

Our ref: JDJ\MHAR\1000-053-527
Partner: Justin Jones
Direct line: [REDACTED]
Email: [REDACTED]
Contact: Matthew Harper, Lawyer
Direct line: [REDACTED]
Email: [REDACTED]

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BY EMAIL

Susie Black
Director, Adjudication Branch
Australian Competition and Consumer
Commission
GPO Box 3131
Canberra ACT 2601

Attention: Miriam Kolacz and Andrew Mahony

By email to: adjudication@acc.gov.au

Ashurst Australia
Level 26
181 William Street
Melbourne VIC 3000
Australia

GPO Box 9938
Melbourne VIC 3001
Australia

Tel +61 3 9679 3000
Fax +61 3 9679 3111
DX 388 Melbourne
www.ashurst.com



Dear Susie

Clean Energy Council Limited – application for re-authorisation AA1000514 – draft determination

We act on behalf for B.Solar Holdings Pty Ltd as Trustee for the Foti Vakitsidis Family Trust (**B.Solar**).

This submission is made on behalf of B.Solar in response to the Australian Competition and Consumer Commission's (**ACCC**) draft determination dated 13 August 2020 (**Draft Determination**) proposing to conditionally re-authorise the Clean Energy Council's (**CEC**) Solar Retailer Code of Conduct (the **Code**).

B.Solar is an Approved Solar Retailer under the Code.

While B.Solar generally supports the conditional re-authorisation of the Code because it recognises the importance of an instrument like the Code in promoting the highest standards in the industry, our instructions are that B.Solar nonetheless has concerns about the administration of the Code by the CEC.

In this respect, B.Solar supports Bell Solar Pty Ltd's 16 June 2020 submission to the ACCC before the Draft Determination¹ as reflecting many of its own concerns about the CEC's Code administration. While the Draft Determination acknowledges Bell Solar's concerns, the Draft Determination also states at paragraph 4.47 that "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".

Correspondingly, we set out some of B.Solar's experiences and concerns with the Code and its administration, as follows:

¹ This submission may be found on the ACCC's public register at:
<https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Bell%20Solar%20Pty%20Ltd%20-%2016.06.20%20-%20PR%20-%20AA1000514%20CEC.pdf>.

- While it is clear from section 3.7.1 of the Code that, in deciding whether the Code has been breached by an Approved Solar Retailer, the CEC must exercise its discretion reasonably and in accordance with the rules of natural justice, B.Solar is concerned that this does not always occur in practice. B.Solar instructs us that its experience is that the CEC, in framing allegations of breaches, sometimes fails to particularise exactly what sections and sub-sections of the Code it alleges have not been complied with. B.Solar also considers that the CEC can fail to link alleged breaches to the exact terms of the Code – for example, failing to couch alleged breaches of 2.1.1(f) of the Code in the actual language of that paragraph, including the key terms "misleading or deceptive". B.Solar submits that this approach denies Approved Solar Retailers a reasonable opportunity to understand the complaints against them, and to defend themselves, and therefore denies them natural justice.
- A key section of the Code is 2.1.1 which addresses advertising standards. B.Solar's experience is that the CEC's administration of this section is inconsistent and leaves Approved Solar Retailers in doubt about how they may and may not advertise. B.Solar considers that the guidance and directions it has received from the CEC as to the appropriateness of its advertising pursuant to the Code have varied markedly over time, leaving it uncertain about what representations would meet the CEC's standards. In B.Solar's view, these standards do not appear to be tied to accepted principles as to what advertising may breach the Australian Consumer Law (**ACL**), despite the adoption in the Code of similar language to the ACL. B.Solar's concerns in this regard reflect similar concerns that Bell Solar set out at page 4 of its letter in relation to the CEC's interpretation of component pricing requirements.
- Relatedly, B.Solar is concerned that different retailers are subject to different treatment in the CEC's administration of the Code. During its period as an Approved Solar Retailer, it has identified numerous instances of competing retailers engaging in advertising that the CEC has informed B.Solar would breach the Code. Raising these instances with the CEC has not, in its experience, led to any improvements in these advertising practices. In addition, outside the advertising context, B.Solar instructs us that it is aware of an instance in which the CEC allowed a solar retailer to be part of and remain part of the Code, even though a government entity managing a state-wide rebate program had rejected the same retailer's application to participate in that scheme due to compliance issues. B.Solar understands that the CEC was aware of the government entity's decision, and that those compliance issues were also relevant to criteria the CEC uses in determining whether a retailer may participate in the Code. B.Solar finds it concerning that the CEC would allow a retailer to continue participating in the Code in those circumstances, while there are instances (referred to in other submissions to the ACCC, including Bell Solar's submission) of the CEC rejecting other retailers on arguably lesser grounds.
- B.Solar has also identified what it considers to be a tendency of the CEC to "fixate" on particular Approved Solar Retailers in relation to enforcement of the Code, while ignoring others engaging in the same or similar conduct. In B.Solar's view, this is particularly apparent through the issues with inconsistent advertising noted above. It is also consistent with Bell Solar's concerns, at page 3 of its letter, as to whether stricter rules are applied to some industry participants than others.
- Finally, B.Solar has concerns that the processes the CEC and the Code Review Panel must follow in investigating and sanctioning instances of non-compliance under part 3 of the Code are insufficiently detailed and structured to promote fair, equitable and consistent outcomes between Approved Solar Retailers. As an example, the Breach Matrix in section 3.5.3 identifies breaches not by section number, but by headings used in the Code and summaries of the obligations. The terms of these summaries are in some instances vague and not necessarily reflective of the terms of the corresponding obligations elsewhere in the Code. This makes it difficult for Approved

Solar Retailers to understand what conduct they may be penalised for, and the severity of the penalties. In B.Solar's view, the additions the CEC has proposed to the Breach Matrix as part of the re-authorisation process compound this uncertainty – terms such as "disrepute" give wide latitude to the CEC to frame the requirements of the Code as it desires from allegation to allegation, undermining the fair and equitable administration of the Code.

B.Solar requests that the ACCC considers these matters in determining what public detriments may arise from the re-authorisation of the Code.

In addition, we are instructed that B.Solar considers that the following matters should be taken into account by the ACCC when framing the terms of any conditions on re-authorisation:

- B.Solar agrees with the Draft Determination's provision that the re-authorisation be conditioned on introducing an appeals process for rejected applicants. Given B.Solar's concerns about the current administration of the Code, including by the Code Review Panel in its role, B.Solar suggests that the condition mandate that a new independent appeals process is introduced, rather than leaving it open to the Code Review Panel to take on this role.
- Given B.Solar's concerns about the CEC's approach to advertising and ACL type requirements, B.Solar submits that the re-authorisation should be conditioned on the CEC, within a specified period after the re-authorisation, establishing ACL guidelines and training for its staff involved in compliance functions. If those materials already exist, the condition should be that the CEC reviews and updates those materials within a specified period. B.Solar submits that the guidelines and training materials should be prepared, or reviewed and approved, by an independent specialist in the ACL.
- B.Solar agrees with Bell Solar's letter on page 6 that the CEC, as Code Administrator, should not have any role in making binding determinations of alleged breaches and that this should be left to the Code Review Panel at first instance. To ensure an appeals process remains open, the same independent appeals process suggested for rejected applicants could be used to review the Code Review Panel's determinations.
- B.Solar agrees with Bell Solar that the CEC should not have the power to unilaterally reduce the severity of a breach, despite the terms of the Breach Matrix. However, B.Solar submits that the Code Review Panel should have this power, as it may be desirable for there to be some flexibility in reducing the severity of (and corresponding sanctions for) a breach in individual cases.

B.Solar is very happy to engage further with the ACCC on this matter. Please contact Justin Jones, Partner, on [REDACTED] or Matthew Harper, Lawyer, on [REDACTED] if you have any queries arising out of this letter.

Yours faithfully



Ashurst