



**Australian
Competition &
Consumer
Commission**

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Ramy Soussou
Acting CEO
Energy Assured Limited
Suite 2, Level 4, 189 Kent St
SYDNEY NSW 2000

By email: rsoussou@eraa.com.au

Dear Mr Soussou

Energy Assured Limited applications for authorisation A91258 & A91259

I refer to the meeting between Energy Assured Limited (EAL) and the Australian Competition and Consumer Commission (ACCC) on 31 January 2010 in relation to the above listed applications for authorisation. I also refer to the ACCC's letter of 10 December 2010 about the applications. In the letter and meeting, the ACCC expressed concerns about some elements of the proposed self regulatory scheme covering the use of door to door sales in energy retailing that is the subject of the applications for authorisation. This letter reiterates those concerns and the attachment to this letter provides some further detail as appropriate.

I also note that a number of these concerns, as well as several others, are set out by a variety of stakeholders in their submissions about the applications for authorisation that the ACCC has provided to EAL.

Broadly, the proposed scheme the subject of the applications for authorisation aims to ensure better standards in door to door sales. This would be achieved through a focus on two areas:

- training and accreditation of door to door sales agents, and
- self regulation of the conduct of door to door sales agents, and members, in their dealings with consumers.

In this respect, EAL has stated that the scheme is intended to require higher levels of compliance than existing regulatory frameworks.

The ACCC is particularly concerned about elements of the second of the two areas on which the scheme focuses, the self regulation of door to door sales agents and EAL members in their dealings with consumers. The key areas where the ACCC has outstanding concerns include:

- information to be provided to consumers about the scheme
- compliance monitoring and reporting
- complaints processes.

These areas of concern relate to central elements of this code (or indeed any code aimed at conduct in retail markets). Addressing these concerns is likely to require a substantial review of the structure and content of the scheme as currently set out.

As noted in our discussion, while we have indicated that various areas in the code would benefit from revision, consideration also needs to be given to the way in which key sections of the code interact internally, as well as the relationship between the code and external regulatory mechanisms (e.g. ombudsman schemes). For example, a clear link between compliance monitoring and complaints processes is critical in any such code.

In addition, there is a range of provisions in the code and related documents that are currently ambiguously worded and open to a variety of interpretations, or where a high degree of discretion is available to decision makers or members such that the operation of the code is unclear. Such ambiguity is likely to adversely impact on the effective operation of the scheme.

A key element of any scheme of this nature is the ability of consumers and other stakeholders to understand the coverage of the code and the way it works in practice. A clear articulation of what the code is trying to achieve and how it will operate provides a sound basis for the more detailed provisions and processes set out in the code and supporting documents.

In the ACCC's letter of 10 December 2010, the ACCC raised a range of concerns about the lack of clarity in some of the clauses of the EAL Code of Practice, Procedures Guideline and Complaints Process ('scheme documents').

In response to a number of these concerns, EAL provided indicative examples of how it was anticipated that these clauses would operate. However, the ACCC understands that much of the work in some of these areas is still to be done and specific details about how some clauses will operate is still to be determined.

As discussed in our meeting on 31 January 2011, it is difficult for the ACCC to be confident about the effectiveness of the scheme while details of how various aspects of the scheme will operate have not been finalised.

Further, the ACCC is required to assess the public benefits and detriments of the contract, arrangement or understanding for which authorisation is sought, which in this case is EAL members adopting and complying with the EAL Constitution, and the scheme documents. In undertaking this assessment the ACCC cannot rely on general assertions about the way

broadly and ambiguously worded clauses in these documents may operate. Nor can the ACCC rely on specific assertions about how these clauses will operate if EAL's assertions about its intent in respect of these issues is not reflected in the scheme documents which form the substance of the application for authorisation.

Many of the additional details you have provided about how the scheme will operate need to be reflected in the code documents. Given that authorisation is currently sought for EAL members to adopt and comply with the EAL Constitution and the scheme documents in the form they were submitted to the ACCC, these documents would therefore need to be amended and these amendments provided to the ACCC before the ACCC could consider them as part of the application.

These issues, as they pertain to specific aspects of the scheme, are discussed in more detail in the attached list of outstanding issues.

Given the requirement for ongoing consultation on the application, this is not however a definitive list of issues as other issues may be raised in the course of the ACCC's assessment of the application. The authorisation process is an open and transparent process and consultation with interested parties is an integral part of the process. A range of stakeholders have raised concern with the proposed scheme and indicated a desire to comment on any future developments of the scheme.

Timing

As you are aware the ACCC must consider applications for authorisation within strict statutory timeframes. In order to meet these statutory timeframes the ACCC's current intention is to release a draft determination about EAL's applications in February. Accordingly, the ACCC's ability to have regard to any substantial changes to the arrangements the subject of EAL's application, or additional information EAL may provide at this late stage, may be limited. Therefore, I would encourage EAL to provide any additional information in response to the concerns outlined in this letter as soon as possible.

Timing issues are likely to curtail the ACCC's ability to consult with interested parties about any information provided by EAL in response to this letter before issuing a draft determination. This may also limit the ACCC's ability to have regard to any substantial changes to the arrangements the subject of EAL's application, or additional information EAL may provide at this late stage, in preparing a draft determination.

There will be a further opportunity for the ACCC, and interested parties, to consider any changes to the arrangements EAL may make after the ACCC releases a draft determination. However, depending on the scope of any changes to the arrangements EAL considers necessary to address the concerns raised in this letter, the ACCC considers that there is some question as to whether the additional work to be undertaken could be completed in time to allow the ACCC to engage in a full public consultation process and assess the arrangements before issuing a final determination.

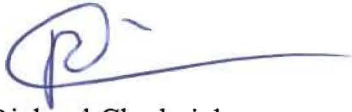
Finally, as discussed in our meeting on 31 January 2011, the comments in this letter and attachment are an overview of the ACCC's potential concerns with the scheme. Decisions on whether to grant authorisation pursuant to s. 88 of the *Competition and Consumer Act*

2010 can only be made by the Commission, comprising the Chairperson and the other full time members.

A copy of the letter has been placed on the public register.

Should you wish to discuss any aspect of this matter please do not hesitate to contact Gavin Jones on 03 9290 1475.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'R Chadwick', with a long horizontal flourish extending to the right.

Richard Chadwick
General Manager
Adjudication Branch

ACCC outstanding concerns with Energy Assured Limited Code of Practice and Complaints Process to self-regulate door to door energy sales

Consumer awareness

Information to be provided to consumers

The ACCC considers that for a code to be effective it is important that consumers can understand and are aware of the standards of behaviour governed by the code and the recourse available to them if they consider these standards have not been met.

As explained in the ACCC's letter of 10 December 2010 the code does not currently address how information about customers rights, sales agents obligations under the code and details about complaints processes will be communicated to consumers beyond the broad requirement for members to develop information packs to be given to customers when undertaking sales activities.

EAL has advised that the code as it stands is a series of documents designed for internal use by EAL members and that information materials for consumers will be developed. However, given the importance of effective communication to consumers about the standards of behaviour governed by the code and the recourse available to them if they consider these standards have not been met it is difficult for the ACCC to assess the likely effectiveness of the code until this work is done.

Who will receive information about the scheme?

The ACCC also notes that information packs will only be provided to consumers if the consumer enters into a contract as a result of a visit by a sales agent or asks for a copy of the information pack.

A clear, easily understood and public articulation of what the scheme is trying to achieve and how it will operate in trying to achieve its objectives is likely to be important to the success of the scheme.

The effectiveness of the proposed code would be greatly improved if the vast majority of consumers, who will not enter into a contract as a result of a visit by a sales agent, are aware of their rights, sales agents obligations and the complaints process available under the code.

The schemes complaints and sanctions processes

For the scheme to be effective it is critical that members have clear, unambiguous responsibility for the actions of their sales representatives. Therefore, it is important that the scheme has clear and unambiguous requirements in this area.

In this respect, self regulatory schemes are most effective where there are clear incentives for compliance and discretion in the way in which members are able to achieve compliance is minimised as much as possible.

Competence complaints received by members about agents

Clause 11.6 of the code provides that members 'should' monitor sales agent performance through competence complaints received by members. Clause 11.4 of the code provides for competence complaints about sales agents to be categorised as level one, two or three complaints depending on the severity of the issue. The category of the issue raised, if proven, is then used to inform consequential action.

The categories of complaint as defined are broadly and ambiguously worded such that the manner in which this process will work, and in particular, the type of conduct that will fall into each category of complaint is unclear.

This is particularly important as the level assigned to a complaint will determine whether a complaint about a sales agent will trigger the separate EAL complaints process for deregistration of the agent. The type of conduct that will fall into each category is also important because the number of competence complaints by category type will also inform member compliance with the code as provided for by clause 11.6 of the code.

Some information about what the code manager would consider when deciding whether to deregister a sales agents was provided in response to the ACCC's information request of 10 December 2010. However, this information does not address the issue of what type of conduct that will fall into each category of complaint. Nor is any of the information that was provided reflected in the code or complaints process.

Further, while a category three level complaint, if proven, is intended to result in dismissal of the agent and their deregistration from the EAL Register, there is no requirement in the code that members refer level three complaints (however the member chooses to define this level of complaint) to the EAL complaints process that provides for deregistration of an agent.

In addition, the code purports to achieve common standards in door to door sales across the industry. The ambiguity about the categories of complaint and the subjectivity in how members define levels of complaint runs counter to this intention.

In response to the ACCC's information request of 10 December 2010, EAL submitted that a guideline would be developed providing information about the way in which the EAL complaints process will be triggered. However, this guide is yet to be developed and the information provided is only an indication of the way this process 'may' operate. Accordingly the manner in which this process will work also remains unclear and is not reflected in the code itself.

Consumers rights to seek recourse to the relevant energy ombudsman

The ACCC's letter of 10 December 2010 asked whether at the time of lodging a complaint with a member, customers would be made aware of their right to seek recourse to the relevant energy ombudsman. In response EAL stated that various existing codes of conduct require members to inform customers of this right and therefore customers will still be made aware of this right.

The ACCC notes that the purported intention of the scheme is to compliment, reinforce and set higher standards than existing regulatory provisions, and that one of the objectives of EAL is to manage a complaint process in relation to sales agents. Therefore, while the requirement to inform customers of their right to seek recourse to the relevant energy ombudsman exists independently of the code, to avoid confusion about this issue the requirement to inform consumers of this right should be reflected in the code.

The ACCC also notes that a customer may make a complaint to the relevant energy ombudsman about behaviour that would breach the code, either instead of complaining to the member or because they are dissatisfied with the outcome of their complaint when considered by the member. The ACCC considers that the code should provide that if such a complaint is proven, and the behaviour of the agent fits within one of the three categories provided in the competence monitoring process (once properly defined) this should be recorded as a proven complaint about the agent under the competence monitoring process in the code.

This is important both to identifying any trends in breaches of the code by particular sales agents and so that the reporting done by EAL members about breaches more accurately reflects any proven breaches by sales agents.

EAL complaints process – who can bring a complaint against a member

The scheme includes a complaints process to deal with complaints against individual sales agents that are deemed sufficiently serious to warrant deregistration of the sales agent if proven and to deal with complaints against EAL members. This process is separate to the complaints process each member must have in place to deal with customer complaints about sales agents discussed above.

This complaints process provides for a cascading series of sanctions to be imposed on the member for breaches of the code.

EAL members, the code auditor, energy ombudsmen, regulatory bodies and government are able to bring a complaint against an EAL member. In response to the ACCC's letter of 10 December 2010 EAL advised that consumers are not able to bring complaints against EAL members because consumer complaints generally arise out of a specific incident and consumers are not typically in a position to make a complaint about any systemic problems with member's compliance.

Generally, the ACCC considers that codes are most effective where there are not artificial limitations on who can bring a complaint about the conduct of members. There would be a range of other stakeholders, for example consumer groups and in some cases individual consumers, who in some case could be in a position to identify systemic problems with a members compliance.

EAL complaints process – composition of the complaints panel

Complaints under the complaints process will be dealt with by a code manager and code panel to be appointed by EAL. In response to the ACCC's request for further information on 10 December 2010 EAL provided details of the make up of the panel which hears

complaints in relation to the United Kingdom scheme as an example of the types of persons who may be included on EAL's panel.

The ACCC considers that it is vital that the code manager and complaints panel are completely independent of EAL and its members. The ACCC also considers that ideally the panel should consist of members representing all relevant stakeholders, including for example, members with expertise in consumer advocacy.

As currently drafted the complaints process provides complete discretion to EAL about the types of persons that will make up this panel. Given the importance of the independence of the panel the ACCC considers that there should be a greater degree of specificity about the make up of the panel and that details about the make up of the panel should be prescribed in the complaints process.

Sanctioning EAL members

Commercially significant sanctions are necessary to achieve credibility with and compliance by members, and also engender stakeholder confidence in the scheme. Sanctions should reflect the nature, seriousness and frequency of the breach.

The ACCC notes that the level of sanction imposed on a member will depend on whether a member has been sanctioned previously. The complaints process does not appear to address the issue of whether regard to previous sanctions will be had indefinitely or whether previous sanctions will be disregarded after a certain period of time in considering any sanction in relation to a new breach.

Nor does the sanction process, by providing for a series of cascading sanctions, appear to apply sanctions in a manner that reflects the nature and seriousness of the breach. Regardless of the seriousness of the breach only a level 1 sanction can be applied for a first breach, and thereafter, with the exception of sanction level three which can be applied if a level one or two sanction has previously been applied, a sanction can only be applied if a sanction at the previous level has already been applied.

Monitoring sales agents' behaviour

Under the scheme as currently drafted individual members maintain significant discretion with regard to how monitoring of sales agents' behaviour will be undertaken and how rigorous monitoring of sales agent behaviour will be.

As noted above, self regulatory schemes are most effective where there are clear incentives for compliance and discretion in the way in which members are able to achieve compliance is minimised as much as possible.

Post-sale verification process with customers

Clause 13.2 of the procedures guideline requires members to undertake post sale verification to confirm with customers that they have entered into a contract and that the customer was satisfied with the way the sale was conducted. Members are required to 'use best endeavours to conduct this process with enough customers to give a reasonable confidence rate of compliance.'

Members maintain significant discretion regarding the robustness of their post-sale verification process, particularly with regard to the number of customers with which post sale verification is undertaken.

Other monitoring of sales agents' behaviour

The ACCC's letter of 10 December 2010 sought information about what measures EAL and members would undertake to monitor on-going conduct of sales agents other than responding to complaints.

EAL responded that complaints are always a good indicator of competence and that annual re-training also provides a means of periodic checks. EAL also stated that members currently use other proactive methods to monitor competence such as random field audits.

The ACCC considers that initiatives such random field audits can potentially provide effective means of pro-actively monitoring sales agents. However, the code currently contains no provisions providing for such pro-active monitoring.

Further, the ACCC considers that annual re-training, while an effective means of reinforcing required behavioural standards, does not address the issue of the monitoring of agents behaviour when undertaking sales activities.

While complaints can also be a good indicator of sales agents' behaviour, awareness of complaints processes will be largely dependant on the sales agent, whose behaviour the complaints process is intended to monitor, informing the customer of their right to lodge a complaint. In this respect sales agents who do not comply with the standards required by the code are unlikely to be pro-active in informing customers about their rights to complain.

More generally, as noted above, the onus in monitoring and regulating the behaviour of sales agents rests almost entirely with the individual member on whose behalf the sales agent is undertaking sales. Individual members who have a potential conflict of interest between the role of enforcing behaviour standards and seeking to maximise sales maintain significant discretion with regard to how monitoring of sales agents' behaviour will be undertaken and how rigorous monitoring of sales agents' behaviour will be.

The code would benefit from a more pro-active approach to monitoring sales agents' behaviour as well as from the introduction of greater independent monitoring of sales agents' behaviour.

Member self-reporting of compliance

Clause 13 of the code provides that EAL will monitor members' compliance with the code on a regular basis through reviews of monitoring reports provided by and agreed to with the member.

As raised in the ACCC's letter of 10 December 2010, there is currently a lack of clarity in the code around who will set the scope of what is provided in the monitoring reports provided by members and the information that will be provided in these reports.

In response to the ACCC request for further information, EAL stated that the scope of the monthly monitoring reports would be set by the EAL Board, the independent code panel, and the code auditor where remedial action has been prescribed. EAL's response also provided details of the types of information a 'typical' monthly report will consist of. However, neither the manner in which the scope of monthly reports will be reported or the types of information that will be included in the reports is addressed in the code itself.

Providing certainty in relation to these issues is particularly important given the noted potential conflict of interest between individual members role of enforcing behaviour standards and seeking to maximise sales.

Annual independent compliance audits

Clause 13 of the code requires members to submit to an independent compliance audit on a yearly basis. However, other than a requirement that the auditor be a reputable firm of independent auditors the code is unclear about how the auditing process will work.

In response to the ACCC's request for further information EAL indicated a detailed annual report of the code auditor would be provided to the EAL code manager and the individual member concerned. A consolidated report would be provided to the EAL Board and relevant regulators in confidence and a high level summary of the audit report would be made available to the public in EAL's annual report. However, none of these requirements are reflected in the code itself.

Further, it is not clear, from the code or the additional information provided, whether information about individual members compliance with the code will be provided to the EAL Board and relevant regulators.

It does appear from the annual report of the United Kingdom scheme which EAL cites as an example of the sort of information that will provided to consumers that no information about individual members compliance with the code will be provided to consumers.

The ACCC considers that information about individual members compliance with the code should be provided to the EAL Board and relevant regulators and that this should be clearly stated. Further, where issues of systemic non-compliance are apparent these should be reported more broadly. Currently, non-compliance with the code by EAL members is only publicly reported once a level 6 sanction under the complaints process, resulting in deregistration of the member, has been imposed. The code manager also has the discretion to inform the public if a level 5 sanction is imposed.

Dealing with possible breaches of regulatory requirements by members

EAL states that should it become aware that a member may have contravened an applicable regulatory requirement EAL will notify the member and that, in consultation with relevant regulatory authorities, EAL's annual report will detail potential member breaches or systemic issues and how they have been addressed.

The ACCC considers that the EAL scheme should explicitly require it to report to relevant regulatory authorities any concerns that members may have contravened applicable regulatory requirements.

EAL membership criteria

Under the EAL Constitution, EAL does not have to give reasons for rejecting an application for membership. The ACCC's letter of 10 December 2010 sought reason why this was the case. EAL's response did not address this issue but rather stated that it was not anticipated that an application would be rejected except in extreme cases. The ACCC also sought details of dispute processes for applicants that are refused membership. EAL advised that rejected applicants do not have any right of appeal.

The ACCC considers that such a subjective and non-transparent process for considering applications for membership lacks any form of procedural fairness.

Training requirements

The ACCC's letter of 10 December 2010 noted concerns that EAL's training requirements omitted areas including product knowledge, safety, consumer rights and privacy obligations.

In response EAL stated the list of matters members are required to train sales agents in is non-exhaustive, that the list is included as a guide, and that it is implicit that product knowledge and safety would be covered. EAL also submitted that the requirement that sales agents be trained in legislative and regulatory obligations would capture product knowledge, safety, consumer rights and privacy obligations.

Where a code explicitly sets out standards, or in this case training requirements, even in a non-exhaustive manner, there is a risk members will adopt those matters listed as constituting all relevant requirements. Accordingly, the ACCC considers that the code would benefit from the requirements that members provide training in product knowledge, safety, consumer rights and privacy obligations being explicitly acknowledged.

Distinction between energy retailer members and energy marketer members

The code defines a member as an energy retailer or energy marketer that has signed the EAL Constitution and in doing so agreed to adhere to the code. No distinction is made between different classes of members in the code.

With respect to many of the requirements of the code it is not clear whether they are intended to apply to all members, just energy retailer members or just energy marketer members.

For example, each member must operate a competence monitoring process including a process for complaints handling. Presumably, this is intended to apply only to energy retailer members. In the alternative, if this requirement to establish and deal with customer complaints also applies to energy marketer members this is likely to create confusion both for the customer about where complaints should be directed and for

members in monitoring and addressing sales agents' behaviour. The ACCC considers that complaints about sales agents' behaviour should be dealt with by the retailer on whose behalf sales agents are conducting the sales.

There are a number of other areas of the code where it is also unclear whether the relevant reference is to all members or just energy retailer, or energy marketer, members. For example, in relation to monitoring and auditing reports and post sale verification processes.