

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Outline of Submissions

File Number: ACT1 of 2019

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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DEPUTY REGISTRAR

Dated: 01/06/2020 4:37 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

File No: ACT 1 of 2019

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

FLEXIGROUP LTD (ACN 122 574 583)

Applicant

CONSUMER ACTION LAW CENTRE'S

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Filed on behalf of (name & role of party) Consumer Action Law Centre (intervener)

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

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

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A INTRODUCTION AND SUMMARY

A1 Issues

1. The subject of this review is an application for authorisation of the proposed New Energy Tech Consumer Code (**NET Code**) pursuant to s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
2. The NET Code is a voluntary industry code of conduct, by which signatories agree to be bound and, upon breach, subjected to the dispute resolution and disciplinary measures detailed therein.
3. The NET Code sets practice standards for the sale of New Energy Technology (**NET**) products, systems and services – defined to include solar photovoltaic systems, wind turbines, energy storage systems, systems for managing energy usage, and electric vehicle charging services – by retailers to residential and small business customers.
4. The stated objectives for the NET Code are ‘*to raise standards of consumer protection in the sector, to strengthen consumer confidence in New Energy Tech and to encourage innovation and the development of choice for consumers*’. The NET Code sets standards for the conduct of retailers in advertising and promotion; direct marketing and sales; fitness for purpose; quoting; contracts; payment and finance; delivery, installation and safety; activation; user information; customer service; warranties; complaints; and compliance.
5. The main issues in this review concern the NET Code’s treatment of “buy now, pay later” (**BNPL**) credit arrangements, which are structured so as to not be regulated by, or to be exempt from, the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the *National Credit Code* (**NCC**). A reference to BNPL in these submissions is a reference to unregulated credit.¹
6. On 5 December 2019, the ACCC granted authorisation to the Authorisation Applicants and future signatories of the proposed NET Code, subject to conditions. The conditions included:
 - (a) signatories to the NET Code will only be permitted to offer unregulated credit arrangements (i.e. BNPL) from credit providers that have been assessed as having specified consumer safeguards in place, as set out in revised versions

¹ We refer to credit arrangements that are regulated by the NCCPA and the NCC as **regulated** credit; and to credit arrangements that are not regulated by and/or exempt from the NCCPA and the NCC as **unregulated** credit.

of cl 25, A7 and A7A of the NET Code; and

- (b) signatories to the NET Code must not offer customers unregulated credit arrangements in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.
7. The controversy now presented to the Tribunal is narrow in scope, relative to the breadth of the NET Code. All parties to the review support the authorisation of the NET Code, in one form or another, the principal question being whether the NET Code should be approved:
- (a) in its unaltered form; or
 - (b) with the conditions imposed by the ACCC; or
 - (c) with some alternative conditions, focusing on the comparatively narrow aspect of the extent to which NET Code signatories will be permitted to offer BNPL finance.
8. Although the issue relates only to one aspect of the NET Code, it has a disproportionate impact on both consumers and the market more generally. In the NET market, the provision of BNPL is a source of widespread and significant public detriment. This encompasses both harm to vulnerable consumers, and the fact that the offering of BNPL, of itself, substantially distorts the efficient operation of the markets for both NET products and associated finance.

Issues generally

9. The first issue, and the threshold criterion for the granting of authorisation, is whether the Tribunal is satisfied, for the purposes of s 90(7)(b) of the CCA, that:
- (a) enabling the Authorisation Applicants and other future signatories to the NET Code to agree, sign up to and comply with the provisions of the NET Code would result, or be likely to result, in a benefit to the public; and
 - (b) the benefit of introducing the NET Code would outweigh the detriment to the public that would result, or be likely to result, from it (the **Net Public Benefit Test**).
10. The second issue is whether the Tribunal should exercise its discretion under s 88(1) of the CCA to authorise the NET Code, and if so, with what (if any) conditions imposed under s 88(3)?
11. The conditions of authorisation which CALC contends the Tribunal should apply are set out in **Annexure A**.

12. In answering these questions, CALC advances submissions in relation to three main areas of dispute:

Specific Issue 1: Availability of BNPL

13. Under the version of the NET Code that was originally submitted to the ACCC on 29 April 2019 (**April Version**), signatories to the NET Code would have been required to ensure that any deferred payment arrangement was provided by an NCCPA-licensed credit provider, and regulated by the NCC. Its effect would have been to preclude the NET Code signatories from offering BNPL.
14. The later versions of the NET Code, as submitted on 25 September 2019 (**the September Version**)² and 11 November 2019 (**the November Version**)³ and in the version as modified by the ACCC's condition of authorisation (**ACCC Version**),⁴ attempt to establish similar consumer protections by offering the possibility that a NET Code signatory may nonetheless offer credit that is "exempt from" NCC regulation (including BNPL) if:
- (a) the NET Code Administrator has assessed that a (wholly different) industry code of conduct (here referred to as the **BNPL Code**, although it does not yet exist), to which the proposed unregulated credit provider is a signatory, meets certain standards and provides certain protections, including matters specified under the NCCPA, the NCC and ASIC regulatory guides: cl 25(a)(ii)(A)⁵; or
 - (b) as an interim arrangement, pending the anticipated establishment of a separate industry code for BNPL credit providers, the NET Code Administrator has evaluated and approved the deferred payment contracts and internal processes and policies of the proposed credit provider: cl 25(a)(ii)(B) and cl A7.
15. CALC contends, in substance, for the position from the original April Version of the NET Code: namely, that NET Code signatories should not be permitted to offer any unregulated credit, including BNPL. In particular, CALC says:
- (a) BNPL is a significant source of consumer detriment, which is exacerbated in the conditions of the NET market.

² Exhibit BB-1 to the Statement of Benjamin Barnes (the **Barnes Statement**), tab 12 (**September Version**).

³ Exhibit BB-1, tab 14 (**November Version**). The November Version also appears at Attachment B to the ACCC's **Final Determination** of 5 December 2019.

⁴ The ACCC Version of the NET Code appears at Annexure A to Flexigroup's SOFIC.

⁵ Unless otherwise indicated, references to provisions of the NET Code are to the NET Code in the form as resubmitted by the Authorisation Applicants to the ACCC on 11 November 2019, namely the November Version.

- (b) BNPL facilitates unsuitable lending and high-pressure unsolicited sales.
 - (c) BNPL distorts and conceals the true cost of finance, by hidden surcharges or hidden cross-subsidisation, to the detriment of consumers, regulated credit providers, and the efficient working of the markets for NET products and associated finance more generally.
 - (d) Permitting the provision of BNPL by signatories to the NET Code would constitute an inappropriate endorsement of conduct that is arguably lawful, but otherwise harmful. That is particularly the case where the NET Code purports to create “substantially equivalent” standards of protection between BNPL and NCC-regulated credit.
 - (e) The NET Code’s contemplated benefit of shielding both consumers and the market from the harms associated with BNPL will not be achieved in practice, because the measures intended to achieve that benefit are poorly designed and impractical. Rather, this benefit would better be achieved by excluding BNPL entirely.
16. We develop these submissions in part E below.

Specific Issue 2: Unsolicited offering of BNPL finance

17. Clause 3(d) of the NET Code provides that signatories’ advertising and other promotional material will not “make” unsolicited offers of unregulated payment arrangements (ie BNPL) (**No Advertising Requirement**).
18. In its final determination, the ACCC supplemented the No Advertising Requirement with an additional condition that signatories may not offer customers unregulated payment arrangements in connection with any unsolicited sale of a NET product (**Unsolicited Sales Condition**). This condition mirrors the existing position faced by merchants who offer regulated credit: namely, that merchants may not offer regulated credit in connection with an unsolicited sale, unless they are themselves licensed under the NCCPA.⁶
19. If NET Code signatories are to be permitted to offer BNPL at all, then CALC supports the Unsolicited Sales Condition, in addition to the No Advertising Requirement.
20. We address this issue in part F below.

⁶ See NCCPA s 29 and *National Consumer Credit Protection Regulations 2010* (Cth) r 23(3)-(4).

Specific Issue 3: Scope of clause 25

21. The BNPL model claims to be exempt from regulation under the NCC on the basis that **either** it imposes only modest up-front and ongoing charges on the consumer (**Low-Charge BNPL arrangements**), or it does not impose **any** upfront or ongoing charges to the consumer (a **No-Charge BNPL arrangement**).
22. As drafted, the obligations regarding the provision of credit under cl 25 of the NET Code appear to capture only the provision of regulated credit and unregulated Low-Charge BNPL arrangements, but does not also capture unregulated No-Charge BNPL arrangements.
23. There is no principled reason for the consumer protections that cl 25 seeks to maintain being applied to unregulated Low-Charge BNPL but not to No-Charge BNPL. CALC contends for a simple deletion of the narrowing words of cl 25 of the NET Code, to ensure that BNPL providers are not allowed to circumvent the intent of cl 25 by restructuring the currently-offered Low-Charge BNPL arrangements as No-Charge BNPL arrangements.

A2 CALC's evidence

24. CALC has filed nine affidavits⁷, the contents of which are summarised in Annexure B. They are broadly divided as follows:
 - (a) Three **Consumer Case Studies** are deposed to in the affidavits of solicitors Rex Punshon and Sue-Anne Thompson of CALC and Jane Foley of the Financial Rights Legal Centre, who acted for the individual consumers in their disputes about the unsolicited sale of solar panels with BNPL. This evidence illustrates the consumer harm that arises from the provision of BNPL in the NET market, and gives real-life context to CALC's other empirical evidence.
 - (b) The **CALC Solar Panel Survey** is deposed to in an affidavit of Ursula Noye of CALC and the affidavits of Katherine Ross, Elisa Bolzonello and Karl Shami of Maurice Blackburn Lawyers. The Maurice Blackburn affidavits set out survey data collected from retail companies selling residential solar panels with finance, including BNPL, in response to telephone requests for quotations. **Annexure C** to these submissions is a table summarising the results. This evidence demonstrates that a majority of retailers were imposing a surcharge on the sale of solar panels when financed by BNPL, allowing the merchant fee

⁷ Noting that, for six of those affidavits, CALC has filed both a 'public' version and a 'confidential' version.

to be passed on to the consumer.

- (c) **Consumer Complaints Data** is deposited to in further affidavits of Mr Punshon and Ms Noye.
- (i) Mr Punshon's affidavit provides an aggregated overview of CALC's legal work (both advice and representation) for vulnerable consumers in their disputes about the unsolicited sale of solar panels with BNPL for the period January 2016 to April 2020, and CALC's associated policy work.
- (ii) Ms Noye's affidavit sets out consumer complaints data collected, collated and provided to CALC by ASIC, the Energy and Water Ombudsman Victoria (**EWOV**), Consumer Affairs Victoria (**CAV**), the Australian Financial Complaints Authority (**AFCA**), and Flexigroup.

B RELEVANT LEGAL PRINCIPLES

B1 Weighing of benefits and detriment – broadly defined

25. In applying the Net Public Benefit Test, it is necessary to identify the specific character of the public benefits and detriments that will need to be weighed against each other.
26. The test is broad, and contemplates:
- ... the widest possible conception of public benefit... anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.⁸
27. In addressing the concept of detriment, the Tribunal must consider '*... any impairment to the community generally, any harm or damage to the aims pursued by society including as one of its principal elements the achievement of the goal of economic efficiency.*'⁹
28. In applying the Net Public Benefit Test, the Tribunal is therefore not limited to considering matters affecting economic efficiency, or the degree of competition in a market. Indeed, conduct that involves lessening of competition does not give rise to a

⁸ *Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481, cited in *Re Medicines Australia Inc* [2007] ACompT 4 (***Medicines Australia***), at [107].

⁹ *Re 7-Eleven Stores Pty Ltd* (1994) 16 ATPR 41-357 at 42,683, cited in *Medicines Australia* at [108].

detriment *per se*.¹⁰ Rather, the Tribunal must consider all of the benefits or detriments which are likely to accrue to the public, including the protection of, and the provision of adequate information to, consumers. This accords with the equal significance afforded between economic competition and consumer protection in the overarching statutory objectives expressed in s 2 of the CCA, being ‘... to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. Indeed, retail markets work best when consumers are informed and engaged, empowering them to make good purchasing decisions. By doing so, informed and engaged consumers both benefit from *and* further stimulate effective competition.¹¹ Further, consumers’ ability to make efficient choices will be positively undermined where they are misled, or treated unfairly.¹²

29. Ultimately, the Net Public Benefit Test involves a weighing of a range of factors that may be incommensurable.¹³ In effect, the Tribunal is required to form a value judgment, a synthesis of “classical” competition and efficiency interests with broader community expectations and standards.
30. In *Re Media Council of Australia (No 2)* (1987) 88 FLR 1 (**Media Council**), the Tribunal observed, in relation to the authorisation of industry codes, that:
 - (a) benefits flowing from authorisation may include an improvement in the quality of services, as well as procedural and enforcement efficiencies, although in assessing how effectively and efficiently a code may realise those conceivable benefits, the Tribunal will need to pay close regard to its practical operation: at 35-36;
 - (b) there may be a net public benefit where a code requires a higher standard of conduct than that which is allowed by the general law, despite any anti-competitive effect, provided they are well-founded in a balanced, sufficient and current understanding of community values and expectations: at 41-42, 44, 48;
 - (c) similarly, authorisation of a code may create a public detriment if the code is overly permissive towards conduct which is not prohibited by law, but is otherwise offensive or harmful, and therefore risks being seen as giving such

¹⁰ *Re Media Council of Australia (No 2)* (1987) 88 FLR 1 at 10.

¹¹ Productivity Council, *Review of Australia’s consumer policy framework*, final report, 30 April 2008, at 28, 38-43; Intergovernmental Agreement for the Australian Consumer Law, Recitals C and D(1); Office of Fair Trading (UK), *What does behavioural economics mean for competition policy?*, 2010, at 9-10; Harper et al, *Competition Policy Review*, final report, March 2015, at 293-305 and Recommendation 21.

¹² See eg Murray et al, *Financial System Inquiry*, final report, November 2014, at 193-194.

¹³ *Re Qantas Airways Ltd* [2004] ACompT 9 at [208]-[209].

conduct an unwarranted 'stamp of approval': at 37.

31. In these submissions, CALC will develop its contentions that:
- (a) there will be a net public benefit if signatories to the NET Code agree not to offer unregulated credit, and that that agreement is properly founded in the signatories' common desire to promote and incentivise transparent and fair conduct towards consumers, consistent with contemporary community values and expectations; and
 - (b) there will be a public detriment if the offering of BNPL for the purchase of NET products is afforded the imprimatur that a merchant's membership of the NET Code will confer, and if consumers were to derive a false assurance that BNPL offered by signatories is subject to equivalent regulatory oversight and scrutiny as regulated finance.

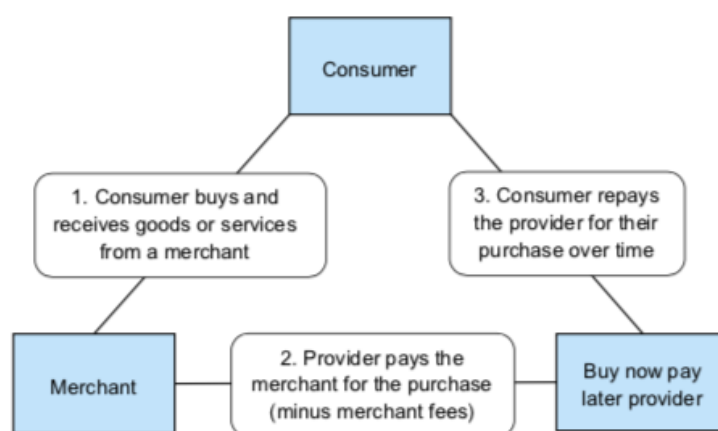
B2 The discretion to authorise and to impose conditions

32. Where the Net Public Benefit Test has been met, the Tribunal retains a discretion whether to grant authorisation, and if so, on what conditions. Authorisation may properly be made subject to conditions in cases where:
- (a) the proposed conduct would not otherwise satisfy the Net Public Benefit Test, and imposing conditions will either increase the benefit, or decrease the detriment, in order that the test will be met;
 - (b) the proposed conduct might theoretically satisfy the Net Public Benefit Test, but imposing conditions will increase the likelihood of the contemplated benefits being achieved; and
 - (c) the proposed conduct does satisfy the Net Public Benefit Test, but the Tribunal would not be prepared to exercise its discretion in favour of authorisation unless conditions are imposed: *Medicines Australia* at [133]-[134].
33. In this review, CALC's submissions are directed principally to the second and third scenarios. That is, it seeks to best ensure that the contemplated public benefits will be realised (i.e. protecting both consumers and the market from wholly unregulated BNPL), and that unjustified detriment will be avoided (i.e. the NET Code should not positively endorse BNPL as appropriate or equivalent in safeguards to NCC-regulated credit), where the Net Public Benefit Test is otherwise satisfied with regard to the authorised conduct and the NET Code as a whole.

C BACKGROUND

C1 Features of BNPL finance

34. The essential characteristics of BNPL finance are that:
- (a) a consumer buys and receives goods or services from a retail company (**merchant**);
 - (b) the BNPL provider pays the merchant for the purchase, less an amount comprising the merchant's payment for the provision of finance (**the merchant fee**);
 - (c) the consumer pays the BNPL provider for the purchase over time, but pays either minimal or no up-front credit charges to the BNPL provider.
35. This will usually involve a tri-partite contractual framework:
- (a) a contract between the consumer and the BNPL provider;
 - (b) a contract between the consumer and the merchant; and
 - (c) a contract between the BNPL provider and the merchant.



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36. As a result of that structure, for most BNPL providers the merchant fee comprises the majority of their revenue, though revenue is also derived from late payment and default fees.¹⁵

¹⁴ Diagram extracted from ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018) (**ASIC Report 600**), Annexure KF-1 to the statement of Kevin Foo dated 5 May 2020 (**Foo Statement**), 13.

¹⁵ ASIC Report 600, p 10, figure 2.

37. In the case of Flexigroup's BNPL product, humm, the merchant agreement provides in substance that:
- (a) humm will be paid a fee (**Rate**), which is a lump sum, calculated as a percentage of the amount of the loan: cl 4.1, 16;
 - (b) the amount of the Rate will be deducted (by way of set off) from the amount to be paid to the merchant for the purchase of the product: cl 4.3, 4.4; and
 - (c) humm will instruct payment to be made to the merchant, less the amount of the Rate, on the next business day following the purchase: cl 4.3.
38. Insofar as the merchant fee is analogous to interest (in that it may incorporate both the lender's profit and a premium against the risk of non-repayment of principal by the customer), it is to humm's advantage that the merchant fee is paid by the merchant to humm up front, and rather than paid progressively by the customer over the course of the loan (as interest is). Flexigroup's contention that it has a lower margin for error than other unsecured lenders¹⁶ entirely ignores the comparative advantage it derives from upfront payment of the merchant fee.
39. In contrast to more conventional forms of consumer credit, Low-Charge BNPL arrangements are designed to fall within an exemption to NCC regulation. This is because, so long as any charges to the consumer for providing the credit are below \$200 in the first year of the arrangement, and \$125 in each subsequent year, the BNPL arrangement is deemed not to be "credit to which the NCC applies": s 6(5) of the NCC and r 51 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**NCCPR**).¹⁷
40. Similarly, BNPL arrangements are also not subject to the comprehensive regulatory regime for financial services and products under Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**). Like all credit products, they are specifically excluded from the definition of a 'financial product' for the purposes of Chapter 7 of the *Corporations Act*.¹⁸

¹⁶ Flexigroup, Opening submissions, at [15].

¹⁷ As to the establishment and ongoing fees charged by Flexigroup, see Statement of Taras Mysak, 24 April 2020 (**First Mysak Statement**), at [42].

¹⁸ Section 765A(1)(h)(i) of the *Corporations Act* defines a 'financial product' as excluding a 'credit facility within the meaning of the regulations'. A credit facility is broadly defined in 7.1.06 of the *Corporations Regulations 2001* (Cth), as including a facility for the provision of credit, for any period, with or without any prior agreement, whether or not both credit or debit facilities are available, that is not a financial investment product as contemplated by s 763A(1)(a), and is not a product of a type that is specifically included in the definition of 'financial product' by s 764A(1)(a)

41. In contrast, a BNPL arrangement will be a ‘financial product’ for the purposes of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*.¹⁹ As a consequence, it is subject to the provisions of Part 2, Division 2 of the ASIC Act. Those ASIC Act provisions substantially replicate for financial products the general consumer protections set out in Chapter 2 of the Australian Consumer Law, save that they are enforceable by ASIC, rather than the ACCC.
42. BNPL therefore falls between the stools of ASIC’s regulatory responsibilities in relation to financial products and services under the Corporations Act and in relation to consumer credit under the NCCPA and the NCC. As we will show below,²⁰ this creates an immediate obstacle to BNPL providers obtaining the “contemplated” ASIC approval of the draft BNPL Code.
43. Insofar as ASIC has a narrower jurisdiction over BNPL providers under the ASIC Act, there has been little or no enforcement activity to date. Nothing in the material before the Tribunal suggests that, and our own researches have not identified, any reported instance in which ASIC has taken any regulatory enforcement action, or any civil remedies have been granted, against a provider of BNPL finance under Part 2, Div 2 of the ASIC Act.²¹ That lack of enforcement of the ASIC Act provisions sits in tension with the consumer complaints data set out in Part D4 below, which indicates that BNPL is disproportionately a source of enquiries to CALC.

C2 Differences between regulated credit and BNPL

44. Like all consumer credit, BNPL arrangements create a risk of causing financial harm to consumers. However, as they are unregulated, BNPL arrangements are not subject to the obligations under the NCCPA and NCC which are intended to mitigate that risk.
45. The consumer protection obligations which apply to regulated credit, include:
- (a) responsible lending obligations, contained in Chapter 3 of the NCCPA;
 - (b) disclosure obligations under Part 2, Divisions 1 and 5 of the NCC;
 - (c) restrictions on fees, charges and interest for certain credit contracts, under Part

¹⁹ Section 12BAA(7)(k) of the ASIC Act, and reg 2B of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.

²⁰ Part E5 below.

²¹ See [Confidential to ASIC / Confidential to Flexigroup] [REDACTED]

[REDACTED] Cf ASIC Report 600, at [174]-[177], in relation to the unfair contract terms prohibition under ss 12BF and 12GND of the ASIC Act: “We have written to each provider in our review to highlight potential unfair contract terms in their contracts with consumers.”

- 2, Division 3 of the NCC;
 - (d) obligations concerning financial hardship arrangements, under Part 4, Division 3, and Part 5, Division 2 of the NCC;
 - (e) general conduct obligations on licensees, including obligations:
 - (i) to take reasonable steps to ensure that the credit activities are engaged in efficiently, honestly and fairly;
 - (ii) to ensure that its representatives are adequately trained; and
 - (iii) to have both internal and external dispute resolution procedures in place: NCCPA s 47; and
 - (f) restrictions on unsolicited offers of third party credit by unlicensed merchant parties: see NCCPR r 23(4).
46. Unlike regulated credit providers, BNPL providers:
- (a) are lawfully permitted to offer credit to anyone, regardless of their capacity to pay;
 - (b) are not under any specific disclosure obligations regarding price, terms, available remedies, or anything else;
 - (c) are not obliged to offer any financial hardship arrangements;
 - (d) are not obliged to offer any internal or external method for the resolution of customer disputes;
 - (e) are not subject to an obligation to act efficiently, honestly and fairly towards their customers; and
 - (f) are not obliged to ensure that their (sales) representatives are adequately trained.

C3 The market for solar panels and other NET products

47. As at 2019, the Australian solar panel installation industry is a \$1.9 billion market.²² This is only a sub-set (although no doubt a very substantial part) of the market for NET products more broadly. As at December 2016, there were 4,000 to 5,000 solar retailers in Australia.²³ The industry is largely comprised of small to medium-sized businesses and, as is demonstrated by the consumer complaints data and the CALC Solar Panel

²² IBISWorld, *Industry Report OD4042: Solar Panel Installation in Australia* (June 2019), p 24.

²³ Affidavit of Rex Punshon re CALC's Internal Data sworn 4 May 2020 (**CALC Internal Data Affidavit**), Exhibit RPP-26 (**Knock It Off Report**), at 150.

Survey, merchants vary in their sales jurisdiction, operating style and finance offerings.

48. Solar panels and NET products are regularly sold on the basis of representations that the products will enable the consumers to realise large savings on their electricity bills.²⁴ These are borne out by Sun Energy's "Pay As You Save" marketing pitch,²⁵ and most starkly by the following "hooks" prescribed in Sun Energy's lead generation script:

[Confidential to Sun Energy] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

49. These representations trade on consumer anxiety over rising energy costs, and so are apt to have particular appeal for (and be targeted at) low-income consumers,²⁷ including those relying on Centrelink payments such as Ms **[Confidential to CALC]** [REDACTED] Mr **[Confidential to FRLC]** [REDACTED] and Mr & Mrs **[Confidential to CALC]** [REDACTED]
50. Due to the technical nature of NET products, and the financial complexity of the retail electricity market generally, it is difficult (at best) for ordinary consumers to accurately assess or estimate:
- (a) the products' performance;
 - (b) which products, and how many, would be suitable for their needs;
 - (c) the actual impact on their energy costs, and any likely savings; and
 - (d) the likely pay-off time for their capital investment.²⁸
51. Solar panels are also very frequently sold to consumers with BNPL, often described

²⁴ CALC Internal Data Affidavit, Exhibit RPP-25 (**Sunny Side Up Report**), at 58-59.

²⁵ Described in the Statement of Chantha Lake (**Lake Statement**) at [14], [17] and [22].

²⁶ Confidential exhibit CL-1 to the Lake Statement.

²⁷ CALC, Sunny Side Up Report (Exhibit RPP-25), at 59-60.

²⁸ Sunny Side Up Report (Exhibit RPP-25); Exhibit JC-1, tab 9, (ANA.001.001.0404) (**KPMG Report**), Chapter 3.

as 'interest-free finance'.²⁹ **Annexure C** to these submissions, which summarises the results of the CALC Solar Panel Survey, indicates that 11 of the 19 merchants providing a quote offered some form of BNPL finance.

52. Where the solar merchants did not offer BNPL finance, the remarks made by their sales personnel were often striking. Of the six merchants who provided a quote but did not offer BNPL, in four cases the salesperson disparaged BNPL finance:
- (a) Total Solar Solutions: BNPL did not align with the merchant's values;³⁰
 - (b) HP Energy: people pay more money for that type of finance;³¹
 - (c) Sunterra: it was '*a dodgy practice*' and people get trapped in bad financial agreements;³² and
 - (d) Solar Gain: the total price is more expensive.³³
53. If this were a simple, single-market situation, and the salespeople were disparaging the solar merchants' own competitors, such disparagement would fairly be seen as conventional, self-serving marketing talk. But in this particular intersection of the NET and consumer finance markets, these remarks are deserving of greater attention: at the very least, they show that solar merchants use their offering of (or refusal to offer) BNPL finance as a point of competitive differentiation between themselves and competing solar merchants – and that they do so variously by reference to:
- (a) the true overall cost comparison between purchasing NET products with BNPL as opposed to regulated finance; and
 - (b) community standards and expectations in relation to consumer credit.
54. It appears to be uncontroversial that the two main providers of BNPL finance for NET products in Australia are Flexigroup (trading as Certegy or humm) and Brighte.³⁴ Their prominence in the market for consumer finance for NET products is reflected in:
- (a) CALC's experience of consumer complaints, in which Flexigroup and Brighte are the only BNPL providers against whom CALC has received any complaints arising from the sale of NET products;³⁵

²⁹ Sunny Side Up Report (Exhibit RPP-25), at 54.

³⁰ Ross Affidavit, [94].

³¹ Ross Affidavit, [111].

³² Ross Affidavit, [123].

³³ Bolzonello Affidavit, [145].

³⁴ See, eg, ASIC submission to ACCC (exhibit KF-4 to the Foo Statement) at [26]-[28].

³⁵ CALC Internal Data Affidavit, at [32](d).

- (b) the CALC Solar Panel Survey, in which Flexigroup or Brighte were the BNPL providers for 10 out of the 11 merchants surveyed and offering BNPL finance.

C4 The development of the NET Code

- 55. We provide the following overview of the development of the NET Code as background to the specific issues arising in this review in Part E below.
- 56. The NET Code originated with a request from the Council of Australian Governments (**COAG**) Energy Council that the Australian Energy Council (**AEC**), in collaboration with Energy Consumers Australia (**ECA**) and other stakeholders, develop ‘an industry-wide Code of Conduct for sellers of behind-the-meter products and services’.³⁶
- 57. The “behind-the-meter” working group (**BTMWG**) was established in October 2017 for the purpose of designing such a code and included a diverse range of stakeholders, namely:
 - (a) representatives of the clean energy and solar, storage and smart energy industries (the Clean Energy Council and the Solar Energy Council);
 - (b) sustainable living advocates (Renew);
 - (c) representatives of energy wholesalers and retailers (the AEC, AGL, Energy Queensland);
 - (d) representatives of the national electricity and gas transmission and distribution networks (the Energy Networks Association, Energy Queensland);
 - (e) a specialist advocate for energy consumers (the ECA); and
 - (f) two broad-based consumer advocates (CALC and the Public Interest Advocacy Centre).
- 58. The BTMWG consulted widely, including receiving a submission from, and subsequently meeting with, Brighte Capital.³⁷
- 59. Following that process, the April Version of the NET Code that was first submitted to the ACCC for authorisation set out a series of ‘Key Commitments’ in cl 1 of the NET Code, including commitments by the NET Code signatories to:
 - (a) ‘provide you with clear, accurate and relevant information to help you make

³⁶ Statement of Jacqueline Crawshaw dated 5 May 2020 (**Crawshaw Statement**), [26]-[28], Exhibit JC-1 (ANA.001.001.0354).

³⁷ Statement of Ben Barnes dated 5 May 2020 (**Barnes Statement**); Exhibit JC-1, tab 5 (ANA.001.001.0357).

informed choices’;

- (b) ‘ensure that our sales practices are responsible’; and
- (c) ‘ensure that products, systems, services and documentation provided under the Code are suitable and fit for purpose’.

60. Beneath those key commitments – which are themselves uncontroversial – the BTMWG agreed that NET Code signatories should undertake not to offer unregulated credit, including BNPL. The April Version of the NET Code originally submitted to the ACCC for authorisation included an undertaking that signatories would not offer unregulated credit. Specifically, cl 24 required that signatories may only offer a deferred payment arrangement where:

- (a) the provider was licensed under the NCCPA; and
- (b) the arrangement itself was regulated by the NCCPA and the NCC.

61. Significantly, it was the BNPL providers themselves and the ACCC, rather than NET industry participants or any consumer representative, that first raised concerns regarding the undertaking not to offer BNPL finance. In its draft determination dated 1 August 2019³⁸, the ACCC stated that:

A number of ‘buy now, pay later’ (BNPL) providers that currently supply finance for a sizeable share of New Energy Tech products, particularly solar products, would not be permitted to provide finance under the Consumer Code as it is presently drafted. ***Although these providers are not captured by NCCPA and NCC regulation, they submit that they are subject to separate regulation and provide equivalent consumer safeguards.*** They submit that preventing consumers from accessing these finance arrangements will in turn restrict consumers’ access to New Energy Tech products.

The ACCC invites further submissions on whether it is feasible and desirable to modify these provisions of the Consumer Code to permit finance arrangements that fall under other regulatory regimes if they can be demonstrated to provide ***equivalent consumer safeguards*** to those in the NCCPA and NCC.

[emphasis added]

62. The Authorisation Applicants responded by letter dated 6 September 2019, sent by the

³⁸ Crawshaw Statement, Exhibit JC-1, tab 10 (ANA.001.001.0278), at .0279-80.

CEC.³⁹ Among other things, the letter:

(a) proposed an amendment to cl 24(b) of the NET Code, so that a deferred payment arrangement would also be permitted if the credit provider was licensed, and it *'complies with a regulator approved Code of Conduct or industry code that delivers substantially equivalent consumer protections to those contained in the NCCPA'*;

(b) stated that:

it wasn't the intent of the BTMWG [to exclude BNPL altogether], rather that consumers received adequate protections when entering finance arrangements with signatories. We understand BNPL providers are intending to develop a code of conduct that, once in place, would provide ***substantively similar protections*** to consumers to the NCCPA. *[emphasis added]*

63. On 25 September 2019, the Authorisation Applicants wrote to the ACCC with the September Version of the NET Code. This provided that a deferred payment arrangement would also be permitted if the credit provider was licensed, and the deferred payment arrangement *'complies with a regulator approved code of conduct (such as those meeting ASIC RG 183) that is verified by the Administrator, in consultation with the Industry Council, as delivering substantively equivalent consumer protections.*⁴⁰
64. Each of Benjamin Barnes of the AEC and Jacqueline Crawshaw of ECA, describe the BTMWG's retreat from its initial prohibition on BNPL finance as essentially a pragmatic compromise, in the face of resistance from the ACCC. Mr Barnes states that the issue was a *'relatively narrow'* one, and he was concerned to ensure that it did not risk the granting of authorisation.⁴¹ Similarly, Ms Crawshaw states that the ECA had a *'very significant concern'* that the authorisation process more generally should not be *'derailed or delayed'* by the issue of BNPL.⁴²
65. Specifically, in agreeing to relax the prohibition on BNPL finance, the evidence shows that the BTMWG had not been positively persuaded of the principled public benefits of doing so; rather, they were primarily motivated by a desire that the authorisation of the NET Code (and its wider public benefits) should not be obstructed by the ACCC's

³⁹ Crawshaw Statement, Exhibit JC-1, tab 13 (ANA.001.001.0323).

⁴⁰ Crawshaw Statement, Exhibit JC-1, tab 19 (ANA.001.001.0375) (emphasis added).

⁴¹ Barnes Statement, [78](d)

⁴² Crawshaw Statement, [85](c).

concerns.

66. Further, Mr Barnes states that *‘the consensus position from the BTMWG was to seek to moderate the exclusion of BNPL, but **only if that could be achieved without introducing any additional risk for consumers.***⁴³ Ms Crawshaw confirms that position.⁴⁴
67. Similarly, Ms Crawshaw confirms her view, which other members of the BTMWG shared, was that:
- (a) ASIC, rather than the administrator of the NET Code, should be responsible for assessing the adequacy of the consumer safeguards in the proposed BNPL Code;
 - (b) the role of the administrator of the NET Code should be limited to ensuring that a BNPL provider was a signatory to the BNPL Code; and
 - (c) the NET Code Administrator was unlikely to possess the deep familiarity with the NCCPA and the NCC so as to make such an assessment itself, and it was not appropriate that it do so.⁴⁵
68. Mr Barnes’ expectation was that having the proposed BNPL Code approved by a regulator would ensure that there would be meaningful verification, by an appropriately-qualified party, that the BNPL Code would in fact provide adequate and appropriate consumer protection.⁴⁶ Ms Crawshaw’s recollection is that Mr Barnes said that a requirement for ASIC approval of the proposed BNPL Code might overcome his concerns about the adequacy of those consumer protections.⁴⁷
69. On 25 September 2019, there was a further consultation between the Authorisation Applicants and the ACCC. Mr Barnes’ evidence is that:
- (a) the ACCC was still concerned that the drafting of cl 25 was not sufficiently clear; and
 - (b) Mr Barnes invited the ACCC to let the Authorisation Applicants know if the ACCC had a specific form of amendment that it had in mind, which could address the concerns.⁴⁸

⁴³ Barnes Statement, [79].

⁴⁴ Crawshaw Statement, [72].

⁴⁵ Crawshaw Statement, [97](e), [119]-[120].

⁴⁶ Barnes Statement, [83]

⁴⁷ Crawshaw Statement, [97](a).

⁴⁸ Barnes Statement, [116].

70. On 22 October 2019, the ACCC proposed a further amendment to cl 25.⁴⁹ Critically, that amendment abandoned any reference to the earlier principle of substantially equivalent protection, and also any reference to the proposed BNPL Code. Rather, it prescribed a series of requirements to be verified by the NET Code Administrator in relation to the policies of each unlicensed finance provider individually.
71. Each of Mr Barnes and Ms Crawshaw state that the Authorisation Applicants substantially accepted the ACCC's proposed amendment to cl 25, again as a matter of pragmatism – that is, in order not to put the authorisation of the NET Code at risk.⁵⁰ Ms Crawshaw stated that *'the Authorisation Applicants were confronted with the reality that obtaining the authorisation depended on acceptance of the ACCC Version of Paragraph 25'*, and that she did not want to see the introduction of the NET Code *'derailed'* by a dispute over the BNPL issue.⁵¹
72. Rather, each of Mr Barnes and Ms Crawshaw remained concerned about the practical operation of cl 25, as proposed by the ACCC.
73. By a final amended application dated 11 November 2019,⁵² the Authorisation Applicants proposed a further revision (being the November Version) of the NET Code under which the NET Code administrator would not be required to verify the ACCC's criteria for the policies and practices of each BNPL provider individually. Rather, it would only be necessary for the NET Code Administrator to ascertain *'that the credit provider is a signatory to an industry code of conduct that requires the credit provider'* to comply with those requirements (emphasis added).
74. However, this assumed the existence of such an industry code. In its absence, the transitional clause A7 continued to provide that the NET Code Administrator must itself assess each BNPL provider's contracts and policies.
75. In summary:
- (a) The BTMWG's original position, agreed on a principled basis, was signatories of the NET Code should not be permitted to offer unregulated credit.
 - (b) The retreat from that position was not provoked by any concern from consumers or NET merchants themselves. Rather, the primary objection (aside from that of the BNPL providers themselves) was raised by the ACCC.

⁴⁹ Barnes Statement, Exhibit BB-1, tab 13 (ANA.001.001.0037).

⁵⁰ Barnes Statement, [120]; Crawshaw Statement, [116].

⁵¹ Crawshaw Statement, [115]-[116].

⁵² Barnes Statement, Exhibit BB-1, tab 14 (ANA.001.001.0163).

- (c) Further, the ACCC's objections apparently emerged from a submission by the BNPL providers, to the effect that (as it was understood by the ACCC) they were '*subject to separate regulation and provide equivalent consumer safeguards*', and that providers of unregulated credit who nonetheless provided '*equivalent consumer safeguards*' ought to be permitted.⁵³
 - (d) In proposing to relax the restrictions on unregulated credit, the ACCC did not suggest how such '*equivalent consumer safeguards*' might be measured – rather, when asked to do so, it abandoned that concept in favour of a prescriptive standard.
 - (e) When the Authorisation Applicants were led to relax their initial exclusion of unregulated credit, it was not because their concerns had been satisfied. Rather, it was a position pragmatically taken, and based on the understanding that consumers would be provided with '*substantially equivalent safeguards*'.
 - (f) However, the ACCC then retreated from this position, instead proposing a prescriptive standard. This undermined its original proposal that BNPL be permitted with '*equivalent consumer safeguards*'.
 - (g) Again, the Authorisation Applicants' accepted the move to a prescriptive standard pragmatically, and in order to secure the ACCC's authorisation, and not because their concerns were alleviated.
 - (h) While the Authorisation Applicants were concerned about the ability of the NET Code Administrator to properly assess a BNPL provider's compliance with the standards in question, their response in the November Version was to outsource the problem, rather than resolving it. This was, however, assuming the existence and adequacy of a BNPL Code that was not yet approved, and a BNPL Code Administrator that did not yet exist.
76. In practical terms, the notion of "*substantially equivalent*" safeguards between regulated and unregulated credit is false, or unworkable at best. That submission is developed at Part E4 below. In negotiating a compromise between the ACCC's competition concerns and the Authorisation Applications' consumer protection concerns, both the ACCC (which does not regulate either financial products or credit) and the Authorisation Applicants (whose expertise concerns energy, and not credit regulation) were acting outside of their primary areas of expertise.

⁵³ Crawshaw Statement, Exhibit JC-1, tab 10 (ANA.001.001.0278), at .0279-80.

77. As a result:
- (a) the Authorisation Applicants have made significant concessions from their original consensus to exclude BNPL, in deference to the ACCC, and on the basis of a hypothesis that BNPL can be held to substantially equivalent consumer safeguards as apply to regulated credit;
 - (b) however, neither the ACCC nor the Authorisation Applicants have any strong idea of how their respective proposals will work, or of how (if that is still intended) they will ensure such standards in practice.
78. Rather than excluding BNPL due to legitimate concerns about the associated consumer detriment (as was originally proposed), the NET Code is now proposed to implicitly endorse BNPL. This is subject only to a complex, untested and uncertain set of standards, which, the Authorisation Applicants agree, the NET Code Administrator will not be well suited to enforce. The notion that this will result in consumers being conferred with a truly equivalent set of consumer safeguards to those that are formally overseen and policed by ASIC appears to have emerged as the wishful result of a well-intentioned, but insufficiently thought-through, series of collective compromises.
79. CALC's more detailed submissions regarding the serious defects in the regime currently proposed in cl 25 of the NET Code, and its various alternative formulations, are further developed in Part E below.

D PARTICULAR CONSUMER PROTECTION ISSUES RAISED BY BNPL IN THE SOLAR / NET MARKET

D1 Evidence of consumer harm

80. There is substantial evidence that the provision of BNPL finance in the NET market brings with it a significant risk of poor sales practices and harm to consumers. CALC relies principally on the evidence as summarised in Part A2 above.
81. First, the poor sales practices, unsuitable and unaffordable products and lack of consumer protections have a disproportionate impact on vulnerable and disadvantaged consumers. This is illustrated by CALC's consumer complaints data generally and consumer cases evidence more specifically.
82. Second, BNPL's fee structure is crafted to conceal the true cost of credit from the consumer. Simultaneously, it incentivises merchants to adopt differentiated pricing, or surcharging for BNPL – even though they are contractually bound by their merchant agreements not to do so. The CALC Solar Panel Survey (and the similar evidence

from Ratesetter)⁵⁴ demonstrates that surcharging by solar merchants who offer BNPL has been, and continues to be, widespread in the market place. The prevalence of this surcharging conduct undermines the very basis on which BNPL providers claim to be exempted from NCC regulation (as we develop further in Part D8 below).

83. Third, CALC relies on data and research from its own credit and consumer law practice, as well as from EWOV, ASIC, CAV, AFCA and Flexigroup to illustrate that BNPL in the NET market, and BNPL more generally, are over-represented among legal centre enquiries and ombudsman and regulator complaints received in relation to consumer finance.

D2 Consumer case studies

Case Study 1: [Confidential to CALC] [REDACTED] | Solar Today | Brighte Capital

84. In his affidavit affirmed on 3 May 2020 (**Punshon Case Study Affidavit**), Mr Punshon deposes to his representation of vulnerable consumers [Confidential to CALC] [REDACTED] [REDACTED] in a dispute with Solar Today and Brighte Capital.
85. Mr and Mrs [Confidential to CALC] [REDACTED] live in rural Victoria and each receive Centrelink payments as their main source of income, Mrs [Confidential to CALC] [REDACTED] the Disability Support Pension and Mr [Confidential to CALC] [REDACTED] the Carer Payment.⁵⁵ They were referred to CALC by a financial counsellor from Anglicare, who described the matter at the time as ‘a perfect example of the predatory behaviour of these solar panel ‘mobs’.⁵⁶
86. On 20 March 2018:
- (a) A representative of Solar Today made an unsolicited visit to Mr and Mrs [Confidential to CALC] [REDACTED] home, and attempted to sell them solar panels.⁵⁷
 - (b) Mr [Confidential to CALC] [REDACTED] told the representative that they were not interested, because they already owned a 12-panel solar system, and they could not afford anything further, due to their limited income. The representative proposed that Mr and Mrs [Confidential to CALC] [REDACTED] pay for the solar panels by entering into a loan with Brighte.⁵⁸

⁵⁴ Statement of Daniel Foggo dated 25 May 2020 (**Second Foggo Statement**).

⁵⁵ Punshon Case Study Affidavit, [7](a).

⁵⁷ Punshon Case Study Affidavit, [7](b).

⁵⁸ Punshon Case Study Affidavit, [7](b).

- (c) After the salesperson continued with his sales pitch, Mr and Mrs **[Confidential to CALC]** [REDACTED] agreed to purchase a 2kW 8-panel solar system by entering into a \$6,050 loan with Brighte. They subsequently received a 'Interest Free Payment Plan' of \$47.12 per fortnight, paid over 130 fortnights (5 years).

59

87. On 8 May 2018:

- (a) The same representative again attended Mr and Mrs **[Confidential to CALC]** [REDACTED] home uninvited, to sell them further solar panels. He persisted until Mr and Mrs **[Confidential to CALC]** [REDACTED] agreed to purchase a further 1.5kW 6-panel system (bringing them to 26 solar panels in total, and three separate systems).⁶⁰
- (b) He told them that the price for the further system would be \$3,500, if they paid in cash.⁶¹

88. Mr and Mrs **[Confidential to CALC]** [REDACTED] were unable to pay for the 6-panel system upfront. Accordingly, on 21 May 2018, the representative came to their home again, and told them they could purchase the system for \$5,050, with a \$500 cash deposit and a further loan with Brighte for the balance of \$4,550. This represented a surcharge of \$1,550 more than the upfront price. Mr **[Confidential to CALC]** [REDACTED] signed a Customer Sales Agreement which specified the higher price of \$5,050.⁶²

89. Although the representative told Mr and Mrs **[Confidential to CALC]** [REDACTED] that the more solar panels they purchased, the more they would save, purchasing the two additional solar panel systems led to little or no reduction of their energy bills at all.⁶³

90. Further, the representative did not comply with the provisions of Part 3.2, Division 2 of the Australian Consumer Law, concerning unsolicited consumer sales. Among other matters, the representative:

- (a) did not, before starting to negotiate, inform Mr and Mrs **[Confidential to CALC]** [REDACTED] that he was obliged to leave their home upon request, as required by s 74(b); and
- (b) did not leave the premises as soon as Mr and Mrs **[Confidential to CALC]** [REDACTED]

59 Punshon Case Study Affidavit, [7](b); Exhibit RPP-3.

60 Punshon Case Study Affidavit, [7](c).

61 Punshon Case Study Affidavit, [7](d); Exhibit RPP-4 (signed Customer Sales Agreement).

62 Punshon Case Study Affidavit, [7](e); Exhibit RPP-5.

63 Punshon Case Study Affidavit, [7](f).

██████████ stated that they were not interested in purchasing a solar panel system from him, as required by s 75.⁶⁴

91. Mr and Mrs **[Confidential to CALC]** ██████████ did not understand, and were not informed, that the increase in the total loan amount would lead to an increase in their fortnightly payment from \$47 to \$85 (as opposed to the loan being paid over a longer period of time).⁶⁵ In any event, their fortnightly excess income was only \$30.25, even before the Brighte repayments.⁶⁶
92. To avoid incurring late fees, Mr and Mrs **[Confidential to CALC]** ██████████ asked that their Brighte repayments be debited from their bank account on the same day that they received their Centrelink payments. As a result, they did not have enough Centrelink money left over when purchasing food, or to meet medical and essential expenses later in the Centrelink payment cycle. They were forced to seek hardship assistance from Anglicare, including food vouchers; to obtain personal loans in order to pay for medical and other essential daily living expenses; and to cancel specialist medical appointments, which they could not afford to pay for.⁶⁷
93. To make matters worse, rather than saving money on their electricity bills, in March 2019 Mr and Mrs **[Confidential to CALC]** ██████████ were forced to apply for a Utility Relief Grant, merely in order to pay them.⁶⁸
94. After CALC had written to Brighte on Mr and Mrs **[Confidential to CALC]** ██████████ behalf, Brighte arranged for Solar Today to attend their home (with their agreement) on 25 September 2019, to assess whether they were getting any benefit from their solar panels. Contrary to the agreement, Solar Today's directors attended Mr and Mrs **[Confidential to CALC]** ██████████ home, but did not inspect their solar panels as proposed: instead, Solar Today offered \$1,500 in compensation, which Mr and Mrs **[Confidential to CALC]** ██████████ felt pressured to accept, and did.⁶⁹
95. Mr and Mrs **[Confidential to CALC]** ██████████ subsequently resolved their dispute with Brighte on a separate basis.
96. In summary, the **[Confidential to CALC]** ██████████ case study is a textbook example of a predatory unsolicited sale. Mr and Mrs **[Confidential to CALC]** ██████████ who

⁶⁴ Punshon Case Study Affidavit, [7](h)

⁶⁵ Punshon Case Study Affidavit, [7](i)

⁶⁶ Punshon Case Study Affidavit, [12]; Exhibit RPP-9.

⁶⁷ Punshon Case Study Affidavit, [7](j)

⁶⁸ Punshon Case Study Affidavit, [12]; Exhibit RPP-9.

⁶⁹ Punshon Case Study Affidavit, [41]–[46]; Exhibit RPP-20.

were vulnerable and of limited financial means, were sold two further solar systems that they did not need and could not afford. They derived no substantial benefit from those two further solar systems. The sales representative secured the sale through persistent attention, and misleading statements that Mr and Mrs **[Confidential to CALC]** ██████████ would save money on their electricity bills. This was plainly inappropriate, predatory and unlawful sales conduct.

97. To be fair, the sales conduct was that of Solar Today's representative, and not that of Brighte's own agent. However, that predatory sales conduct was both facilitated and exacerbated by the availability of BNPL finance. Had the responsible lending obligations under the NCC been complied with, the loan would likely have been assessed as unsuitable. Moreover, the avoidance of responsible lending checks is central to BNPL's attractiveness to sellers of solar and NET products: it enables the sale to be completed "on the spot" (as both of the further sales to Mr and Mrs **[Confidential to CALC]** ██████████ were), without the customer having any meaningful opportunity to reflect on whether they can afford to make the required repayments, and whether the investment in solar panels will in fact be in their financial best interests.
98. Finally, the true cost to Mr and Mrs **[Confidential to CALC]** ██████████ of the BNPL finance was accompanied by a \$1,550 surcharge on the second sale – and, presumably, a similar surcharge that was embedded in the \$6,050 price for the first system, but which was never disclosed to them. In practice, a surcharge of this nature was a means for Solar Today to pass on to the consumer the 'merchant fee' that was charged by Brighte – and amounted to the equivalent of around 8.5% p.a. interest over the 5-year term of the loan. As such, the purported BNPL arrangement was not (or should not have been) exempt from NCC regulation. Under the NCC, Solar Today would have been prohibited from offering the credit at all in an unsolicited sale, unless it held an Australian Credit Licence under the NCCPA.

Case Study 2: [Confidential to FRLC] ██████████ | Massive Solar, Green Power Gen | Certegy Ezi-Pay (Flexigroup)

99. In her affidavit affirmed on 29 April 2020 (**Foley Affidavit**), Ms Foley of the Financial Rights Legal Centre in Sydney deposes to her representation of vulnerable consumer **[Confidential to FRLC]** ██████████ in a dispute with Massive Solar Pty Ltd (**Massive Solar**) and Certegy Ezi-Pay (Flexigroup).
100. In July 2016, Mr **[Confidential to FRLC]** ██████████ was 67 years old and deaf, with a cochlear implant in one ear and a hearing aid in the other. He received the Centrelink Aged Pension, a fortnightly payment of \$661 and had fortnightly living expenses of

approximately \$600.⁷⁰ He lived with his wife, [Confidential to FRLC] ██████████.

101. Like Mr and Mrs [Confidential to CALC] ██████████ Mr and Mrs [Confidential to FRLC] ██████████ already had eight solar panels, which were installed on the roof of their home in 2000, at a cost of approximately \$5,000.⁷¹
102. On 20 July 2016, a representative of Massive Solar made an unsolicited visit to Mr and Mrs [Confidential to FRLC] ██████████ home. Mr [Confidential to FRLC] ██████████ advised them that he already had solar panels, but the representative persisted, advising that he could reduce his energy bills by installing more panels. The representative's manner was pressuring. Mr [Confidential to FRLC] ██████████ had trouble hearing and understanding the representative. When Mrs [Confidential to FRLC] ██████████ asked a question about the panels, the representative asked Mr [Confidential to FRLC] ██████████ *"Who is the boss in this house?"*⁷²
103. Mr [Confidential to FRLC] ██████████ was provided with a Green Power Gen Solar System Agreement, a Certegy Credit Application and Certegy Credit Schedule, for the purchase of a 10 solar panel system for \$11,000. The documents were extremely faint and almost totally illegible, and Mr [Confidential to FRLC] ██████████ was not given an opportunity to read or understand them. Mr [Confidential to FRLC] ██████████ was told that the solar panels would cost \$11 per month, when in fact they would cost \$200 per month. He was not informed that the total cost of the solar panels was \$11,000, or that the sale would not attract the Small-Scale Technology Certificate discount. Had he been aware of those matters, he would not have purchased the panels.⁷³
104. The following day, an additional ten solar panels were installed at Mr and Mrs [Confidential to FRLC] ██████████ home, in addition to their existing eight-panel system.⁷⁴
105. Massive Solar failed to comply with the provisions of Part 3.2, Division 2 of the Australian Consumer Law, concerning unsolicited consumer sales. Specifically:
 - (a) the representative did not provide information concerning the 10-day cooling off period, as required by s 76; and
 - (b) Massive Solar installed the equipment within the cooling off period, in breach of s 86.

⁷⁰ Foley Affidavit, [6]-[7].

⁷¹ Foley Affidavit, [8].

⁷² Foley Affidavit, [10]-[12].

⁷³ Foley Affidavit, [13]-[18].

⁷⁴ Foley Affidavit, [17].

106. Finally, the value of the panels installed was only about \$7,000 (before the STC discount), and not the \$11,000 charged with BNPL finance. This appeared from various quotes obtained by Mr [Confidential to FRLC] [REDACTED] and FLRC at the time, and was confirmed by a statement made by Green Power Gen to Mr [Confidential to FRLC] [REDACTED] that he had “*equipment on [his] roof worth \$7,000.*”⁷⁵ This represents price inflation of about \$4,000 – it ought to be inferred, in the absence of a comparative cash price, that some or all of that price inflation was a passing through of the merchant fee payable to Certegy. The concealment of the true cost of the BNPL finance exacerbated the sales representatives’ misstatement of the monthly cost of the solar system.
107. On 28 February 2017, with the assistance of the FRLC, Mr [Confidential to FRLC] [REDACTED] settled his dispute with Certegy, on the basis that it would cancel the contract and provide him with a full refund.⁷⁶
108. If Mr [Confidential to FRLC] [REDACTED] had been offered a regulated loan, it would likely have been assessed as unsuitable, it could not have been offered to him on an unsolicited basis, and he would have to be given a clear understanding of his rights and liabilities, including the total amount for which he was liable. By offering BNPL finance, the sales representative was able to pressure Mr [Confidential to FRLC] [REDACTED] into signing up on the spot for a solar system that he did not need, which he had no strong motivation to purchase, at a total price he did not properly understand, and that he could not afford.

Case Study 3: [Confidential to CALC] [REDACTED] | Green Power Gen | Certegy Ezi-Pay (Flexigroup)

109. In her affidavit affirmed on 1 May 2020 (**Thompson Affidavit**), Ms Thompson deposes to her representation of vulnerable consumer [Confidential to CALC] [REDACTED] in a dispute with Green Power Gen and Certegy.
110. In 2018, Ms [Confidential to CALC] [REDACTED] was 71 years old, vision-impaired, and living alone in country Victoria. She had suffered a number of strokes and had serious health issues and received the Centrelink Aged Pension.⁷⁷
111. On 26 June 2018, a representative of Green Power Gen knocked on Ms [Confidential to CALC] [REDACTED] door, offering to sell a solar panel package. Ms [Confidential to

⁷⁵ Foley Affidavit, [20], Annexure JF4.

⁷⁶ Foley Affidavit, [21]-[22], Annexure JF5.

⁷⁷ Thompson Affidavit, [8](a).

CALC] ██████ asked the representative a number of times for information about the package, and its total cost. He was evasive, and did not answer her questions directly, but said she would not regret it. When the sales representative asked Ms **[Confidential to CALC]** ██████ to sign documents for the purchase of a solar package, she felt pressured to do so, so that he would leave.⁷⁸

112. At the sales representative's request, Ms **[Confidential to CALC]** ██████ signed a Solar System Agreement and a Certegy Credit Schedule. Because she could not properly read the documents, she did not appreciate, and the sales representative did not tell her, that the cost of the system was \$7,150 including GST, and that she was obtaining credit through Certegy. She did not understand that she would be paying \$73.45 per fortnight to Certegy, until later receiving a welcome letter dated 26 July 2018.⁷⁹
113. The salesperson also did not comply with the provisions of Part 3.2, Division 2 of the Australian Consumer Law, concerning unsolicited consumer sales. Specifically, he:
 - (a) did not provide his full name to Ms **[Confidential to CALC]** ██████ as required by s 74(a);
 - (b) did not, before starting to negotiate, inform Ms **[Confidential to CALC]** ██████ that he was obliged to leave her home upon request, as required by s 74(b);
 - (c) did not provide the mandated information concerning the 10-day cooling off period, as required by s 76.⁸⁰
114. In August 2018, the first deduction of \$73.45 resulted in Ms **[Confidential to CALC]** ██████ bank account going into default, incurring a fee from her bank. The second fortnightly deduction left her without enough funds to meet her everyday living expenses. Ms **[Confidential to CALC]** ██████ local bank manager subsequently helped her to cancel the direct debits.⁸¹
115. In September 2018, Certegy contacted Ms **[Confidential to CALC]** ██████ by telephone and letter, demanding payment of \$7,146. After a number of calls, Ms **[Confidential to CALC]** ██████ felt threatened and distressed.⁸²

⁷⁸ Thompson Affidavit, [8](b)-(d).

⁷⁹ Thompson Affidavit, [8](d)-(e), (g).

⁸⁰ Thompson Affidavit, [8](f).

⁸¹ Thompson Affidavit, [8](j)-(l).

⁸² Thompson Affidavit, [8](m).

116. On 30 January 2019, following assistance from CALC, Certegy settled with Ms [Confidential to CALC] [REDACTED] agreeing to pay her a full refund.⁸³ That refund was not provided until 1 April 2019, after persistent enquiries from CALC.⁸⁴
117. One can well understand that an elderly woman, living alone in a country location, with impaired vision and poor general health, would feel uncomfortable at the presence of a persistent younger salesman. If the finance had been offered as regulated credit, it would likely have been assessed as unsuitable, and it could not have been offered on an unsolicited basis. In this case, Ms [Confidential to CALC] [REDACTED] was not aware at the time that she had entered a credit contract with Certegy, let alone its key terms such as the total cost, duration or repayment amounts.
118. Here again, one sees that the offering of BNPL finance was central to the salesperson's ability to sign Ms [Confidential to CALC] [REDACTED] up "on the spot" to making a significant household investment with finance. The circumstances gave Ms [Confidential to CALC] [REDACTED] no realistic opportunity to consider the cost of what she was signing up for, whether she could afford to meet the repayments, or whether investing in rooftop solar would result in achieving an overall financial benefit.

D3 CALC Solar Panel Survey

119. The CALC Solar Panel Survey demonstrates that there is a persistent practice in the market of applying a surcharge for the purchase of solar panels through BNPL finance. The surcharge may be either presented as a higher total cost for the financed product, or built into the price and applied by offering an "up front discount".
120. In her affidavit dated 5 May 2020, Ms Noye detailed the request to Maurice Blackburn Lawyers (**Maurice Blackburn**) for the collection of survey data (**Noye Survey Affidavit**). Ms Noye provided a list of solar providers to Maurice Blackburn and requested that they contact each of the providers by telephone, request a quote for solar panels using a script and record the responses in a systematic fashion.⁸⁵
121. Among other questions, the script required that the callers enquire:
- (a) whether they had to pay upfront, or could pay in instalments; and
 - (b) in the event that interest-free finance was offered, whether the quoted price was the same as for an up-front purchase.

⁸³ Thompson Affidavit, [24].

⁸⁴ Thompson Affidavit, [24]-[29].

⁸⁵ Noye Survey Affidavit, Exhibit UCN-11, 4; Exhibit UCN-12, 172.

122. On 23 April 2020, after receiving Flexigroup’s evidence and the statement from Chantha Lake of Sun Energy, CALC requested that the same enquiry be made of Sun Energy for inclusion in the Solar Panel Survey.
123. Detailed accounts of the telephone calls made are deposited to in the affidavits of Maurice Blackburn staff members Katherine Ross and Elisa Bolzonello dated 4 May 2020 and of Karl Shami dated 5 May 2020.
124. In conducting the survey, Ms Ross, Ms Bolzonello and Mr Shami contacted 25 solar providers in total, and were successful in obtaining a quote from 19 of those providers. A summary of the results of survey is set out in **Annexure C**. Of the 19 solar merchants who provided a quote, 11 of those merchants included an option for BNPL finance. Of the 11 solar merchants offering BNPL, 3 offered Brighte BNPL⁸⁶, 6 offered humm (Flexigroup), 1 offered both Brighte BNPL and Certegy (Flexigroup), and 1 offered Zip Pay BNPL.
125. More critically for the Tribunal’s purposes, of the 11 solar merchants offering BNPL, **seven of those merchants (63%)** either applied a surcharge to the price of the BNPL option, or offered a discount where the product was purchased up front without finance. While acknowledging the small sample size, this included a majority of cases for each of the Flexigroup (humm / Certegy) products (71%) and the Brighte products (75%).
126. These details are broken down in the table below:

BNPL Provider	No of Merchants Offering	No with surcharging
Flexigroup (humm / Certegy)	7	5 (71%)
Brighte	4	3 (75%)
Zip Pay	1	0 (0%)
TOTAL⁸⁷	11	7 (63%)

127. Where stated, the amount of the surcharge varied between \$518⁸⁸ and \$5,300.⁸⁹ (In one case, a discount for up-front payments was offered, but the amount not

⁸⁶ We note that some solar merchants also offered regulated loans through Brighte Capital, in addition to those offering the Brighte BNPL product.

⁸⁷ The total is 11, and not 12, because one merchant offered BNPL through both Certegy and Brighte.

⁸⁸ Bolzonello Affidavit, [86] (Solar Secure).

⁸⁹ Bolzonello Affidavit, [128], [132] (Your Choice Solar) – base ‘system price’ quoted was \$11,223, but instalments totalled \$14,540 if paid over 5 years, also offered a further ‘cash upfront discount’ to \$9,500.

specified.)⁹⁰ These amounts were equivalent to interest rates ranging between **4.6%**⁹¹ **and 11.1%**⁹² **per annum**, with an average surcharge equivalent to **7% per annum**. The significance of these effective interest rates is not that they are exorbitant or usurious – rather it is that:

- (a) they should be fairly disclosed to the customer (together with the upfront and ongoing fees) as the true cost of BNPL finance, separate from the price of the NET products – thereby facilitating informed customer choice, and enhancing effective competition, in both the markets for NET products and the associated market for consumer finance; and
 - (b) they give the lie to the offer of “interest-free” finance.
128. The results of the Solar Panel Survey are further supported by a similar exercise conducted by Ratesetter in June and July 2018. In that exercise, Ratesetter found that 11 out of 11 solar retailers were applying a surcharge for BNPL finance, with average price inflation of **[Confidential to Ratesetter]** [REDACTED].⁹³
129. In turn, both the Solar Panel Survey and Ratesetter’s evidence corroborate the evidence of surcharging that ASIC identified in its Report 600,⁹⁴ and in its submission to the ACCC.⁹⁵

D4 Consumer complaints data

CALC Consumer Complaints Data

130. In his affidavit affirmed on 4 May 2020, Mr Punshon deposes to CALC’s internal data concerning legal (advice and case) work in representing vulnerable consumers in NET product (solar) and linked BNPL finance disputes for the period January 2016 to April 2020 and the consequent policy work (**Punshon Data Affidavit**).
131. CALC provides free legal and financial counselling assistance to Victorian consumers regarding consumer, credit and debt issues. In FY2019, “irresponsible lending or maladministration” was the fifth most common issue addressed by CALC’s legal service. For CALC’s financial counselling service, the two most common issues were credit card debt and utility debt with personal loans and household debt the fourth and

⁹⁰ Bolzonello Affidavit, at [27(f)] (Fair Value Solar).

⁹¹ Bolzonello Affidavit, [118]-[119] (InStyle Solar).

⁹² Bolzonello Affidavit, [128], [132] (Your Choice Solar).

⁹³ Second Foggo Statement, exhibit DF-4.

⁹⁴ ASIC Report 600, at [36]-[38].

⁹⁵ ASIC submission to ACCC, at [72]-[74].

fifth most common.⁹⁶ Where BNPL products seek to exploit a regulatory exemption to avoid the consumer protection requirements of the NCC and NCCPA, that is a matter of significant concern to CALC and the consumer base it represents.

Significant number of requests for assistance regarding solar/NET products:

132. Between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in at least **192 discrete matters** involving solar panels or NET products – averaging between 3 and 4 requests in any given month.⁹⁷
133. CALC's 2019 report *Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria*, was borne out of CALC's observations from its substantial caseload of requests for assistance by solar and NET purchasers in hardship.

Flexigroup is disproportionately over-represented in complaints regarding BNPL providers:

134. 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 BNPL providers.⁹⁸
135. Of those matters, **108 (73%) related to Flexigroup or Brighte** – the two most prominent BNPL providers operating in the NET market. Flexigroup alone accounted for **103 complaints, or two-thirds of all of the total complaints** against BNPL providers.
136. By way of comparison, the next largest target of complaints was Afterpay, with 21 complaints. Although Afterpay has a reported customer base that is 3.5 times larger than that of Flexigroup,⁹⁹ it is only the subject of 20% as many complaints to CALC. In CALC's submission, that is in part a function of the fact that Flexigroup operates in markets for larger and more complex purchases, such as solar panels,¹⁰⁰ which tend to magnify the risks of harm caused to consumers by BNPL finance.
137. **BNPL and unsolicited sales in the solar/NET market are significant sources of complaints:**
138. There is substantial overlap between requests to CALC for assistance dealing with

⁹⁶ Punshon Data Affidavit, [10].

⁹⁷ Punshon Data Affidavit, [15]-[16].

⁹⁸ Punshon Data Affidavit, [24].

⁹⁹ Punshon Data Affidavit, [29].

¹⁰⁰ For example, solar purchases comprised 48% by value of the pool of Flexigroup receivables offered to investors through the Flexi ABS Trust in November 2019: exhibit TM-1, tab 1, FXL.001.002.0086 at 0106.

solar/NET market issues and requests concerning BNPL finance – 60 matters in total.¹⁰¹ This accounted for 41% of all matters concerning BNPL providers, and 31% of all matters concerning NET products more generally.

139. Of the 60 matters raising issues concerning both solar / NET products and BNPL:
 - (a) 73% (44) arose from an unsolicited sale; and
 - (b) 58% (35) concerned situations where the loan was unaffordable or caused financial hardship to the consumer.
140. Each of the consumer case studies presented in Part D2 above are representative of the way in which unsolicited offering of BNPL finance can exploit consumer vulnerability and result in, and exacerbate, financial hardship.

Flexigroup causes disproportionately more complaints than either Ratesetter or the Big 4 banks:

141. Flexigroup was over-represented in enquiries to CALC by way of comparison to a regulated credit provider in the NET market, and each of the Big 4 banks, where for the same period:
 - (a) Flexigroup was the subject of 103 enquiries regarding BNPL loans, 56 of which related to NET products;
 - (b) Ratesetter (the largest provider of regulated credit in the NET market) was the subject of only 4 enquiries in total;¹⁰² and
 - (c) Without being limited by the subject matter of NET products and noting that each of the Big 4 banks have a customer base that is many times larger than Flexigroup's, the best performing of the Big 4 banks was the subject of 402 enquiries, and the worst performing bank, 821 complaints.¹⁰³

External Complaints Data

142. In her affidavit dated 4 May 2020, Ms Noye detailed the requests for consumer complaints data from 1 January 2016 made by CALC and the responses provided by ASIC, CAV, AFCA, EWOV and Flexigroup (**Noye Data Affidavit**).
143. **Data from the Australian Securities and Investments Commission:**
 - (a) Between 1 January 2016 and 20 April 2020, ASIC received 56 consumer

¹⁰¹ Punshon Data Affidavit [33]

¹⁰² Punshon Data Affidavit, [39]

¹⁰³ Punshon Data Affidavit, [39]

complaints about the main BNPL providers known to ASIC. Of those 56 complaints about BNPL finance, 33% (18) were specifically flagged as concerning the purchase of NET products, specifically solar panels.¹⁰⁴

- (b) Of the 18 complaints concerning BNPL and NET products, the issues recorded by ASIC were as follows:

Issue	No of complaints	Percentage of complaints
Responsible lending	16	88.9%
Unlicensed credit	14	77.8%
Misleading / deceptive conduct	13	72.2%
Payment pursued during cooling off period	1	5.6%
Unfair sales practices	1	5.6%
Failing to produce documents	1	5.6%

- (c) **There were disproportionately more complaints against Certegy than other BNPL providers:** ASIC also produced further data to the Tribunal on 15 May 2020 (**ASIC Complaints Spreadsheet**), which indicates that of the 56 consumer complaints that ASIC had received about BNPL providers, 60% (34) of those complaints were about Certegy (Flexigroup). Of those complaints against Certegy, 44% (15) are recorded as relating to NET products.

144. **Data from Consumer Affairs Victoria:**

- (a) In the period from 1 January 2016 to 8 April 2020, CAV received 216 consumer complaints relating to “Solar Electricity Systems” where at least one or more BNPL providers or door-to-door sales methods were recorded in their case management systems.¹⁰⁵
- (b) At least 179 of those 216 complaints concerned transactions where the consumer purchased the solar system. Of those 179 complaints, 72% (128) were sold via door to door and telemarketing sales.¹⁰⁶ The proportion of “conduct” issues arising from unsolicited sales was 22% (29 out of 128), being

¹⁰⁴ Noye Data Affidavit, [22].

¹⁰⁵ Noye Data Affidavit, [28].

¹⁰⁶ Noye Data Affidavit, [28](c)(ii),(d),(f), Exhibit UCN-8.

higher than for solar complaints generally, namely 16% (35 out of 216).¹⁰⁷

145. **Data from the Australian Financial Complaints Authority:**

- (a) In the period from 1 November 2018 (when AFCA commenced operation) to 31 December 2019, AFCA received:
 - (i) 118 complaints against Certegy – which was classified as a “very small” business; and
 - (ii) 47 complaints against Ratesetter, which was relatively larger – a “small” business.¹⁰⁸
- (b) In that period therefore, there were disproportionately more complaints to AFCA about the conduct of Certegy than that of Ratesetter.

146. **Consumer complaints data from Flexigroup:**

- (a) In the First Mysak Statement, Flexigroup produced spreadsheets containing data regarding consumer complaints regarding NET products in the period 2015 to 2019. Those spreadsheets record that, in an average year, Flexigroup received **[Confidential to Flexigroup]** ■■■ hardship enquiries and ■■■ Internal Dispute Resolution referrals.¹⁰⁹
- (b) In response to a direction from the Tribunal, Flexigroup produced a spreadsheet containing details of consumer complaints received in connection with the sale of NET products, between the period 1 May 2018 and 30 April 2020, including the date of the complaint, the name of the merchant in question, the type and source of the complaint, a brief description of the conduct complained about, and the details of the response to the complaint (**Flexigroup Complaints Spreadsheet**).
- (c) The Flexigroup Complaints Spreadsheet recorded that Flexigroup had received **[Confidential to Flexigroup]** ■■■ complaints in connection with the sale of NET / solar products in a two year period – ■■■ complaints per year on average.
- (d) Surcharging is reported by Flexigroup in **[Confidential to Flexigroup]** ■■■ ■■■■■■■■■■ complaints, which contrasts sharply with the apparent prevalence of this issue as revealed in the CALC Solar Panel Survey and the Second Foggo Statement. There are likely several possibilities for the contrast,

¹⁰⁷ Noye Data Affidavit, [28](g), Exhibit UCN-8

¹⁰⁸ Noye Data Affidavit, [32]. AFCA’s classification of business sizes is addressed in exhibit UCN-9, in response to question 10(k).

¹⁰⁹ Noye Data Affidavit, [39]; Exhibit TM-2 (FXL.001.002.0064).

including that a customer of Flexigroup may not recognise surcharging has occurred, or as an issue or would have any reason to report it, That matter is dealt with below in Parts D8-10.

147. Flexigroup's Merchant Compliance Action Process:

- (a) In the First Mysak Statement, dated 24 April 2020, Mr Mysak describes the process that Flexigroup uses to investigate complaints involving a merchant, which may lead to a merchant's contract being suspended or terminated. In the Second Mysak Statement, dated 20 May 2020, Mr Mysak produces data regarding the outcomes of this process in the two-year period from 1 May 2018 to 30 April 2020 (**Compliance Spreadsheet**).¹¹⁰
- (b) The Compliance Spreadsheet records [**Confidential to Flexigroup**] [REDACTED] complaints and that [REDACTED] merchants' agreements were terminated, where:
 - (i) [REDACTED] merchant agreements were terminated in relation to surcharging, despite there being [REDACTED] instances of surcharging recorded over the two-year period;
 - (ii) the low number of surcharging complaints and merchant agreement terminations over the two-year period is inconsistent with the:
 - 1. 7 instances of surcharging revealed in the 25 telephone sales enquiries made over two days in April 2020 for CALC's Solar Panel Survey; and
 - 2. 11 instances of surcharging established by the Ratesetter evidence, collected in the month of June 2018.
- (c) The results of CALC's Solar Panel Survey and Ratesetter's similar exercise suggest that Flexigroup's contractual prohibition of surcharging and its compliance process are ineffectual.

¹¹⁰ Second Mysak Statement at [5], Exhibit TM-4 (FXL.001.006.0104).

D5 Solar panels / NET products are themselves a significant financial investment

148. The decision to purchase and install household solar panels is itself a significant financial investment. The purchase of a solar panel system typically costs several thousands of dollars. Merely by reason of their higher purchase price, the risks associated with BNPL finance are greater when it is used to purchase solar system purchases than when it is used for ordinary consumer purchases.
149. The main driver for customers purchasing solar systems is a desire to save money on their electricity bills.¹¹¹ However, working out what those savings will be over time, and whether they justify the expense of purchasing (and financing) a solar system, involves a complex series of calculations and considerations. These include:
- (a) how much electricity the household uses, and its pattern of daily use;
 - (b) whether the household's pattern of daily electricity use will change following the installation of solar panels;
 - (c) the generating capacity of the solar panels;
 - (d) the conversion efficiency of the solar inverter;
 - (e) the expected operating life of the solar panels and solar inverter;
 - (f) the geography of a dwelling's roof, including whether it may be overshadowed at certain times of the day and year, and whether it is at risk of being overshadowed by neighbouring developments in future;
 - (g) how much excess electricity (if any) the household can expect to feed back to the grid;
 - (h) the feed-in tariff that the household can expect to receive for every unit of electricity fed back to the grid, both at the time of installation and over the expected life of the solar system; and
 - (i) a comparison of the expected power bill savings from installing solar compared with the savings that may be realised from accessing a better tariff or offer from one's existing electricity retailer or another retailer.¹¹²
150. It is likely that only a relatively small number of consumers have the ability to properly assess the financial benefits of installing a rooftop solar system, or to meaningfully

¹¹¹ See KPMG Report (Exhibit JC-1, tab 9, (ANA.001.001.0404)), at 0440-0442.

¹¹² Sunny Side Up Report (Exhibit RPP-25), at 60; see also KPMG Report (Exhibit JC-1, tab 9, (ANA.001.001.0404)), at 0426; Barnes Statement, [45].

compare the costs and benefits of differing systems.

151. Particularly in the setting of unsolicited sales, the additional decision-making difficulties can be readily seen in circumstances where:

- (a) the solar merchants are required to “pitch” to the customer that installing a solar system will result in savings overall through savings on their electricity bills; and
- (b) at the same time, the customer is given little or no time to meaningfully consider information either provided to them by the sales representative or from their own research concerning the overall savings that they may realise.¹¹³

152. This accords with KPMG’s observations in its report to ECA, namely that a majority of household solar purchasers appeared not to be undertaking their own financial assessment of the value of installing solar, but instead relying on information provided by the merchant.¹¹⁴

153. The statement of Ms Lake, of Sun Energy, provides an example of how a customer’s expectations might be inflated by a merchant’s sales pitch. At [17], Ms Lake describes the ‘Pay As You Save’ promotion as intended to **[Confidential to Sun Energy]**

[REDACTED]

That explanation is superficially straightforward – but Ms Lake gives no explanation as to how the Sun Energy salesperson derives a meaningful estimate of the savings that the customer is realistically likely to achieve, taking account of the considerations outlined above.

154. The “Pay As You Save” message is also one that is calculated to work on consumers’ inflated expectations that installing solar will result in their power bills being eliminated, rather than merely reduced. At [22] of her statement, for example, Ms Lake states that the customer ‘pays for the product by fixed fortnightly payments ideally calculated by SunEnergy using Flexigroup’s formulas to total less than the customer’s current annualised fossil fuel power bills as described in paragraph 17.’ However, the two explanations are different. The latter explanation suggests that the payments will be set at a level below the customer’s existing power bills, while the former refers only to

[Confidential to Sun Energy] [REDACTED] One sees from the Sun Energy lead generation script that the only relevant information that the salesperson asks the customer for is **[Confidential to Sun Energy]** [REDACTED]

¹¹³ Lake Statement, Confidential Exhibit CL-1, tab 3.

¹¹⁴ KPMG Report (Exhibit JC-1, tab 9, (ANA.001.001.0404)), 0451.

155. In other cases, solar merchants may also seek to exploit customers' (mis)perception that larger systems will provide proportionately larger savings.¹¹⁶ The **[Confidential to CALC]** [REDACTED] and **[Confidential to FRLC]** [REDACTED] case studies are stark examples of this, where consumers with existing solar systems were encouraged to purchase more. In at least the **[Confidential to CALC]** [REDACTED] case study, this was expressly on the representation that the more solar panels they had, the more they would save.¹¹⁷
156. The purchase of a solar panel system is a household *investment*, rather than a mere consumer purchase, in that it requires a calculation of the financial cost and return over time. Insofar as customers may be attracted to household solar as a means of managing the financial risk of high electricity prices, it is an enticement that can be felt particularly by vulnerable and low-income consumers, such as those illustrated in the case studies, for whom paying these bills is a continuing source of anxiety. It is those consumers who are:
- (a) most likely to purchase their solar panels through finance, because they cannot afford to do so upfront;
 - (b) most likely to be targeted by unsolicited door to door sales;¹¹⁸
 - (c) least able to bear the risk that the net return will be less than was promised or anticipated;
 - (d) most strongly in need of the robust consumer protection regime that exists under the NCC; and
 - (e) more likely to face barriers (due to resources or capacity) in pursuing their rights when they are treated unfairly.
157. Consumer credit compounds the financial risk that is involved in the purchase of a solar system, and therefore adds to the complexity of the financial calculation that the consumer makes (or prudently ought to make). If the consumer is not provided with sufficient and meaningful information and time to consider that information in making that investment decision, the likelihood increases that the consumer may be saddled with a long-lasting financial burden to service a bad investment.

¹¹⁵ Confidential exhibit CL-1 to the Lake Statement [FXL.001.001.0045].

¹¹⁶ KPMG Report (Exhibit JC-1, tab 9, (ANA.001.001.0404)), at 0453.

¹¹⁷ Punshon Case Study Affidavit, [7](f).

¹¹⁸ Sunny Side Up Report (Exhibit RPP-25), 59.

158. That analysis is supported by the case studies and by the data on consumer complaints, as set out in Part D4 above: in particular that Flexigroup (the largest provider of BNPL in the NET market) is disproportionately over-represented in complaints made by financially vulnerable consumers to CALC.
159. Consumers' ability to make well-informed decisions about the purchase and the finance of household solar systems is only further complicated by the marketing of BNPL to consumers which conceals the true cost of the credit. This prevents the customer from being able to make informed like-for-like comparisons:
- (a) between solar systems offered by NET merchants who offer BNPL and those offered by NET merchants who do not; and
 - (b) between BNPL and regulated finance.
160. The impact of this concealment on the efficiency of the market for NET products and the market for associated consumer finance is developed in Parts D8 and D9 below.

D6 No responsible lending obligations

161. Hardship caused by unaffordable household and personal debt is a significant consumer issue in the solar panel industry, as we have noted in Part D4 above. The majority of enquiries to CALC concerning BNPL and NET products involved unaffordable loans and/or financial hardship, reflected also in each of the consumer case studies.
162. The importance of 'responsible' selling in the NET market is recognised in the "Key Commitments" that are enshrined in cl 1 of all versions of the NET Code. These include a commitment to '*ensure that our sales practices are responsible.*' It is important that these commitments should not be limited to the NET products themselves, but should be upheld for the finance that NET merchants promote to their customers, to pay for the NET products.
163. Each of the case studies described in Part D2 is an example of a consumer who could not afford, and should not have been signed up to, finance. Had the BNPL providers been required to comply with the NCCPA requirements for responsible lending, those loans would likely not have been assessed as suitable for the consumers. If the credit product had been NCC-regulated, and the credit provider failed to comply with responsible lending obligations, the consumer would have the right to pursue remedies, and ASIC would be able to take enforcement action against the credit provider.

164. The application process for Flexigroup's humm product is summarised by Ms Lake.¹¹⁹ That process is a minimal one, requiring only that the consumer provide confirmation of their contact details, their age and identity, their employment status (their employer and number of hours worked), and their credit card or bank details. Flexigroup's assessment of the suitability of a loan for a new customer is otherwise **[Confidential to Flexigroup]** [REDACTED]

[REDACTED].¹²⁰ The need for anything further only arises in limited circumstances:

- (a) if the customer is self-employed, they must provide their business information;¹²¹
- (b) if the customer is a pensioner, they must provide the details of their most recent pay date;¹²² and
- (c) only if the customer does not work at least 25 hours per week are they required to provide any evidence of their income or outgoings: the last 2 months' bank statements, a rates notice or utility bill, and recent payslips or income statements.¹²³

165. In comparison, providers of regulated credit must not enter into a credit contract with a consumer,¹²⁴ suggest a credit contract to a consumer, or assist a consumer to apply for a credit contract,¹²⁵ without assessing that the credit contract is not unsuitable for the consumer. There is a prohibition on entering into credit contracts that are, in fact, unsuitable.¹²⁶ In assessing applications for credit, regulated credit providers are required:

- (a) to make reasonable enquiries about the consumer's financial situation, and their requirements and objectives;¹²⁷
- (b) to take reasonable steps to verify the consumer's financial situation;¹²⁸ and

¹¹⁹ Lake Statement, [24]-[25].

¹²⁰ First Mysak Statement, at [28]; confidential exhibit TM-2, tab 6, FXL.001.005.001 (Flexigroup's assessment process for humm).

¹²¹ Lake Statement, [25].

¹²² Lake Statement, [25].

¹²³ Lake Statement, [33].

¹²⁴ NCCPA, s 128.

¹²⁵ NCCPA s 123(1).

¹²⁶ NCCPA s 133.

¹²⁷ NCCPA s 130.

¹²⁸ NCCPA s 130.

- (c) to make (and document) an assessment about whether or not the credit contract is “not unsuitable” for the consumer in question.¹²⁹
166. A credit contract will be considered unsuitable if, at the time of the assessment, it is likely that:
- (a) the consumer will be unable to comply with their obligations, or could only comply with substantial hardship; or
 - (b) the contract will not meet the consumer’s requirements or objectives.¹³⁰
167. It is in this context that Ms Lake described the regulated Ratesetter product as requiring ‘a considerable amount of documentation’, and Flexigroup’s approval process as less complicated.¹³¹ Simply put, it is easier to apply for BNPL (and so more attractive to merchants such as Sun Energy), because the merchant is not required to conduct the assessment required to lend responsibly, or to observe the other consumer protection requirements applicable to regulated credit.
168. Further, and contrary to the submission by Flexigroup,¹³² the risks for a BNPL provider in providing unaffordable credit are in truth lower than those of a regulated credit provider. This is a product of BNPL’s peculiar fee structure, where the cost of the loan is largely recovered upfront by the finance provider through the merchant fee. While a BNPL provider will risk its principal in much the same way as a regulated lender, its risk on the interest component (which may include a premium against the risk of non-repayment) is lower than that of an ordinary unsecured lender. A regulated lender will typically recover its interest slowly over the period of the loan, whereas a BNPL provider will largely earn its equivalent return up front.¹³³
169. Ms Lake says further that the documentation required to be provided for Ratesetter’s regulated product ‘made it more difficult for customers such as those who are self-employed, aged retirees, self-managed retirees and those working casual or part time to obtain finance compared with the humm product.’ This raises two separate issues: (1) ease of use, and (2) equitable access to finance.
170. The ease of use argument is also advanced by Mr Mysak, Flexigroup’s Head of Credit Risk. Mr Mysak says that, if customers are required to provide further information in support of an application for finance in respect of solar products, they are less likely to

¹²⁹ NCCPA ss 129; 132.

¹³⁰ NCCPA s 131(2).

¹³¹ Lake Statement, [29].

¹³² Flexigroup’s Outline of Submissions, [15].

¹³³ This analysis is based on Flexigroup’s humm model, discussed in Part C1 above.

complete the process.¹³⁴ The customer may not complete the process because, turning their mind properly to the financial commitment involved, they come to the realisation that they cannot afford to buy a household solar system. In any event, mere inconvenience is hardly an adequate reason to forgo a responsible lending enquiry in the context of a loan for a complex and substantial investment decision like the purchase of a solar system. Rather, if the minor inconvenience of submitting to a credit check will deter a customer from going through with a potential sale, then that customer may not have been strongly motivated to purchase the system in the first place. Convenience to the merchant should not be an overriding factor, particularly for the purchase of complex, high-cost products.

171. Put simply, unregulated finance ought not be relied on to lubricate the unsolicited sale of complex NET products. Doing so is inconsistent with the NET Code's objective of ensuring responsible sales practices, and is not a sufficient standard for the NET Code to uphold above conduct that is merely lawful.
172. The equitable access to finance issue is best examined in light of the consumer case studies. In the absence of responsible lending obligations, BNPL providers have no obligation to ensure that the finance is not unsuitable for a consumer. As the case studies reveal, the real-world consequence of the lack of consumer credit protections is that finance is provided to those who cannot afford it, who may prioritise its repayment over food and other essential living expenses and who are therefore exposed to further financial harm. Access to NET products for low-income consumers is indeed an equity issue, but it is one to be addressed by government subsidies, rather than by permitting NET Code signatories to unaffordable finance.

D7 Offering BNPL in unsolicited sales

173. An unsolicited sale may occur by an uninvited door-to-door salesperson, or an unsolicited telephone call.
174. CALC's 2017 report *Knock it off! Door-to-door sales and consumer harm in Victoria*¹³⁵ addresses the harms caused by door-to-door sales at length. It compares them with solicited sales, as follows:

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

¹³⁴ Statement of Taras Mysak dated 24 April 2020 (**Mysak Statement**), [58].

¹³⁵ Punshon Data Affidavit, Exhibit RPP-26, 90 (**Knock It Off Report**),

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. ...

[In contrast] 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.¹³⁶

175. Solar systems and other NET products are highly complex, both from a technical perspective and in the financial assessment of their cost versus anticipated savings, particularly where paid for on credit. There is a real question (although not agitated in this review) whether they are products that are suitable to be sold unsolicited at all.
176. The *Knock It Off* report details several ways in which unsolicited sales are difficult to resist, from a behavioural perspective. These include:
 - (a) **The foot in the door technique:** A person is induced into complying with a significant request, by first agreeing to a smaller request, or a number of smaller requests. The more the subject complies with the request, the more they are likely to continue complying, even as subsequent requests become larger and more demanding. This is particularly true if the target is otherwise stressed or vulnerable, and lacks the energy or wherewithal to resist.¹³⁷
 - (b) **Social norms and politeness:** The act of asking a person to leave your house, closing the door on them, or hanging up the phone, requires greater psychological resources, and is a more confrontational action, than simply walking away, as a consumer may do in a store. That is particularly the case where a persistent salesperson might seek to prolong or divert the conversation, or refuse to leave.¹³⁸
 - (c) **Selecting easy targets:** Unsolicited salespeople have a strong incentive to target those classes of consumers who they consider are likely to yield results. Psychologically speaking, people in a situation of disadvantage are more likely

¹³⁶ Knock It Off Report (Exhibit RPP-26), at 115.

¹³⁷ Knock It Off Report (Exhibit RPP-26), at 116.

¹³⁸ Knock It Off Report (Exhibit RPP-26), at 116.

to be vulnerable to undesirable direct selling techniques, and to be targeted for this reason.¹³⁹ This is supported particularly by the [Confidential to CALC] [REDACTED] case studies, where both (already owning a solar system) were then sold a second system, with Mr and Mrs [Confidential to CALC] [REDACTED] being sold a third soon after by the same representative.

177. The dangers of unsolicited sales were recognised by the Full Court of the Federal Court in *ACCC v Lux Distributors Pty Ltd*, which concerned the telemarketing and door-to-door sale of vacuum cleaners :

The vulnerability of the consumer to the salesperson in her or his own home arises from the difficulty in putting an end to the sales process once the salesperson is in the home, especially after that person has spent time and undertaken persuasive effort in a sales process or “pitch”. People can simply agree to things to put the situation at an end. These are not new revelations referable only to the operation of the ACL. They concern the basic psychology of salesmanship, taught by life experience and common sense, once entry has been gained to the privacy of a person’s home. Ingratiating solicitude, just as much as high-pressure bullying sales tactics, may lead to a feeling of necessitous acceptance, especially by a polite and accepting person. In other words, special or particular care and attention to a customer can be just as effective as a sales tactic as high-pressure bullying. Further, the acquisition of comparative information is not often possible in the home, and reliance is necessarily placed on the truthfulness of the salesperson’s information. Critical to the success of the sales conduct is the gaining of entry into the home, the winning of the confidence of the customer, and remaining long enough to persuade the customer to buy; entry into the home and length of time in the home are critical factors.¹⁴⁰

178. Those concerns are by no means confined to door-to-door unsolicited selling. CALC’s *Sunny Side Up* report listed a long series of warnings issued and enforcement actions taken between 2010 and 2018, by the ACCC, CAV and ACMA, arising out of unsolicited telemarketing of solar panels.¹⁴¹

179. Mr Mysak’s evidence is that unsolicited sales “*underpin the operating model for a large*

¹³⁹ Sunny Side Up Report (Exhibit RPP-25), 59, 117.

¹⁴⁰ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [10] (Allsop CJ, Robertson, Gordon JJ).

¹⁴¹ Sunny Side Up Report (Exhibit RPP-25), 61-62.

number of merchants” in the solar industry.¹⁴² Ms Lake’s evidence is that Sun Energy generates [Confidential to Sun Energy] █████ of its business from outbound telemarketing – further, █████ of its sales are financed by BNPL, and only █████ in cash.¹⁴³ BNPL and unsolicited sales work hand in hand in the NET market: they are both integral to a business model that seeks to make sales “on the spot” to passive sales targets, before the customer has the opportunity to undertake a meaningful assessment of the likely financial benefit of installing solar panels, a meaningful comparison between differing sizes and models of solar system, or a meaningful comparison between unregulated BNPL and other forms of credit.

180. Importantly, providing BNPL also enables solar merchants to avoid the prohibition on merchants offering regulated credit in unsolicited sales, unless they themselves have a credit licence.¹⁴⁴ Contrary to the (unsupported) assertion in Flexigroup’s written submissions, this prohibition in relation to regulated credit cannot be overcome by a licensed credit provider appointing its merchant partners as authorised credit representatives. Rather, either the merchants themselves must be licensed,¹⁴⁵ or the licensed credit provider must individually appoint each of the merchant’s salespeople as a credit representative of the credit provider.¹⁴⁶
181. As the Authorisation Applicants recognised from the outset, both the unsolicited selling model and the offering of BNPL can and do lead to poor consumer outcomes and to consumer harm of the types that are illustrated in CALC’s consumer case studies. Ms Crawshaw states that, as late as September 2019, the BTMWG continued to be concerned that unsolicited sales could lead to high pressure sales, and to consumers agreeing to detrimental financial arrangements or acquiring unfit products.¹⁴⁷ Their concerns are amply reflected in the CALC and external customer complaints data that we have addressed in Part D4 above.

D8 Surcharging or differential pricing

182. ASIC’s Report 600 into BNPL found that *‘some buy now pay later arrangements result in the price of goods being inflated’*: at [34]. ASIC also found that, while consumers do not currently pay more for using BNPL than for other payment methods when buying

¹⁴² First Mysak Statement, [55].

¹⁴³ Lake Statement, [13], [22].

¹⁴⁴ NCCPR r 23(4).

¹⁴⁵ In this case, their employees will be covered by the defence in NCCPA s 29(3)(b)(i).

¹⁴⁶ In this case, as authorised representatives, the salespeople will be covered by the defence in NCCPA s 29(3)(b)(ii).

¹⁴⁷ Crawshaw Statement, [91].

lower-priced consumers goods:

we have received anecdotal evidence that some merchants may have charged consumers significantly higher prices for using a buy now pay later arrangement, including for:

- (a) *higher-value purchases (over \$2,000);*
- (b) *where the price of goods is less transparent and 'negotiable' (e.g. solar power products); or*
- (c) *where consumers are acquiring services.*¹⁴⁸

183. Similarly, in ASIC's submission to the ACCC, it reported that evidence it had collected in early 2019 'suggests that some solar merchants are introducing additional surcharges that varied as a percentage increase of the cash price from 2.71% to 46.75% across seven solar merchants. This represents a substantial financial detriment to consumers.'¹⁴⁹
184. As described in Part D3 above, CALC's Solar Panel Survey found surcharging conduct by 7 of the 11 solar merchants (63%) offering a BNPL option. This included 5 of the 7 merchants (71%) offering a Flexigroup BNPL product, and 3 out of the 4 merchants (75%) offering a Brighte BNPL product. The similar exercise conducted by Ratesetter in 2018 found surcharging by all of the 11 merchants contacted, with average price inflation of **[Confidential to Ratesetter]** ██████████.¹⁵⁰
185. Further, that conduct remains prevalent despite the terms of both Flexigroup and Brighte's¹⁵¹ merchant agreements that prohibit their merchants from passing on the merchant fee to customers. Flexigroup's evidence is that it has received **[Confidential to Flexigroup]** ██████████ complaints relating to surcharging conduct over the last 2 years, of which it has terminated **[Confidential to Flexigroup]** ██████████ merchants' agreements. Given that the surcharging conduct apparently remains endemic in the sale of solar products, it ought to be inferred from those low complaint and termination rates that Flexigroup's contractual prohibition on surcharging is ineffectual.
186. This is indeed true of Sun Energy. Ms Lake describes Flexigroup's humm product as an "interest-free payment arrangement", and she exhibits Flexigroup's merchant agreement with Sun Energy, which prohibits it from increasing the purchase price or

¹⁴⁸ ASIC report 600, at [36] (emphasis added).

¹⁴⁹ Foo Statement, Annexure KF-4, 222.

¹⁵⁰ Second Foggo Statement, Exhibit DF-4.

¹⁵¹ ASIC, Report 600, at [34].

charging the customer fees when the customer uses Flexigroup's BNPL finance.¹⁵²

187. However, on 24 April 2020, Mr Shami was told by Sun Energy's salesperson that the cost of the same solar panel system with BNPL finance would be approximately \$1,600 higher than if he were to pay upfront.¹⁵³ So, despite the contractual prohibition stipulated by Flexigroup, Sun Energy did impose a significant surcharge on the humm BNPL product it attempted to sell to Mr Shami. This conduct was also replicated by the majority of other solar merchants offering BNPL included in the CALC Solar Panel Survey.
188. Flexigroup might very well intend that its merchant partners do not engage in surcharging where products are financed by BNPL – after all, the lack of a charge for credit is the basis for its purported exemption under the NCC.¹⁵⁴ The problem is that the unregulated BNPL structure creates a very strong incentive for merchants to offer a reduced price for a cash sale – both as a conventional sales technique, but also to allow the solar merchant to receive part of the inflated product price without having to pay any merchant fee to the BNPL provider. And, as is seen by notice prominently included in Flexigroup's customer terms and conditions, Flexigroup itself is hardly oblivious to the risk that surcharging conduct is carried on covertly.¹⁵⁵

Surcharging consequences: Part or all of the merchant fee is explicitly passed on to the consumer

189. The effect of a surcharge is explicitly to pass on to the consumer part or all of the merchant fee which, under the BNPL model, the merchant alone is supposed to bear. Taking the Sun Energy example, the fees expressly payable by the consumer to Flexigroup were limited to an \$85 establishment fee and a \$8 monthly account-keeping fee. But, in substance, the cash discount offered by Sun Energy's salesperson imposed an additional \$1,600 charge on the consumer as a price for choosing to take up BNPL finance.

¹⁵² Lake Statement, exhibit CL-1, tab 7, clause 2(d).

¹⁵³ \$7,434, compared to \$5,799: Shami Affidavit, [35]-[43].

¹⁵⁴ Flexigroup's standard warning letter to merchants found to have engaged in surcharging states:

[Confidential to Flexigroup] [REDACTED]

See confidential exhibit TM-4 to the Second Mysak Statement [FXL.001.006.0079].

¹⁵⁵ See also the prominent notice set out in the humm customer terms and conditions: exhibit TM-1 to the First Mysak Statement, tab 9, FXL.001.002.0276 at 0277.

Surcharging consequences: The BNPL arrangement will not be exempt from the NCC

190. As discussed in Part C1 above, BNPL is putatively exempt from the NCC because the charges imposed for credit are less than \$200 in the first year of the arrangement, and \$125 in each subsequent year. The effect of a surcharge is to directly impose an increased charge, above the level of exemption, with the result that the arrangement ought to be NCC-regulated.¹⁵⁶
191. The NCC offers the following definitions:
- (a) **credit** is provided if under a contract, payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred, or one person (the debtor) incurs a deferred debt to another (the credit provider);¹⁵⁷
 - (b) a **contract** includes 'a series or combination of contracts and arrangements';¹⁵⁸ and
 - (c) a **credit contract** is a contract under which credit is or may be provided, being the provision of credit to which the NCC applies.¹⁵⁹
192. The NCC applies to the provision of credit if, when the credit contract is entered into or is proposed to be entered into, 'a charge is or may be made for providing the credit.'¹⁶⁰ However, the credit is exempt from NCC regulation 'if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided', and it is below the \$200 / \$125 threshold established by r 51 of the NCCPR.¹⁶¹
193. In *Walker v Consumer, Trader and Tenancy Tribunal of NSW (Walker)*¹⁶², under the equivalent Uniform Consumer Credit Code in NSW, the Supreme Court of NSW found that a credit charge was imposed where a car dealer charged the consumer a higher than market price for a motor vehicle, financed by an interest free loan: at [201]. Therefore, the Code applied to that loan. The lender did not charge any interest to the

¹⁵⁶ There is an available (and more fundamental) argument that the merchant fee itself is a relevant charge for the purposes of NCC s 6(5), regardless of the fact it is charged to the merchant and not directly to the consumer, so that effectively **all** BNPL arrangements will fall outside of the exemption, and ought to be NCC-regulated. However, that is not an issue that relates to the NET market specifically, and CALC does not press it here.

¹⁵⁷ NCC s 3(1).

¹⁵⁸ NCC s 204.

¹⁵⁹ NCC s 4.

¹⁶⁰ NCC s 5(1)(c).

¹⁶¹ NCC s 6(5).

¹⁶² *Walker v Consumer, Trader and Tenancy Tribunal of NSW* [2013] NSWSC 1432.

consumer, but charged a \$1,000 “deal fee” per car to the car dealer, which it passed on to the consumer by means of the inflated price. Hall J held that:

- (a) in construing the phrase ‘*a charge... for providing the credit*’, the charge need not be imposed by the credit provider itself: [188]-[190]; and
- (b) the expanded definition of a ‘contract’ serves the purpose of responding to a situation where the requirements of the Code can be avoided by strategies or devices: [199];
- (c) the contract of sale (between the consumer and the dealer), the loan contract (between the consumer and the lender) and the deal fee arrangement (between the dealer and the lender) each formed the constituent parts of a ‘contract’ (within the expanded meaning of that term) under which credit was provided: [200].

194. A similar analysis was applied in *ASIC v Fast Access Finance Pty Ltd*¹⁶³, under the NCCPA, in which what was in substance a credit arrangement was disguised as a transaction for the sale and purchase of diamonds. In that case, a deferred debt created by a (purported) Sales Agreement contained both the credit amount of \$2,000, and a charge of \$2,000: at [263].

195. Finally, in *Kobelt v ASIC (Kobelt)*¹⁶⁴, the Full Court of the Federal Court unanimously held that a “book-up arrangement” (by which a merchant offered a deferred payment for goods at a higher price than was payable immediately in cash) was also a credit contract to which the NCC applied, between the merchant and the consumer, with the relevant charge being the difference between the “book-up price” and the cash price (i.e. the surcharge): [205], [325]-[326].

196. In light of those cases, ASIC’s Report 600 stated at [38]:

ASIC is considering the legal position of scenarios where a merchant inflates the cost of the underlying goods if a consumer uses a buy now pay later arrangement. We have taken action against credit providers for attempting to avoid the National Credit Code by creating artificial business models and for engaging in credit activities without a licence.

197. The authors of *Duggan & Lanyon’s Consumer Credit Law* make a similar observation:

An arrangement that genuinely provides credit at no charge is outside the

¹⁶³ *ASIC v Fast Access Finance Pty Ltd* [2015] FCA 1055.

¹⁶⁴ *Kobelt v ASIC* (2018) 252 ALR 689. That decision was appealed to the High Court, but the appeal did not address the NCC issues.

NCC and the NCCPA. ...

A properly structured [BNPL] arrangement of this kind, with no merchant surcharges or other hidden charges or extra fees, should be outside the NCC and the NCCPA, as the consumer is not being charged for the credit. If a charge is in fact passed on to the consumer through an inflated price, and the credit provider is involved with this, then the situation may be different on the basis of the principles discussed in part 12 below [relating to charge avoidance structures].¹⁶⁵

198. Significantly, where there is doubt as to whether or not a BNPL arrangement is a credit contract to which the NCC applies, the NCC is presumed to apply unless the BNPL provider can establish that it does not.¹⁶⁶

D9 BNPL conceals both the true cost of the NET product and the true cost of finance, and so distorts both markets

199. Flexigroup's application for review is premised on the proposition that its BNPL offering for NET products is exempt from regulation under the NCC.¹⁶⁷
200. It will be seen from our factual and legal submissions regarding surcharging, that it is essential to Flexigroup's maintenance of that NCC-exempt status that surcharging does not, and is not seen to, occur. That is presumably why Flexigroup's merchant agreements contractually prohibit the merchants from engaging in surcharging, or passing on to customers the merchant fee that Flexigroup charges to the merchant.¹⁶⁸
201. Insofar as the merchants offering BNPL adhere to that contractual prohibition, and do not engage in surcharging,¹⁶⁹ then, under the tripartite BNPL sales and financing framework:
- (a) the BNPL provider covers its cost of lending primarily through the merchant fee charged to merchants, as well as through the (artificially low) upfront and ongoing customer fees, and any additional default or late payment fees;
 - (b) the cost of the BNPL finance is borne in the first instance by the merchant, who recovers that cost through an inflated sale price of the product, which the

¹⁶⁵ Hal Bolitho, Nicola Howell, Jeannie Paterson, *Duggan & Lanyon's Consumer Credit Law* (2nd ed, 2020) Chapter 2, [11.5], at pp 84-85.

¹⁶⁶ NCC s 13(1); see *Kobelt*, [204].

¹⁶⁷ Flexigroup SFIC, at [26].

¹⁶⁸ First Mysak Statement, at [42].

¹⁶⁹ As, for example, Flexigroup's merchants Hello Solar and Arise Solar did not, in the sales enquiries made during the CALC Solar Panel Survey.

merchant charges uniformly to customers who take up BNPL finance and to customers who do not; and

- (c) consequently, being presented with the inflated product price, the customer is not allowed to be told:
 - (i) what the merchant's standalone price for the NET product would be; or
 - (ii) the true cost of the BNPL finance.

202. In that scenario, the customer's ability to make an informed purchasing decision either for NET products, or for the associated finance, is fundamentally compromised by a contrived concealment of the price of both the finance and the product itself. This consequence was noted by ASIC in its Report 600, although only in relation to the concealment of the true cost of finance:

These higher prices can be misleading to consumers if they are not disclosed, because they can obscure the actual cost of using a buy now pay later arrangement. This can make it difficult for consumers to make an informed decision about the costs of the arrangement.¹⁷⁰

203. The concealment of that information deprives consumers of the real information that they need in order to make their already-complex purchasing and investment decisions on an adequately informed basis.

204. The effective working of, and effective competition in, both the market for NET products and the market for associated consumer finance depends upon consumers being able to seek out and obtain clear and accurate pricing information:

Apart from market failure arising from sub-optimal market structures and restrictive trade practices, market failure can arise from ... information asymmetry. Where one party to the transaction knows more than the other party, [this] can give rise to inefficiency. For example, if the buyer is not fully informed, the buyer is not able to make rational decisions about the quality or price of goods or services before acquiring them. ... By improving the accuracy of information, consumer decision-making can be improved. Significant efficiency gains can be made at relatively low cost.¹⁷¹

205. The offering of BNPL finance, which obscures pricing information from consumers, impairs effective competition in both the NET product and NET finance markets. Of

¹⁷⁰ ASIC, Report 600, at [37].

¹⁷¹ Duke, *Corones' Competition Law in Australia* (7th edition, 2019) at 23.

itself, that is a very significant anti-competitive detriment, which the Tribunal should be concerned to minimise.

D10 Customers who pay the undiscounted “BNPL price” up front: a further manifestation of consumer detriment

206. We have addressed above the position where – in breach of their contractual prohibition – a merchant explicitly passes on part or all of its merchant fee to a consumer, by imposing a BNPL surcharge or (more commonly) by offering a “cash discount” against the price offered to customers who take up BNPL finance.
207. On the other hand, where the merchant complies with the contractual prohibition, and offers an undifferentiated price to all customers, regardless of whether they take up BNPL finance, then there will be some subset of customers who are induced to pay the undifferentiated price up front. For example, Ms Lake’s evidence is that **[Confidential to Sun Energy]** █████ of Sun Energy’s residential customers elect to pay in cash, rather than to take up Flexigroup’s BNPL offering.¹⁷²
208. Insofar as those customers are paying the undifferentiated price, which has embedded within it part or all of the merchant fee, then this results in:
- (a) a windfall gain to the merchant, who pays no merchant fee in respect of that customer – and a corresponding dead-weight loss to the customer; and/or
 - (b) a cross-subsidisation by the cash-paying customer of the cost of the finance that is provided to BNPL customers.
209. Whichever way this kind of detriment is characterised, it results in a loss of consumer surplus and is a further symptom of the ineffective working of the NET product and consumer finance markets.
210. It might reasonably be supposed that the class of customers paying up front, as a whole, may be at that time more affluent and less acutely price-sensitive than customers who cannot afford to do so. But a properly functioning market will reduce the scope that merchants enjoy to take advantage of these, as well as vulnerable, customers – by incentivising or requiring merchants to advertise in ways that ensure that meaningful price and product information is provided to consumers.
211. This is a further, albeit less immediately obvious, form of consumer detriment that results from the deliberate concealment of accurate product and finance price information. It is another manifestation of the market failure that is caused by the

¹⁷² Lake Statement, at [22].

offering of BNPL that we have noted above. In substance, the BNPL providers insist on a structure which hides their true prices of NET products and NET finance from consumers, in order to maintain the veneer which exempts them from proper regulation.

E NET CODE SIGNATORIES SHOULD NOT BE PERMITTED TO OFFER UNREGULATED CREDIT AT ALL

E1 BNPL is a significant source of public detriment generally

212. For the reasons we have outlined above, the offering of unregulated BNPL in connection with NET products is a significant source of public detriment. This is true both of itself, through its corrosive effect on competition within both the NET product and linked finance markets (see Parts D8 and D9 above); and, by creating unacceptable risks of the particular manifestations of consumer harm we have illustrated (see Parts D6, D7 and D10 above).
213. In this Part E1, we address the reasons why CALC's proposed modification of cl 25 of the NET Code¹⁷³ should be applied by the Tribunal as a condition of authorisation, in preference to the variants of cl 25 as set forth in any of the November Version, the ACCC Version or for which Flexigroup contends.

BNPL has not been specifically exempted by Parliament:

214. Flexigroup's assertion that BNPL was specifically contemplated by Parliament, in drafting the relevant exemptions,¹⁷⁴ is not borne out by evidence, nor is there any reference to BNPL in the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009. Of the leading current BNPL providers, Flexigroup is the only one that existed when that Bill was passed, with all of the others being established in the period between 2013 and 2015.¹⁷⁵
215. The relevant exemptions in s 6 of the NCC actually preceded the existence of the NCCPA itself, and were found in the previous Uniform Consumer Credit Code (**UCCC**).¹⁷⁶ The Ministerial Council on Consumer Affairs' review of the UCCC in December 1999 raised similar concerns then about the exploitation of s 6 by 'tiny terms

¹⁷³ Annexure A, proposed condition 1.

¹⁷⁴ Flexigroup's Submissions, [9], [77](a), [86], [98].

¹⁷⁵ Punshon Data Affidavit, [29](e).

¹⁷⁶ Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Cth), [8.38].

contracts' as are now raised about BNPL.¹⁷⁷ This reveals, tellingly, that the exemptions have been a continuing source of creative avoidance structures.

216. And, if BNPL itself is not completely new, it has substantially increased in prominence. According to ASIC Report 600, the market for BNPL grew rapidly in the period between 2016 and 2018, going from:
- (a) 400,000 consumers to 2 million consumers;¹⁷⁸
 - (b) 50,000 transactions per month to 1.9 million transactions per month;
 - (c) a balance of outstanding debt from \$476 million to \$903 million;
 - (d) an approximately 50-fold increase in the number of merchants offering BNPL; and
 - (e) the revenues of the six leading BNPL providers more than doubling over that period.¹⁷⁹
217. The BNPL arrangement is a product offering that has recently grown in prominence as an exploitation of the regulatory lacuna presented by the NCC's exemption of "low-charge" finance. In the face of the persistent practice of surcharging by solar merchants despite the contractual prohibition, the contractual prohibition appears to be little more than an attempt to conceal regulatory avoidance structure. The prevalence of surcharging demonstrates the impediment to effective competition that BNPL imposes, while casting doubt on BNPL's right to continued enjoyment of that regulatory exemption.

Unregulated BNPL is contrary to the principles of the NET Code:

218. The NET Code seeks to inculcate standards of customer dealing that are materially higher than the bare minimum of conduct that is merely "lawful". It sets out to do so by:
- (a) requiring signatories to provide customers with clear, accurate and relevant

¹⁷⁷ Ministerial Council on Consumer Affairs, *Uniform Consumer Credit Code: Post Implementation Review*, Final Report, December 1999, 53-54. The report states:

'A number of respondents expressed concerns about 'tiny terms' contracts. Tiny terms contracts are contracts where the cost of credit is incorporated into the cash price and the transaction is represented as a sale of goods by instalment (without any credit charges). This practice is alleged to occur in relation to some motor vehicle sales and, in disguising the cost of credit, appears to be intended to avoid the application of the Code.'

¹⁷⁸ ASIC Report 600, [2].

¹⁷⁹ ASIC Report 600, [24]-[27].

information to help them make informed choices;¹⁸⁰

- (b) setting good standards for providing NET products, systems and services;¹⁸¹
 - (c) raising standards of consumer protection in the sector;¹⁸²
 - (d) strengthening consumer confidence in NET;¹⁸³ and
 - (e) ensuring that signatories' sales practices are responsible.¹⁸⁴
219. To permit NET Code signatories to offer unregulated BNPL (even on the terms and conditions in the November and ACCC Versions of the NET Code) would be to endorse the provision of consumer credit that is inconsistent with those objectives.
220. In the context of the NET Code's objectives, the best that can be said about unregulated BNPL is that it is not currently unlawful,¹⁸⁵ and is otherwise a source of systemic consumer harm. If the NET Code is unduly permissive towards BNPL, it will be seen as an implied endorsement and as offering misplaced assurance to the public: that is a detriment that would flow from approving the Code in a form that permits continued offering of BNPL at all.¹⁸⁶ Conversely, effective voluntary codes can deliver public benefit where they complement and extend beyond the reach of statutory regulation in dealing with market failures.¹⁸⁷

Clauses 3(n) and 25(c)(iii) of the NET Code will not result in open disclosure of “with” and “without BNPL” prices

221. In terms, cl 3(n) of the NET Code requires that signatories' advertisements and promotional material must *'be clear about any additional cost for finance or an alternative purchasing arrangement for New Energy Tech when the cost is being recovered in the overall price (eg where the price of the financed New Energy Tech is greater than the price that would apply if immediate payment is made)'*.
222. To similar intended effect, cl 25(c)(iii) promises that consumers will receive *'clear and accurate information'* regarding *'the proposed total cost under the deferred payment arrangement compared with the cost of that same New Energy Tech product, system*

¹⁸⁰ Clause 1(a).

¹⁸¹ Preamble.

¹⁸² Preamble.

¹⁸³ Preamble.

¹⁸⁴ Clause 1(c).

¹⁸⁵ See Part D8 above.

¹⁸⁶ *Media Council*, at 37-38.

¹⁸⁷ *Medicines Australia*, at [308].

or service if you were to purchase it outright on that day.'

223. Although cl 3(n) and 25(c)(iii) might appear at first glance to require disclosure of hidden surcharges, it cannot be expected that they will cause NET Code signatories offering BNPL to advertise in a way that would contravene the contractual prohibition that lies at the root of the BNPL business model. The NET merchants are contractually prohibited from advertising that their product is available for sale at a cheaper price than if the customer elects to use BNPL finance. As such, there is no price difference or price comparison that the NET merchant is required to disclose under those clauses. This is why the BNPL surcharges are imposed by NET merchants covertly: if they were to advertise differential prices overtly, they are at risk of being terminated by the BNPL provider, in the interests of the BNPL provider's own regulatory self-preservation.
224. Accordingly, it would be unrealistic for the Tribunal to expect that either the BNPL providers will lift their contractual prohibition on surcharging, or that the merchants would feel any more compelled to advertise these surcharges than they do at present.

E2 The detriment associated with BNPL is exacerbated in the NET market

225. The general categories of detriment associated with BNPL, identified above, are particularly exacerbated in the NET market.
226. **Responsible lending:** The concerns regarding unaffordability and responsible lending are heightened by the fact that NET products are substantial household investments, not ordinary consumer purchases. Further, they are typically marketed on the basis that they will be a source of savings, and not a mere expense. And calculating the likely savings is itself a complex task, affected by the technical characteristics of the NET products themselves, patterns of household use, the available tariffs for retail electricity, and the cost of any finance. If the anticipated savings are not in fact realised, this can cause hardship for the consumer, and particular hardship for financially vulnerable consumers, as illustrated by the **[Confidential to CALC]** [REDACTED] and **[Confidential to FRLC]** [REDACTED] case studies.
227. **Unsolicited sales:** BNPL finance and unsolicited sales of NET products work together to facilitate a sales model that aims to secure "on the spot" sales. Where the customer has little or no opportunity for meaningful research or deliberation of highly complex NET and finance products in the context of a money-saving investment, there remains the question of whether unsolicited sales are suited to this market at all. However, the use of BNPL continues:

- (a) because regulated credit cannot be offered by a merchant in an unsolicited sale, unless either the merchant itself has a credit licence, or each of the merchant's salespeople is an authorised representative of the credit provider; and
 - (b) because the real cost of the finance is hidden from the customer, thus enhancing the appeal of a "Pay As You Save"-type promotion.
228. **Surcharging conduct and distortion of pricing signals:** The CALC Solar Panel Survey, the Second Foggo Statement and ASIC's Report 600, demonstrate that surcharging conduct is a persistent practice. Higher prices (and lower volume), highly technical goods, and negotiable pricing all serve to increase the merchants' incentive and opportunity to apply a surcharge in order to pass the cost of the merchant fee on to the consumer.
229. Where surcharging occurs, it means that the consumer is not told the merchant's standalone price for the NET product, or the true costs of any associated finance, and the consumer may then pay more for the NET product.
230. That price distortion is particularly problematic in the NET market, where the products themselves are highly technical (and likely to become even more so), and it is a complex process (and likely to become more complex) to determine their cost and financial return in the form of savings.
231. The CALC, Ratesetter and ASIC evidence of surcharging lays bare that BNPL is not a cheaper product.¹⁸⁸ Rather than a cheaper product, BNPL as offered in the NET market is a product whose costs are borne by, but largely concealed from, the customer.
232. **The predicted detriments if BNPL is excluded from the NET Code are largely illusory:** Flexigroup asserts that authorisation of the NET Code as per the November Version or the ACCC Version will result in a lessening of competition in, and a shrinkage of, the market for NET products.¹⁸⁹ But it has not articulated this head of detriment in either its application for review or SOFIC, nor has it produced any supporting evidence.
233. More realistically, the Tribunal should expect that NET merchants will act in their own competitive self-interest. Currently, there are many solar merchants who trade and compete while *not* offering BNPL.¹⁹⁰ Further, in the CALC Solar Panel Survey, four of

¹⁸⁸ Second Statement of Daniel Foggo, at [10] and exhibit DF-3.

¹⁸⁹ Flexigroup, Opening Submissions, at [12(a)(iv)-(v)], [82], [105].

¹⁹⁰ See Annexure C.

the eight merchants who did **not** offer BNPL differentiated themselves from rival merchants that do offer BNPL by reference to higher standards of sales conduct. A voluntary commitment to such a higher standard of conduct is exactly what the NET Code is intended to achieve. Membership is voluntary, and is intended to establish an opt-in standard that is higher than the bare minimum of “lawful” conduct. If the NET Code precludes its signatories from using BNPL to facilitate unsolicited sales, then it will fall to BNPL providers such as Flexigroup to convince its merchants that a “future with BNPL” (but without the kitemark of NET Code membership) will be more advantageous to the merchant than a “future without BNPL”. That both enhances competition between NET merchants and between finance providers offering differing kinds of finance – while simultaneously serving to improve price signals in both markets.

234. The Tribunal should not give any substantial weight to the asserted loss of consumer choice. The proposition that BNPL offers customers “cheaper” finance starts from a flawed premise, and produces a false comparison.¹⁹¹ Any assertion or evidence of apparent customer satisfaction can only be given weight if those surveyed have been given a true comparison of the “without BNPL” price of the NET product and the true cost of the BNPL finance.
235. In summary, if BNPL were excluded from the NET Code, the prices of NET products will decrease, rather than increase; and will result in an improvement, rather than a lessening of, effective competition, spurred on improved price transparency and better informed customer choice. The distinction between regulated and unregulated credit, and the voluntary promotion of a higher standard of conduct may become a valuable point of competitive difference between NET merchants. That is consistent with the underlying purpose of the NET Code, and voluntary consumer codes more generally.

E3 Clause 25 and the cl A7 transitional provision

November Version– specific requirements

236. Clause 25(a) in the November Version provides that a deferred payment arrangement may be offered by a credit provider licensed under the NCCPA, and:
 - (a) the credit arrangement is regulated by the NCCPA and NCC; or
 - (b) the credit arrangement is exempt from the NCC, and **either** of cl 25(a)(ii)(A) or (B) applies (**Option (A)** and **Option (B)**, respectively).

¹⁹¹ As is shown by exhibit DF-3 to the Second Foggo Statement.

237. Option (A) will apply where *‘the [NET Code] Administrator has determined that the credit provider is a signatory to an industry code of conduct (BNPL Code) that requires the credit provider to’*:
- (a) have in place both internal and external dispute resolution processes (including membership of AFCA);
 - (b) have processes to identify whether a consumer is experiencing payment difficulties due to hardship;
 - (c) offer consumers alternative and flexible payment options if they are experiencing payment difficulties, so that they can meet their repayments;
 - (d) comply with ss 128 to 133 of the NCCPA (which relate to the assessment of unsuitable loans) as if the credit provider was a licensee and the credit contract was regulated by the NCCPA and the NCC.
238. Alternatively, under option (B), as an interim measure until 1 January 2021, a deferred payment contract may be approved by the NET Code Administrator in accordance with paragraph A7 of the Annexure to the NET Code. The transitional cl A7 requires that, pending the development of a BNPL Code, the NET Code Administrator must appoint an *‘appropriately qualified person’* to review the deferred payment contract in question and certify that it includes undertakings to comply with the substantial consumer protections required under option (A).
239. These provisions reflect a well-meaning attempt to draft a compromise outcome among the BTMWG and the ACCC. But the design and drafting of these provisions are insufficiently well thought through.
240. **First**, the Authorisation Applicants say that, in order to meet the ACCC’s concern as to the exclusion of BNPL, their intention was to ensure that the NET Code’s terms in relation to unregulated BNPL would provide “equivalent” protections for consumers.¹⁹² But, on examination, cl 25 of the November Version is not capable of providing consumers anything close to true equivalence to the customer protections for regulated credit. The cl 25 protections are narrower in their coverage and lack a full-fledged regulator to meaningfully enforce them.
241. **Second**, the NET Code Administrator does not have the expertise or resources to evaluate or enforce NCC-style protections, as contemplated by both option (A) and the clause A7 transitional provisions under option (B). We address these first two points

¹⁹² See Crawshaw Statement, at [97(e)]; Barnes Statement, at [124].

in Part E4 below.

242. **Third**, there is no finalised BNPL Code yet in existence, nor is there any clear understanding of which regulator will approve the BNPL Code and under what power. Paragraph 25(a)(i)(B) expressly contemplates that the BNPL Code referred to in option (A) is to be *'regulator approved'*. The regulator responsible for doing so is not specifically identified. But insofar as the Authorisation Applicants say that the BNPL Code ought to be approved by ASIC, the true position is that ASIC lacks power to approve the BNPL Code. We address that point in Part E5 below.

ACCC Version – specific requirements

243. The ACCC Version does not require that the credit provider be licensed under the NCCPA, where not providing NCC-regulated credit. Otherwise, it is substantially similar to the November Version, requiring membership of a BNPL Code that meets particular criteria. Under the ACCC Version, the original criteria from the November Version have been modified to be slightly more demanding – save that the BNPL Code need only require that signatories undertake a responsible lending assessment that affords “substantially equivalent” protections to the identified provisions of the NCCPA: cl 25(a)(ii)(A)(iv). The BNPL Code must also contain mechanisms for:
- (a) ongoing monitoring and investigation of complaints about potential breaches of the Code;
 - (b) appropriate remedies to be imposed that have regard to the severity of the breach, including suspension or expulsion of credit providers that are found to be in breach;
 - (c) reporting on breaches by credit providers that are approved pursuant to the NET Code: cl 25(a)(ii)(B).
244. The ACCC’s proposed clause 25(c)(iv) would require the disclosure, for NCC-exempt arrangements (ie BNPL), of *'information to assist [the consumer] in assessing the credit product, including the credit provider’s fees and charges.'* Once again, that wording would not result in the NET merchant or the BNPL provider being required to disclose to the customer the merchant service fee, or the cash price that the NET merchant would offer if it were not prohibited from doing so.¹⁹³
245. Finally, the transitional cl A7 is also substantially more involved than that in the November Version. Among other things, it requires the NET Code Administrator to

¹⁹³ See paragraph 223 above.

engage ‘an appropriately qualified person’ to review **both** the BNPL provider’s deferred payment contract **and** its internal policies and processes. The additional cl A7A contemplates that the NET Code Administrator may (but is not obliged to) reassess and revoke any approval previously given under cl A7, where the provider in question has failed to comply with clause 25. In essence, cll A7 and A7A contemplate that the NET Code Administrator may act as a quasi-credit regulator, but without properly considering whether it will have the resources or the expertise and ability to do so effectively.

246. The ACCC Version of cll 25 and A7 suffer from substantially the same problems as the November Version. To the extent that it contemplates – optimistically – a more robust and active quasi-regulator role to be played by the NET Code Administrator, this merely serves to emphasise how substantial equivalence cannot be achieved between regulated credit and BNPL, absent a real prospect of regulatory enforcement and consumer redress.

Flexigroup’s proposed conditions – a regulator-approved Code that delivers substantively equivalent protections

247. Under Flexigroup’s proposed conditions, cl 25(a) would provide that the deferred payment arrangement must be either regulated by the NCCPA and NCC, or ‘*complies with a regulator-approved Code of Conduct or industry code that delivers substantively equivalent consumer protections to those contained in the NCCPA*’.
248. However, this proposal is fraught with uncertainty, none of which Flexigroup has properly grappled with. The ambiguous verbal formulation both hints at the possibility that ASIC might approve the proposed BNPL Code, while evidently lacking conviction that ASIC has power, or would see fit, to do so.¹⁹⁴
249. Importantly, Flexigroup’s proposed condition also declines to identify who will determine whether the unspecified industry code does, or does not, offer “substantially equivalent” protections, or any meaningful criteria by which “substantial equivalence” is to be reliably assessed.
250. Insofar as Flexigroup seeks to have the Tribunal make that assessment itself of the currently proposed BNPL Code, then the Tribunal should find that the BNPL Code does not deliver “substantially equivalent” protections – both as a matter of a comparison of the responsible lending requirement, and in the absence of anything close to an equivalent regulatory oversight and enforcement framework: see paragraphs 269ff

¹⁹⁴ See also paragraph 260 below.

below.

E4 There is no “substantial equivalence”

251. There is no substantial equivalence of the standards required as between BNPL and regulated credit, or as between the reality of regulation by ASIC and oversight by the NET Code Administrator (or BNPL Code Administrator).
252. At a preliminary level, the requirements contemplated are only a limited subset of the standards applicable to NCC-regulated credit.
253. More fundamentally, the oversight of those standards by an administrator of a voluntary industry code is a far less rigorous discipline than having them enforced by ASIC itself. ASIC is a well-resourced regulator with expansive investigative powers under the ASIC Act, and the power to sanction non-compliance with the NCCPA and the NCC by means of licence cancellations, banning orders, and civil and criminal prosecution. The discrepancy between ASIC and a code administrator is even wider in this instance, where the standards relating to consumer credit are well removed from the ordinary remit of the NET Code Administrator.
254. The transitional cll A7 and A7A in the ACCC Version are particularly ambitious in this regard. Expecting the NET Code Administrator to assess the merits of a BNPL provider’s deferred payment contracts and internal policies, and also take disciplinary action for the breach of the prescribed standards, is quite unrealistic.¹⁹⁵ The offering of BNPL in the NET market has previously been unregulated, and has been a noted source of consumer complaints, meaning that the burden of administering any newly-created standards for BNPL in this market will not be a light one.
255. The benefits and the detriments that the Tribunal is required to weigh are the benefits and detriments that can realistically be expected to accrue in practice; not benefits and detriments that merely appear on paper.¹⁹⁶ In that sense, the concept of ‘*substantially equivalent*’ consumer protections, as between regulated and unregulated credit, risks offering a false promise. Unregulated credit that is overseen by a non-expert code administrator administering a voluntary code of conduct is not regulation. Regulated credit provides consumers with recourse to an array of remedies and Parliament with recourse, through its statutory agencies, administrative and judicial sanctions.
256. The most straightforward – and perhaps the only – way to achieve equivalence, either

¹⁹⁵ See Barnes Statement, [83], [124]; Crawshaw Statement, [97](e), [120]; Flexigroup, Opening Submissions, [93].

¹⁹⁶ *Media Council*, at 35-36.

as a matter of consumer protection, or competitive equivalence between finance providers, is for NET Code signatories to undertake to offer only credit that is uniformly regulated within the NCC and NCCPA regime. Without an equivalent regulatory apparatus to ensure they are properly effective, the endorsement of BNPL as meeting nominally “equivalent standards” to those of the NCC risks lulling customers into a false assurance.

257. Rather than requiring a single standard of consumer credit conduct, higher than that which is merely lawful, the NET Code risks creating double standards, whereby:
- (a) regulated credit is subject to the full scope of consumer protections under the NCC and NCCPA, is offered by licensed providers, and is regulated by ASIC as the specialist regulator, under existing and proven legislation; and
 - (b) BNPL is subject to an approximation of the NCC’s protections, subject only to membership of an untested BNPL Code which does not yet exist and cannot be approved by ASIC, and regulated either by a NET Code Administrator which does not want and is not suited to the task, or a BNPL Code Administrator that, again, does not yet exist, and which has disciplinary powers that are even weaker than those of the NET Code Administrator.
258. It would be positively misleading, and unfair to the regulated credit providers, to then suggest that all forms of credit that NET Code signatories provide are held to a meaningful common standard of consumer protection. Conversely, if NET Code membership can be taken as a guarantee that the NET merchant offers only regulated credit, then the competitive dynamic between NET merchants who offer regulated and unregulated finance will be sharpened.

E5 The proposed BNPL Code

ASIC does not appear to have the power to approve the proposed BNPL Code

259. Each of the November Version, the ACCC Version of the NET Code and Flexigroup’s proposed conditions, appear to have been put forward on an assumption that ASIC has the power to approve the proposed BNPL Code. The requirement for ASIC’s approval was a significant source of comfort to the Authorisation Applicants, in particular.¹⁹⁷
260. In this proceeding, ASIC itself has confessed that it is unsure whether it has the power

¹⁹⁷ Barnes Statement, [107], [121]-[122]; Crawshaw Statement, [97](a), (e).

to formally approve the BNPL Code.¹⁹⁸

261. Flexigroup has repeatedly ventured that *'It is contemplated that the BNPL Code will be approved under ASIC Regulatory Guide 183' (RG183)*.¹⁹⁹ RG183 is merely a policy document, and not a source of power in itself. Rather, ASIC's power to approve a code of conduct, and the statutory basis for the discussion in RG183, derives from s 1101A(1) of the Corporations Act. Section 1101A(1) is in the following terms:

ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:

- (a) financial services licensees; or
- (b) authorised representatives of financial services licensees; or
- (c) issuers of financial products;

being activities in relation to which ASIC has a regulatory responsibility.

262. **s 1101A of the Corporations Act does not give ASIC the power to approve the BNPL Code:** That provision does not enable ASIC to approve the BNPL Code, because BNPL does not fit within any of the categories (a), (b) or (c). These relate respectively to financial services licensees, authorised representatives, and (other) financial product issuers, none of which categories encompass BNPL.
263. Critically, and as previously noted above, a BNPL arrangement is not a *'financial product'* within the meaning of the Corporations Act (as opposed to the broader definition in the ASIC Act).²⁰⁰ The consequence for BNPL providers (and other credit providers) is that they are not required to hold an Australian financial services licence under the Corporations Act.
264. Accordingly, because BNPL facilities do not require a financial services licence, ASIC's powers under s 1101A(1)(a) and (b) are not a source of power for its authorisation of the BNPL Code. And because BNPL facilities are not financial products within the meaning of the Corporations Act, ASIC's power under s 1101A(1)(c) is also not applicable.
265. **Nor does ASIC have the power to approve the BNPL Code under s 241 of the NCCPA:** Although it does not appear to have been specifically contemplated, and is not addressed under RG183, ASIC also has a corresponding power to approve codes

¹⁹⁸ ASIC SOFIC, [11]

¹⁹⁹ Flexigroup Amended SOFIC, [40]; First Mysak Statement, [68]; Flexigroup, Opening Submissions, [47] (emphasis added).

²⁰⁰ Corporations Act, s 765A(1)(h)(i); Corporations Regulations, reg 7.1.06.

of conduct under s 241(1) of the NCCPA, which provides as follows:

ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:

- (a) licensees; or
- (b) credit representatives;

being activities in relation to which ASIC has a regulatory responsibility.

266. That power does not extend to approving the BNPL Code, for substantially the same reasons as apply in relation to s 1101A of the Corporations Act. BNPL providers are not required to be credit licensees or credit representatives, and do not fall into either of the categories (a) or (b) that are contemplated by s 241. Rather, BNPL arrangements are specifically structured so as **not** to require that the provider be licensed, and for the arrangements to be **excluded** from ASIC's scope of authority under the NCCPA.

267. The fact that each of Flexigroup, the ACCC and the Authorisation Applicants appear merely to have assumed that ASIC has the power to approve the BNPL Code is indicative of the fact that the readmission of BNPL into the September Version of the NET Code, and subsequent iterations, has not been fully thought out.

268. In those circumstances, and given that even ASIC has expressed doubt that it has the necessary power, Flexigroup's assertion that *'it is contemplated that [the BNPL Code] will be approved'* by ASIC is a remarkably cavalier submission for Flexigroup to have made repeatedly to this Tribunal in support of its proposed modification to cl 25(a)(ii).

Even on its face, the BNPL Code does not provide for a "substantially equivalent" standard to the NCCPA

269. In any event, the current draft of the BNPL Code will not provide for any meaningfully equivalent standard of consumer protection to that of the NCCPA and the NCC.

270. The draft BNPL Code as presently proposed by AFIA does not meet that standard. Most critically, cl 4.8 of the AFIA BNPL Code proposes that, in determining whether a loan may be suitable, BNPL providers need only consider and collect **one or more** of the following: external data sources (eg a credit check), the consumer's repayment history, information about the consumer's income, and information about the consumer's expenses, which may include existing debts.

271. There is no specific requirement that the BNPL provider does anything more than an external credit check, or that it undertake any comparison of the customer's income

and expenses. This is a far less stringent obligation than the NCC responsible lending obligation, which requires that a credit provider at least:

- (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and
- (b) make reasonable inquiries about the consumer's financial situation; and
- (c) take reasonable steps to verify the consumer's financial situation.²⁰¹

272. Under the NCCPA, a breach of that provision may be investigated by compulsory examination under Part 6.2, or the compulsory production of documents under Part 6.3, among other powers. In contrast, the AFIA BNPL Code provides that Members will not be obliged to provide the Code Compliance Committee with access to records if to do so would cause it to be in breach of existing obligations at law, including obligations of privacy and confidentiality.²⁰² In that respect, a Member could resist any investigation that was not specifically endorsed by the consumer in question, on the basis that the relevant details were confidential and could not be disclosed.

273. Further, a breach under the NCC is punishable by civil penalties of up to \$1,050,000 per contravention and/or banning orders.²⁰³ There is no such equivalent deterrent under the BNPL Code, nor could there be.

274. By contrast, under the Terms of Reference of the Code Compliance Committee (the **CCC**) for the BNPL Code,²⁰⁴ the CCC may only impose a sanction on a BNPL Code signatory after:

- (a) the CCC has commenced an investigation of an alleged breach: cl 10.1;
- (b) the alleged breach is not within any of the 7 categories of breach which the CCC must not consider: cl 10.2;
- (c) having completed its investigation, the CCC includes a recommendation for corrective measures to be implemented by the BNPL Code signatory (including potential remediation or rectification) (cl 10.5), and either:
 - (i) the CCC reaches agreement with the BNPL Code signatory on appropriate corrective measures, but the signatory later fails to

²⁰¹ NCCPA s 130. These requirements are fleshed out by ASIC, Regulatory Guide 209: Credit licensing – responsible lending conduct, [209.58] – [209.78] (Information about the customer's financial situation) and [209.120]-[209.125] (Verifying the customer's financial situation).

²⁰² AFIA BNPL Code, Annexure B to Flexigroup's SOFIC, [6.11].

²⁰³ NCCPA s 80.

²⁰⁴ Exhibit TM-3 to the Second Mysak Statement: tab 4 [FXL.001.006.0001].

implement and comply with the agreed corrective measures: cl 10.7, 10.8(a); or

- (ii) in the CCC's opinion, the BNPL Code signatory fails to reach agreement with the CCC about appropriate corrective measures within "a reasonable timeframe": cl 10.8(b).

275. Only after that process is exhausted may the CCC impose a sanction, which may involve no more than issuing a formal warning to the contravening BNPL Code signatory. Even at the most severe end, the CCC's powers rise no higher than revoking membership of the Code or recommending to the Board of AFIA that membership of AFIA be terminated: cl 10.9(g), 10.9(i).
276. The prospect of sanctions that are meaningfully comparable to those that ASIC can impose is so remote as to be illusory.

E6 Application of principles

277. **The exclusion of BNPL is founded on community expectations:** The BTMWG's original agreement that BNPL should be excluded from the NET Code was founded on community expectations, and a concern that BNPL gives rise to an excessive risk of consumer harm in the NET market. The BTMWG approached the NET Code on the basis that it should reflect, but not be in front of, community expectations.²⁰⁵ The BTMWG itself was broad-based and diverse, and consulted widely with industry, government and consumer groups: it was well placed to gauge what the community expects of consumer credit for the NET market. In some cases, as with BNPL, the obligations imposed by the NET Code are higher than the minimum requirement provided by the law. Promoting of a voluntary adherence to higher standards, in an easily recognisable way, is the primary reason that codes of conduct like the NET Code exist. Where properly founded in community expectations, such codes produce a recognised public benefit.²⁰⁶
278. **BNPL is a significant source of public detriment in the NET market:** For the reasons set out in Parts E1 and E2 above, BNPL is a significant source of public detriment, particularly in that it undermines the provision of clear price signals in the NET product and finance markets. The associated risks of consumer harm are particularly exacerbated in the NET market. There are no substantial countervailing benefits, and the detriments asserted by Flexigroup if BNPL is excluded are not

²⁰⁵ Barnes Statement, [49]-[50].

²⁰⁶ *Media Council*, 41-42, 44, 48.

supported by the evidence before the Tribunal. In any event, NET merchants will be entitled to continue offering BNPL, if they consider it to be an advantage over their competitors. The NET Code will clearly differentiate between NET merchants who do **not** offer BNPL, and those who may wish to do so, while signalling that the former have signed up to a higher standard of customer protections and transparency.

279. **There will be a public detriment if BNPL is positively endorsed by the NET Code:** In *Media Council*, the Tribunal warned of the dangers of authorising a code of conduct that was overly permissive towards conduct that is lawful but otherwise harmful.²⁰⁷ As the inclusion of cl 25 of the NET Code itself recognises, the offering of BNPL in the NET market is recognised to be a lawful but harmful practice. As the Tribunal has previously warned, if the NET Code accepts the continued provision of BNPL by its signatories, this operates as an endorsement and promotion of BNPL to consumers.
280. **There will be a further detriment if the cl 25 BNPL protections are represented to be ‘substantively equivalent’ to regulated credit:** Each of the November Version, the ACCC Version and the proposed Flexigroup Conditions go further than merely endorsing BNPL as acceptable. They are structured in a way which presents BNPL as having substantially equivalent protections to those which are offered in relation to consumer credit. That is apt to create a misleading impression, to the likely detriment of consumers.
281. **The putative customer protections in relation to BNPL under cl 25 of the NET Code will not be realised in practice:** As the BTMWG’s deliberations and the successive iterations of the NET Code reveal, this is not a matter where CALC and the Authorisation Applicants, or even the ACCC, disagree in principle that the offering of BNPL in the NET market may produce an excessive risk of consumer harm. The point of difference is whether this is risk that can be adequately mitigated, while allowing BNPL finance to be offered by signatories to the NET Code.
282. Each of the Authorisation Applicants and the ACCC have proposed variations to the original April Version (which excluded BNPL entirely), that are intended to ensure that regulated credit and BNPL will each be held to “substantially equivalent” standards of consumer protection. However, neither the November Version nor the ACCC Version will achieve their intended aim in practice. Rather, the continued offering of BNPL by NET Code signatories undermines the “key commitments” that the NET Code is meant to enshrine – foremost among which is a commitment to *“provide you with clear, accurate and relevant information to help you make informed choices”*: cl 1(a)

²⁰⁷ *Media Council*, 37-38.

(emphasis added).

283. **Signatories to the NET Code ought to be permitted to agree not to offer BNPL:**

It is unlikely that the protections intended by cl 25 or transitional cl A7 in either version of the NET Code will in fact be achieved. In practice, it will simply not be possible to ensure an “equivalence” between regulated credit and BNPL. Accordingly, the Tribunal ought not exercise its discretion to approve the NET Code either in its November Version or the ACCC Version.

284. Rather, to ensure that the NET Code will most effectively achieve its intended benefit in relation to consumer finance, the Tribunal should impose conditions that simply exclude NET Code signatories from offering BNPL finance, as was originally proposed in the April Version that the BTMWG first submitted to the ACCC.²⁰⁸ The compromise on which the Authorisation Applicants have settled, in retreating from their original position, should properly be regarded as misconceived and based on an inadequate grasp of the intrinsically anti-competitive nature of BNPL. The compromises that each of the Authorisation Applicants and the ACCC have attempted to fashion are not best adapted to achieve the intended benefits.

F NET CODE MERCHANTS SHOULD NOT BE PERMITTED TO OFFER UNREGULATED CREDIT FOR UNSOLICITED SALES

285. CALC’s primary position is that signatories to the NET Code should not be permitted to offer unregulated credit at all. If they are to be permitted, however, they should be subject as far as possible to an equivalent standard of protection to that which is afforded for regulated credit providers. That is a principle that was prominent in the BTMWG’s deliberations, as set out in Part C4. It particularly applies in relation to the issue of unsolicited sales, which are a considerable source of consumer detriment - discussed in Part D7 above.

286. It has long been recognised that unsolicited selling of particular categories of product may justifiably be prohibited in the public interest, in particular where the “product” is one that requires the purchaser to make a complex financial or investment decision. The rationale was pungently described by Kenneth Hayne AC QC in the final report of his Royal Commission:

‘Hawking’ company securities, by making unsolicited approaches to

²⁰⁸ See Annexure A, proposed condition 1.

potential buyers, has long been unlawful.²⁰⁹ The practice has long been unlawful because it too readily allows the fraudulent or unscrupulous to prey upon the unsuspecting. There is no real check on what is said to the target and often the target is not able to check the truth of what is said. The asymmetry of power and information between the provider of the product and service and the acquirer is very large. Even if the 'hawker' is not fraudulent or unscrupulous (and, too often, cases examined in evidence showed that the hawker was at least unscrupulous) the acquirer is nevertheless 'unsuspecting'. The potential acquirer who has not sought out the product or service comes to the encounter unprepared to look critically at whatever is said. The potential acquirer often does not know what questions to ask.²¹⁰

287. Those observations are entirely germane to the unsolicited offering of BNPL for the purchase of NET products.

288. The ACCC was correct to identify that the November Version's response to the use of BNPL to facilitate unsolicited selling was insufficiently comprehensive. The No Advertising Requirement in cl 3(d) of the November Version provided that:

Our advertisements and other promotional material will not include any false or misleading claims about us or our New Energy Tech. In particular, our advertisements and promotional material will: (d) make no unsolicited offers of payment arrangements not regulated by the [NCCPA].

289. The ACCC Version imposes the Unsolicited Sales Condition, which is in broader (and more effective) terms:

5.12 Signatories must not offer customers finance arrangements not regulated by and exempt from the NCCPA and NCC (ie BNPL) in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.

290. No explanation has been given why the existing cl 3(d) should be confined to advertising and promotional material, and should not extend to the whole of a NET

²⁰⁹ The 1926 Report of the UK Company Law Amendment Committee chaired by Mr Wilfrid Greene KC (Cmnd 2657) recommended that the offering from house to house of shares, stock, bonds, debentures or debenture stock or similar securities either for subscription or sale should be made an offence. Hawking company securities has long been an offence under Australian company law. See now Corporations Act s 736.

²¹⁰ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, final report, 1 February 2019, vol 1, at 13.

merchant's sales conduct, much of which is transacted privately with the customer. Mr Barnes' evidence is that, from the September Version onwards, the BTMWG had intended to exclude the offering of BNPL through unsolicited sales, in much the same way as it was prohibited for offers of regulated credit.²¹¹ This is reflected in the letter from the CEC dated 25 September 2019.²¹²

291. The Unsolicited Sales Condition reflects the BTMWG's intentions in that regard, and gives proper and meaningful effect to the restriction that is already imposed by the No Advertising Requirement. If BNPL is permitted at all, the Unsolicited Sales Condition will at least prevent the significant public detriment where it is offered in an unsolicited sale context.²¹³

G CLAUSE 25 SHOULD NOT BE CONFINED TO "LOW CHARGE" BNPL

292. Lastly, CALC raises a comparatively straightforward matter of the drafting of the chapeau to cl 25 of the NET Code.
293. Clause 25 is drafted to address "*deferred payment arrangements*". That expression is undefined, but it is clearly intended to encompass all kinds of consumer finance that a NET merchant may offer "*as an alternative to upfront payment upon delivery or installation*".
294. Whatever the outcome of the "unregulated credit" issue in this review, it is cl 25 that will do the work of delimiting the kinds of finance that NET Code signatories agree that they may, and may not, offer to customers.
295. The evidence suggests that unregulated BNPL providers who offer finance for NET products presently operate a "Low Charge" BNPL offer: that is, they charge modest upfront and ongoing costs directly to the consumer, while recovering the larger part of the cost of finance through the merchant fees. That is clearly the case for Flexigroup's humm offering, and appears also to be the case for Brighte.²¹⁴
296. So far as CALC is aware, BNPL providers do not presently offer "No Charge" BNPL in relation to NET products: that is, BNPL finance structured so that the customer pays

²¹¹ Barnes Statement, [113].

²¹² Barnes Statement, tab 12 of Exhibit BB-1.

²¹³ Annexure A, proposed condition 4.

²¹⁴ ASIC report 600, p 8 ("Fee structures"). See also Ross affidavit at [48] (Brighte BNPL offered by The Solar Power Co); Bolzonello affidavit at [128(b)] (Brighte BNPL offered by Your Choice Solar).

no upfront or periodic fee directly to the BNPL provider.²¹⁵ If “No Charge” BNPL were offered, it would not be exempt from NCC regulation under the “low charge” exemption;²¹⁶ rather, it would fall outside the scope of “*credit to which the NCC applies*”, because no charge is made [to the customer] for providing the credit.²¹⁷

297. Turning to the chapeau to cl 25, it commences as follows:

We may offer you New Energy Tech with a deferred payment arrangement as an alternative to upfront payment upon delivery or installation. If you are a Residential Customer and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n), we will ensure that:

298. CALC’s submission is simply that the underlined words are unnecessary to include in the chapeau to cl 25, and that, by their inclusion:

- (a) the operative limitations and/or obligations in relation to deferred payment arrangements are needlessly and inappropriately confined to a subset of deferred payment arrangements, that does not include “no charge BNPL” finance; and
- (b) the undue narrowing of the chapeau then invites the possibility that, if the underlined words are not deleted, a BNPL provider would be at liberty to circumvent the protections afforded by cl 25 if it were to restructure its BNPL offering for solar and NET products to a “no charge BNPL” product, potentially along the lines of that presently offered by Afterpay.

299. The words “*and this deferred payment arrangement includes an interest component, additional fees or an increased price*” reflects one of the integers of credit to which the NCC applies – namely, that “*a charge is or may be made for providing the credit*”. There is no need for that integer of NCC regulation to be made an integer of the protections afforded by cl 25 of the NET Code, in circumstances where the very purpose of cl 25 will either be to exclude unregulated or exempt credit or to impose particular additional requirements on the offering of unregulated or exempt credit. Indeed, to limit the scope of cl 25 in that way risks undoing the benefit that cl 25 is intended to secure.

300. The scope of the chapeau to cl 25 appears not to have been remarked upon in any

²¹⁵ But other BNPL providers, such as Afterpay, offer “No Charge” BNPL: see ASIC Report 600, at p 8.

²¹⁶ NCC, s 6(5); NCCP Regulations, reg 51.

²¹⁷ NCC, s 5(1)(c).

submissions to or determinations of the ACCC, and there is no evidence from the Authorisation Applicants' witnesses that it was the subject of any debate during the drafting or authorisation processes. With respect to all of those involved in the drafting, the potential loophole that has arisen by the unnecessary inclusion of the underlined words in the chapeau to cl 25 is typical of the risks unintentionally created by using more verbiage, rather than less, when seeking to draft a pathway through an already complex regulatory landscape.

301. CALC therefore submits that those narrowing words should simply be deleted from the chapeau to cl 25.²¹⁸

Dated: 1 June 2020

Tom Clarke
Matthew Peckham

Counsel for the Consumer Action Law Centre

Consumer Action Law Centre

²¹⁸ Annexure A, proposed condition 5.

ANNEXURE A CALC'S PROPOSED CONDITIONS OF AUTHORISATION

1. In lieu of cl 25(a) of the NET Code, substitute:
 - a) this deferred payment arrangement is offered through a credit provider (whether ourselves or a third party) that is licenced under the NCCPA and the deferred payment arrangement is regulated by the NCCPA and the National Credit Code ("NCC").
2. Modify cl 25(c)(iv) of the NET Code, by deleting the words "(regardless of whether the arrangement is regulated under the NCC)".

[Consequential upon condition 1]
3. Delete cl A7 of the Annexure to the NET Code.

[Consequential upon condition 1]
4. Alternatively to conditions 1 to 3, impose a condition that:

Signatories must not offer customers finance arrangements not regulated by and/or exempt from the NCCPA and NCC in connection with the sale of a New Energy Tech product if the sale of the New Energy Tech product is unsolicited.
[Reflecting ACCC's condition at [5.13]]
5. Modify the chapeau to cl 25 of the NET Code, by deleting the words "and this deferred payment arrangement includes an interest component, additional fees or an increased price (see paragraph 3.n)".
6. Reporting conditions, as imposed by the ACCC, at [5.15]-[5.18]

ANNEXURE B SUMMARY OF CALC'S EVIDENCE

Affidavit	Subject Matter
Consumer Case Studies	
Rex Punshon (CALC)	Consumers: [Confidential to CALC] & [Confidential to CALC] Merchant: Solar Today BNPL provider: Brighte Capital Pty Ltd Key issues: Misleading and deceptive conduct; irresponsible lending; breach of unsolicited sale provisions; surcharging; unconscionable conduct
Jane Foley (Financial Rights Legal Centre)	Consumer: [Confidential to FRLC] Merchant: Green Power Gen BNPL provider: Certegy Ezi-Pay Key issues: Irresponsible lending; breach of unsolicited sale provisions; surcharging
Sue-Anne Thompson (CALC)	Consumer: [Confidential to CALC] Merchant: Green Power Gen BNPL provider: Certegy Ezi-Pay Key issues: Irresponsible lending; breach of unsolicited sale provisions; unconscionable conduct
Consumer Complaints Data	
Rex Punshon (CALC)	Summary of CALC's legal and policy work for vulnerable consumers in relation to the unsolicited sale of solar panels with BNPL
Ursula Noye (CALC)	Consumer complaints data as produced by the following external bodies: <ul style="list-style-type: none"> • Energy and Water Ombudsman Victoria • Australian Securities and Investments Commission • Consumer Affairs Victoria • Australian Financial Complaints Authority • Flexigroup Ltd
CALC Solar Panel Survey	
Ursula Noye (CALC)	Survey data request and methodology
Katherine Ross (Maurice Blackburn)	Survey data collected from retail companies selling residential solar panels with finance, including BNPL
Elisa Bolzonello (Maurice Blackburn)	
Karl Shami (Maurice Blackburn)	

ANNEXURE C: RESULTS OF CALC SOLAR PANEL SURVEY

1. SOLAR PROVIDERS THAT OFFER BNPL FINANCE OPTIONS

No	Name of Provider	Depo nent	Price quoted if paid upfront (after rebate deducted)	Surcharge for BNPL?	Terms of repayment quoted	Other comments
Solar providers offering BNPL through Brighte						
1.	Energy Wired Energy Matters	KR	\$5,548.00 [29].	No clear surcharge.	Interest Loan: 7.99% interest per annum: [24]. BNPL: 0% interest. Unclear whether \$400 in fees over 12 months referred to the loan or to BNPL: [30].	Provider stated that it would be better to take out an interest loan than the BNPL option: [28].
2.	The Solar Power Co	KR	\$3,824 [53]	Yes. \$832 over 4 years. (5.4% per annum.) “One-time set-up fee”: [55].	Interest Loan: 5.99% interest per annum: [42] BNPL: <ul style="list-style-type: none"> • \$4,656 if paid over 48 months. • \$4,800 if paid over 60 months: [54]. 	“No interest on Brighte finance, in its place is a one-time set-up fee.”: KR-5. Interest loan described as cheaper if you can pay it out quickly; Brighte “slightly cheaper” over the full term of the loan: KR-5.
3.	Your Choice Solar	EB	\$9,500 Price originally quoted was \$11,223, but reduced for 'cash upfront discount'. [128], [132]	On 5-year finance plan, the \$11,223 system would be \$111.85 per fortnight. [128] = \$14,540 Offered a cash upfront price of \$9,500. \$5,300 surcharge, (inc \$260 fees), equivalent to 11.1% interest.	BNPL <ul style="list-style-type: none"> • Brighte do not charge interest, but they do charge fees. • \$111.85 per fortnight on a 5 year plan. This would total \$14,540, not \$11,223. • \$1 weekly account keeping fee, and \$4.99 late payment fee if applicable 	

No	Name of Provider	Depo nent	Price quoted if paid upfront (after rebate deducted)	Surcharge for BNPL?	Terms of repayment quoted	Other comments
Solar providers offering BNPL through Humm (Flexigroup)						
4.	Fair Value Solar	EB	\$5,000 (without Vic rebate) \$3,112 with rebate: [26]. "Discount if I paid up front" : [27]	Yes. Unspecified discount for up-front payments.	BNPL <ul style="list-style-type: none"> • \$85 establishment fee. • \$8.00 per month account fee • Offered plans for between 1-3 years 	
5.	Solar Secure	EB	Initial offer "discounted to" \$3,191 if paid up front. [86]	Yes. [86]. Finance price is \$3,421 plus \$8/monthly account keeping fee. Price difference of \$374, plus \$144 in fees. Surcharge of \$518 (7.7% per annum)	BNPL <ul style="list-style-type: none"> • \$3,421 over 18 months, plus \$8 monthly account fee. • \$84.77 per fortnight. 	A further discounted offer of \$3,021 was made (Exhibit EB-9), although this was not expressly put as an "up-front" price. [90]
6.	Hello Solar	KR	\$3,199.00 [80]	No	BNPL: <ul style="list-style-type: none"> • Start-up fee of \$70. • Fortnightly fee of \$4 (\$104 total). [84] 	
7.	Arise Solar	EB	\$4,139.00 [96]	No.	BNPL: <ul style="list-style-type: none"> • \$97 per fortnight over 21 months. • \$85 establishment fee. • \$8 monthly account keeping fee. 	

No	Name of Provider	Depo nent	Price quoted if paid upfront (after rebate deducted)	Surcharge for BNPL?	Terms of repayment quoted	Other comments
8.	Instyle Solar	EB	\$6,500.00 [118]	Yes. \$900 surcharge (4.6% per annum). [119]	Interest Loan: Ratesetter – 5.99% over 3 years. BNPL: Humm. Said that the \$6,500 system quoted would be \$7,400 after fees.	InStyle Solar recommend Ratesetter because Humm claims to be interest free, but the overall price is more expensive. [118](c) Humm charges a merchant fee which can be an extra \$1,500 - \$2,000 front loaded onto the consumer, built into the instalments. [118](d)
9.	SunEnergy	KS	\$5,799.00 [35]	Yes. \$7,434, plus an \$8/month account keeping fee (\$480 over 5 years). [43] Surcharge of \$2,115 (7.2% per annum).	BNPL: <ul style="list-style-type: none"> • 5 year plan • \$125 a month (\$7,434), around \$1,600 more expensive, plus an \$8 account keeping fee. 	BNPL ‘Pay As You Save’ program: <ul style="list-style-type: none"> - No deposit - No upfront/install cost Representative said “no interest ever, only an \$8 account keeping fee”. Then, when asked, said it would be about \$1,600 more expensive.
Solar providers offering BNPL through both Brighte and Certegy (Flexigroup)						
10.	Sunboost Solar	EB	\$3,991.00 [61]	Yes. Offered “cash discount” of \$3,400. [67]. \$591 price difference, plus \$144 in fees Surcharge of \$735 (6.1% per annum).	BNPL: <ul style="list-style-type: none"> • \$3,991 over 3 years. • Instalments of \$52 per fortnight. • \$4 account keeping fee. 	Initially said that finance price only matched to upfront price in order to assist people during COVID-19 pandemic. (Suggesting that there would normally be a surcharge for finance.) [64] Subsequently offered a further discount for cash.[67]
Other BNPL providers – Zip Pay						

No	Name of Provider	Deponent	Price quoted if paid upfront (after rebate deducted)	Surcharge for BNPL?	Terms of repayment quoted	Other comments
11.	Nemco Solar	EB	\$4,400 [50]	No. Assuming extra costs of 2% (\$88) as described, this would fall below the threshold.	Interest Loan (Brighte): 4-7% BNPL (Zip Pay): Described as technically interest free but extra costs of around 2% which is absorbed by the provider and passed onto the consumer through the instalments: [46].	"Interest free finance providers, in reality, do charge interest, it is just absorbed into the total price": [45]

2. PROVIDERS THAT DO NOT OFFER BNPL FINANCE OPTION

No.	Name of Provider	Deponent	State	Price quoted if paid upfront (after rebate was deducted)	Finance provider	Terms of repayment quoted	Comments
12.	More Green Energy	EB	NSW	\$2,699.00 [71]	Sky Finance	Not disclosed.	6 months interest free. [71] Subsequent interest rate not disclosed.
13.	Solarbeam	KR	NSW	\$3,300	Ratesetter Latitude Gem Card	6% N/A, then 7-8%	Latitude Gem Card was no interest for 6 months, then 7-8%. When asked about BNPL: "No-one can offer finance without having a benefit.": [74]
14.	Total Solar Solutions	KR	VIC	\$9,697.00	Community First (a green loan)	6%	When asked if there was a BNPL option, said BNPL doesn't align with the company's values: [94].
15.	Sunrun Solar	KR	VIC	\$3,162.00	Brighte Finance	7.99%	

16.	HP Energy / Home Solar Panels Melbourne	KR	VIC	\$3,388.00	Australian Solar Finance	~7%	When asked if there was a BNPL option, commented that people pay more money for that type of finance: [111].
17.	Sunterra	KR	VIC	\$3,711.00 [120]	Ratesetter and Brighte	Did not know.	When asked about BNPL options, said it was a “dodgy practice” and people get trapped in bad financial agreements: [123](d).
18.	Solar Gain	EB	VIC	\$3,878.00	Ratesetter	7.54% per annum on a 60 month plan	They do not offer BNPL. They previously went through Certegy, but the total price to consumers was more expensive, so they stopped providing this option. [145]
19.	SAE Group	KR	QLD	\$5,500.00	Parker Lane Finance	6%	

3. OTHER PROVIDERS THAT WERE CALLED BUT DID NOT PROVIDE QUOTE

No.	Name of Provider	State	Notes
20.	First Choice Solar	VIC	Waiting for a call back – 28/04/2020
21.	Infinite Energy	VIC	They don't do residential properties – gave referral to Smart Energy Answer
22.	Smart Energy Answer	VIC	No answer - LVMTCB
23.	Trione Energy	VIC	Attempted calling – never returned my call
24.	Do Solar	VIC	Attempted calling – never returned my call
25.	RevoluSun	VIC	Insufficient details obtained.