

13 May 2011

Mr Richard Chadwick
General Manager, Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3000

By email: richard.chadwick@acc.gov.au; neil.howes@acc.gov.au;
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Dear Mr Chadwick,

Energy Assured Limited (EAL) Applications for Authorisation A91258 & A91259

We refer to the Draft Determination issued on the 11th April 2011 in relation to the above applications for authorisation (**Draft Determination**). We also thank you for arranging the subsequent meeting held with representatives of EAL and the ACCC on the 20th April 2011, where you provided further insights into the concerns raised in the Draft Determination.

EAL takes the ACCC's concerns very seriously and has prepared this submission to form part of its Applications for Authorisation.

1 Amendments to the EAL Scheme and underlying documentation

1.1 Having regard to the Draft Determination and the meeting, EAL has reviewed the structure and operation of the EAL Scheme and has made further changes to the underlying documentation that supports it. Enclosed with this letter are the following revised documents:

- (1) Code of Practice (which now incorporates the Complaints Process);
- (2) Procedures Guideline; and
- (3) Constitution.

1.2 Many of the changes to the documentation formalise procedures that address concerns raised in the Draft Determination. EAL has particularly sought to:

- (1) create greater rigour around the processes for disciplining and sanctioning Sales Agents and EAL Members particularly by:
 - (a) providing greater guidance on how to categorise breaches of the Code of Practice and EAL Standards;

- (b) clarifying the instances in which the Code Manager may investigate potential Code of Practice breaches and what subsequent action to take if a breach is discovered; and
 - (c) revising the Sanctions applicable to Members, particularly by increasing a Member's exposure to be "named and shamed" to energy ombudsmen and regulators and/or the public at large;
- (2) increase accountability of Members for the conduct of their Sales Agents;
 - (3) adopt best practice and applicable laws in the EAL Standards;
 - (4) increase measures for consultation with and reporting to stakeholders including consumer groups, energy ombudsmen and energy regulators; and
 - (5) merge the Code of Practice and Complaints (Sanction) Process to improve clarity and transparency under the regime.

The specific changes made to address these and other issues raised in the Draft Determination are set out in **Annexure A and B of this letter** using the headings adopted by the ACCC in its Draft Determination.

2 Public benefits

- 2.1 EAL repeats and relies on the correspondence and submissions made by EAL in the course of its applications for authorisation.
- 2.2 EAL resubmits that the ACCC must consider the EAL Scheme that is before it. Whether or not the EAL Code of Practice and other documentation is ideal or the preferred system of self-regulation is not a matter that goes to the likely public benefit of the arrangement that is before it.
- 2.3 Furthermore, particularly with this latest tranche of amendments, EAL is strongly of the view that the EAL Scheme will realise a substantial measure of public benefit, including those public benefits identified in its earlier submissions. In its Draft Determination, the ACCC recognised that the EAL Scheme had important potential advantages, such as the regime for the establishment and operation of the EAL Register, together with the associated recruitment, training, monitoring and disciplining of Sales Agents. With the improved certainty and clarity in the compliance and sanctioning regime, the initiative will clearly deliver substantial enhancements to member compliance, consumer confidence, consumer choice and competition in the energy industry.

3 Consultation on revised Scheme

- 3.1 EAL has sought to address concerns raised by the ACCC in the Draft Determination on behalf of interested parties (particularly consumer groups) and those raised in submissions made before the release of the Draft Determination. In preparing this version of the EAL Scheme Documentation, the statutory timeframe has not permitted EAL to directly consult with consumer groups or interested parties. However, EAL is of the view that key consumer concerns have already been significantly addressed. Also, various consumer groups and interested parties

attended information sessions conducted by EAL to detail proposed changes to the Code. We have offered to forward them a copy of the revised documentation as soon as practicable.

4 Independent Code Review

4.1 After the Draft Determination, EAL engaged an independent consultant with a regulatory background and experience in the design of energy marketing codes of conduct to review the Scheme documentation (**Independent Reviewer**). The Independent Reviewer considered how well the revised Code of Practice addressed regulatory concerns raised in the Draft Determination. EAL adopted the recommendations of the Independent Reviewer and incorporated them into the Code of Practice.

5 Information Asymmetry and Pressure Selling

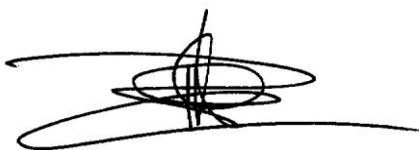
5.1 EAL and its members are deeply concerned by statements made by the ACCC in clauses 4.27 and 4.122 of its Draft Determination – and in particular, suggestions that there is an *“inherent conflict of interest for energy retailers who employ and train sales agents and also directly benefit from sales agents’ sales”*.

5.2 If that is indeed a conflict of interest, it is a conflict of interest that applies in all industries and under all sales channels. EAL submits that the ACCC’s argument is not supportable for the purposes of the Draft Determination unless the ACCC is suggesting that the energy industry is more non-compliant when it comes to sales activities than other industries.

5.3 In any case, Retailers, and the marketing companies they engage, have extensive controls in place to ensure that the protection of consumers is maintained as a key objective. As discussed at our meeting on 20 April 2011, it is not in a retailer’s best interest to benefit from an agents’ sales, where the sale has occurred unlawfully or through the use of high pressured tactics. In addition to the fact that energy retailers do endeavour to be good corporate citizens, flow on effects of reputational risks associated with such conduct, the risk of penalties afforded under the various regulatory regimes far outweighs any perceived benefit derived from such conduct.

If there is any further information you require or we can provide any assistance. Please do not hesitate to contact us.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ramy Soussou', with a stylized flourish underneath.

Ramy Soussou
Acting Chief Executive Officer

Annexure A- Public Benefits of the EAL Scheme

Issue	ACCC's views	Draft determination reference	Approach in revised code
Consumer awareness			
	Customers must understand the standards of behaviour governed by the scheme and the recourse available to them.	4.51	This is now incorporated in clause 2.5 which explains how the Code supplements existing regulatory regimes. The issue is also incorporated throughout the Code.
	Information requirement standards in the scheme as a minimum meet the standards required by law.	4.52/4.63	Addressed in clauses 4, 5 & 6 and throughout the documents.
	Code should require marketers to advise consumers of their right to require marketers to leave the premises on request (as contained in ACL).	4.58	This has now been addressed under clauses 4.1(2) and 4.1(7).
	EAL should consider EWOV's suggestions to improve consumer awareness of the scheme.	4.61/4.62/4.64	<p>Clause 4.1(11) provides for the consumer to be given a copy of EAL marketing on request and clause 5.1(4)(d) provides for the consumer to be given a copy on entering a contract .</p> <p>As highlighted in previous submissions Members can elect to adopt EWOV's recommendations voluntarily. EAL further believes that the promotional obligations required by both EAL and its Members go far beyond existing regulatory requirements., as detailed in clause 7.14, 7.15,9.4, 9.5, 9.6, 10.2 (2), 10.9, 11.</p>
	The minimum information provisions in the scheme should explicitly comply with existing legislative requirements so as not to confuse consumers of their rights – communicated in the code and the flyer.	4.71	This has now been addressed in the revised Code.
	The scheme should be explicit about the times when sales agents can contact consumers.	4.72	This is addressed in clause 4.1 of the Code

Issue	ACCC's views	Draft determination reference	Approach in revised code
	Information should be provided to assist consumers from non-English speaking backgrounds.	4.73	This has now been addressed under clause 9.4(2) of the Code.
	Welcomes consideration by the EAL to revise its training packages to incorporate feedback from consumer groups, particularly through biennial round tables.	4.88	This has now been incorporated in the Code under clauses 11.1(8) and 16.2(13).
Compliance			
	Extent of benefits arising from public register depends on whether or not members are accountable for the integrity of the data and processes that underpin the register. Members need to be accountable to ensure that only agents who have successfully completed training and competency checks are registered, and that responsibility for sanctioning falls upon the retailers.	4.97	Whilst already dealt with in the Code, this is further dealt with under clauses 25.3 and 28.2
<i>Mechanisms to monitor sales agents' behaviour</i>	In the absence of explicit statements in the scheme about the independence of the post-sale verification process and the random field assessment of sales agents, the incentives for retailers to undertake rigorous compliance checks may be lessened.	4.100 & 4.101	This has now been addressed under clause 18, 19, 27.3, 28.2 & 28.3
Enforcement			
<i>Non-compliance by sales agents</i>	ACCC still has significant concerns about the code's provisions concerning the categorisation of complaints.	4.111 through to 4.116	The categorisation of complaints has been revised in clause 20. Clause 20.4 and 28 now also incorporate additional consumer protection measures and appropriate sanctions should the measures not be properly administered by a Member.
	The code does not address circumstances where an agent breaches the code on more than one occasion in a particular	4.117	This has now been addressed in the Code under clauses 20.3(2)(a) and 20.3(3)(a)

Issue	ACCC's views	Draft determination reference	Approach in revised code
	month		
	A sanctions process must adequately address the inherent conflict of interest for energy retailers who employ and train sales agents and also directly benefit from sales agents' sales.	4.122	Please refer to comments in the cover letter
<i>Who can make a complaint?</i>	The ACCC considers that complaints processes are most effective where there are no artificial limitations on who can bring a complaint about conduct of a member.	4.136 & 4.138	<p>EAL relies on previous submissions in regards to this point.</p> <p>Allowing consumers an avenue to complain about the conduct of Members direct to the Code Manager will create additional confusion in the market with the role and responsibility of relevant energy ombudsmen.</p> <p>However, consumer complaints become known to the Code Manager through Monthly Report and Audit processes. The Code Manager must investigate the Member for potential breaches that come to its attention.</p> <p>Inclusion of the sales complaints process flow chart has now been incorporated in the Code under Annexure A.</p>
	ACCC would welcome the EAL enabling consumer associations to lodge complaints against EAL pursuant to the EAL complaints process	4.137	This has now been addressed in accordance with clause 26.1.
<i>The code manager</i>	For the benefits of the sanctions process to be realised, explicit guidance is required in the scheme about the exercise of the code manager's discretion in relation to both the investigations and the sanctions process.	4.144 & 4.145	This has now been addressed in clause 25, 26, 27 & 28 of the Code
<i>The Panel</i>	The scheme would benefit from being more explicit on how panel members are to be selected for panel hearings so as to	4.152	This has now been addressed in clauses 12.4(2) and 12.7.

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	address concerns about whether individual members are appropriately qualified, whether there would be any perception of bias or whether there are any possible conflicts of interest.		
<i>Sanctions for non-compliance by members</i>	The ACCC deems that that there is limited guidance and transparency around how the code manager will decide on the level of sanction appropriate to apply to a member.	4.155	This has been comprehensively addressed in clauses 27, 28 and Annexure B of the Code.
<i>Retailer Reporting on compliance with the scheme</i>	The scheme does not provide any guidance on what constitutes a 'higher level' of sales complaints.	4.161	This has now been addressed in accordance with the examples provided under Sanction 3 in clause 28.
	The scheme is silent as to how systemic issues and problematic compliance trends will be identified and investigated as a result of these reports. The scheme is also silent as to the trigger for issues or complaints to be actioned through the EAL scheme or referred to other regulators.	4.162 & 4.164	This has now been addressed in the code under clauses 9.6(9), 11.1(7), 19.8, 20.5, 24.5, 26, 27.3, and 28.
	There is some lack of transparency in relation to the annual audit process, e.g. it is unclear how much information will be in the public 'high level' summary.	4.167	EAL considers that the information provided in clause 24 of the Code is comprehensive. Furthermore the Code Auditor will provide the detailed report of findings of each energy retailer to the relevant energy regulator under clause 24.5.
	There is a lack of information as to how systemic issues will be identified and actioned as a result of the annual independent audits. There should be a process that allows systemic issues, including systemic issues that may arise in relation to an individual member's compliance, to be reported to the EAL Board and relevant regulators. Industry wide systemic issues that are identified from the annual audit process should be reported more publicly.	4.168	This is now addressed in clauses 9.6, 11.1(7), 19.8, clause 20.5, 24.5, 26, 27.3, and 28.

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	The EAL scheme purports to require higher standards of compliance than existing regulatory frameworks. Scrutiny could be enhanced by transparent and comprehensive reporting of the results of compliance audits.	4.169	The Code Auditor will provide the detailed report of findings of each energy retailer to the relevant energy regulator under clause 24.5.
<i>Redress for consumers</i>	Greater clarity between the scheme and the Ombudsman's complaint processes may help to reduce possible consumer confusion and thereby improve consumer confidence.	4.170 & 4.174	This has now been addressed throughout the Code

Annexure B- Public Detriment of the EAL Scheme

Issue	ACCC's views	Draft determination reference	Approach in revised code
Complexity of the scheme and consumer confusion			
	The scheme is complex as it is contained in four documents and the ACCC has identified inconsistencies between those documents.	4.185	<p>The scheme documentation has been simplified so that it now consists of one key document, the Code of Practice.</p> <p>Whilst the</p> <ul style="list-style-type: none"> • Procedures Guideline; and • Minor variations to the Constitution, <p>are part of the Scheme documentation, the Code of Practice is the focal document for the Scheme.</p>
	The ACCC notes that the EAL has proposed further amendments to the scheme regarding its role, including that it is not a dispute resolution body and how it will refer consumers to the retailer or the Ombudsman. These changes would be welcome.	4.193	This is now incorporated in clauses 2.5, 9.1, 9.5 and 17.2.
EAL membership criteria			
	The ACCC has concerns about the lack of transparency and procedural fairness in the EAL's application process. The proposed amendments to EAL's constitution would address these concerns. However, as noted, EAL has not, to date, implemented these changes.	4.214	The amendment has been reflected under clause 8.2 of the Constitution. EAL will formalise the constitutional amendment by obtaining relevant approvals and submitting it to ASIC should the ACCC authorise the EAL Scheme.