

29 April 2019

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

Sent by email to: adjudication@accc.gov.au

Dear Madam / Sir

RE: Application for authorisation made under sections 88(1) of the Competition and Consumer Act 2010

Please find attached an application for authorisation in relation to the proposed New Energy Tech Consumer Code, which has been prepared by the following applicants:

- (i) Australian Energy Council (AEC)
- (ii) Clean Energy Council (CEC)
- (iii) Smart Energy Council (SEC)
- (iv) Energy Consumers Australia (ECA)

The applicants have developed the proposed voluntary industry code of conduct for sellers of new energy technology products and services in response to a request from the Council of Australian Governments Energy Council (COAG EC) for a consistent approach from industry to improving the consumer experience in this industry.

The following documents are enclosed:

- (i) Application for Authorisation (Non-merger) New Energy Tech Consumer Code, including Details of the Applicants as Attachment A
- (ii) Attachment B: Proposed draft New Energy Tech Consumer Code
- (iii) Attachment C: The Consumer Code Journey – an explanatory memorandum that sets out the steps taken to develop the Consumer Code, the stakeholder consultation steps including those consulted, the matters raised and how they were resolved through the drafting process. Annexed to this is the letter from the COAG Energy Council requesting the development of a code (originally called the Behind-the-Meter Code) and the Memorandum of Understanding for Governance, Accountability and Administration reached by the Behind the Meter Stakeholder Panel
- (iv) Attachment D: Relevant market participants
- (v) Attachment E: The currently authorised Solar Retailer Code of Conduct

The lodgement fee related to this application has been paid.

For any queries regarding this application, please do not hesitate to contact

Mindy Lim (CEC) on 0403 196 570 and mim@cleanenergycouncil.org.au (*unavailable from 26 April to 8 May 2019 inclusive*)

Anna Sexton (CEC) on 0438 150 973 and asexton@cleanenergycouncil.org.au

Jacqueline Crawshaw (ECA) on 0436 033 045 and Jacqueline.crawshaw@energyconsumersaustralia.com.au

Ben Barnes (AEC) on 0421 497 491 and ben.barnes@energycouncil.com.au (*unavailable from 12 April to 3 May 2019 inclusive*)

Nick Leys (AEC) on 0413 621 484 and nick.leys@energycouncil.com.au

John Grimes (SEC) on 0400 102 396 and ceo@smartenergy.org.au

Sincerely,

A handwritten signature in blue ink that reads "Anna Sexton". The signature is written in a cursive style with a large initial 'A'.

Anna Sexton

**Compliance and Risk Manager
Clean Energy Council**

Application for ACCC Authorisation for Proposed Conduct (non-merger)

New Energy Tech Consumer Code

Overview Information

This Application seeks authorisation for the New Energy Tech Consumer Code (Consumer Code), a single industry-wide code of conduct that has been developed by a number of new energy market industry associations in conjunction with consumer organisations in response to a request by the Council of Australian Governments' Energy Council in August 2017.

Parties to the proposed conduct

1. Applicant details

The Applicants are the following organisations:

- a) **Australian Energy Council (AEC)** - The AEC is the industry body representing 23 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.
- b) **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 600 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 6000 solar installers. It is committed to accelerating the transformation of Australia's energy system to one that is smarter and cleaner.
- c) **Smart Energy Council (SEC)** – is a peak body for the solar, storage and smart energy in Australia. Since 1954, the SEC has been advancing the cause of solar energy as the Australian Solar Energy Society and the Australian Solar Council. In 2014, it added energy storage with the creation of the Energy Storage Council. In 2017, it became the Smart Energy Council. The SEC is a not-for-profit membership organisation committed to clean, efficient, cheap and smart energy solutions for all Australians. Its membership comprises individual, small and medium businesses as well as many Australian and international companies or organisations as corporate members. It encompasses installers, sales people, engineers, scientists, recruiters, managers and financiers, and some individual consumers; all of whom are in some way involved in the smart energy industry.
- d) **Energy Consumers Australia (ECA)** - The ECA is a national voice for residential and small business energy consumers. Established by the Council of Australian Governments (COAG) Energy Council in 2015, its objective is to promote the long-term interests of consumers with respect to price, quality, reliability, safety and security of supply.

Contact details for all organisations are provided at Attachment A.

This Application is being submitted on behalf of the applicant organisations by:

Mindy Lim
Code of Conduct Manager (Solar Retailer Code)
Clean Energy Council
Level 15, 222 Exhibition St
Melbourne VIC, 3000

Tel: 03 9929 4153

Email: MLim@cleanenergycouncil.org.au

A second contact if required is:

Anna Sexton
Compliance and Risk Manager
Clean Energy Council
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Melbourne VIC, 3000

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2. Authorisation is also sought on behalf of those providers of New Energy Tech (as defined in the Consumer Code) who will become signatories to the Consumer Code and engage in the proposed conduct. Those expected to become signatories range in scale from micro businesses to large energy companies with New Energy Tech lines of business.

Signatories are expected to number in the many hundreds. There are currently 280 signatories to the CEC Solar Retailers Code¹ and they are likely to transfer to the new technology-neutral Code. It is projected that there will be at least another 300 additional future members of the Consumer Code (conservatively based on current growth trends arising from government incentive programs, interest registered by members of the Smart Energy Council and the application of a Code to a broader range of New Energy Tech and services).

The proposed conduct

3. The proposed Consumer Code will set standards of consumer protection that will be provided by signatories covering all aspects of the customer experience, ranging from initial marketing and promotion through, as appropriate to the offering, quoting, contracts, finance and payments, installation, operation, customer service, warranties, complaints and etc.

Details of the proposed conduct are set below and in a series of Attachments:

Attachment A - Details of the Applicants

Attachment B - The proposed New Energy Tech Consumer Code

¹ <https://www.solaraccreditation.com.au/retailers.html>.

Attachment C - The Consumer Code Journey – an explanatory memorandum that sets out the steps taken to develop the Consumer Code, the stakeholder consultation steps including those consulted, the matters raised and how they were resolved through the drafting process. Annexed to this is the letter from the COAG Energy Council requesting the development of a code (originally called the Behind-the-Meter Code) and the Memorandum of Understanding for Governance, Accountability and Administration reached by the Behind the Meter Stakeholder Panel

Attachment D – Relevant market participants

Attachment E - The currently authorised CEC Solar Retailers Code

4. Aspects of the provisions of the Competition and Consumer Act 2010 (Cth) may be relevant to the proposed conduct, in particular:
 - a) Cartel conduct (s45AD) – see paragraph 24 below
 - b) contracts, arrangements or understandings that restrict dealings or affect competition (s. 45) – see paragraph 9 below
 - c) concerted practices (s.45) – see paragraph 9 below
 - d) misuse of market power (s. 46) – see paragraph 9 below
 - e) exclusive dealing (s. 47) – see paragraph 20 below

The proposed conduct is set out in the Consumer Code which requires voluntary signatories to meet certain minimum standards of good practice and consumer protection. The impact of the Consumer Code could be magnified if, as expected, government funded or approved New Energy Tech incentive schemes or rebates are only available for products or services provided by signatories to the Consumer Code or if governments mandate Consumer Code subscription for classes of government purchasing/supply. The result could be that signatories' position in the market is enhanced to the detriment of those that are not prepared to meet those good practice and consumer protection standards.

5. The aim of the Consumer Code is not, however, to diminish competition. Rather the Consumer Code aims to raise standards of consumer protection in the sector and to strengthen consumer confidence in New Energy Tech so that the market continues to grow and innovate, while providing choice for consumers. The Consumer Code aids consumer choice by allowing easier comparisons of offers from signatories by providing an assurance of like-for-like standards. The Consumer Code makes a series of undertakings that cover the key aspects of the customer journey including marketing and sales, quoting, contracts, provision of consumer information, installation, safety and activation, effective operation, customer service and warranties and complaints-handling.
6. This application is seeking authorisation for the proposed conduct for the default period of five years. The Consumer Code itself provides for three-yearly independent reviews (The Annexure, Paragraph 27. g.)). These independent reviews are intended to cover a wide range of stakeholder and internal issues that go beyond the scope of the competition issues that relate to the proposed authorisation. Stakeholders considered this shorter interval of three years to be necessary in light of rapid evolution of the New Energy Tech sector and for testing the effectiveness of the administration arrangements, resourcing and powers.

Market information and concentration

7. New Energy Tech, as defined for the Consumer Code involves products, systems and services that are:
- a) small-scale (in-home or small business) products and systems that generate, store or trade energy away from Australia's main transmission and distribution Energy Networks or as distributed energy resources connected to an Energy Network
 - b) services that support or are closely related to those products and systems
 - c) products, systems and services that monitor or manage a Customer's usage of energy whether on or off an Energy Network and
 - d) permitting future flexibility and innovation, any other product, system and service that the Consumer Code Administrator is satisfied sits appropriately within this Code.

The definition is not intended to include simple, low cost or off-the-shelf New Energy Tech, such as might be purchased from a whitegoods or hardware store for self-installation. The intention is that a class exemption be made by the Administrator to provide clarity, in accordance with paragraph 17 of the Consumer Code Annexure – Code Administration.

Examples of New Energy Tech include:

- e) distributed energy resources owned by or leased to the Customer that are connected to an Energy Network for supplementary supply such as solar photovoltaic systems, wind turbines, hydro and bioenergy generators
- f) a microgrid that may be connected or fully isolated from the Energy Network
- g) a power system for a single Customer, whether or not the Customer is also connected to an Energy Network
- h) energy management products, systems and services supplied to a Customer including home energy management systems and services, battery and other storage products, systems and services
- i) programs aimed at stabilising the supply of energy including by paying Customers an incentive to reduce their usage during critical peak periods or by shutting down or restricting the power consumption of Customer appliances during critical peak periods
- j) a Power Purchase Agreement
- k) person to person energy trading systems and services
- l) electric vehicle charging services
- m) suppliers of repair, maintenance and removal services for New Energy Tech products and systems.

These examples are not intended to limit the scope of the definition. Rather the term has been defined to accommodate new products and services as they enter the Australian market where

the nature, complexity and cost is such that the Consumer Code protections are appropriate. This is a rapidly evolving sector with many innovations. The definition and scope of New Energy Tech is intended to evolve and expand over time.

8. The Consumer Code is intended to apply in all Australian States and Territories
9. The New Energy Tech sector is likely to be quite diverse. Some New Energy Tech markets, such as solar photovoltaics (PV), are highly competitive with large numbers of suppliers. In these markets, any number of potential signatories to the Consumer Code may have business relationships with each other or may be direct or indirect competitors (and for this reason exemption is sought from both aspects of section 45). For nascent New Energy Tech products and services such as Virtual Power Plant services, it is however possible that at least initially, there may be one or a small number of dominant suppliers (and for this reason exemption is sought from section 46).
10. The sector is currently dominated by solar PV, which is now being followed by a rapidly expanding market for energy storage (mostly battery). Electricity self-production and self-consumption is becoming a prime motive for purchasers, along with price certainty. The scale and impact of the New Energy Tech in the marketplace for consumers, which underscores the need for the Consumer Code, can be seen in the following:
 - a) Solar PV – By the end of 2018, more than 2 million residential PV rooftop systems had been installed. Last year saw particularly rapid growth in the small-scale sector of the solar PV market, with the number of solar installations on homes and small businesses increasing by 43% on the previous year.² The Clean Energy Regulator expects that growth is likely to continue for at least 10 years. Installations to date represent 22%³ of dwellings that are suitable for solar PV so the majority of consumer spend is to come. Additionally, after 10 years of implementation of systems and with major cost reductions, the sector is seeing a fast-developing upgrade market.
 - b) Battery Energy Storage Systems (BESS) – the current installed number is around 70,000 and growing rapidly with State and probable Federal Government support programs expanding. There is a rapidly increasing uptake for BESS attached to new PV systems and a booming retrofit market as premium feed-in-tariffs are ended and power export prices have fallen below retail prices, making self-consumption the preferred option.
 - c) Virtual Power Plants (VPP) – a number of these are in pilot stages with around 100,000 households expected to be involved by 2020. These are expected to transition to commercial operation as the early results are already positive.
 - d) Demand Response (DR) Services – this is a nascent market which will burgeon when new market rules allow monetisation of household resource capacity to deliver benefits to the network. The potential is for millions of households to choose these services as they increase the potential revenue from the householders’ assets.
 - e) Battery and hybrid electric vehicles and electric vehicle infrastructure – this market is also at an early stage of development, uptake of electric vehicles having been slow in Australia. Just less than 2,300 battery and hybrid electric vehicles were sold in Australia in 2017 (albeit a 67 per cent increase from the previous year). For the vast majority of Australians, the significant cost of electric vehicles has been a barrier to entering the market. A lack of government

² 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>

³ <http://www.cleanenergyregulator.gov.au/Infohub/Media-Centre/Pages/Media%20updates/NewsItem.aspx?ListId=19b4efbb-6f5d-4637-94c4-121c1f96fcfe&ItemId=589>

incentives relating to electric vehicles has led to a reluctance by manufacturers to bring their vehicles to Australia. Without strong consumer demand for electrical vehicles, the market for products and services associated with electric vehicles also remains small. However, EV manufacturers are starting to bring electric vehicles at more accessible price points into Australia. And with recent announcements from political parties at Federal⁴ and State⁵ levels, the market is likely to experience significant growth.

- f) Other smart energy systems and services are appearing in the market which would see consumers benefit by purchasing from signatories to the Consumer Code. This is an emerging part of the sector with innovation at its core. The Consumer Code establishes a basis for consumer-centric approaches by signatories who will be obliged to provide detailed and transparent information in their customer interactions.

11. The vast majority of New Energy Tech hardware is imported. Currently local manufacture is limited to a single solar PV panel assembler with a tiny percentage of the market, but a reputation for high quality, a couple of inverter manufacturers and a few BESS assembly plants.

Hardware is mostly sold under distributorship models, but some manufacturers have local operations and direct sell. Australian software and services companies are world leaders and hold high market shares, and there are international providers too. Global competition in this space means that other players are expected to enter the market.

It is important to note that energy systems in Australia and globally are already in a transition to decarbonise – the only question is timing. Regardless of the timing, the heavily decreasing cost curves for renewable energy technologies means that the economics are dictating a faster transition with consumers leading the way based on financial and personal benefit considerations alone. Current trends project New Energy Tech purchases over the coming decade by more than 6 million households.

12. Current experience is that this dynamic growth is both encouraging new entrants to the market and the development of new products and services across the price and quality spectrum. While there are leading participants in each segment of the industry, for example, well-known manufacturers of batteries and electric vehicles, and pioneering product suppliers who remain at the forefront of the photovoltaic industry, the industry is developing at a pace that doesn't allow for leaders or other groups of participants to co-ordinate pricing or other market behaviours. New market entrants support high levels of competition.
13. The Consumer Code is not aimed (and should not be) at pricing decisions. Its aim is to ensure the quality of Consumer Code signatories' product and service offerings and customer service. By acting to maintain quality, the Consumer Code should limit the possibility of the two actions of raising prices and reducing quality or choice being done in conjunction with each other. In particular:
 - a) The Consumer Code will help to maintain high levels of quality in the products and services offered to consumers, and the quality of the customer service around the sale and marketing of those products and services.
 - b) Product quality will be maintained by requiring signatories to provide a minimum warranty, in many cases beyond the requirement of the Australian Consumer Law. It is proposed that the Consumer Code Administrator will operate an audit program designed to encourage high levels of customer service and satisfaction.

⁴ <https://www.afr.com/news/politics/national/labor-sets-50pc-target-for-electric-cars-20190331-p519do>

⁵ <https://roadmaprenewables.nt.gov.au/>

- c) Signatories to the Consumer Code will be 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 if a complaint is raised against them. Currently, the Clean Energy Council reports to the Applicants that, in its administration of the Solar Retailer Code of Conduct, it has been able to maintain high levels of customer satisfaction through its investigations of consumer complaints and its ability to assume a conciliatory role in the dispute process. It is intended that this approach will also be adopted by the Consumer Code Administrator.
- d) Market forces are likely to keep prices low or stable in the new energy technology industry. The audit and complaints handling processes of the Consumer Code administrator and technological advances in product development are likely to maintain a high level of quality. Together these factors limit the ability for industry participants to raise prices while reducing quality and/or choice for consumers.
- e) By definition, the New Energy Tech sector is innovative. Global research, development and innovation in this industry are prolific and drive the consumer appetite. As the industry matures, external participants in the market develop new ways to engage with new energy technology consumers.

14. Existing competitors in the New Energy Tech sector

There is no register or other record that establishes the precise number of solar PV retailers operating in the Australian market. Credible estimates range from 4,000 to 5,000 retailers⁶, with approximately 70% being sole proprietors or employing fewer than four people⁷. 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 ago⁸.

The battery energy storage device market is also accelerating. Incentives introduced by the South Australia, Queensland and Australian Capital Territory governments are contributing to the increased consumer demand⁹. Given the persistently high cost of electricity, demand for home batteries is likely to continue increasing.

For electric vehicles, there are currently approximately ten different brands available in the Australian retail market¹⁰. A small number of suppliers operate in the electric vehicle infrastructure market, including suppliers of home-based electric vehicle chargers.

For less mature segments of the New Energy Tech market, a smaller number of market participants/competitors exist. New Energy Tech products and services still in development or very new to the market are not well known to many consumers, so supply and demand in these segments are proportionate.

15. Likely entry by new competitors

⁶ 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.

⁷ 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>

⁸ <https://www.solarquotes.com.au/panels/cost/>

⁹ <https://assets.cleanenergycouncil.org.au/documents/resources/reports/clean-energy-australia/clean-energy-australia-report-2019.pdf>

¹⁰ <https://electricvehiclecouncil.com.au/about-ev/evs-available/>

The New Energy Tech 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 expand exponentially.¹¹ In particular, the trend for governments to require suppliers under their incentivised/subsidised programs to be code signatories is likely to continue to bring new competitors into the industry.

Public benefit

16. The Consumer Code aims to protect consumers by setting good practice standards for providers of New Energy Tech products, systems and services and providing additional consumer protections to those applying under the Australian Consumer Law (ACL).
17. Signatories to the Consumer Code agree to deliver the following Key Commitments to customers:
 - a) Provide you with clear, accurate and relevant information to help you make informed choices
 - b) Encourage you to be aware of your rights under the law and the Consumer Code
 - c) Ensure that our sales practices are responsible
 - d) Ensure that products, systems, services and documentation provided under the Consumer Code are suitable and fit for purpose
 - e) Support staff training and work processes that ensure that we comply with the law and the Consumer Code
 - f) Ensure that we will be responsive to your needs and take prompt, appropriate action if you make a complaint.
18. Importantly, the Consumer Code is principles-based and focuses on good customer outcomes through the customer journey. The Consumer Code will also be a mechanism to deliver important Consumer Information Products to better educate customers and allow them to make informed decisions.
19. The solar industry has been active for long enough to reveal areas where consumer detriment can occur with novel energy products and services. Areas of particular concern have included¹²:
 - a) High-pressure or misleading sales tactics leading to consumers buying systems that don't meet their needs

¹¹ https://www.energy.vic.gov.au/_data/assets/pdf_file/0033/73779/New_Energy_Technology_Strategy_-_web_version_-_20160308.PDF

¹² These issues are documented in a number of reports by the Consumer Action Law Centre that are informed by analysis of case studies of detriment experienced by consumers who have sought legal assistance, including *Knock It Off: Door-to-door sales and consumer harm in Victoria* (2017, available at <https://consumeraction.org.au/wp-content/uploads/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>), and *Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria* (2019, available at https://consumeraction.org.au/wp-content/uploads/2019/04/1904_Sunny-Side-Up-Report_FINAL_WEB.pdf). More general studies of consumer protection gaps in emerging energy markets include *Power Transformed: Unlocking effective competition and trust in the transforming energy market* (Consumer Action Law Centre, 2016, <https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>) and *Empowering the future: Appropriate regulation and consumer protections in emerging energy markets* (Alternative technology Association, 2016, https://energyconsumersaustralia.worldsecuresystems.com/grants/729/ap729-empowering-the-future-appropriate-regulation-and-consumer-protections-in-emerging-energy-markets_ATA.pdf)

- b) Unaffordable unregulated finance leading to financial hardship and debt for vulnerable consumers
 - c) Grid connection not being properly completed, preventing consumers from being paid for their solar feed-in (a key part of the value proposition)
 - d) Poor quality components with high failure rates and unreasonably short warranty periods
 - e) Inability to claim warranties due to companies going out of business
 - f) Poorly-structured residential Power Purchase Agreements (PPAs) that lead to significant financial losses when solar systems are oversized and most generation is not used
 - g) No access to dispute resolution beyond state small claims tribunals, which are expensive to access
20. The Consumer Code addresses these issues by requiring signatories to:
- a) Avoid high-pressure sales tactics, give clear information on products and prices, base performance estimates on reasonable assumptions and determine the customer's intent in order to verify whether the product or service is suitable for their need
 - b) Use only licenced credit providers and regulated finance products when offering third-party finance (and for that reason exemption is sought from section 47)
 - c) Take stewardship of the grid connection process (where a grid connection is required), following up with other relevant parties to ensure they have actioned the request
 - d) Only use products meeting minimum warranty period requirements
 - e) Provide information about product manufacturers to customers so they can more readily pursue warranty claims if the signatory can not
 - f) Give Power Purchase Agreement customers a billing estimate based on their individual circumstances, and clear information about pricing
 - g) Have an internal complaints process, and refer customers to relevant external dispute resolution bodies (Ombudsmen, State Fair Trading bodies, or the Consumer Code Administrator as appropriate)
21. Some provisions of the Consumer Code are additional requirements over and above the ACL. Others are to clarify the application of ACL to the New Energy Tech markets. For example:
- a) Clause 1 goes beyond ACL's requirement to not mislead in advertising and marketing by requiring signatories to provide explicit information about pricing, performance metrics, and other factors of a product or service in order to inform the customer as fully as possible about the realisable value of the product or service.
 - b) Clause 4 requires signatories to take extra care when marketing to vulnerable customers and clause 50 requires signatories providing ongoing services to respond promptly to customers in vulnerable circumstances, for example, needing energy for medical or life-support equipment.

- c) Clause 15 requires signatories to provide a site-specific design of products that require professional installation in order to fully inform the customer of the functional and aesthetic impact of the product on their living space and property.
 - d) The ACL entitles consumers to redress if a product is not fit for purpose. This entitlement is difficult to enact if the customer's purpose is not clear. The Consumer Code requires vendors of complex and costly products or services to ask about the customer's intent, advise whether or not the product or service can fulfil that purpose, and document this in the contract or agreement.
22. Significantly, the requirement for signatories to use only licenced credit providers and regulated credit products when offering third-party finance is an important clear public benefit. These requirements are likely to result in consumers making more informed and effective decisions about finance arrangements to purchase New Energy Tech because they will be provided with regulated information about the credit product, be in a better position to be able to compare credit products effectively, and benefit from licensing protections. In particular:
- a) Consumers will have regulated information about the credit offer, including repayment terms, percentage rates, fees and charges etc pursuant to the National Credit Code, allowing for clear comparison across different products (this is not required for Buy Now Pay Later (BNPL) providers where the cost of credit is bundled into the cost of the goods);
 - b) Consumers will benefit from the obligation on credit providers to make a responsible lending assessment under the National Consumer Credit Protection Act (this is not a requirement for BNPL and other unregulated credit providers¹³);
 - c) Consumers will be assured of the ability to take any complaint or dispute about the credit product to an external dispute resolution scheme (also not a requirement for BNPL and other unregulated credit providers).

Furthermore, the Consumer Code Administrator will be able to rely on the licensing decisions of the Australian Securities and Investments Commission (ASIC) to ensure a level of consumer protection when assessing signatories, noting that it itself will not be specialist in consumer finance. At the time of submission, there is no other benchmark or specific consumer protection requirements for unregulated credit providers.

23. To achieve these aims, it was agreed that there was a need for clear and robust governance, accountability and administration arrangements for the Consumer Code in line with the ACCC's Guidelines for developing effective voluntary, industry-based codes. The Memorandum of Understanding - New Energy Tech Consumer Code - Governance, Accountability and Administration of January 2019 sets out these arrangements, with one of its key guiding principles being consumer outcomes (clause 2(a)). Its consumer orientation is additionally illustrated by:
- a) The Chair of the Council having expertise in consumer affairs and the confidence of consumers, consumer organisations, industry and other key stakeholders (clause 7)
 - b) Representatives of consumer bodies on the Council (clause 7)
 - c) A consumer representative on the Code Monitoring and Compliance Panel (clause 15).

¹³ Leading consumer advocates have extensively documented the considerable harm caused to vulnerable consumers by unlicensed lenders that provide unregulated finance products: <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/11/181109-Final-submission-Senate-Inquiry.pdf>

24. The Memorandum of Understanding gives the Council the power to appoint the Consumer Code Administrator. Its responsibilities include:

a) Assessing applications by those wishing to become a signatory to the Consumer Code.

Paragraph 4 of the Consumer Code Annexure – Code Administration specifies two matters that the Code Administrator must take into account when considering whether to admit an applicant as a signatory: first, whether the applicant’s processes and documents are sufficient to support compliance with the standards set out in the Consumer Code and secondly, whether the key personnel have had significant involvement in another business that became insolvent. Subject to these requirements and payment of the application fee, admission as a signatory will be open to any business that applies and indeed the hope is that the Consumer Code will have broad uptake within the New Energy Tech sector.

b) Assessing application by signatories to renew their status as a signatory

Paragraph 5 of the Consumer Code Annexure – Code Administration requires the Code Administrator to take into account any complaints that have been made about the signatory and whether the signatory has co-operated with the Code Administrator and the Code Monitoring and Compliance Panel in carrying out their responsibilities. Other than these consumer protection standards, constraints will not be imposed.

c) Powers to enforce the Consumer Code

The Code Administrator’s powers include requiring a signatory to rectify issues giving rise to a breach of the Code. Where there is serious non-compliance, the Administrator may propose to the Code Monitoring and Compliance Panel that the signatory should be suspended or expelled (for this reason exemption from the cartel provisions in section 45AD is sought). Procedural fairness will be accorded to the signatory before this occurs.

These responsibilities are exercised free of influence by existing signatories and subject only to oversight by the Code Monitoring and Compliance Panel.

25. The Consumer Code Annexure – Code Administration also sets out a process that involves multi-party responsibility for fixing fees to be charged to Consumer Code signatories and applicants. This process is designed to ensure that fees are fair and as low as possible, consistent with ensuring that there are adequate resources to administer the Consumer Code properly. The aim is to ensure that fees pose as minimal a barrier to participation in the sector as practicable.

Public detriment (including likely competitive effects)

26. While the introduction of the Consumer Code into the New Energy Tech sector is expected to bring significant consumer benefit through raised standards, the proposed conduct may also have some potentially negative impacts. These include:

a) Raised standards of protection and a professionally administered code that meets ACCC standards will increase direct process and compliance costs for industry which may eventually be reflected in higher prices being passed on to consumers

In this sector, a significant proportion of the products, systems and services are being considered or purchased for economic reasons (as well as sustainability and concern for the environment) – ie. to reduce energy costs. This makes the sector highly price competitive with many purchase decisions hinging on estimated savings (return on investment) calculations. Providers are particularly sensitive to costs and anything that might limit consumer take up of New Energy Tech.

Some submissions in response to drafts of the Consumer Code and input from stakeholder forums put the view that the Consumer Code could add direct costs to their operations (eg. through training, requirement for documentation, the obligation for fit-for-purpose design, some inflexibility in product or design substitution and stronger consumer protection provisions such as refunds, recalls and financial hardship). These stakeholders were concerned that adding costs for the industry providers who were most committed to good customer outcomes might make them less price competitive with providers who avoided the higher standards or who took shortcuts.

Significantly, other industry representatives expressed confidence that the Consumer Code requirements were not too onerous and, in many cases, were already being delivered by providers committed to good customer outcomes.

The Applicants took the view that the value to the community and to industry of higher standards and improved reputation and trust were worth any potential additional costs.

- b) Proposed raised standards of protection for financing New Energy Tech products, systems and services (eg. requiring an Australian Credit License and the use of regulated consumer credit products) may exclude some third-party financiers from providing finance to customers of Code Signatories.

A number of providers and potential Consumer Code signatories partner either with unlicensed credit providers or with licensed credit providers who provide unregulated credit products – in particular the BNPL providers of finance.

BNPL providers and some New Energy Tech providers expressed a concern that setting a standard that excluded this source of financing would diminish options available for consumers and diminish competition.

They argued that the Consumer Code was attempting to set a standard that was beyond common practice in other retail settings and would exclude a legal financing option commonly available to consumers outside the New Energy Tech sector. They quoted from recent reviews by both ASIC and ACCC that did not recommend any change to the regulation of BNPL.

Some provided examples of higher than required standards of consumer protection being voluntarily undertaken by individual providers, eg. membership of external disputes resolution schemes. There was also reference made to moves to establish a BNPL Code of Conduct, albeit we understand that this has not yet begun.

The Applicants took the view that on balance, the consumer benefit of the Consumer Code provisions outweighed any potential impact on competition (see Paragraph 22). In particular, by requiring providers to use licensed credit providers and regulated credit products, the Consumer Code can rely on existing regulation to manage financial hardship, capacity to pay assessments, and dispute resolution between customers and lenders. The alternative would have been to address these issues through the Consumer Code which would have been

resource intensive and less effective. The Applicants are also keen to follow the progress of the potential BNPL Code of Conduct and how it may interact with the Consumer Code to achieve better consumer outcomes in the New Energy Tech market.

- c) A number of stakeholders raised concerns that the codification of good practice through the Consumer Code would introduce inflexibility to a highly dynamic and evolving sector.

One example of these concerns was that a requirement for detailed specification of what will be supplied in a contract might restrict a large provider's ability to substitute newly available components during the implementation stages. The Applicants took the view that this issue could be handled through drafting of contract specifications that are performance-based.

Another example raised was the desire to run pilot programs of new offerings that may not meet the Consumer Code standards – so-called 'sandboxing'. The Applicants took the view that this could be achieved through an application to the Administrator for a temporary exemption, where it could be shown that there would be no customer detriment.

Contact details of relevant market participants

27. The Consumer Code is expected to have interest for a wide range of stakeholders including consumer representatives, potential signatories, industry associations, suppliers and a range of government regulators and policy-makers. See Attachment D for a representative sampling of contact details.

Declaration by Applicant(s)

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).

This Application made on behalf of the four applicant organisations:

- i. Australian Energy Council
- ii. Clean Energy Council
- iii. Smart Energy Council
- iv. Energy Consumers Australia



Signature of authorised person

Office held: Compliance and Risk Manager, Clean Energy Council

Name of authorised person: Anna Sexton

This 29th day of April, 2019

Attachment A – Contact details for Applicants

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