upon successful grid connection. Solar retailers may justifiably object to this on the basis of the time lag that would be created while they wait for retailers or distributors to action the forms. One way of partly ameliorating the time-lag issue would be a part payment formulation under which a majority of the purchase price of the solar system is paid before the system is fully delivered, and the remainder only when it is operating in accordance with representations made during the sales process. This option is worth further consideration. Consumer Action has been advised that current practice amongst retailers is to require full payment for the rooftop solar installation three days prior to installation, leaving individuals in a weaker bargaining position should something go wrong before during or after installation. A part payment arrangement would go some way in addressing this imbalance.

A second issue that solar retailers may raise in objection to bearing the responsibility for grid connection is the potential for them to be held accountable for circumstances outside of their control. It would be useful to hear from the solar retailers detailing why this is unfairly burdensome for them and any special cases where unfair detriment has or may be caused. Ultimately, this requires consideration about whether the individual consumer or the retailer is best placed to bear the risk of non-connection. We consider that solar retailers are best placed to bear this risk, and should be responsible for completing and submitting the paperwork necessary for grid connection is consistent with their responsibility to ensure the products and services they sell are fit for purpose and live up to any promises made. Furthermore, this may promote better practices by solar retailers. They could, for example, keep copies of the completed documents and records of when the forms were sent to other parties such as the energy retailers and distributors, and pursue their own commercial legal claims to recover any losses. If this evidence were provided to their customers, they may then be able to make a complaint in EWOV against their electricity supplier or retailer.

Placing clear responsibility of grid connectivity on the solar retailer would give people like Susan and Tui a clear avenue for redress. Even without a payment arrangement conditional upon successful grid connection, people would be certain in their position and could, for example, take the solar retailer to VCAT for failing to provide the services with due care and skill and failing to make the solar panels fit for purpose.

RECOMMENDATION 1:

Regulatory reform to make it clear that solar retailers are responsible for ensuring that all the paperwork necessary for grid connection is completed and submitted to the relevant recipient, unless the consumer elects otherwise.

5.3 Unregulated Finance Arrangements

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

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

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

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

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

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

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

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

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

178 NCC ss 16, 17(c).

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

CASE STUDY 3: "JOHN"

Illustrative of the following issues:

- **Unlicensed and unaffordable finance**
- **Poor business practices in the negotiation of unsolicited consumer agreements**

John is a 72-year-old aged pensioner who lives alone in an old weatherboard miner's cottage in a small rural town about four hours from Melbourne. He has no income, and no savings. John often sits out on the front verandah of his small cottage and refers to it as his "lounge-room."

One day, a salesperson for a Solar Panel Company came up John's front drive and started talking to him about solar panels. John said that he was not interested but the salesperson was insistent and let himself into John's home.

John followed the sales representative into the house. They then sat at John's kitchen table for at least an hour as the salesperson talked John through various features of the panels, and how they could reduce his energy costs. The salesperson was insistent that John could make big savings.

John continued to advise that he did not want solar panels but became increasingly intimidated by the salesperson. John describes himself as "shaking and shivering" and did not know how to handle the situation. John asked the salesperson to leave but the salesperson would not. He continued to refuse to take no for an answer and continued to talk John through the paperwork relating to the sales.

John did not understand the technical details of what was being offered to him. The salesperson continued with his pitch and offered John a finance contract to pay for the solar panels. John said he could only afford $25 per week.

The salesperson arranged the paperwork and then rang the Finance Company on John's behalf. John never spoke to the Finance Company himself. The Finance Company did not have a licence under the NCCPA and was therefore unregulated under that act.

John eventually signed up for a 3KwH solar panel system, including 12 panels, at a cost of $8,695.00. John said that he signed up to get rid of the salesperson and that he felt stupid, but it sounded like a good deal.

Shortly afterwards, John received a letter saying that he must make 87 fortnightly payments of $103.87 per fortnight (with the first monthly payment adding a $3.50 account fee) to the Finance Company, adding up to $9,040.

John found the repayments to the Finance Company difficult to repay, as he could not afford it. He would often have no money left for food at the end of the fortnight. John didn't try to cancel the arrangement because he did not know there was a cooling off period. Despite the salesperson's claims, John was not saving much on his energy usage at all, and certainly not the amount that the salesperson said he would.

After a period of time, John's relative, who lives next door to him, contacted Consumer Action on John's behalf. With assistance, John was able to terminate the agreement, arguing that there had been breaches of the ACL. John obtained a refund for the amount of money he had paid up to the date he terminated the agreement (being around $3,000) and invited the solar retailer to collect the panels from his roof.

The solar retailer did not attend to remove the panels.

The ACL says where an unsolicited consumer agreement is terminated, the goods received under the agreement become the property of the consumer if: the consumer has notified the retailer of where they can collect the goods; and the retailer fails to collect the goods within 30 days of termination.

Over a year after John terminated the solar agreement, the solar retailer tried to recover the solar system from John alleging that they still owned the solar system. With Consumer Action's help, John was able to get the solar retailer to finally confirm that they will stop contacting him and that they will stop trying to recover the solar panels. John argued, amongst other things, that what the solar retailer was doing amounted to misleading or deceptive conduct and prohibited debt collection activity.

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

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

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

> *We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 1.m), we will ensure that:*
>
> *a. this payment arrangement is offered through a credit provider (whether ourselves or a third party) licenced under the National Consumer Credit Protection Act (2009) (Cth ("***NCCCPA***");*
>
> *b. the deferred payment arrangement is regulated by the NCCPA and the National Consumer Code ("***NCC***");*
>
> *c. the term of the deferred payment contract or lease is no longer than the expected life of the product or system; and*
>
> *d. ensure that you receive the following clear and accurate information…*

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

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

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

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

180 The Code says that the warning must contain the following wording: "This arrangement is not regulated by the National Consumer Credit Protection Act 2009 (Cth) ("the NCCP Act"). As a result: (a) I f you have a complaint about the arrangement, you may not have access to the services of an external dispute resolution scheme that has been approved by ASIC. This means that you may have to go to court to resolve a dispute with the provider. *If you have a complaint about the arrangement, you may not have access to the services of an external dispute resolution scheme that has been approved by ASIC. This means that you may have to go to court to resolve a dispute with the provider. (b) If you have trouble paying the periodic payments required under the arrangement: (i) you may not have the right to ask the provider for a hardship variation to help you get through your financial difficulty; (ii) The provider may take action against you for non-payment without giving you an opportunity to remedy the default.*

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

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

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

While there are others with similar business models, the most common company we have seen offer inappropriate financing to purchase solar panels is Certegy. Certegy does not hold an Australian Credit Licence under the NCCPA.[183] It claims that it does not need to hold a licence because they offer 'no interest ever'[184] finance to people who buy goods through specific Certegy-partnered retailers. Certegy's 'no interest' finance contracts appear as continuing credit contracts,[185] with periodic or fixed charges that do not exceed the modest caps set under the NCC. Continuing credit 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.[186] If true in the case of rooftop solar, this would mean that not only are people paying more than they realise for their rooftop solar system but are being unfairly denied rights under the NCCPA and NCC.

There are two recent developments that could offer the momentum needed to change the law to address NCCPA and NCC avoidance. In November 2018, ASIC released a report reviewing the buy now, pay later arrangements. Arrangements offered by Certegy fell within the ambit of this review.[187] While ASIC did not go as far as recommending to the Government that the buy now pay later providers be required to comply with the NCC,[188] they flagged that they may do so in the future and that, in the meantime, ASIC's product intervention power ought to be extended to address some of the detriment found to be occurring in the report.[189]

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

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

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

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

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

186 Ibid 10-11.

187 Ibid.

188 Ibid [71].

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

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

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

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

Extending the NCCPA is the more principled regulatory solution to the issues presented in this report for three reasons. Firstly, there is no principled reason why these providers should be exempt from these basic consumer protections that apply to other consumer credit products. Currently, there is a gap between what the average person considers to be credit and the nuanced version of credit invented by the NCC. The gap creates regulatory loopholes in the NCCPA and NCC that Consumer Action feels are exploited by fringe lenders for no good reason. Secondly, extending the NCCPA laws to all of these finance products will future proof the regulation against other gaps and loopholes that may be exploited by new energy product retailers. Some providers will always look for canny ways to avoid regulatory oversight and so we should keep the opportunities to do so to a minimum. Lastly, this approach could be complemented by a broad anti-avoidance provision that allows the regulator to crack down on avoidance models. Examples of anti-avoidance models can be found in the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018 (Cth) and the Corporations Act 2001 (Cth). The anti-avoidance provisions under Corporations Act 2001 (Cth), target schemes that appear to have no commercial purpose other than to avoid the application of parts of that Act.[191] Persons under such schemes may be liable for a civil penalty if they have breached the anti-avoidance provisions. Similar anti-avoidance provisions would be necessary to ensure the policy intent behind broadening the application of the NCC and NCCPA is achieved.

RECOMMENDATION 2:

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

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

5.4 Misleading and High-Pressure Unsolicited Sales

Consumer Action has observed a number of concerning sales practices used by some solar retailers. The kind of concerning practices are exemplified by case studies 1 and 3, extracted above. In these case studies, the inappropriate sales practices occurred in the context of an unsolicited door-to-door sale. Consumer Action understands that concerning sales practices are also occurring outside of unsolicited sales. For example, Consumer Action understands that some solar companies have been falsely portraying themselves as community, not-for-profit, bulk buy organisations. While these are concerning reports, they are not reports coming through our casework and will therefore not be dealt with in detail in this report. Rather the focus of this section will be on misleading and high-pressure sales tactics occurring in the context of unsolicited sales.

In case study 1, the salesperson's tactics can be described as evasive and lacking in transparency. The salesperson failed to comply with the ACL unsolicited sales provisions by not telling Susan of her cooling off rights and did not comply with the requirements relating to providing written notice of the cooling off rights. The salesperson also failed to inform Susan of the process required to receive a feed-in-tariff and grid connection and therefore the solar panels failed to operate as promised. The salesperson in this case was not subject to the CEC Code (as they had not voluntarily signed up) and even if they had, Susan would not have been able to receive compensation or legal redress by making a complaint to the CEC.

In case study 3, the behaviour of the salesperson was pushy and invasive. The salesperson persisted to hold lengthy negotiations with John who clearly stated that he was not interested and failed to leave when asked by John to do so. This is a clear breach of the ACL. The salesperson's behaviour was of such a poor standard as to leave John feeling intimated and shaky.

In all case studies, the individuals harmed were pensioners with little income. From these cases and others like it, it appears that these sales techniques disproportionately impact people experiencing vulnerability. There is other evidence to support these propositions.

Several evidence-based reports have drawn links between door to door sales and the targeting of people in situations of disadvantage. A 2002 National Competition Policy review of the *Door-to-Door Sales Act 1967* (NSW) found that some of the most vulnerable groups in the community were encountering undesirable direct selling practices, including elderly groups, people with linguistically diverse backgrounds and the disadvantaged.[192] Many direct selling businesses were also found to be targeting particular suburbs, including those with a high percentage of public housing.[193] In a joint paper released in 2007, Consumer Action and Financial & Consumer Rights Council (**FCRC)** confirmed anecdotal evidence that direct marketing misconduct was wide spread in the energy retail market, with marketers regularly taking advantage of people experiencing vulnerability, particularly people with disadvantaged and linguistically diverse backgrounds.[194] In 2012, ACCC released a research report on the door to door sales industry. The report showed that businesses frequently engage third party sales agents to conduct door to door sales on their behalf and some of these businesses reported preying on 'easy targets,' being people experiencing vulnerability.[195] The report also highlighted how door-to-door commission-based remuneration schemes promote aggressive sales behaviour and create incentives for non-compliance with the laws.[196]

192 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 469 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

193 Ibid.

194 Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* (November 2007) <https://energyconsumersaustralia.worldsecuresystems.com/grants/270/AP-270-CALC-report-on-direct-marketers.pdf>.

195 ACCC, *ACCC cracks down on door to door sales practices* (17 August 2012) <https://www.accc.gov.au/media-release/accc-cracks-down-on-door-to-door-sales-practices>.

196 ACCC, *ACCC cracks down on door to door sales practices* (17 August 2012) <https://www.accc.gov.au/media-release/accc-cracks-down-on-door-to-door-sales-practices>.

There is also evidence to suggest that people experiencing disadvantage are likely to be disproportionately affected by aggressive and improper sales techniques. A study undertaken in 2009 by the FCRC, found that door-to-door marketing techniques caused the greatest detriment to people experiencing factors correlated with vulnerability such as poverty, impairment, mental health concerns, recent immigration and where people do not have the literacy capacity required to understand certain offers.[197] This is not surprising in light of the research into the impact of scarcity on human decision making. Studies on the cognitive impacts of poverty, for example, had found that 'the human cognitive system has limited capacity. Preoccupations with pressing budgetary concerns leave fewer cognitive resources available to guide choice and action.' [198]

Compounding these issues is the likelihood that only a small portion of Australians would have the numeracy levels to be able to fully understand the financial benefits of the installation of rooftop solar systems. Being in a position to understand the financial benefits of solar involve complex calculations involving multiple factors including:

- how much electricity the household uses and when;
- the generating capacity of the solar panels;
- the conversion efficiency of the solar inverter and its ability to deliver power under a range of conditions;
- how much excess electricity a person can expect to sell back to the grid;
- the feed-in-tariff that they can expect to receive for every unit of electricity generated by them; and relative benefits of solar compared with accessing a better tariff or electricity retail offer.

As well, a person would need to understand the impact of certain variables on their calculations including weather conditions, export limitations placed on electricity generated by rooftop solar by electricity distributors and the fact that the performance, in terms of electricity generating ability, of solar system degenerates over time.

Data presented by the Australian Bureau of Statistics (**ABS**) in the 2011–12 Programme for the International Assessment of Adult Competencies (**PIAAC**) suggests that the majority of Australians would not have the numeracy skills to make these calculations. Arguably, these calculations require people to be operating, at the very least, at what PIAAC defined as numeracy skill level 3,[199] According to the data only 43.4% of Australians in 2012 had numeracy skills at this level or higher.[200]

Consumer Action has been expressing concern with unsolicited sales for many years. We first identified problematic unsolicited selling of solar panels in a joint paper with the FCRC in 2007, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* and several other years since then.[201] While these reports were in relation to industries other than

197 Above n 191, 467.

198 Mani, A., et al. Poverty Impedes Cognitive Function (2013) 341 *Science* 976.

199 The descriptions provided for the relevant numeracy skill levels are these:

- *Below Level 1 (lower than 176)*: Tasks at this level require the respondents to carry out simple processes such as counting, sorting, performing basic arithmetic operations with whole numbers or money, or recognising common spatial representations in concrete, familiar contexts where the mathematical content is explicit with little or no text or distractors.
- Level 1 (176 to 225): Tasks at this level require the respondent to carry out basic mathematical processes in common, concrete contexts where the mathematical content is explicit with little text and minimal distractors. Tasks usually require one-step or simple processes involving counting, sorting, performing basic arithmetic operations, understanding simple per cents such as 50%, and locating and identifying elements of simple or common graphical or spatial representations.
- Level 2 (226 to 275): Tasks at this level require the respondent to identify and act on mathematical information and ideas embedded in a range of common contexts where the mathematical content is fairly explicit or visual with relatively few distractors. Tasks tend to require the application of two or more steps or processes involving calculation with whole numbers and common decimals, per cents and fractions; simple measurement and spatial representation; estimation; and interpretation of relatively simple data and statistics in texts, tables and graphs.
- Level 3 (276 to 325): Tasks at this level require the respondent to understand mathematical information that may be less explicit, embedded in contexts that are not always familiar and represented in more complex ways. Tasks require several steps and may involve the choice of problem-solving strategies and relevant processes. Tasks tend to require the application of number sense and spatial sense; recognising and working with mathematical relationships, patterns, and proportions expressed in verbal or numerical form; and interpretation and basic analysis of data and statistics in texts, tables and graphs.

200 ABS, 4228.0 - Programme for the International Assessment of Adult Competencies, Australia, 2011-12 (9 October 2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4228.0Main%20Features202011-12?opendocument&tabname=Summary&prodno=4228.0&issue=2011-12&num=&view=>.

201 See, for example, the *Knock It Off!* (2018) and Power Transformed (2016) reports.

the retail solar industry, they provide a telling story about the strong links between unsolicited sales and misleading, deceptive and/or high pressure sale tactics.

Most recently, Consumer Action has been reporting on harm caused by unsolicited sales and related improper sales practices in the solar panel industry. However, we are not the only ones seeing these issues in the solar panel industry. For example:

- In August 2010, the ACCC ScamWatch warned against unsolicited telephone calls offering rebates on energy efficient initiatives including solar panels.[202]
- In September 2011, ACCC ScamWatch again issued warnings advising Australians to continue to be wary of scammers offering bogus government rebates for the installation of solar panels.[203]
- In August 2012, the ACCC launched a research report on the 'problematic' door-to-door sales approach which indicated, amongst other things, that solar panels were one of the four biggest industries using door to door sales.[204]
- In January 2018, Australian Communications and Media Authority (**ACMA**)[205] reported on a $10,800 infringement notice issued to Instyle Solar Pty Ltd for failing to obtain consent to call numbers on the Do Not Call Register.[206] ACMA has also listed solar industry telemarketing as priority area for 2018-2019[207] and has warned that 'ACMA is putting the solar power industry's telemarketing practices under the microscope as a result of a high number of complaints from consumers.'[208]
- On 8 October 2018, Solar Victoria issued a warning to solar panel retailers against high-pressure tactics and inaccurate marketing as the state government solar rebate program is rolled out. It also announced a joint taskforce to combat rebate scams.
- Recently, Solar Victoria and Consumer Affairs Victoria (**CAV**) separately posted warnings about solar rebate scams from callers claiming to be from the Victorian Government or Solar Victoria.[209]
- CAV currently list as their regulatory priorities, protecting consumers from false and misleading claims about solar, batteries and energy products.[210]
- The ACCC and the ACMA have identified compliance failures in lead generation activities in the solar industry.[211]
- In 2018, in response to a review by Consumer Affairs Australia and New Zealand (**CAANZ**), the relevant Ministers for Consumer Affairs agreed to make amendments to the ACL unsolicited consumer agreements provisions to capture situations where retailers obtain consent or details from lead generators.

202 ACCC ScamWatch, *Beware of 'green scheme' scammers!* (23 August 2010) <https://www.scamwatch.gov.au/news/beware-of-%E2%80%98green-scheme%E2%80%99-scammers>.

203 ACCC ScamWatch, *Continue to beware of scam solar offers* (23 August 2010) <https://www.scamwatch.gov.au/news/beware-of-%E2%80%98green-scheme%E2%80%99-scammers>.

204 ACCC, *ACCC cracks down on door to door sales practices* (17 August 2012) <https://www.accc.gov.au/media-release/accc-cracks-down-on-door-to-door-sales-practices>.

205 ACMA is responsible for compliance and enforcement of the *Do Not Call Register Act 2006* (Cth), the Spam Act 2003 (Cth), the Telecommunications (Telemarketing and Research Calls) Industry Standard 2017 and the Fax Marketing Industry Standard 2011. These laws and standards seek to minimise the impact on Australians of unsolicited marketing and electronic messaging.

206 ACMA, Australian Government, *Instyle Solar penalised for calling numbers on the Do Not Call Register* (22 January 2018) Do Not Call Register < https://www.donotcall.gov.au/media-releases/instyle-solar-penalised-for-calling-numbers-on-the-do-not-call-register/>.

207 ACMA, Australian Government, *Unsolicited communications priorities 2018–19* (15 January 2019) <https://acma.gov.au/theACMA/unsolicited-communications-priorities>.

208 ACMA, Australian Government, *Instyle Solar penalised for calling numbers on the Do Not Call Register* (22 January 2018) Do Not Call Register < https://www.donotcall.gov.au/media-releases/instyle-solar-penalised-for-calling-numbers-on-the-do-not-call-register/>.

209 Solar Victoria, Victoria State Government < https://www.solar.vic.gov.au/en>; CAV, Victoria State Government, *Solar energy* (15 February 2019) <https://www.consumer.vic.gov.au/products-and-services/energy-products-and-services/solar-energy>; CAV, Victoria State Government, *Rebate scam* (22 January 2019) <https://www.consumer.vic.gov.au/resources-and-tools/scams/consumer-scams/rebate-scam>.

210 CAV, Victoria State Government. *About us* (31 January 2019) <https://www.consumer.vic.gov.au/about-us>.

211 Lead generation is the process of identifying people who are potential sales targets or "leads." Inappropriate lead generation occurs where the lead generating business obtains a consumer's contact details or permission to be contacted by a retailer, in order to avoid the unsolicited consumer agreements provisions in the ACL. The harm caused by these activities and the regulatory reforms necessary to prevent harm from lead generation were discussed in Consumer Action's 2018 report, *Dirty Leads.*

This list confirms the widespread nature of problematic unsolicited selling of solar products and reveals that this is not just occurring at people's doorsteps, as Consumer Action's casework suggests, but it is also occurring through telephone marketing. While a number of actions taken by the ACCC suggests that improper marketing of solar panels is occurring outside of the unsolicited selling practice,[212] there is clearly a long-standing problem with unsolicited sales in the solar industry and those problems are not going away.

Consumer Action feels that there are three acceptable solutions to these persistent issues:

- ban all unsolicited selling;
- ban unsolicited sales in the solar industry; or
- amend the ACL to replace the cooling off rights with an 'opt-in model' for all unsolicited consumer agreements, regardless of the industry.

Consumer Action feels that the more principled solution is to ban all unsolicited consumer selling, followed by the 'opt-in model.' Both options would be economy-wide solutions, not limited to the solar panel industry.

The opt-in model was one option initially presented (but not adopted) in CAANZ's interim report (2016) on their review of the ACL.[213] The opt-in model can be contrasted with the current cooling off provisions in the ACL which represent an 'opt-out' model. Under the current model, individuals have 10 days to opt out of an unsolicited consumer agreement by actively terminating the agreement. Under an opt in model, no agreement would be made until a person actively opted in after a cooling off period. The person would opt in by actively contacting the retailer.

Historically, cooling off periods have been adopted on the basis that they 'protect consumers from the so-called 'hard sell.'[214] They can also be justified on competitive terms as a cooling off period provides breathing space for people to do some research about the goods or services being sold, to access information about the price and quality of similar products and to try to understand the contract terms.

However, cooling off periods may not be providing the degree of protection that is intended. As explored in greater detail in the Knock it off! Report, opt out cooling off models are grounded in traditional economic theories of the rational person and how a person is supposed to behave. Research[215] and behavioural economics, both of which study how people actually behave, reveal that cooling off periods are not actually effective in protecting people from the hard sell.

Based on a behavioural economics analysis, the *Knock it off!* report supported the opt-in model as a relatively meritorious option amongst those presented in CAANZ's interim report. It was argued that the opt-in model would avoid the negative impacts of the 'endowment effect,' 'status quo bias' and 'consistency theory', concepts used by behaviour economists to explain common ways of behaving. In short, the impacts of these concepts would be avoided because people will not be making decisions at the time of the sale.[216] An opt in model would do a better job at placing

212 See, for example, the following ACCC media releases: *Solar panel retailers amend claims on discounts and electricity savings* (2 August 2010) <https://www.accc.gov.au/media-release/solar-panel-retailers-amend-claims-on-discounts-and-electricity-savings>; *Solar claims must be accurate: joint warning* (4 May 2011) <https://www.accc.gov.au/media-release/solar-claims-must-be-accurate-joint-warning>; *ACCC accepts informal undertaking for alleged misleading carbon price claims* (5 July 2012) <https://www.accc.gov.au/media-release/accc-accepts-informal-undertaking-for-alleged-misleading-carbon-price-claims>; *WA solar retailer Austech pays infringement notice* (2 September 2011) <https://www.accc.gov.au/media-release/wa-solar-retailer-austech-pays-infringement-notice>; *True Value Solar pays infringement notices for misleading advertising* (4 November 2011) <https://www.accc.gov.au/media-release/true-value-solar-pays-infringement-notices-for-misleading-advertising>; *Gotta Getta Group pays infringement notices for alleged misleading solar offer* (10 June 2014) <https://www.accc.gov.au/media-release/gotta-getta-group-pays-infringement-notices-for-alleged-misleading-solar-offer>; *ACCC takes action against Euro Solar and Australian Solar Panel for misleading claims* (8 May 2013) <https://www.accc.gov.au/media-release/accc-takes-action-against-euro-solar-and-australian-solar-panel-for-misleading-claims>.

213 Consumer Affairs Australia and New Zealand (CAANZ), Australian Consumer Law Review: Interim Report (October 2016), 17 <https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf >.

214 Jeff Sovern, 'Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures' (2014) Spring 2014 *University of Pittsburgh Law Review* 337.

215 Jeff Sovern, 'Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures' (2014) Spring 2014 *University of Pittsburgh Law Review* 355.

216 Consumer Action Law Centre, Loddon Campaspe Legal Centre and WEstjustice, *Knock it off!* (November 2017), 28 – 29 <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>.

people in analogous position of having walked into a store and being able to walk away without loosing face.[217]

The *Knock it off!* report proposed a trial opt-in model for the solar industry, one reason being because the landscape at the time provided a unique opportunity to do so. While the pilot program was recommended as a way of testing the practical effectiveness of an opt-in model, it was also suggested in light of the then recently announced development of an industry code of conduct for all new energy products. Furthermore, CAANZ had concluded, as part of their ACL review, that an economy-wide study was necessary before giving further consideration to amending the ACL's unsolicited consumer agreements provisions.[218]

However, the landscape has since changed and there is now a better opportunity for a superior solution. The Andrews Labor government has committed to banning door-to-door energy sales.[219] It is not clear whether this pre-election promise applies to new energy products, however, Consumer Action's view is that it should. The significant and wide-spread incidence of marketplace detriment identified in this report quite clearly warrants the inclusion of new energy products and services, such as rooftop solar panels, in the Victorian Government's ban of door-to-door sales. Unsolicited sales in this sector are undesirable, given the complex nature of the product, and the number of relatively small and new firms in this sector.

While Consumer Action would welcome the banning of unsolicited solar panel sales for these reasons, the most comprehensive and principled approach would be to ban the making of unsolicited consumer agreements all together. Three significant reasons for this are that: the problems do not seem to be going away; the problems exist across many different industries; and the problems disproportionally impact people experiencing poverty or other factors of vulnerability and this is simply unfair.

The issues associated with unsolicited consumer agreements are not new and have persisted in the face of significant regulation and significant regulatory oversight. Since Consumer Action and the FCRC released their joint report in 2007 describing the problematic nature of direct sales channels,[220] significant regulatory reform has occurred. This includes the introduction of the national CCA and ACL. As described above, the ACL contains a number of provisions that are intended to strike a fairer balance between unsolicited retailers and households.

Furthermore, to ensure these protections are effective, every consumer protection agency in Australia allocates significant resources for the development of information and materials for consumers, advising them of these rights in relation to unsolicited sales.

Further still, and despite the significant regulation and resources allocated to the task, certain sectors and communities have found it necessary to take additional, non-legislative steps to counter harm caused by unsolicited sales.[221] In the solar market, this has been the CEC and SEC Codes. In the traditional energy market, major participants AGL, Origin and EnergyAustralia, have all opted out of the unsolicited sales practice all together.

While there are some problems unique to the solar industry (discussed elsewhere in this report), problems associated with unsolicited consumer agreements is not one of them. Experience has shown that consumer harm from unsolicited sales comes in waves and often migrates from product to product. While solar panels are the product of the moment, in the past we have

217 Consumer Action Law Centre, Loddon Campaspe Legal Centre and WEstjustice, *Knock it off!* (November 2017), 29 <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>.

218 In 2016, CAANZ released an interim report for their ACL review, suggesting an opt in model but ultimately chose to maintain the status quo. In doing so, however, CAANZ recognised that harm was being done by unsolicited selling in some sectors but that there were gaps in the available data. To plug this gap, CAANZ proposed an economy wide study of unsolicited selling to further inform policy decisions, flagging that additional interventions may be required. The economy wide study was scheduled for commencement in 2017 and 2018, however, the progress is unclear: Commonwealth of Australia, *Meeting of Ministers for Consumer Affairs Thursday 31 August 2017 Melbourne, Australian Consumer Law* <http://consumerlaw.gov.au/communiques/meeting-9-2/>.

219 Victorian Labor, *Fact Sheet: Cracking Down On Dodgy Energy Retailers – Labor's Energy Fairness Plan* <https://www.yammer.com/consumeraction.org.au/topics/35127022#/uploaded_files/159914456?threadId=1195139474>

220 Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* (November 2007) <https://energyconsumersaustralia.worldsecuresystems.com/grants/270/AP-270-CALC-report-on-direct-marketers.pdf>.

221 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>.

seen unsolicited sales cause harm through the selling of a range of products and services including:[222] home security systems; encyclopaedia; vacuum cleaners; educational software; and traditional energy products and services. The next "problem product" may well be home battery storage systems. Applying a ban simply to the solar industry would not prevent the harm caused by unsolicited sales, it would only prevent harm from the unsolicited sale of solar products. It would therefore be a less principled approach.

Finally, any harm resulting from unsolicited sales disproportionately impacts people experiencing vulnerability. Consumer Action implores legislators to give more weight to this factor than they have in the past. In the explanatory memorandum to the ACL, the legislators acknowledged this harm caused by unsolicited sales but weighed it against the 'convenience' some people may experience from unsolicited sales and also weighed it up against the interests of businesses.[223] The argument of convenience does not hold water in today's diverse and easily accessible market place, if ever. Furthermore, to quote Energy Australia CEO, Catherine Tanna, when explaining Energy Australia's decision to stop door knocking in 2013, 'there's no good reason for the practice and we'd like to see all retailers do the right thing and stop door-to-door sales.'[224]

RECOMMENDATION 3:

Ban all unsolicited consumer agreements.

222 Some of these trends have been reported by Consumer Action in the past. See, for example: 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>; Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* (November 2007) <https://energyconsumersaustralia.worldsecuresystems.com/grants/270/AP-270-CALC-report-on-direct-marketers.pdf>.

223 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>.

224 Brian Robbins, 'Call to halt door knocking energy sales rebuffed', *Sydney Morning Herald* (online), 29 August 2016 <https://www.smh.com.au/business/call-to-halt-door-knocking-energy-sales-rebuffed-20160826-gr1vxk.html>.

5.5 Product Faults and Poor Performance

A significant number of enquiries from Consumer Action's advice line services relate to product faults. Examples of the types of complaints we receive are provided in the case studies below.

CASE STUDY 4: "MARTHA" & "GREG"

Illustrative of the following issues:

- **Faulty product**
- **Inadequate dispute resolution**

Martha and her husband Greg live in rural Victoria. Both rely on Centrelink income. They bought their house in early 2018 with a $20,000 solar system already installed.

A few months later Greg was cleaning the panels when he noticed some lines in the panels, commonly known in the solar panel industry as 'snail trails.' Snail trails can indicate a loss of solar panel productivity.

Martha and Greg contacted the ex-owners of the house to find out where they had bought the solar panels. The former owners obliged, confirming the Solar Retailer they dealt with and forwarding the original invoice for purchase of the panels. They also discovered that the panels came with a 25-year warranty.

However, when Martha and Greg contacted the Solar Retailer, the Solar Retailer disputed their liability under the warranty.

Martha and Greg attempted to press the issue, but the Solar Retailer became evasive - repeatedly claiming that the person handling the matter was away sick.

Martha and Greg then went to Consumer Affairs Victoria, who advised that if the Solar Retailer did not comply with the warranty by the end of the week then Martha and Greg should lodge a claim against them in VCAT.

Martha and Greg sought Consumer Action's assistance to enforce their rights under the consumer guarantee provisions of the Australian Consumer Law, but on learning they would need to pay for an electrician's report to accompany a VCAT claim they chose to discontinue the matter.

Martha and Greg were not in a financial position to pursue the action. Unfortunately, they did not have access to a free Ombudsman service to hear their dispute.

CASE STUDY 5: "HENRY"

Illustrative of the following issues:

- **Faulty product**
- **Inadequate dispute resolution**

Henry is a self-employed computer technician in his late 50s. He earns a modest income while he and his wife support two children in suburban Melbourne. Family finances are tight.

Following a bequest from his late father in 2013, Henry purchased an $18,000 solar and battery system from a Solar Retailer. Soon afterwards, Henry found that the system had a faulty inverter.

He pursued the matter with the Solar Retailer who replaced it twice, but the faults persisted. From 2017 the Solar Retailer refused to service the system and Henry had to send the latest inverter interstate to have it assessed, where it was confirmed to be faulty.

Henry eventually paid a further $8030 to install a new, functioning inverter through another company.

In late 2016 Henry lodged a compensation claim in VCAT against the Solar Retailer. After an arduous and stressful process involving five hearings, Henry was successful with his claim.

VCAT ordered the Solar Retailer to compensate Henry almost $7000.

Unfortunately, the Solar Retailer did not make the compensation payment, so Henry was then forced to apply to the Magistrates' Court for an enforcement order.

When the owner of the Solar Retailer was called to give oral evidence at the Magistrates' Court hearing, he gave evidence that the Solar Retailer had ceased trading in 2016 and had less than $30 in its trading bank account.

The Magistrates Court awarded Henry $187.50 for out of pocket expenses.

Other organisations have reported on the issue related to product faults in rooftop solar systems. In December 2018, the Auditor General's office released an independent performance audit of the Clean Energy Regulator who administers the Small-scale Renewable Energy scheme Target under the Renewable Energy Target scheme. For installations to be eligible for the financial incentives under the scheme, they must meet the Australian and New Zealand standard and comply with the state and federal safety regulations.[225] As part of the administration of this scheme, the Clean Energy Regulator must arrange inspections of a statistically significant selection of small generation units installations (primarily solar systems[226]) for compliance with the safety and quality related eligibility criteria.[227]

225 Clean Energy Regulator, Australian Government, Small-scale systems eligible for certificates (20 February 2019) Renewable Energy Target <http://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Agents-and-installers/Small-scale-systems-eligible-for-certificates>.

226 Australian National Audit Office, Commonwealth Government of Australia, *Auditor-General Report No. 18 2018–19 Administration of the Renewable Energy Target*, 4 <https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2018-2019_18.pdf>.

227 Ibid 48.

The audit report found that between 21.7% and 25.7% per cent of small generation unit installations inspected were rated as 'unsafe' or 'sub–standard' each year, with the exception of the years 2012 and 2013.[228] A sub-standard rating was given where work was required to rectify the non-compliance or where the non-compliance created a high risk.[229] Examples of non-compliance and risks in this category include: the risk of inverter falling; freestanding panels were not secure; or incorrect wiring at the inverter. An unsafe rating was given were there was a perceived high risk caused by the non-compliance, for example, exposed live wiring or where the rooftop panels were not secure.[230]

The audit report notes that the Clean Energy Regulator can suspend installers from the scheme where they have been subject to at least three adverse inspection findings but also reports that the Clean Energy Regulator is yet to impose this type of sanction.[231] The audit concluded that the regulator's inspection activities would be more valuable if they continuously monitored inspection results for multiple adverse findings and if they suspend installers where appropriate.[232]

Responses to the audit report were varied. The report promoted the Energy Minister, Angus Taylor, to write to his state counterparts warning that lives could be at risk if action was not taken to address poor solar panel installations.[233] From a news article published in The Australian, an electrician with 8 years' experience in the solar industry seemed less surprised, commenting that:

"I get a lot of calls. A lot of them are solar orphans. The sharks have come in, they've whacked it in. No design, no care, poor workmanship... There are thousands that have closed. They change their name, they have a different director. Half of my customers are solar orphans. The companies may be there, but they don't answer."[234]

228 Ibid 49.
229 Ibid 49.
230 Ibid 49.
231 Ibid 51.
232 Ibid 51.
233 Simon Benson, 'Warning of deaths over solar panel installations', *The Australian* (online), 20 December 2018 <https://www.theaustralian.com.au/national-affairs/climate/warning-of-deaths-over-solar-panel-installations/news-story/dccd1f4a8169cadb5941b6d99591ee7a>.
234 Sam Buckingham-Jones, 'Fly-by-night operators installing faulty solar panels', *The Australian* (online), 20 December 2018 <https://www.theaustralian.com.au/business/mining-energy/flybynight-operators-installing-faulty-solar-panels/news-story/d7479168aa51b13073ebacfaf7080aed>.

The results of a 2018 consumer survey also made significant findings relating to quality and performance of rooftop solar systems. Consumer advocacy group, CHOICE, surveyed more than 1000 CHOICE members across Australia about their experience buying and owning a solar system. The survey found that one third of respondents have experienced a problem with their system and around one third have had problems with their installer.[235]

The top five problems reported were:[236]

- significant installation delays;
- incorrect or faulty wiring;
- roof damage;
- missing or inadequate documentation and paperwork; and
- a failure to honour or facilitate the warranty process.

However, the survey also found that customer satisfaction levels were high and the quality of installations seem to be improving.[237] That being said, on a previous occasion in April 2018, CHOICE reported that CHOICE member complaints about the solar industry had doubled in the preceding year.[238] Consumer Affairs Victoria have also listed misleading and false claims about solar and energy products an enforcement priority,[239] suggesting that they too have received a number of complaints about these issues.

Information provided to Consumer Action through our policy and campaigns work, suggests that an emerging issue, particularly in regional Victoria, relates to the negative impacts that voltage and export limiting can have on solar systems performing as promised. Export limiting occurs when electricity network operators limit the export of electricity from households to the grid in order to reduce the negative impacts of too much solar electricity entering the grid. Anecdotal evidence provided to Consumer Action is that export limiting is common for some regional area and occurs on an arbitrary basis, impacting the finances of some households but not others. Further, we have been told that these areas are also being affected by high voltages which can cause damage to solar inverters. However, because high voltages are the responsibility of network operators and distributors and not solar retailers, damage caused in this way can negatively impact a person's ability to access their ACL guarantees and any rights they have under additional warranties. Consumer Action understands that households are only becoming aware of these risks once households have already entered into solar agreements.

The current avenues for redress for people with underperforming or faulty rooftop solar systems is to go to VCAT claiming a breach of the ACL consumer guarantee provisions and, if applicable, a breach of a warranty.

Based on Consumer Action's casework, it appears that people trying to resolve disputes about solar product faults are likely to face hurdles in two areas. The first is knowing what is causing the underperformance and who is responsible for the fault. The average person is unlikely to have the technical expertise to diagnose what is causing underperformance or faults. Solar systems are complex, involving multiple parts and requiring multiple parties to ensure proper installation and grid connection. This creates fertile ground for blame shifting between the entities involved. In theory, this shouldn't occur because the ACL guarantees apply to the supplier of the goods, in this case the solar retailer, who can then seek compensation from the manufacturer.[240] The retailer would also be responsible for the work of any subcontractors acting as their agents and so would be responsible for the installation work if the solar retailer had arranged this to be done

235 Alison Potter, Choice, *Survey results: Are you happy with your solar panels?* (14 December 2018) <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>.
236 Alison Potter, Choice, *Survey results: Are you happy with your solar panels?* (14 December 2018) <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>.
237 Alison Potter, Choice, *Survey results: Are you happy with your solar panels*? (14 December 2018) <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>.
238 Alison Potter, Choice, *Dodge the shonks* (10 April 2018) <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/how-to-find-a-good-solar-installer>.
239 Consumer Affairs Victoria, *About us* (31 January 2019) <https://www.consumer.vic.gov.au/about-us>.
240 ACL s 274.

through a subcontractor. However, along with having poor technical knowledge, an individual is also unlikely to be armed with a strong understanding of their consumer rights when dealing directly with their solar retailer. In these circumstances, it is easy for people to be given the run around.

The second hurdle faced by many people with disputes relating to product faults is being able to prove their case at VCAT. For example, if a person were to make a claim that a solar retailer breach the consumer guarantee as to acceptable quality, they would have to be able to prove, with evidence and on the balance of probabilities, that the goods were not of acceptable quality. The ACL says that:[241]

(2) Goods are of acceptable quality if they are as:

a. *fit for all the purposes for which goods of that kind are commonly supplied; and*

b. *acceptable in appearance and finish; and*

c. *free from defects; and*

d. *safe; and*

e. *durable;*

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable…

The available remedy for a breach of a consumer guarantee depends on whether the failure to meet the guarantee is a 'major failure' or not. There is a legal test saying what amounts to a major failure. This test would also have to be met, on the balance of probabilities, if a person wanted VCAT to order the relevant remedy for a major failure. This is a major evidentiary hurdle.

If the person wanted to prove there was a breach of a voluntary warranty, the person would again need to prove, with evidence, the nature and extent of the product fault and address any other terms and condition of the voluntary warranty. For example, sometimes voluntary warranties will exclude certain faults and the retailer will claim they do not have to pay to fix those faults.

A person is also likely to struggle to prove a case of false or misleading information about the capabilities of the solar system and the savings it could deliver if the system is underperforming. To prove a case at VCAT it would be necessary to articulate exactly how far the system falls short of the representations made and exactly how much money has been lost as a result. This would be extremely difficult to calculate and articulate given the performance of solar panels depends on conditions like the weather. This is even more difficult to calculate when the loss is ongoing. This was one of the difficulties that Henry from case study 5 experienced.

It is extremely difficult, if not impossible, for people to prove these kinds of ACL breaches without evidence from an independent expert about the nature and extent of the product fault or the degree and cause of the underperformance. Breaches of this kind will often involve highly technical questions about the state of the solar panels and what is needed for their repair. Neither VCAT tribunal members nor the average person typically have this technical expertise. As we saw in the case studies of Henry, Martha and Greg, an inability to obtain an expert report proved fatal to each case. Martha and Greg could not afford the cost of an expert report and so did not go ahead with their case, while Henry went to VCAT without an expert report and failed to provide enough technical evidence to prove a number of his claims to the satisfaction of the VCAT member. The VCAT member therefore only ordered that the solar retailer pay a portion of Henry's claim.

Steps have been taken outside of the legal framework to reduce some of the harm caused by product faults. The CEC Code provides for a standard minimum 5-year warranty covering the operation and performance of the whole solar system, including workmanship and products,[242] Under the warranty, the retailer is responsible for addressing any problems relating

241 ACL s 54.

242 Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), 6 and 17 <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>.

to workmanship or product that arise during this period.[243] In the current draft of the NET Code, the warranty period is not specified but says it will be set by the Code administrator for each particular energy product.

The Clean Energy Regulator (who administers the commonwealth Small-scale Renewable Energy Scheme) is also in the process of rolling out its Solar Panel Validation Initiative. This initiative seeks to address the issue of sub-standard and counterfeit solar panels in the Australian market[244] following the identification of non-genuine Canadian Solar branded rooftop solar panels that had been installed across New South Wales and Queensland in 2016.[245] The initiative enables solar installers to scan a barcode on the panels to check them against a database of approved solar panel manufacturers. Both the Solar Panel Validation Initiative and the CEC Code suffer from the same limitation. They are both voluntary schemes that do not have 100% sign up across the solar industry.

One viable solution to the issue of faulty and underperforming solar panels would be to introduce a statutory warranty that would apply to all solar retailers. A statutory warranty is a mandatory warranty written into the law that must be given by the entity specified by that law. As in the CEC Code, the statutory warranty ought to cover the operation and performance of the whole solar system, including workmanship and products. Under the warranty, the solar retailer would be solely responsible for addressing any problems relating to the workmanship or physical components of the system that arises during the statutory warranty period.

In relation to an appropriate warranty period, a minimum of a 10-year whole system warranty is proposed. Technical information provided to Consumer Action indicated that an appropriate period for a performance warranty (up to 80%) should be 25 years and for a product warranty, 10 years. Consumer advocacy group, CHOICE, reports that most solar PV systems should last at least 25 years.[246] However, it is important to note that a statutory warranty would not prevent retailers offering longer warranties on particular parts or longer performance warranties of their choosing nor would it replace the ACL but would rather provide an additional protection.

Statutory warranties for particular industries are not unusual. Under the *Motor Car Traders Act 1986* (Vic), a used car purchased from a motor car trader automatically comes with a statutory warranty in the sale contract if the car is less than 10 years old and has been driven less than 160,000km.[247] The warranty period is 3 months or however long it takes to drive 5,000km, whichever is shorter.[248] If a defect appears during this period, the motor car trader must fix it or arranged for it to fixed.[249] The *Domestic Building Contracts Act 1995* (Vic) also contains a number of automatic implied warranties that builders and tradespeople must honour. These implied warranties transfer to a new owner for up to 10 years from completion of the work.[250] Both of these industry specific statutory warranties apply in addition to the ACL consumer guarantees.

A statutory warranty is warranted in the solar industry for a number of reasons. The first reason related to the nature of the product and its significance to households. The products and related services that solar retailers offer is much more complex than the products offered by typical retailers, who mostly sell single stand-alone items. Rooftop solar systems are relatively expensive to purchase, they are affixed

243 Ibid 6.

244 Clean Energy Regulator, Australian Government, T*he Solar Panel Validation Initiative Information for manufacturers* <http://www.cleanenergyregulator.gov.au/DocumentAssets/Documents/Solar%20Panel%20Validation%20Initiative%20-%20Manufacturers%20prospectus%20factsheet.pdf>.

245 Clean Energy Regulator, Australian Government, *Replacement of non-genuine solar panels* (30 November 2016) Renewable Energy Target <http://www.cleanenergyregulator.gov.au/RET/greenbank>.

246 Chris Barnes, Choice, *How to Buy the best solar panels for your home* <https://www.choice.com.au/home-improvement/energy-saving/solar/buying-guides/solar-panels#standards>.

247 *Motor Car Traders Act 1986* (Vic) s 54(1).

248 *Motor Car Traders Act 1986* (Vic) s 54(2B).

249 *Motor Car Traders Act 1986* (Vic) s 54(2A).

250 Consumer Affairs Victoria, *Implied warranties and domestic building insurance – checklist* (23 February 2019) <https://www.consumer.vic.gov.au/housing/building-and-renovating/checklists/implied-warranties-and-domestic-building-insurance>.

to people's homes, contribute to the creation of an essential service (electricity) and directly impact the finances of a household.

Secondly, a properly articulated statutory warranty for solar panels would create more certainty. How long should a solar retailer be responsible for repairing any defects or causes of underperformance? How long must a product be of acceptable quality? The ACL does not answer these questions with any degree of certainty. A statutory warranty would create this level of certainty.

Thirdly, a whole system statutory warranty would reduce the complexities currently existing for people trying to claim on a warranty or their ACL rights. Solar systems are made up of separate products but are sold as a single integrated and complex system. Often, each component on a solar system comes with a different warranty. For example, in case study 5, the solar retailer tried to argue that the solar panels Henry purchased had a five year warranty but the inverter had a one year warranty (this argument was not accepted by the tribunal member). As was the case with Henry, having separate warranties can be misleading and create further complexities for people trying to navigate their contractual rights and trying to have a technical fault remedied. Having a whole system statutory warranty against retailers would also reduce the amount of blame shifting that Consumer Action currently sees when people try to resolve their complaints directly with their solar retailer. An analogy can be made to suppliers of cars who are required to take responsibility for the whole vehicle and are not allowed to shift responsibility to the suppliers of component parts. Retailers of solar systems should be no different.

Lastly, a statutory warranty of this kind may reduce the number of people forced to take legal action when product faults arise. This is because it would clarify how long a person can expect their system to perform and at what level. It would also make it clear that the solar retailer is responsible for the performance of a solar system and reduce the amount of room available for a dispute. Of course, disputes will still arise over the performance of the rooftop solar systems. In case studies 4 and 5, Henry, Martha and Greg all had performance warranties on their systems but still needed to go to VCAT to enforce their rights. Both cases fell down due to a lack of expert evidence diagnosing the problems with the systems. This problem may be ameliorated to some degree if people had the opportunity to take their case to a specialised external dispute resolution body. Dispute resolution is discussed in the next section of this report.

RECOMMENDATION 4:

Introduce a 10-year whole system product statutory warranty.

5.6 Lack of Affordable Dispute Resolution

There is a growing need for an affordable dispute resolution body to hear solar related disputes. Case studies 4 and 5 illustrate some of the difficulties with the current avenues available for solar dispute resolution. Individuals can go through the solar retailers' internal dispute resolution but many of Consumer Action's clients have had negative experiences with some retailers who engage in buck-passing.

To enforce their ACL rights, consumers are then forced to go to VCAT, which, as Henry from case study 5 reflected is much more 'court like' and formal than an ombudsman. As Henry also found out, to be successful in cases involving technical faults a person usually needs to have an independent expert report to help prove their case. These reports are expensive and, like Martha and Greg from case study 4, many of Consumer Action's clients simply cannot afford the cost.

Unfortunately, the experiences of Martha, Greg and Henry are not unique. While VCAT was established to create an accessible, efficient, cost efficient and independent judicially governed tribunal,[251] VCAT can be a cumbersome and intimidating forum for many consumers. It can also be prohibitively expensive when expert reports are required. Consumer Action has presented similar stories but in the context of motor car disputes[252] while campaigning for a motor car dispute resolution service which would provide a free technical vehicle assessment.

The Victorian Government has also recognised the accessibility issues with VCAT. Following its 2016 Access to Justice Review (**The Review**), the Review report stated that:[253]

"The resolution of small civil claims at VCAT has become too complex, and disadvantaged Victorians and Victorians residing in regional areas continue to experience barriers to accessing justice."

The Review recommended a number of targeted reforms in order to improve access to justice. One such reform related to the facilitation of the early and cheap resolution of motor car disputes. The recommendation involved two elements: a compulsory conciliation service by Consumer Affairs Victoria and government funding for a technical assessment to assist dispute resolution.[254]

In many ways, the issues seen in car disputes are analogous to those involving rooftop solar. Like car disputes, disputes about faulty solar systems will often involve highly technical questions regarding the state of the products or parts, the quality of the services, whether faults can be repaired and, if so, the cost of the repairs. A similar solution involving a dedicated dispute resolution conciliation service may therefore be appropriate.

251 Government of Victoria, *Access to Justice Review Volume 1 Report And Recommendations* (August 2016), 244 < https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/3314/8601/7221/Access_to_Justice_Review_-_Report_and_recommendations_Volume_1.PDF>.

252 See, for example, Consumer Action's 2018 Lemon-aid report and information about our ongoing *Fix my Car!* campaign. Available at: https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/06/LemonLaws_ConsumerActionLawCentreJune2018.pdf

253 Above n 250, 244.

254 Above n 250, 287.

One attractive solution is for the Energy and Water Ombudsman Victoria (**EWOV**) to be given expanded jurisdiction to hear complaints regarding solar panels. Indeed, the Review report noted that:

"Industry and government ombudsmen schemes appear to embody some of the best elements of alternative dispute resolution: accessibility, speed, low cost, flexibility, efficiency, support, capacity to identify systemic issues, and ability to redress power imbalances."[255]

The Review then went on to explain five factors identified by the Productivity Commission that indicate the suitability of an ombudsman scheme for a particular industry. Four out of those five factors apply to the retail solar industry. They are: essential services are involved; there is significant asymmetry of information, such that consumers would have difficulty asserting their rights; and there is a large number of disputes.[256]

Currently, however, EWOV cannot hear the majority of disputes about solar purchases and installations. EWOV can only resolve complaints made by "customers" about "participants" to the EWOV scheme.[257] According to its Constitution and Charter, participants are businesses which:

- are legally required to have a licence; or
- legally required to become a member of EWOV;[258] or
- participate in the energy industry and have entered into an agreement with EWOV to be bound by the scheme.[259]

Electricity retailers are required by law to have a licence[260] and consequently they are required to be a participant of EWOV. Solar panel retailers and installers, however, are not required by law to have a licence or else have been legally exempted from the licence requirement and therefore are not required to be part of an alternative dispute resolution scheme. While it may be theoretically possible for solar panel retailers and installers to voluntarily enter into an agreement to be bound by EWOV, it appears they have not done so.

In any case, it is generally accepted that EWOV's jurisdiction in relation to the new energy market, including the solar panel industry, is limited.[261] EWOV's website publicises that while it can help with solar related issues connected to the retailer or distributor such as tariff concerns or meter configuration, it cannot help with problems with a private solar installer.[262] Despite this, EWOV still receives complaints related to solar but is unable to hear about one in five of those complaints received.[263]

255 Above n 250, 233.
256 Above n 250, 215.
257 EWOV, *Energy and Water Ombudsman (Victoria) Charter* (14 March 2018), cl 2.3 <https://www.ewov.com.au/files/ewov_charter_140318.pdf>.
258 EWOV, *Constitution of Energy and Water Ombudsman (Victoria) Limited* (17 may 2010), cl 8.1 <https://www.ewov.com.au/files/ewov-constitution.pdf>.
259 Ibid cls 2.1 (definition of 'participant' and 'contracting participant') and 7.2.
260 Electricity Industry Act 2000 (Vic) s 16.
261 John Thwaites, Patricia Faulkne and Terry Moulder, Independent Review into the Electricity & Gas Retail Markets in Victoria (August 2017), 45 <http://apo.org.au/sites/default/files/resource-files/2017/08/apo-nid102181-1208661.pdf>. Also see, the number of reported solar complaints received by EWOV falling out of their jurisdiction: EWOV, *Res Online 25* (November 2018) <https://www.ewov.com.au/reports/res-online/201811>.
262 EWOV, Solar < https://www.ewov.com.au/resources/videos/solar> .
263 EWOV, *Res Online 26* (February 2019) <https://www.ewov.com.au/reports/res-online/201902>.

The gaps in EWOV's jurisdiction have been recognised in the 2017 Independent Review into the Electricity & Gas Retail Markets in Victoria (the Independent Review). Recommendation 10 of the Review proposed that EWOV's powers be expanded to cover emerging businesses, products and services. [264]

In their final response to the Independent Review, the Victorian Government stated that it supported recommendation 10A, elaborating that:[265]

"The Government will make sure the Ombudsman has the appropriate powers to assist with complaints about new and emerging energy businesses, products and services. The Government has started this work by expanding the powers of the Ombudsman to cover customers in embedded electricity networks..."

However, it also placed a caveat on this support by stating that the Victorian Government would work with COAG Energy Council to ensure the proposed Behind the Meter code provides strong protections for consumers and that: [266]

"If it deems these protections to be inadequate, the Government will extend the Ombudsman's jurisdictions to cover these products and services."

This is far from unconditional support for an expanded EWOV jurisdiction.

The current consultation draft of the NET Code does not create an industry dispute resolution scheme and Consumer Action understands that there is no intention for the NET Code to do so. It is submitted, therefore, that the protections will not be adequate to deal with the injustices experienced by people who have no other option than to go to VCAT. Furthermore, any other protections provided in the Code will lack regulatory strength and all inclusive application due to the inherent nature of the Code as a voluntary industry code.

One way of increasing membership and incentivising greater compliance with the CEC Code and its eventual successor is to link it to both federal and state financial incentives schemes. That is, a person will only be entitled to receive a financial benefit from the scheme if they purchase a rooftop solar system through a

264 Above n 261, 45.

265 Department of Land, Water and Planning, Victoria State Government, *Victorian Government Final Response to the Independent Review of the Electricity & Gas Markets in Victoria* (2018), 16 <https://www.energy.vic.gov.au/__data/assets/pdf_file/0034/396583/Independent-and-Bipartisan-Review-of-the-Electricity-and-Gas-Retail-Markets-in-Victoria.pdf>.

266 Ibid 16.

retailer that is approved under the code. In the case of the Victorian scheme, the government announced on 22 March 2019, that they would be making CEC code membership an eligibility criteria under the scheme.[267] This change is to start rolling out from 1 July 2019, with some retailers not required to sign up until 1 November 2019.

Consumer Action welcomes this change as we believe it will create a strong incentive for retailers to sign up to the Code, however, is unlikely to result in universal membership as not all retailers rely on rebates. It is also likely to result in higher levels of compliance with the Code among its members as a failure to comply may result in being removed as an approved retailer and therefore removed as a retailer through which people can access government initiatives.

However, it is unlikely to result in universal membership as many solar systems have already been installed under the scheme, not all retailers rely on rebates and the federal government's incentive program is not linked to the Code. To be effective, this change would need to be supported by stronger oversight and enforcement activities by the CEC. While the CEC currently undertakes some compliance activities, these would need to become more regular, systematic and supported by a strong enforcement culture. The CEC's guidelines relating to when they will suspend or remove a signatory as an approved retailer would also need to be strengthened.

For these reasons, linking the CEC Code to financial incentives currently available through government policy, should not be considered the silver bullet option and taken in the place of increasing the jurisdiction of EVOV. Furthermore, this could amount to a short term and unstable solution. Energy and environmental policies are highly prone to change according to the government of the day. Should government incentives be phased out, as they appear to have done in England,[268] so too will any membership and compliance incentive.

In contrast, extending the jurisdiction of EWOV is a more long-term and more stable solution. This would probably need to be done through an industry funded registration and licencing scheme. However, it is noted that the Access to Justice Review recommended that the motor vehicle dispute conciliation service and technical assessment be administered by Consumer Affairs Victoria and assumedly, therefore, funded by the government.

One question that arises in the face of the potential extended EWOV jurisdiction is whether EWOV's jurisdiction will be extended to the extent to allow them to hear complaints against businesses that finance the purchase of rooftop solar. Currently, there is no clear pathway for people to access free and informal dispute resolution services for claims against finance providers. The pathway is muddied by question of:

- whether a finance arrangement would fall under the NCC and NCCPA's definition of 'credit' and therefore whether AFCA is available to resolve disputes in relation to the finance arrangement;
- whether VCAT can hear disputes in relation to financial services that are not regulated by the NCC or NCCPA (because they do not meet the legal definition of 'credit' under these laws); and
- whether VCAT can hear claims against financial service providers if they are 'linked credit providers' under the ACL.

Generally speaking, however, finance providers involved in the purchase of solar panels usually claim they are exempt from the NCC and NCCPA and therefore AFCA is generally not available. VCAT is also generally unavailable to hear disputes in relation to financial goods or services. If both positions are true, individuals are left with courts as their only dispute resolution option.

These issues would be resolved if, as recommended in this report, solar retailers and solar purchasers

267

268 See, Adam Vaugham, 'UK home solar power faces cloudy outlook as subsidies are axed', *The Guardian* (online) 28 June 2018 <https://www.theguardian.com/environment/2018/jun/27/uk-home-solar-power-subsidies-costs-battery-technology>.

were unable to use unregulated finance providers to finance the purchase of solar panels. As only licensed and regulated credit would be available, people would then be able to take any claims against credit providers to AFCA.

While having both EWOV and AFCA available to people with complaints about solar transactions involving finance would add a layer of confusion for consumers, it is probably a preferable option compared with extending EWOV's jurisdiction to hear credit law cases in order to create a one stop dispute resolution shop. The national credit and financial law schemes are complex and highly specialised and EWOV may not be in the best position to hear disputes related to these laws. While EWOV deals with complaints related to debt collection, credit default listing and financial hardship arrangements,[269] they do not appear to hear more complex credit law claims such as irresponsible lending or unconscionable conduct. These laws therefore may best be dealt with by AFCA. Any confusion people experienced in knowing which service to go to lodge a complaint with could be addressed by clear regulation and strong referral process.

RECOMMENDATION 5:

Extend EWOV's jurisdiction to hear complaints about all new energy products and services.

269 EWOV, *Res Online 25* (November 2018) <https://www.ewov.com.au/reports/res-online/201811>.

5.7 Business Closures

Consumer Action has encountered a number of cases where individuals have been frustrated in obtaining a remedy because a solar retailer has gone out of business. We are concerned that some of these cases involve deliberate phoenixing behaviour, where businesses intentionally shut shop to avoid their liabilities. Case study 2 involving Tui demonstrates the difficulties that people face when their retailer goes out of business or where their business is wound down.

A further illustration is set out below in case study 6. In this case, Consumer Action's client, 'William', was put in a compromised position under the threat that the solar retailer was going out of business. This case study also demonstrates the kinds of blame shifting that Consumer Action sees between solar retailers and solar installers.

CASE STUDY 6: "WILLIAM"

Illustrative of the following issues:

- **Faulty services**
- **Blame shifting**
- **Solar retailer going out of business**

William is in his early 60's and survives on workers compensation payments following a work place injury. William's injury left him wheelchair bound and suffering depression and anxiety. William lives alone in rural Victoria and cannot drive.

In late 2011, William purchased a solar panel system from a solar retailer for around $9,000. The solar retailer reassured William that his iron Klip Lok roof would not be drilled into when the panels were being installed and that special clamps would be used instead.

The solar retailer contracted with a third person to install the panels. Unfortunately, the installer did in fact drill holes into William's iron roof.

In early 2012, shortly after the panels were installed, William's roof began to leak. William immediately contacted the solar retailer who arranged for the installer to attempt to fix the roof.

However, a few months later, the roof began leaking again. When William contacted the solar retailer, they advised him that there was no one available to assist to repair the leak. William decided to contact a plumber instead, who patched up the most obvious holes.

Throughout 2013 and 2014, the roof continued to leak. William again contacted the solar retailer. Their response was that his 12-month warranty had now expired. William engaged another plumber, who again attempted to fix the roof without success.

Despite repeated attempts to contact the solar retailer throughout late 2015 to early 2017, William was unable to obtain a substantive response. Finally, in mid-2017 the solar retailer replied to William stating that they were not responsible for the roof damage and that if he wished, William could contact the installer.

In the meantime, William had contacted his own home insurer who, following a building report, denied his claim.

In late 2017, Consumer Action took William's case on. Despite early indications from the solar retailer that they wanted to reach an out-of-court settlement of the case, the retailer then stopped responding to communication and the matter remained unresolved.

Consumer Action has found it difficult to negotiate with the solar retailer. The solar retailer did not provide information (such as their insurer's reports about the damage), did not provide timely responses to communications and communicated with Consumer Action in a vague manner that lacked transparency. For example, after Consumer Action had discussions with some representatives of the solar retailer, they were later told that those representatives did not have authority to hold discussions and make decisions on behalf of the solar retailer. The solar retailer's position in relation to whether they are responsible for the damage to William's roof or whether the installer is responsible has also changed throughout Consumer Action's dealings with them.

Consumer Action filed a claim in VCAT on William's behalf to progress the matter. All the while, William's roof continued to leak.

Recently, and after filing the claim in VCAT, the solar retailer advised Consumer Action that they were winding up their company. This was concerning for William because, if the business shut down, it would make it much harder, if not impossible, for William to obtain compensation for the damage done to his roof. Fortunately, with Consumer Action's help William was able to reach an out-of-court compromise with the solar retailer and the solar retailer has paid William a substantial portion of his claim which he expects will be sufficient to cover the essential repair work required on the home. William will finally be able to fix his roof after over 7 years of fighting with the solar retailer.

Again, we are not the only ones who have noticed this problematic trend. LG Solar, who sell both residential and commercial solar, have recently published on their website a list of over 690 solar installation companies who have had a change in trading conditions, gone into liquidation or stopped trading between 1 March 2011 and 31 January 2019.[270] LG says the list was compiled from ASIC records. LG calculates that if each company operated for 4 years and completed 250 installations a year then there are 650,000 solar 'orphans' in Australia. While Consumer Action is unable to validate these calculations, it is concerning that so many companies in the solar retail industry are going out of business, undoubtedly leaving many people with worthless warranties and an inability to enforce their ACL rights. Consumer advocacy group, CHOICE, has also recently reported on the issue of solar companies going out of business noting that of all the member enquiries its consumer advisory service receives, at least 10% of these involve companies that have liquidated, 'leaving the member with a faulty system and little recourse.'[271] The trend has led CHOICE to, like LG, also hypothesise that there may be hundreds of thousands of solar panel 'orphans' across Australia.[272]

This story is not new, however. Other organisations have been reporting on the liquidation trend for several years, including news outlets[273] and other businesses in the industry.[274] Ironically, one of the solar retailers that warned potential customers against buying solar products auctioned off when solar companies fail due to 'mismanagement, competition' or 'selling poor quality equipment'[275] is now in the process of going out of business itself.

The impact of uncompensated loss was the subject of research commissioned by ASIC's Consumer Advisory Panel and reported in Susan Bell Research, Compensation for retail investors: the social impact of monetary loss, ASIC Report 240, May 2011. Some of the research's key findings included that:

- 17% of the group were living below the poverty line and had either lost their home or were perilously close to losing it;
- a further 27% were experiencing a significant decline in living standards to the point where they were now 'living frugally'.
- many suffered from long-term depression;
- affected consumers draw more on community resources than would otherwise be the case; and
- damage to consumer trust and confidence in the relevant industry.

In 2016, in an independent review of the CEC Code (**the CEC Code Review**), consultancy firm Cameron Ralph recommended the following in response to the 'trail of retailer insolvencies:'[276]

> *Recommendation 1*
>
> *In consultation with Code signatories, the Code Administrator should explore Code obligations that would assist a consumer with a claim, including a warranty claim, against a Code signatory that has become insolvent. Possibilities might include a national warranty*

270 LG, *LG Solar FAQS: Show me solar installation companies that have left the industry in Australia*, LG Solar FAQS <https://www.lgenergy.com.au/faq/buying-a-solar-system/show-me-solar-installation-companies-that-have-left-the-industry-in-australia>.

271 Alison Potter, Choice, *What to do if your solar company goes out of business: Thousands of solar systems in Australia have been left stranded by solar companies that have been wound up* (11 October 2018) <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/what-to-do-if-your-solar-company-goes-out-of-business>.

272 Choice, *'Sundown for your solar supplier?'* (Choice monthly magazine, February 2019), 40.

273 See, for example: Tom Arup, 'Lights out for solar firm,' The Sydney Morning Herald (online), 7 June 2011 <https://www.smh.com.au/business/small-business/lights-out-for-solar-firm-20110607-1fq14.html>; Daniel Palmer, 'Solar's deathly spiral and the $650 million Suntech fraud', The Australian (online), 31 July 2012 <https://www.theaustralian.com.au/business/business-spectator/solars-deathly-spiral-and-the-650-million-suntech-fraud/news-story/1f8e7f3e5c434f341c41a7841778ddd3>; *Renew Economy, Another big Australian solar installer in liquidation* (20 June 2016) https://reneweconomy.com.au/another-big-australian-solar-installer-in-liquidation-19816/; Cole Latimer, "Unavoidable': Rooftop solar panel installer True Value Solar to close', *The Sydney Morning Herald* (online), 13 November 2018 <https://www.smh.com.au/business/consumer-affairs/unavoidable-rooftop-solar-panel-installer-true-value-solar-to-close-20181123-p50hvh.html>.

274 See, for example: Energy Matters, Be Wary of Solar Company Liquidation Auctions (23 August 2012) <https://www.energymatters.com.au/renewable-news/em3352/>; Solar Grain, Solar Companies Gone into Liquidation <https://www.solargain.com.au/solar-companies-gone-liquidation>; Total Solar Solutions Australia, Why do so many solar companies file for bankruptcy?

275 Energy Matters, Be Wary of Solar Company Liquidation Auctions (23 August 2012) https://www.energymatters.com.au/renewable-news/em3352/>; Solar Grain, Solar Companies Gone into Liquidation <https://www.solargain.com.au/solar-companies-gone-liquidation>; ChoiceEnergy, *Top 4 reasons solar companies keep going under* (8 December 2018) <https://www.choiceenergy.com.au/solar-companies-liquidation/>.

276 Cameron Ralph Navigator, *Independent Review Solar Retailer Code of Conduct* (December 2016), Clean Energy Council Solar Accreditation Reports and Statistics, 10 <https://www.solaraccreditation.com.au/retailers/statistics.html>.

manager arrangement or a capped default fund arrangement. Measures of this kind would need to be carefully assessed to determine when they should be introduced…[277]

Consumer Action supports the further investigation and consideration of a default fund. However, if one of the eligibility criteria for access to the default fund was that the retailer had to be a CEC Code signatory, as the CEC Code Review seems to be suggesting, the impact on households would be limited. Especially because, as noted by the CEC Code Review, in its first three years of the CEC Code's operation, only two Code signatories had become insolvent.[278] While the situation is likely to have changed since the review, it remains true that voluntary take up of the CEC Code is relatively low and therefore the fund would only be available for a limited number of households. A more appropriately structured default fund would need to be supported by a licensing scheme for solar retailers under which they were required to contribute financially to the fund.

It is useful to look to similar schemes introduced or proposed in other industries. The Motor Car Trader's Fund and the proposed last resort compensation scheme for the financial industries provide good examples.

The retail car industry is regulated in Victoria by the Motor Car Traders Act 1986 (Vic) (**MCTA**). Under the MCTA, motor car traders must be licensed.[279] A licensee must pay an annual licence fee to the Business Licensing Authority.[280] All of the fees and any penalties issued under the MCTA goes towards the establishment of the 'motor car trader fund,'[281] essentially a statutory trust fund. A person can make a claim against the fund to be compensated for any loss suffered because:[282]

- the motor car trader has failed to comply with certain parts of the MCTA such as odometer tampering, a breach of the cooling off provisions and a breach of the statutory warranty contained within the MCTA;
- the motor car trader has failed to do certain things associated with the transfer of ownership of a used car; or
- loss has been incurred because of a failure of a motor car trader to comply with a court or tribunal order.

A motor car licence is automatically suspended 30 days after a successful claim is made against the fund.[283] Sole traders, partnerships, partners, companies and company directors will become ineligible for a licence under the MCTA if they have been a partner, director or a person involved in managing a partnership or body corporate that has had a claim admitted against the Motor Car Traders Guarantee Fund.[284] A similar provision attached to the licensing and administration of a default fund for the solar industry would therefore also help to address the concerns Consumer Action has with possible phoenixing behaviour.

For several years, Consumer Action Law Centre has been advocating for a last resort compensation scheme for victims of misconduct by insolvent financial service firms. In the wake of the Banking Royal Commission final report, the government has finally committed to an industry funded last resort compensation scheme, which banks would be compelled to contribute to under their licence.[285]

The elements of the type of scheme that Consumer Action has previously proposed in the past are:

277 Cameron Ralph Navigator, *Independent Review Solar Retailer Code of Conduct* (December 2016), Clean Energy Council Solar Accreditation Reports and Statistics, 16 <https://www.solaraccreditation.com.au/retailers/statistics.html>.
278 Cameron Ralph Navigator, *Independent Review Solar Retailer Code of Conduct* (December 2016), Clean Energy Council Solar Accreditation Reports and Statistics, 10 <https://www.solaraccreditation.com.au/retailers/statistics.html>.
279 MCTA s 7(1).
280 MCTA ss 23, 3 (definition of 'authority').
281 MCTA s 74(2)(b).
282 MCTA s 7(1).
283 MCTA s 29(1).
284 Consumer Affairs Victoria, *Apply for a motor car trader's licence* (16 February 2019) <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/licensing/apply-for-a-licence>.
285 Christopher Knaus, 'Banks may face criminal charges after final royal commission report', *The Guardian* (online), 4 February 2019 < https://www.theguardian.com/australia-news/2019/feb/04/banks-may-face-criminal-charges-after-final-royal-commission-report>.

- available only to retail claims;
- apply to unpaid compensation awards from external dispute resolution schemes, court and tribunal orders;
- apply to future claims and claims dating back 10 years, including legacy unpaid determinations or orders;
- for future claims, be funded by all industry participants;
- for past claims, be funded by industry with a contribution by Government.
- if full redress is not possible, a rationing mechanism based on financial hardship should apply;
- trigger ASIC action against the firm's directors and managers to reduce phoenixing and incentivise prudent behaviour;
- be administered by a separate, self-funding unit; and
- be governed by a board with an independent chair and an equal number of directors from industry and consumer backgrounds.

With appropriate modifications, these extensively researched elements could be considered for a last resort scheme for the solar industry. However, any solar industry default fund would similarly operate as a compensation scheme of last resort. That is, it would only be available for claims where:

- loss flows from misconduct by a licensee;
- the misconduct has been proven through an alternative dispute resolution provider, a court, tribunal or through the fund administrator in cases where the company has already gone out of business by the time the person is able to make a claim;
- the licensee then cannot meet the claim; and
- all avenues for compensation have been exhausted.

The default fund would therefore only be called on in a minority of cases.

A default fund may trouble some industry groups concerned that solar retail companies doing the right thing will be forced to pay for the wrongs of those with less ethical business models. However, such a concern would be misplaced. If, as is being suggested here, all solar retailers are required to have a licence and a portion of all licence fees go into the default fund, all players in the industry would be responsible for the harm being caused in the industry. Furthermore, if a retailer's licence can be suspended upon a successful claim on the fund and if the persons running that retail business are restricted from starting up a new solar retail business (as is the case in the motor car trader's industry), then surely this would result in reputational benefits for, and increased consumer trust in, the industry as a whole. This can only be a good thing from the perspective of retail business doing the right thing by their customers.

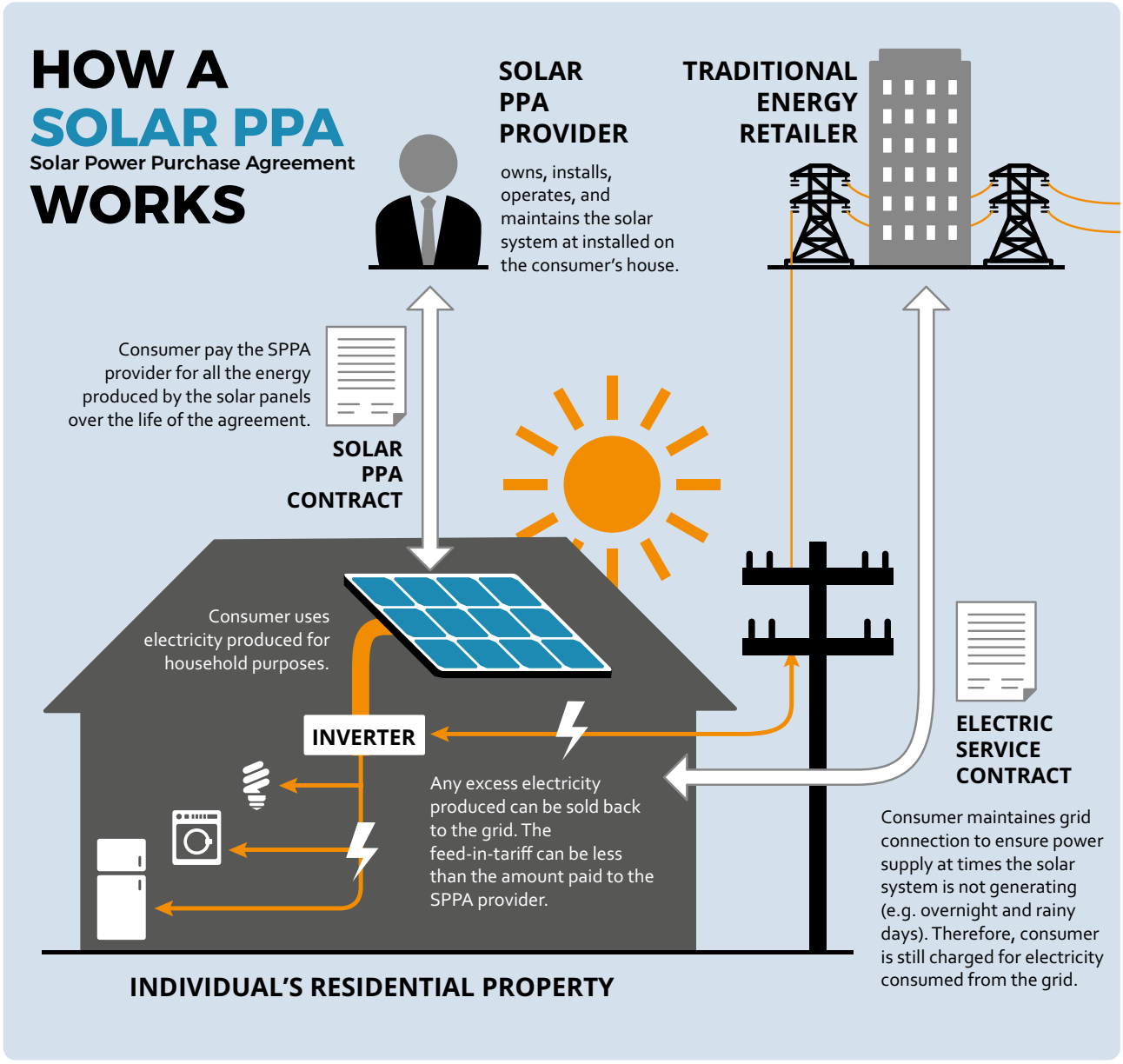
If such a scheme existed the harm and social impact of monetary loss would be reduced. Households with faulty 'solar orphans' would have an avenue for redress as would people like 'Henry', who was lumped with an underperforming rooftop solar system and an unenforceable and unpaid VCAT order.

RECOMMENDATION 6:

Introduce an industry-funded default or last resort compensation scheme.

5.8 Solar Power Purchase Agreements

Consumer Action have seen cases, such as case study 7 below, of poorly structured solar power purchase agreements or "Solar PPAs." A Solar PPA is usually a long-term contract to purchase electricity generated by a solar panel system installed on an individual's residential property but not owned by that individual. All of the electricity produced by the panels is purchased by the individual from the owner of the panels, regardless of the amount of electricity used by the household. The individual, who remains connected to the gird, is then free to sell any excess electricity to their energy retailer. This type of arrangement is illustrated below.



The purpose of solar PPA is to reduce the household's energy costs by reducing the amount of electricity they buy from traditional energy retailers. But, as we see with case study 7, a poorly structured solar PPA can have the opposite effect.

CASE STUDY 7: "HUIXUAN"

Illustrative of the following issues:

- **Solar PPA**
- **Installation of system not fit for purpose**
- **Potentially unconscionable and/or misleading conduct**

Huixuan is a 54-year-old single Mum who depends on Centrelink income. She is primarily Mandarin speaking, cannot read or write English and required an interpreter to give her instructions when communicating with Consumer Action.

In 2014 Huixuan was convinced by a friend of hers, acting as an agent for a Solar Power Retailer, to enter into a solar power purchase agreement.

Huixuan's understanding of the agreement was that, in return for allowing the Solar Power Retailer to install solar panels on her roof, Huixuan would receive free energy through the panels during the day and pay her usual Energy Retailer for energy she used at night, at normal rates.

Huixuan further understood there would be no charge for installation of the panels and she would not pay for energy produced by the panels that she didn't use.

Unfortunately, the contract that Huixuan entered into was complex and did not reflect her understanding of the arrangement. In fact, Huixuan's obligations under the contract would not even be clear to a native English speaker not acquainted with technical terms and industry regulations such as feed-in tariff rates.

The contract deemed Huixuan to be using 70% of electricity produced by the system and charged her a rate of 11.5c kW/h for that usage.

In addition, Huixuan was required to pay for electricity that the Solar Retailer acknowledged she did not use, at a rate of 8.8c kW/h, which exceeded the feed-in tariff rate at the time. This meant that Huixuan incurred cost for every kW/h the system produced in excess of her deemed usage.

It appeared the arrangement operated as an incentive for the Solar Power Retailer to install a system far in excess of Huixuan's power usage needs, and in fact they did install a system with production capacity of approximately 300% of her total monthly electricity usage prior to installation. In addition, Huixuan was charged $243.52 for installation of the panels.

Finally, the contract signed by Huixuan stipulated a 15-year term.

When referred to Consumer Action, Huixuan was being pursued by the Solar Power Retailer for $1810.

Consumer Action successfully negotiated a settlement on behalf of Huixuan, alleging under the Australian Consumer Law that the Solar Power Retailer had engaged in misleading and deceptive conduct, unconscionable conduct, and that the supplied system was not fit for purpose.

Under the terms of the settlement, Huixuan agreed to pay manageable monthly instalments to the Solar Power Retailer for twelve months – at which point Huixuan will own the solar panels, and the solar power purchase agreement that she entered into will be discharged.

Very clearly, the agreement Huixuan entered into was unfair, inappropriate and would inevitably lead to financial hardship. Her case demonstrates the need for clearer consumer guidance, and stronger regulation of solar power purchase agreements.

From Consumer Action's perspective at least, residential Solar PPAs seem to still be reasonably rare. However, we have seen enough cases of this kind involving significant unconscionability to represent a red flag. We are concerned that the number of these kinds of agreements may increase in the years ahead.

These are often very complex arrangements making them extremely difficult to understand. As was the case with Huixuan, the complexities can be compounded by misleading representations, unfair contract terms and lack of accountability and transparency. This can result in households paying far more than they expected for electricity, defeating the purpose of entering into the arrangement in the first place. Depending on the contract terms of the Solar PPA, an individual may be forced to pay the owner of the solar panels a higher rate for the electricity that the panels create than what they get back in a Feed-in-Tariff.

One solution to the issues presented in cases like Huixuan's is to require that solar panel providers make further enquiries about a person's objectives before entering into an agreement. This was one of the initiatives suggested in Consumer Action's Power Transformed report (2016) which suggested a requirement for energy service providers to identify a consumer's purpose in acquiring a service, to ensure it is appropriate.[286] In applying such an initiative to the sale of new energy products and services such as rooftop solar, a person's purpose for purchase would be expressly declared in the purchase documentation which would support a person's rights under the ACL that goods and services are fit for purpose. Regulations could also be enacted requiring solar retailers to make enquiries in relation to and document a person's energy use in order to ensure the product will meet the person's objective. This type of reform would also support people who are sold more panels than they need.

A second solution relates to dispute resolution avenues. Currently, people or businesses offering Solar PPAs are exempt from holding a licence under the Electricity Industry Act 2000 (Vic) but must be registered in a 'Register of Exempt Persons' under the Act.[287] This has not always been the case. In 2015, the Victorian Government amended the class of exemptions from the requirement to hold a licence to include solar PPA providers.[288] This means that from 2015, Solar PPAs were exempt from holding a licence and did not need to register their exemption or activities in the "Register of Exempt Persons' under the Act. DELWP undertook a review of all of the exemption to the Act, including the one relating to Solar PPAs, culminating in their final position paper published in 2017,[289] which said that Solar PPAs will continue to be exempt but will need to register their activities. This is still the position now.

During the government review process, Consumer Action made submissions setting out our position about a registration exemption for Solar PPAs. We made it known to DELWP that we strongly disagree with its then proposed approach to limit jurisdiction of EWOV to consumers with Solar PPAs.[290] Further, we made it known that our strong preference is that the EWOV should cover disputes arising from any energy service, including SPPAs. We maintain this view notwithstanding the Government's reasons for not extending EWOV's jurisdiction in 2017, which, appear to be based of the perceived negative impacts EWOV's jurisdiction might have on innovation, although not explicitly stated in those terms.[291]

286 Consumer Action Law Centre, *Power Transformed* (July 2016), 36 <https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>.

287 Victorian Government, *'Electricity Industry Act 2000* General Exemption Order 2017' in Victoria, Victorian Government Gazette, No. S 390, 15 November 2017, [17] <https://www.energy.vic.gov.au/__data/assets/pdf_file/0029/89309/General-Exemption-Order-2017-GG2017S390.pdf>.

288 Department of Environment, Land, Water and Planning, State of Victoria, *Review of the Victorian Electricity Licence Exemptions Framework Final Position Paper* (2017), 29 <https://www.energy.vic.gov.au/__data/assets/pdf_file/0025/80746/Review-of-the-Electricity-Licence-Exemptions-Framework-Final-Position-Paper.pdf>.

289 Department of Environment, Land, Water and Planning, Victoria State Government, *Victorian Licence Exemptions – General Exemption Order* (23 November 2018) <https://www.energy.vic.gov.au/legislation/general-exemption-order>.

290 Consumer Action and Consumer Utilities Advocacy Centre, Submission to Department of Environment, Land, Water and Planning, General Exemptions Order Draft Position Paper, 30 August 2016, 14 <https://consumeraction.org.au/wp-content/uploads/2016/09/CUAC-CALC-SUMBISSION-ON-GEO-REVIEW-DRAFT-PAPER-30-AUG_amended.pdf>.

291 See, Department of Environment, Land, Water and Planning, State of Victoria, *Review of the Victorian Electricity Licence Exemptions Framework Final Position Paper* (2017) <https://www.energy.vic.gov.au/__data/assets/pdf_file/0025/80746/Review-of-the-Electricity-Licence-Exemptions-Framework-Final-Position-Paper.pdf>.

Making EWOV available to different types of energy consumer will become increasingly important as the sector continues to innovate and diversify. Victorians accessing electricity in exempt selling arrangements with fewer than ten customers encounter the same or worse detriment than other Victorian customers, yet without reform these arrangements will remain largely invisible to regulators, and their customers denied access to effective dispute resolution.

In our 2016 report, Power Transformed, which was informed by the deliberations of the Demand Side Energy Reference Group (including a senior member of DELWP) we describe a key area of consumer detriment, where new energy products and services may fall outside the current regulatory framework. One of three principles identified as essential for consumer engagement and trust in a competitive market is the application of consumer protections to all energy products and services.

There is an opportunity in Victoria to tackle this continued failure in the Victorian energy market by accepting Recommendation 10A from the Independent Review and extend EWOV's jurisdiction to cover disputes arising from any energy service, including SPPAs.

RECOMMENDATION 7 AND 8:

- **Require solar retailer to enquire about a customer's purposes and objectives before entering into an agreement to ensure that the products and services being sold are appropriate and fit for purpose.**
- **Remove the registration exemption for Solar PPAs from the *Electricity Industry Act 2000* General Exemption Order 2017 to enable EWOV to have jurisdiction over these arrangements.**

06 REGULATORY OPTIONS

Regulatory Instrument and Regulator Responsibility

This report has made a number of recommendations for regulatory reform. There are a number of options for policymakers to consider when considering the form of the regulatory instruments and the structure of regulatory scheme.

As a general principle, national uniform regulation would be the most desirable outcome. Although given the current differences in the national and Victorian regulation of the traditional energy market, this seems unlikely. As a short to medium term solution it would make sense to leverage off the state-based regime to incorporate the regulatory reforms suggested in this report. The options for legislative reform would include:

- **amend the current *Electricity Industry Act 2000* (Vic) to include new energy products within the requirement to be licensed and create additional provisions where necessary; or**
- **create a standalone piece of legislation for the new energy market containing the regulatory reforms recommended in this report.**

In terms of regulatory responsibility, consideration could be given to whether the ESC, as the statutory body with responsibility for regulation of the state's essential services, or whether CAV, as the Victorian regulator with responsibility for administering the Victorian consumer law, should have responsibility for residential solar and other new energy products and services. Relevant to the consideration are the following factors:

- rooftop solar panels are related to the creation of an essential service and the ESC;
- the ESC already has significant expertise and corporate knowledge in relation to the distribution and retail supply of electricity and the energy market;
- the ESC already has a close relationship with EWOV which is formalised through their memorandum of understanding;[292]
- having the ESC regulate both new and traditional energy markets would aid clarity and consistency across the industries.

Factors in favour of CAV taking regulatory responsibilities include:

- CAV has significant expertise and corporate knowledge in relation to the ACL, currently the main form of consumer protection for people who have purchased rooftop solar panels;
- CAV administers the licencing of motor car traders under the MCTA and the motor car trader's default fund which would aid their administration of similar schemes for the solar industry.

From Consumer Action's perspective, it appears that the ESC would be in the best position to administer the regulatory reforms proposed in this report.

292 EWOV, Regulators <https://www.ewov.com.au/about/our-relationships/regulators>.

07 CONCLUSION

The energy market is changing but the regulatory system is dragging its feet. Through our work, Consumer Action has observed the impact of this lag. The most common and pressing issues we have seen in recent times 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;**
- **poorly structured and highly problematic solar power purchase agreements.**

Consumer Action is not the only one reporting on these trends and discussions are underway about the improvements that could be made to both the traditional and new energy markets. Now is the time to capitalise on the momentum behind these discussions, particularly given further government investments in the new energy sector. The problems we are seeing with solar panels will repeat and manifest themselves in relation to other new and emerging energy technology in Australia unless we take the opportunity to prevent their spread.

Consumer Action is of the view that the following regulatory reforms will significantly reduce the harms currently being caused in the solar and new energy industries and will prevent future harm:

1. **Solar retailers should be given legal responsibility to ensure that solar panels are properly connected to the grid, unless people elect to take responsibility themselves;**
2. **The national credit laws should be amended so that all buy now, pay later finance arrangements come within their ambit;**
3. **Unsolicited sales should be banned;**

4. **A 10-year statutory warranty applying to the whole solar system should be provided by solar panel retailers;**

5. **The jurisdiction of the Energy and Water Ombudsman should be extended to include the retail sale of new energy products and services;**

6. **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;**

7. **Solar power 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.**

Not only will these reforms benefit households but they will also be of benefit to industry. For competition to thrive, consumers need to be willing to participate in the market, perceiving the benefits of participation to outweigh the costs.[293] Effective consumer participation is based on trust that the market will deliver the outcomes they expect in terms of service, quality and price.[294] Continued consumer detriment will undermine this trust.

Consumer detriment and a lack of trust also erodes the environmental ambitions shared by individuals who invest in new energy, community groups, innovative markets and governments alike. A refusal to implement the regulatory reforms suggested in this report does not protect economic and environmental innovation. Rather, a failure to implement regulatory reform would protect unscrupulous businesses that continue to do the wrong thing, often at the expense of those in our community who are already doing it tough.

293 Consumer Action Law Centre, *Power Transformed* (July 2016), 5 <https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>.
294 Ibid.

consumer action law centre

/consumeractionlawcentre

consumer_action

consumeraction.org.au

IN THE AUSTRALIAN COMPETITION TRIBUNAL

APPLICATION BY FLEXIGROUP LIMITED

ACT 1 OF 2019

Certificate identifying exhibit

This is the exhibit marked **RPP-26** now produced and shown to Rex Pascal Punshon at the time of affirming his affidavit on 4 May 2020.

Before me:

Signature of person taking affidavit

Knock it off!

Door-to-door sales and consumer harm in Victoria

consumer action law centre

loddon campaspe community legal centre

WEstjustice

November 2017

ACKNOWLEDGEMENTS

This report was funded by a Consumer Assistance and Advocacy Program Innovation Grant, administered by Consumer Affairs Victoria.

The report compiles case studies drawn from three community sector law service providers:

- Consumer Action Law Centre
- WEstjustice; and
- Loddon Campapse Community Legal Centre.

DISCLAIMER

This report highlights nineteen case studies from across Victoria, to illustrate the impact of unscrupulous unsolicited sales practices on vulnerable consumers.

All effort has been made to de-identify the consumers and businesses involved in the case studies. All case studies have been included with the consent of the consumers concerned.

Contents

FOREWORD 4
EXECUTIVE SUMMARY 6
1. Unsolicited consumer agreements: Why this project, and why now? 10
1.1 Back to basics: What is an unsolicited consumer agreement? 12
1.2 Rewind: Current measures and initiatives, a brief re-cap 14
1.3 Fast Forward: The ACL Review 17
1.4 What are 'cooling off' periods? Why do we use them, and do they work? 18
1.5 What is the 'opt-in' model? And how is it meant to work? 21
2. The Human Factor: Behavioural economics and the inter-personal dynamics of unsolicited sales. 24
2.1 The foot in the door 24
2.2 Social norms, politeness and the commercial advantage of familiarity 25
2.3 The cognitive impact of poverty 26
2.4 "Don't call me, I'll call you."— Cooling off periods vs. Opting-in: A behavioural economics analysis. 28
2.5 The opt-in model: How would it affect legitimate traders? 30
2.6 Common training and remuneration practices in the door-to-door sales industry 32
3. CASE STUDIES 36
CASE STUDY #1 – "John" 37
CASE STUDY #2 - "Casey" 38
CASE STUDY #3 - "Margie" 39
CASE STUDY #4 - "Cara" 40
CASE STUDY #5 - "Rajesh & Shifa" 41
CASE STUDY #6 - "Liam" 42
CASE STUDY #7 – "Sarah" 43
CASE STUDY #8 – "Desmond" 45
CASE STUDY #9 – "Henry and June" 46
CASE STUDY #10 - "John" 47
CASE STUDY #11 - "Debbie" 48
CASE STUDY #12 – "Ferdinand" 49
CASE STUDY #13 – "Jenny" 50
CASE STUDY #14 – "Philomena" 51
CASE STUDY #15 – "Hugo" 52
CASE STUDY #16 – "Eustace" 53

CASE STUDY #17 – “Marcus” 54
CASE STUDY #18 – “Geraldine” 55
CASE STUDY #19 - “Harold” 56
4. CONSUMER HARM HOTZONE #1 – THE SOLAR PANEL INDUSTRY 58
5. CONSUMER HARM HOTZONE #2 – REMOTE INDIGENOUS COMMUNITIES, FAR NORTH QUEENSLAND 60
6. CONSUMER HARM HOTZONE #3 – LETTING THE VAMPIRES IN: THE PROBLEM OF ‘INVITED’ IN-HOME SALES. 64
Sarah’s Case 66
Carlos’ Case 66
CONCLUSION 69

FOREWORD

This report contributes to years of work by Victorian community legal centres in the field of unsolicited sales. While the report focuses on the immediate policy debate, it draws on the collective experience of practitioners who have dealt with the harm done by unsolicited sales over the past few decades. The report has been informed and improved by that experience and seeks to capture the harm that all community sector lawyers know exists, and present it for the benefit of policy-makers. Accordingly, while much of the report speaks to the current political moment (a moment that will inevitably pass quite quickly), it is hoped that it will remain a useful resource over the medium to longer term—for any with an interest in the consumer experience of unsolicited sales.

Many community sector practitioners hold the view that the only way to prevent consumer harm in unsolicited sales is to ban the practice altogether. The combination of commission-based incentives, unsupervised sales staff and vulnerable consumers ill-equipped to resist the 'hard-sell' is simply too difficult to regulate effectively. Consumer advocates strongly argued this position throughout the recent Australian Consumer Law (**ACL**) Review, and were not successful in persuading Consumer Affairs Australian and New Zealand (**CAANZ**) of this view. While CAANZ acknowledged that consumer harm and pressure selling occur in at least some sectors, it also expressed concern about limited evidence of the extent and nature of unsolicited selling across the economy.

Mindful of the current policy dialogue and appetite for change, this report does not call for an outright ban on unsolicited sales. Such an outcome is politically unlikely, and—at least for now—unsupported by policymakers. While the community sector has more than enough evidence of consumer harm, in order to justify a ban it may also be necessary to show that unsolicited sales do *no good*—or at least, do so little good that banning the practice becomes the only logical policy response. One argument by supporters of unsolicited sales is that they provide important access to goods for people in remote communities. Accordingly, while consumer harm in such areas can be extreme, some people advise that banning the practice altogether would leave people in those communities without access to important or essential goods. While these views might be questioned in the age of online selling, it is hoped that the forthcoming economy-wide survey of unsolicited sales can more fully inform the policy debate on the desirability, or otherwise, of a ban.

In the meantime, this report demonstrates that consumer harm resulting from unsolicited sales is significant and ongoing. While a ban may not be the most practical response, some additional form of regulatory intervention certainly is. Further, it is obvious that at the time of writing the unsolicited sale of solar panels is causing significant consumer harm. Misleading and inappropriate sales of solar panels, including but not limited to vulnerable low-income consumers, has become systemic and requires an urgent, concerted and comprehensive policy response. It is also obvious that elderly and culturally and linguistically diverse (**CALD**) people are disproportionately affected by unsolicited sales. In designing any regulatory intervention, the needs and vulnerability of these consumers must be taken into account.

We hope that this report informs those with an interest in unsolicited sales and consumer harm, and is a useful contribution to the current policy debate. We have included numerous case studies in this report to provide a human face and voice for the issue, and to demonstrate that the harm caused by unsolicited sales is unacceptably high. Finally, we hope that this report will give readers pause to ask this question—how much harm do we accept, before we find it necessary to intervene?

Knock it off!

Door-to-door sales and consumer harm in Victoria

EXECUTIVE SUMMARY

In mid-2016 the Consumer Action Law Centre (CALC) applied to Consumer Affairs Victoria's (CAV) Tenancy Assistance and Advocacy (TAAP) and Consumer Assistance and Advocacy (CAAP) Innovation Fund grants program to undertake a research project examining unsolicited sales and consumer harm.

This report is the result of that project, and brings together casework from three key community legal centres participating in the CAAP.

The centres are:

- Consumer Action Law Centre, located in Melbourne CBD and operating as a phone advice and casework service.
- WEstjustice – Western Community Legal Centre, providing legal services in the Western Suburbs of Melbourne.
- Loddon Campaspe Community Legal Centre, located in Bendigo.

Collectively, these CAAP agencies provided nineteen de-identified case studies, which are presented in chapter 3 of the report. Of those nineteen, three case studies were also recorded as video case studies—and can be viewed at **consumeraction.org.au/knockitoffvideos**

The report has been written to contribute to the policy debate around unsolicited consumer agreements, specifically the protections needed to prevent consumer harm. This debate was flagged by Consumer Affairs Australia and New Zealand (CAANZ) in its recent review of the Australian Consumer Law (ACL), where CAANZ concluded it was:

> ***Aware of the level of consumer detriment caused by unsolicited selling in some sectors, [and] CAANZ remains concerned that some degree of additional intervention may be required.***[1]

Further, CAANZ stated that:

> ***The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration***.[2]

At a Minister for Consumer Affairs Meeting (**CAF Meeting**) on 31 August 2017, Federal and State Consumer Affairs Ministers directed CAANZ to place the proposed economy-wide study on their forward work program, and required that the project commence in 2017-18. This report should inform the economy-wide study that CAANZ will soon be undertaking. [3]

In compiling the report, particular attention has been paid to developments in behavioural economics, and how these inform our understanding of unsolicited sales. Behavioural economics research shows that the effectiveness of cooling-off periods as a consumer protection is questionable, particularly for vulnerable consumers. Further, behavioural economics principles indicate that an 'opt-in' model may provide more effective consumer protection. The option of an 'opt-in' model for unsolicited sales was raised by CAANZ in their ACL Review Interim Report, and is likely to be prominent as the policy debate continues. Accordingly, this report examines potential benefits of replacing the cooling-off period with an opt-in model in some depth.

[1] CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf
[2] Ibid.
[3] Ministers for Consumer Affairs, *Communique*, 31 August 2017.Available at: http://consumerlaw.gov.au/communiques/meeting-9-2/

The report also identifies three "consumer harm hotzones". The first is the solar panel retail industry—over half of the case studies presented in this report relate to the unsolicited sale of solar panels. It is clear that these sales are causing systemic consumer harm, and regulators must act to mitigate that harm. The report raises the possibility of an industry-specific trial of the opt-in model, to be applied to the unsolicited sale of solar panels. Given that the COAG Energy Council has recently announced its intention to develop an industry-led Code of Conduct for the sale of new energy products and services, the timing (and administrative machinery) for such a trial may be right. It should be noted that the energy sector generally has a long history of poor unsolicited sales practices—to the point where major energy retailers voluntarily chose to discontinue the practice in 2013 following significant public complaints.

The second consumer harm hotzone is remote indigenous communities, which have experienced a disproportionate amount of consumer harm from unsolicited sales over many years. Both Consumer Action and WEstjustice have a history of engagement with indigenous communities in Victoria concerning unsolicited sales. In Consumer Action's case, this work has predominantly been in relation to supporting two regional communities with issues relating to consumer leases.

This report documents the launch of the 'Do Not Knock Informed Town' initiative in Yarrabah community, just outside of Cairns in far north Queensland—a visit that was facilitated by the Indigenous Consumer Assistance Network (ICAN). Yarrabah is the second community to launch the initiative—and more communities in far north Queensland are likely to follow. As an illustration of the harm that unsolicited sales can cause and the measures that are required to protect consumers from unscrupulous traders, the Do Not Knock Informed Town initiative is hard to ignore.

Third, the report discusses the consumer harm hotzone of 'invited' in-home sales, and other off-premises sales interactions. While not necessarily caught by the current unsolicited consumer agreement provisions of the ACL, the behavioural factors that apply in these transactions are very similar. The report raises the question of whether a protection for 'off-premises' contracts may be more effective than the current unsolicited consumer agreements protections (noting that such a construction already exists in the EU and the UK, and used to exist in Victoria prior to the enactment of the ACL).

Finally, the report presents its findings and recommendations in seven simple dot points. These are reproduced below:

- As identified by CAANZ in its review of the ACL, and as demonstrated by successful community initiatives such as Do Not Knock stickers and Do Not Knock informed towns, ***consumer detriment caused by harmful unsolicited sales is significant and persistent.***

- ***Vulnerable consumers*** including elderly consumers, CALD and Indigenous consumers ***appear to be disproportionately affected by harmful unsolicited sales***.

- ***The efficacy of the 'cooling-off' protection is highly questionable and it seems largely an ineffective consumer protection***—it is based on a false and now outdated understanding of human behaviour.

- ***An 'opt-in model' is preferable from a behavioural perspective—it restricts sales to where the purchaser clearly and intentionally chooses the product or service.*** Any impact on legitimate trade can be tested through a narrow trial of the model.

- ***Unsolicited retail sales of solar panels are currently causing significant consumer harm.*** This is driven by a number of factors including consumer anxiety over rising energy costs, limited understanding of the product and appropriate cost, and access to (often inappropriate) finance which makes the purchase achievable.

- ***An industry specific trial of the opt-in model may be useful*** to test the impact of such a model on both reducing consumer harm, and also the impact it has on legitimate trade***. The solar panel industry seems the logical industry in which to conduct such a trial***.

- ***Consideration should be given to broadening protections so that they apply to all 'off-premises contracts', as is currently the case in the EU and UK***. This would ensure that consumers who are subject to high-pressure sales tactics through invited in-home sales, or attending timeshare style presentations, are also protected. This is significant because the behavioural aspects of those interactions are often very similar to unsolicited sales, creating the same difficulties for consumers that the unsolicited consumer agreement protections are designed to counter. Further, emerging legal uncertainty in case law concerning some off-premises sales and whether they qualify as unsolicited could be addressed by such a reform.

“He's man way out there in the blue, riding on a smile and a shoeshine. And when they start not smiling back — that's an earthquake. And then you get yourself a couple of spots on your hat, and you're finished. Nobody dast blame this man. A salesman is got to dream, boy. It comes with the territory.”

- **Arthur Miller, *Death of a Salesman.***

“ABC. A, always. B, be. C, closing. ALWAYS BE CLOSING. Always be closing!”

- **David Mamet, *Glengarry Glen Ross.***

1. Unsolicited consumer agreements: Why this project, and why now?

Throughout 2016 and into the early months of 2017, Consumer Affairs Australia and New Zealand (CAANZ)—the peak body for Australia's consumer protection regulators—conducted an extensive review of the Australian Consumer Law (ACL).

The ACL is Australia's foremost piece of consumer protection legislation, and sets out general protections applying to most consumer purchases, as well as more specific protections applicable to particular forms of commerce. CAANZ's review was not the result of any particular political pressure, but was mandated by an intergovernmental agreement as a sensible step to take after five years of operation of the ACL.[4] The review drew on submissions from stakeholders across the spectrum, and was undertaken in an investigative style with no predetermined agenda.

In the wake of the review CAANZ recommended no immediate reform to the law concerning unsolicited consumer agreements. CAANZ did state, however, that they are:

> ***Aware of the level of consumer detriment caused by unsolicited selling in some sectors, [and] CAANZ remains concerned that some degree of additional intervention may be required.[5]***

In concluding their remarks, CAANZ clearly stated that any such intervention should only proceed on the basis of careful consideration, supported by evidence based research:

> ***The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration**.[6]*

To contribute to this policy discussion, in mid-2016 the Consumer Action Law Centre (CALC) applied to CAV's TAAP & CAAP Innovation Fund grants program for funding to undertake a research project examining unsolicited sales and consumer harm.

This report is the result of that project, and brings together casework from three key community legal centres participating in the CAAP.

The centres are:

- Consumer Action (located in Melbourne CBD and operating as a phone advice and casework service)
- Westjustice, (located in Footscray, Werribee and Sunshine)
- Loddon Campaspe, (located in Bendigo).

The report is accompanied by three video case studies of affected consumers told in their own words (those case studies are also included as written case studies), and a brief interview with Indigenous Consumer Assistance Network (ICAN) Operations Manager Jon O'Mally, discussing the impact of unsolicited sales in the Indigenous communities of far north Queensland, and the Do Not Knock Informed Town initiative. The videos can be found online at **consumeraction.org.au/knockitoffvideos**

While community legal centres (CLCs) are not commonly in a position to provide definitive, economy-wide statistical data, they can and do provide a strong indicative measure of the practices occurring in the community—particularly those that affect vulnerable people. It is clear from the case studies in this report

[4] COAG, *Intergovernmental Agreement for the Australian Consumer Law*, 2 July 2009, clause 51, Available at: http://consumerlaw.gov.au/files/2015/06/acl_iga.pdf

[5] CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

[6] Ibid.

that the unsolicited selling of solar panels is currently causing serious consumer harm requiring essential regulatory action for its prevention.

That being said, we would caution against too narrow a focus, as experience has shown that consumer harm from unsolicited sales comes in waves and often migrates from product to product. While solar panels are the product of the moment, in the past we have seen unsolicited sales cause harm through the selling of mattresses, encyclopaedias, vacuum cleaners, educational software, energy contracts and a range of other products and services. Indeed, it is not difficult to envisage that the next "problem product" may well be home battery storage systems. The product itself is not the subject of this report—it is the method of selling, along with the need for a regulatory framework that will reduce harm caused by this method of selling.

Accordingly, this report anticipates policy discussion of the relative merits of an "opt-in" model for unsolicited consumer agreements versus the current "cooling off" approach. This discussion was foreshadowed by CAANZ's ACL Review Interim Report in October 2016, and is likely to form part of the further policy consideration that CAANZ have flagged.

As this report makes clear, an opt-in model may well provide superior consumer protection than cooling off. Further, we suspect concerns that an opt-in model would infringe on legitimate trade are over-stated. We have arrived at these views through consideration of our casework experience, behavioural economics research, and the history of the cooling-off model—and its relative ineffectiveness as a consumer protection.

While this report can only theorise and provide arguments for our views on regulatory reform, a pilot program is recommended to test the practical effectiveness of an opt-in model and should form part of the economy-wide study that CAANZ have suggested. It may be opportune to conduct this trial in the solar panel industry, given the high degree of harm identified in that sector. Further, a recent announcement by the COAG Energy Council may provide the opportunity for such a trial. On 3 August 2017, the COAG Energy Council announced they are seeking industry groups to develop an industry-led Code of Conduct to provide consumer protection in relation to new energy products and services.[7]

This report briefly provides some background on the recent history of consumer protection in relation to unsolicited sales in Australia, and presents some options for reform. We are conscious that unsolicited selling has been a feature of retail trade for decades, and there is a danger that the harm it causes has been normalised, or somehow accepted as "the way things are"—and that the measures currently in place could be seen as the only way to deal with the problem. We do not believe that this is the case, and would say that measures taken to date have largely failed to prevent systemic consumer harm. This recent history clearly shows that unsolicited sales do cause significant problems and additional intervention is warranted—provided it is carefully considered and tested.

[7] COAG Energy Council, *Energy Market Transformation Bulletin Update 5*, 3 August 2017, Available at: http://www.coagenergycouncil.gov.au/publications/energy-market-transformation-bulletin-no-05-%E2%80%93-work-program-update

1.1 Back to basics: What is an unsolicited consumer agreement?

Unsolicited consumer agreements are defined by section 69 of the Australian Consumer Law (ACL) as agreements made between a consumer and a trader at a place other than the trader's business premises, or by telephone, in circumstances where the trader has not been invited by the consumer to attend the place of negotiation or make the call.[8]

Put more simply, unsolicited consumer agreements are made between consumers and uninvited door-to-door salespeople, or through 'cold-calling' telemarketing. They also include circumstances where a consumer is approached by a trader in an unusual location, away from the trader's place of business—such as in a supermarket, or a carpark.

It can be contested that unsolicited sales include agreements made where consumers have been enticed to attend a presentation in an 'off-premises' location (as often happens with time-share arrangements, for example), although this is an arguable view – and depends on exactly how they were enticed. Section 69(1A), a late addition to the ACL text, states that a consumer is not to be taken to have invited a dealer to come to a place or make a telephone call merely because they have given their contact details for purposes *other* than entering negotiations relating to the supply of goods or services (e.g. attending a presentation, entering a competition or having an in-home demonstration) or have contacted the dealer following an unsuccessful attempt by the dealer to contact the consumer (e.g. returning a missed call from a telemarketer).

Fundamentally though, the significance of unsolicited sales is that they describe a situation in which the sales interaction is 'sprung' on the consumer by the trader, as opposed to being sought out by the consumer proactively approaching a trader. It should be noted that unsolicited sales do not include direct mail marketing. Direct mail is better characterised as a form of advertising, as it does not involve the presence of a trader either in person or over the phone, and does not therefore subject the consumer to a 'hard-sell' experience.

It is also worth noting that there is currently some legal uncertainty about the extent to which the sales interaction must be 'sprung' on the consumer, at least in relation to 'pop-up' style trading. In *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd [2016] FCA 403,* Reeves J found that this unequivocally required that it be the "*dealer who has to initiate the negotiations with the consumer*".[9] By contrast, in the more recent *Australian Competition and Consumer Commission v Unique International College [2017] FCA 727,* Perram J found that:

---

[8] It should be noted that sales of less than $100 are excluded from the definition, which is reproduced in full below:

s69 Meaning of *unsolicited consumer agreement*

(1) An agreement is an ***unsolicited consumer agreement*** if:

(a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

(b) it is made as a result of negotiations between a dealer and the consumer:

(i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or

(ii) by telephone;

whether or not they are the only negotiations that precede the making of the agreement; and

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and

(d) the total price paid or payable by the consumer under the agreement:

(i) is not ascertainable at the time the agreement is made; or

(ii) if it is ascertainable at that time--is more than $100 or such other amount prescribed by the regulations.

[9] *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd [2016] FCA 403* at 134.

> "*I do not agree that…the dealer must initiate negotiations. Section 69(1)(b) does address itself to the identity of the initiating party but only by providing that it must not be the consumer. It does not say that it must be the dealer. Indeed, it seems clear to me that the definition is explicitly addressing itself to the situation that neither party initiates the negotiation and declares that that situation is covered by the requirements of the Division.*" [10]

This is a finer legal point, and refers to circumstances in which a trader has set themselves up for trade in a novel location, where they may encounter consumers. Under Perram J's construction, this can be a circumstance in which neither party can be regarded as having truly 'initiated' the sales negotiation.

At a meeting for Ministers of Consumer Affairs (**CAF Meeting**) on 31 August 2017, State and Federal Consumer Affairs Ministers agreed that threshold requirements for unsolicited sales needed to be clarified to ensure that they unequivocally apply to interactions in public places, but also capture suppliers in their negotiations with consumers when consumer contact details have been obtained from a lead generator. These will be welcome reforms, resulting directly from recommendations made by CAANZ through the ACL Review.[11]

These issues, and the problem of 'invited' in-home sales, are discussed more fully later in this report. (Refer to *Consumer Harm Hotzone #3 – Letting the Vampires In: The Problem of 'Invited' In-home Sales* at page 64).

Suffice to say, it is unequivocal that unsolicited sales *do* encompass door-knocking and cold-calling, and these sales techniques form the main basis of our discussion.

Unsolicited consumer agreements are problematic because they often involve unfair, high-pressure sales practices which result in inappropriate or unaffordable purchases—often by people experiencing vulnerability who are ill equipped to withstand such tactics, and least likely to assert their rights in the event of a bad deal. Aggressive, manipulative, confusing, misleading and persistent sales tactics are not uncommon. Very often, goods are bought simply to get the salesperson to leave, or so as not to seem impolite. As is generally acknowledged, a power imbalance exists that needs to be addressed by regulation.

This acknowledgment is by no means restricted to Australia. The European Union (EU), the United Kingdom (UK), the United States of America (USA), Canada and Singapore have all legislated cooling off periods to counter the potential harm of unsolicited sales, the earliest of which dates back to 1964 with the introduction of the *Hire Purchase Act* in the UK.

The *Hire Purchase Act* cooling off protection was suggested by the Final Report of the UK Committee on Consumer Protection, which, in language of the era, acknowledged that the intention of sales staff is not always pure—and the capacity of consumers is not always high:

> *"…with the realisation that the persons to be protected are usually ignorant and credulous and the opposite party lacking in scruple, it is not easy to design the form of the protective device. It must not be overlooked that the overbearing salesman may be as willing to deceive the finance house concerning the correct sequence of events and the attitude and acts of the hirer as he is to beguile the latter*."[12]

[10] *Australian Competition and Consumer Commission v Unique International College [2017] FCA 727* at 742.
[11] Ministers for Consumer Affairs, *Communique*, 31 August 2017.Available at: http://consumerlaw.gov.au/communiques/meeting-9-2/
[12] *Final Report of the Committee on Consumer Protection, 244 Parl Deb., H.L. 605 (5th ser.) (1962)* at p. 172.

1.2 Rewind: Current measures and initiatives, a brief re-cap

Over the course of its ten-year history the Consumer Action Law Centre (Consumer Action) has seen harm resulting from unsolicited sales of energy contracts, vacuum cleaners, mattresses, encyclopaedias, solar panels, medical equipment, education software, and a number of other products.

Over time, the problematic nature of unsolicited consumer agreements has precipitated a range of regulatory, industry, and community responses.

- ***Legislative protections***

The ACL currently stipulates a number of specific consumer protections applicable to unsolicited consumer agreements.

These include:

- ***Clear disclosure requirements*** for traders: to say who they are, what they're there for and to advise the consumer that they will leave if asked to do so.[13]

- ***A requirement to leave if requested***, and not return for at least 30 days.[14]

- ***Restrictions on allowable operating hours*** to make unsolicited sales approaches, including no contacts at all on Sundays or public holidays, or before 9am or after 6pm on other days (5pm on Saturdays).[15]

- And perhaps most crucially, a ***mandatory 10 day cooling off period***, during which the consumer may choose to terminate the agreement without penalty, no questions asked.[16] Again,

---

[13] **s74 Disclosing purpose and identity**
A dealer who calls on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must, as soon as practicable and in any event before starting to negotiate:
(a) clearly advise the person that the dealer's purpose is to seek the person's agreement to a supply of the goods or services concerned; and
(b) clearly advise the person that the dealer is obliged to leave the premises immediately on request; and
(c) provide to the person such information relating to the dealer's identity as is prescribed by the regulations.

[14] **s75 Ceasing to negotiate on request**
(1) A dealer who calls on a person at any premises for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must leave the premises immediately on the request of:
(a) the occupier of the premises, or any person acting with the actual or apparent authority of the occupier; or
(b) the person (the ***prospective consumer***) with whom the negotiations are being conducted.

[15] **s73 Permitted hours for negotiating an unsolicited consumer agreement**
(1) A dealer must not call on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose:
(a) at any time on a Sunday or a public holiday; or
(b) before 9 am on any other day; or
(c) after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

s82 Terminating an unsolicited consumer agreement during the termination period
(3) The period during which the consumer may terminate the agreement is whichever of the following periods is the longest:
(a) if the agreement was not negotiated by telephone--the period of 10 business days starting at the start of the first business day after the day on which the agreement was made;
(b) if the agreement was negotiated by telephone--the period of 10 business days starting at the start of the first business day after the day on which the consumer was given the agreement document relating to the agreement;

> disclosure plays a part here, traders are required to clearly inform consumers of the cooling off period and how to exercise their right to terminate.[17]

To ensure these protections are effective every consumer protection agency in Australia allocates resources towards providing information and materials for consumers, advising them of these rights in relation to unsolicited sales, and what to do if those rights are infringed.

Despite these legislative measures, regulators, particular industries, the community sector and certain contained communities have found it necessary to take additional, non-legislative steps to counter harm caused by unsolicited sales.

- ***The energy sector***

In the energy sector, major participants AGL, Origin and EnergyAustralia have acknowledged the potential for harm from unsolicited sales by choosing not to engage in the practice at least in terms of door-to-door marketing.

These decisions were taken following a number of high profile actions taken by the Australian Competition and Consumer Commission (ACCC), which resulted in significant fines for energy retailers on the basis of misleading and deceptive sales conduct and breaches of the unsolicited sales provisions of the ACL. At least some of the industry recognised that it was too difficult to ensure salespeople complied with regulatory requirements and that the conduct of outsourced sales companies risked substantial reputation concerns for the businesses.

Energy Australia CEO, Catherine Tanna, has since stated:

> "*EnergyAustralia stopped door knocking in 2013 because it was the right thing to do. There's no good reason for the practice and we'd like to see all retailers do the right thing and stop door-to-door sales*."[18]

- ***Public perception, regulator response and community initiatives.***

Unsolicited sales are also known to be unpopular, and regarded by many as a nuisance.

In 2016 Consumer Action conducted an online poll of 1,045 participants, which found that 81.3 percent of Australians hold a negative view of unsolicited sales, and 77.7 percent supported banning the practice altogether. This is a strong indication of how unpopular the practice is in the community.

---

[17] **s76 Informing person of termination period etc**.
A dealer must not make an unsolicited consumer agreement with a person unless:
(a) before the agreement is made, the person is given information as to the following:
(i) the person's right to terminate the agreement during the termination period;
(ii) the way in which the person may exercise that right;
(iii) such other matters as are prescribed by the regulations; and
(b) if the agreement is made in the presence of both the dealer and the person--the person is given the information in writing; and
(c) if the agreement is made by telephone--the person is given the information by telephone, and is subsequently given the information in writing; and
(d) the form in which, and the way in which, the person is given the information complies with any other requirements prescribed by the regulations.

[18] Robbins, Brian. *Call to halt door knocking energy sales rebuffed*, Sydney Morning Herald, 29 August 2016. Available at: http://www.smh.com.au/business/energy/call-to-halt-door-knocking-energy-sales-rebuffed-20160826-gr1vxk.html

For people who do wish to head unsolicited salespeople 'off at the pass', the Do Not Knock sticker is available for display at their residence, and the Do Not Call Register can be used to avoid telemarketers.

- ***The Do Not Knock sticker***

The Do Not Knock sticker is a small sticker that can be placed on a front door or a letter box, advising salespeople that they are not welcome at the residence—and if they approach, that their approach is unlawful.

Consumer Action first promoted the sticker in 2007. The initiative has been incredibly popular, and Do Not Knock stickers can be ordered by mail or collected from a network of 110 community sector organisations and MP electoral offices around the country.[19] While initially opposed to the idea, consumer affairs and fair trading agencies also now distribute the stickers. This change was perhaps influenced by the 2012 Federal Court decision that a Do Not Knock sticker constituted a 'request to leave' under the ACL—and therefore any salesperson ignoring such a sticker is indeed in breach of the law.[20]

- ***Do Not Knock Informed towns***

In Far North Queensland, unsolicited sales have been so problematic that Indigenous communities at Wujal Wujal and Yarrabah have designated themselves as "Do Not Knock Informed" towns.

This initiative is a good measure of how unwanted the sales practice has become with some residents, and how much harm it has caused in remote Indigenous communities.

Under the initiative, large warning signs are erected at the community entrance to inform door-to-door traders that, amongst other things, if a home displays a Do Not Knock sticker they are not to approach that residence. This initiative is discussed in more detail later in this report (see section *5. Consumer Harm Hotzone #2: Remote Indigenous Communities, Far North Queensland* at page 60) and mentioned here as an indication of the ongoing harm caused by unsolicited sales, and the resources deployed in attempting to mitigate this harm.

- ***The Do Not Call Register***

The Australian Communications and Media Authority (ACMA) administers the "Do Not Call Register".[21] This is an easy online service which enables consumers to opt out of receiving unsolicited calls by registering their phone number (or numbers) as 'off-limits'. The Do Not Call Register has been overwhelmingly popular, and gives a strong indication of how unpopular cold calling is with the public. At the time of writing ACMA reports that approximately 10.9 million phone numbers are on the register.[22] Government support of the Do Not Call

[19] See: http://donotknock.consumeraction.org.au/take-action/get-the-sticker-2/

[20] Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd [2012] FCA 1357 (30 November 2012)

[21] See: https://www.donotcall.gov.au/
[22] See: https://www.donotcall.gov.au/home/about-the-do-not-call-register/

Register has strengthened over time, and since April 2015 regular listings on the register have been permanent - rather than being subject to the previous eight year expiry period.[23]

Putting all these measures together, it is striking that a number of approaches have been taken to counter the systemic harm caused by unsolicited sales—over and above the already existing legislative protections.

Despite these measures, community legal centres continue to see people who have been induced into undesirable transactions through unsolicited sales approaches, often causing significant financial harm and distress.

Currently, every consumer protection agency in Australia expends notable resources informing the community of their rights concerning unsolicited sales. Avoidable disputes between consumers and traders cost both sides unnecessary time, money and energy.

These indicators suggest that current legislative protections are still insufficient, and additional intervention is warranted.

1.3 Fast Forward: The ACL Review

In its October 2016 Interim Report, CAANZ described the rationale for the unsolicited consumer agreement protections in the following terms (emphasis added):

> "*The ACL includes specific protections for unsolicited sales made away from the supplier's business or trade premises**. It recognises that, when a consumer is in a situation where they are not expecting to enter into an agreement to purchase a good or service, they can be more vulnerable to unfair sales practices***."[24]

The Interim Report then went on to outline several potential reform options:

- **Option 1:** Maintain the current balance and breadth of the provisions, noting the current gap in available data about the industry and the incidence of consumer problems.

- **Option 2:** Replace the cooling-off period with an 'opt-in' mechanism. An 'opt in' mechanism would allow the consumer to confirm the sale, without further contact by the trader, within a certain time period.

- **Option 3:** Introduce additional rights and protections for consumers entering into enduring service contracts. While stakeholders did not generally put forward mechanisms to help consumers cancel enduring service contracts, the ineffectiveness of the current cooling-off right for these agreements was a common theme.

- **Option 4:** Enhance protections for high-risk transactions while reducing regulations for low-risk transactions. This option explores whether there are more effective ways to protect consumers when making decisions about significant transactions, free from the pressure of a salesperson, while addressing industry concerns about over-regulation of low-risk transactions.

  For example, this option could involve adopting Option 2 or 3 in relation to 'high-risk transactions' (such as goods and services over $500) or to enduring service contracts, while easing the restriction on payment for low-risk transactions, such as goods and services under $500.

[23] ACMA, *Numbers on Do Not Call Register Now Permanent*, Media Release, April 26 2015. Available at: https://www.donotcall.gov.au/media-releases/permanent-registration/
[24] CAANZ, *Australian Consumer Law Review – Interim Report*, October 2016, p 133. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf

As already discussed, in their Final Report released on 19 April 2017, CAANZ chose Option 1, finding that (emphasis added):

> "*While there was a wide range of views on the effectiveness of the protections for consumers and the compliance burdens for traders, CAANZ is convinced that pressure selling and consumer detriment occurs in at least some industry sectors. Given the impacts of pressure selling on vulnerable and disadvantaged consumers, the core protections should not be diluted.*
>
> ***Aware of the level of consumer detriment caused by unsolicited selling in some sectors, CAANZ remains concerned that some degree of additional intervention may be required.*** *That said, while harm is occurring in some sectors, there is little existing information about the extent to which other sectors use unsolicited selling techniques. Accordingly, it is not clear whether other sectors experience similar problems. This makes it difficult to assess the impacts of any economy-wide reforms on legitimate, rather than problematic, traders.*
>
> ***The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration****.*
>
> *In the interim, there is a case for clarifying definitions in the provisions to ensure they operate as intended. CAANZ will also continue to liaise with relevant communications agencies to support greater transparency for unsolicited telephone sales."* [25]

As previously noted, CAANZ have now been directed by the CAF Ministers to undertake the proposed economy-wide study in 2017-18. The remainder of this report is dedicated to presenting case studies gathered in the process of our research, and to weighing the merit of Option 2, the most significant potential reform flagged by CAANZ in their Interim Report.

1.4 What are 'cooling off' periods? Why do we use them, and do they work?

From their inception, cooling off periods have been adopted on the basis that they "*protect consumers from the so-called 'hard sell'*".[26] During the cooling off period, a consumer who has agreed to a contract has a right to cancel that contract, without incurring any penalty. In a sense, the cooling off period is a 'get out of jail free card', for having made a regrettable decision. And in theory, enabling people to rescind unwanted contracts *should* protect them from the overbearing and sometimes uncomfortable sales process. If, in hindsight, the consumer decides against the purchase then they can simply cancel it—away from the distorting influence of the salesperson.

Cooling off periods can also be justified on competitive terms. While unsolicited sales tend to 'capture' the consumer, a cooling off period provides some breathing space to do some market research, assess alternative offers, and then decide if the product they've purchased is really the one they want.

On the face of it, this logic seems reasonably sound and has been prominent in implementing cooling off periods to counter high-pressure unsolicited sales across various jurisdictions.

In the EU, Chapter III Article 9 of the *Consumer Rights Directive* (CRD) provides a 14-day cooling off period for an off-premises contract; in the UK regulation 29 of the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (CCR) also provides a 14-day cooling off period.

---

[25] CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

[26] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 337.

In Canada, the *Direct Sellers Harmonization Agreement* echoes the Australian protection by providing for a 10-day cooling off period, while in Singapore, regulation 4(2) of the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009* provides for a cooling off period of five days.

In 2003, when enacting their Fair Trading Act, Singaporean parliamentarians specifically described the Act as being for the purpose of safeguarding '*small consumers who lack the expertise and resources to fend for themselves against unfair practices*'.[27] In addition, the Act clearly drew inspiration from other jurisdictions—it was noted that it would '*boost consumer confidence among consumers, especially tourists, who come from countries where Fair Trading Acts exist such as the UK, US, Australia or New Zealand.*"[28]

Even in the USA, surely the home of the 'hard-sell', a Federal Trade Commission rule (*Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, or 'the Cooling-off Rule, for short) has provided for a three-day cooling off period for door-to-door sales since 1971.

The cooling-off period was first implemented in the UK *Hire Purchase Act* in 1964. From the very beginning, it was couched as a way to protect "*usually ignorant and credulous*" consumers from the "*overbearing salesman*" who may well be "*lacking in scruple*", and may even "*deceive*" or "*beguile*" them.

With the logic of the cooling off period being so irresistible, it is not surprising that it spread so quickly and for the past half a century has been regarded as the "go to" legislative protection to shield people from the hard sell.

It should also be noted that the use of cooling off periods is not limited solely to unsolicited sales.

For example, while their 'unsolicited' nature can sometimes be disputed, timeshare arrangements in Australia are still subject to cooling off requirements. The Australian Securities Investments and Commission (ASIC) *Regulatory Guide 160* provides that a consumer is entitled to a cooling off period of seven days, or fourteen days—depending on whether the trader is an industry body member, or has been advised by ASIC that they must use the fourteen-day period. [29] In a similar vein, cooling off periods also apply to some financial products, including insurance products. [30]

Even in the EU and UK where cooling off periods apply to unsolicited sales, they are caught by applying to '*off-premises contracts*', which may be unsolicited—or may not be, depending on the circumstances. The point being, the effect of making the contract *away from the trader's usual place of business* is regarded as the central fact, not so much the unsolicited nature of the interaction. This distinction is discussed later in the report (see section *6. Consumer Harm Hotzone #3 – Letting the Vampires In: The Problem of 'Invited' In-home Sales* at pg. 64), and may well provide justification for a broader overhaul of unsolicited consumer agreement protections than proposed by the CAANZ Interim Report. This distinction also applied in Victoria through the *Fair Trading Act 1999 (VIC)*, prior to the enactment of the ACL.[31]

Either way, it is clear that cooling off periods are a well-established and widely used form of consumer protection, and that the logic used to rationalise them is uniform across jurisdictions. What is less clear is whether the cooling off protection actually works. Are cooling off periods used because they have become accepted regulatory practice, based on a rationalisation that hasn't properly been revisited since 1964? Or are they used because they're effective?

---

[27] Professor Stephen Corones et al, *Comparative Analysis of Consumer Policy Frameworks*, Queensland University of Technology, April 2016, p. 69. Available at: https://eprints.qut.edu.au/95636/1/95636.pdf
[28] Ibid.
[29] ASIC *Regulatory Guide 160* RG 160.2 Available at: http://download.asic.gov.au/media/1240832/rg160-published-15-november-2013.pdf
[30] Corporations Act 2001 (Cth), s 1019B. Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1019b.html
[31] See Fair Trading Act 1999 (VIC) Part 4. Available at: http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/$FILE/99-016a.pdf

A 2014 article by Professor Jeff Sovern in the University of Pittsburgh Law Review, *Written Notice of Cooling-off Periods: A Forty-year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, concludes that there are:

> "*…doubts about whether cooling-off periods benefit consumers or whether they provide only illusory protection*."[32]

Professor Sovern, a noted consumer law expert, draws on three different studies attempting to assess the extent to which consumers use cooling off periods, and whether cooling off periods have a significant impact on business.

Two studies were conducted in 1981, and the third was conducted by Professor Sovern himself for the purpose of the article.

The first study was a survey conducted by the Public Sector Research Group (PSRG), which surveyed over 1,400 consumers, 16.4 percent of which reported having bought something from a door-to-door salesperson in the previous year. In addition, 31.4 percent had purchased something at a 'product party' and 12.4 percent had purchased something from a workplace sales visit (to their own workplace), and thus could take advantage of the cooling off period if they so wished. The PSRG found that not a single consumer used the cooling off period, even though 8.3 percent described themselves as being "not at all" satisfied with their purchase. That being said—the outcomes of this study were clouded by the fact that only a small proportion of consumers actually received their product before the three-day cooling off period had elapsed.

The second study was commissioned by the Federal Trade Commission and conducted by private research firm Walker Research, Inc. In this study, 112 executives of door-to-door sales companies were surveyed. Tellingly, only 2 percent stated that the Cooling-Off Rule had increased cancellations, and 18 percent stated no customers at all had cancelled contracts within the three-day period. Collectively, the respondents estimated that only 0.3 percent of all their direct sales contracts were cancelled, indicating that the extent to which consumers utilised the cooling off period was very low. Of those who did report cancellations, the average cancellation rate was 6 percent.

Professor Sovern's own survey was conducted in 2010, and required three research assistants to call 1,875 businesses thought to be subject to cooling off periods. Of those, 200 agreed to answer questions—although this did not, unfortunately, include "pure door-to-door sellers", so any impact of the cooling-off period on door-to-door sales must be made by inference—at least by this survey.[33]

In the survey, 35 percent reported that buyers never cancel within the three days, and another 29 percent claimed that fewer than 1 percent of consumers cancelled. Another 8 percent stated that "*at least 1 percent but not more than 2 percent*" cancelled. Only 3 percent of respondents claimed that 10 percent or more of buyers cancelled, and only 1 percent (equating to two respondents) reported a rescission rate of at least 20 percent.

As Professor Sovern states,

> "*These numbers show such a low rate of rescission that they raise serious questions about the effectiveness of cooling-off periods*."[34]

In addition to the surveys cited and conducted by Professor Sovern, advances in behavioural economics have also cast doubt on the effectiveness of the cooling off model.

---

[32] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 333.
[33] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 354.
[34] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014 p. 355.

Behavioural economics is broadly defined as "*a method of economic analysis that applies psychological insights into human behaviour to explain economic decision-making".*[35] While it did not exist as a formal field of study when cooling off periods were first legislated, the discipline is fast gaining currency in policy-making circles, including consumer protection.

For current purposes, behavioural economics is extremely useful in examining the dynamics at play during an unsolicited sales interaction. In explaining why the cooling off concept may be under-used by consumers, behavioural economic concepts such as ***"the endowment effect"***, ***"the status quo effect"*** *and* ***"cognitive dissonance"*** all shed light on how the cooling-off concept operates—or doesn't.[36]

Recent research in behavioural economics also shows very clearly that the *context* of a sales process (both whether it is unsolicited or not, and the location where it takes place), has a significant impact on the dynamic between the trader and the consumer and ought to be considered when devising consumer protections.

Finally, behavioural economics research also shows disadvantaged consumers are particularly vulnerable to unfair unsolicited sales practices, due to the measurable cognitive impacts of poverty. This in turn has implications for the ACL, which under the Intergovernmental Agreement for the Australian Consumer Law is required to:

> ***"...meet the needs of those consumers who are most vulnerable, or at greatest disadvantage."***[37]

In addition to Professor Sovern's article and additional research into the cognitive impact of poverty, this report draws on recent research commissioned by Consumer Action through Deakin University's Centre for Employee and Consumer Well-Being.

Rather than examining the impact of unsolicited sales, this research focused on the relative behavioural merits of a cooling off period *versus* an opt-in model for the purposes of consumer protection, and is relevant to the economic study proposed by CAANZ. This study is discussed in detail later in this report (see section *2.4 "Don't call me, I'll call you." - Cooling off periods vs. Opting-in: A behavioural economics analysis* at pg. 28).

1.5 What is the 'opt-in' model? And how is it meant to work?

Under the current cooling-off model, a consumer is entitled to terminate an unsolicited consumer agreement within 10 days. This is designed to enable consumers to change their mind away from the immediate influence of the salesperson.

By contrast, an opt-in model would work by requiring the consumer to proactively confirm a purchase decision after a certain period following trader contact (perhaps 48 hours), and would require the trader not to contact the consumer during that time.

While still allowing the consumer to make their decision away from the influence of the salesperson, the opt-in model differs in that the consumer does so *without having already made any form of binding commitment to purchasing the good*. From a behavioural perspective, these protections are quite distinct, which may have important implications for their relative efficacy.

A counter-argument to the opt-in model, however, is that it may be "too effective"—and may result in legitimate trade being curbed because consumers who actually do want to make a purchase simply fail to confirm, either through apathy or poor management. This view needs to be tested. Useful policy initiatives

[35] Oxford English Dictionary online: https://en.oxforddictionaries.com/definition/behavioural_economics.
[36] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, pp. 363 -367.
[37] *Intergovernmental Agreement for the Australian Consumer Law* (2 July), paragraph C. Available at: www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

are too often sunk by the often spectral fear of "unintended consequences". It should be remembered—as noted by Professor Sovern—that early opponents of the cooling off protection predicted then that it would be disastrous for business, yet in practice it appears to have little impact.

> *"Early opponents of cooling-off periods were often vehement in their opposition. Indeed, some complained that cooling-off periods were "contrary to fundamental business concepts, "designed to undermine the foundation of the law of contracts", "discriminatory in the worst way and probably unconstitutional", "would make contracts 'a mere illusion'", "leave [consumers] in greater jeopardy than the 10 percent of our society that is out to take [consumers]", would "invite bad faith contracts" and that cooling-off period rules were "class legislation". It was said that cooling-off periods would occasion "agony" for consumers."* [38]

Of course, these views have altered radically since the 1960s and 70s. When in 2009 the FTC called for submissions in review of the Cooling-Off Rule, only six stakeholders bothered to make one—suggesting that it has not, in fact, ushered in a commercial apocalypse. In fact, the Direct Selling Association stated that "*the Rule serves a valuable purpose for consumers*".[39]

As Sovern identifies:

> "*The only merchant objection to the Rule came from a seller of fresh fish that complained that the Rule permitted buyers to cancel sales and by the time that seller could reclaim the fish, several weeks would have passed and so buyers could keep the fish for free*." [40]

For what it's worth, fishmongers in Australia have so far been silent on this dilemma.

The point is raised to highlight the potential for objections to the opt-in concept to be over-stated, or even catastrophized. Opt-in models have been shown to serve their intended purpose well in a data collection/privacy context, and have recently been implemented in the vocational education and training (**VET**) sector, where rampant mis-selling (much of it unsolicited) resulted in billions of public sector dollars wasted.

In the VET sector, since January 1 2016, providers have been prohibited from accepting a request for a VET loan form unless two business days have passed from the date and time the person enrolled.[41] A Commonwealth Department of Education Training Fact Sheet designed to explain this reform stated:

> "*This will ensure students have had time to fully understand the details of their course enrolment and consider the fee payment options available to them*."[42]

Given the known harm that unsolicited sales cause, and given that CAANZ have acknowledged the existence of that harm, it would seem prudent to at least test the potential of an opt-in model—rather than assume its effect would be negative.

As the case studies in this report highlight, the unsolicited selling of solar panels currently constitutes a consumer harm "hot spot" (see section *4. Consumer Harm Hotzone #1: The Solar Panel Industry* at page 58) which may provide a useful opportunity to run a discrete trial to test the real world impact of applying the opt-in model to unsolicited sales.

---

[38] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 375.
[39] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 376.
[40] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 376
[41] See *VET Student Loan Rules* s.10. Available at: https://www.legislation.gov.au/Details/F2017C00602
[42] Australian Government - Department of Education and Training Factsheet, *VET-FEE HELP Reform,* Last Updated July 2016, p.2. Available at: https://docs.education.gov.au/system/files/doc/other/160901_vet_fee-help_reform_factsheet.docx_higher_ed.pdf

Sales of solar panels are particularly troubling due to the frequent provision of so called 'interest free' finance by unlicensed creditors to facilitate the sale. Although by no means limited to solar panels (medical equipment and mattresses are other products that have been found to be sold using this form of finance), the practice is commonplace in the solar panel sales sector.

This is problematic because the finance is not subject to credit licensing requirements, which would provide robust consumer protections. The finance often involves significant sums which causes serious financial detriment for consumers if the purchaser defaults because repayments are unaffordable. The availability of finance is often instrumental in facilitating these sales, and putting vulnerable people into financial hardship.

Other “consumer harm hot-spots” identified and examined by this report are:

- the impact of unsolicited sales on Indigenous communities; and
- the impact of ‘off-premises’ sales, whether unsolicited or ‘invited’—normally generated from an initially unsolicited contact.

2. The Human Factor: Behavioural economics and the inter-personal dynamics of unsolicited sales.

Behavioural economics is invaluable to the design of robust consumer protection because it explains how people *actually* behave in an economic context, as opposed to how they are *supposed* to behave.

Where traditional economics assumes that consumers will always act objectively in their own unwavering self-interest, behavioural economics reveals that decision making is seldom purely rational, and is affected by any number of behavioural and psychological factors. By studying these factors and examining the manner in which consumers actually make their decisions, policies can be devised that not only improve economic outcomes—but also prevent consumer harm.

The argument for consumer protection in unsolicited sales rests on the notion that people are uniquely vulnerable to unfair sales tactics in unsolicited sales negotiations, and are often persuaded, bullied or deceived into making decisions against their own self-interest. Indeed, the 'hard-sell' conduct that may seem standard in door-to-door sales would often be considered completely excessive in a traditional store —and may well prompt the consumer to leave. This is not only because the sales interaction occurs in a setting where the salesperson is not subject to direct managerial oversight (although that is a factor), but is also due to the psychological elements of an unexpected sales negotiation occurring away from a usual place of business.

In a typical solicited sales approach, the consumer approaches the trader after the consumer has identified their own want or need, and decided to take action to satisfy that want or need—generally with at least some awareness of the potential cost involved (and often after having done some research into potential options). This puts the consumer in a relatively strong position to choose to give their business to a trader, or decide not to. The consumer, in this type of sales process, is generally in control of the outcome. If they don't like what they see they can simply leave the store.

Unsolicited sales negotiations short-circuit this process.

Uninvited traders persuade people to buy products that they may not have previously thought they wanted or needed, or even considered. The sales process itself seeks to instil that want or need in the consumer and then immediately satisfy it.

In our casework experience, we have encountered 'hard-sell' unsolicited sales techniques which include bullying, harassment, deliberate obfuscation, and outright deceit. Often these behaviours are able to take place because the salesperson is not being observed by third parties and is very often operating on a commission basis—incentivised to make a sale at "any cost" with no sense of obligation or responsibility to the consumer. In these circumstances salespeople can use 'hard-sell' techniques to persuade sometimes unwilling consumers to buy, or even trick them into making purchases they are not aware of.

While these are obviously unfair sales tactics, more nuanced behavioural factors also apply. These do not rely on particularly poor trader conduct—but still place the consumer at a psychological disadvantage, and make them more likely to enter an undesirable transaction.

2.1 The foot in the door

"Foot in the door" technique is a well-known compliance tactic which has been extensively researched by social psychologists and takes its name from door-to-door sales—the idea being that once a salesperson has

their foot in the door, you can't close it on them.[43] The technique was first studied by two Stanford researchers in 1966 and written up in the Journal of Personality and Social Psychology under the title *Compliance Without Pressure: The Foot-in-the-Door Technique.* [44]

Rather than being a literal, physical, foot in the door, the technique describes a process whereby a person is induced into complying with a significant request by first agreeing to a smaller request, or number of smaller requests. The more the subject complies with the requester the more likely they are to continue complying with the requester, despite the potentially large or demanding nature of the final request—which is the requester's intended goal from the beginning.

The technique is effective due to the behavioural concept of "successive approximations", which dictates that the subject is likely to feel obligated to continue in an attitudinal direction once it has been established. This can be explained in social terms because the initial small agreement, or series of agreements, generates a bond between the requester and the subject. This is true no matter how insignificant the initial request, which may only have been agreed to out of politeness. The subject will then justify further compliance on the basis that they do not want to seem inconsistent and may mistake this internal justification for a genuine bond between them and the requester—or convince themselves that the request is genuinely in their own interest.

Foot in the door technique can be used to first engage the consumer and then build rapport through a number of smaller requests. These can include very simple requests like, "May I have a few moments of your time?", "Can I show you something?", "Excuse me, could I ask you a question?". Innocuous in themselves, acquiescence with these smaller requests establishes an attitudinal direction in which the consumer feels compelled to continue, and which requires cognitive effort to resist.

This is particularly true if the person is otherwise stressed or vulnerable, and lacks the energy or wherewithal to resist—sometimes described as "self-regulatory resource depletion".[45]

2.2 Social norms, politeness and the commercial advantage of familiarity

The act of asking a person to leave your front door, closing the door on them, or hanging up the phone requires greater psychological resources than simply walking away, as a consumer may do in a store setting. Social norms of behaviour dictate that it is acceptable to decide nothing in the store is for you and to simply leave. No-one need feel offended or affronted in that context, or awkward for having taken that action.

By contrast, an unsolicited sales approach requires the consumer to take what some might feel is a confrontational action by pro-actively severing the interaction. Further, if the salesperson is particularly persistent, strong-willed or pushy they can make this process even more difficult for the consumer by diverting the conversation, refusing to leave, or simply not taking no for an answer—as we have seen in some of our case studies.

Severing contact is particularly difficult if the consumer is conflict averse, or bound by social standards of conduct which make them feel impolite for not hearing a salesperson out. If the sales interaction is lengthy, or the person feels a strong rapport has been established, this process may reach a stage where it feels impolite to say no to the transaction—whether the product is wanted or not.

---

[43] Patel, Neil. *Foot in the Door technique: How to get people to seamlessly take action*, Forbes, 13 Oct 2014. Available at: https://www.forbes.com/sites/neilpatel/2014/10/13/foot-in-the-door-technique-how-to-get-people-to-take-seamlessly-take-action/#7f874d8e7d9e

[44] Freedman, J. L., & Fraser, S. C. (1966). *Compliance Without Pressure: The Foot-in-the-Door Technique*. Journal of Personality & Social Psychology, *4*(2), 195–202.

[45] Dr Paul Harrison et al. *Shutting the Gates: An Analysis of the Psychology of In-home sales of Educational Software*, Deakin University and the Consumer Action Law Centre, March 2010, p. 24.

The home context particularly blurs the nature of a sales interaction, because home is where we usually engage in interactions with people we know personally. Sales representatives leverage this to create what feels like a personal relationship with the individual, and can win their trust more fully than they might in a store setting. Simply put, in a store setting, the customer always knows that they're being sold to and can manage the interaction accordingly. In the home setting, the line between a commercial and a personal interaction is blurred—which makes it harder to say no. Research shows that people prefer to say yes to people they like, perceive as similar to them, or regard as being in authority.[46]

The current ACL protections acknowledge the contextual element of door-to-door sales by requiring salespeople to advise consumers that they may ask them to leave, and then promptly leaving if asked to. This is intended to 're-set' the power balance between the parties and overcome the potential awkwardness of feeling impolite. While useful and well-intentioned, it is difficult to measure compliance with this protection—and even if compliance is high, the measure does not fully overcome the blurring of the line between a sales interaction and a personal one. The home context of the interaction means that the consumer can never really be on the same psychological footing as if they had walked into the trader's place of business, knowing they can leave at any point without feeling awkward or causing offence.

This effect was acknowledged by CAANZ when they stated in their Interim Report:

> ***"…when a consumer is in a situation where they are not expecting to enter into an agreement to purchase a good or service, they can be more vulnerable to unfair sales practices."***[47]

When considering these factors, it's important to note that what may merely seem like "strong" sales tactics to one person, can feel more like bullying or harassment to another. This means that some people are more susceptible to hard-sell tactics than others.

2.3 The cognitive impact of poverty

Some people are less likely to assert themselves and more likely to agree to an undesirable transaction than others. It is not unrealistic to assume that over time, salespeople identify consumer groups which yield particularly good results—and then target those groups to maximise profits.

Counterintuitively, this may involve targeting people on lower incomes, who behavioural economists have identified as having depleted cognitive resources and therefore less capacity to resist the hard-sell—precisely *because* they are poor. This is not a judgement of those who are experiencing poverty, rather a description of the cognitive impact that poverty has on *anyone*—whatever their background or previous circumstances.

Research into the impact of poverty on cognitive capacity is widely known and should inform the reform debate around unsolicited sales. For example, high profile multi-institutional research[48], published in *Science* on August 30, 2013 hypothesised that:

> "*The poor must manage sporadic income, juggle expenses, and make difficult trade-offs. Even when not actually making a financial decision, these preoccupations can be present and distracting. The human cognitive system has limited capacity. Preoccupations with pressing budgetary concerns leave fewer cognitive resources available to guide choice and action*."[49]

---

[46] Dr Paul Harrison et al. *Shutting the Gates: An Analysis of the Psychology of In-home sales of Educational Software*, Deakin University and the Consumer Action Law Centre, March 2010, p. 23.
[47] CAANZ, *Australian Consumer Law Review – Interim Report*, October 2016, p 133. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf
[48] Authors of the study were from the University of Warwick, Harvard University, Princeton University and the University of British Columbia respectively.
[49] Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyaing, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, p. 976.

Through their laboratory studies, the researchers determined that this hypothesis was correct:

> *"The data reported here suggest a different perspective on poverty: Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity. The findings, in other words, are not about poor people, but people who find themselves poor.*
>
> *How large are these effects? Sleep researchers have examined the cognitive impact (on Raven's)* of losing a full night of sleep through experimental manipulations. In standard deviation terms, the laboratory study findings are of the same size, and the field findings are three quarters that size. Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep. In addition, similar effect sizes have been observed in the performance on Raven's matrices of chronic alcoholics versus normal adults and of 60-versus 45-year-olds. By way of calibration, according to a common approximation used by intelligence researchers, with a mean of 100 and a standard deviation of 15 the effects we observed correspond to ~13 IQ points. These sizable magnitudes suggest the cognitive impact of poverty could have large real consequences.*
>
> *This perspective has important policy implications*."[50]

Given the high cognitive resources required to resist unsolicited sales approaches, it is not surprising that people on low incomes are particularly susceptible—while at the same time being least able to afford undesirable transactions.

Further, it is not surprising that the current protections in the ACL—even when complied with—are not sufficient to protect people experiencing vulnerability from harm arising out of unsolicited sales.

In order to provide effective consumer protection, the ACL should, as far as possible, place the individual consumer in the psychological position of having made the initial approach or inquiry (i.e. a typical solicited sale). If this could be achieved, it would empower consumers to metaphorically 'walk away from the store' without any sense of awkwardness or any great cognitive effort—just as occurs in a real store.

In fact, the current cooling-off protection is designed to achieve exactly that effect.

Theoretically, the cooling-off protection *should* empower consumers to terminate an undesirable agreement once they are no longer under the direct influence of the salesperson—and do so without great difficulty. Under the law, unsolicited sales representatives are required to inform consumers of their right to terminate, and the process for doing so. This *should* place the consumer in a strong position to rethink and cancel an undesirable transaction before they experience detriment. If consumers conformed to the construct of the "rational economic man", then the cooling-off period would probably be effective.

As it happens, consumers do not behave like the "rational economic man", the cooling-off period does not work, and behavioural economics can again explain why. Further, behavioural economics can also theorise why the proposed opt-in model would be significantly more effective: in behavioural terms, the opt-in model would psychologically place the consumer in the position of having made the initial approach. This makes it easier to metaphorically "walk away from the store".

***** NB: 'Raven's' is a reference to Raven's Progessive Matrices, also known as Raven's test. Raven's test is a common component in IQ tests and is used to measure "fluid intelligence", the capacity to think logically and solve problems in novel situations, independent of acquired knowledge.

[50] Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyaing, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, p. 980.

2.4 "Don't call me, I'll call you."– Cooling off periods vs. Opting-in: A behavioural economics analysis.

In 2016 Consumer Action commissioned research by Dr Paul Harrison, (assisted by Dr Josh Newton) to examine the relative effectiveness of cooling off and opt-in models from a behavioural economics perspective. Dr Harrison is a professor of marketing and co-Director of the Centre for Consumer and Employee Wellbeing at Deakin University in Melbourne, and has since released the headline results of his research. Full results will be published in a report at a later date.

For the purposes of the research, Dr Harrison devised an experiment which was undertaken by 759 participants who were asked to select from one of two reward options.

The options were to:

- Receive $2 immediately; or
- Receive $1 immediately plus a chance to win $25.

The 240 participants who chose the latter option were then randomly allocated to one of four study conditions, of 60 participants each.

The groups were:

- Control
- Cooling off
- Double opt-in, with the provider contacting the consumer.
- Double opt-in, with the consumer contacting the provider.

In the control group, participants automatically received their chosen reward ($1 plus a chance to win $25).

In the cooling off group, participants were given a 48-hour window to revert to the alternative reward choice ($2) if they chose to do so.

In the double opt-in, "provider contacts group" participants were contacted within 48 hours via email and asked to confirm their choice. If they did so, they received their initial chosen reward. If they didn't confirm or respond then they received the alternative reward ($2).

The final group required participants to proactively opt-in within 48 hours to confirm their choice by email. Those who did not respond or confirm then received the $2 reward.

The findings were statistically significant and showed that:

- 100 percent of participants who were offered a 'cool-off' option (i.e. they were required to make active contact to change their mind) ***did not change*** their initial decision. Not one participant chose to take the $2 reward.
- 100 percent of participants who were offered the 'opt-in' option (i.e. they were required to make active contact to confirm their decision) ***also did not change their initial decision***, even though doing so would have provided them with the same choice as the 'cooling off' group;
- 70 percent of participants who were contacted and asked to 'opt in' to receive the same choice as the cooling-off group ($2), did not change from their initial choice.

Dr Harrison concluded that the findings are explained by the behavioural concept of consumer "inertia". This concept dictates that those who make a decision are ***very unlikely*** to use their cooling off rights to change their mind. Similarly, people are ***highly unlikely*** to confirm an initial decision if they are required to opt-in to it at a later time. Even if they are prompted to opt-in by the provider, the research shows that most people (in the study, 70 percent) stick with an initial decision—although this was the only category in which active confirmation behaviour was observed (at a rate of 30 percent).

The study overwhelmingly found that passivity is the dominant behavioural trait when faced with either a cooling off or opt-in option—and indicates that people, perhaps 'irrationally', become attached to an initial decision.

When discussing his research in online publication *The Conversation,* Dr Harrison explained that consumers are behaviourally pre-disposed ***not to use*** cooling off periods. This can be explained by the fact that people become attached to their initial decision, and there is cognitive effort in changing your mind:

> "*The problem with the current cooling-off periods is that they operate after a customer has taken ownership of something or signed an agreement. Our research finds cooling-off periods simply don't overcome many of the inherent biases of human behaviour.*
>
> *Dr Josh Newton and I, from Deakin University's* Centre for Employee and Consumer Wellbeing*, tested how 759 consumers responded when presented with cooling-off and opt-in alternatives as part of an online survey.*
>
> *A number of behavioural theories, such as the* endowment effect*, the* status quo bias *and* consistency theory*, show that once a person "owns" something, they value it more and are less likely to give it up – at least in the short term. This is particularly the case if they have put mental, physical or social effort into their decision*."[51]

These concepts were also identified by Professor Sovern in his article, although he described "consistency theory" with an alternative term—"cognitive dissonance".[52]

To elaborate further, these concepts are defined below:

- **Endowment effect:** The endowment effect describes a circumstance in which an individual values something which they already own more than something which they do not yet own. Sometimes referred to as divestiture aversion, the perceived greater value occurs merely because the individual possesses the object in question. Investors, therefore, tend to stick with certain assets because of familiarity and comfort, even if they are inappropriate or become unprofitable. The endowment effect is an example of an emotional bias.[53]

- **Status quo bias:** Is the human tendency to like things to stay relatively the same. The current situation is taken as the reference point, and any change from that baseline is perceived as a loss. Assumptions of longevity (long lasting), goodness and inertia (resistance to change) are said to be contributing factors to status quo bias.

  Status quo bias is not the same as a rational preference for the state of affairs, such as is the case when the current situation is objectively better than the available alternatives. Status quo bias also differs from a situation with insufficient or incorrect information. This type of cognitive bias in judgment and decision making is similar to anchoring bias and confirmation bias.[54]

- **Consistency theory:** Is a psychological theory that proposes that humans are motivated by inconsistencies and a desire to change them. Cognitive inconsistencies cause imbalance in individuals and the tension from this imbalance motivates people to alter these inconsistencies. The tension arises when thoughts conflict with each other and this tension creates a motivation to change and correct the inconsistency. When this tension is reduced balance is achieved in the individual.

[51] Harrison, Paul. *Cooling off periods for customers don't work: study,* The Conversation, November 28 2016. Available at: https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473
[52] Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 363 -367.
[53] Definition taken from: http://www.investopedia.com/terms/e/endowment-effect.asp
[54] Definition taken from: http://www.mbabrief.com/what_is_status_quo_bias.asp

> The three main components of this theory state that people anticipate consistency, inconsistencies create imbalance and dissonance in individuals, and that tension motivates the individuals to create consistency in order to achieve balance.[55]

Taken together, it is not difficult to see that once someone has been induced to make a purchase from an unsolicited sales approach then the odds of them utilising the cooling off period to cancel the agreement (assuming they're even advised of that right in the first place) are extremely low.

To do so requires the individual to overcome a sense of loss (the endowment effect), as well as a natural tendency to stick with the status quo, and be inconsistent in their decision making (consistency theory). Changing your mind in this context literally creates discomfort—it is far easier to stick with your initial decision even if you're not entirely comfortable with it, or it seems slightly irrational. If your self-regulatory resources are depleted through the cognitive impact of poverty, then utilising the cooling off period is likely to be even more difficult. Not only are you more likely to be sold an undesirable purchase—you're also less likely to take advantage of the cooling off period to cancel it. The fact that your life may also be quite chaotic creates another barrier—you are less likely to use the cooling off period purely due to the administrative burden involved, however light that may seem to an outsider.

By contrast, the opt-in model works by not requiring the individual to commit to a decision at the time of the sales interaction, avoiding the sense of the good being "owned" (and therefore the endowment effect). The impact of consistency theory is also nullified. As a decision has not yet been made, there is no pattern of decision making for the individual to remain consistent with—the ball is still in their court, so to speak. In terms of status quo bias, they are left in the position they would be in if they walked into a store. They may choose to disrupt the status quo if their want or need for the good on offer is strong enough—and if it isn't, then they can walk away without loss of face. And in terms of administrative burden, while the effort required is not great—it is enough so that only those who genuinely want the good are likely to confirm the sale.

When considered from a behavioural economics perspective, it seems clear that an opt-in model *should* be a significantly more effective consumer protection than the current cooling-off provision. It would be surprising if the opt-in model did not act to reduce consumer harm, saving time, money and energy for consumers, traders, community legal centres and administrative tribunals alike.

In short, the opt-in model should act to ensure that less goods and services are mis-sold through the unsolicited sales process - and more of those purchased by the consumer are genuinely wanted, and represent a legitimately worthwhile and affordable purchase.

That being said, it is possible that an opt-in model may have an impact on commerce, and the degree to which the model may impact legitimate trade needs to be carefully considered.

2.5 The opt-in model: How would it affect legitimate traders?

CAANZ have signalled that:

> *The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration.*[56]

[55] Definition taken from: https://www.alleydog.com/glossary/definition.php?term=Cognitive%20Consistency
[56] CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

In undertaking the proposed study, CAANZ will need to consider the impact an opt-in model may have on legitimate traders.

In his research, Dr Harrison identified that participants were highly unlikely to confirm a sale through the opt-in process, and that inertia was the dominant behavioural trait—affecting both the cooling-off model and the opt-in model. This does raise the concern that imposing an opt-in requirement on unsolicited sales may in fact inhibit legitimate commerce, and otherwise appropriate and mutually beneficial transactions may be lost due to consumer inertia.

In response to this concern, it is worth noting that the experiment conducted by Dr Harrison involved very limited sums ($1 or $2 respectively—with the chance to win a maximum $25), and although it effectively measured behaviour in that context, the increased reward of a good or service that the consumer genuinely wants may well act to improve the take up under the opt-in model. On that basis, there are grounds for a 'real world' trial of the concept. The Harrison study should not be taken as a definitive statement of how consumers will behave, but as an indication that requires testing.

Harrison's findings do give sufficient cause for concern that the trial should be narrow and contained. A trial of the opt-in model for the unsolicited sale of solar panels may be a useful place to start, as this is an area where consumer detriment is currently high—and where the unsolicited sales model is being used extensively by a sector whose participants can be easily identified and corralled for the purposes of a trial.

As stated earlier in this report, it is important not to dismiss the opt-in model on the grounds of potential unintended consequences. Apart from anything else, such objections were vociferously raised in the US in objection to the cooling-off model back in the 60s and 70s, and proved to be illusory.

Further, the recent local example of applying an opt-in model to the sale of vocational education courses has shown that opt-in models do not necessarily stem all trade—but do act as an effective filter to ensure that consumers are making their purchases willingly, with full knowledge of the consequences, and are not being pressed into a decision through high-pressure sales tactics.

Intuitively, if a consumer genuinely wishes to buy something, then surely they can be trusted to do so away from the direct influence of the salesperson, and *should* make the minimal effort necessary to confirm a sale. If they do not do so, perhaps they don't really want the good. If the transaction would only be entered into under the direct influence of a sales approach, who is to say whether it is genuinely wanted, or whether the consumer has simply 'fallen' for a sales pitch?

There would still be considerable value for traders in making unsolicited approaches to market their wares, particularly in an increasingly 'noisy' marketing environment, where all of us are constantly subject to advertising through multiple platforms. As a marketing exercise, unsolicited approaches still have the benefit of raising consumer awareness of the good, engaging them in the market and providing access for purchase—if they wish to do so.

In theory, the opt-in model *should* allow legitimate commerce to thrive—while nullifying the consumer harm caused by high-pressure sales tactics.

A major benefit of the approach would be to remove the influence of sales staff on a final purchase decision. Even if the sales conduct is poor and consumers are not properly advised of their rights under the law (as often occurs), the opt-in model would continue to act as an effective protection—whether the salesperson complies with the law or not. As pessimistic as it may sound, this may well be a more effective and realistic policy intervention than attempting to improve the conduct of sales staff.

To explore this further, it is necessary to examine current employment practices in unsolicited selling.

2.6 Common training and remuneration practices in the door-to-door sales industry

In 2012 the Australian Competition and Consumer Commission (ACCC) commissioned a comprehensive research report titled *Research into the Door-to-door Sales Industry in Australia,* compiled by consultancy firm Frost and Sullivan.

The Frost and Sullivan report drew on primary and secondary sources, and included a significant amount of qualitative research which highlighted common industry practices. The research included interviews with 15 individuals who had recently worked in door-to-door sales. The report found that in most cases companies engage a service provider to undertake door-to-door sales on their behalf, which can make it difficult to "*achieve consistency in the customer experience of door-to-door sales*".[57]

Put more plainly—the report found that the conduct of door-to-door sales people can vary radically, and is often out of the control of the traders whose goods the salespeople are peddling.

> "*This is due to recruitment and remuneration issues in the sales industry, including the temporary nature of many sales people and the remuneration structure which may drive a strong focus on making sales, and the fact that traders appear to prefer to outsource the door-to-door selling functions*."[58]

Implementing an opt-in model is unlikely to change the out-sourced or temporary nature of employment in unsolicited sales. Unsolicited selling is notoriously difficult, gruelling work and is noted for being a 'burn and churn' industry. Constant rejection, repetitive work, exposure to the elements, uncertain remuneration and high physical demands mean that employees seldom stay in unsolicited sales for long.

However, without being able to 'close' a sale at the time of the sales interaction, sales staff would become more of an advertiser than a fully-fledged salesperson. The effort required to coerce a consumer into buying a good would become pointless—and potentially counteractive—if there is no capacity to finalise the deal on the spot. Even if the salesperson did engage in high-pressure tactics, they would not be able to 'seal the deal' at the time of the interaction.

So while an opt-in model may not necessarily stabilise the workforce and improve "*consistency in the consumer experience*", it may at least mitigate the potential for harm caused by the "*strong focus on making sales*."

Certainly, as things currently stand the culture of door-to-door selling is defined by a strong focus on making sales, leading to a particular employee 'type' that thrives in the industry:

> "*In all but the most unorganised/informal set ups there is some tracking mechanism whereby performance is monitored. This is usually through the achievement of sales targets. Management encourages those with strong results and there may be ceremonial events to celebrate high achievers internally. Such encouragement may include formal announcement of performance, ringing of bells in the office, special bonuses, name printed on a high achiever board etc. At the other end of the scale, not meeting sales targets is reflected in pay received (and in some cases, this could be no pay at all), pressure from management to perform or at worst ostracising from the group or termination.*
>
> > *"In the office we had a big bell and a gong and basically if you got a PB (personal best) or made more than 3 sales you got to ring the bell so everyone would know you did well. If you made more than 5 sales you got to smash the gong and put your name on the back of the gong. It was a confidence boost and makes you feel better about yourself." (Respondent 1)*

[57] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, p. 11. Available at: https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf
[58] Ibid.

Respondents allude to a particular style or personality type that succeeds in the door-to-door sales industry. Typically those who had ascended to management roles are:

- *Charismatic*
- *Persuasive*
- *Competitive and high achievers*
- *Goal driven and highly motivated*
- *Tough and resilient*
- *Well presented*
- *Articulate*
- *Decisive and uncompromising (at worst, lacking compassion and ruthless); and*
- *Young and male."*[59]

Given these characteristics, it is unsurprising that vulnerable consumers are often persuaded into purchases they do not really want.

Further, the remuneration structure of door-to-door selling is almost a perfect recipe for consumer harm:

"*The two most common models for remuneration are:*

- *100 percent commission only (no base): where income is only achieved if sales are made, irrespective of hours worked or training undertaken; and*
- *A relatively low base wage with additional commissions: i.e. workers will receive some income if no sales are made, but this income may be minimal.*

Roles at companies offering 100 percent commission (which include many of the major service providers, although some may pay workers for initial training) may have uncapped earning potential, so may result in the worker earning $5,000 per week or more, if they are highly successful at making sales (and have a large team of motivated sellers below them too). This remuneration package is ideally suited to those who are highly driven at selling door-to-door and often have the personality characteristics described above in the previous section on management."

Service providers train their sales staff in behavioural techniques designed to elicit compliance—and it seems that there is at least some targeting of lucrative and often vulnerable consumers:

> *"We had tip sheets and on there you would have nearly every type of stereotypical person and tips on how to talk to them…You would use certain dialogue for elderly people through to what to do with people who wouldn't even open the door and shouted through the window, telling you to leave" (Respondent 2)*

Looking and acting professional, using appropriate tone and employing body language techniques such as mirroring, repeating key words, copying language used by the customer etc are all important. One technique used by a few respondents interviewed in different states is G.I.F.T.S. This acronym stands for:

- ***G = Greed** – appeal to the customer's sense of greed. Continually mention the benefit to them (usually a discount percentage or a dollar value of the potential saving to them if they take up the offer). Some believe this worked particularly well with those from less affluent areas or ironically, wealthier households;*
- ***I = Indifference** – couch the conversation so that it sounds like there is no end benefit to the door-to-door salesperson, irrespective of whether the customer buys or does not buy the service or product. This laid back approach has been mentioned as working quite well at weekends (when householders are generally more relaxed). It usually includes such comments as, "it makes no difference to me if you take up the offer, but…";*

[59] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 56-57. Available at:https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

- ***F = Fear of loss*** *– indicate (whether factual or otherwise) that the customer was missed on the last run of the neighbourhood and the salesperson has now come back as a final check. Alternatively, it may be implied that the salesperson is only working in this area today, thus the householder may act impulsively, fearing potentially missing out;*
- ***T = The Jones theory*** *– Mention (whether fabrication or truthful) that all of their neighbours have already signed up to the deal or discount, implying everyone is gaining a great deal, thereby creating a sense of pressure for some to follow the herd; and*
- ***S = Sense of urgency*** *– Imply (whether fabrication or truthful) that the promotion is strictly limited, or even a one day offer and that they must act immediately to gain the benefit or else they will miss out. This technique may also be accompanied by the salesperson acting like they are in a hurry to leave."*[60]

What is striking about the G.I.F.T.S approach is the degree to which misleading statements can be built into the sales pitch. Telling consumers that "*everyone else is doing it*", that the deal is "*for a limited time*" and that this is their "*last chance*" are all seen as acceptable statements—whether they're true or not.

Given the apparent ubiquity of this approach, can these techniques be considered legitimate commerce; or are they misleading and deceptive?

Perhaps more material to the issue at hand—is it possible to prevent this kind of conduct occurring in a sales interaction? Or is it more pragmatic to create *a gap in time* during which the consumer can consider their purchase without acting on a false sense of urgency? Taking it even further—if a gap in time were put in place, would salespeople be tempted to create that false sense of urgency in the first place?

Certainly, some of the comments by former sales staff raise serious concerns about trader conduct, and provide impetus for at least trialling a consumer protection designed to remove sales conduct from the consumer's final decision-making process.

> "*We had a target range. Older people, single parents and the young ones who were just in their first house – don't ask me how they got the list because I have no idea – but I went to a lot of Centrelink people and young people who were all attracted to the bright lights of the offers and we had to feed them all a whole bunch of garbage but I didn't find out it was a bunch of garbage until later…we preyed on the vulnerable…we were given a list of streets for the vulnerable such as housing commissions, older people…they (employer) weren't gonna write any of this down though because they aren't stupid" (Respondent 8)* [61]
>
> *"The best clients are the ones with a lack of power like the older person. They don't know what you are on about or what you represent…For some clients, you are never going to change them unless you trick them…And it depends on the (employee) too. Once they walk out that door they are on their own and you could make all the rules in the world and they can be ignored by the salesperson (to do what they like without fear of retribution)" (Respondent 14)* [62]
>
> *"I was just lying to people…on good days you just got another sucker…and they (employer) didn't care because they just want the sale and they are a big company!" (Respondent 8)* [63]

---

[60] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 60-61. Available at:https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

[61] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 61. Available at: https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

[62] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 61-62. Available at:https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

[63] Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, p. 63. Available at: https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

> *"You just use the word 'government' as many times as you can…so then it feels like you are working for the government (implying trust). You would use similar language or techniques of the intelligence industry or you could just tell them lies like I am not going to gain any advantage by selling this as I am not on commission – it is all very psychological what you are doing and there are neuroscience techniques…You may keep using the word 'agree' (suggestively, over and over). It is really just bullying." (Respondent 14)* [64]

At this point it would be remiss not to make mention of Sales Assured, [65] an industry driven initiative designed "*to ensure the best practice in face to face marketing for customers".* Sales Assured describes itself in the following terms:

> *With a commitment to improving the customer experience, Sales Assured has established guidelines to increase service standards. These include standards in recruitment, training, accreditation and ongoing monitoring of sales agents. In this way, customers can be confident when buying face to face at their door, at a kiosk or for their business.*
>
> *Those companies which choose to be Members are demonstrating their commitment to improving the standards of face to face marketing across many industry sectors.*
>
> *The robust standards can apply for energy, telcos, Pay TV, energy efficiency, registered training organisations, charities and more.*
>
> *Whilst recognising that there are laws, such as the Australian Consumer Law, that govern face to face sales, Sales Assured aims to lift the bar further and ensure the strictest compliance and most ethical practices by sales agents when dealing with customers face to face.*[66]

Sales Assured is a member based organisation, with members across the direct selling and energy industries. It imposes a high standard of conduct on sales agents, and has the power to take disciplinary action where those standards are breached (emphasis added):

> *It is a self-regulated scheme to monitor and improve face to face marketing standards. It seeks to improve compliance to promote consumer confidence and reduce complaints.*
>
> *It includes:*
>
> - *A national scheme to ensure sales agents are recruited, trained and assessed in a consistent manner*
> - *A central register of sales agents that includes the accreditation history for more than 22,000 sales agents*
> - *Monitoring sales agent behaviour such that* ***a breach of the standards may result in disciplinary measures and deregistration of the sales agent for five years****.*[67]

While Sales Assured is a positive initiative, it's true to say the organisation focuses on individual breaches and ensuring that 'bad apples' are forced out of the industry—rather than tackling systemic issues around high-pressure selling, and the consumer harm it causes. To date these efforts have not been sufficient to shift the prevailing culture of unsolicited selling.

Common attitudes of unsolicited sales staff (and some of the behaviours described above) can be clearly seen in the case studies compiled in section 3.

---

[64] Ibid.
[65] For more information see: http://www.salesassured.com.au/
[66] http://www.salesassured.com.au/
[67] http://www.salesassured.com.au/

3. CASE STUDIES

What follows is a series of de-identified case studies gathered by Consumer Action, WEstjustice and Loddon Campaspe for this project.

While the people in these case studies have generally had positive outcomes, this is only because they have had assistance from a community legal centre. These case studies represent a very small, indicative sample of the harm that is caused by unsolicited sales. It is fair to assume that a high degree of consumer harm occurring in the community does not receive the benefit of community legal centre assistance. In fact, the most vulnerable consumers are often the least likely to seek assistance in the first place - so they will often fly under the radar.

Although community legal services cannot provide statistical data covering the entire market, we have collated the data represented by these case studies and can make the following observations.

1. **The solar panel industry is prominent in the sample.** In 10 of the 19 case studies (i.e. 52.6 percent), the good being sold was solar panels. This was not isolated to any one of the three community legal centres participating in the report. Solar panel case studies were provided by all three centres.

2. **Elderly consumers are prominent in the sample.** Nine of the case studies (i.e. 47 percent) involve elderly consumers. This may be partly due to the fact that elderly consumers are more likely to be at home when door knockers call, but may also be indicative of vulnerability and the capacity to be bullied by high pressure sales tactics. Whatever the case, it is clear that elderly consumers disproportionately fall foul of poor unsolicited sales practices – and are possibly targeted by traders as 'soft touches'.

3. **CALD consumers are prominent in the sample.** Of the 19 case studies, six involve CALD consumers (i.e. 31.5 percent). Limited English skills are a common theme in these case studies, with consumers often being signed up for purchases that they do not fully understand, and clearly being taken advantage of by unscrupulous sales staff. Again, these consumers may be specifically targeted by salespeople who are prepared to bully and mislead.

While not represented in this sample, the impact of unsolicited sales on remote Indigenous communities is also well documented, as discussed in section 5. *Consumer Harm Hotzone #2: Remote Indigenous Communities, Far North Queensland*, at page 60 of this report.

Taken together it is clear that vulnerable consumers including the elderly, CALD and those in remote Indigenous communities are particularly at risk of consumer harm caused by unscrupulous practices in unsolicited selling.

It is not difficult to imagine that an opt-in model may well provide a far more effective protection for those consumers than the current cooling-off model. The same behavioural factors that make vulnerable consumers susceptible to being signed up to inappropriate deals (and unlikely to utilise the cooling-off protection) should also mean they are unlikely to proactively opt-in, unless they genuinely wish to make a purchase. In that way the opt-in model could act as a regulatory filter to prevent the worst kinds of abuses in unsolicited sales—while not inhibiting legitimate commerce.

This would seem sufficient justification to at least trial the concept.

CASE STUDY #1 – "John"

When salespeople won't take 'no' for an answer

Product: Solar panels *Location: Rural Victoria*

Sales Process: Door knocking *Customer: Elderly pensioner*

Note: This case study has also been recorded as a video case study

John is a 72 year-old aged pensioner who lives alone in an old weatherboard miner's cottage in a small rural town about four hours north-east of Melbourne. He has no income, and no savings. John often sits out on the front verandah of his small cottage, and refers to it as his "lounge-room".

One day, a salesperson for a Solar Panel Company came up John's front drive and started talking to him about solar panels. John said that he was not interested but the salesperson was insistent, and let himself into John's home.

John followed the sales representative into the house. They then sat at John's kitchen table for at least an hour as the salesperson talked John through various features of the panels, and how they could reduce his energy costs. The salesperson was insistent that John could make big savings.

John continued to advise that he did not want solar panels, but became increasingly intimidated by the salesperson. John describes himself as "shaking and shivering" and did not know how to handle the situation. John asked the salesperson to leave – but the salesperson would not. He continued to refuse to take no for an answer, and continued to talk John through the paperwork relating to the sales.

John did not understand the technical details of what was being offered to him. The salesperson continued with his pitch, and offered John a finance contract to pay for the solar panels.

John said he could only afford $25 per week.

The salesperson arranged the paperwork and then rang the Finance Company on John's behalf. John never spoke to the Finance Company himself.

John eventually signed up for a 3KwH solar panel system, including 12 panels, at a cost of $8,695.00. John said that he signed up to get rid of the salesperson and that he felt stupid, but it sounded like a good deal.

Shortly afterwards, John received a letter saying that he must make 87 fortnightly payments of $103.87 per fortnight (with the first monthly payment adding a $3.50 account fee) to the Finance Company. John found the repayments to the Finance Company difficult to repay, as he could not afford it. He would often have no money left for food at the end of the fortnight. John didn't try to cancel the arrangement because he did not know there was a cooling off period.

After a period of time, John's sister - who lives next door to him - contacted a community legal centre on John's behalf. The community legal centre found that the Solar Panel Company contract did not comply with any of the notice requirements for unsolicited consumer agreements required by the Australian Consumer Law.

Despite the salesperson's claims, John was not saving much on his energy usage at all, and certainly not the amount that the salesperson said he would.

Outcome

After brief negotiations, the legal centre was able to retain a full refund for John of approximately $3,000—the amount he had paid by that stage. He also retained the panels.

CASE STUDY #2 – "Casey"

Caught unawares, with persistent follow-up

Product: Vocational training course

Sales Process: Door knocking

Location(s): Supermarket carpark and client's home, suburban Melbourne

Customer: Single mother, carer, CALD

Casey is a single mother with four dependent children, is a Karen refugee, speaks very limited English and is illiterate.

Casey was approached by a man in a supermarket carpark. The man told her that she was entitled to a free laptop from the government to assist with her English studies. He asked for her address and told her that she would receive a free laptop in the mail.

A few days later, Casey was door-knocked by the same man.

The man told her that in order to get the free laptop she would have to provide a tax file number and a copy of her passport. The man told Casey that she would not have any problems accepting the laptop. He asked her to sign multiple documents which Casey did not understand. He also told her to make a phone call to a number, during which he coached her to say yes and no to particular questions.

The man was quite intimidating and Casey felt scared to ask the man to leave her home or to tell him that she did not want to sign the documents.

A month later, the same man came to Casey's home.

Casey hid in her room and her nephew answered and told him that she was not home. Later that day, the same man returned and told Casey she could have another free laptop, but that she had to sign more documents. Casey signed the documents, and then told the man that she did not want any more visits as she did not know what was occurring. Casey was told that she needed to study in the courses that she had signed up to. Casey said that she did not know about the courses and could not study.

Casey came to a community legal centre after receiving two VET FEE-HELP loans in her name for two separate diploma courses, amounting to over $26,000.

The legal centre wrote a letter of demand to the college requesting that Casey's enrolment be cancelled without any penalties. The legal centre also contacted the Department of Education and Training to seek confirmation but did not receive an answer in a reasonable time. The community legal centre then lodged a complaint to the Commonwealth Ombudsman after contacting the Department of Education.

Outcome

Through the complaints process the Department confirmed that the college reversed the two VET-FEE-HELP debts. They also advised the legal centre that Casey had another VET FEE-HELP debt recorded with the ATO from a different private training college. The Department indicated that her personal information was most likely used inappropriately by a third party.

The community legal centre was able to also have this debt remitted. As such, Casey saved over $26,000.

CASE STUDY #3 – "Margie"

Obstructing the cooling-off period

Product: Energy contract *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: CALD*

Margie is an Ethiopian refugee who has basic English and literacy skills. In 2012 a door-to-door salesperson from an energy company came to her home. The salesperson obliged her to let him into her home and pressured Margie to sign up to an agreement.

When she signed up, the salesperson told Margie that she could cancel the agreement if she changed her mind and would not incur any penalties.

Six days after the salesperson came to her home, Margie called the energy company and informed them that she regretted her decision in signing up and requested that her agreement be cancelled. The person on the phone told her that this cancellation was accepted.

Four years later, Margie received a letter from a debt collector, which stated that they were seeking to recover over $450 in relation to debt owed to the aforementioned energy company.

In assisting Margie with this matter, the community legal centre discovered that the bill relating to this debt continued to accrue after the period that Margie had cancelled the service and moved out of her property.

Outcome

The legal centre lodged a complaint with the Energy and Water Ombudsman of Victoria (EWOV) to dispute the validity of the debt.

As a result, the energy company waived the amount charged to Margie.

CASE STUDY #4 – "Cara"

Invasive conduct – when salespeople go too far

Product: Energy contract *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: Single mother, CALD*

Cara is a 28 year-old Sudanese refugee who speaks limited English. She is a single mother of 7 children and her sole income is from Centrelink.

Cara was visited by door-to-door sales people multiple times. Two different men visited her at different times in relation to her energy bills.

One man came to her home and asked her which energy company she was with. As Cara was unsure, she showed him her bills. The man took down some notes and then left.

Another time, a man came to Cara's house when Cara was in the shower—so one of her children answered the door. The man let himself in and when Cara came out of the shower, he was in Cara's house, taking photos of Cara's utility bills. Cara asked the man why he was taking photos and he told her that he wanted to know how much she was paying for her bills.

Following these visits, a Finance Company contacted Cara alleging that she owed around $1,500 to an energy company.

Cara received multiple threatening calls from them seeking to recover this money. Even though Cara disputed this debt, Cara felt pressured by the Finance Company to enter into a payment plan with them, paying $40 a fortnight.

Outcome

The community legal centre sought cancellation of the alleged debt and was able to remove the default listing from Cara's name.

As a result, Cara saved close to $1,500.

CASE STUDY #5 – "Rajesh & Shifa"

When salespeople leverage public funds - and claim to be 'from the government'

Product: Vocational training course *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: CALD*

Door-to-door salesmen came to Rajesh and Shifa's house, claiming that they were representatives of the government.

The salespeople offered them free laptops. Unbeknownst to them, the couple were signed up to a TAFE online course. As Rajesh and Shifa received free laptops they told their friends, Rajnita and Edwardo about this opportunity too and facilitated an introduction with the same salesmen. The salespeople also told Rajnita and Edwardo that they were representatives from the government.

Rajnita and Edwardo told the salespeople that they only required one laptop—but were persuaded to take two. They were shown the VET fee help booklet and were told that per page 25, they were only required to pay for the laptops if either of their salaries exceeded $54,126.

Based on this information Rajnita and Edwardo signed the paperwork presented to them. They were unaware that they had signed up to study a Diploma of Business Administration.

After sharing their story to a friend who could read English, she became suspicious, and after reading the emails that they had been sent the friend told them what they had signed up to.

Outcome

The community legal centre contacted the education provider on behalf of both couples requesting the enrolments be cancelled without any penalty. Both couples were withdrawn from the college and moreover, the Operations Manager advised us that the salespeople involved in this sale were terminated.

CASE STUDY #6 – "Liam"

Creating a sense of urgency – the "very limited offer"

Product: Solar panels *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: Serious health issue*

Liam was on chemotherapy suffering from bowel cancer. He was visited by an unsolicited sales representative who was selling solar panels. Liam informed the sales representative that he was unwell, on chemotherapy and was worried about paying high prices.

The sales representative insisted that his company were offering a very low price for that day only, making multiple calls to his manager to lower the price. The sales representative also promised that Liam would receive "substantial savings" on his electricity bills after the installation of solar panels and was told that he would receive a 66 cent feed-in tariff.

The representative was in Liam's house for many hours, and Liam felt pressured to sign a contract.

The contract stated that the price of installation would be $11,500 and further that he could only obtain 60 cents in feed-in tariff.

Liam later obtained alternative quotes for comparative panels which amounted to $6,000 less than what he had paid.

Outcome

A community legal centre assisted Liam in lodging a VCAT application on the grounds that the energy company engaged in misleading and deceptive conduct.

As a result the trader offered to settle the matter before the hearing, refunding Liam $6,000.

CASE STUDY #7 – "Sarah"

Door knocking to book an "invited" in-home appointment - complete with rubbery numbers

Product: Solar panels *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: Elderly pensioner*

Note: This case study has also been recorded as a video case study

Sarah is a pensioner who lives with her husband in the outer south-west of Melbourne. They are both concerned by the increasing cost of electricity. Sarah makes sure that all her appliances are turned off unless they are absolutely needed.

One Saturday afternoon a salesperson knocked on Sarah's door to talk about a solar panel system. He was a young man in his 20s and he provided all the relevant identification. Sarah was wary as she does not like door knockers—but she was also curious about solar panels, and asked about the price.

The salesperson said he didn't know about the cost and how many panels she needed. He could, however, leave Sarah with a voucher for a $2,000 government rebate to be used if she made a purchase. Other than that, all he could do was arrange a call with someone to talk to Sarah in more detail. Sarah consented to receiving a follow-up call.

The following Monday at about 9am, Sarah received a phone call from the Solar Panel Company. They were delighted that she was interested in the offer, and tried to arrange for someone to come out that day and talk it through. Sarah was unable to meet that day so a time was made for Wednesday instead.

On the Wednesday a female salesperson arrived to talk Sarah and her husband through the offer. Initially the salesperson identified that Sarah would need twelve solar panels to cover her energy use, based on what Sarah was currently using.

Sarah queried this, as other people in her street had up to ten solar panels - and some only five. In a small house with only two people, it didn't make sense to Sarah that she should need twelve panels.

The lady said she had never seen a bill from Sarah's supplier before, so was unclear on how to read it in order to determine Sarah's use. After a phone call to the supplier, the salesperson then agreed with Sarah that ten panels would probably be enough. The lady also advised that the panels could be paid for through an interest free finance plan, which appealed greatly to Sarah and her husband.

After well over an hour and - in Sarah's words, "I don't know how many coffees" – the negotiations finally arrived at pricing. Sarah balked as she knew it was far too expensive for her. For the ten panels, she was quoted $7,400 to be paid in 87 fortnightly instalments of $88.99, with a monthly administration fee of $2.95.

The salesperson was persistent, and queried why Sarah couldn't afford the price. In her view it should have been within Sarah's means. Sarah explained that she had a mortgage, and was a pensioner. It was simply too expensive.

According to Sarah, the salesperson lit up at this and said "Why didn't you tell me you were a pensioner!" She then advised that Sarah would be able to access a special pensioner's payment plan, which amounted to $38.99 per fortnight, plus an administration fee of $2.95 per month – to be paid "for as long as it takes" to pay off. At which point, they would then be completely free of electricity bills.

Sarah and her husband were delighted, as it made financial sense for them to save on energy costs in the meantime and then be completely free of costs once the panels were paid off.

After another call back to the Finance Company the salesperson happily congratulated Sarah on the approval of her finance plan. Sarah has since noted that conversations with the Finance Company were conducted

over the phone by the salesperson and Sarah cannot be sure of what was said at the other end of the line – if anything at all.

The contracts were then signed, and shortly afterwards the panels were installed on the roof.

It was then that Sarah received an email from the Finance Company advising her of her payment plan – which was set at $88.99 a fortnight, with a *fortnightly* administration fee of $3.50. The 'pensioner payment plan' clearly did not exist.

Upon re-checking her contracts, Sarah says she immediately rang the Finance Company to advise that the terms were different from her contract. She says she was abruptly advised that if that were the case, her finance plan was no longer approved.

Sarah's husband insisted that they immediately contact a Legal Aid lawyer and Sarah was then referred through to a community legal centre.

Outcome

Throughout the negotiation period, Sarah says the solar company continued to contact Sarah to "do a deal". They asked her repeatedly "what do you want?". Sarah advised them to speak to her lawyer – to which they replied that they had no intention of answering the lawyer's letters. The Solar Panel Company told Sarah they had been through this before – that they would win any dispute, and that legal action was going to end up costing her a lot of money.

Sarah nevertheless persisted, and with the assistance of the community legal centre was successful in having the panels removed and the contract cancelled.

CASE STUDY #8 – "Desmond"

Door knocking, solar panels, faulty goods and altered contracts

Product: Solar panels *Location(s): Rural Victoria*

Sales Process: Door knocking *Customer: Unemployed, welfare dependant*

Desmond is 58 and lives alone in an isolated rural town. One day in October 2013 a salesman for a solar panel system attended his home and sold Desmond a solar energy system for over $9,000. He was signed up to a 3-year payment plan through a Finance Company. At the time, Desmond was working but earning a low income. He was not advised of a cooling off period, nor was notification included in any of the paper-work.

From the time they were installed, Desmond's Energy Retailer failed to recognise the panels – they did not seem to be connected to the grid. At the same time, Desmond could not determine if this was the fault of the retailer or the Solar Panel Company.

Frustrated with this situation, Desmond ceased paying for the panels in early 2015. By this stage he had already paid nearly $2,500 for the system.

He instructs that around this time the Solar Panel Company advised him that the cost of the panels was $12,990, as opposed to $9,640. Desmond believes that the order forms had been altered after he had signed them – to include a $3,350 government rebate and a series of charges for the finance.

Desmond subsequently made a complaint to EWOV, and in June 2016 his system was finally connected to the grid.

The Solar Panel Company then requested full payment of the original $9,640 purchase price – but Desmond maintained that the system was *still* not generating any energy, or providing any energy back to the grid.

In October 2016, the Solar Panel Company commenced proceedings against Desmond in VCAT.

Outcome

A community legal centre assisted Desmond, and the Solar Panel Company subsequently withdrew its VCAT proceedings. The Finance Company refunded the payments he had made up to that stage, and Desmond was able to keep the panels.

CASE STUDY #9 – "Henry and June"

Door knocking, solar panels and inappropriate finance

Product: Solar panels *Location(s): Rural Victoria*

Sales Process: Door knocking *Customers: Disability support pension dependant*

Henry and June are both disability support pensioners. They live in a small town about a three and half hour drive north-west of Melbourne. A salesperson came to their home selling solar panels.

When told of the price, Henry and June were concerned that they could not afford the solar system—but the salesman assured them they would no longer receive energy bills if they installed the panels, and they could pay using third-party finance.

Henry agreed to try and apply for the finance—not believing that he would get it because he was on the Disability Support Pension. Copies of the signed paperwork were not left with them.

Henry and June say they later learned the salesman had subsequently completed the contracts, (without their knowledge), and incorrectly indicated one of them was employed.

In addition, Henry and June were not told about the cooling-off period on unsolicited sales.

Henry and June were eventually rejected for finance once the third-party discovered they were both pensioners. However, in the meantime, the panels had been fully installed and Henry and June had no capacity to pay for them.

The Solar Panel Company subsequently engaged debt collectors to recoup the $15,000 cost of the panels, and successfully obtained default judgement against Henry and June in March 2016.

A community legal centre assisted Henry and June to have the judgment set aside for a re-hearing.

As part of that process, the centre conducted research which showed the solar panels should have cost around $6,000 to $7,000 (as opposed to the $15,000 they were charged).

Outcome

The matter was settled prior to a final hearing.

CASE STUDY #10 – "John"

Cold calling and dubious consent. What was said?

Product: Telephone contract *Location(s): Suburban Melbourne*

Sales Process: Cold calling *Customer: Elderly pensioner, CALD*

John is a 70 year-old refugee from Burma. He set up his home line and internet bundle with a major telecommunications company. He spoke to numerous people on the phone and also had a technician come to his home and set it up. After setting up this service John began receiving bills from both his telecommunications company and another company. Both bills were for the same home line and internet service.

John contacted the other company he had not set up his phone bundle with and informed them that he did not understand why he was receiving bills from both companies and he had never signed up to a home line and internet service with their company. The company told him that John was mistaken, that he had signed up with them; and that if he wanted to cancel the service he would have to pay a cancellation fee.

After he came to them for help, a community legal centre requested the company give John access to all records in relation to his alleged account - but the company denied this access. The community legal centre then lodged a complaint with the Telecommunications Industry Ombudsman (TIO). During negotiations the telecommunications company confirmed that the sale was made over the phone with John. Whilst the company agreed to provide the legal centre with all documentation that was sent to John, they still refused to provide access to the phone recording of the sale.

Outcome

The company agreed to cancel John's contract without any penalty, waive the outstanding costs and provide John with a full refund on the condition that he has no access to the phone records. Based on John's instructions, the community legal centre accepted this offer to settle. As such John saved approximately $700.

CASE STUDY #11 – "Debbie"

False promises – illusory health benefits and 'miracle' products

Product: Massage products

Sales Process: Pop-up booth, follow-up in-home visit

Location(s): Shopping centre, consumer's home (suburban Melbourne)

Customer: Elderly pensioner

In 2016, Debbie, a 75 year-old pensioner approached a sales representative at Coles who was selling portable at-home massage products. The sales representative informed Debbie that she could arrange for someone to demonstrate the products at Debbie's home. A time was organized for a representative to visit.

Later that month, a sales representative from the company visited Debbie's home. At the time, Debbie's husband Dimitri, who is 83 years old and suffers from arthritis, was also present.

The sales representative initially told Debbie and her husband that the products were good for low blood pressure as they helped blood circulation. He stated that the products would cost Debbie and Dimitri close to $5,000, at which point Dimitri refused.

Debbie then told the sales representative that as both she and her husband suffered bad arthritis the products would only be worth purchasing if they helped alleviate the arthritis. The sales assistant then sold the products based on this, stating that they would also alleviate the pain of the arthritis.

Debbie and Dimitri signed an agreement as they were under the impression that she was to pay an initial $500 deposit and then pay the remaining balance in 30 days, when the products would be delivered. However, Debbie and Dimitri were debited the entire amount of close to $5,000.

The products never relieved any pain or symptoms of arthritis.

Outcome

A community legal centre assisted Debbie and Dimitri by sending a letter of demand to the company who sold the products to them.

In response, the company agreed to refund the full amount paid upon the return of the products. As such, Debbie and Dimitri were refunded the full amount they had paid.

CASE STUDY #12 – "Ferdinand"

Selling $5000 adjustable beds – in a public housing estate

Product: Bed *Location(s): Suburban Melbourne*

Sales Process: Cold calling, follow-up in-home visit *Customer: Elderly pensioner, intellectual disability*

Ferdinand is a single 76 year-old man who lives in public housing. He has an intellectual disability and has never worked. He can hardly read or write. Ferdinand doesn't sleep well and suffers from arthritis.

In August 2015, Ferdinand was cold-called by a woman who said, "I'm just down in your street". The woman asked if she could come up to talk about beds. Ferdinand agreed.

Ferdinand signed a contract with the Company for an adjustable bed and reclining chair. The price of the goods was given as $7,495 but a rebate (the details of which are unclear) of $1,500 was applied, reducing the price to $5,396.

Ferdinand paid a deposit of $599, with the balance to be paid via the Finance Company at a rate of $86.89 per fortnight. By May, he had paid a total of $1,650.91 and still owed $3,996.84.

Additionally, there was an account establishment fee of $60, and a payment processing fee of $2.95. Under the contract, the Finance Company could also charge late payment fees of $15 and collection fees of $30.

Ferdinand maintained payments with the help of a friend. But at a certain point, the friend decided they didn't want to help anymore as it was too expensive.

Outcome

With the assistance of a community legal centre, Ferdinand was released from further liability under the contract and retained the bed.

CASE STUDY #13 – "Jenny"

Creating scarcity – 'available for ten properties only!'

Product: Solar panels *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: Disability support pensioner*

Jenny is 58 years-old and her only income is the Disability Support Pension. Jenny lives alone, with her daughter occasionally residing with her to provide care.

In June 2016, a man came to Jenny's door and said he had a special offer that was available for only 10 properties in her suburb. The deal was for solar panels that were very cheap due to this special deal, and the $2,500 Government rebate. The salesperson asked Jenny if he could return at a later date to explain the deal to her in full.

Jenny agreed.

When the salesperson returned, he was in Jenny's home for three hours and talked her into buying a 2Kw solar panel system.

Jenny says in the course of three hours at her home the salesperson said a number of things that weren't correct. Jenny diligently budgets to make sure that she covers all of her expenses. She allocates $50 per fortnight for her electricity and then when the bill arrives, she makes up the difference.

Jenny was told there was no deposit on the system, the instalments would be $58 per fortnight to the Finance Company and there would only be $20 left on her bill to pay when it arrived. Jenny repeatedly clarified this with the salesperson.

This turned out to be untrue. Jenny was given an unexpected connection fee and her electricity bill did not reduce, leaving her $58 per fortnight worse off.

On top of that—the "special discounted deal" was not a very good one. Jenny contracted to pay $5,950 for the panels, while according to the solar panel index the average market price for the same product was $3,990 to $4,290.

The salesperson did not advise Jenny of a cooling off period, nor was it noted in the paperwork. Jenny also advised that the salesperson failed to leave the terms and conditions of the agreement at Jenny's home.

On 24 November 2016 a community legal service wrote to the Solar Panel Company on Jenny's behalf. They advised that Jenny would stop paying due to the misrepresentation about the price, and that the company could come and take the solar panels back.

Outcome

Jenny's matter was referred to another community legal centre, who negotiated on Jenny's behalf. The Finance Company agreed to provide a full refund and Jenny retained the solar panels.

CASE STUDY #14 – "Philomena"

Solar panels, without a cooling off period

Product: Solar panels *Location(s): Rural Victoria*

Sales Process: Cold calling *Customer: Elderly pensioner*

Philomena is 72 years old and lives in a rural country town in Victoria. One day she received a call from a Solar Panel Company, to canvass her interest in a solar energy system. Philomena instantly told the representative that she was not interested and could not afford it. However, she was then talked into allowing a representative to come to her house to provide more information.

Subsequently, a representative from the Solar Panel Company visited Philomena's property to discuss solar energy options. A number of representations were made about the cost of installing the system and the amount of money it would save. Philomena was told the system would cost $102 per fortnight and would be large enough (in terms of kW output) to save close to $100 per fortnight on her electricity bill. Philomena was told she would not receive an electricity bill as a result of all the savings. Philomena believed these representations and relied on them when she signed the contract for the purchase of a system at a value of $10,130. She was not provided with a copy of the contract.

The next day, Philomena was contacted by the company who stated that due to a cancellation they were able to install the system the following day. Of course, next day installation of an unsolicited consumer agreement is a breach of the Australian Consumer Law (as it does not allow for a cooling-off period).

The community legal centre identified other breaches as well:

- Misrepresentation as to the adequacy of the system (a larger system would be required to cover the entire energy requirements of the household, so that there would be no monthly electricity bills).

- Misrepresentation of the monthly costs that would be debited out of the clients account, (expected cost was $116.00, but cost debited per month was $144.45).

- Failure to provide a quote /disclose cost of the installation of a new metre box prior to installation, to afford the client the opportunity to make a reasoned decision as to the appropriateness of the system and total cost.

- The sales representative claimed Philomena would receive no further electricity bills as her solar unit would cover her home energy use. This statement was a material inducement into the purchase, and falsely represented the capacity of the unit.

In fact, Philomena received an electricity bill from her Energy Retailer in the amount of $1,364.84. This unexpected cost was attributed to the hot water services operation at night. (The Solar Panel System cannot store energy and doesn't accrue enough energy to cover the costs while energy trickles back in during the day when unused.)

The Solar Panel Company was notified of their mistake and failed to rectify it.

Outcome:

Direct negotiations with the Solar Panel Company failed to elicit a response, so the community legal centre proceeded to VCAT. The matter has been decided in VCAT twice, however the company has for the second time asked for a review of the decision due to non-attendance. The matter is likely to be subject to another request for review.

CASE STUDY #15 – "Hugo"

Solar panels (again). And again, without a cooling off period

Product: Solar panels *Location(s): At the client's workplace, regional Victoria*

Sales Process: Door knocking *Customer: CALD*

Hugo is an immigrant that arrived in Australia some 9 years ago. His comprehension of written and spoken English is very limited.

In early 2015, whilst at his former workplace, Hugo was approached by two door-to-door salespeople from a Solar Panel Company.

Just a few days later, one of the salespeople returned uninvited to Hugo's former workplace. During this visit Hugo was presented with the Sale Contract that was financed by a Finance Company to purchase solar panels and have them installed on his property. The door-to-door salespeople from the Solar Panel Company took advantage of Hugo's CALD background, he did not understand the contract as it was not translated or explained to him in his native language, but he signed it. In addition to his inability to understand English, Hugo also had a very low income and didn't understand the long-term contract he was entering into nor the financial hardship this would cause.

Hugo was not given a copy of the terms and conditions of this contract, nor was it explained to him that he had a 10 day cooling off period. The solar panels were installed at Hugo's home before the end of this 10 day cooling off period.

Hugo then fell into financial hardship and defaulted on payments to the linked credit provider. At the point that he defaulted on his payment, he had an outstanding debt of $6,738.95. This resulted in the Finance Company issuing proceedings against Hugo in the Magistrates' Court of South Australia.

Outcome:

After being given the authority to act for the client, the community legal centre emailed the Finance Company to inform them that it would be filing a defence on their client's behalf. Once the defence was filed, the Finance Company's Legal Officer forwarded this to their Director of Legal and Compliance.

After the matter had been escalated further with the Finance Company, they filed a Notice of Discontinuance with the South Australian Magistrate's Court. The legal centre was then able to negotiate a favourable out-of-court settlement for Hugo.

Under the settlement Hugo was released of the obligation to pay the outstanding $6,738.95, and received a refund of the $2,147.77 he had already paid. In addition, Hugo retained the solar panels and all legal proceedings against him were withdrawn.

CASE STUDY #16 – "Eustace"

Unsolicited sales and poor quality goods

Product: Massage chair *Location(s): Rural Victoria*

Sales Process: Door knocking *Customer: Elderly pensioner*

Eustace is elderly and lives in a rural country town. In April 2014 she was approached by a door-to-door salesperson from a Furniture Company. Eustace entered into an arrangement (signed on that day) for the purchase of a mobility focused (synthetic) leather massage chair for approximately $3,000 on a financial payment plan through a Finance Company at $38.63 per fortnight. It would take an estimated 3 years to payoff.

By April 2015 it had become apparent that the synthetic leather upholstery was not of acceptable quality, as the leather had started to split and large sections of material were peeling away from the cushions. A $3,000 chair should be durable enough to last longer than 12 months, and as a result Eustace was offered and accepted a replacement model.

Twelve months later, this replacement model also showed the same poor quality and was not in a reasonable condition.

At this point Eustace sought the removal of the chair and a cessation of the payment plan, and for the Furniture Company to pay out the remaining balance of their contract with the Finance Company ($1,049.68). This request was refused. The Furniture Company instead maintained that they satisfied their requirements to remedy consumers under the ACL by providing a replacement only.

In May 2016 the Community Legal Centre lodged an application to VCAT seeking a full refund of the purchase amount.

The Furniture Company have left Eustace without a suitable mobility assisted chair and an unsuitable level of debt for the quality of product she received. The ongoing legal dispute has lasted over 2 years and has caused a great deal of stress for Eustace and her husband.

Outcome:

An action has been pursued at VCAT on the basis that the client has received goods of unacceptable quality (under section 54 of the ACL).

Unfortunately, the claim is unable to capture the true nature of the inequitable dealings of the Furniture Company and limits Eustace's entitlement to certain remedies. In this matter, replacements have only prolonged the issue and associated stressors—the ACL has been unable to free Eustace from an onerous financial and legal burden arising from unsolicited sales.

CASE STUDY #17 – "Marcus"

The offer 'too good to refuse'

Product: Coffee machine *Location(s): Suburban Melbourne*

Sales Process: Cold calling *Customer: Sole trader*

Note: This case study has also been recorded as a video case study

Marcus received a cold call from a company selling coffee machines, making an offer 'too good to be true'. The company offered a coffee machine for a once off payment of $59—with sample coffee—in the hope that the consumer would continue to purchase coffee from the coffee machine company. Marcus is not a coffee drinker nor is his wife, but because the deal was so good he agreed to the purchase. He reasoned that he could give the machine to his daughter—who had just moved out of home, and is a coffee drinker.

After the machine arrived, a second payment came off Marcus' credit card. Not long after that, a third payment was deducted. Believing there must be some mistake, Marcus contacted the coffee machine company only to be told that he still had another seven payments to make. Marcus contested this, as he had clarified multiple times during the sales call that the first payment was a 'once off payment'. Marcus also requested to hear the recording of the sales call (which he was told had been made) but the company refused to allow him access to the recording.

Marcus contacted his bank and cancelled any further payments from his credit card. He then told the company they could collect the machine after they refunded him. In response, the company offered to make a partial refund—claiming that Marcus had by that stage already had use of the machine. In order to receive this refund, the company insisted that Marcus would first have to return the machine. Marcus refused this offer, countering that the machine has only been used once (to test if it worked).

Marcus has since received multiple contacts from a debt collector seeking full payment for the machine, and one letter in particular which he found very threatening and which 'seriously scared' his wife. As a result, she suggested they just pay the amount to be rid of the whole issue. Marcus refuses to budge, and is adamant that he was 'scammed from the start'. The only documentation Marcus ever received was an invoice which arrived with delivery of the coffee machine, which did not reflect the terms agreed to in the initial phone call.

When Marcus contacted the fraud division of his bank to cancel the payments they did so immediately—noting that 'this happens all the time.'

Marcus maintains that the company can still have the machine back—but first they must provide him with a full refund. The saga has been going on for over a year.

CASE STUDY #18 – “Geraldine”

The illusory $7,000 rebate

Product: Solar panels *Location(s): Suburban Melbourne*

Sales Process: Cold calling *Customer: Elderly pensioner*

Geraldine is an aged pensioner who cares for her husband. They own their home but survive on a low income. After repeated cold calls from a Solar Panel Company, Geraldine agreed to a salesperson attending her home to give her a quote for solar panels.

The salesperson was at Geraldine’s home for almost three hours. Geraldine says she thought the government was backing the Solar Panel Company, as they continually emphasised the rebate available to her—although these representations were only ever made verbally, never written down.

Geraldine understood that a $7,000 government rebate would be deducted from the $10,990 she eventually agreed to, and signed up to a payment plan on the spot. However, the rebate never happened and she was signed up to the full amount.

Geraldine says that the only explanation the salesperson ever gave her was that her account would be debited fortnightly, and that the arrangement was interest free. Geraldine struggles to make the fortnightly payments of $117, and says she feels foolish for having agreed to the deal. She attempted to cancel the contract but was outside the cooling-off period, and now feels trapped.

CASE STUDY #19 – "Harold"

The $200 solar panel deal

Product: Solar panels *Location(s): Suburban Melbourne*

Sales Process: Door knocking *Customer: Elderly pensioner*

In October 2015 Harold received a visit from a door knocker. The salesperson, a well-spoken young English woman, advised him that he should think about solar panels. Harold replied that he didn't want them, and didn't have much money. She responded they would only cost about $200. At that, Harold indicated that maybe it was worth thinking about. Two of his near neighbours have solar panels, and he knows from one of them (who have had panels since 2011), that they have been receiving a significant feed-in tariff.

A few days later, a gentleman named Richard knocked on Harold's door. Richard was from the Solar Panel Company. He was there to talk Harold through the product and discuss pricing.

Richard told Harold that the first salesperson had made a mistake – the cost would be more like $2,000, as opposed to $200. Then Harold took Richard out into his backyard and pointed out his neighbours' homes, which have 16 panels each. Richard said that Harold would need the same number of panels – but this would cost more like $6,000.

For that cost though, Harold says that Richard promised Harold would no longer receive an electricity bill—he would 'do better' than his neighbours. He told Harold he would never get another electricity bill again. He also told Harold that finance could be arranged through a Finance Company, and that Harold had a cooling off period of 8-10 days if he happened to change his mind.

Harold signed the contract, but Richard didn't leave a copy behind—or any other documents. Just his business card with his phone number on it, and an empty folder.

After Richard had left, Harold thought again about the deal. He decided he couldn't afford it and decided to cancel. He rang Richard that night, but the phone wasn't answered. Harold rang the next day, and the day after that. Eventually Harold learned that Richard didn't work with the company anymore, and that there was no-one else Harold could talk to.

Harold persisted, and managed to find the number for the office of the Solar Panel Company. He rang within the 10-day cooling off period—but was told that he was too late and was no longer able to cancel.

Not long after that, a van arrived at Harold's home. Two men got out, and showed him 16 solar panels that they said they were there to install. Harold reluctantly agreed, figuring that he had lost his chance to cancel.

Several months after the installation, Harold realised that he wasn't getting any discount on his energy bills—even though he now had the panels. Reasoning that there must be something wrong with the system, Harold decided to have a look at the panels himself. On inspecting the panels, however, he found that there were only 8 on his roof—not the promised 16.

Harold then rang the Solar Panel Company to complain, saying he was receiving no discount on his electricity bills—and only had 8 panels, not 16. Harold told them he wasn't going to pay anymore until it was sorted out, and that he wanted a copy of the contract. They assured him they would send him one, but no contract ever arrived.

On 1 June 2016, Harold stopped making payments to the Finance Company.

Shortly afterwards, Harold received a call from the Finance Company. The man advised him never to call the Solar Panel Company again saying, 'you talk to me now'. By this stage, Harold had paid $1,500, but still owed approximately $4,500.

Not long after that, Harold received a call from a debt collector. Indignant that he only had half the panels requested, Harold offered to pay 50 percent of the cost. He then revoked that offer, and reduced it to 25 percent. The debt collector did not accept that offer.

Harold then received a communication from Consumer Affairs Victoria (CAV) advising that the Solar Panel Company was under investigation, and that he should not pay anything more. Harold has since advised the debt collector of this, and relayed the advice given to him by CAV directly.

Since that time, Harold has been back in touch with the Solar Panel Company. He managed to obtain a copy of their contract by pretending that he wanted new panels. When the salesperson arrived, Harold was told the cost would be $6,000 for 12 panels but that he would have to pay $2,000 upfront, because the Finance Company 'takes 50 percent'. Harold though this was odd, as he believed that the finance was interest free. Harold cancelled the contract the same day, but has retained the contract for his records.

As far as he is aware, the Solar Panel Company is still under investigation—although Harold has been unable to clarify this with CAV.

4. CONSUMER HARM HOTZONE #1 – THE SOLAR PANEL INDUSTRY

Through the course of this project it has been difficult to ignore the large volume of case studies which concern the unsolicited sale of solar panels, and the common features which those case studies share.

Solar panels are frequently sold on the illusory (or at the very least, grossly over-stated) promise that they will save the consumer significant amounts on their electricity bill. Often it is falsely stated that once the consumer has paid off the panels, they will have no further electricity bill at all.

There is an intrinsic appeal for low-income and often welfare dependent consumers in being able to limit their energy costs, and salespeople frequently leverage growing anxiety over rising energy costs in order to facilitate a sale. Salespeople are also advantaged by the technical nature of the product (and the energy market generally), which means that consumers are unable to fully grasp the deal being offered, and instead find themselves having to trust the salesperson—and inclined to believe the promises being made. Very often this trust is misplaced, as the complex and technical nature of the product frequently results in poor or failed performance. The promises made are seldom kept.

The fact that the correct price for solar panels is not widely known also means that consumers are vulnerable to over-charging, and have little market intelligence to fall back on when assessing the deal. Consumers generally do not understand how solar panels work, how many they are likely to need, and what the actual impact on their energy costs will be. At the same time, the desire to future proof against rising energy costs is strong. This plays into the hands of unscrupulous sales staff.

The frequent (in our experience, almost universal) use of 'interest free' finance to fund the panels only adds to the obfuscation, and leaves people vulnerable to unjustified mark-ups. Certegy Ezy-Pay (a product of ASX-listed FlexiGroup) appear to be by far the most prominent player in this market. While Certegy's finance product is not limited to solar panels, it is very often relied on for these transactions. FlexiGroup's 2016 annual report states that Certegy Ezy-Pay has over half a billion dollars worth of goods under finance.[68] It has even attracted financing from the Federal Government's Clean Energy Finance Corporation.[69] Often, the finance offered by Certegy is integral to the sale being made. The 'interest free' nature of the product is crucial in closing the sale and enticing consumers to commit.

Unfortunately, very often the payment plan offered by Certegy is unaffordable for the consumer and appears to be made without any rigorous assessment of their capacity to pay. Furthermore, because Certegy's product is 'interest free', it is not caught within the scope of the *National Consumer Credit Protection Act 2009* (Cth) and is exempt from the usual protections that apply to the provision of credit. These include licensing, responsible lending provisions, and the requirement to belong to an external dispute resolution scheme.

The Clean Energy Council (CEC) administers a *"Solar Retailer Code of Conduct"* ("Code") which requires compliance with the ACL protections on unsolicited sales, and sets a high bar for trader conduct. The provisions include certain pre- and post-sales requirements which are designed to ensure sales representatives act ethically at all times during marketing campaigns and when dealing with customers. Unfortunately, the Code is a voluntary industry code which provides very little coverage.

[68] FlexiGroup, *Annual Report 2016*, p. 4. Available at: http://news.iguana2.com/flexirent/ASX/FXL/979320

[69] Drummond, Shaun. *FlexiGroup first to issue 'green securitised bond' to fund solar financing*, Sydney Morning Herald, 22 April 2016. Available at: http://www.smh.com.au/business/banking-and-finance/flexigroup-first-to-issue-green-bond-to-fund-solar-financing-20160421-gocg8q.html. See also CEFC media release: *CEFC supports Australian green bond market with investment in innovative securitisation* , 22 April 2016, available at:https://www.cefc.com.au/media/files/cefc-supports-australian-green-bond-market-with-investment-in-innovative-securitisation.aspx

At the time of writing, the CEC website shows that only 43 solar retailers are officially identified by the CEC as "Approved Solar Retailers"—which means that they have undertaken to comply with the Code.

To give a sense of the limited extent of this coverage, a December 2016 independent review of the Code found:

> *The CEC estimates that there are currently 4,000 to 5,000 retailers in Australia. Whilst there has been a steady flow of applications to the CEC to become Code signatories, it remains the case that less than 1 percent of retailers are Code signatories. These retailers are estimated by the CEC to account for about 3 percent of PV system installations.*[70]

This is significant not only for the fact that 43 out of 4-5,000 isn't much, but also that the industry is essentially made up of small to medium sized businesses which seem to exhibit high degrees of variance in terms of professionalism, operating style and legal compliance. Attempting to set standards for such an industry through the auspices of an industry body like the CEC, while laudable, is a quixotic task. Comprehensive oversight of a diffuse sector is likely to be only achieved through specific industry regulation.

In the context of this report, the solar panel industry seems a logical industry in which to trial an opt-in requirement for unsolicited sales. This could be done for a limited period or in limited jurisdictions in order to gauge the effectiveness of the protection—not just in terms of preventing consumer harm, but also in terms of how much impact it has on legitimate commerce—if, in fact, it has any impact at all.

As previously noted, on 3 August the COAG Energy Council released a media release stating that they were concerned existing consumer protections were insufficient to protect consumers of new products and services, and requesting that industry devise a Code of Conduct to protect those consumers. The media release stated in part:

> *Ministers noted that while current consumer protections provided by the National Energy Customer Framework and Australian Consumer Law are generally sufficient for behind the meter (BTM) products, they considered an industry-led Code of Conduct would support consumer protections for customers acquiring new energy products and services.*
>
> *Ministers agreed to write to representative industry groups asking industry to lead the development of a Code of Conduct for new energy products and services. While there are clear benefits in industry taking the lead, ministers may reconsider whether further regulatory intervention is required in the future.*[71]

Exactly how this potential code will relate to the CEC Solar Retailer Code of Conduct is currently unclear, but it may present an opportunity for incorporating an opt-in model into the unsolicited retail sale of solar panels. At the very least, the reference group formed between the COAG Energy Council and identified industry groups may provide a useful forum to discuss, and potentially implement a trial of the opt-in model.

[70] Cameron Ralph Navigator, *2016 Independent Review: Solar Retailer Code of Conduct*, December 2016, p. 7.
[71] COAG Energy Council, *Energy Market Transformation Bulletin Update 5*, 3 August 2017, Available at: http://www.coagenergycouncil.gov.au/publications/energy-market-transformation-bulletin-no-05-%E2%80%93-work-program-update

5. CONSUMER HARM HOTZONE #2 – REMOTE INDIGENOUS COMMUNITIES, FAR NORTH QUEENSLAND

Both Consumer Action and WEstjustice have a history of engagement with indigenous communities in Victoria concerning unsolicited sales. In Consumer Action's case, this work has predominantly been in relation to supporting two regional communities with issues relating to consumer leases. In order to highlight this area of unsolicited sales Consumer Action observed the launch of the "Do Not Knock Informed Town" initiative in the Yarrabah Aboriginal Shire community, approximately 50 kilometres by road east of Cairns in far north Queensland. This visit was facilitated by the Indigenous Consumer Assistance Network (**ICAN**).

Yarrabah is the second Indigenous community in Far North Queensland to adopt the initiative. The first was the Wujal Wujal Aboriginal Shire community, a much smaller and more remote community 30 kilometres north of Cape Tribulation, which became a Do Not Knock Informed Town in April 2016.

The "Do Not Knock Informed Town" campaign is a community-led initiative coordinated by the North Queensland Indigenous Consumer Taskforce. The Taskforce, led by the ICAN, involves a range of consumer regulatory agencies and community services organisations, to address systemic civil law issues at a regional level in innovative ways.

ICAN staff Sandy Rosas, Carmen Daniels and Jon O'Mally with the Do Not Knock Informed Town sign in Yarrabah.

The initiative is a community engagement campaign, which involves erecting a large sign at the entrance to the communities followed by regular and ongoing community engagement. The sign, and the Do Not Knock informed project more broadly seek to communicate three key messages:

1. Door-to-door traders are not to approach residences displaying a 'Do Not Knock' notice;
2. Door-to-door traders must comply with the relevant provisions contained within the Australian Consumer Law; and
3. Community members have an ongoing relationship with regulators and an awareness of their consumer rights which they will enforce by reporting unlawful conduct.

On May 9, 2017, officials from the North Queensland Indigenous Consumer Taskforce, including: ACCC, Queensland Office of Fair Trading (**QLD OFT**), ICAN, and ASIC attended the community to assist in launching the Yarrabah Do Not Knock-Informed campaign. The Mayor of Yarrabah, Ross Andrews, officially launched the campaign, followed by speeches from all of the participating agencies. The launch, covered by local print, radio and television media, saw a complementary community barbecue operating throughout the event which facilitated many a yarn between agency representatives and community members. 'Do Not Knock' stickers were freely distributed to those who wished to have them.

Michael Dowers, North Queensland Regional Director, ACCC addresses radio and TV media

'Do Not Knock' stickers distributed on the day

Yarrabah is a large and geographically disparate community (about 2,500 people over an area of 158.8 square kilometres) so it is difficult to gauge what proportion of the community attended the barbecue over the course of four or five hours. Suffice to say, 360 sausages, 90 eggs, 10 kg of onions, 60 minute steaks and 30 loaves of bread were consumed.

Yarrabah Aboriginal Shire Council Mayor Ross Andrews with Brian Bauer (QLD OFT Executive Director) and Jon O'Mally (ICAN Operations Manager).

Yarrabah Aboriginal Shire Council Mayor Ross Andrews launched the Yarrabah Do Not Knock-Informed Town initiative after a welcome to country by Gwen Schrieber, Elder and Traditional Owner.

While the launch was an important event, it's also true that awareness of the initiative is likely to spread gradually over time, primarily through word of mouth. This will be aided by school briefings to local students and distribution of Do Not Knock stickers through community hubs – such as the local health centre, where ICAN provides regular financial counselling outreach.

It's important to note that access to goods and services is a genuine challenge for some remote communities, and many argue there is a genuine place for unsolicited salespeople to fill that need. It is not seen by the community as desirable to ban unsolicited sales outright, or seek to prevent salespeople from entering the town altogether.

ICAN Operations Manager, Jon O'Mally, conducting a sausage symphony.

At the same time, the Do Not Knock Informed Town initiative has evolved as a response to persistent harm that has been caused to Indigenous communities over a number of years by unsolicited salespeople, often signing people up to agreements which are not properly explained, or fully understood. Remote Indigenous communities represent potentially 'rich pickings' for unsolicited salespeople, as they are self-contained and therefore represent a 'captive market' of sorts.

In a community with a high percentage of people in receipt of Centrelink benefits, there is also the risk that the Centrepay system can be abused by unscrupulous traders - particularly those selling consumer leases or funeral insurance. While the use of Centrepay to pay funeral insurance is (thankfully) now recent history, the consumer lease industry remains problematic.

The recent Federal Court case of *ASIC v Channic Pty Ltd (No 4) [2016] FCA 1174 ("Channic")* provides a good illustration of the predatory tactics that some traders apply to Indigenous communities, and involved a number of residents of Yarrabah (seven of the ten witnesses came from the community).

In *Channic*, Cairns based lender and broker, Mr Colin Hulbert, (the sole director of both Channic Pty Ltd and Cash Brokers Pty Ltd) was found to have breached consumer credit protection laws when providing car loans for the purchase of second hand cars from Super Cheap Car Sales – which he also owned.

ICAN first took complaints on this matter in 2008. By 2009, it had built a case of 8-10 complaints, and commenced work with QLD OFT and ASIC on the matter. Additionally, in the wake of cyclone Yasi, Mr Hulbert clearly sensed an opportunity, descending on Yarrabah where a number of households had received emergency relief grants. Mr Hulbert proceeded to leverage this influx of capital by selling loans for the purchase of vehicles at 48% interest (the maximum allowable interest charge under credit law), plus brokerage fees of either $550 or $990 - without assessing whether the loans were affordable, or suited to the consumers' requirements. Of course, they generally were not.

Unsurprisingly the Federal Court found that Channic had engaged in unconscionable conduct and that the loans were unjust transactions.

Crucially, the court stated:

> "*It must have been obvious…that having regard to the educational qualifications of the consumers, their background, their financial circumstances and their lack of commercial experience, that they would not have comprehended the content, in a meaningful way, of the loan contracts*."[72]

The factors raised by the court in *Channic* also make many Indigenous community members vulnerable to unscrupulous unsolicited sales practices. For that reason, the Wujal Wujal and Yarrabah Aboriginal communities have both chosen to take a stand against poor door-to-door trading practices, and limit the harm they have historically caused in their communities. More Indigenous communities in Far North Queensland are likely to join the initiative in the near future.

Some examples of successes flowing from the Do Not Knock initiative are:

- Shortly following the launch of Wujal Wujal as a Do Not Knock Informed town, a group of door-to-door traders selling photography packages entered the town. They were met by the local Community Justice Group Coordinator and reminded of their obligations. The traders acknowledged having seen and understood the sign, and left town without making a sale. Their visit was reported, and QLD OFT was able to warn surrounding communities in turn.

- In May 2017, around the same time as Yarrabah became a Do Not Knock Informed town, a company selling air-conditioners signed up a number of people. Following a referral from ICAN, the QLD OFT investigated the company and found they had breached consumer law door-to-door trading rules by failing to advise consumers of their cooling-off period rights and failing to provide cancellation notices. They were fined $10,800 by the QLD OFT.[73]

The Taskforce has enabled state and federal agencies to come together with the community sector and the communities themselves to drive this initiative. It is an admirable example of inter-agency cooperation that efficiently accesses resources and expertise across agencies to tackle complex unsolicited sales issues in an Indigenous community context.

[72] *ASIC v Channic Pty Ltd (No 4) [2016] FCA 1174 at1837.*

[73] QLD OFT 28/7/17 https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/fair-trading-latest-news/media-statements/office-of-fair-trading-turns-the-heat-up-on-door-to-door-air-conditioning-sales

6. CONSUMER HARM HOTZONE #3 – LETTING THE VAMPIRES IN: THE PROBLEM OF 'INVITED' IN-HOME SALES.

During this project, the issue of 'invited' in-home sales and other off-premises sales practices inevitably came to light.

The ACL's definition of unsolicited consumer agreements (and therefore the specific protections that apply to them) exclude agreements made where the consumer has invited the trader to attend the place where the transaction occurs.

Section 69(1)(c) states that an agreement can only be considered unsolicited if (emphasis added):

> *(c) the consumer did not **invite** the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply);…*

While this is a logical construction ('unsolicited' does literally mean 'unasked for', after all), it does create the problem whereby a subsequent arranged visit from an *initially* unsolicited sales contact is arguably exempt from the protections applicable to unsolicited agreements.

In the case of solar panels, for example, an initial unsolicited door knock or cold call can be used to arrange a subsequent in-home sales visit, during which the consumer is still subject to many of the disadvantages identified earlier—and which continue to be explored by behavioural economists. Indeed, the *location* of the sale (and all of the social, psychological and behavioural elements that go along with an in-home visit) may well be more material, placing the consumer at greater disadvantage, than the fact that the consumer was not anticipating the interaction.

It should be noted that section 69(1)(a) does partially address the problem of 'invited' sales. This provision states:

> *[No invitation to dealer] The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:*
>
> > *(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services …; or*
> >
> > *(b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.*

This provision means that if someone provides their information to a trader for the purpose of, for example, receiving a quote or having an in-home demonstration, and a sale subsequently takes place, the consumer will not be considered to have invited the salesperson and the unsolicited sales provisions will apply. The protections will not apply, however, if the person does invite the salesperson to their home—thus vulnerable consumers remain susceptible to, and poorly protected from, high-pressure in-home sales.

In his 2010 report, *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, Dr Paul Harrison found that in relation to in-home sales (IHS) of maths software (emphasis added):

> *During this sales process, a number of key psychological and social processes are activated or employed to increase the likelihood that certain consumers will sign up to contracts for educational software (often with related finance) that can result in financial stress.*

> *Our research found that the key factors influencing consumers during the IHS process are **consistency**, **trust**, **scarcity**, **reciprocity**, and the activation of **anxiety**.*
>
> *These variables are influential because they facilitate (or advance) the likelihood of automatic behaviour, or behaviour that requires little cognitive effort and rational thought.* [74]

Even sales interactions that are conducted at premises not in-home but at a place other than the traders usual place of business, (and to which the consumer has been invited—or otherwise induced to attend) could place the consumer at a disadvantage.

Consumer Action has been conscious for a number of years of systemic consumer harm caused by the sale of timeshare holiday accommodation. Typically, these are sold through lengthy presentations at shopping centres, hotels and other ad hoc venues. It is not uncommon for consumers to be offered a cash reward or some other inducement to attend such presentations. The presentation will then, very often, turn out to be extremely lengthy and will often involve high-pressure sales tactics.

In January 2017 Consumer Action and the Financial Rights Legal Centre (FRLC) made a submission to ASIC, who at the time of writing are reviewing their class orders applicable to time-share schemes. Currently, timeshare operators are required to provide consumers with a cooling off period of seven days if they are a member of the Australian Timeshare and Holiday Ownership Council (ATHOC), or fourteen days if they are not a member (or have otherwise been advised by ASIC that they must provide fourteen).

The submission argued that the cooling-off protection was ineffective, and that an opt-in model would provide stronger consumer protection—for many of the same reasons outlined in this report.

> "*Many parallels can be drawn between the high-pressure sales tactics employed by the operators of time share schemes, and those who seek to sell their products using door-to-door sales. The two methods are inherently uncompetitive and anachronistic. They are uncompetitive because they 'capture' the consumer with the one option being offered, directly working against the rational choice ideal of consumers making well-informed, autonomous consumer choices in an open and competitive market. They are anachronistic because traders have so many avenues and platforms through which to reach consumers (online, TV, radio, print). It really shouldn't be necessary to have consumers take time out of their holiday to be subjected to these practices."*[75]

In relation to the opt-in model, the submission states:

> *"…an opt-in arrangement would minimise the number of consumers who might otherwise be caught up in these costly transactions as a result of high-pressure, unconscionable or misleading conduct. It would also minimise the need of these consumers to resort to resource intensive dispute resolution avenues such as external dispute resolution schemes, tribunals and courts to resolve their disputes."*[76]

To illustrate common practices in the timeshare industry, two brief case studies from that submission are reproduced below:

---

[74] Dr Paul Harrison, *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, Deakin University & Consumer Action Law Centre, March 2010, pp. 4 -5. Available at: http://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf

[75] Consumer Action Law Centre and Financial Rights Legal Centre, Submission in response to Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes, pp. 6 -7. Available at: http://download.asic.gov.au/media/4215122/cp272-submissions-ca.pdf

[76] Consumer Action Law Centre and Financial Rights Legal Centre, Submission in response to Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes, p.7. Available at: http://download.asic.gov.au/media/4215122/cp272-submissions-ca.pdf

Sarah's Case

Context: High pressure, misrepresentation

Problem: Sarah is a female in her late 20s. While holidaying in Queensland in late 2015, Sarah attended a one hour timeshare sales presentation. She claims that at this presentation they were told that they could (a) exit the contract at any time for 'good reason' and (b) sell off holiday credits to friends. She purchased a membership in the timeshare program, took out finance of $25,000 and committed to yearly payments of $800. Since then, Sarah has discovered she can neither exit for good reason, nor trade credits with friends.

Carlos' Case

Context: High pressure sales, misrepresentation, change in circumstances, subsequently identifying product is unsatisfactory.

Summary: Carlos is a male in his mid-twenties with dependent children. Carlos attended a seminar in late 2015 provided by a timeshare company after receiving an email. At that seminar, the company made an aggressive sales pitch. Carlos claims that he was told that the timeshare product guaranteed two weeks of holiday per year and that 'all smart people' sign up. He also claims that the sales representative said they needed a decision then and there, that the special offer would expire if he did not sign up straight away, and that if he delayed he would not have a right to roll-over points. Carlos signed up for 10,000 credits and applied for a loan as well. In a short interview the company checked his expenses and income. After the purchase, Carlos discovered that the program was only worth a few days a year. He claims this is not the product he signed up for and the loan repayments are causing financial pressure as he has another baby on the way.

The issue of in-home sales and off-premises sales such as those which commonly occur in the timeshare industry are raised to highlight areas where behavioural factors very similar to unsolicited sales are at play, yet the transactions may not always be caught by the ACL's current construction of unsolicited consumer agreements (or at least, the point may be arguable either way).

Given this, there may be merit in examining the current construction of unsolicited sales—and considering whether 'off-premises' may be a more useful descriptor. If framed correctly, this may enable the specific protections currently applicable to unsolicited sales to also apply to in-home sales and timeshare style off-premises sales. Prior to the implementation of the ACL, Victoria had such a protection through Part 4 of the *Fair Trading Act 1999* (VIC),[77] but it was lost in the drive to create a nationally uniform consumer protection law. At the time, requirements for telemarketing and door-to-door selling were identified by the Productivity Commission as one area where inconsistencies existed across jurisdictions.[78] In the current context, it would seem that this was a significant loss for consumer protection and warrants serious reconsideration. 'Off-premises' may well count for more than 'unsolicited', and may more effectively capture trader misconduct.

Strong international precedent exists for taking such an approach, perhaps most notably in the EU, where paragraph 21 of the Directive on Consumer Rights states (emphasis added):

> *An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, for example at*

[77] See:
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/$FILE/99-016a.pdf

[78] Productivity Commission, *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report, Volume 2 – Chapters and Appendices*, 30 April 2008, p. 19. Available at:
http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf

> *the consumer's home or workplace. In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise,* ***irrespective of whether or not the consumer has solicited the trader's visit****.*
>
> ***The definition of an off- premises contract should also include situations where the consumer is personally and individually addressed in an off-premises context but the contract is concluded immediately afterwards on the business premises of the trader or through a means of distance communication****.*
>
> *The definition of an off-premises contract should not cover situations in which the trader first comes to the consumer's home strictly with a view to taking measurements or giving an estimate without any commitment of the consumer and where the contract is then concluded only at a later point in time on the business premises of the trader or via means of distance communication on the basis of the trader's estimate. In those cases, the contract is not to be considered as having been concluded immediately after the trader has addressed the consumer if the consumer has had time to reflect upon the estimate of the trader before concluding the contract. Purchases made during an excursion organised by the trader during which the products acquired are promoted and offered for sale should be considered as off-premises contracts.* [79]

This definition is replicated by the UK *Consumer Contracts (Information, cancellation and Additional Charges) Regulations 2013,* which eschews editorialising while containing the same essential elements:

> *"off-premises contract" means a contract between a trader and a consumer which is any of these—*
>
> *(a) a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;*
>
> *(b) a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;*
>
> *(c) a contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;*
>
> *(d) a contract concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.*[80]

In both cases, 'off-premises contracts' are subject to 14-day cooling-off periods, and are the mechanism by which consumers in those jurisdictions are protected against unscrupulous unsolicited sales.

As previously noted, there is also some uncertainty in our own case law as to how essential the 'surprise element' is to deeming a sale 'unsolicited' under the ACL. In *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd [2016] FCA 403* Reeves J found that for a sale to be unsolicited, it unequivocally required that the "*dealer … initiate the negotiations with the consumer*".[81]

However, in another more recent Federal Court matter, (*Australian Competition and Consumer Commission v Unique International College [2017] FCA 727),* Perram J found that:

---

[79] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 para 21. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1

[80] *The Consumer Contracts (Information, cancellation and Additional Charges) Regulations 2013.* Available at: http://www.legislation.gov.uk/uksi/2013/3134/regulation/5/made

[81] *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd [2016] FCA 403* at 134.

> "*I do not agree that…the dealer must initiate negotiations. Section 69(1)(b) does address itself to the identity of the initiating party but only by providing that it must not be the consumer. It does not say that it must be the dealer. Indeed, it seems clear to me that the definition is explicitly addressing itself to the situation that neither party initiates the negotiation and declares that that situation is covered by the requirements of the Division.*" [82]

This is of interest in the current context in that it addresses 'pop-up' style sales which can sometimes exist in a grey area, and can be difficult to determine as unsolicited or otherwise. More fundamentally though, the judgement opens up the discussion around what constitutes the essential element of the interaction which places the consumer at a disadvantage—and determines that the element of surprise, in which the dealer foists themselves on the consumer, is not the sole (or even the most important) factor to consider in these interactions.

In addition to trialling the opt-in model as a potentially more effective protection than a cooling-off period, consideration should also be given to adopting the notion of the 'off-premises contract' as a broader alternative to 'unsolicited consumer agreements.' The rationale for doing this—as flagged by the EU—is that consumers can be subject to:

> *"…potential psychological pressure or may be confronted with an element of surprise,* ***irrespective of whether or not the consumer has solicited the trader's visit***."[83]

The findings of this report, the legislative history of the issue and the current uncertainty in case law suggest that a review could be extremely worthwhile. As Perram J appears to indicate in the *Unique* matter, the current understanding of unsolicited consumer agreements may well be too narrow—one which fails to protect consumers in very similar circumstances, subject to very similar behavioural factors, and who clearly require protection.

As behavioural economics continues to develop and elucidate real world human behaviour in an economic context, we may find that a number of consumer protections designed on the basis of the 'rational consumer' require considered revision. In the end, protecting people on the basis of how they actually behave should take precedence—and yield better economic outcomes—than adherence to any form of ideological or economic doctrine.

[82] *Australian Competition and Consumer Commission v Unique International College [2017] FCA 727* at 742.
[83] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 para 21. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1

CONCLUSION

In conducting research and collating case studies, this report concludes the following concerning unsolicited sales.

- As identified by CAANZ in its review of the ACL, and as demonstrated by successful community initiatives such as Do Not Knock stickers and Do Not Knock Informed towns, ***consumer detriment caused by harmful unsolicited sales is significant and persistent.***

- ***Vulnerable consumers*** including elderly consumers, CALD and Indigenous consumers ***appear to be disproportionately affected by harmful unsolicited sales***.

- ***The efficacy of the 'cooling-off' protection is highly questionable and it seems largely an ineffective consumer protection***—it is based on a false and now outdated understanding of human behaviour.

- ***An 'opt-in model' is preferable from a behavioural perspective—it restricts sales to where the purchaser clearly and intentionally chooses the product or service.*** Any impact on legitimate trade can be tested through a narrow trial of the model.

- ***Unsolicited retail sales of solar panels are currently causing significant consumer harm.*** This is driven by a number of factors including consumer anxiety over rising energy costs, limited understanding of the product and appropriate cost, and access to (often inappropriate) finance which makes the purchase achievable.

- ***An industry specific trial of the opt-in model may be useful*** to test the impact of such a model on both reducing consumer harm, and also the impact it has on legitimate trade***. The solar panel industry seems the logical industry in which to conduct such a trial***.

- ***Consideration should be given to broadening protections so that they apply to all 'off-premises contracts', as is currently the case in the EU and UK***. This would ensure that consumers who are subject to high-pressure sales tactics through invited in-home sales, or attending timeshare style presentations, are also protected. This is significant because the behavioural aspects of those interactions are often very similar to unsolicited sales, creating the same difficulties for consumers that the unsolicited consumer agreement protections are designed to counter. Further, emerging legal uncertainty in case law concerning some off-premises sales and whether they qualify as unsolicited could be addressed by such a reform.

The community legal centres participating in this report would like to express their sincere thanks to the people who were prepared to tell their stories and make this report possible.

It is our hope that these stories will contribute to the case for sensible law reform, and prevent further harm being caused by unsolicited sales.

Consumer Action Law Centre

Our vision: a **just marketplace** where
people have power and **business plays fair**

Level 6, 179 Queen Street
Melbourne VIC 3000
AUSTRALIA
consumeraction.org.au

IN THE AUSTRALIAN COMPETITION TRIBUNAL

APPLICATION BY FLEXIGROUP LIMITED

ACT 1 OF 2019

Certificate identifying exhibit

This is the exhibit marked **RPP-27** now produced and shown to Rex Pascal Punshon at the time of affirming his affidavit on 4 May 2020.

Before me:

Signature of person taking affidavit

Power Transformed

Unlocking effective competition and trust in the transforming energy market

consumer action law centre

July 2016

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 Demand-side Energy Reference Group, whose discussions and advice directly informed the development of this report. We thank Ben Burge, Ian Clyde, Mark Feather, Michelle Groves, Gabrielle Kuiper, Chris Murphy, Tim Nelson, Larissa Nicholls, Lara Olsen, Melissa O'Neill, Stuart Richardson, Rosemary Sinclair, Paul Smith, Chris Spangaro, Yolande Strengers, Dean Van Gerrevink, Tony Wood and David Young for the contribution of their time, ideas and advice. We also thank Ross Wyatt for his skilful facilitation of Reference Group meetings.

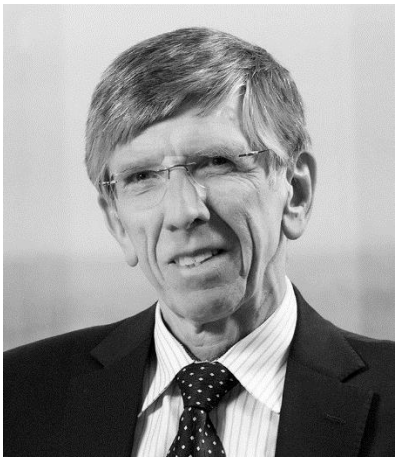
We also warmly thank Philip Cullum and Gabrielle Kuiper for peer reviewing this work.

We especially wish to thank Andrew Reeves for his wisdom and guidance in chairing the Demand-side Energy Reference Group, and contributing his expertise to the development of this report.

Disclaimer

This project was funded by Energy Consumers Australia (www.energyconsumersaustralia.com.au) as part of its grants process for consumer advocacy projects and research projects for the benefit of consumers of electricity and natural gas. The views expressed in this document do not necessarily reflect the views of Energy Consumers Australia.

Chair's foreword



"...it is inevitable that consumers will make decisions that are less than optimum and, in some cases, to their detriment."

The rapid development of new technology in electricity supply is disrupting the traditional means of delivery of this essential service. As in other sectors, the consumer is at the heart of these changes and consumer choice will, as never before, determine the service and mix of technology to meet each need.

But such a shift involves risk for the consumer and for the community. With imperfect information systems it is inevitable that consumers will make decisions that are less than optimum and, in some cases, to their detriment. There is consequently a risk of over-reaction by consumers choosing not to participate, or by policy makers creating barriers to technological transformation to avoid harm. There is the prospect though, of a longer term harm as a result of continuing investment in redundant systems, or by over-investment in new systems and early redundancy of existing and useful facilities.

The challenge for policy makers is to facilitate innovation while maintaining the community's confidence in the long term benefits of change. Effective competition is central to the drive for greater efficiency, but competition can only be effective if consumers are confident and actively engaged. Maintaining the confidence of the community includes identification of the risks and instituting appropriate protection measures.

Research on the implications of the electricity transformation has until recently focussed largely on the technical, environmental and economic aspects of these changes.

> “This Report represents the first documentation of consumer issues and strategies in the evolving energy market.”

There has been little research that addresses the transformation from a consumer perspective. The Consumer Action Law Centre has recognised the complexity of these issues and, as a leading advocate, initiated public consideration of the consumer implications through its 2014 study *Smart Moves for a Smart Market*.

In recognition of the need for a broad perspective to advance this work, Consumer Action proposed a Reference Group of thought-leaders in government, sectors of the supply industry and consumer advocates to explore these issues. The Reference Group held a series of workshops, canvassing contributions from leading experts in the financial services and telecommunications sectors that had experienced, or are experiencing, similar challenges. In addition, discussions were informed by the insight that behavioural economics is bringing on how consumers make decisions on complex matters, and how policy makers and regulators may influence outcomes.

Each of the Reference Group members volunteered their valuable time because of the importance of the timing and scope of the research. At the commencement of the project there was little attention to the consumer implications, but this has now changed and this work will be of considerable interest to policy makers. This Report represents the first documentation of consumer issues and strategies in the evolving energy market. It does not provide all the answers we need for a full regulatory and policy response to the issues faced by consumers in the new market, but it does provide a foundation to start this important work. And importantly, it provides a blueprint for whole-of-sector collaboration as we work together to take this important work forward.

Andrew Reeves

Chair, Demand-side Energy Reference Group

Executive Summary

Australia's Energy Market Challenge

Australia's energy market is rapidly evolving. Deregulation and reform to increase competition have given consumers more choice and created the platform for innovation. At the same time, rising energy prices over recent years have given people the impetus to look for new solutions and plummeting technology costs have unleashed the opportunity for people to choose cheaper, more personalised and more innovative energy products and services.

Like many markets before it—including entertainment, accommodation and telecommunications—transformation in the energy market will provide people with the opportunity to find products and services that better meet their personal preferences and needs, allowing them to benefit from lower costs, higher utility or both. Effective competition and meaningful choice is good for consumers, and many people will find better deals and greater satisfaction.

With this evolution, the role of the energy consumer is fundamentally shifting. Consumers will need to navigate an array of choices and a web of relationships to source the supply and demand technologies and services that best suit their needs.

However, this is likely to create real challenges for many people. It is well established that 'human decision-making markedly deteriorates as the amount or complexity of information increases.'[1] Rather than assessing all available information against their needs and making decisions in response to price signals that leave them better off, consumers use shortcuts and rules of thumb to make decisions. In cases of extreme complexity or choice, they frequently even fail to make a decision at all.[2]

[1] Stenner, K., Frederiks, E., Hobman E.V., and Meikle, S. (2015). *Australian Consumers' Likely Response to Cost-Reflective Electricity Pricing*. CSIRO, Australia. Page 16.
[2] Frederiks, E.R., Stenner,K. and Hobman, E.V. (2015). *Household Energy Use: Applying behavioural economics to understand consumer decision-making and behaviour*. Renewable and Sustainable Energy Reviews 41, 1385-1394.

The challenge Australia's energy market now faces is that effective competition, innovation and market efficiency require informed consumer participation, but evidence shows that consumers are not engaged in the energy market[3] and don't make the decisions expected of them. [4]

To unlock the full potential of recent energy market reforms, consumer benefit must be prioritised to build their trust and engagement. The foundation of further market reform must be:

How can we enable good consumer outcomes in the transforming electricity market for effective competition and innovation?

The Demand-side Energy Reference Group

Addressing the challenge requires a concerted whole-of-market response at the structural, regulatory and product level. Consumer Action therefore established the Demand-side Energy Reference Group (**Reference Group**) of leaders from across the energy sector in early 2015.

The Reference Group worked with Consumer Action to explore the role of, and implications for, consumers in a transforming energy market. Together, we considered responses that could enable better consumer outcomes and build their trust in the energy sector, as a precondition for market benefit and effective competition. For the membership and methodology of the Reference Group, see the Appendix to this report (page 39).

The positions put forward in this report were informed by discussions of the Demand-side Energy Reference Group. They do not, however, necessarily reflect the views of Reference Group members or their organisations.

Confident Consumer Participation and Trust

Innovation and competitive markets 'increase the prosperity and welfare of Australian consumers'[5] whose long-term interests remain at the heart of competition policy and reform. For competition to thrive, and deliver efficient costs, consumers need to be willing to participate, perceiving the benefits of participation to outweigh the costs. Effective consumer participation is therefore based on trust that the market will deliver the outcomes they expect in terms of service, quality and price.

People 'use trust as a simple decision-making heuristic when assessing risk and making cost-benefit appraisals'.[6] As the complexity of the market increases, people's reliance on heuristics (or decision-making shortcuts) becomes more prevalent. Strong levels of trust are therefore critical to consumer participation and effective competition.

Trust in the energy market, or individual energy companies, will influence how people respond to the risks of the new energy market[7]— willingness to participate will increase with greater trust that the company will deliver the expected outcome or has the consumer's best interests at heart.

---

[3] In a recent survey, Accenture found that only 9% of consumers trust their energy provider. Accenture (2014). *The Balance of Power: Why Australian utilities need to defend, delight and disrupt*.
[4] Frederiks, E.R., Stenner,K. and Hobman, E.V. (2015). *Household Energy Use: Applying behavioural economics to understand consumer decision-making and behaviour*. Renewable and Sustainable Energy Reviews 41, 1385-1394.
[5] Australian Competition and Consumer Commission. https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc (viewed 10 December 2015)
[6] Frederiks, E.R., Stenner,K. and Hobman, E.V. (2015). *Household Energy Use: Applying behavioural economics to understand consumer decision-making and behaviour*. Renewable and Sustainable Energy Reviews 41, 1385-1394.
[7] Frederiks, E.R., Stenner,K. and Hobman, E.V. (2015). *Household Energy Use: Applying behavioural economics to understand consumer decision-making and behaviour*. Renewable and Sustainable Energy Reviews 41, 1385-1394.

Trust must therefore be at the core of efforts to enable good consumer outcomes in Australia's transforming energy market, and the foundation for effective competition and innovation.

Unnecessary consumer detriment will undermine this trust. The innovative products and services available in Australia's energy market are already creating challenges as new business models push the boundaries of the existing market, and consumers carry the burden of risk—Consumer Action is already witnessing a rise in complaints about solar sales and installations (Case Study 3, page 21). In a significantly more diverse and innovative energy market, the potential for detriment is increased, as consumers face more novel products and choices, and the risks that come with them.

Consumer detriment may arise for a wide range of reasons, from minor disputes, through to significant technical failures or exclusion from the market.[8] However, not all detriment is equal and not all require treatment. In fact, sometimes detriment can be a catalyst for innovation and better consumer outcomes. The market itself is self-correcting. Those businesses and models that do not deliver good consumer outcomes will fail in time, but there is the risk of harm and damage to trust that may be avoided with foresight.

Some detriment may create barriers and poor outcomes for people trying to engage with the new energy market. This detriment (Table E1) can be attributed to three key sources:

- variability in regulatory requirements as new business models enter the market (e.g. some consumer protections which apply to conventional services do not currently apply to emerging services);
- information asymmetries (there are greater unknowns with new technologies); and
- a legacy of reliance on disclosure, even though it is acknowledged that greater disclosure of complex information does not assist consumers to make better decisions.

If addressed, more effective competition would be unlocked through the confident participation of consumers.

Building Trust in Australia's Energy Market

Capturing the benefit of innovation and increased competition relies on confident consumer participation, and building consumer trust. In achieving this, policy-makers, regulators and energy businesses will need to weigh up competing interests and navigate an array of trade-offs to find practical responses that achieve the goal of facilitating strong innovation while appropriately supporting consumers.

Trade-offs that are already impacting on decision-making in the energy market include:

- **The Opportunity Trade-off:** balancing unlocking immediate opportunity with managing risk to consumers and the market
- **The Temporal Trade-off:** balancing the interest of consumers today with the interest of future consumers
- **The Individuality Trade-off:** balancing benefits to individuals with benefits to society
- **The Delivery Trade-off:** balancing the rate of change to achieve greater economic efficiency with meaningful consumer engagement and equitable social outcomes.

Building consumer trust through good practice and good intent is in the best interests of market participants – who will benefit from greater consumer engagement and loyalty – and the operation of the market itself, which will become more efficient as consumers become more engaged and better informed. It is therefore fundamental to the strong operation of an innovative Australian energy market that the needs of consumers are prioritised.

[8] Westmore, T. and Berry, L. (2014). *Emerging Energy Services – Issues for Consumers: awareness, engagement and protection.*

Table E1: Potential detriment for consumers in the new energy market

Detriment	Example
1. Lack of access to basic consumer protections	Many new products and services may fall outside of the current regulatory framework, and protections that ensure a right to supply, hardship arrangements and access to Ombudsman schemes may not apply
2. Buck-passing and blame shifting	When disputes arise in new products and services which may require a network of relationships to deliver, the potential for buck-passing and blame shifting between parties is high
3. Mis-selling	As products get more complex, some companies may turn to sales tactics relying on product complexity to mask inappropriate or unsuitable products and services
4. Poor decision-making	Consumers may find it difficult to make decisions in their own interests when the number of choices, and complexity of those choices, increases
5. Long lock-in contracts	Long lock-in contracts (e.g. 15 years for a solar lease) reduce consumer choice and flexibility
6. Complex financing tools	New financing arrangements for products and services (e.g. solar leases and power purchase agreements) are complex and may include unclear costs and inconsistent regulatory oversight
7. Inability to access the new market	Some consumers may face systemic barriers to participation in the new, personalised electricity market; this may include those with low incomes, poor literacy skills, language barriers and renters
8. Difficulty comparing products and services	Bundled products and services which are increasingly marketed to individuals based on their personal usage profiles may become difficult to compare where inclusions, exclusions and terminology differ
9. Market failure due to segmentation	Downward pressure on energy prices through mass market competition may be undermined in a market where retailers can increasingly identify and target active, affluent households with individual deals
10. Exclusion through complexity	People who could benefit from switching to new products and services may not engage if information and price signals are too complex, or the reason for participating is not clear
11. Hardship in off-grid scenarios	Off-grid households may experience reduced supply or loss of supply if they fall into hardship, or during a dispute with their technology provider
12. Reduced choice in off-grid communities	Consumers in off-grid communities may have reduced ability to choose their preferred electricity provider and may face higher costs where retail competition is reduced

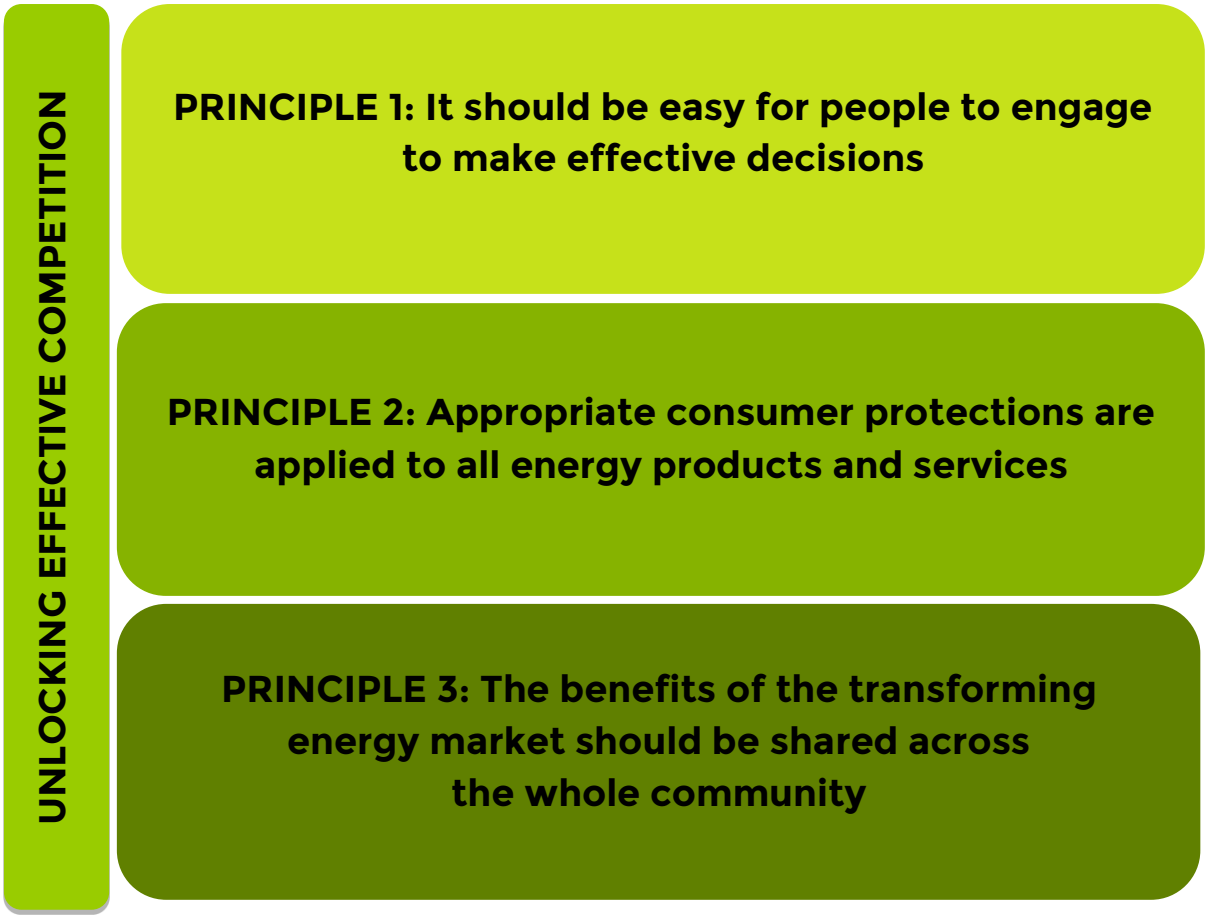
Different people will have different needs in the new energy market. Strong innovation policy may be sufficient to support some, while others may be more reliant on effective competition, clear education campaigns, or more traditional essential service regulation to continue to get fair and affordable energy supply in a decentralised and tech-heavy energy market.

To support the needs of all consumers, it is therefore important to:

- Provide meaningful information and choices which take into account real consumer decision-making biases;
- Ensure the adequacy of consumer protections across all products and services; and
- Share the benefits of energy market innovation across the whole community, including the vulnerable demographics who may face barriers to accessing new products and services.

Energy businesses and governance institutions are best placed to develop the initiatives and interventions that best fit their business practices or jurisdictions, while providing improved consumer outcomes. However principles are required to guide these developments, to ensure that enabling better consumer outcomes and trust are embedded in the development of products, services and regulations.

Based on the evidence of consumer experience, decision-making biases and responses to complexity in other markets presented in this report, there are three simple principles that are required to guide all further market reform and innovation:



These principles provide a competitively neutral, balanced and fair platform to underpin further development of Australia's energy market, ensuring consumers can make good decisions, get the expected outcomes and trust their rights when things go wrong. They must be adopted widely across the energy market, to ensure the success of energy market reforms and underpin effective competition.

While giving effect to the principles must primarily be the responsibility of energy businesses and governance institutions, the experience of the Demand-side Energy Reference Group is that there are strong benefits to taking a whole-of-sector approach that considers the expertise and perspectives of a range of different market participants, including consumers. New approaches that enable better consumer and market outcomes, regardless of the trajectory of innovation or the ultimate regulatory structure, are needed. These 'no-regrets' solutions will be critical to efficient competition in the evolving energy market.

From a consumer perspective, no-regrets initiatives that could be adopted in the short to medium-term include:

1. Testing the need for, and form of, market interventions against real consumer decision-making.
2. Ensuring adequate access to justice by expanding the jurisdiction of energy Ombudsman schemes.
3. Requiring energy service providers to identify the consumer's purpose in acquiring a service, to ensure it is appropriate.
4. Identifying programs to assist vulnerable demographics access new products and services.
5. Targeting concessions to address need rather than tying them to specific supply arrangements.