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TERCEIRO LEGAL CONSULTING Pty Ltd

4 September 2020

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

Attention Susie Black and Miriam Kolacz

By email – adjudication@accc.gov.au

Dear Susie and Miriam,

Clean Energy Council – application for revocation of authorisations A91495 and A91496 and substitution of AA1000514

Introduction

Thank you for the opportunity to make a submission in respect of the draft determination for the re-authorisation of the Solar Retailer Code (Code).

I have been retained to prepare and lodge this submission on behalf of Bell Solar Pty Ltd. My Client's related entity, 3P Solar Pty Ltd ("**3P**") is an Approved Solar Retailer under the Code. My Client previously made submissions to the ACCC in relation to the Solar Retailer Code (Code) and the proposed New Energy Tech Consumer Code.

My Client is very pleased with the ACCC's decision to impose a condition as part of its proposed re-authorisation to require the Clean Energy Council (CEC) to include an independent appeals process for retailers who apply to become signatories to the Solar Code but are rejected.

As stated in our earlier submission, the rejection of an application by the CEC is particularly problematic given that the Federal Government and many state governments require suppliers to become signatories of the Code in order to access solar incentive or subsidy programs. The risk from a competition law perspective is that the Code Administrator has the ability to prevent new entrants from becoming signatories under the Code by rejecting their application for anti-competitive purposes.

Concerns

Whilst my Client is very pleased with the inclusion of an appeal process, it remains concerned about a number of aspects of the proposed Code and the CEC's administration of the Code.

We remain concerned that CEC is still able to impose a condition on applicants that to be accepted as a signatory, the 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.

The CEC has claimed that the condition in relation to close family relatives is required to prevent illegal phoenix activity. While my Client's fully support all efforts to combat such illegal activity, the current prohibition is a very blunt instrument to address these concerns. CEC is not required to be satisfied as to whether there is any actual evidence of illegal phoenix activity before potentially cancelling a membership or not approving an application. Rather the mere fact that a close family member of a shareholder has received a court judgment against them in the last five years will be sufficient grounds for cancellation or exclusion. We remain of the view that this requirement should be prohibited by the ACCC due to the risk of its misuse for anti-competitive purposes.

Furthermore, the requirement that an application can be rejected if a shareholder of an applicant has received a court judgment against it in the last 5 years remains a nonsense as explained in our earlier submission as follows:

> *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 remain signatories to the Code.*

We do not believe that CEC has provided any justification for this requirement in relation to shareholders. There is simply no valid reason to make accreditation somehow contingent on the actions of a shareholder who by definition has no management role in the business. We remain of the view that this requirement should be prohibited by the ACCC due to the risk of its misuse for anti-competitive purposes.

We are also concerned that the ACCC has prohibited the CEC from determining an application or terminating a membership on the basis of alleged consumer complaints received by the CEC which have never been disclosed to the applicant. In other words, as we stated in our earlier submission in the past the CEC has made decisions to reject applications under the Code on the basis of alleged consumer complaints which the applicants knew nothing about and which they were not given the opportunity to respond to. Such conduct must be positively prohibited as part of the ACCC's authorisation of the Code. The CEC must be required to observe the rules of natural justice in terms of disclosing to applicants the details of all complaints and then giving the applicants an opportunity to respond to those complaints – ie the hearing rule.

We again note that the administrator's power under paragraph 4.1.2 of 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 Code 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 Code in the past. Appropriate wording would be as follows:

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

My Client's most significant concern remains the fact that the Code Administrator retains the power to both investigate and make binding determinations concerning breaches of the Code.

As stated in our earlier submission, we do not believe that this is an appropriate model for an ACCC authorised Code of Conduct. Indeed, in this respect the Code appears to depart from the guidance provided by the ACCC in its publication *Guidelines for developing effective voluntary industry Code of Conduct* which states at page 10:

> ***Independent review of complaints handling decisions***
>
> *The code should also provide for a review mechanism when a member of the public or an industry member is dissatisfied with an initial attempt to resolve the complaint.*
>
> *This internal review mechanism may be offered by the industry association to attempt to conciliate the dispute. If all internal industry efforts fail to resolve the complaint then the industry should sponsor an independent complaint body to review it.*
>
> *This independent review body should:*
>
> - ***be recruited from outside the industry***
> - ***hold no preconceived ideas about the industry***
> - *have tenure for a fixed period*
> - *be suitably qualified to hear and resolve complaints.*
>
> *By recruiting from outside the industry to hear complaints not only is justice being done but it is also being seen to be done. Associations exist for the benefit of their members at the exclusion of others. Therefore, they may not generally be seen as an acceptable independent body to review complaints.*
>
> *Examples of independent complaints bodies include:*
>
> - *an independent referee with conciliation powers or*
> - *an industry ombudsman with power to make binding decisions or*

- *a committee composed of an independent chair, one or more industry members and consumers.*

(Emphasis added)

As currently drafted the Code permits the Code Administrator to make binding decisions in relation to the sanctions to be imposed in relation to signatories – paragraphs 3.1.2(c), (d) and (e). This is not appropriate as the investigation and determinative functions should be separated to avoid potential conflicts of interest. In addition, by allowing the Code Administrator to make binding determinations in relation to signatories there is a risk that this power may be misused for anti-competitive purposes.

We are also not convinced of the independence of the current members of the CEC Code Review Panel (CRP), particularly in terms of them being recruited from outside the industry or holding no preconceived views about the industry, as per the ACCC's Guidelines.

The CRP is Chaired by Gerard Brody of the Consumer Law Centre Victoria who has been very vocal in his criticism of the Buy Now Pay Later arrangements in the solar industry, as most recently voiced on the 7.30pm Report in August 2020. It appears to us that Mr Brody does in fact hold a number of strong preconceived views about the industry.

The second member is Damien Moyse, Policy and Research Manager or Renew. Renew describes itself as follows:

> *Renew ('Alternative Technology Association Inc trading as Renew Australia) is a national, not-for-profit organisation that inspires, enables and advocates for people to live sustainably in their homes and communities. Established in 1980, Renew provides expert, independent advice on sustainable solutions for the home to households, government and industry.*

A significant part of Renew's role is advocacy "for policies that promote renewable energy and cut emissions, make our homes healthier, more affordable and climate resilient, and protect consumer rights in our rapidly changing energy markets". It is clear that Mr Moyse has not been recruited from outside the industry.

The final member is Nigel Morris who is described as an Industry Member. Mr Morris is the Business Development Member for a company called Solar Analytics which describes itself as "Australia's largest independent third-party solar and energy monitoring provider". We understand that Solar Analytics markets and sells its services to a number of solar companies, including current CEC members. Again, it is clear that Mr Morris has not been recruited from outside the industry.

It appears to us that there is a clear contradiction in clause 3.2.2 of the Code. Clause 3.2.2 states that the CRP will be an independent body. The clause also states that representatives must be independent of Code signatories and must not have any conflict of interest for example, having recently been employed by, or consultant to, any Code Signatory. However, clause 3.2.2(d) then states that the CRP must consist of at least three participants that are all non-signatories to the Code, including…(ii) a PV representative with experience in the solar PV industry appointed by the Code Administrator.

While we are not suggesting in any way that the individuals on the CRP have been undertaking their roles in an inappropriate manner, we do not believe that the CRP could be seen to be in any way independent of the solar industry. It is essential that the individuals who are appointed to the CRP are seen to be genuinely independent.

In our view, clause 3.2.2(d)(ii) should be removed so as to make the CRP truly independent, Furthermore, appointments to the CRP should be made, not by the Code Administrator, which is the very entity whose decisions are to be appealed to the CRP, but rather by the CEC Board, ideally in consultation with the ACCC (which appears to be required under clause 3.2.2(d)(i) in relation to consumer representative).

Our final concern is that the CEC is not being required to seek authorisation of its Accreditation Code of Conduct. As stated in our earlier submission, the Accreditation Code permits the imposition of significant sanctions against solar installers and designers who breach the Code. For example, the CEC has the power to suspend or cancel a solar installer or designer's accreditation for an indeterminate period without any right of appeal. The solar installer can reapply for accreditation once the cancellation period has ended but the CEC still has the right to refuse reinstatement pursuant to clause 5E of the Accreditation Terms and Conditions which states:

> *"**Rights of the CEC**"*
>
> *The CEC has the right to take any of the following actions or any combination of them, where an Applicant or Accredited Person has breached any of these Terms and Conditions, including the Code of Conduct:*
>
> *E. refuse re-instatement of the accreditation of a person who was previously an Accredited Person"*

Therefore, it appears to us that the CEC have a discretion to cancel a solar installers accreditation period for any period it chooses and then to refuse to reinstate the accredited person at the end of the cancellation period for a further indeterminate period. Furthermore, the solar installer has no right to challenge or appeal any of these decisions.

Recently, my client has become aware of at least two installers who have had their CEC accreditation cancelled for a period of 12 months. Without seeking to comment on the merits of CER's decision in these two matters, it does not seem appropriate as

a matter of principle for the CEC to have the power to unilaterally cancel an installer's accreditation for any period it wishes, on the basis that once the period of cancellation expires it can decide to not re-instate the installer for a further indeterminate period and for both of these decisions to be made without any right of appeal.

We are strongly of the view that the Accreditation Code of Conduct as it is currently operating contravenes a number of provisions *Competition and Consumer Act* 2010 and as such is illegal unless authorised by the ACCC.

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

Yours sincerely

[redacted]

Michael Terceiro
Competition and Consumer Lawyer