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TERCEIRO LEGAL CONSULTING Pty Ltd

16 June 2020

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

Attention Danielle Staltari and Miriam Kolacz

By email – adjudication@accc.gov.au

Dear Danielle 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 proposed 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 proposed New Energy Tech Consumer Code.

My Client has a number of concerns about the Code and the way in which the Code has been administered by the Clean Energy Council (CEC) in the past.

CEC
As you know the CEC is a private organisation with a wide number of stakeholders and members. Many of the stakeholders and members are competitors in various solar energy markets, as manufacturers, retailers and installers of solar energy systems. For example, one of the CEC's directors is the Managing Director of Suntrix Solar which is an Approved Solar Retailer. Furthermore, per the content of its website, Suntrix Solar is a top 20 installer. Another CEC director is the Managing Director of juwi whose business includes constructing solar farms.

Accordingly, it is vitally important that the Code operate in a manner which does not facilitate anti-competitive conduct.

Administration of Code

My Client is concerned about the CEC's poor record in administering the Code in an open, fair and transparent manner.

Late last year CEC commenced an investigation against 3P based on a complaint from a customer of 3P. During the investigation process the matter was resolved between 3P and the customer. The customer subsequently "spoke to [CEC] to withdraw [his] complaint". Despite there being no active complaint, as the complaint had been withdrawn, the Code Administrator still demanded a response from 3P. The CEC investigation was subsequently closed.

Applications for membership

Part 4 of the Code sets out the process for becoming a signatory of the Code. The Code Administrator is able to make decisions on applications from industry participants wishing to become signatories under the Code.

My Client is concerned that the Code makes no provision for an appeal against a decision by the Code Administrator to reject an application from an industry participant to become a signatory. In other words, the Code Administrator is able to make a decision to reject an application from an industry participant without any avenue for a review of that decision.

This situation is particular problematic given that many state and territory governments require suppliers to become signatories of the Code in order to access solar incentive or subsidy programs.

The risk from a competition perspective is that the Code Administrator has the ability to prevent new entrants from becoming signatories under the Code by rejecting their application for an anti-competitive reason. Furthermore, such a rejection would not be subject to any form of review.

My Client has knowledge of a number of the problems which have arisen in relation to the CEC's administration of the Code in relation to membership applications in the past.

For example, My Client is aware of decisions by the CEC to reject applications from applicants on highly technical grounds. In addition, the CEC introduced an exclusion period which operated to prevent an unsuccessful applicant from reapplying to become a signatory of the Solar Code for a period of 3 months. Previously, the exclusion period was 6 months.

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

As would be apparent to the ACCC, as the relevant competition regulator, the CEC's decision to unilaterally impose an exclusion period (which incidentally was not part of

the ACCC authorised conduct) had the effect of preventing a number of competitors from entering particular solar energy markets for a period of six months. We believe that some of these rejections substantially lessened competition in those markets to the detriment of consumers.

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

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

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

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

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

This raises a genuine concern as to whether the CEC has been applying the provisions of the Code in a fair and equitable manner or whether stricter rules are being applied to some industry participants, particularly in relation mavericks which have a history of disrupting solar markets.

In one particular case, raised with the ACCC previously in the context of the New Energy Tech Consumer Code, the CEC rejected an application on the grounds that it

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

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

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

It is clear to us that in the past the CEC has failed to follow the rules of natural justice in terms of disclosing the details of all complaints to applicants and then giving the applicants an opportunity to respond to those complaints – ie the hearing rule.

We believe the above accounts of the CEC's performance in terms of administration of the application process under the Code demonstrate the significant problems which have arisen, due to the Code not including a right of appeal in relation to decisions by the Code Administrator to reject applications from industry participants to become signatories to the Code.

Due to the absence of an appeal right, the Code effectively gives the Administrator unfettered power to decide which companies may become signatories to the Code and as such are permitted to enter and compete in various energy markets. Put simply, there is a very real risk that the Code Administrator may reject applications for the purpose, or with the effect or likely effect, of substantially lessening competition in various energy markets.

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

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

We also believe that paragraph 3.2.4 of the Code would also have to be amended to confer jurisdiction on the Panel to consider such appeals:

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

Natural justice

We also note that the Code 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 application process 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.*

Compliance

My Client is also concerned about the current provisions concerning compliance set out in Part 3 of the Code.

As currently framed the Code Administrator has the power to investigate and make binding determinations concerning breaches of the Code.

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.*

However, 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 power may be misused for anti-competitive purposes.

We do not believe that the Code Administrator should have any power to make binding determinations – rather its role should be limited to investigating complaints.

In our view this part of the Code has to be substantially redrafted to make it clear that only the Code Review Panel can make binding determinations under the Code and also to establish a more detailed structure for the conduct of disciplinary matters. It appears to us that the Code is particularly light in relation to the disciplinary mechanisms which operate under the Code, particularly when one compares these mechanisms to other ACCC-approved disciplinary models such as the Medicines Australia's Code Conduct Committee or the Mortgage and Finance Association of Australia's Disciplinary Tribunal.

We also believe that the breach matrix set out in paragraph 3.5.3 raises a number of concerns. Our first concern is the number of issues which are deemed to be "severe" or "major" breaches of the Code. It appears to us that too much conduct is deemed to be either a "severe" and "major" breach - ie 18 and 17 different types of conduct respectively.

Furthermore, we do not agree that bringing the Code into "disrepute" should be a severe breach given how vague and subjective this requirement is, or that the failure to pay fees to the CEC should be classified as a major breach.

We also note that the following new proposed amendments to the Breach Matrix are too vague, subjective and open ended:

- "**Point of Contract"**

  "Any document which forms part of the contract must be provided to the consumer in a non-editable format eg. hard copy or pdf."

- "**Financing and alternative purchasing agreements"**

  "Signatories must provide all required information for finance and alternative purchasing agreements."

- "Signatories must comply with additional requirements if the finance provider is not regulated by NCCP Act."

We also believe the new proposed breach under "Point of contract" namely "The contract must be expressed in a clear and transparent way, using plain language that is legible" is unnecessary considering the CEC is responsible for approving the contract when an applicant lodges an application to become an Approved Solar Retailer. If there are shortcomings in the way the contract is expressed, this should be addressed by the CEC when the applicant makes its application for Approved Solar Retailer accreditation.

We also believe that the new proposed breach under "Point of contract" namely "Contract must include all terms and conditions and these must be compliant with the Code" is unnecessary for the reasons stated in the above paragraph.

In Paragraph 2.4.7 of the Code it is proposed that the Signatory must notify the Code Administrator within 10 business days of a change in control. Most importantly if the Code Administrator identifies a substantial change which was not disclosed, the signatory status may be revoked. We have a number of concerns about this provision.

First, it appears to us both harsh and unreasonable to revoke an accreditation based on a failure by an accredited retailer to disclose to CEC a change in control. For eg XYZ Pty Ltd could have a husband as a sole director and shareholder, and due to increased business the husband may wish to involve his spouse/domestic partner in his business to assist with management and either issue more shares to the spouse/domestic partner or transfer shares to his spouse/domestic partner whereby the husband and his spouse/domestic partner would have equal shares in XYZ Pty Ltd. This scenario is not uncommon in small business operations. In this case, XYZ Pty Ltd may have its accreditation revoked because of a failure to inform CEC of the change in shareholding of XYZ Pty Ltd.

Second, and most importantly the Breach Matrix does not make any mention of the right of CEC to revoke accreditation for a failure to disclose the change of control. Therefore, it appears that there are other sanctions scattered throughout the Code which are not included in the Breach Matrix. We believe that all potential breaches of the Code should be listed in the Breach Matrix.

We are also of the view that the proposed Breach Matrix could be manipulated to operate in a manner which facilitates anti-competitive conduct. For example, it appears to us that the Code Review Panel has the discretion to alter the breach levels after the Code has been authorised by the ACCC. Therefore, by way of example, an Approved Solar Retailer may be responding to an issue as a "Medium" breach but subsequently the Code Review Panel could exercise its discretion to designate that conduct as a "Severe" breach and suspend/cancel the Retailer's accreditation.

In our view the breach levels have to be "locked in" as part of the ACCC authorisation and any discretion provided to the Code Review Panel to alter breach levels removed.

Accreditation Code of Conduct

We also note that the CEC implemented an Accreditation Code of Conduct (Accreditation Code) to accredit solar installers and designers some time ago. The stated purpose of the Accreditation Code is to establish standards of conduct and professionalism which are expected of solar installers and designers.

The Accreditation Code also 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 – see https://www.cleanenergycouncil.org.au/industry/installers/compliance-toolkit/accreditation-terms-and-conditions.

The solar installer can reapply for accreditation once the cancellation period has ended but CEC still have 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 has discretion to cancel a solar installer's accreditation 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. The solar installer has no right to challenge or appeal either of these decisions.

Somewhat surprisingly this Code is not authorised by the ACCC. This is of significant concern given the very real possibility that the imposition of sanctions by the CEC against various solar installers and designers under the Code and the refusal to reinstate solar installers pursuant to clause 5E of the Code may be undertaken for an anti-competitive purpose or have an anti-competitive effect in contravention of provisions of the *Competition and Consumer Act* 2010.

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

Yours sincerely

[redacted]

Michael Terceiro
Competition and Consumer Lawyer