

MARCH 2021

THE NEW ENERGY TECH CONSUMER CODE

REPRESENTING THE INTERESTS OF
CONSUMERS AT THE AUSTRALIAN
COMPETITION TRIBUNAL

ABOUT

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

ACKNOWLEDGEMENTS

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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.

EXECUTIVE SUMMARY

The New Energy Tech Consumer Code (**NET Code**) is a voluntary industry code of conduct, which sets practice standards for the sale of New Energy Technology (**NET**) products, systems, and services by retailers to residential and small business customers. Primarily, the NET Code applies to solar panel sales and installation.

The process for drafting the NET Code began in August 2017, when the COAG Energy Council wrote to industry groups to collaborate with Energy Consumers Australia (**ECA**) to develop an industry code for 'behind-the-meter' products and services. After two years in development, the NET Code was authorised by the Australian Competition and Consumer Commission (**ACCC**) on 5 December 2019. On 30 December 2019, buy now pay later (**BNPL**) provider Flexigroup Limited (**Flexigroup**) applied to the Australian Competition Tribunal (**the Tribunal**) for the authorisation to be reviewed.

The issues in dispute concerned the ACCC's authorisation of two clauses in the NET Code as it then was which concerned a prohibition on unsolicited sales of NET products with BNPL (**unsolicited sales provision**) and limitations on the unsuitable offering of BNPL to purchasers of NET products (**responsible lending**

provision). Flexigroup sought to remove the unsolicited sales provision, and weaken the responsible lending provision. Consumer Action Law Centre was granted leave to intervene in the proceeding to represent the interests of consumers.

The Tribunal hearings commenced on 9 June 2020. In our submissions, we made the case that solar panel retailers offering BNPL finance have engaged in predatory unsolicited sales practices, signed people up to unaffordable finance arrangements and inflated the cost of solar panels. In essence, we argued that solar panel retailers that commit to the NET Code should not be using this type of unregulated finance, or engaging in unsolicited selling.

The Tribunal's determination was delivered on 15 September 2020.¹ In its determination, the Tribunal concluded that the two clauses under consideration were "likely to generate significant public detriments"² and that the NET Code be amended to remove these provisions. The Tribunal's reasoning was that given the popularity of BNPL finance among purchasers of NET products, they believed the evidence of material consumer harm related to BNPL finance presented was insufficient to justify restricting the

availability of BNPL finance for NET products. The Tribunal was also of the view that, essentially, the existing unsolicited sales laws sufficiently protect consumers.

We consider the decision is a missed opportunity to strengthen protections against consumer harm in the NET industry. The Tribunal concluded that other consumer protection provisions in the NET Code, along with strengthened disclosure obligations and more prominent mention of cooling off periods would offset potential consumer harm.³ However, our previous experience and behavioural economics research has shown these measures to be inadequate,⁴ meaning people purchasing NET products are still exposed to potential harm.

Following the Tribunal's decision, we have produced this report to document our experience of representing the interests of consumers at the Tribunal. We reflect upon the impact of our involvement, on what worked well, what challenges we faced and where we go next to ensure stronger consumer protections are in place within the NET industry.

In summary, this report concludes that:

- Competition policy processes, such as authorisation determinations, should adopt a broader understanding of 'public benefit' that might allow greater consideration of consumer vulnerability and the experiences of disadvantaged consumers. Our position is that determinations should not just be derived from an economic cost-benefit analysis at the macro level. Public benefits are achieved when all consumers are protected and empowered, not just those that

are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them.

- It is difficult, if not impossible, for consumer advocacy organisations to present evidence that satisfies Tribunal processes, given our reliance on the experience of individual consumers that seek assistance as the basis of our evidence. The Tribunal will prefer industry or market-wide data.
- There are challenges with industry codes of conduct as a vehicle to enhance consumer protection in a way that significantly impacts conduct and behaviour in a market. Review processes can be used by industry to challenge effective consumer protections.
- Nevertheless, there is value of the 'voice of the consumer' being before regulatory processes such as authorisation determinations. Involvement in these processes can be leveraged in other ways, including through broader advocacy for market or regulatory reforms that promote the consumer interest.

We would like to take this opportunity to thank ECA for supporting our involvement in the Tribunal proceeding. Despite the outcome, we maintain that it was important to take part in the proceeding to represent consumers experiencing vulnerability and disadvantage and document the consumer harms related to sales practices in the solar industry. ECA's support enabled us to better represent the consumer interest, by enhancing the substance and depth of the evidence and submissions we were able to provide to the Tribunal.



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BACKGROUND

Consumer Action involvement in NET and BNPL

Consumer Action has long campaigned for better protections for consumers using deferred payment options—BNPL products—in the solar market. As a result of assisting many individuals with their disputes with BNPL providers and solar panel suppliers, we have identified poor practices causing consumer harm. As such, we have made complaints to regulators, and advanced submissions to regulators and policy makers about the harm caused by BNPL finance in the solar market.

In addition to representing and providing legal advice to individual consumers, we have made complaints to both the Australian Securities and Investments Commission (**ASIC**) and Consumer Affairs Victoria (**CAV**) about solar panel providers using BNPL finance. We have also released three reports since 2016 recommending changes to strengthen the consumer protection regime for NET products, reduce the harm caused by unsolicited sales and improve trust and consumer outcomes

in the transforming energy market.⁵ We also wrote to the Senate Economics References Committee in 2019 detailing the harm caused by the unsolicited sale of solar panels and BNPL finance.⁶

Developing the NET Code

In August 2017, Consumer Action joined with industry associations, ECA and consumer advocacy organisations to form the Behind The Meter Working Group (**the Working Group**), which was tasked by the COAG Energy Council to develop an industry code for NET products.⁷

Between October 2017 and March 2019, the Working Group met regularly to progress the development of a draft Code with a focus on better consumer outcomes. The Working Group agreed that the Code would, among other things, clearly set out commitments to consumers and focus on good consumer outcomes.

In November 2018, the Working Group produced a draft Code for consultation. Following this, Consumer Action helped to

develop a Memorandum of Understanding about how the governance, stewardship and administration of the draft Code would be managed.

Consumer Action provided written feedback on the draft Code with recommendations to improve the effectiveness of the Code and the consumer protections it offered. Among other things, we recommended that the Code should prohibit all forms of unsolicited selling (or require an 'opt in' model), and that the Code should require signatories to only deal in regulated finance products.⁸

The NET Code was first submitted to the ACCC for authorisation in April 2019 following these consultations. In the April version of the Code, signatories were required not to offer unregulated credit such as BNPL finance. Following subsequent revisions in September and November 2019, this commitment was watered down in clause 25(a) to require that the credit provider be a 'signatory to

an industry code of conduct' that required compliance with a selection of consumer protections that apply to regulated credit.

The November version of the Code also required signatories to make 'no unsolicited offers of payment arrangements not regulated by the National Consumer Credit Protection Act (2009)' (**NCCP Act**) under clause 3(d).

On 5 December 2019, the ACCC granted conditional authorisation to the NET Code until December 2024. On 30 December 2019, Flexigroup applied to the Tribunal for a review of the ACCC's authorisation, arguing that clause 3(d) should be removed, and that clause 25(a) be amended to remove reference to specific consumer protections, and instead rely on an industry code that delivers 'substantially equivalent consumer protections to those in the NCCP Act'.⁹



CASE OUTLINE

Application and issues

On 16 March 2020, Consumer Action was granted leave to intervene in Flexigroup’s application before the Tribunal for review of the ACCC’s authorisation of the NET Code.⁹ The Tribunal sits in the position of the original decision-maker but with the benefit of all evidence submitted in the proceeding, that is, the Tribunal conducts a hearing *de novo*.

The issues in dispute concerned the ACCC’s authorisation of two clauses in the NET Code noted above (clauses 3(d) and 25(a)) which concerned a prohibition on unsolicited sales of NET products with BNPL and limitations on the unsuitable offering of BNPL to purchasers of NET products. See Consumer Action’s opening submissions, especially Part A for a background (pp.3-7) and Part E for Consumer Action’s substantive arguments (pp.56-71).¹⁰

Flexigroup applied to have these provisions struck out to ensure there were no limits on the sale of NET products with BNPL finance. Consumer Action intervened to urge the Tribunal to reinstate

an earlier version of the responsible lending provision and to maintain the unsolicited sales provision. The other parties maintained positions in between.

Parties

Consumer Action was represented by Consumer Action’s inhouse legal team, and Tom Clarke and Matthew Peckham of counsel. Consumer Action was funded by ECA to intervene and hired a paralegal to assist with the legal team’s preparation of the case. Other teams within the organisation, particularly the Policy & Campaigns team and CEO, were key supports throughout the case.

In addition to Flexigroup, represented by Clayton Utz, other parties to the application were the Authorisation Applicants (ECA, Clean Energy Council (CEC), Australian Energy Council (AEC) and Smart Energy Council (SEC)) represented by Allens, the ACCC represented by the Australian Government Solicitor, Ratesetter (a regulated financier of NET products) represented by Johnson Winter Slattery, and ASIC represented by its inhouse legal team.

Evidence and hearings

Following the hearing for the application to intervene, Consumer Action appeared at four case management hearings in May and June 2020 and at the four-day hearing. All hearings were conducted remotely on Microsoft Teams. For the trial, Consumer Action set up an internal meeting room so that the Consumer Action legal team and counsel could appear at the remote hearing together. This required significant operational support to ensure that the facilities were managed in a COVID safe manner.

The hearing was held over four days, between 9 and 12 June 2020. Consumer Action put before the Tribunal evidence of consumer harm in the form of:

- Three solicitor affidavits detailing client disputes. This evidence sought to illustrate the harm that arises from the provision of BNPL in the NET market, including through unsolicited sales, and gave real-life context to the other empirical evidence. The clients experienced hardship due to repayments on BNPL loans and experienced difficulty with their utility bills, despite being promised that solar would provide savings on their electricity.

- Two data affidavits concerning Consumer Action's internal case data and several external bodies' consumer complaints data. This evidence sought to show that BNPL and unsolicited sales in the solar/NET market are significant sources of consumer complaint.
- Four secret shopper affidavits revealing price inflation in quotes for NET purchases with BNPL finance. Surcharging was demonstrated across two thirds of quotes obtained, with the surcharging amounts being equivalent to interest rates of 4.6 percent to 11.1 percent per annum.

We also provided written opening submissions, and oral closing submissions. See Part D of Consumer Action's opening submissions for a more detailed description of Consumer Action's evidence (pp.23-38).

After the hearing, the Tribunal reserved its decision.

Both before, during and after the hearings, we regularly engaged with stakeholders including regulators, policymakers, journalists and community workers to provide updates on the proceeding.

SUMMARY AND ANALYSIS OF DECISION

Summary of decision

The Tribunal's determination was delivered on 15 September 2020 and made publicly available (in full) on 25 September.¹¹ In its determination, the Tribunal concluded that the two clauses under consideration (the unsolicited sales provision and the responsible lending provision) were "likely to generate significant public detriments."¹² The Tribunal further concluded that removal of the provisions in question would result in the NET Code delivering a net public benefit. Accordingly, the Tribunal determined that it would only grant authorisation for the NET Code if it was amended to remove clauses 3(d) and 25(a) – the clauses objected to by Flexigroup.

The Tribunal reasoned that BNPL finance was a "significant and popular" form of finance used by consumers to purchase NET products, and that the purchase of NET products using BNPL finance delivers economic benefit. The Tribunal determined that the proposed restrictions related to BNPL finance and unsolicited selling in the NET industry would therefore "generate substantial public detriments"¹³ by reducing the availability of BNPL finance and in turn reducing consumer uptake of NET products.

Central to this determination was that the Tribunal did not agree that sufficient evidence of consumer harm linked to unsolicited selling and the availability of BNPL finance for NET products was presented. Specifically, the Tribunal determined that the evidence presented by Consumer Action of consumer harm related to NET products was of "very limited value"¹⁴, except for evidence presented relating to BNPL price inflation. Outside of this, the Tribunal preferred to rely on the data it sought from finance providers as to arrears, write-offs, complaints, and hardship applications in the NET industry. Based on this industry data, the Tribunal found that rates of arrears and defaults in the NET sector were lower than for non-NET energy products.¹⁵

Where the Tribunal allowed for the possibility that unsolicited selling and the availability of BNPL finance for NET products might lead to consumer harm, it determined that the risk would be "materially reduced" by the remaining consumer protections contained in the Code. Particular focus in the determination was given to enhanced disclosure obligations under the Code, with the Tribunal suggesting that the improved availability of information would allow consumers to make

better informed choices and promote competition in the NET sector.¹⁶

Analysis of decision

Consumer Action was disappointed in the Tribunal's decision and considers it a missed opportunity to protect consumers from potential harm when purchasing NET products and also to improve consumer confidence and experiences in the NET market.

Firstly, the Tribunal applied a very narrow legal interpretation of competitive benefits rather than a broader understanding of 'public benefit'. This is evidenced by the Tribunal's contention that, "Absent significant market failure, competition can generally be relied on to promote the interests of consumers and the community at large."¹⁷ By perceiving consumers as a homogenous group who are equally served through competition, consideration of the issues such as consumer vulnerability and the experiences of disadvantaged consumers are pushed to the margins. Our position is that the weighing of benefits should not be determined by a narrow analysis focussed on economic costs and benefits at the macro level. Instead, the specific experiences of consumers experiencing disadvantage must be considered, as well as the specific protections required to negate harm. Recognition should be also given to the way in which many of us are vulnerable, including as a direct result of certain market features, such as unfair sales practices. Public benefits are achieved when all consumers are protected and empowered, not just those

that are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them.

Secondly, the Tribunal concluded that consumer protection provisions existing in the Australian Consumer Law and in the NET Code, along with strengthened disclosure obligations and more prominent mention of cooling off periods, would offset potential consumer harm due to unsolicited selling and the availability of BNPL finance. However, recent research by Consumer Action and others has shown these measures to be ineffective forms of consumer protection, meaning people interested in purchasing NET products are still exposed to potential harm.

As explored in our *Knock It Off!* report, opt-out cooling off periods do not provide the degree of protection intended. Cooling off periods are rooted in outdated economic theory based on the assumption that people are rational actors and will use the intervening period to research the product being sold, review the contract terms and conditions and withdraw if they find the product and/or contract disagreeable. This is simply not the case. Contemporary work in behavioural economics instead indicates there are several cognitive biases in play, including the endowment effect, the status quo bias and consistency theory, which together serve to make it very unlikely that people change their minds during cooling off periods.¹⁸ This is why we advocate for a ban on unsolicited sales, or at least moving to an opt-in model for purchase of NET products, to better protect consumers from harm.

Similarly, a recent report by ASIC and the Dutch financial regulator, *Disclosure: Why It Shouldn't Be The Default*,¹⁹ has evidenced the shortcoming of disclosures, and even pointed to disclosure and warnings contributing to consumer harm. For this reason, we are not confident that disclosure alone will adequately address the potential for consumer harm currently present in the NET industry.

Taken together, the Tribunal's reliance on cooling-off periods and disclosures points to a reliance on traditional, but in our view, outdated economic theory. While there has been some recognition of behavioural biases in consumer law (e.g. regulation of drip pricing or add-on products), this has arguably not extended to competition law and policy. Competition policy needs to take better account of modern behavioural economic principles when determining issues like market power and assessing public benefit.

Finally, we were disappointed by the Tribunal's view that it did not have sufficient evidence to conclude that the public benefits of extending responsible

lending obligations to BNPL providers would not exceed the public detriments that could arise. This was in circumstances where the Tribunal emphasised the role of public regulation (rather than private codes of practice) in regulating in the public interest and then indicated that ASIC was conducting a further review of that industry, which would "have more evidence before it to consider whether such an extension is warranted." It is true that it is for government to legislate and for ASIC to regulate BNPL finance, and it is equally true that it was for the Tribunal to review the authorisation of the NET Code. Ultimately, ASIC's report did not make any recommendations in relation to regulation of BNPL finance, despite the report showing evidence of consumer harm.²⁰ This is why the Tribunal's failure to engage substantively with the review of the responsible lending provision in this instance is even more of a missed opportunity to improve protection for people seeking to purchase NET products using BNPL finance.



IMPACT ACHIEVED FOR CONSUMERS

The importance of a consumer voice at the Tribunal

In addition to building on Consumer Action's past involvement in consumer policy relating to NET products, BNPL finance and the NET Code, we considered that there would be significant consumer benefit from Consumer Action intervening in the Tribunal proceeding.

The draft NET Code submitted to the ACCC (versions prior to November 2019), as noted above, included some important provisions that we had advocated for, including a prohibition on offering unregulated finance, and prohibiting unsolicited offers where BNPL is provided. The Code is expected to be mandated for solar retailers that access the Victorian Government's Solar Homes subsidy scheme, so it is likely to have take-up across the NET industry and consequent impact on Victorian consumers. We maintain our view that the wind back of those protections through the Tribunal proceeding will result in significant consumer detriment, particularly in the context of surging uptake of solar technologies.

Consumer Action's goal was to ensure the Tribunal was presented with evidence and submissions that demonstrated the public benefit of the ACCC authorisation, and the

need for additional consumer protections relating to BNPL finance and unsolicited selling. As a specialist advice and casework organisation, which represents consumers in disputes with traders, makes complaints to regulators, and which publishes reports about the poor consumer outcomes caused by this business model, we were uniquely positioned to provide evidence and submissions that no other party could.

Consumer Action's position taken to the Tribunal proceeding was substantially different to that of the ACCC, the authorisation applicants and to ASIC, which was also granted leave to intervene. The ACCC's role in a review of an authorisation application is primarily to assist the Tribunal—it was not for the ACCC to fill the role of an advocate for the interests of consumers in the way Consumer Action was well placed to do. Similarly, ASIC as an intervener assisted the Tribunal to understand its role in the regulation of financial services and products and its reporting on the BNPL industry to date. Furthermore, the authorisation applicants comprised an amalgam of merchant and consumer interests in the NET sector (the consumer interests not being specific to consumers more likely to experience vulnerability and disadvantage represented by Consumer Action). Consumer Action's participation assisted to ensure that the Tribunal's

review had evidence of the impact on consumers, especially consumers in vulnerable circumstances.

Despite the Tribunal's decision we consider that we achieved our goal of ensuring the Tribunal had before it evidence and submissions that demonstrated the public benefit of the NET Code and additional protections relating to BNPL finance and unsolicited selling. Consumer Action's counsel also provided the following reflection on the value of our involvement:

I think that Consumer Action's intervention significantly changed the nature of the debate, leading to a much greater focus on the nexus between BNPL, unsolicited sales, and complex NET products, and the harmful effect on consumers. Consumer Action's secret shopper evidence was also a powerful tool in calling into question the legitimacy of the BNPL model more generally.

Shaping a fairer system

Our involvement in the proceeding has already helped to shape a fairer system in relation to NET products and BNPL finance. In line with Consumer Action's Impact Framework,²¹ our involvement in the Tribunal proceeding has contributed to change in the following areas:

ACTIONS OF REGULATORS BEING MORE ALIGNED WITH THE INTERESTS OF VULNERABLE CONSUMERS

Most notably, our involvement in the proceedings, with our particular focus on

BNPL policy and regulation, helped to ensure that ASIC's position on BNPL was visible during the proceedings. Without our involvement, there was a risk that ASIC's position on these matters would have been less transparent, particularly after ASIC announced it was delaying its second report into the BNPL industry more broadly until after the hearings had finished.²² In its submissions to the Tribunal, ASIC raised significant concerns with the draft BNPL industry code of conduct (**the BNPL Code**), which aligned closely with the concerns raised by consumer groups in a joint submission on the BNPL Code.²³ ASIC's 'lashing' of the BNPL Code received notable media coverage.²⁴ However, we note that ASIC's position in relation to the BNPL Code was more favourable in its most recent BNPL report.²⁵

DISPUTE RESOLUTION FORUMS ARE FAIR, EFFICIENT AND ACCESSIBLE TO VULNERABLE CONSUMERS

Shortly after hearings had finished, the Energy and Water Ombudsman Victoria (**EWOV**) released its report *Charging Ahead*. The report investigated the current and likely future growth of new residential energy technology in Victoria.

Importantly, the report noted that EWOV's jurisdiction will have to change to consider NET products, such as solar technology, to 'evolve and serve customers in a more decentralised system'.²⁶ While this report was underway before the Tribunal proceeding was heard, our continued casework and advocacy representing consumer interests in the NET industry

is likely to have influenced EWOV's consideration of the issues and report.

ACTIONS OF POLICYMAKERS AND LEGISLATORS ARE MORE ALIGNED WITH INTERESTS OF VULNERABLE CONSUMERS

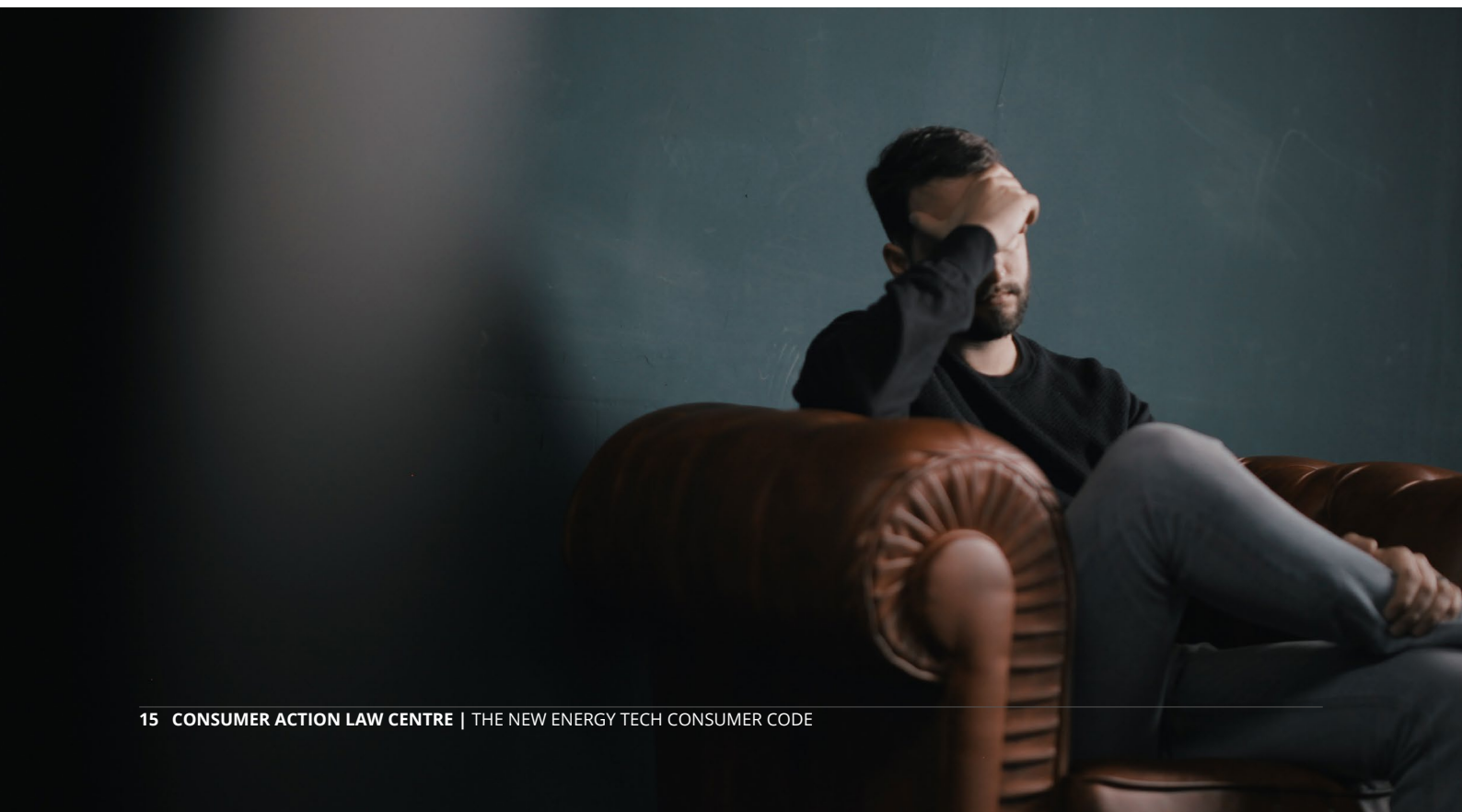
Our involvement in the Tribunal proceeding has also assisted our advocacy on the Energy Fairness Plan in Victoria. The Energy Fairness Plan, which is due to come into effect later in 2021, would ban unsolicited sales by electricity retailers. The evidence we submitted to the Tribunal has bolstered our call for this ban to be extended to all unsolicited sales of solar technology. The proceeding also helped to expose, in a public forum, the harms of a lack of monitoring and regulation of both the NET and BNPL industries.

PUBLIC IS MORE INFORMED, ENGAGED AND ACTIVE IN RELATION TO SYSTEMIC ISSUES AFFECTING VULNERABLE CONSUMERS

We generated significant media coverage about the systemic issues associated with NET products and BNPL finance during the hearings, which is discussed further below. Our potential audience reach has helped to ensure the public is more informed about these issues and their rights.

Assisting and empowering people

Our participation in the Tribunal proceeding has also contributed to consumers better understanding their rights and options, and having the confidence and capacity for self-help, as the significant media coverage we generated provided a further



opportunity to raise awareness in the public arena about consumer problems with NET products and BNPL finance.

On the first day of hearings, 9 June 2020, Consumer Action published a media release which was also distributed via

ConsumerAction's social media accounts.²⁷

The following articles surrounding the case were published in traditional media:

| DATE | TITLE | PUBLICATION | AUDIENCE REACH |
|----------|---|-----------------------------|----------------|
| 10/06/20 | Predatory 'buy now pay later' solar sales practices taken to Competition Tribunal | PV Magazine | 23,495 |
| 10/06/20 | How solar power financing is leaving customers badly burned | The New Daily | 1,541,810 |
| 12/06/20 | Solar Sellers Put New Pressure On Gullible | ChannelNews.com.au | 266,220 |
| 15/06/20 | Consumers call for BNPL protections | Banking Day | 6,446 |
| 10/06/20 | ASIC lashes buy now, pay later code of conduct | Australian Financial Review | 3,277,903 |
| 26/05/20 | Flexigroup, ACCC in fight on 'responsible lending' for solar panels | Australian Financial Review | 3,277,903 |

In total, the potential audience reach for all stories was 10,22,911 with 2,390,817 on desktop and 7,835,094 on mobile. Media coverage of the Tribunal proceedings helped to increase consumer awareness

of problematic sales practices in the solar industry and consumer rights, and showcased Consumer Action's capacity to represent consumers to engage in systemic advocacy.

Supporting an effective community sector

We have used our experience representing consumer interests at the Tribunal proceeding to help support an effective community sector, by building capacity in the sector for other organisations to similarly represent consumer interests in the future. We have done this by sharing our evidence, affidavits, submissions, and a media release, along with insights into the process. We held an information sharing and debriefing session in August 2020 with other advocates where we described the process, what we learned and what we would do differently in the

future. Ultimately, sharing our experience to upskill other community organisations helps to deliver a more sustainable and effective community sector that can better advocate for the interests of consumers in forums like the Tribunal.

Furthermore, we have demonstrated our commitment to systemic advocacy on the issues regularly raised with us by community workers, especially the unsolicited selling of solar panels. We were also able to continue our joint advocacy with other consumer groups, such as our involvement in the joint consumer submission on the draft BNPL Code, and ensure the positions outlined in those submissions had a platform at the Tribunal.



REFLECTIONS

As part of our commitment to reflective practice and continual improvement, we have reflected on what worked well during the proceedings and the challenges we faced.

We have reflected that the following worked well in relation to the proceedings:

- We consulted thoroughly prior to seeking leave to intervene in the proceedings and considered important factors such as the impact we might achieve for consumers experiencing vulnerability and disadvantage, and our ability to contribute specialist expertise and knowledge to the proceeding.
- We had strong working relationships with counsel, pro bono partners and other community legal centres, which enhanced the quality of the case we were able to put forward before the Tribunal.
- We were able to manage a complex trial during COVID-19 restrictions and work collaboratively across teams.
- Our previous legal and policy work in new energy technology, BNPL

finance and unsolicited sales was an important factor in being granted leave to intervene in the proceeding, and meant we had specialist expertise and knowledge to contribute to the proceeding.

- There was significant media coverage of the proceeding and audience reach despite the complex subject matter.
- Consumer Action obtained valuable insight into the Tribunal as a forum for strategic litigation.

While we were able to put the experiences of consumers in the public domain through our involvement in the Tribunal proceeding, we did face several challenges along the way. These included:

- Tensions caused by litigating in a forum that has an avowed economic focus and very narrow legal interpretation of competitive benefits rather than a broader understanding of 'public benefit' that might allow greater consideration of issues experienced by consumers in vulnerable circumstances. Our position is that a determination

of competitive benefits cannot involve just an economic cost-benefit analysis. Public benefits are achieved when all consumers are protected & empowered, not just those that are more capable.

- The scope of the issues under consideration changed several times throughout the proceeding.
- The broadened range of issues in dispute also led to a significant expansion of the work required on the preparation of submissions, and a great deal of pressure for the parties and the Tribunal in ensuring that the issues could be properly heard within the 4 (originally 3) days allocated for trial.
- The compressed hearing time also meant the time allocated for oral submissions and examination of witnesses was limited, meaning much more time was required for written submissions than was anticipated.
- The evidence bar set by the Tribunal was extremely high. This appeared to ignore the fact that simply by nature of their structure, community legal centres such as Consumer Action are not able to provide large-scale, economy-wide data and instead rely on data linked to their client base and case work. Our complaints represent the tip of the iceberg when it comes to consumer harm.

In reflecting on the challenges we faced during the proceedings, we have considered what this means for advocating for the

consumer interest before the Tribunal in future. Importantly, we would consider further how competition law and the 'public benefit' test interacts with the need for protection of consumers experiencing vulnerability and disadvantage more deeply before seeking to intervene in proceedings. We would argue that the relevant test is not simply an economic cost-benefit test and should allow for an outcome where standards that benefit those experiencing vulnerability meet the test, notwithstanding some costs being imposed.²⁸

Nevertheless, this does raise questions about whether the Tribunal is the most appropriate forum for obtaining improved protections for consumers, given its competition and economic focus. The impact of poor industry conduct on consumers, particularly those experiencing vulnerability and disadvantage, cannot always be quantified in terms of numbers of complaints, monetary cost or in such quantities that the Tribunal would find persuasive. Misconduct impacts individuals, families and communities in complex ways, with the effects rippling across society. Intervening in a Tribunal proceeding to stop such misconduct will not necessarily capture the moral, ethical, and societal reasons for protecting consumers.

The Tribunal proceeding also raised questions for us about the role of voluntary industry codes in delivering improved consumer protections. The resources that both consumer groups and industry have contributed to the NET Code process have been substantial, and



yet it took more than three years on from the COAG direction for the Code to be authorised for membership. On top of this, two important clauses in terms of consumer protection were removed from the Code as a result of the Tribunal proceeding. When considering the potential impact of the deleted provisions, we note that unsolicited sales featured in 73% of the consumer cases we presented in our evidence to the Tribunal.²⁸ If it existed, a prohibition on unsolicited sales alone would therefore have most likely prevented these solar purchases and the associated consumer harm experienced.

Our experience advocating for consumers at the Tribunal in relation to NET Code suggests that regulators and government remain the key paths for effectively strengthening consumer protections.

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WHERE TO FROM HERE?

The Tribunal's decision to decline to authorise the unsolicited sales and responsible lending provisions was disappointing. The NET Code represents a small step forward, albeit a missed opportunity for some more enhanced protection. This means that it is now in the hands of government to reform the law to fill the resulting gaps in consumer protections.

Despite the setback of the Tribunal decision, Consumer Action will continue our advocacy for a ban on unsolicited

sales and regulation of BNPL credit and push for law reform to address consumer protection gaps in the NET Code. The Victorian Government's Energy Fairness Plan, which has committed to banning unsolicited sales of traditional energy, presents a key opportunity to improve consumer protections in the new energy technology sector. We continue to strongly advocate for this proposed ban on unsolicited selling to be expanded to new energy products, including solar panels, in Victoria.

ENDNOTES

1. For more information, [the Tribunal's full decision is available here](#)
2. See the Tribunal's Summary of Determination
3. See Paragraph 376 of the Tribunal's decision
4. Documented in our reports Sunny Side up (2019) and Knock it off! (2017)
5. Sunny Side up (2019), Knock it off! (2017) and Power Transformed (2016)
6. For more information about Consumer Action's past involvement in NET products and BNPL finance, and development of the NET Code, see [Affidavit of Consumer Action CEO Gerard Brody](#):
7. [Submission: Consultation Draft Behind the Meter Distributed Energy Resources Provider Code](#)
8. [Flexigroup, Notice of Lodgement, Australian Competition Tribunal](#)
9. Consumer Action application for [leave to intervene and submissions relating to the application available here](#): and [here](#)
10. [CALC Outline of Submissions, Notice of Lodgement, Australian Competition Tribunal](#)
11. [The Tribunal's decision is available here](#)
12. See the Tribunal's Summary of Determination.
13. Ibid.
14. See paragraphs 199, 204 and 212 of the Tribunal's decision.
15. We note that ASIC's report on the BNPL industry suggested significantly higher percentages of customers experiencing hardship than BNPL providers have reported. BNPL providers have said that no more than 1% of their users have been in financial hardship during COVID-19 but the data in ASIC's report found that up to 20% of BNPL users surveyed indicating they cut back on, or went without, essentials (such as food) to make their BNPL payments on time. [You can read ASIC's BNPL report her](#)
16. See paragraph 396 of the Tribunal's decision.
17. See paragraph 260 of the Tribunal's decision.
18. More detail about this work is available in [Consumer Action's 2017 report Knock it off!](#)
19. [Read 'Disclosure: Why it shouldn't be the default' here](#)

20. [20-280MR ASIC releases latest data on buy now pay later industry](#)
21. [Consumer Action Impact Framework](#)
22. [Australian Financial Review: Six-month delay to buy now, pay later code of conduct](#)
23. [Consumer's Federation of Australia Joint Consumer Submission](#): Australian Finance Industry Association (AFIA) Buy Now Pay Later Code of Practice and AFIA Terms of Reference for the BNPL Code Compliance Committee
24. [Australian Financial Review: ASIC lashes buy now, pay later code of conduct](#)
25. [20-280MR ASIC releases latest data on buy now pay later industry](#)
26. [EWOV: Charging Ahead](#) p 6
27. [Consumer Action asks Tribunal to stop 'buy now pay later' solar rip offs](#)
28. [Policy Report: Social and Environmental Considerations in Part VII of the Trade Practices Act 1974](#)



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