



31 May 2011

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

Mr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 520  
MELBOURNE VIC 3001

Dear Mr Chadwick

### **Energy Assured Limited applications for authorisation A91258 & A91259**

Consumer Action Law Centre (**Consumer Action**) is pleased to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) consultation process for the Energy Assured Limited (**EAL**) applications for authorisation A91258 & A91259 (the **applications**) in relation to their revised submission for an EAL Code of Practice and Complaints Process (together the **Code**).

While we appreciate the work that both EAL and the ACCC have put into the development of the Code, we continue to be disappointed by the *approach* that EAL has taken. Its initial failure to consult throughout the development of the Code is reflected in the content of the Code as having no clear understanding of the issues consumers experience in the face of door to door marketing.

The regular occurrence of marketing misconduct suggests that consumers are not currently able to drive competition in our retail energy markets effectively through the making of informed decisions. This represents a failure in the current market.

Further, with respect, we remind the ACCC that the EAL scheme has evolved based on a failure of two aspects of the market. The retailers behaving in a way that is irresponsible to the laws and regulations around energy marketing, and secondly, a failure of the regulators to effectively regulate and enforce these laws for compliance by the retailers.

On this basis, the EAL guideline needs not duplicate any of the provisions of the law, but must seek to differentiate itself from the law by delivering benefits above and beyond those that should be derived under the law, with effective regulation - to establish any public benefit.

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## **Public Benefit**

Door to door sales approaches are unsolicited and often involve high pressure sales techniques at a person's home including misrepresentations made by salespersons, for example, about the purpose for the visit or the offer terms; and unconscionable conduct in procuring a customer, for example signing up customers who may not understand the contract they are entering into.

We note that the primary focus of the Code is to attempt to address the behaviour of sales representatives in these circumstances, through the EAL Register. It is unlikely however, that the register will actually be able to achieve this, for when combined with issues such as salespersons being employed on a commission basis rather than a fixed salary basis, *which in turn provides a heavy incentive to the salesperson to make a sale using the tactics the scheme is trying to address*, the high turnover in the sector and the reliance on students, points to systemic issues within competitive markets and the role of door to door sales, as a whole.

Further, we do not believe that marketing misconduct is limited to, or entirely attributable to, individual energy salespersons – so-called “bad apples”. In the case where an individual marketer has committed poor conduct, we highlight the training or instructions given to these salespersons (sometimes verbal rather than in writing) and, as above, the incentives offered to marketers through the commission salary structure. While there may well be “bad apples”, the energy retailer is also often responsible for the conduct of an individual salesperson.

As we have raised before, there is the potential for the industry to develop effective measures to help address current problems associated with door to door energy marketing. We reiterate that examples might include establishing a consumer do not knock register, taking on additional marketing and sales training and monitoring requirements, adopting revised salary incentives for sales agents and/or placing an onus on the seller to ensure that the consumer has understood what has been presented. These could form part of a more effective industry code, one which has clear consumer objectives and imposes obligations beyond existing legal requirements.

## **Code of Practice**

We continue to have significant concerns with the object of the Code – specifically that it is designed to ‘enhance’ and ‘improve’ compliance with existing Federal and State regulatory frameworks. The Code mentions on several occasions (sections 2.3 and 3) that it applies ‘to the extent that it is consistent with applicable Laws’, and effectively therefore, little else..It is essential therefore that, in order for there to be public benefit, the Code actually works in terms of monitoring compliance.

This is demonstrated in the Code in sections 4.1, 5, 6, as examples which highlight the reliance on activities, including what sales agents are obliged to do at the door, that are already required under a number of laws and regulatory provisions. This is further demonstrated under section 16, which relates to the training of Sales Agents. Sales Agents must be trained in the EAL Standards and all relevant laws and regulations. The EAL standards, are 'consistent with all applicable laws', these requirements are redundant.

To achieve their objectives, the Code outlines a range of activities under section 1.2, for example, enforcement of non-compliance from the Code via disciplinary measure and deregistration. We would query the likely effectiveness of these measures in particular, the extent to which these provisions, and sanctions, enable improvements in compliance.

Section 2.5 of the Code also outlines that the Code 'sits alongside Applicable Laws', and then goes on to confirm that consumers can complain about the behavior of a Sales Agent 'to either the relevant Energy Retailer in the first instance, or to the applicable energy ombudsman should they choose to do so'. We are concerned that the Code, in this instance, could act to limit consumer access to external dispute resolution (EDR), as distinct from reducing the need for it, ie it will divert consumers off into another process when really they should go to EDR. We would query what measures there are in the Code to robustly reassure regulators that problems are being solved, not that consumers are being headed off from EDR.

Further, the discussion of breaches 1, 2 and 3 within the EAL Standard prioritise breaches with little reference to the impact on consumers. While we agree with the seriousness of those issues in Level 3, many of the breaches in Level 1 and 2 are equally serious based on their impacts on consumers, including the misrepresentation, whether by mistake or not, that a discount does not apply to 'that particular customer'. This is a misrepresentation under law and likely to be a significant inducement to customers.

### **Recommendation**

Consumer Action continues to recommend that the ACCC refuse to authorise the applications.

We have stated previously that we would support the industry beginning a process of developing a new and more effective proposal to return to the ACCC for authorisation at some point in the future, but we believe that the current applications do not justify ACCC authorisation at this time. Further, they could lead to increased public detriment, including costs, without corresponding public benefit.

Should you have any questions about our submission, please contact Janine Rayner of our Centre on 03 9670 5088.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink that reads "Janine Rayner". The signature is written in a cursive, flowing style.

Janine Rayner  
Senior Policy Officer - Energy