

**Response by CEC submission to Attachment A ACCC letter dated 17 September 2020 (Public version)**

The CEC provides this response as requested in the ACCC's letter dated 17 September 2020, namely to the issues raised by interested parties, as those issues are summarised in Attachment A to the ACCC's letter (**Attachment A**). Throughout these submissions, the text in red is to be treated as confidential and for the benefit of the ACCC only. The CEC requests that any red text be redacted before this submission is published on the public register.

The CEC refers to and relies on its submissions made previously in relation to the re-authorisation application. It also refers to and relies on in this response to the draft determination of the ACCC (dated 13 August 2020) (**Determination**).

In Attachment A, the ACCC has grouped issues in respect of which it seeks a response, under headings as follows:

1. "Effective administration of the Code";
2. "Appeals mechanisms";
3. "Fees"; and
4. "Length of authorisation".

The CEC responds below to the matters raised in Attachment A, under each of these headings.



**"Effective administration of the Code"**

In Attachment A, the ACCC raises issues under this heading as follows (the ACCC text in italics, CEC defined terms added) (including the "bullet points" in Annexure A, and the paragraphs which follow same):

- *The CEC's failure to apply natural justice principles in investigating potential breaches. For example, by making decisions based on alleged consumer complaints which were not put to retailers, or failing to particularise the exact sections of the Solar Code alleged to have been breached (Natural Justice assertion).*
- *The Breach Matrix being cumbersome, failing to identify breaches by the section number they correspond to, and in some cases the severity of sanctions outweighing the infringement (Breach Matrix assertion).*

- *The process used to apply sanctions, particularly that the current sanctions of suspension and termination are excessive and can cause significant financial impact and detriment to retailers; and that suspension or cancellation takes effect prior to an appeal to the Code Review Panel being heard (Sanction Process assertion)*
- *The Code Administrator having a conflict of interest as the body investigating complaints and making binding determinations (Conflict of Interest assertion).*
- *One submission noted the CEC's inconsistent treatment of retailers in its administration of the Solar Code. For example, by allowing some retailers to remain signatories but rejecting others on arguably lesser grounds; or fixating on certain retailers in its enforcement activity while ignoring others for the same or similar conduct. This submission raised concerns that the CEC's administration of the advertising provisions is not in accordance with the Australian Consumer Law (ACL), and that authorisation should be conditional on the CEC establishing (or reviewing existing) ACL guidelines and training (Inconsistent Treatment assertion).*

Broadly, the above points can be grouped into two.

The first group of points goes to assertions as to the adequacy or otherwise of the provisions of the Solar Code (putting to one side the appeal mechanisms in the Solar Code in relation to the signatory application process, which is addressed further below). The Breach Matrix assertion and the Sanction Process assertion fall in this group.

The second group of points goes to the manner of administration of the Solar Code by the Code Administrator. The Natural Justice assertion, the Conflict of Interest assertion, and the Inconsistent Treatment assertion fall in this group.

As to the first group of points, the CEC maintains that the provisions of the Solar Code are adequate and appropriate having regard to the objects of the Solar Code (including the promotion of responsible activity and development in the sector, and improving the relationship between consumers and retailers).

As to the Breach Matrix assertion in particular, the CEC submits that the breach levels and associated sanctions are proportionate to and reflective of the harm, or potential for harm, for consumers, and accordingly the industry more generally. For example, the Solar Code requires that advertisements and promotions produced must be legal and truthful. Given the potential harm of misleading advertising to consumers (and the reputation of the industry as a whole), a breach of this section of the Solar Code is rated as 'severe' in the breach matrix. On the other hand, a failure of a signatory to appoint a "Primary Contact" for contact with the CEC is deemed a "medium" breach because the potential harm is more limited in nature.

Various stakeholders may hold different individual views on this, but, as above, the CEC remains of the view that the breach matrix as constructed properly balances the severity of sanction against the severity and nature of breach.

As to the second group of issues, and to address first the Sanction Process issue, namely that "*the process used to apply sanctions, particularly that the current sanctions of suspension and termination*



*are excessive and can cause significant financial impact and detriment to retailers”, the CEC’s submission is that the sanctions provided for in accordance with the Solar Code are proportionate and appropriate to reflect the severity of breaches, and are consistent with the objects of the Solar Code. As to the issue raised regarding “suspension or cancellation takes effect prior to an appeal to the Code Review Panel being heard”, the CEC submits that this is appropriate in the circumstances, and is not inconsistent with appeal processes in the courts (where in most matters, there is no default “stay” of the effect of a judgment), and where suspension or cancellation may occur where there is a failure to rectify a breach, or where there is systemic failure.*

On these matters the CEC further submits that the findings made by the ACCC in the Determination are appropriate, including as to the Breach Matrix assertion and the Sanction Process assertion, including the following sections of the Determination:

- Paragraph 4.24 – *“The ACCC considers that there are sufficient mechanisms in place to ensure the Solar Code is effectively administered and enforced...”*
- Paragraph 4.40 – *“The ACCC considers that the amendments to the breach matrix assign ‘severity’ levels to requirements that already existed in the Solar Code and that these are likely to help ensure it is applied transparently and consistently. Further, the amendments increasing ‘severity’ levels (and therefore sanctions) for certain breaches are, to some degree, balanced by the addition of a new power enabling the Code Administrator to lower a breach’s severity level during an investigation.”*
- Paragraph 4.46 – *“...the ACCC considers that the Solar Code has sufficient rules, checks and balances in place to help ensure that the CEC appropriately monitors compliance with the Solar Code, enforces breaches and minimises any potential for conflicts of interest.”*
- Paragraph 4.64 – *“The ACCC considers that the processes in place for considering applications appear appropriate for giving feedback to applicants.”*

As to the second group of issues (Natural Justice assertion, the Conflict of Interest assertion, and the Inconsistent Treatment assertion), in its capacity as the Code Administrator, the CEC is aware of and strives to adhere to the procedures and obligations which are set out in the Solar Code, including overarching obligations as to natural justice.

With due respect to the parties who have made submissions critical of the Code Administrator on these issues, there can be differences of opinion (in particular where the party making the submission here may, at least in some instances, have been involved in a process involving investigations of potential breaches of the Solar Code). The CEC of course acknowledges that, on occasion, signatories may feel aggrieved with the manner in which the CEC administers the Solar Code, in particular where there is a sanction imposed. For some context here, the CEC notes the vast amount of interactions that the CEC has with signatories (which currently number 1070) do not involve complaints, with the CEC having received 233 complaints over the life of the Solar Code (which first came into effect on 17 October 2013). These figures are as of 30 September 2020.

Finally, and whilst the CEC maintains that it always administers the Solar Code in a manner which is compliant with the principles of natural justice, fairness, and the provisions of the Solar Code itself,

the CEC continuously refines and improves its processes to reduce the risk of retailers feeling aggrieved or unfairly treated.

The CEC makes the further following submissions:

- As to the Natural Justice assertion, the CEC refers to and repeats its response to this overarching complaint, namely that the Complaints Procedure under the Code is *“robust and methodically places facts and evidence to the signatory for a response, before reaching any conclusion.”*<sup>1</sup> The CEC notes that the ACCC’s finding on the processes in the Solar Code was that *“the Solar Code has sufficient rules, checks and balances in place to help ensure that the CEC appropriately monitors compliance with the Solar Code, enforces breaches and minimises any potential for conflicts of interest.”*<sup>2</sup>
- In respect of the Conflict of Interest assertion, the CEC does not agree that it has a conflict of interest. The CEC has robust internal mechanisms in place to prevent and guard against any conflict of interest arising. The CEC submits further that the Code Administrator’s power to make binding determinations is appropriately balanced by the ability of signatories to appeal to the Code Review Panel for a review of its decision.
- In respect of the Inconsistent Treatment assertion, the CEC emphasises that it assesses each case on its own merits and makes a determination on the evidence available and the submissions of the signatory. The CEC firmly rejects any allegation that it “fixates” on any particular signatory or retailer any more than others. Consistent with the Solar Code, the CEC merely acts on complaints received and makes a determination as to whether the complaint is substantiated by the evidence available to it (including any evidence and/or submissions provided by the signatory the subject of the complaint). It is out of the CEC’s hands that it may receive more complaints about a particular signatory. The CEC makes additional (and confidential) submissions on this final point further below.
- The Inconsistent Treatment assertion also includes an assertion that the CEC’s administration of the advertising provisions under the Solar Code as is not in accordance with the Australian Consumer Law (ACL), and that any authorisation should be conditional on the CEC establishing (or reviewing existing) ACL guidelines and training. The Code Administrator’s position is that its administration of the advertising provisions under the Solar Code is consistent with the existing ACL guides (available at <https://www.accc.gov.au/publications/advertising-selling> ).

### **“Appeals mechanisms”**

In Attachment A, the ACCC raises issues under this heading as follows:

- *Multiple interested parties raised concerns that the Code Review Panel is not independent, including for reasons that its members have not been recruited from outside the industry*

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<sup>1</sup> See paragraph 4.43 of the Determination.

<sup>2</sup> See paragraph 4.46 of the Determination.



*and/or hold preconceived views about the industry. Parties considered that both rejected applicants and signatories should have the right to appeal to an independent body.*

- *One interested party submitted that it was unclear why the timeframe for rejected applicants to lodge an appeal has been reduced from 30 to 15 days.*

As to the first of the points above, the assertions here go first to the independence of the Code Review Panel (**CRP**) and second to the availability of appeal mechanisms in the Solar Code for retailers who have had their application to become a signatory rejected.

In respect of the first element, the CEC emphasises that while the members of the Code Review Panel come from within the industry, the CRP is entirely comprised of, on the one hand, representatives who are external to, and independent from both the CEC (whether operating in its capacity as Code Administrator or otherwise) and, on the other hand, signatories and retailers. The CEC submits that a CRP member recruited from outside the industry would likely not have sufficient knowledge (and certainly not knowledge comparable to a member from within the industry) of the relevant industry, technology and consumer issues to provide appropriate oversight or arbitrate cases relating to the solar PV industry and would bring little or no understanding to systemic issues within the industry or challenges that consumers and retailers face within the industry.

The CEC also highlights that previous independent reviews have not raised concerns about the CRP's objectivity or independence. Finally, the CEC makes the observation that the concerns raised in the interested parties' submissions around the CRPs independence are not supported by any evidence.

In respect of the second aspect of this submission, the Code Administrator confirms that it has considered the ACCC's feedback in the Determination and has accepted that an appeals mechanism can apply to both rejected applicants and signatories, with a fee (as stated in CEC's submission dated 7 September 2020). The CEC presumes that the reference to "signatories" having a right of appeal in this submission is a mistake on the basis that it is clear that signatories have a right of appeal (to an independent body, namely the CRP) under the Solar Code.

Turning to the second dot point, the CEC refers to paragraphs 4.58, 4.60 and 4.87 of the Determination which, in effect, recommend a staggered reduction of the exclusion periods, namely that they should be reduced to one, two and three months respectively for repeated rejections (paragraph 4.93 of the Determination). The CEC confirms that it will implement these recommendations and amend the terms and conditions on its online application page, and in Section 4.1 of the Code (as is discussed further in the CEC's response to Annexure B of the ACCC's letter dated 17 September 2020).

That said, and upon further reflection, the CEC considers that the timeframe for rejected applicants to lodge an appeal should not be reduced from 30 to 15 days. However, and in order to give effect to the now reduced and staggered exclusion periods, the time period for the exclusion period should run from, if the applicant elects not to appeal, the date of notice of the Code Administrator's rejection of the application or, if the applicant elects to appeal, and the CRP rejects the appeal, then the exclusion period ought to run from the date the applicant receives notice of the CRP's decision.

#### **"Fees"**

In Attachment A, the ACCC raises issues under this heading as follows:

- *One interested party submitted that it is unclear how the CEC has quantified the proposed \$750 non-refundable appeals fee for existing signatories and noted that an individual can lodge an appeal to the Victorian Civil and Administrative Tribunal for a fee of \$200.*
- *Another interested party raised concerns that accredited designers and installers already pay fees to the CEC, and must pay additional fees and sign up to the Solar Code to conduct business.*

In response to these matters, the CEC submits that:

- The appeal fee is an amount intended to reflect at least part of the costs of the appeal, including remuneration to the CRP members to review the appeal brief (1 hour allowed), and the Code Administrator's costs in compiling and indexing the appeal brief, and preparing the appeal more generally.
- The CEC cannot comment on the source of the information underpinning the submission that a \$200 fee would be payable in VCAT. To the CEC's understanding, by reference to publicly available information in relation to VCAT, the VCAT application fee for a review of a decision is at least \$947.80 (for a corporation), or \$663.50 (for an individual trading as a business or partnership), plus a one day hearing fee of \$518.40 (for corporations), or \$362.90 (for an individual trading as a business or partnership). The CEC notes that the VCAT fee schedule also provides that additional fees and services also apply.<sup>3</sup> The CEC further notes that it presumes, but does not know, that VCAT receives Government funding for its operation, whereas the administration of the Solar Code is entirely funded from related fees (and otherwise the CEC's own resources).
- The Accredited Installer scheme is entirely separate from the Solar Retailer Code. That scheme and the fees paid by accredited persons under same, support a myriad of activities to support 7000 installers including but not limited to a technical advice hotline, coordination of reference groups, webinars and toolbox talks, assessment of accreditation, compliance program, appeals panel and a CPD program.

#### **"Length of authorisation"**

In Attachment A, the ACCC raises issues under this heading as follows:

- *Some interested parties considered that the Solar Code should be authorised for no longer than two years, which would allow sufficient time for signatories to transition to the New Energy Tech Code.*

The CEC also notes the ACCC's recommendations on this issue as at paragraph 4.99 of the Determination, namely:

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<sup>3</sup> <https://www.vcat.vic.gov.au/fees>

*The ACCC considers that the Solar Code should only be re-authorised for the minimum period necessary to enable the transition of signatories to the NETCC. It acknowledges that the current Tribunal proceedings create some uncertainty as to whether, when and in what form the NETCC will commence operation. However, the ACCC considers that granting authorisation for a period of two years following the final determination will be sufficient to enable transition to the NETCC or for the CEC to seek further re-authorisation of the Solar Code.*

It is the CEC's view that the combined effect of the CEC's limited finances, its significant operational costs and staffing pressures, and the requirement for the CEC to both administer the existing Code (currently with 1070 signatories and an average of 143 monthly applicants and to set up an appropriate transition to the NETCC necessitates a re-authorisation period of 3 years. The CEC is concerned that a short re-authorisation time will hinder the CEC's ability to continue to effectively administer the Solar Code whilst also facilitating signatories' transferral to the NETCC. The CEC would be pleased to liaise further the ACCC on this issue. The CEC has provided further information in Question 7 of Attachment B.

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