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Ms Susie Black
Director (A/g)
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Lodged electronically: adjudication@accc.gov.au

New Energy Tech Consumer Code [AA1000439] –interested party consultation– 13 May 2019

EnergyAustralia is one of Australia’s largest energy companies with around 2.6 million electricity and gas accounts across eastern Australia. We also own, operate and contract an energy generation portfolio across Australia, including coal, gas, battery storage, demand response, wind and solar assets, with control of over 4,500MW of generation.

We recognise the need to protect customers in relation to behind the meter technologies and practices. We support the development of a voluntary code of conduct for industry to achieve this.

We recommend the applicants and the ACCC consider the benefits to consumers of establishing a code that more businesses are likely to sign up to, rather than authorising something that is likely to gain less signatories. Noting that service providers have been consulted in developing the code as it is currently drafted, the ACCC may wish to explore some of the challenges identified by the applicants in reconciling different views and verify these under its own consultation process.

As a large integrated energy provider that leads technological change for our customers’ benefit, we would like the Code to:

- align with other industry regulations to ensure, as a retailer, there are no contradictions in our obligations or commitments when engaging consumers
- be clear in terms of our obligations, and achieves customer benefits without introducing unnecessary risk or compliance costs
- accommodate different and emerging technologies, including as they will cater for a diverse set of customers and retailers in competitive markets.

We participated in consultation on an earlier draft of the Code via the BTM working group. Various matters were addressed in this consultation and some of our issues have been accommodated in this latest iteration. However, we believe the following matters were not adequately resolved and should be considered further by the applicants and the ACCC.



EnergyAustralia

LIGHT THE WAY

EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 33
385 Bourke Street
Melbourne Victoria 3000

Phone +61 3 8628 1000
Facsimile +61 3 8628 1050

enq@energyaustralia.com.au
energyaustralia.com.au

Duplication of existing consumer protections

One objective of the Code is to present a range of provisions in a single document that guide the customer 'journey'. In doing so the Code includes consumer protection provisions found in existing legislation alongside specific provisions that have been developed to improve outcomes in service provision. We see merit in this as it would raise awareness of existing legal obligations for service providers and consumers, as well as capturing these obligations under the Code's complaints and enforcement mechanisms, including actions of the Code Administrator.

As the applicants are aware, however, this duplication potentially introduces material legal risk, particularly for larger diversified service operators, by blurring the extent of our obligations to customers, including compliance and enforcement actions that could be taken against us. For example, various provisions in clause 2 reflect protections already provided for in the Australian Consumer Law, while other provisions go beyond and are inconsistent with the requirements of the Privacy Act.

In principle there are likely to be consumer benefits where providers take on additional responsibilities for services. However, the inconsistency and overlap between the Code and existing legislation creates a substantial compliance burden and may impede the delivery of services via legitimate commercial channels.

The applicants state they sought to balance the need for the Code to explain the interaction with other forms of regulation, yet avoid repeating provisions that belong elsewhere, and also received requests for the Code to cross-reference different legal instruments.¹ As we suggested in earlier consultation, we see merit in emulating other industry codes that recognise existing consumer law (including the Australian Consumer Law) and privacy protections and seek to cover the gap, which have less duplication with existing obligations. For example, the Telecommunications Consumer Protections Code recognises the Privacy Act and seeks to only regulate privacy for providers that are not required to comply with the Australian Privacy Principles. This Code also focuses on additional sales and customer service protections that are specific to telecommunication services.

Balancing the interests of consumers and service providers

Some provisions, while well intentioned and unlikely to be an issue for smaller technology-specific providers, do not strike the right balance between consumer protection and market efficiency and promotion of innovation:

- clause 19(b) requires service providers to offer a supplier's warranty for a period that must "meet or exceed the period set from time to time by the Administrator". This is too uncertain and burdensome for us to agree to, given that any supplier warranty we choose to offer over and above the consumer guarantees in the Australian Consumer Law will need to reflect and be 'back-to-backed' with the warranties we are able to negotiate with our suppliers and contractors
- clauses 52 and 53 may require us to administer separate and discrete in-house complaints handling procedures across our business, causing confusion as to procedure applies in the relevant circumstance

¹ Attachment C - Draft New Energy Tech Consumer Code - The Consumer Code Journey, pp. 3, 5-6.

- clauses 55 and 56 impose limitations which do not reflect what is required at law and would result in inconsistent privacy and marketing standards across our business.

Prescriptive or restrictive provisions

Several clauses are overly prescriptive or restrictive without offering any clear benefits to customers. These may offer some additional customer protections but the potential benefits do not justify the level of restraint being imposed, particularly in the case of larger diversified service operators like ourselves. For example:

- clauses 8(b) and 8(j)(iii) require the service provider to include in each quote an itemised list of the products / systems being supplied providing full specifications (including manufacturer, model etc) and the contact details of the relevant supplier. This requirement may not be fit for purpose for all circumstances, particularly where the relevant products, systems or services are marketed and sold on the basis of function/capability rather than specific make/model
- clause 16 regarding site-specific system design requirements is highly prescriptive and may not be applicable to all circumstances and forms of products, systems or services.
- clauses governing financing have been significantly improved from previous drafts, however clause 27 may still involve some uncertainty for service providers by providing a blanket discretion on the part of the Code Administrator.

Safety

We have been active in advocating the urgent need for improvements to safety performance in the solar and battery installation sectors for some time. This has included engagements with the CEC, regulators and other industry participants on the need to establish a consistent industry commitment to safety performance.

An earlier version of the Code contained a minor reference to safety (retained in clause 58) under Training. We highlighted this as being inadequate as a commitment under a code of conduct for industry participants, especially when examined in context of:

- the poor safety record of the solar installation industry to date
- the nature of the high-risk work activities which are at the core of solar and battery installation works
- the criticality of safety as being key driver to productive, efficient and sustainable industry activity.

The Code now contains an additional reference to safety in clause 31, which is still inadequate in our view. The applicants considered that imposing additional safety obligations was inappropriate in a voluntary code.² However the Code would place a broad range of obligations on signatories, and we question whether the applicants have

² Attachment C - Draft New Energy Tech Consumer Code - The Consumer Code Journey, p. 29.

adequately considered the benefits of placing greater emphasis on safety, which can be done without imposing new or different obligations.

As we raised previously, occupational/Workplace Health and Safety (OHS/WHS) requirements are well legislated, however we consider that the inclusion of a specific OHS/WHS commitment in the Code is not unreasonable given the magnitude of the negative economic and social impacts of poor industry safety performance.

We therefore strongly recommend that the Code include a specific clause explicitly addressing OHS/WHS as a key industry commitment for all signatories. We consider this to be an important step change for the industry to establish a common commitment to improving safety performance and seeking to reduce and eliminate the significant negative impacts on individual, business and the community of poor safety performance. This includes the safety of the customer, service providers and their contractors, as well as a commitment to ensuring safety is front of mind in designing installations that minimise or eliminate safety risk.

Clarity and applicability of clauses

We understand the Code is intended to use plain language and be accessible to a range of stakeholders, and has been subject to considerable redrafting from the version we previously commented on. Several instances of unclear or undefined terminology remain, making it difficult to determine the extent of our obligations:

- 'pressure selling' (customer journey, page 3) which could be the same or different to 'high-pressure sales tactics' mentioned in clause 4)
- matters that may cause 'confusion or disagreement' (clause 21(a))
- 'reputable sources' (e.g. clauses 2(g) and 8(f))
- 'performing properly' (clause 37(b)).

We appreciate the challenge in designing a Code that adequately deals with technologies and services that are still developing or are otherwise unknown. In some places the Code appears to have been written with solar installations in mind and may be impractical to apply to other technologies. We have some reservations around the Code Administrator having the ability to publish binding standards and guidelines under clause 14(a) to deal with changing technologies and practices. This would create a high level of uncertainty. Any changes to obligations under the Code should be subject to a notification period of at least 6 months. Time periods for Code amendments and notifications should also be subject to extensions where appropriate.

If you would like to discuss this submission, please contact Lawrence Irlam on 03 8628 1655 or Lawrence.irlam@energyaustralia.com.au.

Regards

Sarah Ogilvie
Industry Regulation Leader