

April 2019



SUNNY SIDE UP:

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

ABOUT

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

ACKNOWLEDGEMENTS

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

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



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

CONTENTS

01	EXECUTIVE SUMMARY	4
02	INTRODUCTION The Growth of Solar and New Energy Products	6
03	ISSUES OVERVIEW	12
04	THE CURRENT CONSUMER PROTECTION LANDSCAPE	14
4.1.	Overview	14
4.2	<i>Competition and Consumer Act 2010</i> (Cth) (CCA) and the Australian Consumer Law (ACL)	16
4.3	The <i>Australian Securities and Investments Commission Act 2001</i> (Cth)	21
4.4	The <i>National Consumer Credit Protection Act 2009</i> (Cth) (NCCPA) and the National Credit Code (NCC)	22
4.5	Other – Contract law, voluntary warranties and corporations law	24
4.6	Self-Regulation: The Clean Energy Council (CEC), the Smart Energy Council (SEC) and their codes of conduct	25
05	ISSUES DISCUSSED	28
5.1	Overview	28
5.2	Failure to install and/or connect to the grid properly	28
5.3	Unregulated finance arrangements	35
5.4	Misleading and high-pressure unsolicited sales	40
5.5	Product faults and poor performance	46
5.6	Lack of affordable dispute resolution	53
5.7	Business closures	57
5.8	Solar power purchase agreements	62
06	REGULATORY OPTIONS Regulatory instruments and regulator responsibility	66
07	CONCLUSION	68

01

EXECUTIVE SUMMARY

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

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

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

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

The report relies extensively on Consumer Action's casework.

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

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

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

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

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

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

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

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

INTRODUCTION

The Growth of Solar and New Energy Products

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

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

To put the issues in context it is useful to understand some basic features of the traditional energy market. The traditional energy market is characterised by large power plants used to generate electricity using coal, hydro or gas.¹ Electricity is then fed into a centralised grid from where it is distributed to households. The supply chain is made up of the energy generators,

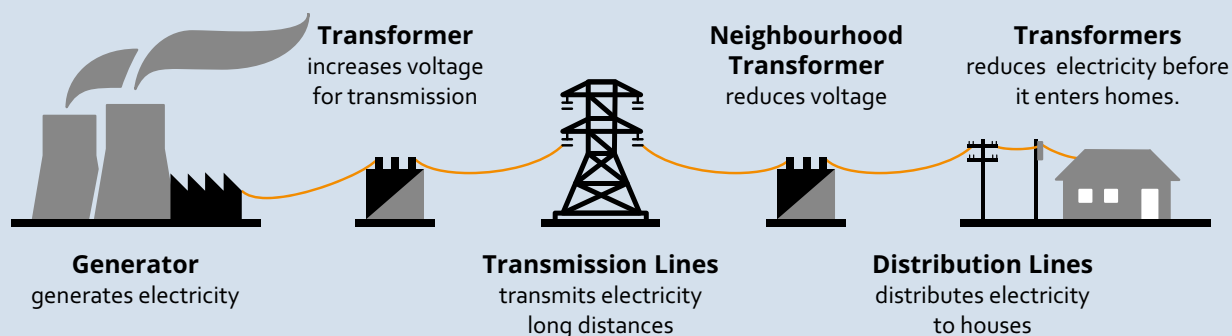
the distributors (who own the wires and poles through which the electricity travels) and the retailer who then sells the energy onto households and businesses. The electricity goes via a wholesale 'spot market' from which energy retailers buy the electricity.

There are five electricity distributors in Victoria, each responsible for a separate region. They are: CitiPower, Jemena, Powercor Australia, AusNet Services, and United Energy Distribution. There are currently over 30 electricity retailers in Victoria², including companies like AGL, Red Energy and Energy Australia. While there are several entities involved in the traditional electricity supply chain, an important feature is that electricity travels in a one-way direction from a generator to consumer. This supply chain is illustrated on the next page.

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

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

THE GRID: Traditional Energy Supply



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

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

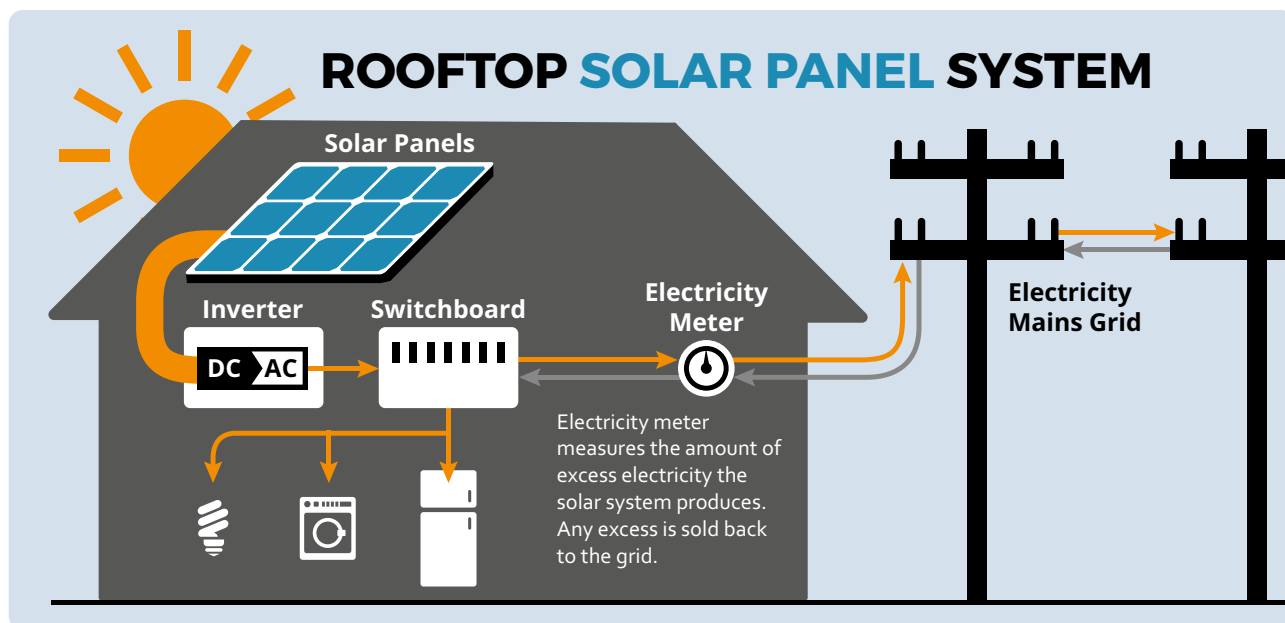
These products are also sometimes referred to as 'behind the meter' products. Although currently less common, they include batteries and energy storage; electric vehicles; and home energy management systems. The term 'behind the meter' or 'BTM' is used for these types of products because the distributors (who own the poles and wires that make up the distribution system or 'the grid') no longer have any control over the electricity once it hits a household's

meter. A household's meter also marks the spot where the traditional energy supply ends as well as where traditional energy regulation seems to end. This report will refer to this broad collection of products and services as 'new energy products.'

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

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

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



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

Probable driving factors behind the growing popularity of rooftop solar are the increasing concerns over energy prices, environmental considerations and the financial incentives created by governments. At

the federal level, the Commonwealth Government's Small-scale Renewable Energy Scheme aims to reduce emissions and support the achievement of the Government's Renewable Energy Target¹⁰ by creating financial incentives in the form of renewable energy certificates that are created by the installation of small solar systems and sold to corporations that need them to meet their targets. In effect, this creates a discount for purchasers of rooftop solar systems.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- *Electricity Industry Act 2000* (Vic), which regulates the electricity supply industry by, for example, prohibiting the unlicensed generation, transmission, distribution, supply or sale of electricity, unless under exemption.¹⁴ All licences issued under this Act are subject to a condition that the licensee enter a customer dispute resolution scheme approved by the Essential Services Commission (ESC).¹⁵ The only ESC approved dispute resolution scheme is Energy and Water Ombudsman (EWOV).
- *Electricity Safety Act 1998* (Vic), aimed at ensuring the safe supply and use of electricity.
- *National Electricity (Victoria) Act 2005* (Vic), which regulates the national wholesale electricity market.
- *Essential Services Commission Act 2001* (Vic), which establishes and grants power to the ESC, an independent regulator of Victoria’s

energy, water and transport sector. The ESC issues licences under the *Electricity Industry Act 2000* (Vic).

- The Energy Retail Code (Vic), which sets out rules that gas and electricity retailers must follow, in accordance with their retail licences, when selling gas or electricity to Victorians.¹⁶
- Energy Distribution Code (Vic), which regulates the distribution of electricity from distributors to their customers and the connection of customers or embedded electricity generating units (such as solar panels) to the grid.

Victorians can take most of their complaints about their energy retailer or distributor to EWOV, an independent dispute resolution service. While EWOV is not given direct legislative powers (and therefore could be considered as falling outside of the regulatory system), the *Electricity Industry Act 2000* (Vic) requires all electricity retailers to hold a licence¹⁷ and be a member of a dispute resolution service approved by the ESC.¹⁸ The ESC has approved EWOV.¹⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- a solar panel retailer who sells the panels, inverter and other products that make up a solar system;
- the installer of solar panels who affixes the panels to a person's rooftop and connects the other parts of the system (and who may or may not be the same as the solar retailer);

- an independent technician to certify that the Australian safety standards have been met;
- the regional distributor who needs to agree to the household using their infrastructure to sell the household's excess electricity back to the grid; and
- a person's retailer who purchases any excess electricity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The remainder of the report will:

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

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

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

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

²⁸ Consumer Action Law Centre, *Power Transformed* (July 2016) <<https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>>.

²⁹ For example, in the 2018 July to September quarter, EWOV received 496 solar complaints, 15% more than for the same period in 2017: *Energy and Water Ombudsman Victoria, Res Online 25 - November 2018* (November 2018) <<https://www.ewov.com.au/reports/res-online/201811>>.

03

ISSUES OVERVIEW

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

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

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

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

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

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



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

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

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

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

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

THE CURRENT CONSUMER PROTECTION LANDSCAPE

IN THIS SECTION

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

4.1. Overview

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

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

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

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

GENERAL CONSUMER AND CREDIT LAWS

(Applicable to Rooftop Solar Transaction)

Non-financial Products and Services**ACL**

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

Financial Products and Services**ASIC**

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

Credit Product**NCCPA & NCC**

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

OTHER

(Applicable to Rooftop Solar Transaction)

Contract Law

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

Corporations Law

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

LAWS REGULATING THE TRADITIONAL ENERGY MARKET

(Limited Application to Rooftop Solar Transactions)

Victorian

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

Federal laws applicable to Victoria

- National Electricity Law (NEL)

Federal laws not adopted in Victoria

- National Energy Retail Law (NERL)

Voluntary Industry Codes**The CEC Code**

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

The SEC Code

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

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

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

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

Consumer guarantees

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

The guarantees provide that all *goods* must:

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

The ACL guarantees that *services* will:

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

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

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

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

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

³⁸ ACL s 54.

³⁹ ACL s 55.

⁴⁰ ACL ss 56- 57.

⁴¹ ACL s 58.

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

⁴³ ACL s 60.

⁴⁴ ACL s 61.

⁴⁵ ACL s 62.

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

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

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

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

Unsolicited consumer agreements

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

Unsolicited consumer agreements are ones in which:⁴⁹

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

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

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

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

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

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

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

⁴⁹ ACL s 69(1).

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

⁵¹ ACL s 73.

⁵² ACL s 74.

⁵³ ACL s 75

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

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

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

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

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

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

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

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

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

⁵⁴ ACL s 76.

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

⁵⁶ ACL s 78.

⁵⁷ ACL s 79(d).

⁵⁸ ACL s 79(e) and (f).

⁵⁹ ACL s 79(a).

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

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

⁶² ACL s 79(c)(i).

⁶³ ACL s 82(3).

⁶⁴ ACL ss 82(c)-(d).

⁶⁵ ACL s 82(1).

⁶⁶ ACL s 83(1).

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

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

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

⁷⁰ Ibid.

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

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

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

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

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

Misleading and deceptive sales

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

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

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

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

⁷² Ibid.

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

⁷⁴ Ibid 466.

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

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

⁷⁷ ACL ss 18–19.

⁷⁸ ACL pt 3.1 div 1.

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

⁸⁰ ACL s 29.

⁸¹ ACL ss 29(1)(a)–(b).

⁸² ACL s 29(1)(g).

⁸³ ACL s 29(1)(m).

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

Unconscionable conduct

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

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

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

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

Unfair contract terms

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

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

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

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

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

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

⁸⁷ ACL, s 20.

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

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

⁹⁰ ACL s 22(1).

⁹¹ ACL s 236.

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

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

⁹⁴ ACL s 26.

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

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

⁹⁷ ACL s 250.

⁹⁸ ACL ss 237, 243.

Linked credit contracts

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

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

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

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

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

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

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

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

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

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

⁹⁹ ACL s 2(a)(iii).

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

¹⁰¹ ACL s 278(2).

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

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

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

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

¹⁰⁶ ASIC Act ss 12BF-12BM.

¹⁰⁷ ASIC Act ss 12CA-12CC.

¹⁰⁸ ASIC Act ss 12DA.

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

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

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

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

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

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

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

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

¹⁰⁹ ASIC Act s 12DB.

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

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

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

¹¹³ See generally, NCCPA ch 2.

¹¹⁴ See generally, NCCPA ch 3.

¹¹⁵ See generally, NCCPA ch 3.

¹¹⁶ NCCPA s 47(i).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²¹ NCC s 5(1).

¹²² NCC s 6(5).

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

4.5 Other – Contract law, voluntary warranties and corporations law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Clean Energy Council (CEC)

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁷ Ibid.

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

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

¹⁴⁰ Ibid.

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

¹⁴² Ibid cl 2.1.1, 2.1.2(b).

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

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

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

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

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

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

¹⁴³ Ibid cl 2.2.10.

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

¹⁴⁵ Ibid cl 2.2.10(b).

¹⁴⁶ Ibid cl 3.1.3.

¹⁴⁷ Ibid cl 3.3.4.

¹⁴⁸ Ibid cls 3.6.4 - 3.6.6.

¹⁴⁹ Ibid cl 3.6.6.

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

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

¹⁵² Ibid cl 3.6.1.

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

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

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

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

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

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

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

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

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

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



ISSUES DISCUSSED

IN THIS SECTION

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

5.1 Overview

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

Consumer Action. Unfortunately, the most vulnerable people in the community are often the least likely to seek assistance.

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

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

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

CASE STUDY 1: “SUSAN”

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

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

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

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

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

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

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

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

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

Shortly after Susan received a letter from the Finance Provider advising that she was required to make payments of \$69.95 per fortnight (and a monthly account keeping

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

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

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

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

Consumer Action is currently representing Susan in her matter.

CASE STUDY 2: “TUI”

Illustrative of the following issues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prior to installation, people wishing to install solar panels are usually required to obtain pre-approval from the relevant energy distributor. However, confusingly the requirement for pre-approval can vary depending on where a person lives (and therefore who the relevant distributor is) and the capacity of their proposed solar system.¹⁶⁰ This process may be streamlined with the introduction of new technical guidelines under Energy Networks Australia's National Grid Connection Guidelines¹⁶¹ for energy distributors but this remains to be seen.

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

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

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

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

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

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

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

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

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

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

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

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

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

party involved will inevitably deny responsibility for completing the forms and refer the individual to one of the other commercial parties.

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

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

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

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

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

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

¹⁶⁹ Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.1.16 <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

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

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

to elect who will be responsible for submitting all of the necessary paperwork. Furthermore, it is not hard to imagine how messy arguments about who said what, when might arise.

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

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

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

¹⁷⁰ Ibid cls 2.1.18 – 2.1.19.

¹⁷¹ Ibid 2.1.17.

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

¹⁷³ Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), cl 2.2.7(a) <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

¹⁷⁴ Ibid cl 2.2.8.

¹⁷⁵ Ibid cl 2.3.

¹⁷⁶ Ibid cl 2.2.7(b).

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

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

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

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

the energy retailers and distributors, and pursue their own commercial legal claims to recover any losses. If this evidence were provided to their customers, they may then be able to make a complaint in EWOV against their electricity supplier or retailer.

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

RECOMMENDATION 1:

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

5.3 Unregulated Finance Arrangements

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

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

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

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

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

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

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

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

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

¹⁷⁸ NCC ss 16, 17(c).

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

CASE STUDY 3: “JOHN”

Illustrative of the following issues:

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

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

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

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

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

John did not understand the technical details of what was being offered to him. The salesperson continued

with his pitch and offered John a finance contract to pay for the solar panels. John said he could only afford \$25 per week.

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

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

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

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

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

The solar retailer did not attend to remove the panels.

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

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

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

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

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

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

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

c. the term of the deferred payment contract or lease is no longer than the expected life of the product or system; and

d. ensure that you receive the following clear and accurate information...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁶ Ibid 10-11.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid [71].

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

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



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

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

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

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

RECOMMENDATION 2:

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

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

5.4 Misleading and High-Pressure Unsolicited Sales

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

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

In case study 3, the behaviour of the salesperson was pushy and invasive. The salesperson persisted to hold lengthy negotiations with John who clearly stated that he was not interested and failed to leave when asked

by John to do so. This is a clear breach of the ACL. The salesperson's behaviour was of such a poor standard as to leave John feeling intimidated and shaky.

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

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

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

¹⁹³ Ibid.

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

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

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

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

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

- how much electricity the household uses and when;
- the generating capacity of the solar panels;
- the conversion efficiency of the solar inverter and its ability to deliver power under a range of conditions;

- how much excess electricity a person can expect to sell back to the grid;
- the feed-in-tariff that they can expect to receive for every unit of electricity generated by them; and relative benefits of solar compared with accessing a better tariff or electricity retail offer.

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

Data presented by the Australian Bureau of Statistics (ABS) in the 2011–12 Programme for the International Assessment of Adult Competencies (PIAAC) suggests that the majority of Australians would not have the numeracy skills to make these calculations. Arguably, these calculations require people to be operating, at the very least, at what PIAAC defined as numeracy skill level 3.¹⁹⁹ According to the data only 43.4% of Australians in 2012 had numeracy skills at this level or higher.²⁰⁰

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

¹⁹⁷ Above n 191, 467.

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

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

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

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

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

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

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

- In August 2010, the ACCC ScamWatch warned against unsolicited telephone calls offering rebates on energy efficient initiatives including solar panels.²⁰²
- In September 2011, ACCC ScamWatch again issued warnings advising Australians to continue to be wary of scammers offering bogus government rebates for the installation of solar panels.²⁰³
- In August 2012, the ACCC launched a research report on the 'problematic' door-to-door sales approach which indicated, amongst other things, that solar panels were one of the four biggest industries using door to door sales.²⁰⁴
- In January 2018, Australian Communications and Media Authority (ACMA)²⁰⁵ reported on a \$10,800 infringement notice issued to Instyle Solar Pty Ltd for failing to obtain consent to call numbers on the Do Not Call Register.²⁰⁶ ACMA has also listed solar industry telemarketing as priority area for

2018-2019²⁰⁷ and has warned that 'ACMA is putting the solar power industry's telemarketing practices under the microscope as a result of a high number of complaints from consumers.'²⁰⁸

- On 8 October 2018, Solar Victoria issued a warning to solar panel retailers against high-pressure tactics and inaccurate marketing as the state government solar rebate program is rolled out. It also announced a joint taskforce to combat rebate scams.
- Recently, Solar Victoria and Consumer Affairs Victoria (CAV) separately posted warnings about solar rebate scams from callers claiming to be from the Victorian Government or Solar Victoria.²⁰⁹
- CAV currently list as their regulatory priorities, protecting consumers from false and misleading claims about solar, batteries and energy products.²¹⁰
- The ACCC and the ACMA have identified compliance failures in lead generation activities in the solar industry.²¹¹
- In 2018, in response to a review by Consumer Affairs Australia and New Zealand (CAANZ), the relevant Ministers for Consumer Affairs agreed to make amendments to the ACL unsolicited consumer agreements provisions to capture situations where retailers obtain consent or details from lead generators.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The opt-in model was one option initially presented (but not adopted) in CAANZ's interim report (2016) on their review of the ACL.²¹³ The opt-in model can be contrasted with the current cooling off provisions in the ACL which represent an 'opt-out' model. Under the current model, individuals have 10 days to opt out of an unsolicited consumer agreement by actively

terminating the agreement. Under an opt in model, no agreement would be made until a person actively opted in after a cooling off period. The person would opt in by actively contacting the retailer.

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

However, cooling off periods may not be providing the degree of protection that is intended. As explored in greater detail in the Knock it off! Report, opt out cooling off models are grounded in traditional economic theories of the rational person and how a person is supposed to behave. Research²¹⁵ and behavioural economics, both of which study how people actually behave, reveal that cooling off periods are not actually effective in protecting people from the hard sell.

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

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

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

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

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

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

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

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

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

While Consumer Action would welcome the banning of unsolicited solar panel sales for these reasons, the most comprehensive and principled approach would be to ban the making of unsolicited consumer agreements all together. Three significant reasons for this are that: the problems do not seem to be going away; the problems exist across many different

industries; and the problems disproportionately impact people experiencing poverty or other factors of vulnerability and this is simply unfair.

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

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

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

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

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

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

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

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

²²¹ Consumer Action Law Centre, Loddon Campaspe Community Legal Centre and WEstjustice, *Knock it off!* (November 2017) <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>>.



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

Finally, any harm resulting from unsolicited sales disproportionately impacts people experiencing vulnerability. Consumer Action implores legislators to give more weight to this factor than they have in the past. In the explanatory memorandum to the ACL, the legislators acknowledged this harm caused by unsolicited sales but weighed it against

the ‘convenience’ some people may experience from unsolicited sales and also weighed it up against the interests of businesses.²²³ The argument of convenience does not hold water in today’s diverse and easily accessible market place, if ever. Furthermore, to quote Energy Australia CEO, Catherine Tanna, when explaining Energy Australia’s decision to stop door knocking in 2013, ‘there’s no good reason for the practice and we’d like to see all retailers do the right thing and stop door-to-door sales.’²²⁴

RECOMMENDATION 3:

Ban all unsolicited consumer agreements.

²²² Some of these trends have been reported by Consumer Action in the past. See, for example: Paul Harrison et al, ‘Shutting the Gates: an analysis of the psychology of in-home sales of educational software’ (Research Discussion Paper, Deakin University and Consumer Action Law Centre, March 2010) <<https://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf>>; Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers* (November 2007) <<https://energyconsumersaustralia.worldsecuresystems.com/grants/270/AP-270-CALC-report-on-direct-marketers.pdf>>.

²²³ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 465-466 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf>.

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

5.5 Product Faults and Poor Performance

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

CASE STUDY 4: "MARTHA" & "GREG"

Illustrative of the following issues:

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

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

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

Martha and Greg contacted the ex-owners of the house to find out where they had bought the solar panels. The former owners obliged, confirming the Solar Retailer they dealt with and forwarding the original invoice for purchase of the

panels. They also discovered that the panels came with a 25-year warranty.

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

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

Martha and Greg then went to Consumer Affairs Victoria, who advised that if the Solar Retailer did not comply with the warranty by the

end of the week then Martha and Greg should lodge a claim against them in VCAT.

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

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

CASE STUDY 5: “HENRY”

Illustrative of the following issues:

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

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

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

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

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

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

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

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

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

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

Other organisations have reported on the issue related to product faults in rooftop solar systems. In December 2018, the Auditor General’s office released an independent performance audit of the Clean Energy Regulator who administers the Small-scale Renewable Energy scheme Target under the Renewable Energy Target scheme. For installations to be eligible for the financial incentives under the scheme, they must meet the Australian and New Zealand standard and comply with the state and federal safety regulations.²²⁵ As part of the administration of this scheme, the Clean Energy Regulator must arrange inspections of a statistically significant selection of small generation units installations (primarily solar systems²²⁶) for compliance with the safety and quality related eligibility criteria.²²⁷

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

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

²²⁷ Ibid 48.

The audit report found that between 21.7% and 25.7% per cent of small generation unit installations inspected were rated as 'unsafe' or 'sub-standard' each year, with the exception of the years 2012 and 2013.²²⁸ A sub-standard rating was given where work was required to rectify the non-compliance or where the non-compliance created a high risk.²²⁹ Examples of non-compliance and risks in this category include: the risk of inverter falling; freestanding panels were not secure; or incorrect wiring at the inverter. An unsafe rating was given where there was a perceived high risk caused by the non-compliance, for example, exposed live wiring or where the rooftop panels were not secure.²³⁰

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

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

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

²²⁸ Ibid 49.

²²⁹ Ibid 49.

²³⁰ Ibid 49.

²³¹ Ibid 51.

²³² Ibid 51.

²³³ Simon Benson, 'Warning of deaths over solar panel installations', *The Australian* (online), 20 December 2018 <<https://www.theaustralian.com.au/national-affairs/climate/warning-of-deaths-over-solar-panel-installations/news-story/dccd1f4a8169caddb5941b6d99591ee7a>>.

²³⁴ Sam Buckingham-Jones, 'Fly-by-night operators installing faulty solar panels', *The Australian* (online), 20 December 2018 <<https://www.theaustralian.com.au/business/mining-energy/flybynight-operators-installing-faulty-solar-panels/news-story/d7479168aa51b13073ebacaf7080aed>>.

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

The top five problems reported were:²³⁶

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

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

Information provided to Consumer Action through our policy and campaigns work, suggests that an emerging issue, particularly in regional Victoria, relates to the negative impacts that voltage and export limiting can have on solar systems performing as promised. Export limiting occurs when electricity network operators limit the export of electricity from households to the grid in order to reduce the negative impacts of too

much solar electricity entering the grid. Anecdotal evidence provided to Consumer Action is that export limiting is common for some regional area and occurs on an arbitrary basis, impacting the finances of some households but not others. Further, we have been told that these areas are also being affected by high voltages which can cause damage to solar inverters. However, because high voltages are the responsibility of network operators and distributors and not solar retailers, damage caused in this way can negatively impact a person's ability to access their ACL guarantees and any rights they have under additional warranties. Consumer Action understands that households are only becoming aware of these risks once households have already entered into solar agreements.

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

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

²³⁵ Alison Potter, Choice, *Survey results: Are you happy with your solar panels?* (14 December 2018) <<https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>>.

²³⁶ Alison Potter, Choice, *Survey results: Are you happy with your solar panels?* (14 December 2018) <<https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>>.

²³⁷ Alison Potter, Choice, *Survey results: Are you happy with your solar panels?* (14 December 2018) <<https://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-power-survey-results>>.

²³⁸ Alison Potter, Choice, *Dodge the shonks* (10 April 2018) <<https://www.choice.com.au/home-improvement/energy-saving/solar/articles/how-to-find-a-good-solar-installer>>.

²³⁹ Consumer Affairs Victoria, *About us* (31 January 2019) <<https://www.consumer.vic.gov.au/about-us>>.

²⁴⁰ ACL s 274.

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

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

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

- a. *fit for all the purposes for which goods of that kind are commonly supplied; and*
- b. *acceptable in appearance and finish; and*
- c. *free from defects; and*
- d. *safe; and*
- e. *durable;*

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

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

If the person wanted to prove there was a breach of a voluntary warranty, the person would again need to prove, with evidence, the nature and extent of the product fault and address any other terms and condition of the voluntary warranty. For example,

sometimes voluntary warranties will exclude certain faults and the retailer will claim they do not have to pay to fix those faults.

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

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

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

²⁴¹ ACL s 54.

²⁴² Clean Energy Council, *Solar Retailer Code of Conduct* (October 2015), 6 and 17 <<http://www.solaraccreditation.com.au/dam/solar-accred/retailers/code-of-conduct/Solar-PV-Retailer-Code-of-Conduct/Solar-Retailer-Code-of-Conduct-Sept-2015.pdf>>.

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

The Clean Energy Regulator (who administers the commonwealth Small-scale Renewable Energy Scheme) is also in the process of rolling out its Solar Panel Validation Initiative. This initiative seeks to address the issue of sub-standard and counterfeit solar panels in the Australian market²⁴⁴ following the identification of non-genuine Canadian Solar branded rooftop solar panels that had been installed across New South Wales and Queensland in 2016.²⁴⁵ The initiative enables solar installers to scan a barcode on the panels to check them against a database of approved solar panel manufacturers. Both the Solar Panel Validation Initiative and the CEC Code suffer from the same limitation. They are both voluntary schemes that do not have 100% sign up across the solar industry.

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

In relation to an appropriate warranty period, a minimum of a 10-year whole system warranty is proposed. Technical information provided to

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

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

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

²⁴³ Ibid 6.

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

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

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

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

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

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

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

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

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

Thirdly, a whole system statutory warranty would reduce the complexities currently existing for people trying to claim on a warranty or their ACL rights. Solar systems are made up of separate products but are sold as a single integrated and complex system. Often, each component on a solar system comes with a different warranty. For example, in case study 5, the solar retailer tried to argue that the solar panels Henry purchased had a five year warranty but the inverter had a one year warranty (this argument was not accepted by the tribunal member). As was the case with Henry, having separate warranties can be misleading and create further complexities for people trying to navigate their contractual rights and trying to have a technical fault remedied. Having a whole system statutory warranty against retailers would also reduce the amount of blame shifting that Consumer Action currently sees when people try to resolve their complaints directly with their solar retailer. An analogy can be made to suppliers of cars who are required

to take responsibility for the whole vehicle and are not allowed to shift responsibility to the suppliers of component parts. Retailers of solar systems should be no different.

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

RECOMMENDATION 4:

Introduce a 10-year whole system product statutory warranty.



5.6 Lack of Affordable Dispute Resolution

There is a growing need for an affordable dispute resolution body to hear solar related disputes. Case studies⁴ and ⁵ illustrate some of the difficulties with the current avenues available for solar dispute resolution. Individuals can go through the solar retailers' internal dispute resolution but many of Consumer Action's clients have had negative experiences with some retailers who engage in buck-passing.

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

Unfortunately, the experiences of Martha, Greg and Henry are not unique. While VCAT was established to create an accessible, efficient, cost efficient and independent judicially governed tribunal,²⁵¹ VCAT can be a cumbersome and intimidating forum for many consumers. It can also be prohibitively expensive when expert reports are required. Consumer Action has presented similar stories but in the context of motor car disputes²⁵² while campaigning for a motor car dispute resolution service which would provide a free technical vehicle assessment.

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

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

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

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

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

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

²⁵³ Above n 250, 244.

²⁵⁴ Above n 250, 287.

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

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

The Review then went on to explain five factors identified by the Productivity Commission that indicate the suitability of an ombudsman scheme for a particular industry. Four out of those five factors apply to the retail solar industry. They are: essential services are involved; there is significant asymmetry

of information, such that consumers would have difficulty asserting their rights; and there is a large number of disputes.²⁵⁶

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

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

Electricity retailers are required by law to have a licence²⁶⁰ and consequently they are required to be a participant of EWOV. Solar panel retailers and installers, however, are not required by law to have a licence or else have been legally exempted from the licence requirement and therefore are not required to be part of an alternative dispute resolution scheme. While it may be theoretically possible for solar panel retailers and installers to voluntarily enter into an agreement to be bound by EWOV, it appears they have not done so.

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

²⁵⁵ Above n 250, 233.

²⁵⁶ Above n 250, 215.

²⁵⁷ EWOV, *Energy and Water Ombudsman (Victoria) Charter* (14 March 2018), cl 2.3 <https://www.ewov.com.au/files/ewov_charter_140318.pdf>.

²⁵⁸ EWOV, *Constitution of Energy and Water Ombudsman (Victoria) Limited* (17 May 2010), cl 8.1 <<https://www.ewov.com.au/files/ewov-constitution.pdf>>.

²⁵⁹ Ibid cls 2.1 (definition of ‘participant’ and ‘contracting participant’) and 7.2.

²⁶⁰ Electricity Industry Act 2000 (Vic) s 16.

²⁶¹ John Thwaites, Patricia Faulkne and Terry Moulder, Independent Review into the Electricity & Gas Retail Markets in Victoria (August 2017), 45 <<http://apo.org.au/sites/default/files/resource-files/2017/08/apo-nid102181-1208661.pdf>>. Also see, the number of reported solar complaints received by EWOV falling out of their jurisdiction: EWOV, *Res Online* 25 (November 2018) <<https://www.ewov.com.au/reports/res-online/201811>>.

²⁶² EWOV, Solar <<https://www.ewov.com.au/resources/videos/solar>>.

²⁶³ EWOV, *Res Online* 26 (February 2019) <<https://www.ewov.com.au/reports/res-online/201902>>.

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

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

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

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

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

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

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

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

²⁶⁴ Above n 261, 45.

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

²⁶⁶ Ibid 16.

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION 5:

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

5.7 Business Closures

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

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



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

CASE STUDY 6: “WILLIAM”

Illustrative of the following issues:

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

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

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

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

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

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

Throughout 2013 and 2014, the roof continued to leak. William again

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

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

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

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

Consumer Action has found it difficult to negotiate with the solar retailer. The solar retailer did not provide information (such as their insurer's reports about the damage), did not provide timely responses to communications and communicated with Consumer Action in a vague manner that lacked transparency. For example, after

Consumer Action had discussions with some representatives of the solar retailer, they were later told that those representatives did not have authority to hold discussions and make decisions on behalf of the solar retailer. The solar retailer's position in relation to whether they are responsible for the damage to William's roof or whether the installer is responsible has also changed throughout Consumer Action's dealings with them.

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

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

Again, we are not the only ones who have noticed this problematic trend. LG Solar, who sell both residential and commercial solar, have recently published on their website a list of over 690 solar installation companies who have had a change in trading conditions, gone into liquidation or stopped trading between 1 March 2011 and 31 January 2019.²⁷⁰ LG says the list was compiled from ASIC records. LG calculates that if each company operated for 4 years and completed 250 installations a year then there are 650,000 solar 'orphans' in Australia. While Consumer Action is unable to validate these calculations, it is concerning that so many companies in the solar retail industry are going out of business, undoubtedly leaving many people with worthless warranties and an inability to enforce their ACL rights. Consumer advocacy group, CHOICE, has also recently reported on the issue of solar companies going out of business noting that of all the member enquiries its consumer advisory service receives, at least 10% of these involve companies that have liquidated, 'leaving the member with a faulty system and little recourse.'²⁷¹ The trend has led CHOICE to, like LG, also hypothesise that there may be hundreds of thousands of solar panel 'orphans' across Australia.²⁷²

This story is not new, however. Other organisations have been reporting on the liquidation trend for several years, including news outlets²⁷³ and other businesses in the industry.²⁷⁴ Ironically, one of the solar retailers that warned potential customers against buying solar products auctioned off when solar companies fail due to 'mismanagement, competition' or 'selling poor quality equipment'²⁷⁵ is now in the process of going out of business itself.

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

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

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

Recommendation 1

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

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

²⁷¹ Alison Potter, Choice, *What to do if your solar company goes out of business*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷⁷ Cameron Ralph Navigator, *Independent Review Solar Retailer Code of Conduct* (December 2016), Clean Energy Council Solar Accreditation Reports and Statistics, 16 <<https://www.solaraccreditation.com.au/retailers/statistics.html>>.

²⁷⁸ Cameron Ralph Navigator, *Independent Review Solar Retailer Code of Conduct* (December 2016), Clean Energy Council Solar Accreditation Reports and Statistics, 10 <<https://www.solaraccreditation.com.au/retailers/statistics.html>>.

²⁷⁹ MCTA s 7(1).

²⁸⁰ MCTA ss 23, 3 (definition of 'authority').

²⁸¹ MCTA s 74(2)(b).

²⁸² MCTA s 7(1).

²⁸³ MCTA s 29(1).

²⁸⁴ Consumer Affairs Victoria, *Apply for a motor car trader's licence* (16 February 2019) <<https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/licensing/apply-for-a-licence>>.

²⁸⁵ Christopher Knaus, 'Banks may face criminal charges after final royal commission report', *The Guardian* (online), 4 February 2019 <<https://www.theguardian.com/australia-news/2019/feb/04/banks-may-face-criminal-charges-after-final-royal-commission-report>>.

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

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

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

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

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

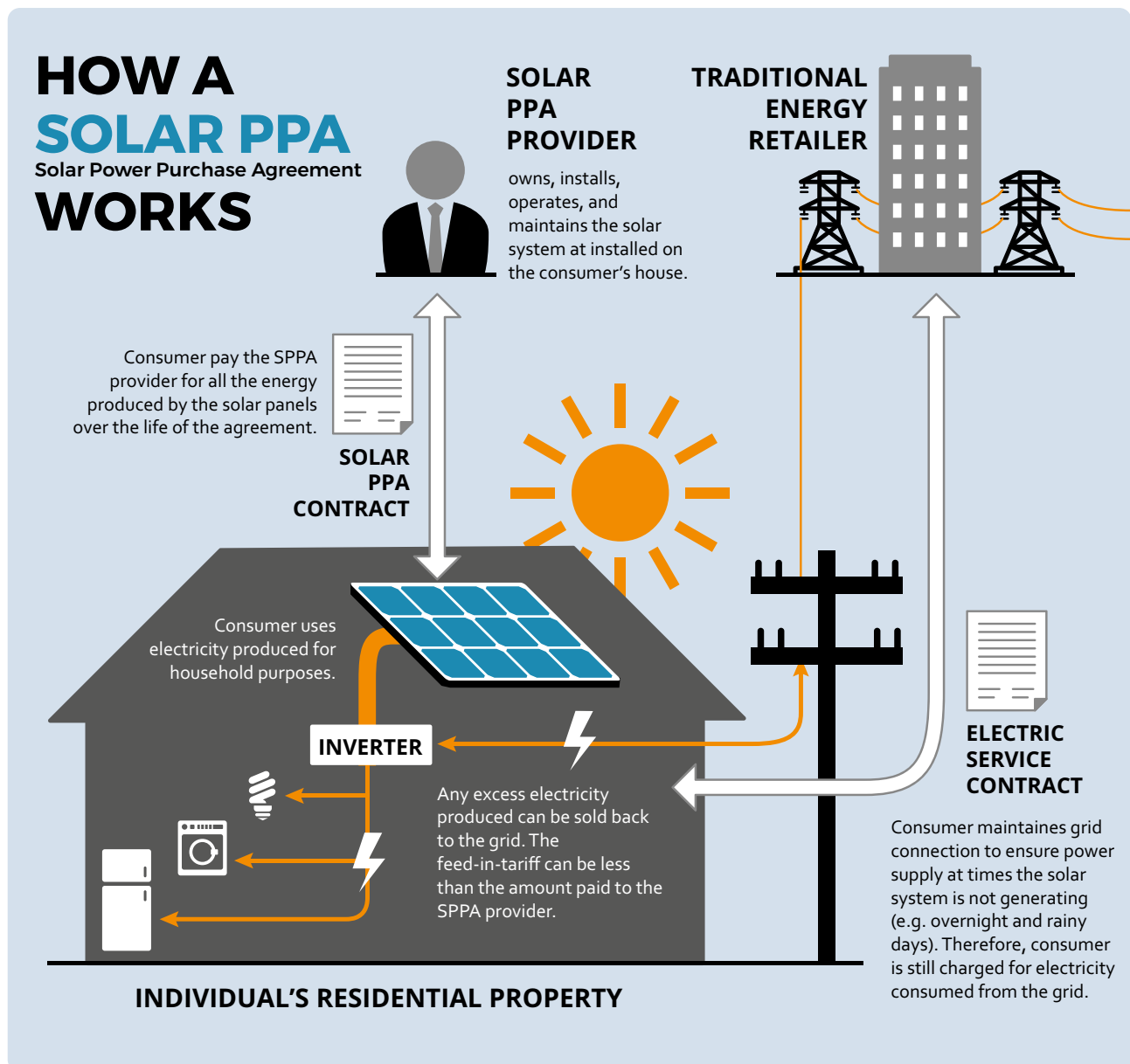
If such a scheme existed the harm and social impact of monetary loss would be reduced. Households with faulty 'solar orphans' would have an avenue for redress as would people like 'Henry', who was lumped with an underperforming rooftop solar system and an unenforceable and unpaid VCAT order.

RECOMMENDATION 6:

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

5.8 Solar Power Purchase Agreements

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



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

CASE STUDY 7: “HUIXUAN”

Illustrative of the following issues:

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

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

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

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

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

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

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

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

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

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

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

Consumer Action successfully negotiated a settlement on behalf of Huixuan, alleging under the Australian Consumer Law that the Solar Power Retailer had engaged in misleading and deceptive conduct,

unconscionable conduct, and that the supplied system was not fit for purpose.

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

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

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

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

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

the person's objective. This type of reform would also support people who are sold more panels than they need.

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION 7 AND 8:

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



06

REGULATORY OPTIONS

Regulatory Instrument and Regulator Responsibility

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

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

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



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

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

Factors in favour of CAV taking regulatory responsibilities include:

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

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

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

07

CONCLUSION

The energy market is changing but the regulatory system is dragging its feet. Through our work, Consumer Action has observed the impact of this lag. The most common and pressing issues we have seen in recent times are:

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

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

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

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



4. **A 10-year statutory warranty applying to the whole solar system should be provided by solar panel retailers;**
5. **The jurisdiction of the Energy and Water Ombudsman should be extended to include the retail sale of new energy products and services;**
6. **A solar default fund should be established to provide compensation to those entitled to compensation but unable to access it due to the insolvency of a solar retail business;**
7. **Solar power purchase agreements should be included within the ambit of any new or extended regulatory regime covering new energy products and services, including the extension of EWOV's jurisdiction to cover all new energy products.**

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

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

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

²⁹⁴ *Ibid.*



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