

23 November 2010

Mr Richard Chadwick
The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: adjudication@acc.gov.au

Dear Mr Chadwick,

Energy Assured Limited applications for authorisation A91258 & A91259 – interested party consultation

The Consumer Utilities Advocacy Centre Ltd (CUAC) is an independent consumer advocacy organisation. It was established to ensure the representation of Victorian consumers in policy and regulatory debates on electricity, gas and water. In informing these debates, CUAC monitors grass roots consumer utilities issues with particular regard to low income, disadvantaged and rural consumers.

We welcome the opportunity to comment on Energy Assured Limited applications for authorisation A91258 & A91259 (“Application”). CUAC welcomes initiatives taken by industry to improve service delivery to consumers, including initiatives to improve marketing practices at the doorstep. However, we have significant concerns with the proposed Energy Assured Limited Code of Practice. We discuss this further below.

Consumer research commissioned by the Australian Energy Regulator (AER) found that in most instances where customers had switched retailers, the switching occurred as a result of direct sales contact from a retailer.¹ Choosing the right energy contract has significant financial implications. If direct marketing of energy offers is to continue, “[p]roper and respectful marketing conduct by electricity and gas retailers, and their sales agents, is essential in maintaining consumer confidence in the integrity of the market and customers’ capacity to exercise their choice of retailer and services.”²

¹ Australian Energy Regulator (AER), AER Retail Pricing Information Guideline (September 2010), at 3.

Dorr-to-door marketing is a problem

Despite the range of legislative instruments and codes regulating direct marketing, marketing misconduct is still a major concern. In Victoria, research commissioned by the Essential Services Commission of Victoria (“ESCV”) confirms that a significant proportion of Victorians are unhappy with retailers’ door-to-door marketing and telemarketing activities. This has led to an increase in the number of complaints to the Energy and Water Ombudsman (Victoria) (“EWOV”).³ The ESCV’s Respecting Customers - Marketing Conduct Regulatory Program 2009-10 was introduced in recognition that marketing behaviour continued to reflect badly on the retail energy market in Victoria. This outlines the ESCV’s regulatory program for monitoring marketing conduct behaviour in Victoria. It also sets out how the ESCV will take compliance and enforcement action when necessary.⁴

CUAC and other consumer organisations have, over a number of years, expressed strong concerns about improper marketing conduct to regulatory bodies and to government. Unconscionable and misleading marketing is difficult to prove because it generally occurs where there are no witnesses present to the interaction between the door-to-door marketer and customer. Low income and disadvantaged customers in particular may be misled by inappropriate marketing behaviour and enter energy contracts without sufficient or reliable information.⁵ Newly arrived immigrants and those with English language difficulties are often vulnerable to direct marketing. In Victoria, a report by the Footscray Community Legal Centre highlighted specific concerns about retailers’ marketing activities to newly arrived refugees, particularly members of the African community in the western suburbs.⁶

In Victoria, marketing issues typically relate to one of the following themes:

² Essential Services Commission of Victoria (ESCV), Respecting Customers: Regulating Marketing Conduct 2009-10 Victorian Retail Energy Businesses (June 2009), at 11.

³ Essential Services Commission of Victoria (ESCV), Energy Retailers: Comparative Performance Report – Pricing and the Competitive Market 2008-09 (December 2009), at 40.

⁴ Essential Services Commission (ESC), Respecting Customers: Regulating Marketing Conduct 2009-10 Victorian Retail Energy Businesses (June 2009). The Essential Services Commission expects that the marketing practices of retailers operating under a Victorian licence will:

- *be respectful, polite and courteous* – that marketers will only contact customers during legitimate hours, will terminate contacts when asked to and will always speak to customers with care and respect
- *be accurate and informative* – that the data and facts provided are truthful and comprehensive to enable customers to make the proper decision for their circumstances
- *not bring the market into disrepute* – that marketers will not mislead or deceive customers and will adhere always to their obligations under the consumer and fair trading laws.

⁵ Essential Services Commission of Victoria (ESCV), Respecting Customers: Regulating Marketing Conduct 2009-10 Victorian Retail Energy Businesses (June 2009), at 5.

⁶ The African Consumer Experience of the Contestable Energy Market in the West of Melbourne: A report prepared by the Footscray Community Legal Centre and the Financial Counselling Service Inc (March 2009).

Lack of Explicit Informed Consent – retailers' sales representatives who do not obtain explicit informed consent from all customers, because those with limited understanding of English or who have lower levels of literacy (in English or their own language) do not fully understand the terms of the contract or what they are agreeing to.

Misleading representations regarding retailer affiliation – retailers' sales representatives who claim to be representing the Government, the Commission, the local distribution company or retailers other than the energy retailer by whom they are employed or engaged.

Misleading, inaccurate or incomplete information – retailers' sales representatives who do not provide sufficient information in relation to energy tariffs, contractual terms and conditions, written offer summaries, copies of the contractual document or information related to their cooling off rights at the point of sale.

General behaviour of sales representatives – sales representatives fail to leave a premise when requested, stay longer than is permitted by the regulations, make contact outside of regulated hours or exert excessive pressure on consumers.

Making contact illegally – retailers fail to maintain and update their *Do Not Contact* lists.⁷

From July to December 2009, the Energy and Water Ombudsman (Victoria) ("EWOV") had 1,561 cases (that is; enquiries and complaints) which raised a total of 1,698 marketing issues:

Misleading marketing remained the most common source of complaint. Some sales representatives continued to imply, or lead customers to believe, they were 'from the government'. Some told customers that the retailer they were representing was 'taking over' in the customer's area – that nothing would change if the customer signed the paperwork, except the colour of their bills and/or the name of their company.⁸

Data reported by the ESCV reveals that marketing and transfer complaints received by EWOV have risen in recent years. In Victoria, marketing and transfer complaints in 2008-09, increased significantly, from 1.38 per 1,000 customers in 2007-08 to 2.66 per 1,000 customers in 2008-09 (109 per cent increase).⁹

⁷ Essential Services Commission of Victoria (ESCV), *Respecting Customers: Regulating Marketing Conduct 2009-10 Victorian Retail Energy Businesses* (June 2009), at 5. See

⁸ Energy and Water Ombudsman (Victoria), *Resolution Issues No 28* (May 2010, reporting on July 2009 to December 2009), at 13.

⁹ Essential Services Commission of Victoria (ESCV), *Energy Retailers Comparative Performance Report – Customer Service 2008-09* (December 2009), at 47; ESCV, *Energy Retailers: Comparative Performance Report – Pricing and the Competitive Market 2008-09*, at 44.

	<i>Electricity Cases</i>	<i>Gas Cases</i>	<i>Dual Fuel Cases</i>	<i>Total Cases</i>
2004-05	2,127	711	176	3,014
2005-06	2,239	727	117	3,083
2006-07	2,872	928	289	4,089
2007-08	3,880	1,431	212	5,523
2008-09	8,038	3,340	150	11,528

Energy Assured Limited Code of Practice (EAL Code of Practice), Code Complaints Process, Constitution

The above section clearly demonstrates that there is serious non-compliance regarding door-to-door marketing in Victoria. We believe that the number of complaints reported understates the actual incidents of non-compliance experienced by consumers at the doorstep. This is as a large section in our community are unaware of their rights and therefore do not lodge complaints. Industry is missing the mark as compliance with direct marketing obligations is a problem. We note that it was the Office of the Victorian Minister for Energy which “specifically asked the ERAA establish a voluntary self-regulatory code of conduct for door-to-door marketing of energy.”¹¹ If marketing misconduct was not such a significant concern, the EAL would not have set up the EAL Code of Practice.

There is a need for stronger monitoring and enforcement of existing marketing obligations by the appropriate authority to ensure industry remains compliant and consumers protected. It is essential that regulators (this includes the Australian Competition and Consumer Commission, Australian Energy Regulator, Consumer Affairs Victoria, Essential Services Commission Victoria¹²) remain vigilant in monitoring compliance and enforcement of the legislation and codes governing marketing which fall under their respective purview. This would be the Australian Consumer Law, National Energy Customer Framework (NECF) and the various codes and guidelines which may be developed under the legislation.

The Application refers to the success of the Energy Retail Association’s (ERA)’s EnergySure Code of Practice in the United Kingdom and suggests that a similar scheme in Australia would also be successful. We are of the view that industry self-regulation cannot be relied upon to adequately regulate their door-to-door marketing activities. In the United Kingdom, the implementation of the EnergySure Code of Practice in 2003 resulted in a fall in the number of complaints. However, a reduction in complaints

¹⁰ Essential Services Commission of Victoria (ESCV), Energy Retailers Comparative Performance Report – Customer Service 2008-09 (December 2009), at 102. See also ESCV, Energy Retailers: Comparative Performance Report – Pricing and the Competitive Market 2008-09, at 44 (Figure 6.2).

¹¹ Submission in support of Application for Authorisation, at paragraph 6.4.

¹² Victoria has not implemented the NECF yet. Therefore, the ESCV still retains jurisdiction over retail energy marketing.

volume is not the sole mark of success of a code of practice. While the EnergySure Code of Practice mirrors many of the requirements of the marketing licence condition and, in some areas, exceeds them, there are still concerns about door-to-door marketing in the United Kingdom. This is acknowledged by Ofgem.

A 2009 Ofgem report stated that “concerns about poor switching decisions by consumers on the doorstep remain and recent cases and allegations of mis-selling have been well-publicised.”¹³ Earlier this year, Ofgem issued guidance on suppliers’ marketing licence condition because suppliers were not conducting due diligence while executing some of the new provisions of Standard Licence Condition 25 (“SLC 25”). Ofgem’s 2008 Energy Supply Probe report found that over half of customer switching takes place in response to direct sales activity. Amendments to SLC 25 were made to address misleading sales and marketing practices and to improve the information available to the potential customer while making a switching decision.¹⁴ On 2 September 2010, Ofgem announced that it was undertaking an investigation into mis-selling following tougher obligations imposed upon suppliers as part of Ofgem’s Energy Supply Probe. Ofgem would examine whether four of the largest suppliers are complying with SLC 25; a hotline was set up with Consumer Direct for consumers to provide any evidence of mis-selling.¹⁵

An industry code of practice normally exceeds regulatory obligations by representing industry’s commitment to best practice.¹⁶ As mentioned above, industry compliance with existing regulatory obligations around marketing is already a problem. There is no guarantee that industry will comply with benchmarks set out in the EAL Code of Practice. Non-compliance with the EAL Code of Practice will be detrimental; it will further erode public confidence in the industry. Consumers must have the assurance that the EAL Code of Practice demonstrates a firm commitment by industry to fix the serious problem of marketing misconduct.

We are not convinced that such a commitment has been demonstrated by industry. A fundamental failure is that the EAL Code of Practice was not drafted with any consumer input. According to the ACCC’s Guidelines for developing effective voluntary industry codes of conduct (February 2005), one of the important steps an industry should take before drafting or reviewing an industry code of conduct is to seek consumer input:

¹³ Ofgem, Regulation of marketing to domestic customers (18 February 2009), at 1.

¹⁴ Ofgem, Guidance on the marketing licence condition - Standard Licence Condition 25 (27 April 2010), at 1.

¹⁵ Ofgem, 2 September 2010 Press Release, http://www.ofgem.gov.uk/Media/PressRel/Documents1/Misselling_Press%20Release%202Sept.pdf

¹⁶ See ACCC, Guidelines for developing effective voluntary industry codes of conduct (February 2005) at 7.

Consumers play an important role in the development of business to consumer codes, code administration and consumer dispute resolution schemes. They will help ensure the code is more robust in terms of consumer protection and more likely to be accepted by stakeholders.....In appointing a consumer representative to participate in a code development, administration committee or dispute resolution scheme the following principles should be taken into consideration....

Regulatory agencies or consumer affairs agencies may sit on code development or administration committees if such expertise is needed.¹⁷

Yet, despite the ACCC Guideline, we are not aware that any consumer group or the regulator was consulted in the drafting of the EAL's Code of Practice, their Code Complaints Process or Constitution. In contrast, the EnergySure Code of Practice in the United Kingdom was written with direct input from Ofgem and the consumer representative body at that time, Energywatch.¹⁸

CUAC has concerns around the EAL framework, for example; around governance, consumer redress, enforcement and penalties for non-compliance, appeals process etc. We believe that it is a serious omission that the EAL Code of Practice does not provide for consumer compensation in the event of marketing misconduct. The UK Code of Practice allows for compensation payment of £250 where gross misconduct involves proven forgery.

Further, we are concerned that the EAL Code of Practice could be used to discourage consumers from seeking redress from the energy ombudsman. Customers who have been subject to marketing misconduct and dissatisfied with the resolution provided via the retailer's internal complaints process should still be advised by the retailer of their right to seek redress through the energy ombudsman. Access to a free, impartial and independent consumer redress is a fundamental consumer right.

CUAC notes elements in the EAL Code of Practice which are potentially beneficial. For example, the standardised training and accreditation process which we support in principle. However, in view of the lack of consumer and regulator participation in the EAL process, CUAC believes that the best outcome would be for the EAL to withdraw its Application, seek consumer and regulatory participation in the process, and thereafter resubmit an application to the ACCC. In the event that this does not occur, CUAC requests that the ACCC reject the Application on the basis that the lack of consumer involvement in the EAL framework calls into question the likelihood of public benefit.

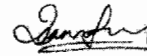
¹⁷ ACCC, Guidelines for developing effective voluntary industry codes of conduct (February 2005) at 8-9.

¹⁸ Consumer Focus is the consumer representative body now.

Thank you for the opportunity to participate in the ACCC's consultation on the Application. If you have any queries, please contact the undersigned.



Jo Benvenuti
Executive Officer



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