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Our ref: AA1000514  
Contact officer: Miriam Kolacz  
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17 September 2020

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

By email: [REDACTED]

Dear Ms Lim

**Clean Energy Council Limited application for re-authorisation AA1000514 – interested party submissions and request for further information**

As you are aware, the ACCC sought submissions in response to the draft determination and the revised version of the Solar Retailer Code of Conduct (**Solar Code**) provided to the ACCC on 3 September 2020. This letter sets out the issues raised by interested parties in submissions (**Attachment A**) and includes a request for further information to the Clean Energy Council (**CEC**) (**Attachment B**).

**Key issues raised by submissions**

The ACCC has received public submissions from the following interested parties:

- An interested party (identity redacted)
- Eric Seegers (Watts Smart Electrical P/L)
- Solar Victoria
- Bell Solar Pty Ltd
- United Solar Energy
- Solar Service Group
- B.Solar

All publicly available submissions are available on the ACCC public register.

Please provide a response to the issues raised by interested parties (**Attachment A**) and the ACCC's request for information (**Attachment B**) by **5 October 2020**.

**Next Steps**

A copy of this letter and your response (subject to any request for material to be excluded) will be placed on the ACCC's public register.

If you wish to discuss this letter, please contact Miriam Kolacz on 03 9658 6476.

Kind regards

A handwritten signature in blue ink, appearing to read 'D Jones', with a stylized flourish at the end.

David Jones  
General Manager  
Adjudication

## **Attachment A - Summary of submissions**

The majority of submissions received following the draft determination opposed re-authorisation of the Solar Retailer Code of Conduct (the **Solar Code**). Below is a non-exhaustive summary of the main concerns raised in submissions. This summary includes concerns that were raised in submissions that were partially excluded from the ACCC's public register.

We note the ACCC also received a submission in support of re-authorisation on the conditions proposed in the draft determination from Solar Victoria.

### ***Effective administration of the Code***

Interested parties raised concerns regarding:

- The CEC's failure to apply natural justice principles in investigating potential breaches. For example, by making decisions based on alleged consumer complaints which were not put to retailers, or failing to particularise the exact sections of the Solar Code alleged to have been breached
- The Breach Matrix being cumbersome, failing to identify breaches by the section number they correspond to, and in some cases the severity of sanctions outweighing the infringement
- The process used to apply sanctions, particularly that the current sanctions of suspension and termination are excessive and can cause significant financial impact and detriment to retailers; and that suspension or cancellation takes effect prior to an appeal to the Code Review Panel being heard, and
- The Code Administrator having a conflict of interest as the body investigating complaints and making binding determinations.

One submission noted the CEC's inconsistent treatment of retailers in its administration of the Solar Code. For example, by allowing some retailers to remain signatories but rejecting others on arguably lesser grounds; or fixating on certain retailers in its enforcement activity while ignoring others for the same or similar conduct.

This submission raised concerns that the CEC's administration of the advertising provisions is not in accordance with the Australian Consumer Law (**ACL**), and that authorisation should be conditional on the CEC establishing (or reviewing existing) ACL guidelines and training.

### ***Appeals mechanisms***

Multiple interested parties raised concerns that the Code Review Panel is not independent, including for reasons that its members have not been recruited from outside the industry and/or hold preconceived views about the industry. Parties considered that both rejected applicants and signatories should have the right to appeal to an independent body.

One interested party submitted that it was unclear why the timeframe for rejected applicants to lodge an appeal has been reduced from 30 to 15 days.

### ***Fees***

One interested party submitted that it is unclear how the CEC has quantified the proposed \$750 non-refundable appeals fee for existing signatories and noted that an individual can lodge an appeal to the Victorian Civil and Administrative Tribunal for a fee of \$200. Another interested party raised concerns that accredited designers and installers already pay fees to the CEC, and must pay additional fees and sign up to the Solar Code to conduct business

### ***Length of authorisation***

Some interested parties considered that the Solar Code should be authorised for no longer than two years, which would allow sufficient time for signatories to transition to the New Energy Tech Code.

## **Attachment B – Request for Information**

### ***Code Administration issues***

1. For the role of the Code Administrator please explain:
  - a. How the Code Administrator is selected;
  - b. Whether the Code Administrator is separate from the CEC Board;
  - c. What experience the Code Administrator has in investigating complaints or breaches of the Solar Code; and
  - d. What training the Code Administrator undertakes to assist it in investigating breaches of the Solar Code.
2. Under both the Solar Code and Complaints Procedure, in what circumstances can a signatory be suspended or cancelled? How much warning is a signatory given when a suspension or cancellation will apply? Can the Code Administrator and the Code Review Panel impose a suspension or withdrawal on a signatory?
  - a. When does the Code Administrator / Code Review Panel inform the general public and interested party that a signatory has been suspended or withdrawn from the Solar Code (as provided for in clause 3.6.6 of the Solar Code)?
  - b. If the Code Review Panel makes a different decision to the Code Administrator, how does the Code Administrator inform the general public of the Code Review Panel's decision?
  - c. Clause 3.5.2(d) of the Solar Code provides that where a breach is found to have been made, depending on the severity of the breach, the Code Administrator will either allocate a sanction in accordance with section 3.6 of the Solar Code or provide documentation relating to the breach along with a recommended course of action to the Code Review Panel for consideration. Please explain the circumstances where the Code Administrator decides to impose a sanction and the circumstances where the Code Review Panel makes the decision on the sanction to be imposed.
  - d. What are the factors the Code Administrator would take into account in deciding to lower a sanction for a breach?
  - e. For the last 2 financial years, please provide details of the appeals which have been conducted by the Code Review Panel, what the outcome of the Code Review Panel was (including the reasons for the decision) and whether the decision was different to the Code Administrator.
3. Appeals mechanism for rejected applicants and exclusion period:
  - a. Could the CEC include the one, two and three month exclusion periods in the Solar Code?
  - b. At what stage can an applicant choose to appeal a CEC decision to reject their application to the Code Review Panel? For example, can they do so after any rejection of their application, or only after their application has been rejected a third time?
  - c. Amended clause 4.2.5 of the Solar Code states that "...applicants will be allowed a maximum of one appeal to the Code Review Panel, or its appointed delegate." We understand this to mean that once a retailer chooses to appeal a CEC decision to reject their application, they lose that right (regardless of how many subsequent times they choose to apply). Please confirm if this is correct.

- d. Amended clause 4.2.3 states that “appeals must be lodged within 15 days of the original Code Administrator’s decision...” Please explain why the period for submitting an appeal has been reduced from 30 to 15 days.
4. Amended clause 4.2.4 of the Solar Code states the Code Review Panel, or its appointed delegate, will consider and provide a ruling on the appeal in writing, along with reasons for the determination, as soon as reasonable practicable. Please outline:
  - a. Who the appointed delegate will be and how they will be selected;
  - b. In what circumstances the Code Review Panel will choose to use an appointed delegate, rather than hearing an appeal themselves; and
  - c. What experience the delegate will have.

***Fees***

5. On page 3 of the CEC submission, it states that the Code Administrator is also considering making further increases to the subsequent application fees due to the changes in exclusion periods. Based on the CEC’s website, there is an application fee of \$200 and a franchisee application fee of \$100, and a review fee of \$200 applies if an application needs to be reviewed for a third or subsequent time. Please explain the rationale for the proposed fee increases for subsequent applications and what the fee increase would be.
6. On page 2 of the CEC submission, it states that the CEC intends to introduce a corresponding appeals fee for signatories for consistency across both appeal mechanisms and the need to cover its costs as the fees for signatories have not increased since 2015. Please outline:
  - a. How many appeals the Code Review Panel considers each year and the cost of the appeals process for the CEC for the last 2 financial years, and
  - b. How much income the CEC has received from ongoing annual fees paid by signatories over the last 2 financial years.

***Length of authorisation***

7. In light of the Australian Competition Tribunal’s decision made on 15 September 2020, in relation to the New Energy Tech Consumer Code, please confirm whether the CEC is still seeking authorisation for three years (including providing reasons why).