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2 June 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; darrell.channing@acc.gov.au;
neil.howes@acc.gov.au; adjudication@acc.gov.au

Dear Mr Chadwick,

Energy Assured Limited applications for authorisation A91258 & A91259

We refer to the submissions made by interested parties and added to the public register since 25 May 2011 relating to the revised EAL Scheme (**scheme**) documentation submitted on 13 May 2011, and to the request for further information by the ACCC on 31 May 2011.

EAL appreciates the opportunity to respond to these submissions, particularly the submissions lodged by the Energy and Water Ombudsman Victoria (EWOV), Consumer Affairs Victoria (CAV), the ACCC and:

- the Public Interest Advocacy Centre (PIAC);
- the Consumer Utilities Advocacy Centre (CUAC);
- the Queensland Council for Social Services (QCOSS);
- the Queensland Council for Social Services (QCOSS); and
- the submission from Mr Chris Connolly.
(**consumer group submissions**).

EAL appreciates and acknowledges the submissions in support to the scheme from the Energy and Water Ombudsman NSW (EWON), EWOV and Australian Power & Gas.

1 Consumer protection is an EAL priority

- 1.1 As previously stated, the scheme has been developed with the protection of consumers as the key objective. A good door-to-door sales experience is a priority for EAL. The effectiveness of the scheme and fruits of the already substantial investment made by the industry in the scheme will not be realised if energy consumers do not also benefit.

- 1.2 EAL made significant alterations to the Scheme documentation to incorporate feedback from both the ACCC and submissions from consumer groups in earlier rounds of consultation under the authorisation process. These were submitted to the ACCC on 13 May 2011. EAL is also willing to address many of the comments received in the current consumer group submissions, and from EWOV, CAV and ACCC (as is set out in Part 3 of this letter and Annexure A of this letter).

2 Public benefit and unanimous Ombudsman support

- 2.1 EAL repeats and relies on the correspondence and submissions made by EAL in the course of its applications for authorisation in regards to the public benefits of the scheme. EAL also submits, as discussed with the ACCC, a further revised Code of Practice and Procedures Guideline that incorporates changes highlighted in this letter.
- 2.2 The scheme has strong Ombudsmen support. As independent bodies with significant experience in dispute resolution, investigation and complaint handling, specifically in the energy industry, that support is extremely relevant to, and should be given significant weight in, the assessment of likely net public benefit under the scheme.

3 Specific matters raised in submissions

- 3.1 EAL has considered and sought to comment on most of the feedback received in the consumer group submissions, CAV, EWOV and ACCC submission and correspondences.

EAL Standards

- 3.2 In the latest round of submissions, CAV recommends that if the Code was to go beyond legislative requirements that clause 4.1 (7) should reflect the requirement to notify the consumer that if asked to leave the consumer's premises, the sales agent cannot return for 30 days. This has now been reflected in 4.1 (8) of the Code.

Consumer awareness

Information provided to all consumers

- 3.3 As detailed extensively in previous submissions, EAL is of the view that the obligations on members to promote the Code to ensure effective consumer awareness has been adequately addressed within the Code.
- 3.4 As previously stated, current AEMO data indicates that over 1.5 million customers elected to switch providers in the 2010 calendar year.¹ Of these, more than 50% (approximately) affected the switch due to door-to-door sales. That means that in 2010, the scheme would have resulted in the distribution of at least 750,000 scheme brochures (as all customers that enter into a contract must be given EAL Marketing Material).

¹ Source: AEMO Retail Transfer Statistical Data, http://www.aemo.com.au/data/retail_transfers.html.

- 3.5 Approximately 40,000 premises are knocked on each day in the energy industry. That amounts to over 12 million premises per year (assuming selling occurs 6 days per week). As submitted by Simply Energy in its letter dated 4 March 2011, it would not only be extremely costly to provide each door-knocked consumer with information about the Code, it would be impractical. For example, Sales Agents cannot carry a significant number of pamphlets with them and a consumer may refuse to accept information about the Code. The negative environmental impact is also a relevant consideration.
- 3.6 That said clause 9.4 of the Code does make provisions for EAL to embark on other promotional, marketing or advertising campaigns that are necessary to ensure that the Code is understood and visible to all parties, inclusive of consumer groups. This is one of the factors that ensures the effectiveness of the scheme and will form part of the review conducted by the Independent Firm in clause 13 of the Code. In addition to this EAL submits that it has inserted in clause 10.1 (10) the requirement of members to provide consumers the EAL Marketing Material where a consumer has expressed an interest to enter into a contract, as referred to in the correspondence from the ACCC on 31 May 2011.
- 3.7 Furthermore, as previously submitted, members may elect to adopt the recommendations of EWOV or may elect to provide the EAL Marketing Material to all consumers that switch to them (whether through door-to-door sales, some other sales channel or because the customer moves house). However, to enshrine these requirements in the Code, as a condition for Authorisation, would be cost prohibitive on members and may impede participation in the scheme, particularly by smaller energy retailers, as discussed with the ACCC on 31 May 2011.

Stakeholder Working Group

- 3.8 Submissions welcomed the insertion of the Stakeholder Working Group (**working group**) however raised concerns as to whether the working group would;
- a) be involved in determining the scope of the two-yearly Code review; and
 - b) be influential in the development of the Code.
- 3.9 EAL submits that the operation and objectives of the working group are clearly defined and outlined in clause 11 of the Code. As EAL is designed as an industry self regulatory Code, the determination of the scope of the review by EAL, the Code Manager and the Code Panel is entirely orthodox. That said the working group will have input into the scope, and the scheme itself, by making recommendations to both EAL and the Code Panel, in accordance with clause 11.2 of the Code.

The Scheme's Complaints and Sanction Processes

Classification of complaints received about Sales Agents

- 3.10 EAL takes very seriously the concerns raised by the consumer groups in regards to assertions that Sales Agents intentionally mislead consumers into signing contracts to secure a sale. EAL has addressed this concern comprehensively in the Code by

appropriating such conduct as a Level 3 breach, which results in the Sales Agent being deregistered from the scheme for 5 years.

- 3.11 EAL is concerned about comments raised in some recent submissions that examples of breaches provided for in Level 2 Breaches that are as a direct result of a **genuine** mistake by a Sales Agent are in fact intentional. As discussed in our meeting with the ACCC on 20 April and 31 May 2011, the Level 2 Breach exists to give Sales Agents that make a genuine mistake the chance to correct improper behaviour (where the breaches are not wilful or examples of gross misconduct), so that unwarranted dismissal and deregistration from the industry does not result. To simply deregister a Sales Agent because of a genuine or honest mistake surely does not pass the test of natural justice. Deregistration is a serious penalty that could deprive a Sales Agent of their livelihood for some time. That said two Level 2 Breaches in the course of six consecutive months will warrant Deregistration.
- 3.12 Furthermore, the Code has been enhanced that where it has been detected that a Sales Agent has committed a breach of the Standards that an appropriate review is conducted in accordance with clause 20.4 of the Code, and that the relevant energy regulator is notified on the breach in accordance with clause 20.5. EAL appreciates CAV's comments in regards to ensuring that the review should not prevent a member reporting a serious breach to the energy regulator that is a serious breach of the law, such as forgery or fraud. EAL submits that clause 7.17 of the Code sufficiently addresses this concern.

EAL Complaint's Process – who can bring a complaint against a member

- 3.13 EAL relies on previous submissions made in regards to individual consumers making complaints to the Code Manager about members. EAL has not been established as a dispute resolution body; this is effectively handled by the relevant jurisdictional ombudsman and the relevant regulator. To provide another avenue for the making of consumer complaints about members would be to duplicate the regulatory and ombudsman complaint processes already in place. In addition to being wasteful, it could risk creating consumer confusion.
- 3.14 Pursuant to the recent correspondence from the ACCC, EAL appreciates that on certain occasions a consumer may contact the Code Manager in regards to a member complaint. EAL has made further enhancements to the Code by inserting clause 26.2 and 26.3 in the Code making it more explicit as to how complaints made by consumers on members will be dealt with under the Code.

Transparency of Information & Public Reporting

- 3.15 In its latest correspondence, the ACCC welcomed the increase in transparency of reporting on compliance, particularly in relation to the results of the audits. The ACCC made reference that the annual compliance audits will be provided to the relevant energy regulator and the energy ombudsman. EAL submits that whilst the relevant energy regulator will be supplied with a detailed report of findings for each Energy Retailer in accordance with clause 24.5, only the consolidated report of results would be supplied to the relevant energy ombudsman in accordance with clause 24.6.

- 3.16 EWOV in its submission recommended that the ACCC authorisation be granted conditional with timely information to be provided to stakeholders on breaches and sanctions imposed. In its latest correspondence with EAL, the ACCC also asked “whether EAL could report more frequently on compliance with the Code to the relevant energy regulator and the energy ombudsman”. EAL submits that transparency and reporting under the Code has already been significantly enhanced above current regulatory requirements, as follows:
- a) EAL board in accordance with provisions contained in clause 9.6, 10.2 (9), 11, 13, 24.6, and Sanction 2 to 6 of clause 28;
 - b) energy regulator in accordance with provisions contained in clause 9.6, 9.7, 11, 13, 19.8, 20.5, 24.5, 27.3, 28, and in particular 10.2 (9) which provides the energy regulator with quarterly updates on compliance issues;
 - c) ombudsman in accordance with 9.6, 10.2 (10), 11, 13, 24.6, and Sanction 3 to 6 of clause 28 and in particular 10.2 (9) which provides the ombudsman with quarterly updates on compliance issues;
 - d) consumer associations and advocacy groups in accordance with clause 9.6, 11, 12, 13, 24.6, and Sanction 5 to 6 of clause 28; and
 - e) consumers in accordance with clause 9.6 and Sanctions 5 and 6 of clause 28.

Sanctioning EAL Members

- 3.17 Pursuant to the ACCC draft determination, EAL made wholesale changes to the sanctions process applicable to members and has particularly sought to limit the discretion afforded to the Code Manager and Panel through:
- a) greater guidance on the sanctions available to the Code Manager and Panel;
 - b) what triggers an investigation by the Code Manager, and any subsequent action taken if the breach is discovered; and
 - c) revising the sanctions applicable to members, particularly by increasing a member’s exposure to be “named and shamed” to the EAL board for any Sanction above a Sanction 1, and to the ombudsman and energy regulator for any Sanction above a Sanction 2.
- 3.18 EAL relies on its letter dated 17 March 2011 and submits that the sanctions are sufficiently strong and does not agree with comments made in recent submissions that “the sanction process set out in the revised Code provides very little, if any, incentive to members to comply with the EAL code of practice” as stated by QCOSS. It must be noted that the Code is separate to the rights of any relevant energy regulator to take enforcement action in accordance with its powers and functions as highlighted in clause 23.4 of the Code.
- 3.19 QCOSS submits that 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. In making a determination as to which Sanction to impose, clause 28.4 of the Code states that the Code Manager must have regard to any previous Warning Notice or Sanction imposed on the member in the past two years. Where a member has been issued various Warning Notices the Code Manager may issue the member a Warning Notice under clause 27.2 stipulating that any further Warning Notices will result in a Sanction 4 being issued. Compliance by members, and the transparency of

this process, is further enhanced by sharing the number and nature of Warning Notices and proposed sanctions to all relevant parties in accordance with clause 10.2 (9), ensuring the effectiveness of the Sanctions Process is maintained.

- 3.20 QCOSS also highlights that due to the cascading effects of the sanctions it is impossible to ever reach the criteria for imposing a Sanction 4. EAL submits that the monthly reports are only one trigger that instigates investigations by the Code Manager as detailed in clause 26.1. The sanctions do not escalate based on one particular breach. Irrespective as to the underlying breach that is attributed to a particular sanction, the Code Manager or Panel may determine that a different sanction be recorded based on the flow chart provided in Annexure B of the Code.
- 3.21 In its latest correspondence with EAL, the ACCC welcomed the improvements in transparency around the reporting of sanctions and sought to clarify whether there was further scope to include public reporting on sanctions below a level 5. EAL submits that the sanctions as provided in the Code are sufficiently strong to encourage compliance with the scheme, in particular as any sanction above a sanction 1 requires the naming of the member, be it to the EAL board for a Sanction 2 upwards or to the relevant regulator or ombudsman for a Sanction 3 upwards. Information provided in the Annual Report, in accordance with clause 9.6, and at the Stakeholder Working Group, in accordance with clause 11, would help ensure further transparency.

Definition of Systemic Issues

- 3.22 The definition provided in the Code is to delineate between breaches that are considered operational in nature (minor and serious) as compared to those that are in direct contravention of the EAL Standards by a Sales Agent, or numerous Sales Agents, which impact directly on consumers (be it material or systemic). That said, EAL has reviewed the examples provided for in clause 28.2 and the definitions in clause 28.3 and has made changes to these clauses to enhance the distinct delineation of categorisation of breaches attributable to members. These changes are reflected in the Code.
- 3.23 A **systemic problem**, as universally defined, is a problem that arises due to an issue(s) inherent in the overall system, rather than due to a specific, individual or isolated factor². In the example provided for by EWOV in its submission, EAL submits that where a Sales Agent makes statements that are intentionally misleading or deceptive in nature, however, is considered to be isolated to that particular Sales Agent, then this should not be considered a systemic issue where it is found that a member had appropriate controls (systems) in place to ensure that the breach did not occur. However, where a member cannot demonstrate that it had appropriate controls (systems) in place, or that the controls (systems) that it had in place were not properly administered, then this is an inherent problem in the member's overall system and would be classified as a systemic breach under the Code.
- 3.24 Where numerous Sales Agents are making statements that are intentionally misleading or deceptive in nature and impacts, or has the potential to impact, a large number of customers, then this highlights a potential problem in the overall system

² http://en.wikipedia.org/wiki/Systemic_problem

(for example, however not limited to, poor training practices) and is defined as a systemic issue under the EAL Code.

- 3.25 To define a systemic issue as suggested by EWOF is unwarranted and impracticable under the Code. If EWOF's recommendation were to be adopted there is an unacceptable risk that Level 2 or Level 3 Breaches that are isolated in nature, despite no inherent issue in the overall system of the member will record a Sanction 3 against the member, pursuant to the initial Warning Notice being issued. Furthermore, as only two Sanction 3's can be recorded against a member within 6 months, the appropriation of this type of breach to this Sanction will result in unnecessary audits on members as a Sanction 4 will be triggered. To enshrine this definition, as a condition for Authorisation, would be cost prohibitive on members and will impede participation in the scheme.
- 3.26 This said, all Level 2 Breaches by a Sales Agent does get reviewed by the Energy Retailer, in accordance with clause 20.4 and 20.5 of the Code.

The EAL Register

- 3.27 The Register and its internal process have been developed taking into account costs to members (through membership fees, Sales Agent registration fees and indirectly through compliance costs) of administering the scheme effectively. As such, certain parts of the system have been automated to assist with the reduction in administrative costs. EAL submits that the automated process will not undermine the reliability or utility of the scheme.
- 3.28 In accordance with clause 25.3, Energy Retailers are obliged to provide the Code Manager with detailed analysis as to the number of Sales Agents registered on the EAL Register through the monthly reports that detail the number of formal competencies undertaken for the month. The Code Manager has access to the data contained in the Register and can ascertain whether there are any discrepancies as to the amount of Sales Agents that have been awarded an Approved Status to the amount of Formal Competencies undertaken. Where a discrepancy is suspected this enlivens the disciplinary process contained in clause 26, 27 & 28 of the Code.

The Code Panel

Composition of the Code Panel

- 3.29 EAL submits a change in the composition size of the Code Panel. This change is to ensure that there is fairer representation of Panel Members amongst jurisdictional states to support the Code's governance framework. Clause 12 of the Code now consists of an additional Panel Member that must meet the following criteria

one person with relevant experience, at a senior level, in either a regulatory or government body that administers consumer laws or marketing codes that govern door-to-door sales activities or with relevant experience, at a senior level, in a Consumer Advocacy Group.

Consultation

- 3.30 The EAL membership spent significant resources on devising and redrafting the documentation, to address the various outstanding issues and concerns raised in the ACCC draft determination. As discussed with the ACCC, due to the tight statutory time frames, the Easter holiday break, and the EAL Board governance approval procedures, EAL had insufficient time to effectively consult with consumer groups. That said, we did hold information sessions with interested consumer groups and parties to table proposed enhancements to the Code, and where practical, made minor changes to the Code pursuant to those meetings.
- 3.31 In the recent information sessions with consumer groups, EAL did make a statement that it was seeking a 10 year authorisation period in its application. As a result of this, the Code had been developed to allow for it to evolve over time, as long as this did not result in any material change being made to the intent of any clauses - to which reauthorisation would be required. As means of illustration, clause 11.1 (5) allows direct involvement by the working group to categorise breaches by Sales Agents to the EAL Standards as they occur. Where a recommendation is accepted by EAL and the Code Panel, than this can be easily enlivened and communicated to all members and Sales Agents party to the Code, allowing for evolvment over time. Where recommendations are made, as example, to change the structure of the Level of breaches, or the sanctions under clause 28 (as an example), than this would be considered a material change to the Code or the intent of a clause and as such ACCC reauthorisation would be required. We have communicated this assumption to the ACCC and they have agreed with this interpretation.

Information Asymmetry and Pressure Selling

- 3.32 As stated in our letter of 13 May 2011, 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”.
- 3.33 APG in its letter of 24 May 2011 reconfirms this concern and further states that “whilst retailers benefit from a successful sale, if a sale is non-compliant or results in a customer complaint, retailers incur significant costs in managing and resolving the customer issue. Further if the non-compliance results in an ombudsman complaint the cost to retailers can exceed several hundred of dollars. Given the average margins from a residential customer (circa \$50) there is no incentive for retailers to tolerate non-complaint behaviour from its sales agents.”
- 3.34 In the letter from EAL to the ACCC of 13 May 2011, EAL did not deny the existence of a conflict of interest as suggested by CUAC rather that if a conflict of interest did exist than this should apply to all industries and all sales channels. Whilst over 50% of the 1.5 Million customers that elected to switch energy providers in the 2009/2010 financial year³ did so through door to door marketing, less than 6000 marketing

³ Source: AEMO Retail Transfer Statistical Data, http://www.aemo.com.au/data/retail_transfers.html.

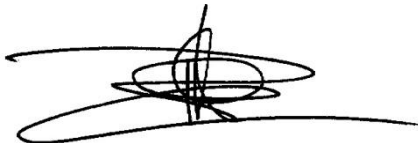
issues⁴ were raised about the marketing conduct of energy retailers to the various ombudsman schemes for that same period⁵. Whilst it is difficult to ascertain whether these are all attributable to door-to-door marketing, it is fair to say that overall, the experience of the majority of customers accessing market offers appears to have been a satisfactory one. However, conscious of the public face that door-to-door marketing has and the “essential services” characteristics of energy, the EAL Code has been developed to strengthen not only energy retailers compliance framework to the various regulatory and by-law schemes that govern door to door energy marketing, but also the energy marketing companies that they may use. Clause 1 of the Code clearly stipulates that the Code aims to:

- (1) promote consumer confidence in door to door sales in the energy industry;
- (2) provide consumers with a better overall experience in energy sales at the door;
- (3) improve the standards and effectiveness of door to door sales in the energy industry;
- (4) reduce the rate of Sales Complaints; and
- (5) discipline and/or remove “rogue” Sales Agents.

EAL requests that the ACCC consider this letter and the changes made to the EAL Code of Practice and the Procedure Guidelines, in support of this letter, as part of the Energy Assured Limited applications for authorisation A91258 & A91259.

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, consisting of several overlapping loops and a central vertical stroke, positioned below the text 'Yours sincerely'.

Ramy Soussou
Acting Chief Executive Officer

⁴ Source: Energy and Water Ombudsman (Victoria), Energy and Water Ombudsman of NSW, Energy Industry Ombudsman South Australia, Energy and Water Ombudsman Queensland 2009/2010 Annual Reports.

⁵ This equates to less than 0.01% of all customers that elected to switch energy providers through door to door marketing.

Annexure A

Section/Clause	Comments	EAL Comments
1.2(6)	Suggest that the word 'further' be removed.	This has now been addressed in the Code
EAL Procedures Guideline	Should 'maintenance' be 'maintaining'?	This has now been addressed in the Code
Code Supplements Existing Regulatory Regime	This section refers to 'jurisdictional regulators' only.	This has now been addressed in the Code
4.1(5)	Would this go better with 4.1(3)?	This is drafted in accordance to common practice.
4.1(7)	Suggest dividing this clause into two. The first half of the clause should start by stipulating when this information is to be provided i.e. '...as soon as practicable and in any event before starting to negotiate' as per the ACL. The second part of this clause should refer to applicable laws (see s.75 of the ACL).	This has now been addressed in the Code
5.1(3)(b)-(d)	Should there be a requirement to provide information on the customers' obligations with respect to electronic transfers as per the National Energy Retail Rules.	This has now been addressed in the Code
5.1(4)(b)	Sales agents no longer required to provide SIDN. Is this because the full name and company ID is sufficient?	Yes this is correct. The SIDN is more used for the EAL Register
7.16	Should marketing material be consistent with laws i.e. should this sentence be constructed the other way around?	This has now been addressed in the Code
9.4 (2)	Marketing material used by "sales agents" (not members)?	This has now been addressed in the Code
9.4(4)	This clause implies that members may develop their own marketing material on the code which contradicts clause 9.4(2). Please confirm that EAL will provide marketing material that will be used by members to promote the code as per clause 9.4(2). Also, are the clause references correct in this clause?	This has now been addressed in the Code
9.5(8)	The members of EAL were not included in the 'draft flyer' of the EAL marketing material provided to the ACCC on 17 March 2011. Please confirm whether EAL intend for this information to be included in the EAL marketing material.	This has now been addressed in the Code
11.2	As identified by EAL by way of a telephone call to the ACCC the second sentence in this clause should start 'EAL and the Code Panel...'	This has now been addressed in the Code
11.3	"The notice of invitation"	This has now been addressed in the Code
12.1(3)	"consumer advocacy ...". And this should be defined such that it does not unintentionally exclude certain groups.	This has now been addressed in the Code

12.6	<i>A member or members of the code panel will hear appeals against sanctions on members and sales agents in accordance with clauses 29 and 30.</i>	This has now been addressed in the Code
14.(2) table	Can 'experienced sales agent' be defined in the dictionary in the code?	This has now been addressed in the Code and the Procedures Guideline
18.2	Query whether it is appropriate to call this process independent given that the retailer can still conduct this process.	The process is called independent as it is independent to the Sales Agent. It is quite common to have a separate verification (quality control) team within a business
18.3	Is 'mystery shopping' the correct term here?	Yes this is the correct terminology used by industry.
27.3	Not clear who this obligation is imposed on.	This has now been addressed in the Code
Dictionary		
EAL scheme	This term does not appear to be used in the scheme and could potentially be confusing given that the word scheme is used elsewhere in the code	This has now been addressed in the Code
Annex A	Suggest removing ' <i>public detriment of the EAL scheme</i> '	This has now been addressed in the Code
Annex B	Doesn't mention that the code manager or code panel (as the case may be) has to take into account costs of compliance for members etc as per clause 28.4(3).	This has now been addressed in the Code