

July 2020

THE NEW ENERGY TECH CONSUMER CODE

Representing the interests of
consumers at the Australian
Competition Tribunal

Executive summary

1. The New Energy Tech Consumer Code (**NET Code**) is a proposed 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 would apply to solar panel sales and installation.
2. The process for drafting the NET Code began in August 2017, when the COAG Energy Council wrote to industry to collaborate with Energy Consumers Australia (**ECA**) to develop an industry code for 'behind-the-meter' products and services. After 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.
3. The issues in dispute concerned the ACCC's authorisation of two clauses in the NET Code 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**).
4. The Tribunal hearings commenced on 9 June 2020. Prior to this, Consumer Action had been granted leave to intervene in the proceedings to represent the interests of consumers. 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.
5. We would like to take this opportunity to thank ECA for supporting our involvement in the Tribunal proceeding. This support enabled us to better represent the consumer interest, by enhancing the quality of the submissions and evidence we were able to present.
6. While we await the Tribunal's decision, we document our experiences of representing the interests of consumers at the Tribunal to reflect upon the impact of our involvement, on what worked well and on what challenges we faced.



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

Acknowledgements

This report is part of a work program made possible through funding by Energy Consumers Australia. The views expressed in this report do not necessarily reflect those of Energy Consumers Australia.



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.

TABLE OF CONTENTS

Executive summary	2
About Consumer Action.....	3
Acknowledgements.....	3
Background	5
Consumer Action involvement in NET and BNPL.....	5
Developing the NET Code	5
Case outline	6
Application and issues	6
Parties.....	6
Evidence and hearings	6
Impact achieved for consumers	7
The importance of a consumer voice at the Tribunal	7
Shaping a fairer system.....	8
Assisting and empowering people.....	9
Supporting an effective community sector	10
Reflections.....	10
What worked well?	10
What challenges did we face?	11
What would we do differently?	12

Background

Consumer Action involvement in NET and BNPL

7. Consumer Action has long campaigned for better consumer protections for consumers using deferred payment options – BNPL products – in the solar market. The campaign includes assisting individuals with their disputes with BNPL providers and solar panel suppliers, making complaints to regulators, and making submissions to regulators and policy makers on the harm caused by BNPL finance in the solar market.
8. 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.¹ We also wrote the Senate Economics References Committee in 2019 detailing the harm caused by the unsolicited sale of solar panels and BNPL finance.²

Developing the NET Code

9. 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.
10. 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.
11. 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.
12. Consumer Action provided written feedback on the draft Code with recommendations to improve the effectiveness of the Code and consumer protections offered. Among other things, we recommended that the Code should prohibit all forms of unsolicited selling (or require an 'opt in' model), and the Code should require signatories to only deal in regulated finance products.³
13. 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.
14. 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).
15. 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

¹ Sunny Side up (2019), Knock it off! (2017) and Power Transformed (2016)

² 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: https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0003/61905/200221-Affidavit-Gerard-Brody.pdf.

³ <https://consumeraction.org.au/submission-consultation-draft-behind-the-meter-distributed-energy-resources-provider-code/>

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'.⁴

Case outline

Application and issues

16. On 16 March 2020, Consumer Action was granted leave to intervene Flexigroup's application before the Tribunal for review of the ACCC's authorisation of the NET Code.⁵ The Tribunal sits in the position of the original decision-maker but with the benefit of all evidence submitted in the matter, that is, the Tribunal conducts a hearing de novo.
17. 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 CALC's opening submissions at **Appendix A**, especially Parts A for a background (pp.3-7) and E for CALC's substantive arguments (pp.56-71).
18. Flexigroup applied to have these provisions struck so as 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. See **Appendix B** for a table with details of all six positions.

Parties

19. Consumer Action was represented by Consumer Action's inhouse legal team, and Tom Clarke and Matt 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.
20. 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, ACCC represented by the Australian Government Solicitor, Ratesetter (regulated financier of NET products) represented by Johnson Winter Slattery, and ASIC represented by its inhouse legal team.

Evidence and hearings

21. Consumer Action put before the Tribunal evidence of consumer harm in the form of three solicitor affidavits detailing client disputes, two data affidavits concerning Consumer Action's internal case data and other external bodies' consumer complaints data, and four secret shopper affidavits revealing price inflation in quotes for NET purchases with BNPL finance. We also provided written opening submissions, oral closing submissions and submissions and requests concerning interlocutory matters. See Part D of Consumer Action's opening submissions (**Appendix A**) for a more detailed description of Consumer Action's evidence (pp.23-38).
22. 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 between 9 and 12 June 2020. All

⁴ https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0004/60934/ACT-1-of-2019-application-with-AnnexACode.pdf

⁵ Consumer Action application for leave to intervene and submissions relating to the application available here:

https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0007/61909/200221-Submissions-by-the-Consumer-Action-Law-Centre-re-application-to-intervene.pdf and https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0005/61907/200221-Application-for-leave-to-intervene.pdf

hearings were conducted remotely on Microsoft Teams. For the trial, Consumer Action set up an internal meeting room so that the 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.

23. On 12 June 2020, the case before the Tribunal closed, after four days of hearing. The Tribunal reserved its decision.
24. 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. A chronology is attached in **Appendix C**.

Impact achieved for consumers

The importance of a consumer voice at the Tribunal

25. 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.
26. The draft NET Code submitted to the ACCC (versions prior to November 2019), as noted above, included some important provisions that we 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. Any wind back of those protections through the Tribunal proceeding would result in significant consumer detriment, particularly in the context of surging uptake of solar technologies. We considered it imperative that consumers' interests were independently represented before the Tribunal to fight for those initial protections, a position we were uniquely placed to take.
27. Consumer Action's goal was to ensure the Tribunal was presented with submissions and evidence 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 has run cases, complained to regulators and published reports about the poor consumer outcomes caused by this business model, we were in a position to provide evidence and submissions that no other party could. Our evidence, as set out above, included data about consumer complaints, case examples and survey material.
28. As set out in our submissions in relation to our application to intervene in the Tribunal proceeding,⁶ Consumer Action has a real and substantial interest in the subject matter, and our casework experience and policy expertise meant that our evidence and submissions were substantially different to those of other parties.
29. Consumer Action's position and its contribution to the Tribunal proceeding was different to the ACCC and the authorisation applicants. The ACCC's role in a review of an authorisation application is primarily to assist the Tribunal – it is 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. Furthermore, the authorisation applicants comprised of an amalgam of merchant and consumer interests in the NET sector. The participation of a consumer

⁶ See https://www.competitiontribunal.gov.au/__data/assets/pdf_file/0007/61909/200221-Submissions-by-the-Consumer-Action-Law-Centre-re-application-to-intervene.pdf

advocate, such as Consumer Action, assisted to ensure that the ACT's review had a balanced reappraisal of the matters under consideration.

30. The Tribunal has reserved its decision, making it difficult at this stage to measure the impact our involvement has had on the outcome of the proceeding. However, we consider that we have achieved our goal of ensuring the Tribunal was presented with submissions and evidence 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:

While the outcome is not yet known, I think that CALC'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. CALC's secret shopper evidence was also a powerful tool in calling into question the legitimacy of the BNPL model more generally.

31. Regardless of the outcome of the proceeding, our involvement will still have significant positive impacts for consumers more broadly, as outlined below.

Shaping a fairer system

32. One of the key outcomes we intend to achieve through ECA Project 1044 'Tacking vulnerability' is ensuring Victorians can access suitable and effective NET products and services, to help people manage their energy use affordable. The measure of success for this outcome is that we have an effective regulatory regime in place for NET products and services, including a strengthened NET Code. The success of which would be demonstrated by consumer problems being quickly and effectively resolved through Consumer Action's legal services and other complaint forums.
33. As noted above, the NET 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 the requirements contained therein will have a significant impact on consumers. Intervening in the Tribunal proceeding was important to help ensure that we protected the consumer protections in the draft Code. Despite not yet having a Tribunal decision, we have already urged the regulator to a public position on the draft BNPL Code and to publish some consumer complaints data which demonstrates the harm of the model..
34. Our involvement has already helped to shape a fairer system in relation to NET products and BNPL finance. In line with Consumer Action's Impact Framework,⁷ our involvement in the Tribunal proceeding has contributed to:
- *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.⁸ 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

⁷ <https://consumeraction.org.au/wp-content/uploads/2019/03/Impact-Framework.jpg>

⁸ <https://www.afr.com/companies/financial-services/six-month-delay-to-buy-now-pay-later-code-of-conduct-20200518-p54two>

Code.⁹ ASIC's 'lashing' of the BNPL Code received notable media coverage.¹⁰ We consider that our evidence during the proceedings had a significant influence on ASIC's policy positions in relation to the BNPL Code and the use of BNPL finance in the solar industry more generally.

- *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 investigates the currently and likely future growth of new residential energy technology in Victoria. Importantly, the report noted that EWOV's jurisdiction will have to change to take into account NET products, such as solar technology, to 'evolve and serve customers in a more decentralised system'.¹¹ 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 policy-makers and legislators are more aligned with interests of vulnerable consumers* – our involvement in the Tribunal proceeding has also assisted our advocacy on Energy Fairness Plan in Victoria. The Energy Fairness Plan, which is due to come into effect later in 2020, 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, as demonstrated by positive feedback received from Victorian Minister for Energy the Hon Lily D'Ambrosio MP in private meetings. The proceeding also helped to expose, in a public forum, the harms of lack of monitoring and regulation of both the NET and BNPL industries and its obfuscation by interested parties.
- *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 ACT hearings, which is discussed further below. Our potential audience reach has helped to ensure the public is more informed about these issues.

Assisting and empowering people

35. 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 has raised awareness about problems with NET products and BNPL finance.
36. On the first day of hearings, 9 June 2020, Consumer Action published a media release which had also been distributed via Consumer Action's social media accounts. A copy of the media release is attached at **Appendix D**.¹² There were the following articles surrounding the case were published in traditional media, a copy of which is attached:

Date	Title	Journalist and publication	Audience reach
10/06/20	Predatory 'buy now pay later' solar sales practices taken to Competition Tribunal	Blake Matich, PV Magazine	23,495
10/06/20	How solar power financing is leaving customers badly burned	Killian Plastow, 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	John Kavanagh, Banking Day	6,446

⁹ <https://cclswa.org.au/wp-content/uploads/2020/05/20200506-FINAL-Submission.pdf>

¹⁰ <https://www.afr.com/companies/financial-services/asic-lashes-buy-now-pay-later-code-of-conduct-20200610-p55191>

¹¹ https://www.ewov.com.au/files/ewov_charging_ahead_report_release_june_2020.pdf p 6

¹² Also available here: <https://consumeraction.org.au/consumer-action-asks-tribunal-to-stop-buy-now-pay-later-solar-rip-offs/>

10/06/20	ASIC lashes buy now, pay later code of conduct	James Eyers, AFR	3,277,903
26/05/20	Flexigroup, ACCC in fight on 'responsible lending' for solar panels	James Eyers, AFR	3,277,903

37. 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. Copies of the relevant articles are attached at **Appendix E**. The success of our media strategy hinged on our existing strong reputation with key media outlets, but also proactive contact with interested journalists in the lead up to the hearings (February to June 2020), an organised approach to drafting and sign off of the media release, appropriate media and communications resourcing, an existing media distribution list and ongoing engagement with journalists.
38. The two AFR stories had the highest impact in terms of influencing policymakers, as they had the largest potential audience reach and were in depth pieces. The publication is also considered 'decision maker media', in that politicians and regulators regularly read and are influenced by it. The PV Magazine article has smaller reach, but has a highly targeted audience (i.e. solar panel industry) so also likely to be quite high impact in terms of aligning actions of industry with the interests of vulnerable consumers. However, The New Daily has a significant 'general public' readership, which would make that article higher impact in terms of consumers better understanding their rights and options.
39. Furthermore, bringing issues like these to the attention of decision makers shows that Consumer Action has the ability to garner national attention to issues and campaigns that matter. Unfortunately, for many decision makers these days, if an issue is not in the public arena it can be ignored because it doesn't exist.
40. We have also been able to assist consumers to engage in systemic advocacy, in particular our clients whose experiences were documented in solicitor affidavits as part of our evidence before the Tribunal.

Supporting an effective community sector

41. 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 media release, along with insights into the process. We are holding an information sharing and debriefing session in August 2020 with other advocates where we plan to describe the process, what we learned and what we would do differently. 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.
42. Furthermore, we have demonstrated our commitment to systemic advocacy on the issues raised with us by workers, such as 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, through the proceedings and ensure the positions outlined in those submissions had a platform at the Tribunal.

Reflections

What worked well?

43. We have sought feedback from staff involved in the Tribunal proceeding at Consumer Action, as well as Counsel, as part of our commitment to reflective practice and continual improvement.
44. We have reflected that the following worked well:

- We consulted thoroughly both internally at Consumer Action, and with external stakeholders, prior to seeking leave to intervene in the proceedings, and had thoughtful consideration of important factors in our decision-making process such as:
 - o The impact we could achieve for vulnerable and disadvantaged consumers
 - o Our ability to contribute specialist expertise and knowledge to the proceeding
 - o Our capacity and resources
- With the support of ECA, we were able to work closely with experienced counsel and hire a paralegal which enabled us to respond quickly and effectively to deadlines for seeking leave to intervene, and subsequent deadlines relating to evidence, submissions and responding to applications from other parties. This had a significant impact on the quality of the case we were able to put forward to the Tribunal.
- We had an excellent working relationship with Counsel, with junior counsel describing our instructing solicitors as 'approachable, very competent, and reliable, in what ultimately became a substantial and high-pressure hearing, involving very complex factual and legal issues.'
- 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 showed the importance of laying the groundwork for advocacy going forward.
- Our ability to manage a complex trial during COVID19, including overcoming challenges related to working from home and social distancing requirements.
- Our legal and policy teams worked together 'hand in glove' throughout the proceeding, and the integrated approach we took enabled us to respond promptly to issues that arose during the hearings, and increased the impact of our involvement, for example, by co-ordinating our media strategy with legal deadlines.
- Our media strategy was highly effective, leading to significant media coverage of the proceeding despite the complex subject matter.
- We were able to leverage pro bono support from partners such as Maurice Blackburn to further strengthen our evidence and submissions to the Tribunal.
- We were able to obtain a solicitor affidavit from Financial Rights Legal Centre, which was made possible by strength and trust in our relationship.
- Consumer Action cemented its role as a strategic litigator, and raised the question too of the use of the Tribunal as a forum for strategic litigation without the need to have vulnerable consumers giving evidence, in a no costs jurisdiction, which are both challenges in other fora.

What challenges did we face?

45. While we were able to achieve significant impact for consumers through our involvement in the Tribunal proceeding, we did face a number of challenges along the way. These included:
 - Tensions causing by litigating in a forum that has an avowed economic focus rather than a broader understanding of 'public benefit' that might allow greater consideration of issues experienced by vulnerable and disadvantaged consumers. This was a tension that the Tribunal members did not appear to have a strong appreciation for. Our position is that this is not just a 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. We had originally limited our submissions to matters pertaining to the two relevant clauses in the NET Code, but eventually were drawn into considering broader issues such as cross-subsidisation of solar in the energy market.
- 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. In particular, because of the additional evidence gathered, the additional issues raised, and the need for detailed written submissions to accommodate the relatively compressed hearing time, our submissions required almost 2-3 times as much work as originally anticipated, within a short period. This placed a great deal of pressure on us and on Counsel in getting the work done well and on time. It also meant that the actual work required was substantially more than the fixed budget allocated to Counsel fees. As a result, Counsel ultimately provided support over and above what was anticipated and paid for.
- 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.

What would we do differently?

46. In reflecting on the challenges we faced during the proceedings, we would consider making the following improvements to our approach if advocating for the consumer interest before the Tribunal in future:

- Allow for more time to brainstorm with the whole team—legal, policy and Counsel—at an early stage to better scope the likely and unlikely issues for consideration. This would help to make strategic decisions about likely submissions and resources required, rather than making those decisions under time pressure during the hearing.
- Consider how competition law and the ‘public benefit’ test interacts with the need for protection of vulnerable and disadvantaged consumers more deeply. 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.¹³ Nevertheless, this does raise questions about whether the Tribunal is the most appropriate forum for obtaining improved protections for vulnerable and disadvantaged 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 or monetary cost. 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 proceedings also raise questions 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 three years on from the COAG direction we are still waiting for a final code. On top of this, we are facing the prospect of the two important clauses in terms of consumer protection in the Code being removed or significantly watered down as a result of the ACT proceedings. Had the unsolicited sales clause been in place, more

¹³ <https://consumeraction.org.au/policy-report-social-and-environmental-considerations-in-part-vii-of-the-trade-practices-act-1974-cth/>

than 70% of our affected clients would not have experienced detriment. If the outcome of these proceedings is to allow unsolicited sale and the provision of unregulated finance, then law reform will be required to fill the gaps in consumer protection that result.

47. Please contact Director Policy & Campaigns Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this report.