



Draft Determination

Application for revocation of A91495 and A91496 and the substitution of authorisation AA1000514

lodged by

Clean Energy Council Limited

in respect of

the Solar Retailer Code of Conduct

Authorisation number: AA1000514

13 August 2020

Commissioners: Sims
Keogh
Rickard
Court
Ridgeway

Summary

The ACCC proposes to grant conditional re-authorisation to the Clean Energy Council Limited for the Solar Retailer Code of Conduct (Solar Code). The Solar Code has been previously authorised twice since 2013 and is substantively unchanged, subject to certain minor amendments.

The ACCC proposes to grant re-authorisation for two years subject to a proposed condition that the Solar Code is amended to include an appeals mechanism for retailers who seek to become signatories but are rejected, and to reduce the exclusion periods that retailers who have been rejected must wait before they are able to re-apply.

The ACCC invites submissions in relation to this draft determination by 4 September 2020, and expects to make its final determination in October 2020.

On 15 May 2020, the Clean Energy Council Limited (the **CEC**) lodged an application for re-authorisation in respect of an amended version of its Solar Retailer Code of Conduct (the **Solar Code**). The Solar Code sets minimum standards that retail businesses selling solar photovoltaic (**solar PV**) systems must comply with when interacting with customers, including in advertising, contract documentation, finance and payments, design and installation, operation, customer service, warranties, and complaints handling. The Solar Code operates alongside a range of existing legal and regulatory protections.

The Solar Code has been authorised by the ACCC in 2013 and 2015. The 2015 authorisation is due to expire on 15 October 2020. The CEC intends that the Solar Code will ultimately be replaced by the New Energy Tech Consumer Code (**NETCC**) and that retailers who are signatories of the Solar Code will become signatories of the NETCC in stages. The ACCC granted conditional authorisation in respect of the NETCC in December 2019 and this is currently subject to a review by the Australian Competition Tribunal (**Tribunal**). Accordingly, there is some uncertainty as to the NETCC's introduction and likely timing, which is why the CEC wishes to keep the Solar Code in place.

The ACCC has undertaken extensive consultation about this application and received submissions from a range of stakeholders, including solar retailers, government agencies and consumer bodies.

Key issues raised by interested parties related to the effective administration of the Solar Code, including that the consequences if administration is ineffective are now greater than when the Solar Code was previously authorised; while the decision to become a signatory to the Solar Code is still voluntary, it has become virtually essential in order for a retailer to be viable in certain jurisdictions, because it is the only way to access significant government incentives. In this context, some interested parties were particularly concerned about the fact that retailers who have their application to become a signatory rejected by the CEC cannot appeal the decision and must wait three months (or longer for multiple rejections) before they can re-apply.

Parties also submitted that provisions should be amended to address specific issues, and that the period of authorisation should be as short as possible to achieve the transition to the NETCC.

The ACCC considers that the Solar Code has resulted, and is likely to continue to result, in public benefits. In particular, for complex products such as solar PV systems, the obligations on retailers under the Solar Code (for example, regarding advertising, information disclosure and consumer education) help consumers make better and more informed purchasing decisions. The ACCC also considers that the Solar Code is likely to result in public benefits

in the form of increased consumer protections from key commitments required by signatories, which go beyond what is required by law.

The ACCC considers that for existing retailers who are signatories, the Solar Code is likely to result in limited public detriment. The costs incurred by retailers to comply with the Solar Code are necessary for it to be effective, and the disciplinary processes in place to deal with complaints are appropriate.

Where retailers seek to become signatories to the Solar Code, but are rejected (i.e. applicants), there may be a reduction in competition in the supply of solar PV systems. To the extent that applicants are rejected for good reason, any loss of competition is outweighed by the benefit to consumers of maintaining high standards of retailer conduct. However, the ACCC considers that some public detriment is likely to arise because there is no independent process for applicants to appeal their rejection. This presents a risk that applicants are incorrectly rejected. The public detriment is compounded by the exclusion periods that the CEC has introduced before rejected applicants can re-apply.

The ACCC considers that there needs to be an ability for rejected applicants to seek a review of the CEC's decision, so that rejected applicants who have considered and sought to address the reasons for the CEC's decision to reject their application can re-apply without undue delay. The ACCC proposes to grant authorisation subject to a condition that provides for this ability.

The ACCC notes the CEC's submission that including an appeals process would impose an administrative burden on the Code Administrator and Code Review Panel, and that the cost would be applied to applicants. It is open to the CEC to introduce an alternative independent appeals process instead of using the Code Review Panel. The independent appeals process should set out the criteria to be met before an applicant can appeal. In terms of the cost of the appeals process, the ACCC accepts that an appeal would be more costly for the CEC than an initial consideration, and that it may be appropriate for at least part of the additional cost to be borne by applicants. However, the cost should not be prohibitive for retailers. The independent appeals process should also include a limit on how many appeals an applicant can lodge.

As to the waiting periods to re-apply, the ACCC understands that the Code Administrator introduced these to ensure rejected applicants take the necessary time to address the deficiencies in their application (as identified by the Code Administrator) before re-applying, rather than re-applying quickly without doing so. The ACCC considers that this objective could be still achieved with shorter waiting periods for retailers seeking to re-apply, and proposes that the Solar Code be amended to provide for this, thereby reducing the extent of public detriment likely to arise from applicant rejections.

The ACCC proposes to grant authorisation for a period of two years. The ACCC considers that the Solar Code should be re-authorised for the minimum period necessary to enable the transition of signatories to the NETCC. The current Tribunal proceedings create some uncertainty as to whether, when and in what form the NETCC will commence operation. However, the ACCC considers that two years from the ACCC's final determination is likely to be sufficient to enable the transition.

The ACCC particularly invites further submissions on:

- the form and content of the ACCC's proposed condition. In particular, whether, in addition to including an appeals mechanism, it is also necessary to require that the exclusion periods for rejected applicants be reduced. Views are also sought on the mechanism for the appeals process

- whether the proposed duration of the authorisation (two years) is appropriate, and
- the issues relating to the Solar Code's privacy provisions, as raised by the Office of the Australian Information Commissioner and set out in paragraphs 4.18-4.21.

1. The application for authorisation revocation and substitution

- 1.1. On 15 May 2020, the CEC lodged an application to revoke authorisations A91495 and A91496 and substitute authorisation AA1000514 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). The CEC is seeking re-authorisation of an amended version of the Solar Code, dated March 2020. The Solar Code is a voluntary code for solar PV retailers (**retailers**) which was first authorised by the ACCC in October 2013, and re-authorised in October 2015 (the **previous Code**). Re-authorisation is sought for three years. This application for re-authorisation AA1000514 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicant

- 1.3. The CEC is applying for re-authorisation on behalf of itself and current and future retailers who are signatories to the Solar Code.
- 1.4. The CEC is a not-for-profit, membership-based organisation for the clean energy industry in Australia. It represents over 800 businesses in the renewable energy industry (such as solar, wind, hydro, bioenergy, geothermal and marine) and energy storage, and over 6,500 solar installers. The CEC:¹
 - provides an Approved Solar Retailer scheme in relation to the marketing and sale of solar PV systems, under which retailers of solar PV systems can become signatories to the Solar Code. Under the Solar Code, retailers agree to comply with best practice standards for the marketing and supply of solar PV systems to consumers. Some government solar programs require consumers to use Approved Solar Retailers to be eligible for financial incentives and rebates for their solar PV system
 - provides an accreditation scheme under which individuals who are solar PV designers and/or installers can obtain a qualification that shows competence in the design and/or installation of solar PV systems. Solar PV systems designed and installed by 'CEC-accredited' individuals are eligible for federal government financial incentives.² The accreditation scheme for solar PV designers and/or installers is not part of this application for authorisation, and
 - provides a membership program for companies who work in and support the clean energy sector, which provides members with opportunities to attend events and participate in policy meetings and forums.

¹ Clean Energy Council, [Who we are, what we do for your business](#).

² The federal *Renewable Energy (Electricity) (Cth) Regulations 2001* require that only consumers who use a designer and installer accredited under the Clean Energy Council accreditation scheme are eligible for Small-scale technology certificates (**STCs**) – certificates which can be sold or traded to recoup a portion of the cost of their solar PV system.

The Conduct

- 1.5. The CEC seeks re-authorisation to enable current and future retailer signatories to agree, sign up to and comply with provisions of the Solar Code (the **Conduct**).
- 1.6. The Solar Code is a voluntary code which aims to improve consumer protection and promote best practice for retail businesses selling solar PV systems, by setting standards in advertising, contract documentation, finance and payments, design and installation, operation, customer service, warranties, and complaints handling. Although the Solar Code is voluntary, as noted, it has become more important for retailers to become signatories in order to access customers who are eligible for government funding schemes.
- 1.7. The CEC's current authorisation for the Solar Code was granted in 2015 and is due to expire on 15 October 2020. The CEC submits that its intention is that the Solar Code will ultimately be replaced by the NETCC and that its signatories will transfer across to the NETCC in stages, over a two-year period. The CEC is therefore seeking re-authorisation for three years to cover the resolution of the current NETCC Tribunal proceedings and the transfer of signatories to the NETCC.
- 1.8. The Applicants have sought re-authorisation in relation to the following provisions of the Act which might apply to the Conduct: Division 1 of Part IV (cartel conduct), section 45 (contracts, arrangements or understandings, and concerted practices), and section 47 (exclusive dealing).

NETCC

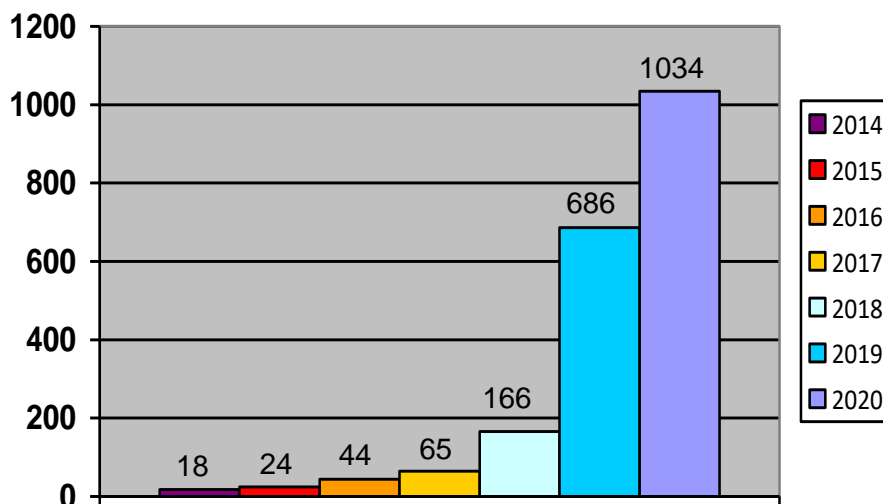
- 1.9. On 30 April 2019, the CEC, the Australian Energy Council (**AEC**), the Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) lodged an application for authorisation of the NETCC. The NETCC sets minimum standards that suppliers of 'new energy tech' products (for example, solar panels, energy storage systems and other emerging products and services) must comply with when interacting with customers, including from initial marketing and promotion through to installation and complaints handling. The NETCC contains an appeals process for unsuccessful applicants to appeal decisions to the Code Monitoring and Compliance Panel.
- 1.10. On 5 December 2019, the ACCC issued a determination granting conditional authorisation to the NETCC for five years. The conditions relate to requirements that 'buy now pay later' (**BNPL**) finance providers must meet in order for signatories to offer such finance arrangements under the NETCC, and the prohibition in the NETCC on BNPL finance being offered in unsolicited sales of new energy tech products. The ACCC also imposed a reporting condition on the operation of the NETCC.
- 1.11. The ACCC's determination did not come into force. On 30 December 2019, FlexiGroup Limited lodged an application for review of the ACCC's determination with the Tribunal. The matter was heard before the Tribunal from 9-12 June 2020 with the determination being reserved.
- 1.12. Due to this, it is unclear whether, when and in what form the NETCC will commence operation and signatories can begin to transition.

2. Background

Solar installation industry

- 2.1. Australia has the highest uptake of rooftop solar PV systems globally. As at 31 May 2020, 2.43 million rooftop solar power systems have been installed across Australia, representing 21% of homes.³ The CEC notes that the solar PV retail industry continues to grow rapidly, with the number of solar installations on homes and small businesses increasing by 43% in the 2018-2019 year. The Clean Energy Regulator expects that growth is likely to continue for at least 10 years.
- 2.2. There is no precise record of the number of solar PV retailers operating in the Australian market. The CEC references a 2014 industry report that estimated there are between 4,000 and 5,000 retailers, with the majority being sole proprietors or small businesses employing four or less people.
- 2.3. There were 1,034 signatories to the Solar Code as at 30 July 2020.

Chart 1: Growth in Approved Solar Retailers



- 2.4. The CEC notes that the current signatories of the Solar Code range in size from owner-operator businesses to large energy retailers. Some signatories exclusively install residential rooftop solar while others may also install medium and commercial scale systems. The CEC estimates that current signatories to the Solar Code account for around 50% to 60% of the solar PV industry by total installed capacity.

Rationale for the Solar Code

- 2.5. The CEC submits that the Solar Code seeks to enhance consumer protection and promote best practice for retail businesses selling solar PV systems to residential and small-scale commercial customers, and increase consumer confidence in the solar PV industry (see section 1.1 of the Solar Code).
- 2.6. The retail purchase of PV solar systems is generally a once-off purchase that may be relatively complicated for consumers and may involve a number of different parties.

³ <https://www.energy.gov.au/households/solar-pv-and-batteries>.

- 2.7. The primary entities involved in the sale and installation of solar PV systems are the installer, designer and retailer. These roles can be fulfilled by one individual or a number of different entities. The CEC submits that, typically, consumers purchase solar PV systems from a medium/large retailer who then sub-contracts with a system designer and installer.
- 2.8. As noted in paragraph 1.4 above, the CEC accredits individual solar PV designers and installers in relation to the safety and technical aspects of systems. A CEC-accredited designer or installer is bound by (and can face action by the CEC for breach of) the CEC Accreditation Code of Conduct, CEC Accreditation Terms and Conditions and CEC Design and Install Guidelines, the relevant Australian Standards and all other relevant laws and regulations.
- 2.9. In contrast, the Solar Code applies only to retailers and deals with the way in which they market and sell solar PV systems to consumers. It was developed because retailers who sub-contract design and/or installation are not covered by a standard, other than existing consumer protection legislation. This 'regulatory gap' created concerns about retailers' lack of accountability in sale and post-sale activities (particularly their accountability for the actions of sub-contracted parties). Now, such retailers can choose to become signatories to the Solar Code and agree to be bound by its requirements, which include complying with existing relevant law and Australian Standards and additional obligations (such as being responsible for all actions of sub-contracted parties).
- 2.10. There are numerous solar rebate government programs currently in operation. These government programs require consumers to use solar retailers who are Solar Code signatories, or individuals who are CEC-accredited designers/installers, to access financial incentives (see **Table 1** below). The CEC also advised that some governments have made it a requirement to access tenders for the installation of solar PV units that the solar retailer being used must be a Solar Code signatory.

Table 1: Government solar programs

State / Federal	Program	Requirement	Financial Incentive
Federal	Small-scale Renewable Energy Scheme <i>Ends 2030</i>	CEC accredited designer / installer ⁴	Small-scale technology certificates (STCs) - can be sold or traded to recoup a portion of the cost
Victoria	Solar panel rebate <i>Ends 2028</i>	CEC Approved Solar Retailer	\$1,850 off solar PV systems, plus an interest-free loan up to \$1,850 ⁵
South Australia	Home battery scheme <i>Target of 40,000 houses</i>	CEC Approved Solar Retailer ⁶	Maximum \$4000 subsidy for home battery installation ⁷

⁴ The *Renewable Energy (Electricity) (Cth) Regulations 2001* require consumers to use CEC-accredited installers/designers, but do not require consumers to use Approved Solar Retailers. However, because the Solar Code mandates that Approved Solar Retailers can only use CEC-accredited installers/designers, the implication is that any consumer who chooses to use a CEC Approved Solar Retailer is automatically eligible to receive STCs.

⁵ <https://www.solar.vic.gov.au/solar-battery-rebate>.

⁶ Or commitment to an acceptable equivalent Solar Code of Conduct.

⁷ <https://homebatteryscheme.sa.gov.au/about-the-scheme>.

NSW (Hunter Region)	Solar PV and battery storage assistance <i>Rolls out state-wide in 2021</i>	CEC-accredited installer	Interest-free loan up to \$14,000 for a solar PV and battery system or \$9000 for retrofitting a battery system
Queensland	Interest-free loans for solar and storage <i>Now closed (2018)</i>	CEC Approved Solar Retailer ⁸	Interest-free loans and grants for solar systems, standalone battery systems, or combined battery/solar systems

The Solar Code

2.11. The CEC seeks authorisation for an updated version of the Solar Code, which it submits does not include any substantive changes from the version authorised in 2015. The key provisions of the amended Solar Code are outlined below.

Consumer protection

2.12. The Solar Code seeks to enhance consumer protection by requiring retailers to (among other things):

- not engage in misleading or deceptive conduct in relation to the price, value or quality of goods and services (clause 2.1.1 (f)(ii))
- adhere to ethical sales and quoting practices, including avoiding high pressure sales tactics (clause 2.1.2 (a))
- provide a minimum retailer's warranty period of five years on the operation and performance of the whole PV system including workmanship and products (clause 2.2.10)
- clearly explain the process surrounding the payment and trade of Small Scale Technology Certificates (**STCs**), new electricity tariff rates, and the grid connection process
- provide consumers with greater clarity in contracts, with amendments that require all contractual terms and associated documents, as well as the process for paying STCs, be provided in writing
- comply with privacy obligations and minimum standards for the use of consumer data. These include signatories having the option (but not obligation) to allow consumers to opt-in to receive marketing material, and requiring signatories to include an opt-out provision (clause 2.2.13-14) and
- comply with all local, state and federal legislation, the CEC Accreditation Guidelines and regulations (section 2.4.1). Amendments now require that system designs comply with CEC Accreditation Guidelines, not merely that signatories employ CEC-accredited designers.

Monitoring and enforcement

2.13. Retailers are also subject to the following monitoring and enforcement arrangements:

- the Solar Code is administered by the Code Administrator (also known as the CEC Code of Conduct Team). Oversight and monitoring is provided by the

⁸ Or equivalent.

independent Code Review Panel, which must include at least three participants that are all non-signatories⁹ (clauses 3.1 and 3.2)

- the Code Review Panel prepares annual reports on the Solar Code's operation including compliance (clause 3.8.1)
- potential breaches are investigated by the Code Administrator, with each breach assigned a severity rating which corresponds to relevant sanctions (clause 3.5.1). Amendments include an updated 'breach matrix' which reflects requirements already in the Solar Code; altered 'severity' levels for certain breaches (three increased, two decreased); and giving the Code Administrator discretion to lower a breach's severity level in an investigation
- sanctions for breaches range from the appointment of an auditor, the publication of the breach on the CEC's website, and the suspension or cancellation of signatories in certain circumstances (clause 3.6)
- appeals against determinations of the Code Administrator are heard by the Code Review Panel (clause 3.7), and
- under new amendments, signatories must notify the Code Administrator if the control/ownership of their entity changes. The Code Administrator has the discretion to revoke a signatory's status if this is not disclosed or they are not satisfied that the signatory has sufficient systems in place to ensure ongoing compliance (clause 2.4.7).

Application process

2.14. The following process applies to retailers wishing to become signatories:

- retailers complete an online form and lodge examples of their standard documentation. The amendments now require retailers to make declarations¹⁰ about their company history and key stakeholders. Incorrect or incomplete information submitted by an applicant may lead to the delay or rejection of an application (clause 4.1.1)
- retailers must explain any adverse findings identified by the Code Administrator and may be required to attend an interview with, or provide referees to, the Code Administrator (clauses 4.1.1(g)-(i))
- the Code Administrator will assess the application based on information submitted by the retailer and further information gathered. The amendments now make explicit that the Code Administrator can reject applications unable to demonstrate that a retailer complies with the Solar Code or whose response to adverse findings does not sufficiently demonstrate compliance (clause 4.1.2), and
- formal feedback on the application assessment will be provided to the applicant (clause 4.1.4).

2.15. Rejected applicants do not have an avenue to appeal a decision and must wait three months before they can reapply (or six months if rejected a second time, or 12 months if rejected a third time). Each application incurs a \$200 fee.¹¹

⁹ The members must include a consumer representative with relevant experience and knowledge in, for example, consumer advocacy, protection and law; a PV representative with experience in the solar PV industry; and a Chair with relevant experience and knowledge in, for example, regulatory or government administration of consumer law, or a suitable background to ensure due process is followed at all times, particularly when dealing with any breach of the Code: clause 3.2.2(d).

¹⁰ See [Attachment F - Declarations on Application Form](#) to the CEC's application for re-authorisation.

¹¹ Clean Energy Council, [Apply](#), accessed 22 July 2020.

Consumer finance

2.16. The Solar Code requires that retailers offering 'alternative finance arrangements' must (clauses 2.1.22-2.1.24):

- ensure that the consumer clearly and accurately receives certain information about the provider, arrangement and fees, which can be satisfied by attaching to its contracts with consumers a pro forma completed by the provider, and
- make reasonable enquiries about whether a finance arrangement offered to a consumer is regulated by the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**). If not regulated by the NCCPA, the retailer must ensure the contract includes a provision stating that the consumer may not have access to a dispute resolution scheme approved by the Australian Securities and Investment Commission and/or the right to ask the provider for a hardship variation.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies, and solar retailers.¹²
- 3.3. The ACCC received 29 public submissions from solar retailers and individuals, state government departments and ombudsman, the Smart Energy Council, Consumer Action Law Centre, the Office of the Australian Information Commissioner and FlexiGroup Limited (an alternative finance provider).
- 3.4. Of these submissions, 18 opposed re-authorisation of the Solar Code, nine supported re-authorisation (some subject to amendments), and two were neutral.
- 3.5. Broadly, interested parties in support of re-authorisation considered that the proposed amendments will improve consumer protections and strengthen competition. State government departments with solar programs (South Australia, Victoria and NSW) considered the Solar Code as being integral to their schemes.
- 3.6. The main issues raised by interested parties opposed to re-authorisation included:
 - concerns about whether the current provisions of the Solar Code, and the CEC's interests, are enabling the Solar Code to be administered in a fair and effective manner. In particular, submissions raised concerns with the requirements retailers must meet to become a signatory and the fact applicants have no appeals mechanism if rejected; the process for investigation of complaints; the definitions and severity of certain breaches; and the CEC having a conflict of interest and not representing the industry
 - that the Solar Code was not voluntary in practice due to the increased numbers of government schemes requiring the use of a CEC Approved Solar Retailer. Parties noted that the concerns about effective administration are compounded by the fact that solar retailers in some states can essentially not compete unless they are signatories to the Solar Code

¹² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- that certain proposed amendments be modified or that further amendments be made (such as the finance and alternative purchasing provisions), and
- that the period of authorisation should be as short as possible to achieve the transition to the NETCC.

3.7. These issues are discussed in more detail in the ACCC's assessment, below.

3.8. Public submissions by the CEC and interested parties are on the [Public Register](#) for this matter.

4. ACCC assessment

4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The Applicants have sought re-authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, may substantially lessen competition or be a concerted practice within the meaning of section 45, or may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,¹³ the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of Competition

4.3. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.4. The ACCC considers that the relevant areas of competition are likely to be:

- competition for the retail sale and purchase of solar PV systems, and
- competition for the sale and purchase of:
 - components of solar PV systems
 - design services of solar PV systems
 - installation services of solar PV systems, and
 - finance provided to consumers purchasing a solar PV system.

Future with and without the Conduct

4.5. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.

4.6. The ACCC considers that, without the Conduct, the current Solar Code authorised in 2015 would continue to operate until it expires on 15 October 2020. Existing consumer protection legislation would continue to regulate the conduct of solar retailers at all times.

¹³ See subsection 91C(7).

Public benefits

4.7. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁴

4.8. The ACCC has considered the following public benefits:

- Reduced information asymmetry
- Increased consumer protections
- Effective administration and enforcement of the Solar Code.

Reduced information asymmetry and enhanced consumer ability to make informed choices that better suit their needs

4.9. Purchasing solar PV systems is a complex purchasing decision and inadequate information disclosure can make consumers' decisions more difficult. Consumers may purchase a solar PV system which is expensive and unsuitable to their needs. The CEC submits that the Solar Code aims to improve the provision of information to consumers to enable better and more confident purchasing decisions.

4.10. The Consumer Action Law Centre (**CALC**), while noting its view on how the Solar Code could be improved, submits that the Solar Code has contributed to improved standards in areas such as advertising and promotions, sales and quoting practices and in responsibilities for connecting to the grid. AGL agrees that the Solar Code plays an important role in improving consumer protections and promoting consumer trust for the purchase of PV systems. Associate Professor Penelope Crossley submits that the requirement for certain information to be included in written contracts with consumers (clause 2.1.6) will ensure adequate consumer protections are available.

4.11. The ACCC considers that the Solar Code is likely to result in better informed consumers, due to the various commitments agreed by signatories. These include commitments to provide detailed information disclosures, including:

- an itemised list of the goods to be supplied (clause 2.1.6(b))
- full specifications of the system, including manufacture, model, quantity and power rating of the solar modules and the inverter/s (clause 2.1.6(e))
- a site specific design plan and performance estimate (clause 2.1.6(f))
- disclosure of the method of all estimations made in relation to system outputs and financial benefits (clause 2.1.6(g))
- any site conditions and special circumstances beyond the control of the Solar Code signatory which may result in extra chargeable work not covered by the quote (clause 2.1.6(h))
- details about any after-sales services, guarantees and express warranties (clause 2.1.6(k))

¹⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- the consumer’s cooling-off and termination rights (clause 2.1.6(l))
 - clearly explaining the process surrounding the payment and trade of STCs, new electricity tariff rates, and the grid connection process (clause 2.1.14), and
 - explanations of how to maintain their system (clause 2.2.6).
- 4.12. AGL raised concerns that the proposed change to clause 2.1.6(f) will result in significant increased costs or involve structural and civil engineering considerations. The CEC responded noting that the intention of the proposed change was to provide clearer guidance on the site-specific site design and there is no requirement for visual representations of the inverter location, as the Code Administrator will accept written representations.
- 4.13. The ACCC accepts that for complex products, such as solar, the commitments under the Solar Code requiring additional information disclosures are likely to result in a public benefit from consumers being able to make better and more informed purchasing decisions about a solar system that best meets their needs.

Increased consumer protections from key commitments by signatories beyond what is currently explicitly required by the law

- 4.14. The CEC submits that the Solar Code provides an important self-regulatory mechanism that brings about increased accountability in the solar industry.
- 4.15. Solar Victoria (a portfolio within the Victorian Department of Environment, Water, Land and Planning) and the South Australian Department for Energy and Mining consider the Solar Code to be the only code with consumer protections appropriate for their respective schemes. Solar Victoria observed that mandating retailers become signatories to the Solar Code via its program has raised industry standards.
- 4.16. The NSW Department of Planning, Industry and Environment submits that it has several programs which are dependent on the interaction between solar retailers and consumers, and that the Solar Code provides a level of assurance that standards will be adhered to, along with an agreed method to address breaches of these protections. It also considers that an extension of the Solar Code is important in maintaining oversight and quality in the industry while the outcome of the NETCC Tribunal decision is pending.
- 4.17. The ACCC considers that the Solar Code is likely to result in greater consumer protections, as a result of the commitments adopted by signatories that go beyond those explicitly required under current consumer protection laws. These include:
- Commitments around warranties and contracts, including:
 - providing a minimum retailer’s warranty period of five years on the operation and performance of the PV system, including workmanship (section 2.2.10), and
 - providing consumers with greater clarity in contracts by requiring any document which forms part of the contract, as well as the process for paying STCs, be provided in writing (clause 2.1.10 and 2.1.14)
 - Commitments to take positive actions with respect to advertising and promotion, including:
 - clearly attributing any claims relating to performance and savings to a reputable source (clause 2.1.1(c))

- advertising the total price as prominently as any components of the price (clause 2.1.1(d))
 - providing information that is specific to the state or region of advertisement (clause 2.1.1(e))
 - Commitments to educate consumers of their existing rights under Australian Consumer Law when undertaking direct marketing, including:
 - advising consumers they can ask a sales person to leave at any time and explaining their right to terminate the agreement within 10 business days for unsolicited sales (clause 2.1.2(b)), and further
 - avoiding high-pressure sales tactics (clause 2.1.2(a)).
- 4.18. The Office of the Australian Information Commissioner (**OAIC**) noted the interaction between Australian Privacy Principle (**APP**) 7 and clauses 2.2.12 and 2.2.13 of the Code. The OAIC expressed concern that clause 2.2.12(b) may include instances where the consumer has not opted-in for future marketing and clause 2.2.13 appears to convey discretion in the need to seek a consumer's consent to receive marketing material. The OAIC provided recommendations as to how these issues could be rectified.
- 4.19. The CEC responded to the OAIC's concerns by stating that it considers the existing clauses in 2.2.14 and 2.2.15 address the suggested amendments made by OAIC regarding a consumer's express consent on direct marketing. The CEC further submits clauses 2.2.11 and 2.2.16 inform signatories of their obligations to ensure that their marketing practices are in line with the *Privacy Act 1988*.
- 4.20. Retailers who are signatories to the Solar Code are required to comply with the Privacy Act and the Australian Privacy Principles. The ACCC invites further submissions from OAIC or interested parties on this issue.
- 4.21. The ACCC considers that the commitments by signatories under the Solar Code are likely to result in public benefits by providing protections that extend beyond what is currently required by the law to reduce the likelihood and degree of consumer harm that can arise from the kinds of practices addressed by these provisions.

Effective administration and enforcement of the Solar Code

- 4.22. Effective administration and enforcement of a code are crucial to the realisation of the claimed public benefits under the code.
- 4.23. A number of interested parties have raised issues with the CEC's administration of the Solar Code, particularly in relation to the criteria and process for considering applications to become signatories to the Solar Code (as detailed below in paragraphs 4.42-4.71).
- 4.24. The ACCC considers that there are sufficient mechanisms in place to ensure the Solar Code is effectively administered and enforced, including:
- there is a complaints process in place for investigations and sanctions can be appealed to the Code Review Panel, and
 - the Code Review Panel must publish annual reports on the Solar Code's operation (including compliance activity) to enable assessment of its effectiveness, ensure its standards meet the identified objectives, and identify systemic issues and areas for improvement. This also promotes transparency as these reports are published publicly.

4.25. The ACCC also notes the positive findings of the independent review of the Solar Code that was conducted in 2016, which found:

*Our Review of these complaints satisfied us that the new complaints procedure is being appropriately applied and the Code Administrator is handling complaints efficiently and fairly. The Code Review Panel's role provides an independent oversight to the process and clear mechanism where there is dissatisfaction with the Code Administrator's complaints handling.*¹⁵

Although the Solar Code requires an independent review must be conducted every three years, the CEC advised that it did not undertake an independent review in 2019 because of the work which began on the NETCC. The CEC stated that once it became clear that there would be a need to extend the Solar Code, it undertook an internal review of the Solar Code, which identified the amendments outlined in the application for re-authorisation. An independent consultant was engaged to consider the merits of these proposed amendments. Whilst acknowledging that this process does not fully meet the review requirements of the Solar Code, the CEC considered that the costs of a full independent review would not have been justified given the imminent replacement of the Solar Code.

4.26. However, the ACCC considers that in relation to the process for considering applications from retailers to become signatories to the Solar Code, there are not sufficient checks and balances in place to ensure the application process is being administered in a transparent way. This is discussed further in paragraphs 4.49-4.71.

ACCC conclusion on public benefit

4.27. The ACCC considers that the Conduct is likely to result in public benefits from:

- reduced information asymmetry (due to Solar Code signatories committing to provide greater information to consumers), and
- increased consumer protections (due to Solar Code signatories committing to consumer protections beyond the legal minimum).

4.28. The ACCC considers that in general, the provisions in the Solar Code provide mechanisms to ensure its effective administration and enforcement. Specifically, the complaints process for investigations and ability to appeal sanctions to the independent Code Review Panel, the requirements that the Code Review Panel to publish annual reports on the Solar Code's effectiveness, and that an independent review is conducted every three years.

Public detriments

4.29. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*¹⁶

4.30. The ACCC has considered the following public detriments:

- Reduced competition in the retail supply of solar PV systems

¹⁵ Application for Authorisation, p. 17

¹⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- Potential to mislead/deceive consumers regarding alternative finance.

Reduced competition in the retail supply of solar PV systems

Increased costs for retailers

- 4.31. The CEC submits that some of the costs of providing a minimum five-year warranty and the fees charged to applicants and signatories are likely to be passed on to consumers in the form of higher prices. It also submits that there is an increased cost in terms of compliance and reporting requirements under the Solar Code which may increase the regulatory burden for retailers.
- 4.32. Some interested parties raised concerns that small businesses, many of whom are owner-operators, lacked the adequate resources to comply with the obligations of the Solar Code. The CEC submits in response that Solar Code fees have not increased since 2015. Further, the only mandatory fees are the application fee (which contributes to the costs of undertaking credit checks and assessing each applicant's documentation) and the annual fee (which is based on a sliding scale so that in most instances smaller businesses pay less than larger retailers, and contributes to compliance, promotion and administration costs).
- 4.33. The ACCC acknowledges that signatories incur costs in order to comply with the Solar Code. However, it considers that:
- for the Solar Code to be effectively enforced, there are costs to the CEC that appropriately need to be covered. The method for calculating annual fees is published on the CEC's website and outlined at **Table 2**.¹⁷ The ACCC considers that the fees are proportionate to a business' output and notes they are capped (currently at \$6,000). Further, the fees have not increased since the previous authorisation in 2015
 - cost increases arising from the additional support supplied to consumers or higher-quality products or services (such as the minimum five-year warranty or additional disclosure requirements) likely reflect a corresponding increase in the quality of those goods/services, and
 - in relation to compliance costs incurred by signatories resulting directly from the Solar Code's implementation, the ACCC considers the compliance requirements are necessary for the Solar Code to be effective.
- 4.34. The ACCC therefore considers that minimal detriment is likely to result from an increased cost of supply for retailers who are signatories to the Solar Code.

Table 2: Fees under the Solar Code

Application fees		Annual fee for Approved Solar Retailers	
Application fee	\$200 + GST	\$0.80 per kW of solar or battery capacity installed in past 12 months:	
Franchisee application fee	\$100 + GST per franchisee	Minimum fee	\$600
Review fee (if being reviewed for third or subsequent time)	\$200 + GST	Maximum fee	\$6000

¹⁷ See Clean Energy Council, [Fees](#).

Investigations/sanctions or denied applications as a barrier to entry

- 4.35. Being a signatory to the Solar Code (a 'CEC Approved Solar Retailer') may provide an advantage over non-signatory retailers because consumers may perceive that signatories uphold better business practices and offer greater consumer protections than non-signatories, making them more attractive. This advantage may be further increased where governments link signatory status to access to consumer rebates or incentive schemes, or offer certain government tenders exclusively to signatories (as further discussed in paragraph 2.10 above). The CEC submits that because government programs are increasingly mandating that retailers be signatories to the Solar Code, sanctions like suspension could reduce competition by preventing their participation in such programs and causing loss of income.
- 4.36. If existing signatories are inappropriately sanctioned (including having their signatory status suspended or cancelled), or potential signatories have their applications rejected due to deficiencies in the application process or its administration (rather than the application itself), this may reduce their ability to compete to provide solar PV systems.
- 4.37. While the ACCC considers it is important that appropriate sanctions are applied for non-compliance with the Solar Code and that applications are rejected where they are deficient, the ACCC considers such decisions by the CEC must be made in a transparent and consistent manner, and be reviewable by an independent body. Such checks and balances are necessary to ensure that the CEC and the Solar Code are operating effectively and fairly and do not result in anti-competitive outcomes, for example by inappropriately excluding retailers and reducing competition between retailers.

Investigations and sanctions as a barrier to entry

Breach matrix

- 4.38. Some interested parties submit that the 'severity' levels allocated to some breaches are too high, or that certain breaches are ambiguous or subjective. Multiple parties raised particular concerns that signatories acting in a way that 'brings the Code into disrepute' (clause 2.4.23) was increased to a 'severe' breach, and submitted that the Solar Code should clarify what types of conduct would breach this clause. However another interested party, Associate Professor Penelope Crossley, considered the changes to the breach matrix to be appropriate and fair.
- 4.39. Regarding clause 2.4.23, the CEC submits that behaviours that would bring the Solar Code into disrepute would include practices such as not ceasing unsolicited door to door sales during active state government restrictions, repeated instances of lying to the Code Administrator, or causing reputational damage to the Approved Solar Retailer program; and that the CEC will consider further consultation on this clause in due course.¹⁸ The CEC also submits that the discretion afforded to the Code Review Panel to alter breach levels in clause 3.5.3 is appropriately balanced with the Code Administrator's discretion to lower breach levels.
- 4.40. The ACCC considers that the amendments to the breach matrix assign 'severity' levels to requirements that already existed in the Solar Code and that these are likely to help ensure it is applied transparently and consistently. Further, the amendments increasing 'severity' levels (and therefore sanctions) for certain breaches are, to some

¹⁸ Clause 2.4.25 requires that any major changes to the Solar Code be undertaken in consultation with the key stakeholders including signatories, industry, ACL regulators and consumer protection agencies.

degree, balanced by the addition of a new power enabling the Code Administrator to lower a breach's severity level during an investigation.¹⁹

Compliance process and conflicts of interest

- 4.41. Multiple interested parties, including solar retailers and the Smart Energy Council, submit that the Solar Code is poorly administered and applied by the CEC. They note the arbitrary nature of adverse rulings and that inconsistent or stricter rules are being applied to some industry participants (particularly mavericks); and that there is a lack of natural justice during the application process (as detailed in 4.47 below), during the investigation of complaints, and when signatories appeal CEC decisions.
- 4.42. Some interested parties also express concerns that the CEC has a conflict of interest. For example, due to the fact the CEC is responsible for both accrediting installers/designers and also for approving retailers, or that the CEC both investigates complaints and makes binding determinations (with one interested party suggesting the Code Review Panel should do the latter instead). Some interested parties also submit that the CEC is not representative of the solar PV industry.
- 4.43. In relation to the compliance process, the CEC outlines the steps in its Complaints Procedure (see paragraph 4.47 below), and submits that this procedure is robust and methodically places facts and evidence to the signatory for a response, before reaching any conclusion. It submits that 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. It also notes that extensions of all deadlines during the compliance process are usually granted in the first instance, provided they are sought before the due date.
- 4.44. In relation to concerns regarding conflicts of interest, the CEC submits that the Solar Code requires the CEC to manage applications, monitor compliance and enforce sanctions. Further, members of the Code Review Panel are not signatories or associated with the Code Administrator, and therefore provide crucial oversight and monitoring to ensure impartiality in hearing appeals against sanctions. The CEC also submits that its Board is elected via an Annual General Meeting of CEC members; that the CEC contributes to a range of standard committees for solar and other relevant technologies; and that independent reviews of the Solar Code have not raised concerns about the CEC's objectivity in administering the Solar Code.
- 4.45. Additionally, the CEC rejects any claims that it is not representative of the industry. It submits that its commitment to advocating on behalf of the industry is demonstrated by the policy forums it participates in, industry events it organises, and by undertaking educational initiatives to help consumers make informed purchasing decisions.
- 4.46. The ACCC considers that where the compliance process is not enforced appropriately or transparently, this may reduce competition between solar PV retailers by, for example, leading to certain retailers having their signatory status inappropriately cancelled or suspended and potentially preventing them from accessing consumers who are seeking to obtain financial incentives under government schemes. However, the ACCC considers that the Solar Code has sufficient rules, checks and balances in place to help ensure that the CEC appropriately monitors compliance with the Solar Code, enforces breaches and minimises any potential for conflicts of interest. In particular:

¹⁹ Amended clause 3.5.3.

- the CEC’s Complaints Procedure, which was recently updated following consultation with signatories and approved by the Code Review Panel, requires:
 - signatories to be provided with details of the alleged breach as soon as practicable and given 21 days to respond (or if they do not dispute the breach, to provide evidence of the actions taken to address it)
 - the CEC must investigate and assess the issue as soon as reasonably practicable, and if a breach is found, allocate a sanction or refer it to the Code Review Panel. The CEC also submits that it advises retailers whether each allegation has been substantiated and explains the reasoning for these decisions
 - sanctions imposed for medium-severe breaches provide the signatory with an opportunity to detail their strategy to rectify the issue (in addition to other actions, depending on the breach level). Where a major breach has occurred, signatories have a reasonable period to remediate the breach as requested by the CEC, and will only be named on the CEC website and annual report if they fail to do so, and
 - if the CEC imposes a sanction requiring a signatory to rectify the issue, the signatory has 30 days to appeal this decision to the Code Review Panel, who will provide a ruling and reasons as soon as reasonably practical
- the Code Review Panel must publish an annual report that includes all breaches and sanctions imposed, which provides transparency and accountability over how sanctions are being applied. The ACCC understands that the CEC now provides signatories with an additional Quarterly Report containing this information.

4.47. Further, the ACCC has not been provided with any evidence to suggest there are systemic issues with how complaints are being investigated, sanctions are being applied or appeals are being resolved under the Solar Code. The ACCC therefore considers that the Solar Code is unlikely to result in public detriment in the form of investigations or sanctions inappropriately preventing or excluding retailers from operating in the supply of Solar PV systems.

Denied membership to the Solar Code as a barrier to entry

4.48. Many interested parties express concerns about the Solar Code’s connection to government schemes which only offer financial incentives for installations performed by retailers who are signatories to the Solar Code.²⁰ They submit that such linkages undermine the voluntary nature of the Solar Code and make signatory status a prerequisite to remaining in the solar retail business in states that have such schemes (as outlined in **Table 1** above, but particularly in Victoria). Some submit that this has reduced business opportunities for non-signatories and contributed to them being driven out of business through no fault of their own. Others note that while originally a voluntary scheme that retailers could use to add value to their business, the Solar Code now offers no tangible value and retailers would not be adopting it but for the financial incentives. One interested party also raised concerns about it being compulsory for retailers to be signatories to access certain government tenders.

²⁰ Additionally, the Smart Energy Council submits that some state government programs make the Solar Code a mandatory requirement for their solar battery support programs, when the Solar Code makes no reference to batteries, only PV installations. The ACCC understands that such schemes – such as the South Australian Department for Energy and Mining’s Home Battery Scheme – operate based on the assumption that when consumers purchase a solar battery, they are purchasing from retailers who also install solar PV systems (as opposed to batteries only), generally in the context of purchasing the solar PV system.

4.49. The ACCC notes that when it last considered re-authorisation of the Solar Code in 2015, there were only 24 signatories and one federal government scheme that linked financial incentives to the Solar Code. As at 30 July 2020, the Solar Code has 1,034 signatories and the Victorian, South Australian and NSW governments now also offer such financial incentives, with more schemes possible in the future. The decision (and ability) to become an Approved Solar Retailer has therefore become much more important in determining a retailer's ability to compete in the solar PV retail market. The increased prevalence of government schemes or tenders requiring retailers be a signatory to the Solar Code makes ensuring that the Solar Code is properly administered and enforced important to minimising any potential competitive harm.

Application process

4.50. The application process is outlined in paragraphs 2.14-2.15 above. The CEC notes that an application consists of an assessment of a retailer's online presence, consumer feedback, an integrity and financial check, any adverse findings from a tribunal, court or fair trading agency, and a comprehensive review of the applicant's documentation. It submits that it provides ample opportunity to applicants to discuss the Code Administrator's findings. The CEC also advises that the amendments to the Solar Code have been made to more firmly embed the Code Administrator's current application assessment process.

4.51. Multiple interested parties raised concerns that the application process reduced retailers' ability to compete to provide solar PV systems in the ways outlined below (at paragraphs 4.59-4.75). Conversely, Associate Professor Penelope Crossley supported the application process as amended on the basis that it enables consideration of the history of conduct of the party applying, which will enable an assessment of the likelihood of future breaches of the Solar Code (and potentially, undertakings that quality improvement measures have been implemented to prevent repeats).

Lack of appeals mechanism

4.52. Interested parties submit that there is no appeals mechanism for rejected applicants and retailers must wait three months before they can re-apply (or six months if rejected a second time, or 12 months if rejected a third time).²¹ They claim that this gives the CEC unfettered power to decide which companies become signatories and therefore compete in various markets.

4.53. In response, the CEC notes that rejected applicants must wait the requisite exclusion period before re-applying, pay a \$200 fee, and sufficiently demonstrate (in writing) that they can comply with the Solar Code requirements and have systems and procedures in place to ensure ongoing compliance. The CEC submits that it introduced an exclusion period because, as government schemes started to mandate that retailers become signatories to the Solar Code, it observed that many applicants failed to reflect the requirements of the Solar Code in their applications and that rejected applicants were re-applying almost immediately without taking due care to understand their obligations. It submits that a three-month exclusion period is considered the appropriate minimum for applicants to read and understand the Solar Code requirements, obtain external advice if required, institute changes in their documents, and communicate the requirements within their organisation. The CEC notes that it has taken on board prior feedback and generally will proceed with an application if there have been clear attempts to meet the requirements of the Solar Code.

²¹ Clean Energy Council, [Apply](#).

- 4.54. The CEC advises that while it considered including an appeals mechanism, it found that this would impose a significant administrative burden on the Code Administrator and Code Review Panel, that it was not practically feasible for the Code Review Panel members to review all appeals, and that a corresponding cost would be levied onto rejected applicants. The CEC estimates that the approximate cost of an appeal would be \$750. This cost is made up of the time taken for one CEC staff member to compile the documents for an appeal and the time of the Code Review Panel to review the appeal.
- 4.55. The ACCC notes that the number of rejected applicants to the Solar Code, as at 30 June 2020, is per **Table 3** below. This results in a rejection rate of approximately 25 per cent (which the CEC advises is not fixed and can fluctuate over time). However, the ACCC also notes the CEC's submission that 80 per cent of rejected applicants who have reapplied have successfully become signatories.

Table 3: Statistics on applications received and rejected from 1 January 2015 to 30 June 2020

Total applications received	1426
Total applications approved	998
Number still under assessment	74
Number of rejected applicants	354
Number of rejected applicants who re-applied	151
Of the rejected applicants who re-applied, how many become signatories to the Code	120
Number of rejected applicants who have an application under assessment	15
Of the rejected applicants who re-applied, how many were rejected again	16

- 4.56. The ACCC considers that the current mechanisms, which give applicants the opportunity to explain any adverse findings detected during the application phase and provide them with formal feedback on the application assessment, go some way to ensuring the application process is appropriately and consistently administered.
- 4.57. However, the ACCC considers that there is potential for the application process to result in public detriments by reducing the ability of new applicants to compete in the supply of solar PV systems.
- 4.58. To the extent that applicants are rejected for good reason, any loss of competition is outweighed by the benefit to consumers of maintaining high standards of retailer conduct. However, the ACCC considers that some public detriment is likely to arise because as applicants are unable to appeal the CEC's decision to reject their application, there is no oversight of these decisions by an independent person or body. Without independent oversight of the application process it is difficult for the ACCC to assess whether retailers are being inappropriately denied signatory status. This public detriment is compounded by the exclusion periods that the CEC has introduced before rejected applicants can re-apply.
- 4.59. Further, where governments link consumer access to rebate or incentive schemes, or government tenders make it a requirement to become a signatory to compete in the market, independent oversight of the application process is necessary. The ACCC

notes that it is a matter for governments to determine the appropriate eligibility criteria for their programs.

- 4.60. Additionally, while the ACCC recognises the CEC's intention behind having a three-month exclusion period (or six months for a second rejection and 12 months for a third time rejection), it considers that a blanket period is excessive and a detriment to applicants.
- 4.61. The lack of transparency in the application process and the CEC's exclusion period for rejected applicants therefore results in a public detriment, particularly for retailers in those states where it is a requirement to become a signatory to the Solar Code to access financial incentives.

Inconsistent or unilateral standards

- 4.62. Two interested parties raised concerns that inconsistent standards and a lack of natural justice are being applied in assessing applications. Bell Solar Pty Ltd cite examples of applicants being rejected based on their terms and conditions, which were in fact identical to those of existing signatories; or based on the CEC's erroneous understanding of the Australian Consumer Law or on alleged complaints that were not disclosed to the applicant. Tru Solar submits that the CEC stated it did not have sufficient resources to explain every requirement that Tru Solar's application did not meet; whereas Tru Solar argues that it is reasonable to expect such an explanation so that it can address any shortcomings and re-apply.
- 4.63. In response, the CEC submits that the onus is on the applicant to demonstrate that it can meet the requirements of the Solar Code. It notes that feedback on the assessment of an application is provided to each applicant (clause 4.1.4). The CEC advises that after it assesses an applicant's terms and conditions, quotes, invoices and advertisements, it will highlight areas of concern and relate those to clauses of the Solar Code. It will then determine the extent of the applicant's non-compliance with the Solar Code and provide the applicant with either:
- a letter of amendments (for minor non-compliance), which seeks amendments to bring the documentation within the requirements of the Solar Code and requests further clarification
 - a first review letter (for major non-compliance) which highlights areas of focus and allows applicants to amend and re-submit their documentation, or
 - a rejection letter (for extensive non-compliance), which formally rejects the application, but still allows the applicant to re-apply after the exclusion period.
- 4.64. The ACCC considers that the processes in place for considering applications appear appropriate for giving feedback to applicants. However, without an independent appeals mechanism, it is difficult to know whether the standards are being applied appropriately and with procedural fairness.

Difficulties satisfying pre-requisites

- 4.65. Some retailers expressed difficulties in meeting certain standards to become a signatory, which retailers are required to 'declare' they meet when applying. A few parties noted the barrier of requiring retailers to have been operational for at least 12 months to qualify, regardless of how experienced their individual director/manager may be. Bell Solar Pty Ltd raised concerns with the requirement that during the past five years, no directors, managers, partners or shareholders of a retailer, or any of their close family members, can have been involved in a business that has (among other

things) gone into liquidation, received a court judgment, or engaged in activity which would cause the Code to fall into disrepute. It submits that this does not appear to be relevant to determining an application, and that presumably, some large existing signatories (such as AGL and Origin) who have thousands of shareholders, would be unlikely to satisfy this.

- 4.66. The CEC notes that the 'declarations' were developed by the Code Administrator and approved by the Code Review Panel, and have been in place since 2015 (although they do not need to be renewed by existing signatories each year). The CEC checks compliance with the declarations via financial and integrity checks for directors and shareholders. The CEC advises that if a retailer cannot meet the criteria, they normally contact the Code Administrator who may request further information (for example, as to why their company was deregistered) and give them an opportunity to respond. That retailer can still go on to become a signatory.
- 4.67. The CEC submits that the minimum 12-month operating requirement is necessary to protect consumers by ensuring that businesses have sufficient experience and expertise, particularly as the CEC's experience has been that operators who enter the solar industry without it have been less inclined to comply with the Code. However, the Code Administrator has also granted requests to waive the 12-month requirement where potential applicants provide further details or substantiate their waiver request with relevant experience in the industry.
- 4.68. The ACCC considers that in most instances, the minimum 12-month operating requirement is appropriate for the reasons outlined by the CEC. However, it considers that this requirement may act as a barrier for new retailers who are seeking to enter markets within which signatory status has become virtually essential in order to be viable, because it is the only way to access government incentives. The Code Administrator already informally waives the 12-month operating requirement where potential applicants can substantiate their experience. The ACCC considers these concerns could be addressed if the Solar Code formalised the ability for applicants who have been operational for less than 12 months to be able to demonstrate that they have the relevant experience. The ACCC requests that the CEC consider this issue.
- 4.69. In relation to declarations regarding 'close family members', the CEC submits that this requirement relies on some of the indicators of illegal phoenix activity (as identified by relevant regulators²²) to ensure as much as possible that only reputable businesses become signatories. This includes, for example, where a director of a new company is a family member or close associate of the director of a former company. The ACCC considers that this requirement appears appropriate in the context of preventing illegal phoenix industry. The ACCC particularly notes the CEC's submission that this restriction only applies to liquidations, court judgements, expulsions from the Code etc. from the previous five years, which recognises that directors and businesses can improve their practices and behaviours.
- 4.70. Overall, the ACCC does not consider it likely that the Solar Code will result in a public detriment in the form of reduced competition due to either the increased cost of supply for retailers who are signatories, or from the sanction process being inappropriately imposed on retailers. However, there is likely to be public detriment resulting from the potential for the application process to unfairly prevent or restrict retailers from supplying solar PV systems, therefore reducing competition for the supply of solar PV systems.

²² Australian Securities & Investments Commission, [Illegal phoenix activity](#), updated 13 July 2020; Australian Taxation Office, [Phoenix factsheet](#), updated 2 July 2019.

Potential to mislead/deceive consumers regarding alternative finance

4.71. The Solar Code requires retailers offering alternative finance arrangements to meet the following standards (clauses 2.1.20-2.1.24):

- ensure that the consumer clearly and accurately receives certain information about the provider, arrangement and fees, which can be satisfied by attaching to its contracts with consumers a pro forma completed by the provider
- must make reasonable enquiries about whether a finance arrangement offered to a consumer is regulated by the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**). If not regulated by the NCCPA, the retailer must ensure the contract includes a provision substantially in the form of 2.1.24 and is signed by the consumer i.e. that the consumer may not have access to a dispute resolution scheme approved by the Australian Securities and Investment Commission and or the right to ask the provider for a hardship variation.

4.72. FlexiGroup submits that these clauses are confusing and unnecessary, and it is not beneficial to consumers to disclose that a finance product is not regulated by the NCCPA. It considers that these clauses are illusory and mislead consumers. FlexiGroup submits that all BNPL providers who finance solar PV systems are members of the Australian Financial Complaints Authority (**AFCA**) and BNPL providers do offer hardship arrangements to their consumers. FlexiGroup proposes that these clauses in the Solar Code be replaced with a clause informing consumers that they can access external dispute resolution provided by the AFCA or hardship support.

4.73. The ACCC understands that the majority of BNPL products are exempt from or not regulated by the NCCPA and National Credit Code, meaning they are not required to be members of AFCA and provide access to dispute resolution, or offer hardship arrangements. However, some BNPL providers offer similar consumer protections and features to those required by the NCCPA and the NCC on a voluntary basis.

4.74. The CEC has advised that it is actively reviewing the arrangements offered by BNPL providers. It advises that should the BNPL provider have an arrangement in place that is in line with requirements under clause 2.1.24 (i.e. contains dispute resolution procedures, hardship variation policies and default payment arrangements) then Solar Code signatories will not be required to use the pro forma in relation to that finance provider. The ACCC considers that this will sufficiently address the issue.

4.75. CALC submits that to avoid consumer harm and embody best practice conduct, the Solar Code should be re-authorised subject to the same conditions that CALC recommended during the ACCC's review of the NETCC application for authorisation, namely:

- prohibiting unsolicited offers of unregulated finance for the purchase of new energy tech, and
- requiring signatories to only offer finance regulated by the NCCPA.

4.76. In response, the CEC notes that CALC's suggested amendments are under review by the Tribunal as part of the NETCC proceedings and will not adopt these amendments at this time.

4.77. The ACCC does not consider that the conditions proposed by CALC should be imposed. The CEC's application is a revocation and substitution, made on the basis that the Solar Code is ultimately intended be replaced by the NETCC. The CEC sought

re-authorisation of the Solar Code after the application for review of the NETCC authorisation was made to the Tribunal. The Tribunal is currently considering the authorisation including what, if any, conditions should be imposed. The ACCC recognises that there could be public benefits in having appropriate protections in relation to alternative finance arrangements. However, as these issues are currently being reviewed by the Tribunal, the ACCC does not consider it appropriate to impose additional conditions regarding alternative finance in the context of this transitional re-authorisation.

ACCC conclusion on public detriment

- 4.78. The ACCC considers that minimal detriment is likely to result from increased costs imposed on retailers who are signatories to the Solar Code. This is because the compliance costs incurred by signatories are necessary for the Solar Code to be effective, the fees the CEC impose on signatories are proportionate to a business' output and the cost increases arising from the additional support supplied to consumers is reflected in a corresponding increase in the quality of goods and services supplied by retailers.
- 4.79. There may be a reduction in competition in the supply of solar PV systems from retailers who are excluded because their signatory status is cancelled or suspended as a result of a compliance activity. However, the ACCC does not consider that this results in significant public detriment because there are sufficient processes in place in the CEC's complaints process to ensure that retailers are not inappropriately sanctioned or excluded from being a signatory. That is, it is appropriate for the CEC, in administering the Solar Code, to impose sanctions on retailers who breach the Solar Code's standards. Some detriment may arise in circumstances where a retailer is mistakenly expelled or sanctioned, but the existing independent appeal mechanism to the Code Review Panel would limit the extent of such detriment.
- 4.80. There may be a reduction in competition in the supply of solar PV systems from retailers who are rejected as applicants. The ACCC considers that this is likely to result in a public detriment because there is no independent process for applicants to appeal a decision of the CEC when their application is rejected. It is difficult for the ACCC to assess whether retailers' applications are being rejected appropriately, without an independent appeals process. The public detriment is compounded by the exclusion process, which the CEC has introduced before rejected applicants can re-apply.
- 4.81. The ACCC considers that to the extent that retailers are inappropriately excluded from becoming a signatory to the Solar Code or are delayed in becoming a signatory to the Solar Code because of the time period rejected applicants have to wait to reapply, the Solar Code reduces competition.
- 4.82. The ACCC considers that the Solar Code is unlikely to mislead or deceive consumers regarding alternative finance arrangements.

Balance of public benefit and detriment

- 4.83. The ACCC considers that the Conduct is likely to result in public benefits in the form of reduced information asymmetry and increased consumer protections.
- 4.84. The ACCC is also satisfied that, in general, the provisions in the Solar Code provide mechanisms to ensure its effective administration and enforcement. Namely, the complaints process for investigations and ability to appeal sanctions to the independent Code Review Panel; and the requirements that the Code Review Panel publish annual reports on the Solar Code's effectiveness.

- 4.85. The ACCC considers that minimal detriment is likely to result from increased costs imposed on retailers who are signatories to the Solar Code. There may be a reduction in competition in the supply of solar PV systems from retailers who are excluded because their signatory status is cancelled or suspended as a result of a compliance activity. However, the ACCC does not consider that this results in significant public detriment because there are sufficient processes in place in the CEC's complaints process to ensure that retailers are not inappropriately sanctioned or excluded from being a signatory.
- 4.86. There may be a reduction in competition in the supply of solar PV systems from retailers who are rejected as applicants. The ACCC considers that this is likely to result in a public detriment because there is no independent process for applicants to appeal a decision of the CEC when their application is rejected.
- 4.87. For the reasons outlined in this Determination, the ACCC is satisfied the Conduct is likely to result in a public benefit that would outweigh the likely public detriment. However, the ACCC is proposing to impose a condition to reduce the likely public detriment resulting from the Solar Code and to ensure the benefits from the Solar Code are fully realised. The ACCC proposes to impose a condition that provides an independent appeals mechanism for rejected applicants and also establishes a reduced exclusion period before rejected applicants can re-apply.

Conditions

- 4.88. The power conferred upon the ACCC to authorise conduct is discretionary.²³ In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.²⁴
- 4.89. The ACCC may specify conditions in an authorisation.²⁵ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.²⁶
- 4.90. The ACCC proposes to grant authorisation subject to a condition that provides:
- an independent appeals mechanism for retailers seeking to become signatories of the Solar Code, and
 - the Code Administrator implement a waiting period for retailers who are unsuccessful applicants of no longer than one month (for first time rejection), two months (for second time rejection) and three months (for third time rejection).
- 4.91. The ACCC notes the CEC's submission that including an appeals process would impose an administrative burden on the Code Administrator and Code Review Panel, and that the cost would be applied to applicants. It is open to the CEC to introduce an alternative independent appeals process instead of using the Code Review Panel. The independent appeals process should set out the criteria to be met before an applicant can appeal. In terms of the cost of the appeals process, the ACCC accepts that an appeal would be more costly for the CEC than an initial consideration, and that it may be appropriate for at least part of the additional cost to be borne by applicants. However, the cost should not be prohibitive for retailers. The independent appeals process should also include a limit on how many appeals an applicant can lodge.

²³ Application by Medicines Australia Inc (2007) ATPR 42-164 at [106].

²⁴ Application by Medicines Australia Inc (2007) ATPR 42-164 at [126].

²⁵ Section 88(3).

²⁶ Section 88(3).

4.92. For the waiting period, the ACCC understands that Code Administrator is seeking to reduce the likelihood that applicants re-apply without taking the necessary time to address the deficiencies in their application (as identified by the Code Administrator). The ACCC has proposed reduced waiting periods for retailers seeking to re-apply. The reduced waiting periods reflect that retailers are likely to need time to address the concerns identified by the Code Administrator.

4.93. The ACCC would welcome further submissions from the CEC or interested parties on the form and content of the proposed condition, particularly regarding:

- the appropriate mechanism for an appeals process, and
- whether, in addition to including an appeals mechanism, it is also necessary to require that the exclusion periods for rejected applicants be reduced; and if so, whether reducing these periods to one, two and three months (respectively) is appropriate.

4.94. The ACCC also notes that, rather than have the ACCC specify conditions, the CEC may consider it preferable to propose amendments to the Solar Code addressing our concerns before the ACCC makes its final determination.

Length of authorisation

4.95. The Act allows the ACCC to grant authorisation for a limited period of time.²⁷ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.96. In this instance, the CEC seeks re-authorisation for three years.

4.97. The Smart Energy Council submitted that the primary goal must be to get the NETCC in place as soon as possible, because any delay is to the significant advantage of the CEC and to the detriment of consumers.

4.98. The CEC submits that a two-year transition process is necessary because:

- given that signatories can sign on at any time of year, it is fair that they be given the full term of the annual fee paid
- there are complex requirements for changing the CEC's existing systems and processes and CEC has very limited capacity for extra costs. This includes revising data capture and data management, all forms and correspondence, and the assessment of applications and compliance procedures all align with NETCC requirements; and alignment with other internal CEC business units, processes and procedures
- the development and consultation required to finalise key operational pieces will require some additional time (for example, NETCC branding, fees, and schedules for specific technologies; the Monitoring Panel; the breach procedures and matrix)
- signatories need to be given time to consider if they wish to transition to the NETCC, and

²⁷ Subsection 91(1)

- there needs to be a period to promote and communicate when the NETCC is expected to go live.

4.99. The ACCC considers that the Solar Code should only be re-authorised for the minimum period necessary to enable the transition of signatories to the NETCC. It acknowledges that the current Tribunal proceedings create some uncertainty as to whether, when and in what form the NETCC will commence operation. However, the ACCC considers that granting authorisation for a period of two years following the final determination will be sufficient to enable transition to the NETCC or for the CEC to seek further re-authorisation of the Solar Code.

4.100. The ACCC invites further submissions from the CEC or interested parties on the length of the authorisation.

5. Draft determination

The application

- 5.1. On 15 May 2020, the CEC lodged an application to revoke authorisations A91495 and A91496 and substitute authorisation AA1000514 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000514 was made under subsection 91C(1) of the Act.
- 5.2. The CEC seeks re-authorisation for the Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.5. Accordingly, subject to the proposed condition, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisations A91495 and A91496 and grant conditional re-authorisation for AA1000514 in substitution to enable them to agree, sign up to and comply with provisions of the Solar Code as described in paragraph 1.5 and defined as the Conduct. The proposed authorisation AA1000514 is subject to the condition that the Solar Code is amended to:
 - include an independent appeals mechanism for retailers seeking to become signatories of the Solar Code, and

- ensure the Code Administrator can implement a waiting period for retailers who are unsuccessful applicants of no longer than one month (for first time rejection), two months (for second time rejection and three months (for third time rejection).
- 5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act or constitute exclusive dealing within the meaning of section 47 of the CCA.
- 5.8. The ACCC proposes to grant authorisation AA1000514 for two years.
- 5.9. This draft determination is made on 13 August 2020.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.