

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Outline of Submissions

File Number: ACT1 of 2019

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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

DEPUTY REGISTRAR

Dated: 01/06/2020 4:37 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2019

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

FLEXIGROUP LTD (ACN 122 574 583)

Applicant

CONSUMER ACTION LAW CENTRE'S

OUTLINE OF SUBMISSIONS

A INTRODUCTION AND SUMMARY 3

A1 ISSUES 3

A2 CALC'S EVIDENCE 7

B RELEVANT LEGAL PRINCIPLES 8

B1 WEIGHING OF BENEFITS AND DETRIMENT – BROADLY DEFINED 8

B2 THE DISCRETION TO AUTHORISE AND TO IMPOSE CONDITIONS 10

C BACKGROUND 11

C1 FEATURES OF BNPL FINANCE 11

C2 DIFFERENCES BETWEEN REGULATED CREDIT AND BNPL 13

C3 THE MARKET FOR SOLAR PANELS AND OTHER NET PRODUCTS 14

C4 THE DEVELOPMENT OF THE NET CODE 17

D PARTICULAR CONSUMER PROTECTION ISSUES RAISED BY BNPL IN THE SOLAR / NET MARKET 23

D1 EVIDENCE OF CONSUMER HARM 23

D2 CONSUMER CASE STUDIES 24

D3 CALC SOLAR PANEL SURVEY 31

D4 CONSUMER COMPLAINTS DATA 33

D5 SOLAR PANELS / NET PRODUCTS ARE THEMSELVES A SIGNIFICANT FINANCIAL INVESTMENT 39

D6 NO RESPONSIBLE LENDING OBLIGATIONS 42

D7 OFFERING BNPL IN UNSOLICITED SALES 45

D8 SURCHARGING OR DIFFERENTIAL PRICING 48

D9 BNPL CONCEALS BOTH THE TRUE COST OF THE NET PRODUCT AND THE TRUE COST OF FINANCE, AND SO DISTORTS BOTH MARKETS 53

D10 CUSTOMERS WHO PAY THE UNDISCOUNTED "BNPL PRICE" UP FRONT: A FURTHER MANIFESTATION OF CONSUMER DETRIMENT 55

E NET CODE SIGNATORIES SHOULD NOT BE PERMITTED TO OFFER UNREGULATED CREDIT AT ALL 56

E1 BNPL IS A SIGNIFICANT SOURCE OF PUBLIC DETRIMENT GENERALLY 56

E2 THE DETRIMENT ASSOCIATED WITH BNPL IS EXACERBATED IN THE NET MARKET 59

E3 CLAUSE 25 AND THE CL A7 TRANSITIONAL PROVISION 61

E4 THERE IS NO "SUBSTANTIAL EQUIVALENCE" 65

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

Prepared by (name of person/lawyer) Ursula Noye

Law firm (if applicable) Consumer Action Law Centre

Tel 03 9670 5088 Fax 03 9629 6898

Email ursula@consumeraction.org.au

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

E5	THE PROPOSED BNPL CODE.....	66
E6	APPLICATION OF PRINCIPLES.....	70
F	NET CODE MERCHANTS SHOULD NOT BE PERMITTED TO OFFER UNREGULATED CREDIT FOR UNSOLICITED SALES	72
G	CLAUSE 25 SHOULD NOT BE CONFINED TO “LOW CHARGE” BNPL	74
ANNEXURE A	CALC’S PROPOSED CONDITIONS OF AUTHORISATION	77
ANNEXURE B	SUMMARY OF CALC’S EVIDENCE	78
ANNEXURE C	RESULTS OF CALC SOLAR PANEL SURVEY	79

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

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

D1 Evidence of consumer harm

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

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

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

D2 Consumer case studies

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

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

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

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

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

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

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

59

87. On 8 May 2018:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰ Foley Affidavit, [6]-[7].

⁷¹ Foley Affidavit, [8].

⁷² Foley Affidavit, [10]-[12].

⁷³ Foley Affidavit, [13]-[18].

⁷⁴ Foley Affidavit, [17].

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

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

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

⁷⁵ Foley Affidavit, [20], Annexure JF4.

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

⁷⁷ Thompson Affidavit, [8](a).

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

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

⁷⁸ Thompson Affidavit, [8](b)-(d).

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

⁸⁰ Thompson Affidavit, [8](f).

⁸¹ Thompson Affidavit, [8](j)-(l).

⁸² Thompson Affidavit, [8](m).

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

D3 CALC Solar Panel Survey

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

⁸³ Thompson Affidavit, [24].

⁸⁴ Thompson Affidavit, [24]-[29].

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

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

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

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

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

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

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

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

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

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

D4 Consumer complaints data

CALC Consumer Complaints Data

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

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

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

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

⁹³ Second Foggo Statement, exhibit DF-4.

⁹⁴ ASIC Report 600, at [36]-[38].

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

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

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

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

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

134. Between 1 January 2016 and 14 April 2020, CALC's legal practice received requests for assistance in **146 discrete matters** involving problems with one or more BNPL providers.⁹⁸
135. Of those matters, **108 (73%) related to Flexigroup or Brighte** – the two most prominent BNPL providers operating in the NET market. Flexigroup alone accounted for **103 complaints, or two-thirds of all of the total complaints** against BNPL providers.
136. By way of comparison, the next largest target of complaints was Afterpay, with 21 complaints. Although Afterpay has a reported customer base that is 3.5 times larger than that of Flexigroup,⁹⁹ it is only the subject of 20% as many complaints to CALC. In CALC's submission, that is in part a function of the fact that Flexigroup operates in markets for larger and more complex purchases, such as solar panels,¹⁰⁰ which tend to magnify the risks of harm caused to consumers by BNPL finance.
137. **BNPL and unsolicited sales in the solar/NET market are significant sources of complaints:**

138. There is substantial overlap between requests to CALC for assistance dealing with

⁹⁶ Punshon Data Affidavit, [10].

⁹⁷ Punshon Data Affidavit, [15]-[16].

⁹⁸ Punshon Data Affidavit, [24].

⁹⁹ Punshon Data Affidavit, [29].

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

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

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

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

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

External Complaints Data

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

¹⁰¹ Punshon Data Affidavit [33]

¹⁰² Punshon Data Affidavit, [39]

¹⁰³ Punshon Data Affidavit, [39]

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

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

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

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

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

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

¹⁰⁴ Noye Data Affidavit, [22].

¹⁰⁵ Noye Data Affidavit, [28].

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

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

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

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

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

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

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

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

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

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

147. Flexigroup's Merchant Compliance Action Process:

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

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