

# Application for revocation of an authorisation for proposed conduct and substitution of a replacement – A91495 and A91496

## Solar Retailer Code of Conduct

### Information

The Solar Retailer Code of Conduct (“the Code”) is a voluntary Code which aims to improve consumer protection and promote best practice for retail businesses selling solar photovoltaic systems. Signatories are required to comply with the requirements of the Code which set standards in advertising, contract documentation, finance and payments, design and installation, operation, customer service, warranties, and complaints handling.

The Applicant expects that the Code will ultimately be replaced by the New Energy Tech Consumer Code (NETCC), and that over 2-year period Code signatories will transfer to become NETCC signatories.

The NETCC was authorised by the ACCC on 5 December 2019. A stakeholder has appealed the NETCC authorisation decision to the Australian Competition Tribunal. This appeal has significantly delayed the commencement of the process of transfer of signatories from the Code to the New Energy Tech Consumer Code.

Pending the resolution of the appeal of the New Energy Tech Consumer Code, it is important that the Code remains up to date and relevant. With the current Code authorisation expiring in October 2020, the CEC would like to use this opportunity to make some minor amendments to the Code and seek re-authorisation.

The Code is not intended to replace existing consumer or energy legislation, policy or regulations but to bring about increased accountability within the Solar PV retail industry.

### Applicants

#### **1. Provide details of the applicants for revocation and substitution, including:**

##### **1.1. name, address (registered office), telephone number, and ACN**

Clean Energy Council Limited (ABN 84 127 102 443; ACN 127 102 443)

Level 15, 222 Exhibition Street

Melbourne, Victoria 3000

Phone: [03 9929 4100](tel:0399294100)

##### **1.2. contact person’s name, position, telephone number, and email address**

Primary:

Mindy Lim

Code of Conduct Manager

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Tel: [REDACTED]

Email: [REDACTED]

Secondary:

David Sanders

Executive General Manager, Industry Integrity

Tel: [REDACTED]

Email: [REDACTED]

### 1.3. a description of business activities

Clean Energy Council (CEC) is a not-for-profit, membership-based organisation and peak body for the clean energy industry in Australia. The CEC represents and works with over 800 businesses operating in or supporting the development of renewable energy (such as solar, wind, hydro, bioenergy, geothermal and marine) and energy storage, along with more than 6500 solar installers. It is committed to accelerating the transformation of Australia's energy system to one that is smarter and cleaner.

### 1.4. email address for service of documents in Australia.

[REDACTED] (refer Primary contact above at 1.2)

## Authorisation to be revoked (the existing authorisation)

### 2. Provide details of the authorisation sought to be revoked including:

#### 2.1. the registration number and date of the authorisation which is to be revoked

(a) A91495 & (b) A91496

Date of authorisation to be revoked: 15 October 2020

#### Key Dates:

The Solar Retailer Code of Conduct was initially authorised by the ACCC in October 2013.

On 17 April 2015, the CEC applied for the revocation of previous authorisations (A91365 & A91366) and the substitution of authorisations A91495 & A91496 (reauthorisation).

On 27 July 2015, the ACCC issued a draft determination proposing to grant authorisation to the CEC for 5 years.

On 23 September 2015, the ACCC issued a final determination and revoked authorisations A91365 and A91366 and granted authorisations A91495 & A91496 in substitutions for the ones revoked. The ACCC granted authorisation for five years.

The authorisation came into effect on 15 October 2015.

#### 2.2. other persons and/or classes of persons who are a party to the authorisation which is to be revoked

All signatories to the Code of Conduct are parties to the authorisation. These signatories are solar retail businesses. As of 29 February 2020, there were 844 signatories to the Code (referred to as Approved Solar Retailers). These retailers' range in size from small owner operated entities to large energy retailers. A list of Approved Solar Retailers is attached (**Attachment A**).

**2.3. the basis for seeking revocation, for example because the conduct has changed or because the existing authorisation is due to expire.**

The existing authorisation in relation to A91495 and A91496 is due to expire on 15 October 2020.

**Authorisation to be substituted (the new authorisation)**

**3. If applicable, provide details of any other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:**

**3.1. name, address (registered office), telephone number, and ACN**

As well as the 844 existing signatories in Attachment A, there are 55 solar retailer businesses who are in the process of applying to be a Signatory to the Code of Conduct as of 29 February 2020 and engage in the proposed conduct. A detailed list of these applicants is attached (**Attachment A**). Many of these applicants will become signatories to the Code prior to the finalisation of this process and a regularly updated list of current signatories to the Code is available online at <https://www.cleanenergycouncil.org.au/industry/retailers>

**3.2. contact person's name, telephone number, and email address**

**Attachment A** includes the primary contact's name and email address.

**3.3. a description of business activities**

The 844 existing signatories and 55 applicants are solar retailers of varying sizes, ranging from sole operators, to large retailers who sell solar PV systems throughout Australia.

**The proposed conduct**

**4. Provide details of the proposed conduct, including:**

**4.1. a description of the proposed conduct and any documents that detail the terms of the proposed conduct**

The Solar Retailer Code of Conduct is a voluntary Code which aims to promote best practice in the solar retail industry. The proposed conduct of the new authorisation does not include any substantive changes. The Code will continue to set standards of consumer protection that will be provided by signatories to the Code. It will cover all aspects of the customer experience, ranging from initial advertising and marketing, contract documentation requirements, finance and payments, design and installation, operation and performance, customer service, warranties, and complaints handling.

The CEC are seeking authorisation, on behalf of themselves and future signatories to the Solar Retailer Code, to agree, sign up to and comply with provisions of the Code. These amendments are predominantly directed at:

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a) Setting minimum standards of good practice as prescribed in the Code, which are intended to cover all aspects of the customer experience. The aim is to reduce information asymmetry and to provide clarity to customers and retailers.

Paragraph 4.2 of this application outlines a number of amendments in the proposed code. For example, section 2.1.6 (d) provides greater clarity to the current provision, requiring that the contract includes the quantity and value of STCs and any disclaimers relating to discounts, STCs, and rebates. Similarly, section 2.1.14 of the existing Code has been amended to require the Signatory to provide STC information in writing. The existing version of the Code does not specify how this information should be provided.

b) Enhanced monitoring by the Code Administrator and sanctioning non-compliance, where the Code Administrator has powers requiring a signatory to rectify issues giving rise to a breach of the Solar Retailer Code, and, where there is serious non-compliance, the Code Administrator may propose that the signatory should be suspended or expelled.

The additions to the breach matrix seeks to incorporate the requirements of the code (for example, the inclusion of abiding with privacy obligations). Each addition reflects a requirement that already exists in the Code but that had previously not been specifically included in the breach matrix. Similarly, section 2.4.7 requires signatories to notify the Code Administrator of a change in the control of the entity.

c) Updated references in the current environment

A number of changes in the proposed draft were undertaken to remove outdated terminology, practices, references and to reflect a change in legislation. For example, third line forcing has been removed from the previous code and the prior requirement to print the application form.

The Code, since its authorisation in 2013 and reauthorisation in 2015, addresses four broad subject areas including pre-sale activities, post-sale activities, documentation and general business practices and provides product specific guidance to consumers and retailers. The purchase of solar PV can often be a complicated process for ordinary consumers. The Code aims to protect consumers by:

- Prohibiting false representations in advertising in the sale and promotion of solar PV and unethical conduct such as high pressure sales tactics;
- Providing consumers with all required written business terms, including details of any guarantees and express warranties and the consumer's cooling off and termination rights;
- Ensuring that the product is fit-for-purpose by requiring a site specific system design, with any estimates based on a reputable source and any assumptions relating to performance and output disclosed;
- Requiring signatories to explain the process surrounding the payment of Small Scale Technology Certificates (STCs), new electricity tariff rates and informing consumers of the grid connection process;
- Supplying consumers with a system that is installed correctly in accordance with existing standards and guidelines;
- Requiring signatories to supply consumers with clear and concise information in relation to finance and alternative purchasing arrangements including information on fees and charges that may apply;
- Ensuring that consumers are provided with a minimum five year warranty including products and workmanship and an obligation on signatories to have an appropriate complaints

handling procedure in accordance with the Australian Standard on Complaints Handling AS ISO 10002-2006 (superseded);

- Outlining the obligations of signatories to protect consumers personal information in accordance with the Privacy Act 1988 and other relevant legislation;
- Investigating any potential breaches of the Code and enforcing sanctions where appropriate.

The amended Code of Conduct is attached to this application (**Attachment B**) with 'marked up' changes and a table of key proposed amendments (**Attachment C**).

A clean copy of the Code has also been included in this application (**Attachment D**).

#### **4.2. an outline of any changes to the conduct between the existing authorisation and the new authorisation**

The proposed changes to the Code are identified below. For convenience, the key amendments are listed and explained in the attachment to this application (**Attachment C**):

*- Website References:*

There are multiple references throughout the current code to an outdated website. The Clean Energy Council's website was updated from solaraccreditation.com.au to cleanenergycouncil.org.au in July 2019 and therefore the CEC seeks to update these website references in the amended Code.

*- Point of Contract*

A number of minor amendments have been made to section 2.1.6 of the current Code. These amendments have been identified below:

- at 2.1.6 the word 'shows' has been replaced with the word 'includes' to make the meaning clearer.
- a new subclause has been added at 2.1.6 (a) requiring that the written contract provided to the consumer includes "all" terms and conditions of that contract. This subclause has resulted in renumbering of all other subclauses in this section.
- Section 2.1.6 (d) provides greater clarity to the current provision, requiring that the contract includes the quantity and value of STCs and any disclaimers relating to discounts, STCs, and rebates.
- Section 2.1.6 (f) details what the signatory must provide in the site-specific full system design. This section has been amended to state: that a sketch or diagram of the panel layout must include measurements; that the tilt and orientation of the panels must be provided in degrees; and that the proposed location of the inverter must be provided. This section has also been amended to require that the performance estimate be compliant with the CEC Design Guidelines (**Attachment L**). These are common areas of dispute between solar retailers and consumers and are updated to provide further clarity.
- Section 2.1.6 (g) has been expanded to require that the method of estimation for system output and financial benefits representations are disclosed. These assumptions could relate to estimates of import and export tariffs, system performance and output assumptions, STC financial incentives and rebates, and estimated return on investment in years and subsequent

future savings. This provision has been expanded to help ensure better understanding and transparency between both parties at point of contract.

- Section 2.1.6 (l) was previously indented through a formatting error and listed as section 2.1.6(i)(ii) in the existing Code. This has been amended to make it clear that the consumer's cooling-off and termination rights must be provided in the contract.

*- Electronic Information*

Section 2.1.10 of the current Code has been expanded to require that any document which forms part of the contract must be provided to the consumer in a non-editable format, i.e. hard copy or pdf. This requirement was added to ensure there is a common point of reference for a contract rather than referencing online terms and conditions which may be subject to change over time.

*- Signatory Contact Details*

Section 2.1.12 of the current Code has been amended to require the Signatory to provide the consumer with an address as well as a telephone number where queries can be answered prior to signing the contract. The requirement to provide the address of a "local office or showroom" has been removed as it is recognised that retailers may not have such premises.

*- Small-scale Technology Certificates (STCs)*

Section 2.1.14 of the existing Code has been amended to require the Signatory to provide STC information in writing. The existing version of the Code does not specify how this information should be provided. However, fluctuations in STC prices are a potential source of disagreement between the Signatory and the consumer and having the process in writing will protect both parties.

*- Electricity Tariffs*

Section 2.1.15 of the existing Code has been amended to require the Signatory to provide information relating to electricity tariffs in writing. The current version does not specify how this information should be provided. Changes in a consumer's electricity tariff after the installation of a solar PV system can result in consumer dissatisfaction and therefore it is important that the retailer provide this information to the consumer in writing to avoid the potential of subsequent dispute.

*- Refund provisions*

Section 2.2.4 (a) and (b) of the existing Code have been amended to refer to an updated section of the Code – 2.1.6(f) rather than 2.1.6(e). This is a consequential update.

Section 2.2.4 (d) of the existing Code has been amended to remove the word 'and' to make it clear that the Signatory must provide the consumer with a full refund upon request in any one of the situations outlined under section 2.2.4(a) to (e).

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### *- Privacy*

Section 2.2.12 of the existing Code has been amended to refer to section 2.2.11 rather than section 2.1.11. This corrects a cross reference error in the current version of the Code.

### *- Complaints Handling Procedure*

Section 2.4.5 (a) of the existing Code has been amended to refer to the updated Australian Standard for complaints handling from 2014 rather than the 2006 version.

### *- Information to be provided to the Code Administrator*

A new clause in Section 2.4.7 has been added to require Signatories to notify the Code Administrator of a change in control of a Signatory within 10 business days to ensure that the Signatory has the necessary systems in place to ensure on going compliance with the Code. Should the Code Administrator identify an undisclosed change in control of a Signatory, the status of the Signatory may be revoked.

### *- System Design*

A new subclause has been added to section 2.4.18 to explicitly state that the system design provided to the consumer must comply with CEC Accreditation Guidelines (**Attachment L**) and manufacturer's requirements. While the original section 2.4.17 already requires that the signatory employ accredited designers for all system designs, non-compliant design remains a common feature of consumer complaints as it can affect the estimated performance and layout of the Solar PV system, and this addition seeks to address this.

### *- Compliance Procedure*

Section 2.4.21 of the existing Code (renumbered to 2.4.22 in the new proposed draft) has been amended to refer to the Code Administrator's Compliance Procedure rather than 'Complaints Procedure' as not all compliance activity stems from a complaint against a retailer. The Code Administrator's Complaints Procedure is attached to this application (**Attachment E**).

### *- Role of the Code Administrator*

Sections 3.1.1 and 3.1.2 of the existing Code have been amended to refer to the CEC Code of Conduct Team rather than the CEC Accreditation Team, to more appropriately reflect current internal organisational structure where these two teams are separate with different functions.

Section 3.1.3 of the existing Code has been amended to say that the Code Administrator 'may' refer consumers to either the Code Signatory or the relevant consumer protection organisation rather than 'will'. This provides the Code Administrator with flexibility should a consumer complaint fall out of jurisdiction.

### *- Breach Matrix*

The Breach Matrix assigns a level of severity to breaches of specific sections of the Code. Section 3.5.3 of the existing Code has been amended to include the provision that the Code Administrator may exercise discretion to lower a breach severity level if it is deemed appropriate in an investigation. This provision has been added to account for the different ways in which a particular breach can occur – e.g. if the breach is of a technical nature, when a signatory contravenes the Code in circumstances which are of low impact to consumers or program integrity and the strict application of the Code would see a sanction imposed which is impractical or excessive under those circumstances.

There have been a number of additions made to the Breach Matrix. Each addition reflects a requirement that already exists in the Code but that had previously not been specifically included in the breach matrix. As such, the additions seek to address a previous oversight in the breach matrix.

In addition to the items added to the Breach Matrix, three breach levels have been changed from that in the existing version of the Code. Namely, a breach of sales and quoting practices has increased from 'major' to 'severe', while both a documentation breach and an in-house complaints handling procedure breach has increased from medium to major. Each of these increases in breach level are designed to better align with the ratings for other breaches and are a reflection of the operational issues encountered in the practical application of the Code by the Code Administrator. Two breach levels have also been lowered, with the issuing of a receipt for deposits and information to be provided to the Code Administrator decreasing from severe to medium and major respectively.

### *- Public Listing of a Breach*

Section 3.6.3 of the existing Code has been amended to refer to the Compliance Procedure rather than 3.6.3 (a) and (b) which do not provide the Signatory with adequate detail relating to how breaches of the Code are addressed.

### *- Public Reporting*

Further, section 3.8.3 of the existing code has been amended to refer to section 2.4.11 rather than section 2.4.7. This corrects a cross reference error in the current version of the code.

### *- Application Process*

A number of minor amendments have been made to section 4.1 of the existing Code. These amendments have been identified below:

- 4.1.1(a): the option to print the application form has been removed.
- 4.1.1(b): some simplification of language.
- 4.1.1(d): a new subclause has been added relating to the declarations which the applicant makes during the application process (**Attachment F**).
- 4.1.1(g): reference to 'findings from a summary report' has been removed.
- 4.1.2: amended to more broadly reflect that information that shall be considered during the application process will include other information gathered by the Code Administrator during the period of the application.
- 4.1.2: makes explicit that the Code Administrator is able to reject an application based on the information provided in an application, it is also amended to include a reference to new section 4.1.1(d)



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- Reordering of 4.1.3 and 4.1.4 as per application assessment process.

These amendments have been made to more firmly embed in the Code the Code Administrator's current application assessment process.

### - *Glossary and Definitions*

Section 5.1 of the existing Code includes definitions of terms used in the document. The definition of 'Contract' has been expanded to specifically acknowledge and clarify that a "contract may be a written quote that has been accepted by the Consumer orally or by text or email notification."

### - *Relevant Acts and Legislation*

Section 5.4 of the existing authorisation refers to the *Competition and Consumer Act 2010* as the 'new name of the *Trade Practices Act 1974*'. The wording has been amended to say 'formerly known as'. This change was made as it previously implied that the *Competition and Consumer Act 2010* was new which is no longer the case.

### **4.3. the relevant provisions of the Competition and Consumer Act 2010 (Cth) (the Act) which might apply to the proposed conduct, ie:**

- cartel conduct (Division 1 of Part IV)
- contracts, arrangements or understandings that restrict dealings or affect competition (s. 45)
- concerted practices (s.45)
- exclusive dealing (s.47)

### **4.4. the rationale for the proposed conduct**

The rationale for the proposed conduct is the same as for the existing authorised Code. The Code will continue to enhance consumer protection and promote best practice for retail businesses selling solar photovoltaic systems to residential and small-scale commercial customers. It continues to aim to raise standards of consumer protection and increase consumer confidence in the solar PV industry, for example, by improving transparency in estimations and assumptions on system outputs and financial benefits, requiring clear information provision to consumers surrounding the trade of STCs and the subsequent change in electricity tariffs.

Section 4.2 sets out the detailed rationale for the changes proposed to be made to the Code as currently authorised. Many of the changes remove ambiguity, update references and correct errors.

The most substantive change is new section 2.4.7. This specifies that the Code Administrator must be notified of changes in the control of an existing Signatory (for example, if there was a purchase of an existing Signatory or change in control of the board of directors). This would assist with on-going monitoring of the Signatory and aims to ensure that the original application assessment process is not circumvented by control subsequently being passed to those not subject to that assessment process.

### **4.5. the term of authorisation sought and reasons for seeking this period.**

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The CEC is seeking authorisation of the Code of Conduct for the period of three years. As noted earlier, this would provide time for the resolution of the NETCC authorisation appeal process and secondly, would provide time for an orderly transfer of Code signatories to the NETCC. The CEC would be unable to transfer all signatories to the NETCC at once and were planning on transitioning the Solar Code signatories in stages. The signatories renew annually and in the past 12 months there have been hundreds of retailers that have signed on to the Solar Code.

It is important that a code is in place to provide consumers with continued protection. It is also important for a code to be in place for industry, especially in light of an increase in state government programs linking solar rebate schemes or loans as a precondition to retailers seeking to participate in these programs.

For example, the Victorian Solar Homes program is a 10-year government rebate and interest free loan which is only available to consumers who purchase their solar PV system from a signatory to Solar Retailer Code of Conduct. Similarly, the South Australian Home Battery Scheme requires that eligible suppliers are CEC Approved Solar Retailers or committed to an acceptable equivalent Code of Conduct that has been authorised by ACCC.

The 844 signatories to the Code represent an increasing portion of the solar PV industry.

### **5. Provide the name of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant goods or services) and detail how or why they might be impacted.**

All signatories and applicants to the Code identified in section 2.2 of this application will be directly impacted by the proposed conduct as they are required to comply with the requirements of the Code. The details are contained in **Attachment A**.

The code may also affect businesses that provide credit to consumers of solar PV.

### **Market information and concentration**

### **6. Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).**

The sale of solar photovoltaic (PV) products includes panels, inverters and components in all states and territories, and the services that support or are closely related to the sale of solar PV systems.

The signatories to the code are retailers of these products. They could be direct or indirect competitors and, on this basis, an exemption is sought for contracts, arrangements or understandings that restrict dealings or affect competition (s. 45) and concerted practices (s. 45).

### **7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.**

The solar PV retail industry continues to grow rapidly with the number of solar installations on homes and small businesses increasing by 43% in the 2018-2019 year. The Clean Energy Regulator expects that growth is likely to continue for at least 10 years. As of 2019, installations represent 22% of dwellings that are suitable for solar PV. This implies that the potential for growth in the industry

remains high.<sup>12</sup> There is further research which indicates that despite the rooftop solar sector now boasting more than 10 GW of capacity, research by the Clean Energy Finance Corporation and Property Council of Australia found that this is just a drop in the ocean.<sup>3</sup>

Signatories to the Code of Conduct range in size from owner-operator businesses to large energy retailers. Some signatories exclusively install residential rooftop solar while others may also install medium and commercial scale systems. Local manufacture is limited to a single solar PV panel assembly with a relatively small percentage of the market. The majority of solar panels are imported from overseas.

The sales process may vary significantly between signatories with some generating sales exclusively through a referral-based approach to some signatories conducting unsolicited sales. All signatories are required to abide by the advertising, sales, quotation, and contract requirements of the Code which provides consumers with a level of protection against misleading and unconscionable sales practices.

**8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.**

There is no precise record of solar PV retailers operating in the Australian market. It is estimated that there are between 4,000 and 5,000 retailers with the majority being sole proprietors or small businesses employing 4 or less people.<sup>4</sup> The CEC estimates that current signatories to the Code account for around 50% to 60% of the market by total installed capacity.

**9. In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously.**

The aim of the Code is to establish a standard of quality for Code signatories' service offerings and related business practices. By acting to maintain or improve service quality, the Code may be limiting the market forces that might otherwise apply.

The following comments are made with regards to the Code's impact on market forces:

- (a) The Code helps to maintain or improve standards of quality in the delivery of products and services offered to consumers, with the enhanced quality of the customer service around the sale and marketing of those products and services part of this standard of quality. Ensuring standards of such practices may potentially impede sales or service practices that may be lawful but are nonetheless not regarded as good practice. This may impact the business-model and cost-structures of some market participants.
- (b) Product quality will be maintained by requiring signatories to provide a minimum 5 year warranty on the product and workmanship, beyond the requirement of the Australian

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<sup>2</sup> Clean Energy Council, Clean Energy Australia Report 2019, <https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/clean-energy-australia-report-2019.pdf>

<sup>3</sup> Clean Energy Council, Clean Energy Australia Report 2020, <https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/clean-energy-australia-report-2020.pdf>

<sup>4</sup> Industry Report: Solar Businesses in Australia prepared by Solar Business Services for REC Agents Association, 2014

Consumer Law. The Code Administrator operates an audit program designed to encourage high levels of customer service and satisfaction.

- (c) Signatories to the Code are required to resubmit their documentation and information about their complaints handling procedures for assessment by the Code Administrator on an annual basis and as requested, should a complaint be raised against them. Currently, the Code has been able to maintain high levels of customer satisfaction through its investigations of consumer complaints and its ability to assume an informal conciliatory role in the dispute process. This is further outlined in paragraph 10 below.
- (d) The Code is not aimed at impacting pricing decisions. Market forces are likely to continue to keep prices low or stable in the solar retail industry due to the relatively large number of market participants on the supply-side.
- (e) Ongoing growth in the industry size and new market entrants suggest that innovation will continue to play a strong role as the industry matures and product development continues. Consumers retain the benefit from the competitive nature within the market, with a corresponding drop in pricing for installing a solar PV system.

### **9.1. existing competitors**

While there is no register of the total solar PV retailers operating in the Australian market, it is estimated that there are between 4,000 to 5,000 retailers<sup>5</sup>, with approximately 70% being sole proprietors or employing fewer than four people<sup>6</sup>. Consumers are benefiting from the competitive nature of the market, with the cost of a 3 kilowatt system now typically between \$5,000 and \$6,000 before any government rebate or financial incentive is applied, compared with approximately \$10,000 for a 1 kilowatt system ten years ago.<sup>7</sup>

### **9.2. likely entry by new competitors**

The solar PV sector is a small but growing part of Australia's economy. With increasing government and commercial interest in the sector, the market and the number of competitors is expected to continue to expand. The barriers to entry into the industry remain low.

### **9.3. any countervailing power of customers and/or suppliers**

- Nil.

### **9.4. any other relevant factors.**

- Nil.

## **Public benefit**

**10. Describe the benefits to the public that are likely to result from the proposed conduct. Refer to the public benefit that resulted under the authorisation previously granted. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.**

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<sup>5</sup> As is apparent from information provided by solar installers in connection with their accreditation under the Renewable Energy(Electricity) Regulations 2001, many of the 6,000 accredited installers are also solar PV retailers.

<sup>6</sup> See for example, Industry Report: Solar Businesses in Australia prepared by Solar Business Services for REC Agents Association in 2014 <http://www.recagents.asn.au/wp-content/uploads/2014/09/Solar-Businesses-in-Australia-Final-2014.pdf>

<sup>7</sup> Solar Quotes - How Much Do Solar Panels Cost? <https://www.solarquotes.com.au/panels/cost/>

The Determination granting reauthorisation to the Code dated 23 September 2015 is attached (**Attachment I**).

### Proposed changes to the Code

As previously explained, the changes to the Code are largely to remove ambiguity, update references, correct errors and better detail the signatory application process. This will assist users of the Code (signatories, their employees, contractors and agents and members of the public who may access the Code through the CEC website).

The main themes canvassed in the ACCC's previous assessment include:

#### **Improved consumer confidence and enhanced consumer protection**

The Code aims to improve the provision of information to consumers to enable better and more confident purchasing decisions. For example, the proposed amendments include additions to 2.1.6(f) relating to a site specific system design to also incorporate inverter location at the customer's premises. The CEC submits that this issue has been previously raised in complaints when there has been confusion around the placement of the inverter relating to the solar PV system. By requiring an explicit provision in the contract, this reduces uncertainty and information asymmetry for consumers and can serve as a point of reference should there be a dispute.

The amendment to 2.4.6(g) has been drafted to include the projected estimates on return on investment and any subsequent future savings. Whilst the price of a solar PV system has reduced significantly over the past 5 years, any inducement to purchase a solar PV system on the grounds of return on investment and future savings must be transparent and disclosed up front to potential consumers to better enable a properly informed purchasing decision.

Similarly, amendments to require provision of information in writing around the payment of STCs and tariff changes to consumers reduces confusion for consumers and enables a greater understanding of the process of obtaining rooftop solar, and subsequent implications on consumers energy consumption and associated costs.

Other key provisions embedded in the existing Code serve to increase consumer protection during the presale and post-sale process for example, by requiring a minimum warranty period of five years, as well as clear and specific circumstances<sup>8</sup> when a consumer is entitled to a refund.

#### **Improved retailer standards and compliance**

To prevent a non-compliant retailer from gaining signatory status by acquiring a signatory, new section 2.4.7 requires a signatory to tell the Code Administrator if there is a change in control of the signatory. The section also outlines clear consequences for failing to pass on the notification. This ensures that retailers seeking to become signatories do not bypass the application stage, prior to conferring signatory status. This amendment has been introduced to retain a level of accountability in retailer behaviour and standards.

The application to be accepted as a code signatory consists of an assessment of a retailer's online presence, consumer feedback, an integrity and financial check, any adverse findings from a tribunal, court or fair trading agency as well as a comprehensive review of the applicant's documentation (including but not limited to its quotes, contracts, advertising, performance estimates, online

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<sup>8</sup> Section 2.1.17 and 2.1.19

presence, invoices, and complaints handling procedures) and provides ample opportunity to **applicants to discuss the Code Administrator's findings.**

**Attachment J** contains a number of case studies and the reasons why applicants to the code have been rejected. These rejected applications contain a number of non compliant terms such as the required minimum 5 year warranty, an appropriate complaints handling procedure, and do not have refund provisions that are compliant with the code.

As government schemes have started to mandate the use of signatories to the code in the past years, the Code Administrator found that many rejected applicants do not read the requirements of the code, as this was often not reflected in their application. The Code Administrator also found that many rejected applicants were re-applying almost immediately, without taking due care to understand their obligations as a signatory.

In response, the Code Administrator implemented new rejection measures to ensure that applicants were committed to developing and conducting their business in line with best industry practice. Under the new measures, any unsuccessful applicant must wait 3 months from their rejection date before their application will be assessed. Before re-applying the applicant must sufficiently demonstrate in writing, that they can comply with the requirements of the Code and have systems and procedures in place to ensure ongoing compliance. The application fee is set at \$200.

An appeal mechanism for rejected applicants was considered however, the administrative burden on the Code Administrator and the Code Review Panel would be significant and a corresponding cost **levied onto rejected applicants. It is the CEC's view that the** volume of applications, preparing appeals and monitoring an ever-increasing number of signatories would be problematic to manage administratively in an efficient and productive manner.

A proposed addition relating to key declarations at 4.1.1(d) has been added to link the application form to the provisions of the proposed draft code. The Code Administrator also requires applicants to make a series of declarations (refer to **Attachment F**) that relates to the history and solvency of the company and its directors, shareholders, managers and associates in order to reduce the undesirable outcomes of illegal phoenix activity<sup>9</sup> in the industry. In order to afford applicants the opportunity to explain any adverse findings detected during the application phase, a new addition has been added to 4.1.2.

**The Code Administrator's complaints procedure** was recently updated in March 2019 after a mandatory period of consultation of three months with Code signatories and approval by the Code Review Panel. The complaints procedure (Attachment E) is publicly available on the CEC website<sup>10</sup> and information on cancellations and prior suspensions are also publicly available. The Code Administrator also releases a Quarterly Report to all signatories to report on breaches and sanctions and to enable regular feedback for continuous improvement.<sup>11</sup>

<sup>9</sup> [https://consumeraction.org.au/wp-content/uploads/2019/04/1904\\_Sunny-Side-Up-Report\\_FINAL\\_WEB.pdf](https://consumeraction.org.au/wp-content/uploads/2019/04/1904_Sunny-Side-Up-Report_FINAL_WEB.pdf)

<sup>10</sup> <https://www.cleanenergycouncil.org.au/industry/retailers/program-activity>

<sup>11</sup> A copy of the latest quarterly report from Nov 2019 to Jan 2020 can be made available upon request.

## Public version

Complaints about the conduct of signatories are assessed and investigated by the Code Administrator in accordance with the complaints procedure, and sanctions applied accordingly. A record of all complaints received by the Code Administrator and the outcomes of each complaint is provided at **Attachment G**.

In 2018-2019, some outcomes obtained by the Code Administrator in relation to the complaints include:

- Compensation paid to consumers regarding down time of the PV system;
- Refund of monies for incorrect direct debits of a purchase;
- Warning to signatory to cease potentially misleading advertising;
- Suspension of a signatory due to repeated complaints of misleading advertising and;
- Amendment of website in relation to potentially misleading information displayed.

The Code Review Panel is the oversight and monitoring body of the Code, which consists of three representatives independent of the CEC and independent of signatories. The Code specifies that the representatives must have relevant expertise in consumer advocacy, industry experience and knowledge of regulation or administration of consumer law. The panel is currently chaired by Gerard Brody, the Chief Executive of the Consumer Action Law Centre along with Damien Moyse, the Acting Chief Executive at the Alternative Technology Association and Nigel Morris, Business Development Manager at Solar Analytics. The Code Review Panel meets quarterly to ensure independent arbitration of matters referred by the Code Administrator, provide an avenue of appeal for signatories and to review policy changes to the Code.

The new additions to the breach matrix of the proposed code provides greater clarity and connects to other existing provisions in the code for example, the breaches of finance and privacy provisions have been included to ensure widespread compliance with the code and to improve standards. A minor amendment in 3.5.3 and 3.6.3 has been introduced to afford the Code Administrator the discretion to lower a breach severity level if appropriate, and to allow signatories to rectify breaches in accordance with the procedure.

The Applicant submits that these provisions of the Code will continue to benefit consumers and the broader community should the uptake in solar PV continue to grow over time.

### **Public detriment including any competition effects**

**11. Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Refer to the public detriment that may have resulted under the authorisation previously granted. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.**

The previous determination (**Attachment I**) referred to a number of public detriments identified in the proposed conduct. These include the following:

#### **Increased Costs**

The minimum five year warranty required by the existing code (replicated in the proposed draft code) and fees charged to applicants and signatories<sup>12</sup> by the Code Administrator means that it is likely that some costs are passed on to consumers in the form of higher prices. Further, there is an increased cost in terms of compliance and reporting requirements which could be an increase in the regulatory burden for signatories or potential signatories.

The CEC notes that there has been no fee increase since the previous authorisation was granted, and submits that the fees are necessary for the Code Administrator to carry out the assessments of potential signatories and to continually monitor compliance with a large number of signatories and to cover the CEC's costs in doing so.

#### **Exclusionary conduct**

The requirement for signatories to employ only CEC Accredited designers and installers (required by the existing code and replicated in the proposed draft) could be seen as anti-competitive conduct. For a small-scale solar, wind or hydro system to be eligible for STCs, it must be designed and installed by someone who is accredited by the Clean Energy Council under the Small Scale Renewable Energy Scheme. Systems that are designed and installed by someone who is not accredited will not be eligible to receive STCs.

#### **Sanctions**

Due to the number of increasing government programs choosing to mandate CEC approved signatories in their programs, any sanctions applied to signatories could have the effect of reducing competition. For example, a suspension of a signatory could result in being prohibited to participate in a government program and cause a loss of income for the signatory. It is noted that barriers for entry into government programs lies with the respective state governments, and not the CEC.

### **Contact details of relevant market participants**

**12. Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators.**

Aside from Signatories and applicants, other parties who may be impacted by the proposed conduct include industry associations and State/Territory Government departments which have mandated the Solar Retailer Code of Conduct into their incentive programs. A number of fair trading regulators and state and territory Ombudsman have also been consulted prior to the submission of this application, as have members of the New Energy Tech Consumer Code working group. (As noted

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<sup>12</sup> Section 4.2 – a minimum and maximum cap applies on fees.



previously, the New Energy Tech Consumer Code was authorised by the ACCC on 5 December 2019, a decision now being reviewed by the Australian Competition Tribunal).

A list of these Government departments, other likely interested parties, and their contact details is provided at **Attachment H**.

### **Additional information**

#### **13. Provide any other information or documents you consider relevant to the ACCC's assessment of the proposed application.**

##### **Consultation**

**Attachment K** contains an outline of the consultation process, a summary of the feedback received and attached submissions in response to the consultation undertaken by the CEC prior to the submission of this application. Two submissions raised issues with 5 year warranty required of signatories. The CEC notes that this key requirement had been captured in the authorisation since October 2013, and in subsequent reauthorisations since.

##### **Independent review**

In line with the requirement that the Code and its administration be independently reviewed every three years, a 2016 review was conducted by Cameron Ralph Navigator (now known as Cameron Ralph Khoury), a private consultancy firm that specialises in industry codes and complaints handling. The review took 5 to 6 months and the findings of Cameron Ralph Navigator were as follows:

“Our Review of these complaints satisfied us that the new complaints procedure is being appropriately applied and the Code Administrator is handling complaints efficiently and fairly. The Code Review Panel’s role provides an independent oversight to the process and clear mechanism where there is dissatisfaction with the Code Administrator’s complaints handling. We spoke with a couple of Code signatories that had experienced these procedures, either as complainant or as the subject of a complaint, and these interviewees were supportive of the new procedures.”<sup>13</sup>

A further independent review was not undertaken in 2019. This was because in 2018 the Applicant together with other members of the New Energy Tech Consumer Code working group began work on the replacement of the Code by a new and broader code, intending to canvass a wide range of technologies, including solar PV. Once it became clear that, for continuity reasons, there was a need to extend the Code for a further few years, the Applicant undertook an internal review of the Code – which identified the enhancements proposed in this application. To provide independent input, Cameron Ralph Khoury were engaged to consider the merits of the proposed enhancements and the proposed drafting. Whilst acknowledging that this process does not fully meet the review requirements of the Code, the Applicant submits that the costs of a full independent review would not have been justifiable in the circumstances of the imminent replacement of the Code.

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<sup>13</sup> Page 10 of the 2016 Independent Review Solar Retailer Code of Conduct. A full copy of the Report can be made available upon request.

**Declaration by Applicant(s)**

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



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Signature of authorised person

Code of Conduct Manager

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Office held

(Print) Mindy Lim, on behalf of the Clean Energy Council

This [6] day of [May] [2020]

*Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.*