

25 May 2011

The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
**CANBERRA ACT 2601**

Dear General Manager,

**RE: Energy Assured Ltd applications for authorisation A91258 & A91259 – further amendments to the proposed scheme**

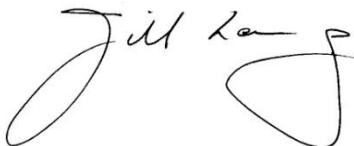
The Queensland Council of Social Service (QCROSS) welcomes the opportunity to comment on the further amendments to the Energy Assured Limited (EAL) self-regulatory scheme which has been submitted for authorisation. We acknowledge that EAL has undertaken an extensive revision of the scheme in an attempt to address criticisms. However, QCROSS does not consider that our key concerns have been addressed.

In summary, QCROSS is concerned that the proposed EAL scheme limits the responsibility of energy retailers for eliminating inappropriate marketing practices, by minimising the likelihood that they will face a significant penalty or cost as a result of misconduct by sales agents acting on their behalf. The sanctions available when members breach the Code are weak and difficult to impose, and there is an unwillingness to accept information about members' compliance from the public, instead relying mainly on members to provide honest and accurate reports of complaints. EAL's failure to consult stakeholders during the development of the scheme and the limitations on the role of the proposed Stakeholder Working Group also raise questions about their willingness to work with other parties to improve the standard of door-to-door marketing.

QCROSS would be willing to support a self-regulatory scheme that promised to effectively address problems in energy marketing. We do not believe that the EAL scheme is capable of achieving this goal. Therefore we maintain our position that the scheme will not provide an overall public benefit, and recommend that the ACCC does not authorise the scheme. Our detailed comments are attached.

For any further information, or to clarify any aspect of this submission, please contact Linda Parmenter, Manager, Low Income Consumer Advocacy, or Nadine Lester, Energy Policy Officer, on 07 3004 6900.

Yours sincerely,



Jill Lang  
**Director**

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## **QCOSS comments on Energy Assured Ltd applications for authorisation A91258 & A91259 – further amendments to the proposed scheme**

Queensland Council of Social Service (QCOSS) is the peak body for over 600 welfare and community sector organisations in Queensland. For over 50 years QCOSS has worked to promote social justice and exists to provide a voice for Queenslanders affected by poverty and inequality. We act as a State-wide Council that leads on issues of significance to the social, community and health sectors. We work for a Fair Queensland and develop and advocate socially, economically and environmentally responsible public policy and action by community, government and business.

QCOSS has been funded by the Department of Employment, Economic Development and Innovation for an energy consumer advocacy project in Queensland. The purpose of this project is to advocate on behalf of Queensland consumers and particularly vulnerable and low income households in relation to energy.

QCOSS notes that EAL's covering letter accompanying the amended documents discusses its contact with consumer groups and other interested parties under the heading 'Consultation on revised Scheme'. QCOSS attended an information session conducted by EAL, and we would like to emphasise that this session should not be interpreted as consultation. Participants did not have an opportunity to view the amended Code of Practice prior to the information session, and so were unable to provide informed comment on the amendments.

QCOSS notes the comments made by EAL regarding the ACCC's suggestion that there is an inherent conflict of interest for energy retailers who engage marketing agents and benefit from their sales. We agree with the ACCC that such a conflict of interest exists, and that it must be addressed if any self-regulatory scheme is to be effective. We are concerned that EAL does not accept that this conflict exists, or that it is a relevant consideration in the development of a self-regulatory scheme for energy marketing.

It appears that this view has resulted in the development of a Code which primarily aims to identify and weed out 'rogue' sales agents, on the assumption that their behaviour arises from individual failings. It does not recognise that inappropriate behaviour by sales agents may be motivated at least in part by systemic issues, such as their employment conditions, including commission-based pay structures and relatively low supervision. While it may not be appropriate for a self-regulatory scheme to set employment conditions for sales agents, it should place enough responsibility on retailer and marketer members to provide an incentive to address the factors that lead to poor sales behaviour. QCOSS does not believe the amended Code achieves this effect.

QCOSS recognises that the ACCC is required to base its decision on whether the public benefits of the proposed scheme will outweigh any public detriment, and not on whether EAL offers the most effective possible scheme. We believe that a register of sales agents, accompanied by standardised training and performance monitoring, could offer public benefits. However, it is our view that weaknesses in other parts of the revised Code of Practice undermine these elements to the extent that it is doubtful the potential public benefits would be achieved. This needs to be weighed against the likely cost of the scheme, which will ultimately be borne by consumers, and the potential for undermining the effectiveness of the existing customer protection framework.

The limited time frame for consultation on the most recent revision of the EAL Code does not allow QCOSS to comment in detail on all our concerns regarding the proposed Code. We have therefore limited our comments below to areas that we believe illustrate the key flaws in the proposed scheme.

### ***Role of the Stakeholder Working Group***

QCOSS welcomes the EAL's intention to establish a Stakeholder Working Group to consider and provide feedback on the effectiveness of the Code. Although the Working Group is expected to discuss areas where the Code can be improved and review many elements of the operation of the Code at its meetings, it will not be involved in determining the scope of the two-yearly Code review under clause 13.2 of the proposed Code of Practice. This brings into question EAL's willingness to involve stakeholders in the development of the Code.

QCOSS notes that the Working Group will meet only bi-annually, and that there is no indication of how participants in the Working Group will be selected, how many participants will be involved, or the proportion of industry to consumer and other representatives on the Working Group. Nor is it clear by what process EAL will decide whether to accept or reject the Working Group's recommendations.

### ***Complaints against EAL members***

QCOSS previously expressed concern that the proposed EAL scheme did not allow individual consumers to make complaints about EAL members. The amended Code has not addressed this concern. While we accept EAL's position that the complaints process is not intended to be a dispute resolution scheme, we do not believe that this justifies excluding consumers from making complaints. We maintain our view that there are circumstances in which some consumers may be able to identify systemic Code breaches. Further, some consumers may not see their complaint as a dispute in need of resolution, if they are not seeking a particular outcome such as the cancellation of a contract. They may simply see complaining as a way of being a good citizen, helping other people in their community by motivating the member concerned to improve their standards. While QCOSS certainly supports referring consumers to their jurisdictional ombudsman if they are seeking redress, we do not see any justification for denying consumers the ability to complain to EAL about a member if their goal in doing so is essentially the same as the objective of the Code itself.

The previous version of the EAL scheme set out the complaints process in a separate document, which contained a section on complaints against EAL members, setting out who could make a complaint, how it should be lodged, and the process for handling complaints. In the process of incorporating this document into the Code of Practice, EAL has split up the section on complaints against EAL members and inserted clauses in different parts of the Code. The reference to how complaints can be made about EAL members, and who can make complaints, now occurs as part of a list of sources of information about breaches in clause 26.1, under the heading 'Investigation of alleged Code breaches by Members'. As a consequence, it is now difficult to find this information. QCOSS believes that it would not be apparent to someone without a detailed knowledge of the Code that there was a process for external parties to make complaints about EAL members.

The purpose of complaints against EAL members appears to be to assist the Code Manager in monitoring compliance with the Code. QCOSS notes that the Australian Energy Regulator (AER) is currently developing guidelines for its compliance monitoring and enforcement function under the National Energy Customer Framework. In its draft Statement of Approach, released in March, the AER has indicated that it will use information provided by energy customers through complaints made to the ACCC Infocentre to identify trends and patterns. QCOSS questions what additional benefit may be provided by a self-regulatory scheme incorporating a compliance monitoring framework that not only has fewer sources of information available to it than the regulator, but also intentionally excludes a potentially key source of information.

### ***Sanctions process***

In our previous submissions on the EAL scheme QCOSS expressed concerns that the sanctions applying to EAL members who breach the Code were weak and little information was available as to how they would be applied. Although the revised Code provides greater

clarity about how sanctions will be determined, it appears that EAL has further weakened the sanctions regime.

The amended Code now provides for warning notices to be issued to members who are suspected of breaching the Code prior to sanctions being imposed, recommending corrective action. There does not appear to be any limitation on the number of times warning notices are to be issued where a member persistently breaches the Code, as long as remedial action is undertaken each time. If the remedial action required was of a limited or specific nature, such as correcting monthly reports previously provided to the Code Manager or updating the EAL Register, a member could continue to breach the Code indefinitely without ever facing a sanction.

Even if sanctions are imposed, it appears unlikely that members would ever face any real penalty for breaching the EAL Code. Descriptions and examples of the types of breaches that may incur Sanctions 1, 2 or 3 are provided in the revised Code, but Sanctions 4, 5, and 6 can be applied only after the member has received multiple sanctions within a limited period of time. There is no provision for higher level sanctions to be imposed if the member has previously received multiple warning notices that did not lead to sanctions. For stakeholders and the public to be notified that a member has breached the Code under Sanction 5, the first sanction that involves any risk of reputational cost, an extensive history of non-compliance would have to be demonstrated, including:

- Failure to respond to warning notices issued for systemic breaches at least twice in sixth months, or more often for isolated operational or material breaches;
- Imposition of at least two Sanction 3s, or at least three Sanction 2s, or a combination of at least two Sanction 2s and one Sanction 3, within sixth months;
- Failure to respond to a further warning notice advising that Sanction 4 may be imposed;
- Failure to comply with an action plan arising from an audit carried out under Sanction 4;
- Failure to respond to a further warning notice advising that Sanction 5 would be imposed if remedial action was not taken.

QCROSS also has concerns about how EAL has classified breaches of the Code. Some of the examples described as minor operational breaches potentially undermine the effectiveness of the entire scheme. For example, if the number of sales agents that passed formal competency assessments for the month did not match the number that obtained an Approved status in the EAL register, and corrective action was not taken as required under a warning notice, this could incur Sanction 1. However, since the EAL register will automatically renew a sales agent's approved status, or change a provisional accreditation status to Approved, inconsistency between the number of agents passing formal competency assessments and the number obtaining an Approved status would suggest that the member was not updating the register when sales agents did not pass competency assessments. It is likely in this case that the member would be allowing sales agents who did not meet the required standards to undertake sales activities. Since the proposed scheme relies on training and monitoring of sales agents to improve the standard of door-to-door marketing, it is hard to see how such a breach could be considered a minor matter. Further, it is not clear whether repeated breaches of this nature could ever lead to higher level sanctions, since the Code only provides for such a breach to be escalated to Sanction 2 if the member has been issued with three Sanction 1s in three months, and to Sanction 4, involving a compliance audit, if three or more Sanction 2s have been issued in six months. With detection of this type of breach being based on monthly reporting, it is impossible to ever reach the criteria for imposing Sanction 4.

Finally, the penalties imposed under each level of sanction continue to be weak. Sanction 1 requires the member to provide a written undertaking that the breach will not be repeated. We question the effectiveness if the member has already ignored a warning notice prior to a sanction being imposed. Sanctions 2, 3 and 4 involve formal letters of admonishment and notification of the EAL board, but the Code does not indicate whether the member will be identified to the board. Again, the value of issuing a formal letter of admonishment is questionable if the member has already been issued and failed to respond to warning notices, possibly several times. Sanction 4 requires an audit to be conducted at the member's cost, but in the revised Code can be imposed only after the member has already had sanctions imposed multiple times within a six month period. Notification of the public, with possible threats to the member's reputation, will only occur if Sanctions 5 or 6 are imposed, which are only available after the member has either failed to comply with an action plan to remedy previously identified Code breaches, or has repeatedly committed further breaches. Furthermore, EAL still does not provide any guarantee that public notification of the imposition of Sanctions 5 or 6 on members would occur in such a way that the information would reach a wide audience.

It is also worth noting that in the revised Code, the requirement for an audit to be carried out at the members expense has been moved to a higher level in the hierarchy of sanctions. Under the previous version of the proposed scheme, an audit could be imposed without prior sanctions having been issued. In the revised scheme it appears that it will be very difficult to impose this sanction, and the resultant remedial action plan.

QCOSS believes that the sanctions process set out in the revised Code provides very little, if any, incentive to members to comply with the EAL Code of Practice.

### ***Breaches by sales agents***

In principle, QCOSS welcomes the introduction of clause 20.4 in the revised Code of Practice, requiring energy retailers to review contracts generated by a sales agent before and after a known breach, and to contact consumers to rectify the matter if any of these contracts were found to have been entered into in circumstances that breached either the Code or the applicable law. However, it is not clear why this clause limits the required action to ten contracts. QCOSS suggests that it would be more appropriate to either review all contracts generated by the sales agent if the breach occurred over a limited period of time, or to review a percentage of contracts generated to determine the likely extent of the behaviour, with a requirement to then review all contracts during the period that the sales agent was breaching the Code. We are concerned that requiring only ten contracts to be reviewed may limit the incentive for retailers to take action to minimise the risks of sales agents breaching the Code.

In our submission on the previous version of the EAL Code, QCOSS expressed that some of the examples included as Level 2 breaches included behaviour that should be regarded as serious misconduct. EAL has addressed this concern by inserting the words 'by mistake' into two examples, involving promising a discount that does not apply or advising a customer that they will not have to pay early termination fees if they switch retailers. QCOSS is sceptical about whether most incidences of this type of behaviour occur by mistake. We do not believe that the examples given to illustrate the levels of breaches by sales agents reflect a commitment to eliminating misleading or coercive sales tactics.

### ***EAL Register***

The concerns previously expressed by QCOSS about automatic renewal of sales agents' approved status and updating from provisional to approved accreditation in the EAL register have not been addressed. Combined with our concerns about the sanctions process discussed above, QCOSS does not believe that there is sufficient incentive in the revised Code for EAL members to keep the register up to date. This negates the public benefit that might otherwise be achieved by maintaining a register of sales agents.