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As has been recognised although the CEC is a voluntary membership organisation, membership is required for retailers to be able to compete in the PV consumer market.

USE accepts that the sector requires regulation to maintain standards and protect consumers and USE fully supports that objective, however USE is of the view that as a member organisation the CEC may fail to exercise reasonable judgement and appropriately balance the objective of protecting consumers with the need to encourage and educate retailers rather than imposing harsh sanctions that cause significant financial detriment.

Retailers such as USE invest significant sums to establish and maintain their business and meet their compliance obligations whilst at the same time providing significant employment opportunities in the sector all of which can be swept away by an administrative decision.

These submissions are made in the context of the above events and focus on the following matters raised by the ACCC in its draft report inviting feedback:

- (a) The ACCC's reference to an independent Appeals mechanism and appropriate appeals process;
- (b) The matrix tables;
- (c) Procedural fairness pending a review or Appeal;
- (d) Conflicts of interest with the Code Review Panel.

AN INDEPENDENT APPEALS MECHANISM

The ACCC proposes a condition that the Solar Code is amended to include an appeals mechanism for retailers who apply to become signatories to the CEC but are rejected on application.

USE supports this position however USE suggests the independent Appeal mechanism should apply not only to applications for membership that are rejected but also a right of Appeal of decisions made by the Code Review Panel where it relates to the proposed suspension or termination of a retailer from membership of the CEC.

Suspension or termination of retail member is a severe sanction which can as shown above cause significant financial impact and detriment to a retailer and on their ability to continue to operate and compete in the sector.

Suspension or termination of a Retailer gives other retailers significant competitive advantage in the market and should only occur for significant breaches of the Code or the ACL.

The ACCC has stated the reality is that while the decision to become a signatory to the Solar Code is voluntary, it has become essential for a retailer (to be viable in the sector) to be a Member to access the State Government consumer rebate scheme for installation of PV systems.

The ACCC has stated "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".

USE supports the ACCC's views that decisions by the CEC must be made in a transparent and consistent manner and be reviewable by an independent body.

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 by inappropriately excluding retailers and reducing competition between retailers.

USE strongly supports the objective of the Code to ensure standards are maintained in the sector and that consumers are adequately protected.

THE APPROPRIATE MECHANISM FOR AN APPEALS PROCESS

USE submits that it should not be left to the CEC to propose the appropriate mechanism for the independent appeals process and that the ACCC should as a condition to the reapplication of the CEC set out and proscribe the preferred Appeals mechanism such as by referral to a Court or VCAT (in Victoria) or similar tribunal in each State or Territory.

THE MATRIX TABLES

USE supports the views expressed by a number of parties that the Matrix tables are cumbersome, difficult to objectively interpret, and in some cases the sanctions and "severity" of the sanction wholly

outweigh the alleged infringement and are often administrative breaches that do not have any real impact on consumer's .

USE submits that the interpretation of the tables is open to subjective assessment and interpretation by the Code Administrator and the matrix tables should be completely reviewed or discarded entirely.

A minor procedural failure may be classified as moderate or severe breach once again leading to severe sanctions of suspension or termination.

Alternatively, USE suggests the '**breach matrix**' should be reviewed with altered 'severity' levels for certain administrative breaches with a number of the breaches allowing for a warning and or a set penalty rather than the threat of suspension or termination as currently is the case..

USE submits giving the Code Administrator **discretion** to lower a breach's severity level in an investigation would only be workable if the independent Appeals process as stated above to an external Tribunal or court, beyond the Code Review Panel was introduced.

The suggestion of giving the Code Administrator discretion to reduce the severity of a breach in fact highlights the very issue that the matrix table at the outset is a flawed model, when compared to other Mandatory Codes of conduct such as the Franchise Code of conduct for example, where the sanctions are imposed by the ACCC by way of fines or penalty units for certain breaches of the Code.

Other codes impose a set of financial fines or penalties for a breach however the livelihood of the business operator is not taken away.

Retailers in the Energy sector make a huge investment in establishing and maintaining compliance in their businesses.

USE and other members of the CEC strive to ensure compliance with the Code as they are patently aware of the severe sanctions that can be applied.

USE submits the current sanctions of suspension and termination are excessive and contrary to the role of the CEC which aims to encourage membership of the CEC and support the sector.

PROCEDURAL FAIRNESS PENDING AN APPEAL TO THE CODE PANEL REVIEW

USE submits that there is no clear guidance or provision in the Code as to the right of a member to continue operating after an immediate suspension or termination, where an appeal has been made to the Code Review Panel or to an external Appeal process.

A provision should be included in the Code that states that pending an appeal whether to the Code Review Panel or to an external review Appeal process, the Member is entitled to continue to operate in the normal course of business unless it is considered to be in the public interest that the retailer not do so. To do so otherwise means the retailer is guilty and punished before they have exhausted their procedural rights which in our submission is procedurally unfair.

At present the suspension takes effect immediately and has a significant financial detriment to the Member until a review or Appeal can be heard.

The current position where a state solar authority such as Vic Solar may take 4 to 6 weeks to reinstate a retailer puts retailers at a significant financial disadvantage pending the right of review or Appeal and this should be taken into account in allowing the retailer to continue to operate pending a review or appeal.

CONFLICTS OF INTEREST

An independent Appeal process whether before a Court or VCAT must be available for retailer members where their financial viability and livelihoods may be taken away by a decision of the Code Administrator and or Code Review panel.

There is potential for members on the Code Review Panel to be conflicted by reason of prior dealings with a member under review or having a vested interest in the sector.

Summary

USE submits the right of Appeal to an independent Court or Tribunal should be available for a retailer not only in relation to their application for membership but also in the event of a decision by the Code Review Panel to suspend or terminate a member for alleged breaches of the Code.

REDUCTION OF THE WAITING PERIOD TO RE-APPLY

The USE supports the ACCC position on reducing the waiting periods to reapply if an application is rejected by the CEC to one, two and three months (respectively).

We trust the above submission contain constructive feedback for consideration by the ACCC in finalising its report.

Should you have any queries, please do not hesitate to contact Robert Toth of our office.

Yours faithfully



Robert Toth
Accredited Commercial Law and Franchise Specialist
Marsh & Maher
Richmond Bennison