T L C
TERCEIRO LEGAL CONSULTING Pty Ltd

23 September 2019

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

Attention Sue Black

By email – adjudication@accc.gov.au and [redacted]

Dear Susie,

New Energy Tech Consumer Code – AA1000439

Introduction
My further submissions will be set out under three separate headings, as follows:

1. Response to Clean Energy Council Response dated 5 September 2019 with heading in the subject line "Re: Draft Determination in respect of the New Energy Technology Consumer Code"
2. Response to Clean Energy Council Response dated 5 September 2019 with heading in the subject line "Response to Submission dated 23 August 2019 by Terceiro Legal Consulting Pty Ltd"
3. Further Submissions by Sunboost and Arise Solar

However, prior to addressing these three issues I wish to confirm that the identities of my two clients are Bell Solar Pty Ltd t/a Sunboost and Arise Solar Pty Ltd.

By way of background I previously provided a submission dated 23 August 2019 to the ACCC, but asked that the names of my two clients not be disclosed – rather these clients were described as simply "two large Australian-based providers of residential and commercial solar electricity systems".

My clients subsequently decided to advise the ACCC that their names could be disclosed.

Mr Yudisthra Seomangal, Sunboost's in-house lawyer attended the ACCC Pre-Decision Conference on 9 September 2019 and presented my earlier submission dated 23 August 2019 plus a number of additional submissions.

Mr Jack Patel of Arise Solar also attended the Conference and made a number of oral submissions.

1. Response to Clean Energy Council Response dated 5 September 2019 with heading in the subject line "Re: Draft Determination in respect of the New Energy Technology Consumer Code"

The Clean Energy Council (CEC) responded to my 23 August 2019 submissions as follows:

> *The submission from Terceiro Legal Consulting contains some serious, unsubstantiated and untrue allegations about its unidentified clients that the CEC will respond to separately. We note that it is difficult to respond to an anonymous submission.*

I do not understand why it would be difficult for CEC to respond to my "anonymous submission" on behalf of two large Australian based providers of residential and commercial solar electricity systems given that virtually every one of the allegations contained in my submission had already been disclosed to CEC in writing in correspondence on behalf of my client, Arise Solar. Accordingly, CEC is being disingenuous when it claims that it was not able to response to an "anonymous" submission, as it knew full well the details of the allegations.

I also wished to make my initial submission "anonymous" to highlight the unfairness of the CEC's current decision-making process under the Solar Code. The CEC relies on anonymous consumer complaints, which it does not disclose to the applicant, as a ground for refusing applications under the Solar Code. Accordingly, it is somewhat ironic that CEC would complain about the unfairness of having to respond to "serious, unsubstantiated and (allegedly) untrue allegations about…unidentified clients" in relation to my submission, given that this is precisely the process which the CEC undertakes when considering applications under the Solar Code.

2.Response to Clean Energy Council Response dated 5 September 2019 with heading in the subject line "Response to Submission dated 23 August 2019 by Terceiro Legal Consulting Pty Ltd"

I refer to CEC's submission under the heading "General Comments" in which CEC stated that my previous submission dated 23 August 2019 were "put on a generalised, unsubstantiated and argumentative basis" and that they were anonymous, and for these reasons it was neither possible or appropriate for CEC to address these submissions in any detail. Further, the CEC submitted that my submissions dated 23 August 2019 should be given limited weight.

I have already highlighted above that the CEC's claims about not being able to respond to my earlier submissions were disingenuous. The CEC had received written correspondence about virtually every one of the allegations contained in my earlier submission. It seems to me that CEC simply does not wish to respond to the serious allegations about its failure to properly administer the Solar Code.

There is also no valid reason for the CEC firstly, to fail to respond and secondly, to give limited weight to my submissions given that the identities of both of my clients have now been disclosed to the CEC.

Attached is a copy of the file note, provided to me by Mr Seomangal, of the submissions that he made at the Conference. By way of background Australian Solar Designs Pty Ltd and Bell Solar Pty Ltd (which trades as Sunboost) are both wholly owned subsidiaries of National Solar Energy Group Pty Ltd (NSEG).

I have quoted a number of the oral submissions made by Mr Seomangal at the ACCC Pre-Decision Conference as follows:

"We are aware of the following problems with the administration by the CEC of the CEC Code.

*1. CEC reject applications on highly technical grounds. By way of example Australian Solar Design Pty Ltd ("**ASD**") previously applied to be an Approved CEC Retailer on 2/2/18. It took just over 4 months for CEC to assess their application and the application was declined on 6/6/18. The only reason that CEC rejected the application was because ASD used the CEC Standard Template which was not purchased by ASD – but which was purchased by another entity.*

Rather than reverting to ASD and stating that ASD should have purchased the Template from CEC and giving ASD the opportunity to pay for a template, CEC declined ASD's application.

I then read word for word the paragraph where the CEC threatened to report ASD to ACCC for this conduct:

> *"If continued or further infringement of the Clean Energy Council's intellectual property rights is made by Australian Solar Designs, we will report the matter to the **Australian Competition and Consumer Commission** and to NSW Fair Trading, as well as taking further action if necessary."*

2. CEC has an "un-ACCC authorised" exclusion period of 3 months which previously use to be 6 months. So in ASD's case it had to wait 6 months to reapply. I mentioned this is not a big issue for a large company like NSEG but it may affect small businesses. I then cited that in Victoria an installer needs to be a CEC Accredited Retailer for their customer to obtain the Victorian rebate. I said there was a risk that small installers in Victoria could close down because of the 3 months' exclusion period.

3. The CEC Application precludes close family members and shareholders of a company/business that has gone into liquidation or received a judgment within the last 5 years. I said that signatories such as AGL and Origin would surely have shareholders who have either gone into liquidation or received a judgment within the last 5 years.

4. Applications are rejected because of advertising or contractual terms that mirror current signatory advertising or terms.

5. One scenario included a rejection because of pricing laws which was erroneously understood by CEC.

6. There are other situations where an application was rejected because of complaints made against an applicant which was never disclosed to the applicant.

7. An incident has been cited in the Terceiro Legal Consulting submissions where an applicant sought a reconsideration of CEC's refusal due to a number of errors by CEC. However, the decision remained the same after reconsideration.

8. The CEC template costs $1600 plus GST (https://www.cleanenergycouncil.org.au/industry/retailers/solar-sale-and-installation-agreement). If the applicant is successful $800 will either be returned to them or taken off the Approved Solar Retailer Fee. As per the Terceiro Legal Consulting submissions CEC has advised that they reject 40% of Applicants. If for example 100 applicants apply the CEC revenue is $112,000.

Calculation:
60 Successful applicants: $800 x 60 = $48000
40 Unsuccessful applicants: $1600 x 40 = $64000

I said that 42.85% of revenue from templates comes from successful applicants and 57.15% comes from unsuccessful applicants. I said that if a business was selling goods or products similar to how ACCC sells their template, that the ACCC would be behind them. The reason is that the true or real price for the template is actually $800 and not $1600.

9. The last example I mentioned was the recent complaint received by CEC about ASD by a customer who had populated the "Send us a Message". I explained that CEC sent us the allegation and asked ASD to respond as to whether or not they dispute the allegation, and provide evidence in support of ASD's view. ASD then wrote to CEC requesting CEC to clarify what provision they allege ASD has breached and requested for more details surrounding the allegation. In terms of the privacy laws, there was no breach. Further the complainant did not own the premises and she made an inquiry for residential solar system where ASD does not sell residential systems but only sells commercial systems. The point I made at the Conference was that CEC did not follow 3.5.2 of the Code which provides that once CEC receives a complaint, they need to contact the Signatory notifying them of the breach. In ASD's case CEC did not do that in the first instance. CEC only provided ASD with the provision "alleged to have been breached" after ASD requested for further and better particulars, and after asking ASD to respond to the allegation (even when ASD was unaware of which CEC Code provision they had alleged to have breached). Once ASD was aware of the provision and better particulars, ASD responded and CEC dismissed the complaint. I then gave an example of a police matter, where if the police charge you with an offence, they need to tell you the offence and provide a brief of evidence. The accused would then prepare their defence based on what has been provided in the police brief of evidence."

Mr Jack Patel from Arise Solar also attended the ACCC Pre-Decision Conference and agreed with Mr Seomangal's points.

Mr Patel also stated that his company applied to the CEC under the Solar Code and was rejected. Mr Patel advised the CEC through his lawyer that he would be lodging a complaint with the ACCC. CEC asked Arise Solar not to lodge a complaint with the ACCC and promised to reconsider Arise Solar's submission as a matter of urgency.

Mr Patel added that a large company can afford to approach a lawyer if the CEC rejects their application but smaller companies cannot afford to do so.

Finally, Mr Patel requested that the ACCC consider the inclusion of an appeal process and that there should be independent members to hear such appeals.

Since the identities of my clients have now been disclosed and various allegations substantiated by way of examples, we look forward to an appropriate and detailed response from CEC to my written and my client's oral submissions.

3. Further Submissions by Sunboost and Arise Solar

At the ACCC Pre-Decision Conference, CEC acknowledged that the Code did not have any appeal mechanism for a signatory whose application had been rejected by the Administrator. CEC expressed that it was open to an appeal mechanism.

In light of this concession by the CEC, my clients wish to repeat their earlier submission that the following new paragraph be included in the Code:

> *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 the refusal, the Administrator must refer the application to the Code Monitoring and Compliance Panel ("**Panel**").*

My clients also repeat their submission that paragraph 26 of the Annexure to the Code should be amended to confer jurisdiction on the Panel to consider such appeals, along the lines of:

> *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.*

My clients repeat their submission that the Administrator's power under paragraph 4 of the Annexure to the Code should be subject to an overriding duty to observe the rules of natural justice and propose the following wording be included in the Code:

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

We also repeat our previous submissions in relation to the "Exemptions" contained in paragraphs 17 to 19 and the "Supplementary Materials" set out in paragraphs 13- 16 of the proposed Code which have not been addressed in detail, or at all, by the CEC.

On 6 September 2019, CEC provided a submission to ACCC with the subject line headed "New Energy Tech Consumer Code – AA 1000439". This submission addressed the CEC's proposal to exclude Buy Now Pay Later ("**BNPL**") providers from participating in the Code. In their submission, CEC expressed that it "wasn't the intent" to exclude Buy Now Pay Later ("**BNPL**") finance providers from the Code and CEC proposed an amendment to clause 24(b) to include BNLP providers to participate in the Code. Our clients are pleased with this about face by CEC and are in favour of the updated wording of clause 24(b) of the Code.

Prior to the ACCC Pre-Decision Conference concluding Mr Seomangal submitted as follows:

> *The compliance costs [under the proposed new Code] can be absorbed by a large company like Sunboost. However, it would drive out small businesses from the market. I*

also stated that the code is over-engineering current laws such as the performance specification. I said that the current laws in the ACL already provide adequate protection to customers.

It is clear that consumers have the benefit of the *Australian Consumer Law* 2010 (ACL). Consumers additionally have the benefit of the State and Territory Fair Trading legislation and State and Territory Home Building Legislation.

For example, in New South Wales the installation of a Solar System under a contract falls within the definition of "special work" in Schedule 1 of the *Home Building Act* 1989 (NSW) NSW ("the Act"), and the work is therefore "residential building work". If a customer has a dispute with regards to the performance of a solar system for example, the customer can approach Fair Trading in the first instance and if the matter is unresolved, they can apply to the New South Wales Civil and Administrative Tribunal. The matter is then set down for a Notice of Conciliation and Hearing where the parties attend the Tribunal and are given the opportunity to try and resolve the matter at a conciliation with the assistance of a trained and qualified Conciliator at the Tribunal. If no conciliation is reached, the matter is set down for a hearing before a Tribunal Member. The Tribunal has jurisdiction pursuant to section 48K of the Home Building Act 1989 to hear and determine this dispute between the parties.

In arriving at its decision the Tribunal is required by section 48O of the *Home Building Act*, to take into account of section 79U(1) of the *Fair Trading Act* 1987 (NSW), which states when making any orders the Tribunal must be satisfied that the orders will be fair and equitable to the parties to the claim. Section 79U(2) expresses a number of factors that must be taken into account if they are material to the particular circumstances of the case.

If either party is unhappy with the Tribunal decision, they can apply to the New South Wales Civil and Administrative Tribunal Appeal Panel which hears appeal of decisions made by the Tribunal.

As is apparent, the current legislation already provides an appropriate regime for consumers to seek to resolve disputes with their solar system supplier. As such we do not believe it is necessary to complicate matters as proposed by the New Code by introducing a new dispute resolution system.

Conclusions

While my clients are generally supportive of the proposed Code, they remain concerned at the way in which the proposed Code may be used by vested interests to hinder and prevent competition in various new energy markets, particularly in solar energy markets. We believe that there is some evidence to suggest that the Solar Code has been used for this very purpose in the past, with a number of vigorous and effective competitors being denied membership of the Solar Code on arguably dubious grounds.

While new energy markets are dynamic markets, existing market participants have a clear incentive to try to hinder and prevent competition, particularly in relation to new entrants who have been able to disrupt markets through lower cost structures and lower pricing.

Accordingly, we believe it is vitally important for the ACCC to be alert to the possibility that the proposed Code will be used by vested interests to hinder and prevent competition in new energy markets unless significant changes, as we have suggested, are made to the proposed Code.

If you have any questions about this submission please call me on [redacted].

Yours sincerely

[redacted]

Michael Terceiro
Competition and Consumer Lawyer

FILENOTE

ACCC PRE-DECISION CONFERENCE: Clean Energy Council & Ors application for authorisation of New Energy Tech Consumer Code AA1000439

Venue: Level 1, Grand Chancellor Hotel, 131 Lonsdale Street, Melbourne

Date and Time: 9 September 2019, 10:00am to 12:20pm

[redacted]

[redacted]

Next was my turn and I summarised Michael Terceiro's submissions as follows:
I explained that I was an in-house lawyer for NSEG Group but also mentioned that I also do other legal work as I do not work for NSEG for the whole of the week. I mentioned that Sunboost was supportive of the code but had some concerns. I acknowledged the professionalism in dealing with Mindy Lim and also Christopher Taylor in the past. I then presented Michael's submissions as follows:
The New Energy Tech Consumer Code ("New Tech Code") has no provision for an appeal against a decision by an Administrator to reject an application. An Administrator can reject with there being no avenue for an Applicant to appeal. This is problematic. I then quoted Michael's proposed wording to including an Appeal right and the provision incorporating the "Natural Justice" provision.

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Commissioner Ridgeway then asked for me to stop there because of time restraints. He said if there is extra time, he would allow me to continue.

[redacted]

[redacted]

[redacted]

[redacted]

I then was provided with a second opportunity to speak. I then raised that Sunboost is against the power of the Administrator granting Exemptions and creating supplementary materials. I cited the submissions where clarity is needed and that granting exemptions is against the whole aim of the Authorisation process.

I then made a comment in support of BNPL. I said Flexigroup and Brighte have put about 225000 solar systems on roofs whereas the $50million quoted by ratesetter only equates to 12500 systems (if each system costs $4000 on average). I said it was important to retain BNPL arrangements as this assists low-income earners. I said excluding BNPL would effect our business and low-income earners.

I also stated that the compliance costs can be absorbed by a large company like Sunboost. However it would drive out small businesses from the market. I also stated that the code is over-engineering current laws such as the performance specification. I said that the current laws in the ACL already provide adequate protection to customers.

[redacted]