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Susie Black  
Director (A/g)  
Adjudication Branch  
Australian Competition and Consumer Commission

**Submitted by email to: [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)**

**22 May 2019**

Dear Ms Black

**Clean Energy Council & Ors application for authorisation of New Energy Tech Consumer Code [AA1000439]—interested party consultation**

AGL Energy (**AGL**) welcomes the opportunity to comment on the application made by the Clean Energy Council (**CEC**), the Australian Energy Council (**AEC**), the Smart Energy Council (**SEC**) and Energy Consumers Australia (**ECA**) (together the **Applicants**) seeking authorisation for the New Energy Tech Consumer Code (**Consumer Code**).

AGL commends the Applicants' work to date in developing the Consumer Code. AGL was nominated by the AEC to represent energy retailers on the BTM Working Group and contributed towards the development of the Consumer Code through formal submissions<sup>1</sup>, technical lead support and ongoing engagement with the BTM Working Group.

AGL supports the COAG Energy Council's view that while current consumer protections provided by the National Energy Customer Framework (**NECF**) and Australian Consumer Law (**ACL**) are generally sufficient for BTM products, there are clear benefits in industry taking the lead in developing the Consumer Code. In our view, the function of the Consumer Code is primarily to build customer confidence in distributed energy resource (**DER**) products, systems and services, thereby encouraging greater and faster participation in the emerging DER market. The Consumer Code has the potential to improve customer confidence by reducing information asymmetry for consumers and requiring minimum and consistent standards for sales practices. We consider that this overarching purpose is articulated well in the Consumer Code aims, as illustrated in the 'customer journey' at page 3.

Given the infancy of the DER market, careful consideration is required to ensure that the Consumer Code fulfils its stated aims while simultaneously promoting innovation.

Accordingly, we recommend that the Australian Competition and Consumer Commission (**ACCC**) consider the potential effect of a range of clauses in the Consumer Code, which we elaborate below.

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<sup>1</sup> See AGL Submission in response to the Draft Industry Behind the Meter Distributed Energy Resources Provider Code (7 February 2019), Available at <https://thehub.agl.com.au/articles/2019/02/submission-in-response-to-the-draft-industry-behind-the-meter-distributed-energy-resources>.



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### ***Fit for purpose inquiry***

In general, we consider that the Consumer Code should align with the ACL requirements, that strike an appropriate balance between protecting customers and promoting industry innovation by ensuring industry participants enquire about customers' circumstances and provide fit for purpose products and services.

Under the ACL, the fit for purpose guarantee does not protect the consumer if they did not rely, or it was unreasonable for them to rely, on the supplier's skill or judgment in agreeing to particular goods or services. In our view, these current legal tests ensure that customer protections are appropriately balanced with market efficiency and the promotion of innovation. In circumstances relating to product performance for example, they ensure that customers' expectations are appropriately managed against representations made by signatories.

However, clause 6 of the Consumer Code requires that signatories document customers' circumstances, need and expectations in quotes and contracts as well as the compatibility of any New Energy Tech with customers' existing New Energy Tech. The current drafting is highly prescriptive and may impose substantial operational costs on signatories. It could also potentially expose signatories to liability that may not be justified from a market efficiency perspective, where for example a customer uses a product or service beyond its intended application as communicated by the vendor. This risk is amplified by the current definition of New Energy Tech in Part C that canvasses a broad range of products and services.

### ***Payment and finance***

Clause 24 requires that signatories deal through licensed credit providers where they offer deferred payment arrangements that include an interest component. We agree with the Applicants' view that this requirement will provide a clear public benefit to consumers by improving information asymmetry, requiring a responsible lending assessment and enabling dispute resolution in certain circumstances.

However, clause 25 provides that paragraph 24 does not apply if the finance is provided by a government body. We anticipate that in the context of State Government subsidy schemes for New Energy Tech, there may be a range of financial arrangements that involve governments engaging third party financiers. In the absence of a clear definition of government body and the arrangements with third party financiers, there is a risk that in some circumstances, consumers engaging with signatories may not obtain the protection of clause 24, especially where a third-party financier has entered into a contractual arrangement with a government body.

### ***Administrator power to establish mandatory and binding standards***

Clause 14 in the Annexure – Code Administration empowers the Code Administrator to develop mandatory and binding standards for signatories which must be followed where they apply.

While we support empowering the Code Administrator with appropriate monitoring and enforcement functions to ensure compliance under the Code, we do not consider it appropriate that the Code Administrator be empowered to develop binding technical schedules into the future. As a voluntary industry code, any new requirements should be agreed to by signatories or, at a minimum, authorized by the Code's Governing Council in consultation with industry. In our view, this safeguard is essential to ensuring due process in any regulatory change. It accords with the design of the regulatory framework that currently governs the broader energy industry, which clearly demarcates the rule maker (being the Australian Energy Market Commission) and regulator (being the Australian Energy Regulator) and provides for appropriate industry consultation.



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Empowering the Code Administrator with both code making and enforcement authority may cause perceived conflict of interest and lack of transparency in Code making processes.

***Administrator power to grant exemptions for trials and ‘value added’ services***

As the Applicants have acknowledged, there may be circumstances where signatories are seeking to run a pilot program of new offerings that may not meet the Consumer Code Standards – so-called ‘sandboxing’. While AGL advocated to the BTM Working Group that the Consumer Code be limited to products and services ‘in market’, the Applicants have taken the view that these circumstances could be managed through the exemption framework established under in clause 17.

Clause 17 in the Annexure – Code Administration provides an avenue for signatories to apply to the Administrator for an exemption from the Consumer Code in the context of a proposed New Energy Tech or a trial involving new technology or a new offering, or a product or service that is a free additional ‘value added’ service that does not materially impact the benefit of the core offering.

In our view, the Consumer Code’s coverage proof of concept and pilots (and the associated need to obtain an exemption) is not proportionate to the Consumer Code’s intended goals. We believe current ACL obligations provide a good balance between consumer protection and product innovation. Hence, it is our view that proof of concept/ trial programs should not be within the scope of the Consumer Code or the current exemption framework.

Should you have any questions in relation to this submission, please contact Kurt Winter, Regulatory Strategy Manager, on 03 8633 7204 or [KWinter@agl.com.au](mailto:KWinter@agl.com.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'K. Winter'.

Con Hristodoulidis

**Senior Regulatory Strategy Manager**