

25 May 2011

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

By email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Dr Chadwick,

**Energy Assured Limited (EAL) applications for authorisation Ag1258 & Ag1259 – interested party consultation in relation to the amended application**

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 EAL’s amended applications for authorisation Ag1258 and Ag1259 (“amended applications”). We have been involved in the ACCC’s process from the start and have provided responses to the EAL scheme on 23 November 2010, 10 January 2011, 4 March 2011, and 20 April 2011. We have also participated in meetings at the ACCC on this matter.

CUAC agreed to meet at EAL’s request on 9 May 2011 for the purposes of EAL advising us how they had responded to the ACCC’s draft determination (“information provision session”). Two other consumer organisations were also present at this information provision session. Prior to the meeting, EAL provided us with a high level summary of issues (a table outlining in brief their proposed amendments to the EAL scheme). We indicated that it was impossible for us to provide more than general responses to them as EAL had not circulated the revised Code of Practice, Procedures Guideline and Constitution (“revised scheme”). EAL said they could not provide the revised scheme

then as the papers had to be sent for board approval before release. We therefore both agreed that the meeting did not constitute a "consultation" process.

CUAC received a copy of EAL's revised scheme on 13 May 2011, the date on which EAL's revised application was lodged with the ACCC, from the ACCC (at 4:26pm), and from EAL (at 5:20pm). Given the tight time frame for responding to EAL's amended applications (by close of business 25 May 2011), we are not in a position to provide detailed and comprehensive comments on the content of the amended applications. We do, however, have overall comments about the revised applications which we would like to make, particularly in response to the issues raised in EAL's letter to the ACCC dated 13 May 2011 ("EAL's letter").

### **Amendments to the EAL scheme and underlying documentation**

CUAC acknowledges the short time frame for response. However, we believe EAL could have engaged and consulted with consumer groups in this period. Instead EAL has responded to the ACCC's draft determination<sup>1</sup> by revising their scheme without engagement or consultation. We believe that the EAL scheme would have benefited from discussions with consumer groups in developing further revisions to the scheme.

EAL's letter suggests that they have attempted to address all the concerns which have been raised by the ACCC in their draft determination. However, we do not believe they have responded sufficiently to key consumer concerns. We mention the following as examples of responses that would benefit from further consumer input:

1. Under EAL's revised scheme, not everyone who is door knocked will be provided with the EAL Marketing Material. Only consumers, who enter into an energy supply contract at the door or those who ask for the EAL Marketing Material, will be provided the material.<sup>2</sup> This means that consumers who experience unconscionable marketing behaviour and who do not enter into a contract may be unaware of the complaints mechanism under the EAL scheme. Therefore, if there is a systemic issue (for example: involving a group of consumers along a street who were exposed to marketing misconduct by a sales agent), this might not be picked up by the EAL scheme if none of the consumers entered into an energy contract or made a request for the EAL Marketing Material.
2. EAL suggested that they have responded to concerns around marketing to non-English speaking consumers by directing them to the EAL website which will

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<sup>1</sup> ACCC, draft determination for applications for authorisation lodged by Energy Assured Limited in respect of a scheme to regulate door-to-door energy sales (11 April 2011).

<sup>2</sup> Energy Assured Limited, code of practice, clause 7.14(3).

have EAL Marketing Material in six major languages.<sup>3</sup> CUAC does not believe this adequately addresses the issue, particularly for low income consumers who may not have access to the internet.

3. Under the code of practice, retailers have to undertake “monthly random assessments of 5% of Sales Agents that have obtained an Approved Accreditation Status.”<sup>4</sup> The code of practice does not prescribe how this may be undertaken. The code of practice states that the assessment may include “mystery shopping” of a sample of consumers and assessment of sales agents while they are performing sales activities.<sup>5</sup> Thus, the mode of assessment is left to the retailer’s discretion. The code of practice should stipulate a sampling process that ensures that all sales agents are captured for assessment over time.
4. The language used in the code of practice suggests that EAL has not understood consumer concerns around door-to-door marketing of energy products. Clause 20.3(2)(b) and (c) of the code of practice refer to a sales agent “advising a consumer, by mistake, that they will not incur early termination fees...”; “promising the consumer, by mistake, a discount that does not apply to that particular consumer.” In CUAC’s experience, these are not “mistakes” but are conscious actions by sales agents in order to secure a sale, in disregard of marketing regulations.
5. The sanctions process under clause 28 of the code of practice requires further discussion and consultation with consumer organisations. In particular, the classification of what constitutes; a minor operational breach, serious operational breach, material breach, systemic breach etc as the consequences for each vary.

### **Lack of consultation on the EAL scheme**

EAL’s letter states that:

In preparing this version of the EAL Scheme Documentation, the statutory time frame 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.

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<sup>3</sup> Energy Assured Limited, code of practice, clauses 9.4(2), 9.5(13).

<sup>4</sup> Energy Assured Limited, code of practice, clause 18.1(2).

<sup>5</sup> Energy Assured Limited, code of practice, clause 18.3.

CUAC notes that within the statutory timeframe, the ACCC was able to organise a national video conference to discuss EAL's response with consumer organisations. We are disappointed that the EAL has consistently avoided genuine consumer consultation and engagement in the development of the EAL scheme.

EAL claims that "key consumer concerns have already been addressed" without consulting with consumer organisations.

### **Information asymmetry and pressure selling**

EAL's letter states that retailers and marketing companies have "extensive controls in place to ensure that the protection of customers is maintained as a key objective."

CUAC notes that currently, there are Commonwealth, State and Territory legislative provisions, and rules regarding door-to-door marketing. There are, nevertheless, significant compliance issues as indicated by complaints data recorded by energy ombudsman schemes. This needs to be addressed with stronger monitoring and enforcement of existing marketing obligations by the appropriate regulatory authorities to ensure industry remains compliant and consumers safeguarded. Until this happens, we are of the view that the industry's "reputational risks associated with such [mis]conduct, the risk of penalties afforded under the various regulatory regimes," will not outweigh any "perceived benefit derived from such conduct."<sup>6</sup>

We agree with the ACCC's draft determination 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.<sup>7</sup> The fact that EAL's letter denies the existence of any conflict of interest and compares door-to-door marketing of energy products with "all industries and under all sales channels" indicates their poor understanding of the consumer's door-to-door experience of energy marketing. It is primarily the energy industry which uses door-to-door marketing as a means to sell their energy products since there is no shop front. Energy is also unlike any other product offered for sale; it is an essential service; not a discretionary purchase. Door-to-door marketing occurs at the consumer's premises; it is confronting for consumers when they are exposed to pressure selling tactics of sales agents. Consumer protection and regulatory oversight are therefore fundamental.

### **Authorisation period & subsequent amendments to the EAL scheme**

At EAL's 9 May 2011 information provision session, we were informed by EAL that if the ACCC grants authorisation to EAL, the authorisation period would be for 10 years. Following the meeting with ACCC on 17 May 2011, we now understand that it is the ACCC

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<sup>6</sup> EAL's letter to ACCC dated 13 May 2011.

<sup>7</sup> ACCC, draft determination for applications for authorisation lodged by Energy Assured Limited in respect of a scheme to regulate door-to-door energy sales (11 April 2011), see clauses 4.27 and 4.122.

who, determines the period of authorisation and EAL who had requested a 10 year authorisation period.

Of particular concern to us is that any amendment to the EAL scheme following a grant of authorisation is difficult. Our understanding is that should authorisation be granted, any amendments to the scheme which constitute "material changes" will require a re-authorisation process. At EAL's information provision session on 9 May 2011, EAL said that the use of non-exclusive language in the revised code of practice (words such as "at a minimum", "must include at least", "however not limited to" etc) will allow changes to be made without going through the process of re-authorisation. EAL also mentioned that the stakeholder working group proposed in the revised code of practice would be able to make recommendations on code development and improvement, discuss breaches, systemic issues, compliance audits, training packages, marketing material etc.<sup>8</sup> We note that EAL has offered to host a stakeholder working group meeting "within two months after the date that authorisation is granted...in respect of this Code."<sup>9</sup>

We are unsure to what extent re-authorisation will be required. For example, would the issues we have highlighted in this submission be considered material and therefore require re-authorisation if changes are to be made to the scheme? In addition, it is unclear what influence stakeholder working group recommendations will have on the EAL scheme. According to clause 11.2 of the code of practice, these recommendations will be adopted "where appropriate." Clause 11.1 refers to bi-annual meetings of the stakeholder working group. It is highly unlikely that meetings twice a year will be adequate to address the range of matters mentioned in clause 11.1 of the code of practice.

We retain the view that EAL should withdraw their amended applications, engage in genuine consultations with consumer organisations and thereafter resubmit their scheme. For a code of practice to deliver a "substantial measure of public benefit" to consumers, the code needs to improve door-to-door marketing standards over and above the current regulatory framework. A code of practice which delivers best practice consumer protections is possible only if consumer organisations are given the opportunity to input into the process.

CUAC is open to working with industry in improving consumer protections around door-to-door marketing of energy products. Short of EAL withdrawing their amended applications, we submit that the ACCC's draft determination in proposing to deny authorisation to EAL is the right outcome for consumers. We recommend that the ACCC confirm this in its final determination at the end of June 2011.

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<sup>8</sup> Energy Assured Limited, code of practice, clause 11.1.

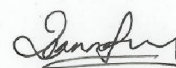
<sup>9</sup> Energy Assured Limited, code of practice, clause 11.3.

Thank you for the opportunity to participate in the ACCC's consultations. If you have any queries, please do not hesitate to contact the undersigned at (03) 9639 7600.

Yours sincerely,



Jo Benvenuti  
Executive Officer



Deanna Foong  
Senior Policy Officer