

Response to Submissions from Interested Parties- Reauthorisation of the Solar Retailer Code of Conduct

Effective administration of the Code

A number of submissions raised concerns about whether the current provisions of the Code, and the Clean Energy Council's (CEC) interests, are enabling the Code to be administered in a fair and effective manner. In particular, submissions noted:

- (a) difficulties with meeting the requirements to become a signatory, such as requiring businesses to have been operating for at least 12 months, and (b) that no 'close family member' of any of a business' directors, partners or shareholders etc. have been involved in a business which has gone into liquidation or received a court judgment in the last five years

CEC's response:

(a) The solar and energy storage industry is highly technical and requires an understanding of specific needs of consumers. The minimum 12-month operating requirement was introduced as a measure to protect consumers, aiming to:

- ensure that businesses have sufficient experience and expertise to sell products that are fit-for-purpose and
- prevent operators without that expertise, who appear to enter the industry solely to take advantage of financial incentives offered by government, from causing harm to safety and/or significant financial detriment.

It has been the Code Administrator's experience that operators who enter the solar and storage industry without any relevant experience or technical expertise have been less inclined to comply with the Code, despite voluntarily signing it. For example, new operators might not have a proper complaints handling policy, refund policies or sufficient warranty periods in place which are key requirements of the Code, nor a proper understanding of the products they are selling.

However, the Code Administrator receives requests to discuss and potentially waive the 12-month requirement and will request that potential applicants provide further details or substantiate their waiver request with relevant experience in the industry. Based on the supporting explanation or documents, the Code Administrator may encourage the applicant to proceed. For example, a potential applicant provided further information about electrical and PV solar experience with supporting documents and the Code Administrator has permitted the application to proceed. See attached- **Attachment 1: Examples of 12-month waiver requests** (restriction claimed)

A primary objective of the Solar Retailer Code of Conduct is to raise standards in the industry. The Code Administrator introduced the 12-month minimum operating requirement as a means of achieving this objective which has been endorsed by the Code Review Panel. The Code Administrator has sought legal advice on this requirement and relies on the argument that the public benefits of this requirement under a voluntary code outweigh any potential detriment to competition.

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(b) There have been numerous reports and studies around illegal phoenix activity and this issue has been prevalent in various industries (particularly in the construction industry¹ of which solar is a subset). During the development of the Code, this issue was identified along with the need to improve the reputation of the solar industry due to a number of unethical operators. In 2014, a large solar retailer was subject to enforcement action by the ACCC, namely Euro Solar² and its director Nikunj Kumar Patel.

Phoenix companies arise from the ‘ashes’ of the collapse of a commercial entity, with debts and a record of poor customer outcomes only to reopen with a similar name, providing similar services. Some indicators of a phoenix company include directors who share same/similar ethnicity, having network companies with common offices³ or common details, a director linked to multiple deregistered companies, the director of the new company being family members, or close associates of the director of the former company or are close associates, such as managers⁴, or utilising fake or dummy directors. These directors can be unknowingly (or knowingly) appointed and may include relatives, friends or associates.⁵

These are some indicators of illegal phoenix activity, and the Code Administrator relies on some of these indicators to ensure as much as possible, that reputable businesses sign on to be a signatory to the ASR program. This restriction does not apply after five years, which recognises that directors or businesses can improve their practices and behaviours in due course.

Consumer advisory service CHOICE Help, reports that at least ten per cent of complaints it receives about solar involve companies that have liquidated, leaving the consumer with a faulty system and little recourse. Fair Trading NSW reported that in the 2018 financial year it received 29 complaints about liquidated or deregistered solar companies. Industry participant, LG, reported that between 2011 and 2018, more than 600 ASIC notices for liquidation or proposed deregistration were listed for companies with ‘solar’ in their name.⁶

· the lack of an appeals mechanism for rejected applicants and concerns with the three-month exclusion period before applicants who have been rejected can reapply again to be signatories to the Code

CEC’s response:

(a) Lack of appeals for rejected applicants: The CEC relies on its response in 3(a)(i) and (ii) in the ACCC’s Request for Information dated 15 June 2020.

(b) Concerns with three-month exclusion: The CEC relies on its response in 3(d) in ACCC’s Request for Information dated 15 June 2020.

¹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report/c05

² <https://www.accc.gov.au/media-release/accc-takes-action-against-euro-solar-and-australian-solar-panel-for-misleading-claims>

³ <https://ngm.com.au/wp-content/uploads/2019/11/Illegal-Phoenix-Activity-Indicators.pdf> (AUSTRAC report)

⁴ <https://www.ato.gov.au/General/Other-languages/In-detail/Information-in-other-languages/Phoenix-factsheet/>

⁵ <https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/>

⁶ <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/what-to-do-if-your-solar-company-goes-out-of-business>

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- that certain breaches of the Code are too severe or not clearly defined. For example, some submissions raised concerns with a severe breach rating applying to signatories who may act in a way which brings the Code into disrepute

CEC's response:

This is a newly introduced addition to Part 3.5 of the Code (the breach matrix) in order to accurately reflect the other provisions of the Code under the Obligations of Signatories.⁷

The Code Administrator would consider practices such as not ceasing the practice of unsolicited door to door sales during active state government restrictions, repeated instances of lying to the Code Administrator or causing reputational damage to the ASR program as behaviours that would bring the Code into disrepute. The Code Administrator will consider further consultation in due course in accordance with 2.4.25 of the Code.

The Code Administrator submits that the discretion afforded to the Code Review Panel in 3.5.3 is appropriately balanced with the discretion afforded to the Code Administrator to lower breach levels.

- that processes followed by the CEC to investigate complaints do not apply the principles of natural justice

CEC's response:

The Code Administrator understands 'procedural fairness' to mean acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the fairness in a substantive sense of that decision. The Code Administrator designs its procedures in accordance with the principles of procedural fairness. It consults with Code signatories, seeks guidance and approval from the Code Review Panel, documents procedures and makes them publicly available, applies procedures consistently, and provides an avenue for appeal.

The Code Administrator's first step is to inform the ASR of the receipt of a consumer complaint.

The ASR is explicitly informed that other than documents associated with the sale and installation they are not obliged to act or comment further, however the opportunity to respond is afforded through this initial notification and any information that is volunteered is considered by the Code Administrator.

If documentary evidence and information received from all parties identifies breach(es) of specific sections of the Code, a letter of allegations outlining these and outlining the supporting evidence is presented to the ASR.

At this stage, a 21 day right of reply timeframe is provided,⁸ before any final determinations are made by the Code Administrator. The ASR has the opportunity to respond, be heard and submit evidence to dispute any or all of the alleged breaches.

Based on the ASR's submission and any evidence or information referenced within it, a letter of outcome then advises the ASR if each allegation is declared to be substantiated, withdrawn, or

⁷ Clauses 2.4.19 to 2.4.26 of the Code

⁸ Clause 3.5.2(b) of the Code

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dismissed. The reasoning for these decisions is explained and evidence reproduced where necessary.

The ASR has 30 days to exercise their right to further dispute the Code Administrator's findings by lodging an appeal to an independent panel -the Code Review Panel (CRP) under Part 3.7 of the Code. The determination to uphold or withdraw a breach by the CRP is final and no further right of appeal is offered. Extensions of all deadlines during the compliance process are usually granted in the first instance, provided the ASR requests further time to respond before the due date.

The CEC submits that the Code Administrator's procedure outlined above is robust and methodically steps through a process of placing facts and evidence to the signatory for a response, before reaching any conclusion. The Code Administrator continues to take a prudent and practical approach in basing its findings on allegations and facts, and only finding breaches when the objective evidence is clear.

- the fees charged by the CEC are significant and have an impact on small businesses

CEC's response:

Most ASRs are small businesses that employ less than 20 people.⁹ All annual fees applicable for any signatories to the Code are proportionate and based on a sliding scale¹⁰ with no increase in Code fees since 2015. This means that in most instances, smaller businesses end up paying less than larger retailers, with fees starting at \$600 and capped at \$6000.

The mandatory fees charged by the Code Administrator include (1) an application fee of \$200 plus GST, which makes a small contribution to the Code Administrator's cost of undertaking the credit checks on each applicant and assessing the terms and conditions of their customer contracts and all other relevant documentation and (2) an annual fee (outlined above) which contributes to the Code Administrator's cost of assessing and ensuring continual compliance with the Code, maintaining a web presence for signatories to the Code, providing certificates and the ASR logo, promoting the ASR program and generally administering the ASR program. Applicants and signatories have the option of purchasing a licence to use a sale and installation agreement template.¹¹

- the CEC has a conflict of interest as the body setting the standards and investigating breaches/enforcing the Code, and

CEC's response:

The CEC submitted the Code for authorisation to the ACCC in 2013 and for reauthorisation in 2015, and part of this was to ensure that there were clear and significant public benefits derived from the Code. The Code provides an important self-regulatory mechanism that brings about increased accountability in the solar PV retail industry that has been recognised by various state governments.¹² The Code was also reviewed independently in 2016.

⁹ As defined by the Australian Bureau of Statistics

https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1516/quick_guides/data

¹⁰ <https://www.cleanenergycouncil.org.au/industry/retailers/fees>

¹¹ <https://www.cleanenergycouncil.org.au/industry/retailers/solar-sale-and-installation-agreement>

¹² Submissions on the ACCC's public register from Dept of Planning, Industry and Environment NSW, Solar Victoria and Dept of Energy and Mining, Government of South Australia.

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The Code requires the Code Administrator to manage applications, monitor compliance and enforce sanctions as outlined in Part 3.1 of the Code. All signatories are entitled to appeal to three independent, suitably qualified, external representatives of the Code Review Panel. Significantly, none of the Code Review Panel members are signatories to the Code, nor associated with the Code Administrator. The CEC submits that this is a crucial aspect of oversight and monitoring to ensure that there is impartiality in the sanctions allocated by the Code Administrator.

Separately, CEC Board members are candidates who are elected through an Annual General Meeting of CEC members in accordance with the requirements of the CEC's Constitution.

The CEC contributes to a range of standards committees for solar panels, inverters, batteries and other relevant technologies as a participating member. The list referenced below contains a list of all standards committees that the CEC has participated in the development of standards.¹³ Standards Australia¹⁴ develops standards according to principles of transparency, consensus and balance of representation.

Under the terms of the ACCC's authorisation of the Solar Retailer Code of Conduct, the Code Administrator is required to participate in an independent review of the Code and its administration every three years. Such reviews have raised no concerns about the Clean Energy Council's objectivity in administering the Code. Further, the Clean Energy Council continually reviews its governance arrangements and has recently engaged legal counsel to make recommendations for further reducing the risk of any potential or perceived conflict of interest and is in the process of implementing those recommendations.

- the Code/CEC is not representative of the majority of the industry.

The Code

The Code underwent an extensive consultation process in 2012 prior to being submitted to the ACCC. The proposed scheme has been developed through an Industry Integrity Working Group with the support of CEC solar members who deliberately called for an initiative to improve retail standards in the PV industry.

However, the range of systemic industry issues addressed in the Code were identified through a much broader stakeholder consultation process. The overwhelming majority of stakeholders indicated their strong support for the proposed scheme.¹⁵ Those consulted with are referenced here¹⁶ and include government, regulatory bodies, consumer organisations and industry. The CEC

¹³ Solar Water Heaters, Renewable Energy Power Supply Systems & Equipment, Sharing of committee drafts, Wind Turbine Systems, Remote Demand Management of Electrical Products, Electrical Energy Storage Smart Grids, Decentralised electrical energy and grid integration of renewable energy systems, Ground Source Heat Pump Systems, Acoustics - Wind Turbine Noise, E-waste, Sustainability Criteria for Bioenergy, Sharing of Committee Drafts for EL-042

¹⁴ <https://www.standards.org.au/standards-development/developing-standards>

¹⁵ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/clean-energy-council-limited-authorisations-a91365-a91366>

¹⁶ PV Retailers (small, medium and large)

- o Engagement with non-CEC members and CEC members, including over 120 PV retailers and a range of other businesses operating in the PV industry
- o Targeted engagement with the top 15 PV retailers with largest market share
- o 16 meetings with companies equating to more than 23.55% of market share

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has continued to run the Code at a loss for a number of years due to the importance of the Code as an industry initiative. Please refer to the **Attachment 2: Historical Finances** (restriction claimed)

There is no prohibition on other industry bodies drafting and administering a voluntary code of conduct. In October 2018, the Smart Energy Council released the Solar, Energy Storage and Related services: Providers Code of Conduct (SESRS) to the public and to state governments.¹⁷ At this time, the rest of the BTM Working Group (of which the SEC participated in) were finalising the draft of the NETCC and preparing for the NETCC industry consultation across four states.

The CEC

Membership

The CEC is the leading membership-based organisation in Australia for the clean energy industry. As of July 2020, the CEC has:

- 7119 Accredited Installers
- 874 CEC Members
- 1030 Approved Solar Retailers

A recent Accredited Installer survey conducted in May 2020 by an independent market research company revealed that the technical information produced by the CEC in various webinars, technology bulletins and installer news ranked highly for accuracy and usefulness.¹⁸

The CEC also formed the Installer Reference Group (IRG), which meets on a monthly basis. The IRG comprises of 23 representatives from Australia and one from New Zealand. This ensures that Accredited installers have input on a range of subjects including standards, guidelines and policy development as well as discussing integrity issues faced by the industry. The issues identified by the IRG are often fed back to the Regulator Reference Group, which meets quarterly. This comprises of

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- o Consumer Utilities Advocacy Centre
 - o Consumer Action Law Centre
 - o Alternative Technologies Association
 - o Choice
 - o St Vincent de Pauls Society
 - State Ombudsmen
 - o Engaged all state bodies, met/talked with Victoria and NSW
 - Consumer Affairs bodies
 - o Engaged all state bodies, met/talked with Victoria, Queensland and ACT
 - o Commonwealth Department of Climate Change and Energy Efficiency
 - o Clean Energy Regulator
 - o Office of Minister for Climate Change and Energy Efficiency, Greg Combet
 - o Office of Shadow Minister for Climate Action, Environment and Heritage, Greg Hunt
 - REC Agents Association
 - o Greenbank Environmental and Green Energy Trading
 - Administrators of other industry codes
 - o Energy Assured Limited Scheme to monitor and improve door to door marketing standards.
 - o United Kingdom Renewable Energy Assurance Ltd. Consumer Code set up by the Renewable Energy Association for consumers of small-scale energy generation systems.
 - o Code Compliance Monitoring Committee who administer the Code of Banking Practice in Australia

¹⁷ <https://www.smartenergy.org.au/news/new-industry-code-sign-now>

¹⁸ An extract of this survey can be made available to the ACCC upon request, including methodology and sample sizes.

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all state and territory regulators from Australia and New Zealand and aims to reach nationally consistent interpretations of standards to installers requiring guidance and clarification.

A 2019 survey of the CEC's members conducted by an independent consultancy, revealed that the CEC recorded extremely high scores for trustworthiness and for being strong advocates of the renewable energy industry, with ████████ of members likely to renew their membership with the CEC.

Events

The CEC also runs a number of well attended industry events across Australia, figures cited are attendance numbers:

- Australian Clean Energy Summit 2018: 779
- Australian Clean Energy Summit 2019: 812
- All Energy conference 2018: 8,571
- All Energy conference 2019: 10,499
- Installer Nights 2018 (held in various states): 741
- Installer Nights 2019 (held in various states): 1290

The growth in attendance figures from 2018 to 2019 demonstrates that the CEC has continued to enjoy strong support and participation from across the industry.

Advocacy and Initiatives

The CEC is actively involved in a range of initiatives and programs to help accelerate the transformation of Australia's energy system to one that is smarter and cleaner. Some of these include:

- A Clean Recovery¹⁹ to assist in progressing the economy recovery post COVID-19
- The Women in Renewables Initiative²⁰
- The Clean Energy at Work report²¹
- Coordinating and responding to key policy issues on a range of directorates and working groups²² that advise the CEC on policy and industry development issues in specific areas of the clean energy industry.

¹⁹ On 5 May 2020, the CEC launched A Clean Recovery, a plan to utilise Australia's extraordinary renewable energy and energy storage potential to lead the economic recovery from COVID-19. A Clean Recovery would create over 50,000 new direct jobs, triple the amount of large-scale renewable energy installed in Australia by adding 30,000 MW of new capacity and inject over \$50 billion worth of investment into the Australian economy.

²⁰ The CEC launched the Women in Renewables initiative in 2015. This initiative promotes women working in the renewable energy industry and has grown to 4000 individuals on the mailing list, 150 Women in Renewables speakers guide and provided scholarships to 4 women annually.

²¹ On 2 June 2020, the CEC released the Clean Energy at Work report. The report, which was based on the largest ever study of current and projected employment in the Australian renewable energy industry, found that the industry currently employs over 25,000 people and could employ as many as 44,000 by 2025 under the right policy conditions.

²² **Directorates** Market & Grid Directorate, Wind Directorate, Utility PV Directorate, Distributed Energy Directorate

Working Groups Inverter Listing Working Group, PV Module Listing Working Group, Energy Storage Working Group, Risks of Modern Slavery Working Group, National Construction Code Working Group

Forums

Renewable Hydrogen Policy Advisory Forum

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- Series of resources to help renewable energy businesses navigate through the severe economic and social impacts of the COVID-19 pandemic including 'A guide to help rooftop solar installers manage the workplace health and safety risks' associated with COVID-19.

Consumers

The CEC and the ASR program has assisted a relatively high number of consumers from an educational perspective, by enabling better informed purchasing decisions, assisting consumers in navigating through a complicated process and providing resources on solar related scams.

Please refer to **Attachment 3: Consumer dashboard July 2019 to June 2020** (restriction claimed) showing the number of views on the dedicated Consumer resources section on the CEC website²³ plus the most viewed pages and guides from July 2019 to June 2020. These included:

- Find an ASR (recorded over 100,000 views)
- Guides to buying solar
- Avoiding solar scams

The CEC rejects any claims that it is not representative of the industry when the above summary clearly outlines the CEC's commitment to advocating on behalf of the industry from numerous aspects.

Suggested amendments

A number of submissions suggested that the CEC's proposed amendments to the Code be modified or that further amendments be made. The ACCC seeks your response to the amendments which have been suggested by interested parties.

CEC's response:

AGL

The Code Administrator advises that the proposed change to clause 2.1.6(f) will not result in significant increased costs or involve structural and civil engineering considerations. The intention of the proposed change was to provide clearer guidance on the site-specific site design and wishes to clarify that there is no requirement for visual representations of the inverter location, as the Code Administrator will accept written representations.

OAIC

The Code Administrator has considered the proposed changes from the Office of the Australian Information Commissioner (OAIC) and submits that the existing clauses in 2.2.14 and 2.2.15 addresses the suggested amendments regarding a consumer's express consent on direct marketing. In addition, clauses 2.2.11 and 2.2.16 informs signatories of their obligations to ensure that their marketing practices are in line with the *Privacy Act 1988*.

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CALC

The Code Administrator notes that CALC's suggested amendments are under review by the Competition Tribunal as part of the NETCC proceedings and will not adopt these amendments at this time.

Flexigroup

The Code Administrator does not consider the use of the pro forma on alternative purchasing arrangements to be misleading. The Code Administrator is actively reviewing alternative finance providers who are not subject to the provisions in the proforma. Should the finance provider have in place a statement that is in line with requirements under Clause 2.1.24 that is, the arrangement is not regulated by the *National Consumer Credit Protection Act 2009* Cth, has dispute resolution procedures, hardship variation policies and default payment arrangements for consumers then Code signatories will not be required to use the pro forma in relation to the finance provider.

Terceiro Consulting

The CEC refers its response in this submission at paragraph 3 of the ACCC's Request for Information dated 15 June 2020 regarding the appeal mechanism.

Transition to the NETCC

A number of submissions submit that any transitional period should be as short as possible to achieve the transition to the New Energy Tech Consumer Code (NETCC). The ACCC has asked for information in its letter of 15 June 2020 about why the transition process is expected to take two years.

The ACCC also seeks to understand whether solar retailers will need to be signatories to both the NETCC and Code during the transition process? How will the potential for confusion amongst solar retailers and consumers with both the NETCC and Code being in operation be managed during the transition process?

CEC's Response:

(a) The CEC relies on its response in this submission at paragraph 2(a) of the ACCC's Request for Information dated 15 June 2020.

As previously stated, there needs to be a reasonable period to promote and communicate when industry and other stakeholders can expect the NETCC to go live in order for potential signatories to be able to understand their obligations, amend their documentation and advertisements as required and communicate their NETCC obligations to their employees in order to comply.

(b) Existing signatories will need to be given an option of whether to transfer to NETCC and sufficient time to consider if they wish to transition to NETCC. It is not the CEC's intention to have signatories to both the NETCC and the Code so as to reduce confusion, but the CEC acknowledges that there is a likelihood of having signatories on both programs for a part of the transition process.

The CEC has considered that the transfer of signatories from the Code to NETCC might need to be done in quarterly batches after a set cut-off date (for example, the Code Administrator has an

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average of 97 renewals per month in the last quarter of 2020) with a three month deferral payment of fees to be instituted if required.

CEC Accreditation Code

One interested party noted that the fact the CEC's Accreditation Code of Conduct is not authorised is of concern, given that it permits the CEC to impose sanctions against installers and designers including cancelling, and refusing to reinstate, their accreditation for an indeterminate period without any right of appeal. The ACCC seeks your response to this issue.

CEC's Response:

The CEC is mandated by the *Renewable Energy (Electricity) Regulations 2001* ("the regulations") to run a scheme that accredits persons who install small generation units or solar water heaters, supply small generation units or solar water heaters, create or trade in small-scale technology certificates (STCs). The regulations enable the CEC to monitor compliance with the code of conduct and is able to take action against a person who is accredited by, or a member of, the organisation for a breach of the code (such as by suspending the person's accreditation or membership), otherwise known as the Accredited Installer scheme.

The CEC Accredited Installer team works closely with the Clean Energy Regulator. The Clean Energy Regulator is a Government body responsible for accelerating carbon abatement for Australia through the administration of the National Greenhouse and Energy Reporting scheme and the Renewable Energy Target. The [Renewable Energy Target](#) has two components: The Large-scale Renewable Energy Target and the Small-scale Renewable Energy Scheme (of which STCs are a core component). Together, these schemes create a financial incentive for investment in renewable energy.

There is a right of appeal for installers and designers under the CEC Accreditation scheme, see [link](#) here. A new appeals panel is currently being established. An appeal must be lodged within seven business days of the CEC informing the Accredited Person of the cancellation of Accreditation.