

21 August 2019

By email: adjudication@acc.gov.au

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

Dear Commissioners

AA1000439 New Energy Tech Consumer Code Application for Authorisation Draft Determination

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment on the Australian Competition and Consumer Commission (**ACCC**) AA1000439 New Energy Tech Consumer Code Application (**the Code**) for Authorisation Draft Determination (**Draft Determination**). Our organisation has regularly assisted vulnerable and disadvantaged consumers in Victoria with legal and financial issues arising from inadequate protections for the provision of new energy technology. We have engaged in the development of the Code to ensure that systemic issues we have identified in our work are adequately addressed for the public's benefit.

It is critical that the ACCC maintain their draft determination to approve the Code's requirement on signatories to only offer deferred payment arrangements that are regulated by the National Consumer Credit Protection Act 2009 (**NCCPA**) and National Credit Code (**NCC**) and provided by credit providers who are licensed under the NCCPA. We also attach our submission¹ and a joint letter with other consumer groups² in relation to the ACCC's earlier consultation paper on the Code's application to reiterate the need for the code to go further and require signatories not to undertake unsolicited selling.

Our more detailed comments are continued below.

About Consumer Action

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

¹ Consumer Action, 2019. *Re: AA1000439 New Energy Tech Consumer Code*. Available at: <https://consumeraction.org.au/wp-content/uploads/2019/05/190515-SUB-ACCC-NETCC.pdf>

² CHOICE, Consumer Action, COTA Victoria et al, 2019. *Re: Support for AA1000439 New Energy Tech Consumer Code*. Available at: <https://consumeraction.org.au/wp-content/uploads/2019/05/190522-ACCC-NETCC-Joint-.pdf>

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

Address Consumer Harm

Consumer Action's case work

Buy Now Pay Later (BNPL) providers have claimed that excluding their products from the deferred payment options that new energy technology providers offer to consumers is a disproportionate response to the consumer protection concerns that we and other groups have raised. However, our previous submission³, *Sunny Side Up* report,⁴ *Knock it Off*⁵ and *Power Transformed*⁶ reports have demonstrated that there are systemic issues in the provision of complex new energy technology products that have significantly harmed our clients and warrant this action.

Consumer Action regularly hears of issues with new energy technology provision with BNPL products and the consequences that result. In a six-month snapshot of our data in 2018, 11 of 21 callers to our legal advice service who mentioned one of the major BNPL providers had issues with that BNPL provider in relation to the provision of solar products. Examples of consequences people face include instances of our clients being at risk of losing their home due to the provision of unaffordable finance⁷ and instances where our clients have gone without food and medical appointments to service unaffordable debt.⁸ In these situations significant harm arises through inappropriate BNPL finance or unsolicited sales or a combination of these two systemic issues that must be addressed.

Solar providers should not facilitate finance with unlicensed businesses

We support the ACCC's draft determination to approve the Code. We also support including the prohibition of new energy technology retailers offering deferred payment through providers not licensed under the NCCPA and NCC regulation.⁹

As recognised by the ACCC in the Draft Determination, the NCCPA and NCC offer significant consumer protections, including requiring:

- Lenders to undertake responsible lending checks to ensure finance is affordable for a customer and will not put them at risk of financial hardship or put them at risk of bankruptcy.
- Lenders to be members of the Australian Financial Complaints Authority.
- Lenders to provide product information disclosures.

While some BNPL providers may voluntarily undertake affordability checks, provide information disclosure and join external dispute resolution schemes, BNPL are not required to do so. BNPL providers also don't have as strong an incentive to comply with a resolution decided by an external dispute resolution scheme where they are not

³ Consumer Action, 2019. *Re: AA1000439 New Energy Tech Consumer Code*. Available at: <https://consumeraction.org.au/wp-content/uploads/2019/05/190515-SUB-ACCC-NETCC.pdf>

⁴ Consumer Action, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*. Available at: <https://consumeraction.org.au/20190404-sunny-side-up-report/>

⁵ Consumer Action, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*. Available at: <https://consumeraction.org.au/knock-it-off/>

⁶ Consumer Action, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*. Available at: <https://consumeraction.org.au/power-transformed-2/>

⁷ *Ibid*, p.22

⁸ Consumer Action, 2019. *Re: AA1000439 New Energy Tech Consumer Code* p.2 & Consumer Action, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria* p.29, 36

⁹ ACCC, 2019. *Draft Determination; Application for authorisation AA1000439*, p.16

required to be a member. Even if BNPL providers do become a member of an external dispute resolution scheme, this will be a very limited form of consumer redress as the scheme will be largely unable to resolve complaints about affordability, for example, where rules relating to affordability do not apply to the sector.

The adoption of the Code is intended to result in greater protections for consumers. Allowing finance providers that fall outside the remit of the NCCPA will undermine this aim and allow systemic issues causing significant consumer harm to continue to arise.

Inadequate protections for BNPL products

Consumers who use BNPL products do not have the same protections as products regulated by the NCCPA. The fact that BNPL arrangements are regulated by the ASIC Act and ASIC's product intervention powers (**PIP**), does not afford people who use these products additional protections. This is because ASIC has not, and has not indicated an intention to, use the PIP in relation to BNPL products.

The intention of the PIP is to give ASIC the capability to make targeted interventions when financial products are causing significant consumer detriment. Thus, while the PIP does have the potential to intervene in products such as BNPL arrangements this is not the same as offering consumers anywhere near the same levels of protection and oversight as the NCCPA provides. The PIP legislation specifically limits ASIC from requiring a person to hold a credit licence or join an external dispute resolution scheme.¹⁰ Similarly, the ASIC Act does not provide the same level of regulatory oversight as the NCCPA does for credit products.

The number of people using BNPL arrangements underscores the importance of ensuring these consumers are protected by Australia's credit laws. The possibility of this transition has not been ruled out by BNPL providers. Flexigroup, a BNPL provider who estimate they have provided deferred payment arrangements for 10 per cent of installed grid connected solar systems in Australia,¹¹ has recently publicly indicated that "it is open to considering the national credit code."¹²

Complying with the NCCPA should not diminish the number of individuals taking up this financing arrangement where it is appropriate to do so, but will instead ensure that BNPL arrangements are safe, suitable for an individual's circumstances and give them rights should their situation change or if things go wrong. It would be reasonable to assume that consumers who opt to use a deferred payment model when purchasing solar panels do not have funds available to pay for the total costs of the system up front. The protections in the NCCPA, which include obligations to carry out responsible lending assessments, are necessary to ensure payment arrangements are suitable and sustainable. This will reduce the financial harm we see occurring to our clients who use finance arrangements that are unsuitable and/or unregulated.

ASIC's study of BNPL reported that users found that the products allowed individuals to spend more than they otherwise would and to buy things they otherwise might not have.¹³ Consumer Action's casework experience confirms this, and our April 2019 report on solar panels and consumer protection identifies questionable sales techniques used by door-to-door solar panel merchants who facilitate finance through BNPL providers.¹⁴ These practices include:

¹⁰ Section 1023D(4)(b), Corporations Act 2001

¹¹ As quoted by the ACCC in this Draft Determination

¹² Atkin, M. 2019, August 15. Calls for greater regulation of 'buy now pay later' services like Afterpay and Zip Pay. *ABC News*. Retrieved from: <https://www.abc.net.au/news/2019-08-15/buy-now-pay-later-services-regulation-afterpay-complaints-zip/11416996>

¹³ ASIC, 2018. *REP 600 Review of buy now pay later arrangements*, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-600-review-of-buy-now-pay-later-arrangements/>

¹⁴ Consumer Action, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*. Available at: <https://consumeraction.org.au/20190404-sunny-side-up-report/>

- inappropriate or unaffordable finance being offered to purchase solar systems;
- misleading and high-pressure sales tactics in the context of unsolicited sales; and
- a lack of affordable dispute resolution when things go wrong.

ASIC's BNPL report also expressed concern that these products may pose a risk of overcommitment to some consumers and sometimes cause inflated prices for consumer goods. It noted that one in six consumers reported difficulty in meeting payments. It pointed out that there was a particular danger in the 23 per cent of cases where consumers used credit cards to pay these debts, thus incurring substantial interest charges.¹⁵

Individuals that purchase solar panels or other new energy technology of significant value for their homes, and pay through deferred payment models, are also at risk of insolvency if something goes wrong and they find themselves unable to keep up with repayments. The Senate Economics References Committee inquiry into financial products heard evidence that BNPL funding was present in more than 20 percent of insolvencies.¹⁶ Individuals who install solar panels are more than likely to own their home and that asset would be at risk if the BNPL debts were unable to be serviced and creditors took bankruptcy action to recoup the debt.

Consumers will still have choice without BNPL

Consumers will still have choice if BNPL deferred payments are not offered by signatories to the Code. There are hundreds of licensed providers that consumers can engage to access new energy technology. Also, the Code only prevents new energy technology providers from offering consumers non licensed deferred payment options but does not prevent a consumer making these arrangements independently of the provider. If anything, BNPL being offered at point of sale by a new energy technology provider gives consumers less choice as salespeople are incentivised to encourage a consumer to only consider that deferred payment option. This is the case particularly in a high-pressure unsolicited sales situation where a consumer has little ability to compare what options are most suitable to their situation.

Competition and innovation

The availability and inadequate regulation of BNPL products has an anticompetitive impact on licensed lenders engaging in the provision of new energy tech. This is because licensed lenders must devote resources to satisfying regulated standards while BNPL providers do not. These standards include important protections such as the requirements to conduct themselves efficiently, honestly and fairly; requirements to lend responsibly; requirements to offer assistance in instances of financial hardship and the requirement to be part of external dispute resolution scheme. BNPL providers not having to comply with these requirements creates an uneven playing field impacting fair competition. The Code should be approved as it was proposed to counter this anticompetitive impact that is not for the public benefit.

Also, the prohibition of BNPL would not impact on effective innovation for public benefit in this sector. If innovation is possible because of a lack of appropriate protections, then this innovation inappropriately puts risk on consumers that is not in their interests or of public benefit.

¹⁵ ¹⁵ ASIC, 2018. *REP 600 Review of buy now pay later arrangements*, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-600-review-of-buy-now-pay-later-arrangements/>

¹⁶ Senate Standing Committees on Economics, *Senate Inquiry into Credit and financial services targeted at Australians at risk of financial hardship*, 9 November 2018, p 69

Despite claims by providers that they offer zero-interest finance for goods, ASICs report highlighted that sometimes the cost of finance in BNPL arrangements is bundled into the prices offered for goods where the price is over \$2,000. ASIC also stated that these high prices can be misleading to consumers as they affect consumer's ability to make an informed decision about the costs of deferred payment arrangements.¹⁷

Where consumers are unaware of the added costs for BNPL when purchasing complex and confusing new energy tech products then the use of BNPL is not for public benefit. BNPL products may be resulting in the retail prices offered to customers being greater than the value without this being disclosed. This may mean that all purchasers of the new energy tech providers who offer BNPL deferred payments are paying more for the goods than their value whether they do or do not take up the offer of BNPL deferred payments. This is not of public benefit and anticompetitive as this lack of transparency distorts price signals in a complex marketplace where consumers are likely to base their understanding of product's value through pricing.

Credit laws require that vendors of goods (like a new energy tech retailer) conducting unsolicited sales and offering credit to hold a licence.¹⁸ The effect of this provision is that we do not see vendors of goods offer licensed credit as part of an unsolicited sale, as they do not want to get a credit licence. This increases competition as consumers subject to an unsolicited sale are protected to freely compare finance options available to them as opposed to just a limited choice of one provider that is common in the context of an unsolicited sale. BNPL are not subject to these regulations and are therefore anticompetitive and not of benefit to the public where offered in such unsolicited sales. In these scenarios they may be the sole choice presented to a consumer who is being pressured not to compare all options that may be available and better suit their needs.

The ACCC must also consider the relevance of recommendation 1.7 of the Royal Commission into Misconduct in the Banking, Superannuation and Finance Industry:

*The exemption of retail dealers from the NCCP Act should be abolished.*¹⁹

The Federal Government has supported this recommendation. When it proceeds to implement the recommendation, vendors like new energy technology retailers offering appropriately licensed finance at the point of sale will either have to be licensed or change their sales process to ensure they only refer to licensed credit providers and take no active part in the application process.

Commissioner Hayne made this recommendation in recognition that vendors are incentivised to have finance approved in order to complete a sale and are therefore incentivised to portray a consumer's financial position in a way that will warrant loan approval. Case studies in the commission provided sufficient evidence that vendors do not always record the true financial circumstances of consumers.²⁰

The recommendation demonstrates that the same issue is likely to arise in the provision of BNPL arrangements at the point of sale for new energy technology where there are even less requirements for salespeople to check that finance is affordable. Once implemented, the changes will also create a competition issue. That is, where new energy technology providers offer deferred payment through licensed finance providers, they will be significantly disadvantaged by having to utilise more resources in complying with appropriate protections when competing with other providers utilising BNPL with inadequate protections. The ACCC should approve the Code's requirement for signatories to only offer licensed finance to counter the competition issues that we have identified.

¹⁷ ASIC, 2018. *REP 600 Review of buy now pay later arrangements*, p.10-11 available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-600-review-of-buy-now-pay-later-arrangements/>

¹⁸ 23(4) National Consumer Credit Protection Regulations 2010

¹⁹ Hayne, K. 2019. *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Volume 1, p.88

²⁰ *Ibid*, p.86.

The new energy technology industry should not conduct unsolicited selling

We reiterate the points from our previous submission that called for a ban on unsolicited sales by retailers who are signatories to the Code.

- The requirement that businesses who join the code 'avoid high pressure sales tactics'²¹ is vague and only provides guidance on avoiding problematic sales practices. It does not commit those who join the code to not conduct high-pressure sales.
- An additional requirement must be added to the Code, which stipulates that businesses who join will not conduct unsolicited sales. This will prevent circumstances where power imbalance, information asymmetry and high-pressure sales tactics lead to bad outcomes for consumers from arising in the first place.

Our *Sunny Side Up* and *Knock it off* reports both point to systemic issues and consumer harm caused by high pressure sales of complex solar products to Victorian households. *Knock it off's* findings included:

- That the review of the Australian Consumer Law identified that the consumer detriment caused by harmful unsolicited sales is significant and persistent.
- That the "cooling off" protection for unsolicited sales was largely ineffective.
- That vulnerable consumers including elderly, culturally and linguistically diverse and Aboriginal consumers are disproportionately affected by harmful unsolicited sales.
- That unsolicited retail sales of solar panels were causing significant consumer harm with access to finance that is often inappropriate and consumer's lack of understanding about these products and appropriate costs as major driving factors.²²

Our *Sunny Side Up* report also identified misleading and high-pressure sales tactics in the context of unsolicited sales of solar as being among the most pressing and common issues in the provision of solar for households in Victoria.²³

As new energy technologies, different to solar but similarly complex and costly, are introduced to the market these products are likely to present similar issues for consumers, in addition to the existing systemic issues with the provision of solar. Consumers should have the ability to compare options about new energy options or simply achieving their objective in relation to energy consumption.

For instance, in many situations consumers interested in accessing new energy technology to save costs may be better off switching to a cheaper tariff or installing insulation in their roof. In other situations, those seeking to consider their options for lowering the carbon emissions from their energy consumption may be better off changing to 'green tariff' or implementing energy efficiency measures.

²¹ ACCC, 2019. *Draft Determination; Application for authorisation AA1000439*, Annexure – New Energy Tech Consumer Code, p.6.

²² Consumer Action, 2017. *Knock it off! Door-to-door sales and consumer harm in Victoria*, p.68. Available at: <https://consumeraction.org.au/knock-it-off/>

²³ Consumer Action, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*, p.5. Available at: <https://consumeraction.org.au/20190404-sunny-side-up-report/>

It must also be noted that unsolicited selling is in no way necessary to increase interest and access to solar or other new energy technology products. Consumers are already considering or investing in this technology. The June 2019 Energy Consumers Australia Consumer Sentiment Survey showed that around a third of consumers surveyed across Australia were considering or had already invested in battery technology and that over half were considering or already had rooftop solar panels.²⁴ Solar panels, batteries and solar hot water systems have also been proven popular as increasing their provision in households was a flagship election policy of a Victorian government recently re-elected with a strong majority.²⁵ Households in Australia have already invested in solar and other new energy technology or are considering doing so. Households in Australia do not need unsolicited and high pressure selling as it drives harm. They also do not need to be made aware of the technology given the high awareness that already exists in relation to solar.

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

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

²⁴ ECA, 2019. *Energy Consumer Sentiment Survey June 2019*, p.34

²⁵ Department of Premier, 2018 September 11. *Cheaper Electricity with Solar Batteries for 10,000 Homes*. Retrieved from: <https://www.premier.vic.gov.au/cheaper-electricity-with-solar-batteries-for-10000-homes/>