TERCEIRO LEGAL CONSULTING Pty Ltd

23 August 2019

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Attention: Susie Black

By email - adjudication@accc.gov.au.

Dear Susie

Submission re Draft Determination in respect of the New Energy Tech Consumer Code - Authorisation number: AA1000439

Introduction
Thank you for the opportunity to make a submission concerning the Australian Competition and Consumer Commission's (ACCC) Draft Determination in respect of the New Energy Tech Consumer Code (Determination).

I have been retained to prepare and lodge this submission on behalf of two large Australian-based providers of residential and commercial solar electricity systems.

Whilst My Clients are generally supportive of the New Energy Tech Consumer Code (Code), they do have a number of concerns about the way in which the Code will operate.

Concerns
Application process
My Clients are particularly concerned about the likelihood that Clean Energy Council (CEC) will be appointed as the Administrator of the Code given their very poor record in terms of the administration of the Solar PV Retailer Code of Conduct (Solar Code).

Under the Code there is provision in paragraphs 2 to 5 of the Annexure to the Code entitled "Code Administration" for the Administrator to make decisions on applications from industry participants wanting to become signatories under the Code.

My Clients are concerned that, as currently drafted, the Code makes no provision for an appeal against a decision by the Administrator to reject an application from an industry participant to become a signatory. In other words, the Administrator would be able to make a decision to reject an application from an industry participant without there being any avenue for a review of that decision.

This situation is particular problematic given that it is highly likely that most state and territory governments will require suppliers to become signatories of the Code in order to access their incentivized/subsidized programs. This probability that this is likely to occur has been acknowledged by CEC at paragraph 15 of its Application.

Accordingly, we believe that there is a real risk that the Administrator (which itself is likely to be association of various competitors in the new tech energy sector) may have the ability to prevent new entrants from becoming signatories under the Code by rejecting their application for anti-competitive purposes. Furthermore, such a rejection would not be subject to any form of review.

My Clients have first-hand knowledge of a number of the problems which have arisen in relation to the CEC's administration of the Solar Code, which could potentially be duplicated in relation to administration of the Code if they are appointed as the Administrator, which appears likely.

For example, My Clients are aware of numerous decisions by the CEC to reject applications by applicants in the solar industry to become signatories under the Solar Code on highly technical grounds.

The CEC has also introduced an exclusion period which operates to prevent an unsuccessful applicant from reapplying to become a signatory of the Solar Code for a period of 3 months. Previously, the exclusion period was 6 months.

In other words, there have been situations where applicants to the Solar Code have had their application rejected on highly technical grounds and then been prevented from reapplying to become a signatory for a period of six months.

As would be apparent to the ACCC, as the relevant competition regulator, the CEC's unilaterally imposed and "un-ACCC" authorised exclusion period has had the effect of preventing a number of competitors from entering particular solar energy markets for a period of six months, which in turn has substantially lessened competition in those markets to the detriment of consumers.

My Clients are also concerned about a further condition imposed unilaterally by the CEC in relation to applications under the Solar Code. The condition is that to be accepted as a signatory an applicant must certify that no close family member of a director, manager, partner or any shareholder of the applicant has been involved in a business which has gone into liquidation or received a court judgment against it in the last 5 years.

My Clients would understand a term that excluded an applicant from becoming a signatory under the Code if a director, manager or partner of the applicant had been involved in a business which has gone into liquidation or received a court judgment against it in the last 5 years. However, we do not understand why the CEC has extended this exclusion to "close family members" and "shareholders" of the applicant.

It does not appear to us to be relevant in any way to the determination of an application under the Solar Code that a close family member of the applicant has gone into liquidation or received a court judgment against it in the last 5 years.

Furthermore, the requirement that no shareholder of the applicant can have gone into liquidation or received a court judgment against it in the last 5 years is clearly a nonsense given current signatories to the Solar Code include such publicly listed corporations as Origin Energy Limited and AGL Limited. Presumably at least one of the many thousands of shareholders of Origin Energy and AGL would have gone into liquidation or received a court judgment against it in the last 5 years. Despite this both Origin and AGL are signatories to the Solar Code.

My Client's are also aware of a number of applicants having their applications rejected on the basis of the CEC's concerns about the content of the applicant's advertising or contractual terms. However, on further investigation it became apparent that existing signatories to the Code were both advertising in exactly the same way as the applicant and often had almost identical contractual terms to the applicant. Yet the former companies have been admitted as signatories under the Solar Code while the latter have had their applications rejected.

This raises a genuine concern as to whether the Solar Code is being applied by the CEC in a fair and equal manner or whether stricter rules are being applied to some industry participants, particularly against mavericks which have a history of disrupting various solar markets. Indeed, we have been advised by the CEC that they currently reject approximately 40% of all applications under the Solar Code.

In one particular case the CEC rejected an application on the grounds that it believed that the applicant had failed to comply with the component pricing laws in its advertising, as set out in the *Australian Consumer Law* 2010 (ACL). On further investigation it became apparent that the CEC had totally misunderstood the relevant law believing that it required applicants to advertise **both** the full price and the price of each of the components of the solar system.

It was pointed out to the CEC that the component pricing laws actually make it mandatory for businesses to advertise the full price of the system where they have decided to advertise the various individual components of the system. However, where a business advertises the full price there is no legal obligation to then separately advertise the component prices. It is of great concern that the CEC would reject an application under the Solar Code based on an erroneous understanding of the relevant law.

My Clients are also aware of situations where the CEC has rejected an application under the Solar Code on the basis of alleged consumer complaints received by the CEC but which were never disclosed to the applicant. In other words, CEC has made decisions to reject applications under the Solar Code on the basis of alleged consumer complaints which the applicants knew nothing about and were not given the opportunity to respond to.

It is clear that the CEC in its processes for considering applications under the Solar Code has failed to follow the rules of natural justice in terms of disclosing the details of all complaints to the applicant and then giving the applicant an opportunity to respond to those complaints – ie the hearing rule.

My Clients are also aware of an instance where any applicant sought a reconsideration of CEC's decision to reject an application under the Solar Code due to numerous alleged errors by the CEC. Despite the CEC advising the applicant that the reconsideration was being given

priority, nine weeks elapsed with no substantive action having been taken by the CEC to reconsider their earlier decision.

We believe the above accounts of the CEC's performance in terms of administration of the application process under the Solar Code amply demonstrates the significant problems which may arise if the Code does not include a right of appeal in relation to decisions by the Administrator to reject applications from industry participants seeking to become signatories under the Code.

In the absence of an appeal right, the Code would be effectively giving the Administrator an unfettered power to decide which of the competitors to the existing signatories to the Code will be permitted to enter various energy markets. Put simply, there is a very real risk that the Administrator may reject applications for the purpose of substantially lessening competition in various energy markets. Indeed, we believe that such conduct may already have been occurring in relation to the Solar Code.

We believe that our concerns about the absence of an appeal from the Administrator's decision to reject an application to become a signatory of the Code could be easily remedied by the insertion of a new paragraph in the Code along the lines of:

> *Where an application under the Code has been received from an Applicant but refused by the Administrator, and the Applicant has notified the Administrator in writing within a period of one (1) calendar month from the date of the letter of refusal and paid the prescribed fee (if any) that the Applicant wishes to appeal that refusal, the Administrator must refer the application to the Code Monitoring and Compliance Panel (Panel).*

We also believe that paragraph 26 of the Annexure to the Code would also have to be amended to confer jurisdiction on the Panel to consider such appeals:

> *26. The Panel is responsible for:*
>
> *…*
>
> *h) hearing appeals from Applicants in relation to the Administrator's decision to reject an Application from the Applicant to become a signatory of the Code.*

Natural justice

We also note that the administrator's power under paragraph 4 of the Annexure to the Code is not subject to any overriding duty to observe the rules of natural justice. We believe that it is essential to include such a provision in paragraph 4 to make it clear that the Administrator must observe the rules of natural justice when determining an Application given the apparent failures by the CEC to observe these rules under the Solar Code application process in the past.

Appropriate wording would be as follows:

> *The Administrator must act without bias and treat all parties with fairness and in accordance with the rules of natural justice.*

Onerous nature of obligations
My Clients have noted the ACCC's observation in the Draft Determination in relation to the likely compliance costs which will be incurred by industry participants which are successful in becoming signatories under the Code:

> *4.40. In relation to the compliance costs for signatories directly resulting from the Consumer Code's implementation and administration, the ACCC considers that the compliance requirements imposed are necessary in order for the Consumer Code to be effective.*

My Clients are not particularly concerned about the compliance costs which will be imposed on signatories under the proposed Code, given that they are both very large players who will be able to incur the required expenditures to meet these compliance obligations.

However, we think that the ACCC is mistaken if it believes that the compliance costs which industry participants will incur under the Code are anything by highly onerous.

The ACCC needs to understand that the industry is highly fragmented, consisting of a high number of family owned micro-businesses. As stated by the CEC at paragraph 14 of its Application:

> *There is no register or other record that establishes the precise number of solar PV retailers operating in the Australian market. Credible estimates range from 4,000 to 5,000 retailers, with approximately 70% being sole proprietors or employing fewer than four people.*

The other relevant factor is the high likelihood, mentioned above, that most state and territory governments will require suppliers to become signatories of the Code in order to access their incentivized/subsidized programs - see paragraph 15 of CEC's Application.

Therefore, it is highly likely that every one of the 4,000 to 5,000 retailers will have to become a signatory to the Code in order to access state and territory incentivized/subsidized programs is they wish to stay in business. Businesses which are unable to become signatories under the Code will more than likely go out of business.

The list of obligations under the Code is remarkably extensive including:

- financial disclosures,
- detailed information about the design of the system,
- connection information,
- operating instructions to be provided in writing or by instructional video,
- performance specifications of the system,
- the establishment of a complaints handling system, and
- the provision of extensive staff training

My Clients fully anticipate that if the Code is approved in its current form that many hundreds of existing solar retailers will either decide not to apply to become a signatory due to the onerous compliance requirements or have their application to be a signatory rejected because they are unable to satisfy the Administrator that they are able to meet these compliance obligations.

Furthermore, My Clients believe that many of the small businesses which are successful in becoming signatories will be unable to meet their continuing compliance obligations under the Code, again forcing them out of the Code and out of the industry.

In effect, My Client's believe that the introduction of the Code will have the effect of significantly rationalising the number of players in the industry, particularly the number of solar retailers.

The very real question for the ACCC to consider is whether it wishes to preside over and, in many ways, facilitate the wholesale rationalisation of the energy industry, which will see the closure of many small, family owned businesses.

Buy now, pay later (BNPL) arrangements

My Client's do not agree with the proposal to prevent signatories under the Code from offered BNPL arrangements, for the reason that those arrangements are not regulated under the *National Consumer Credit Protection Act 2009* and the *National Credit Code 2010.*

As a large solar vendors and installers of solar systems My Clients have direct experience of the financing options currently available for customers who wish to purchase solar panels for their homes. This includes popular BNPL products. We believe there will be negative consequences for consumers, our businesses and the solar sector if BNPL products are excluded from the Code.

In our experience, BNPL products are highly valued by customers, vendors and installers. As a valid and legal financing option enjoyed by Australian consumers, we do not support the exclusion of BNPL products from the Code.

In our view, to effectively ban BNPL arrangements from the new energy sector would be a highly regressive step which will prevent many low-income consumers from being able to afford new energy products, including solar systems.

Exemptions

My Clients noted a section in the Code outlining the power of the Administrator to grant exemptions – paragraphs 17 to 19. While we do not understand precisely how this power is likely to be exercised by the Administrator, our concerns relate more to how this power conflicts with the underlying principles which govern the grant of an Authorisation by the ACCC.

The ACCC is currently considering whether to authorise a wide range of proposed conduct by a number of entities which will undoubtedly have a very profound effect on the energy industry and on many small businesses. Given the seriousness of the likely impact of the Code, we believed that it is essential that all of the powers of the new entities under the Code be spelled out in clear and transparent detail in the Code itself.

However, it seems somewhat incongruous for the ACCC to grant an Authorisation which in turn grants the Administrator a largely unfettered power to grant individual signatories or classes of signatory exemptions from the operation of an ACCC authorised Code. Granting such an exemption power would not only create a great deal of uncertainty in the industry but it would undermine the whole philosophy of the authorisation process which intended to establish clear and transparent rules which the industry can understand and follow.

In our view, the exemption power set out at paragraphs 17 to 19 of the Code should be removed.

Supplementary materials
We have similar concerns about the power of the Administrator to develop what are binding supplementary materials as set out in paragraphs 13 to 16 of the Code.

While these supplementary materials are described as being for the purposes of "assisting" signatories, that apparent intention is contradicted in paragraph 14(a) which refers to:

> *Mandatory and binding standards which must be followed where they apply.*

Again, it seems that the Code as currently drafted will give the Administrator the power to create new mandatory and binding standards which have not been specifically authorised by the ACCC.

It seems entirely incongruous to us that the ACCC would authorise a Code which bestows such apparently unfettered and discretionary powers on the Administrator.

In our view, the power to develop supplementary materials set out at paragraphs 13 to 16 of the Code should be removed. In the alternative, all references to the Administrator having the power to make mandatory or binding standards should be removed.

Code Monitoring and Compliance Panel
My Clients are also concerned at the lack of detail in the Code about the composition of the Panel. While we understand that some detail concerning the composition of the Panel is provided in the *Memorandum of Understanding – New Energy Tech Consumer Code – Governance, Accountability and Administration*, such information should also be included in the authorised Code.

We also believe it is important to have more clarity about who is to be appointed to the Panel and by whom. It is important to specify these issues in the Code to avoid the possibility of inappropriate appointments being made or Panel appointments being captured by vested interests.

We also believe that the Code should make it clear that the Panel is to have an independent chair, with no affiliation with any industry participants or industry group, as well as significant practical expertise in relation to both competition and consumer law.

Again, thank you for the opportunity to comment on the Draft Determination. If you have any questions about this submission please contact me on 0417 213 226.

Yours sincerely

Michael Terceiro
Competition and Consumer Lawyer