



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Energy Assured Limited**

**in respect of**

**a scheme to self regulate door to door energy sales**

**Date: 23 June 2011**

**Authorisation no.: A91258 &  
A91259**

**Public Register no.: C2010/970**

**Commissioners:** Samuel  
Kell  
Schaper  
Walker  
Willett

## Summary

The ACCC grants authorisation to Energy Assured Limited (EAL) for its members to adopt and comply with a scheme to self regulate door to door energy sales that are undertaken on behalf of electricity and gas retailers. The ACCC grants authorisation until 14 July 2014.

Energy Assured Limited (EAL) has sought authorisation for a scheme to self regulate door to door energy sales that are undertaken on behalf of electricity and gas retailers. The scheme purports to ensure better standards in door to door energy sales through the training and accreditation of door to door sales agents as well as self regulating the conduct of door to door sales agents and energy retailers (EAL members) in their dealings with consumers.

On 11 April 2011, the ACCC released a draft determination proposing to deny authorisation for the scheme. The ACCC considered that the scheme was underdeveloped and deficient in a number of areas, and therefore it was not clear that the public benefits of the scheme would be realised. The ACCC also took the view that the potential for consumer confusion due to the lower level of protection offered to consumers under the scheme relative to the level of protection offered by existing regulation would lead to a public detriment.

EAL has now significantly revised the scheme to address the concerns set out in the ACCC's draft determination.

The ACCC considers that the scheme as it now stands is likely to result in public benefit by:

- improving the levels of compliance with laws applying to the door to door selling of energy to consumers
- better informing consumers about their rights and sales agents' obligations in door to door selling of energy and
- reducing the impact of pressure selling practices

The ACCC also considers that the scheme effectively addresses the potential conflicts of interest faced by sales agents and energy retailers as a result of the remuneration structure, particularly in the context of door to door selling.

In reaching these views, the ACCC has taken into account that:

- there are a number of mechanisms which are likely to promote consumer awareness of the scheme
- the scheme is consistent with the same standards required by the law, thereby minimising the risk of consumer confusion
- the central register of accredited sales agents, and standardised recruitment, training and monitoring are likely to ensure compliance with the scheme and improve the conduct of sales agents working in the industry, with the potential to increase consumer confidence
- the scheme contains appropriate sanctions on both sales agents and energy retailers which are likely to incentivise members to comply with the scheme.

The ACCC is of the view that EAL's revisions to the scheme mean that it is likely to result in limited public detriment.

EAL has sought authorisation for ten years. The ACCC considers that the realisation of public benefit will depend on the extent to which the key elements of the scheme are effective in practice. Given that the scheme is newly developed and therefore there is some uncertainty as to how it will operate in practice, the ACCC considers that an early review of the scheme is warranted. Accordingly, the ACCC grants authorisation for three years. In reaching this view, the ACCC notes that a three year authorisation period is:

- consistent with the ACCC's approach to other new industry codes such as the Generic Medicines Industry Association Code of Practice and the Australasian College of Cosmetic Surgery Code of Practice
- consistent with the fact that many other industry codes have regular review periods built into them – indeed, the ACCC notes that the EAL code includes a two year review mechanism, and
- an appropriate timeframe in which to review how the scheme is interacting with the new national energy retail law and the Australian Consumer Law.

Should EAL seek re-authorisation of the scheme after three years, the ACCC considers that the following issues warrant careful review at that time:

- the consumer awareness aspects of the scheme
- the categorisation of sales agent breaches by members (particularly the extent to which there are any instances of unintentional or mistaken misleading and deceptive conduct)
- the extent to which retailers self-report systemic issues to the code manager
- the definition of systemic issues under the scheme
- the use of warning notices in the sanctions process
- the effect on sanction decisions of the requirement for the code manager to consider compliance costs to retailers in determining sanctions
- the level of reporting on member compliance to the public and to the regulator.

If no application for review of the determination is made to the Australian Competition Tribunal, the determination will come into effect on 15 July 2011.

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## List of abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
Act	Prior to 1 January 2011, the <i>Trade Practices Act 1974</i> and, as of 1 January 2011, the <i>Competition and Consumer Act 2010</i> .
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
AGL	AGL Energy Limited
BSL	Brotherhood of St Laurence
CALC	Consumer Action Law Centre
CAV	Consumer Affairs Victoria
code	EAL code of practice
CSV	COTA Senior Voice
CUAC	Consumer Utilities Advocacy Centre
EAL	Energy Assured Limited
EIOSA	Energy Industry Ombudsman South Australia
ERAA	Energy Retailers Association of Australia Limited
ESCV	Essential Services Commission Victoria
EWON	Energy and Water Ombudsman New South Wales
EWOQ	Energy and Water Ombudsman Queensland
EWOV	Energy and Water Ombudsman Victoria
FRC	full retail contestability
IPART	Independent Pricing and Regulatory Tribunal of New South Wales
NEM	national electricity market
OFGEM	Office of Gas and Electricity Markets (Great Britain)
QCOSS	Queensland Council of Social Service

scheme	Consists of three documents: EAL constitution, EAL code of practice, EAL procedures and guidelines
Tribunal	Australian Competition Tribunal
UCA	Uniting Care Australia

# 1. The application for authorisation

- 1.1. On 29 October 2010, Energy Assured Limited (EAL) lodged applications for authorisation A91258 and A91259 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act)<sup>1</sup>. The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC’s consideration of these applications is contained in Attachment B.
- 1.3. Application A91258 was made under section 88(1A) and 88(1) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
  - make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 1.4. Application A91259 was made under section 88(1A) and 88(1) of the Act to:
- make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
  - make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.5. In particular, EAL applied for authorisation for its members to adopt and comply with a proposed scheme to self regulate door to door sales that are undertaken on behalf of electricity and gas retailers.

## The scheme

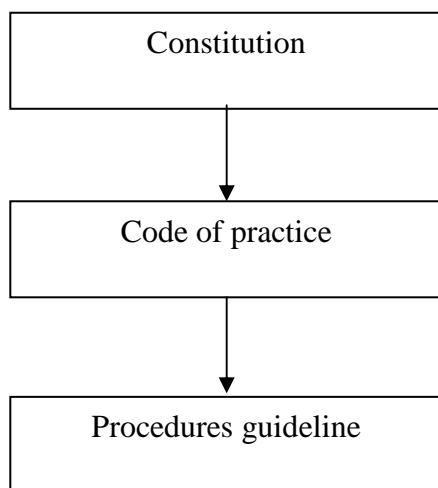
- 1.6. The scheme is designed to improve the levels of compliance in relation to the door to door marketing of energy thereby reducing sales complaints and promoting consumer confidence. EAL has also submitted that the scheme may remove some of the burden on regulators to undertake monitoring and enforcement action.

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<sup>1</sup> The title of the relevant trade practices legislation has changed. As of 1 January 2011, the Trade Practices Act 1974 is now cited as the *Competition and Consumer Act 2010*.

- 1.7. The scheme consists of three documents: the EAL constitution, the EAL code of practice, and the EAL procedures and guidelines. The relationship between these documents is illustrated in Figure 1.1. Copies of these documents are available from the ACCC website. The ACCC’s understanding of each of these documents and the way the scheme operates is discussed below.

**Fig 1.1: Documents that comprise the EAL scheme**



***EAL constitution***

- 1.8. The EAL constitution provides for the establishment of EAL. It sets out the objectives of the company, membership requirements and decision making and governance arrangements. The EAL constitution binds all members to the code of practice.

***EAL code of practice***

- 1.9. The EAL code of practice is the key document and focal point of the scheme.
- 1.10. The code sets out standards that sales agents must comply with in conducting door to door sales. These are referred to as the EAL standards. They include matters such as:
- requiring a sales agent to identify themselves, the energy retailer they represent and their purpose when in contact with consumers
  - requiring a sales agent to provide information on the consumers right to terminate a contract during the applicable cooling off period, and
  - the sales agent must not provide the consumer with information that is misleading or deceptive.

Members are also responsible for ensuring that these standards are complied with.

- 1.11. To this end, the EAL code of practice provides for requirements on the registration, accreditation, recruitment, training, assessment and monitoring of sales agents by members.



- 1.12. Members must register and list the accreditation status and details of sales agents employed by them on a central register.
- 1.13. Members must ensure that sales agents employed by them have satisfied the vetting requirements prescribed in the scheme, inclusive of proof of identification, criminal history checks and reference checks.
- 1.14. Members must ensure that sales agents undertake on the job and off the job training to appropriate levels of competency and undertake a formal competence assessment before permitting the sales agent to undertake sales activities.
- 1.15. To monitor sales agents the code of practice requires energy retailer members to operate a sales complaint handling process. The purpose of the sales complaint handling process is to receive, record and action sales complaints from consumers.
- 1.16. Retailer members are also required to have additional procedures in place to monitor sales agent behaviour including an independent post-sale verification procedure on all consumers that enter into a contract with the retailer, random field assessments of sales agents, and annual formal competence assessments of sales agents.
- 1.17. The code also provides for the categorising and recording of established breaches of the code by sales agents and the process for deregistering a sales agent. The code allows a sales agent to appeal a decision of the code manager to deregister a sales agent.
- 1.18. In addition to setting out processes for monitoring the behaviour of sales agents the code sets out arrangements for monitoring and reporting on member compliance with the scheme. Mechanisms to monitor member compliance include monthly reporting by the energy retailer to the code manager and annual independent compliance audits of the retailer. Complaints about members to the code manager will also provide a mechanism for monitoring member compliance with the scheme.
- 1.19. The code provides for sanctions for member non compliance and sets out the process for this including guidance on the level of breach to be imposed.
- 1.20. The code also sets out administrative arrangements, and arrangements for the promotion and review of the code.

### ***EAL procedures guideline***

- 1.21. The EAL procedures guideline sets out the procedures, principles and processes that underpin the code of practice for the registering and maintenance of sales agents on the EAL register and recruiting, training and assessing of sales agents.

### ***Changes to the scheme prior to the draft determination***

- 1.22. As discussed in chapter 3 of this determination, the ACCC engaged in an extensive public consultation process in response to EAL's application for authorisation.

- 1.23. A number of interested parties raised significant concerns with the EAL scheme. These concerns included the scope and accessibility of information to be provided to consumers about the code, inadequate training for sales agents, a lack of proactive monitoring of sales agents (with the scheme primarily relying on complaints to monitor sales agents' behaviour) and inadequacies of the complaints and sanctions processes. In addition, submissions also raised concerns about the lack of consultation undertaken by EAL in developing the scheme prior to lodging the application for authorisation.
- 1.24. The ACCC wrote to EAL on 10 December 2010 seeking clarification about the operation of many aspects of the scheme. In response to a number of these concerns, EAL provided indicative examples of how it was anticipated that these aspects of the scheme would operate. However, at that time much of the work in some of these key areas was still to be done and specific details about how some aspects of the scheme would operate were still to be determined.
- 1.25. The ACCC met with EAL on 31 January 2011, and on 4 February 2011 the ACCC expressed significant concerns in writing about the proposed scheme. Broadly, the ACCC's concerns related to the lack of clarity about the information that would be provided to consumers about the scheme, ambiguity in the scheme and the level of discretion available to decision makers and members.
- 1.26. The key areas where the ACCC expressed concerns related to:
- information to be provided to consumers about the scheme
  - compliance monitoring and reporting
  - complaints processes.
- 1.27. The ACCC expressed the view that addressing these concerns would be likely to require a substantial review of the structure and content of the scheme. The ACCC also indicated that consideration needed to be given to the way in which key sections of the scheme interacted, as well as the relationship between the scheme and external regulatory mechanisms (e.g. state energy ombudsmen schemes).
- 1.28. In addition, the ACCC noted that there were a range of provisions in the code and related documents that were ambiguously worded and open to a variety of interpretations, or where a high degree of discretion was available to decision makers or members such that the operation of the code was unclear. The ACCC noted that such ambiguity was likely to adversely impact on the effective operation of the scheme.
- 1.29. In response to these concerns, EAL reviewed the structure and operation of the scheme and made what it described as 'wholesale changes' to the underlying documentation that supports the scheme. EAL submitted an amended application for authorisation reflecting these wholesale changes on 11 February 2011.
- 1.30. In light of these changes, and to allow the ACCC sufficient time to assess and consult on EAL's revised application for authorisation, EAL gave the ACCC an assurance that it would agree to extend the statutory timeframe for release of a final determination until 30 June 2011.

1.31. EAL seeks authorisation for a period of ten years.

### **Other parties**

1.32. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. EAL has named current and future EAL members as parties to the proposed arrangements.

### **Draft determination**

1.33. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.34. On 11 April 2011, the ACCC issued a draft determination proposing to deny authorisation to Energy Assured Limited.

1.35. The ACCC was of the view that the majority of public benefits asserted by EAL were either unlikely to be realised or did not extend or add to the consumer protection framework already provided for in the current regulatory environment. For example, the scheme requirements around the provision of information to consumers did not extend protection beyond the requirements in existing laws and regulations, and indeed in some respects did not go as far as those provisions.

1.36. The ACCC's fundamental concern with the scheme was that energy retailers who benefit from the activities of door to door sales agents were not sufficiently accountable for the actions of the agents that they employ and that this manifested itself in a number of ways. For example:

- consumer groups and consumers were unable to make a complaint about members under the scheme
- there was discretion as to how member compliance with the scheme would be monitored and enforced
- the sanctions processes did not appear sufficiently rigorous to deter non-compliance, particularly in regard to member non-compliance and
- there was a lack of transparency of reporting on member compliance with the scheme.

1.37. The ACCC considered that these aspects weakened the incentives for EAL members to comply, or to invest in the resources required to ensure full and effective implementation of the scheme.

1.38. In addition, the ACCC considered that the potential for consumer confusion due to the lower level of protection offered to consumers under the scheme relative to the level of protection offered by existing regulation would lead to a public detriment.

- 1.39. In making its draft decision, the ACCC considered whether it would be appropriate to grant authorisation subject to conditions. However, the ACCC considered that the scheme was not sufficiently developed and therefore it would be difficult to articulate effective conditions at that stage.
- 1.40. Following the release of the draft decision the ACCC sought confirmation of EAL's assurance to extend the statutory timeframe for release of a final determination until 30 June 2011. On 12 April 2011, EAL formally agreed to this extension.
- 1.41. A conference was not requested in relation to the draft determination.

### **Changes to the scheme after the draft determination**

- 1.42. In response to the draft determination EAL reviewed the structure and operation of the scheme and made further changes to the underlying documentation that supports it. This revised scheme was submitted to the ACCC on 13 May 2011. EAL stated that many of the changes to the documentation formalise procedures that address concerns raised in the draft determination.
- 1.43. In response to submissions on the revised scheme and requests for further information from the ACCC, EAL submitted further revised schemes on 3 June 2011 and 21 June 2011. It is this most recent version of the scheme that is before the ACCC for consideration. EAL seeks authorisation for a period of ten years.
- 1.44. The key changes in the revised scheme include:
- the incorporation of existing legislative requirements into the code
  - clarification on the operation of mechanisms to monitor sales agent behaviour
  - greater guidance on the categorisation of breaches of the code by sales agents and members
  - increased guidance to the code manager on the identification of member breaches and when it should investigate matters
  - increased transparency around the member sanctions process (including that a warning notice will be issue prior to any sanction being imposed on a member)
  - a revision of member sanctions
  - increased measures for consultation with and reporting to stakeholders, and
  - merging the Code of Practice and Complaints Process documents into one document.

## **2. Background to the application**

### **The applicant**

2.1. EAL is a non profit company limited by guarantee, whose founding members are:

- the Energy Retailers Association of Australia Limited (ERAA)<sup>2</sup>
- Australian Power and Gas Pty Ltd, and
- AGL Energy Limited (AGL)

2.2. EAL's other members will be licensed electricity and gas retailers (energy retailers) and marketing companies that conduct door to door sales on behalf of energy retailers (energy marketers). All energy retailers and energy marketers will be eligible to become a member of EAL. EAL expects that the majority of energy retailers and energy marketers in Australia will become EAL members.

2.3. EAL has been established to:

- establish, implement and manage an agreed standard for the door to door marketing activities by its members in respect of gas and electricity retail contracts to consumers
- develop and facilitate training programs to provide members with the knowledge and capabilities necessary to maintain the standards required by the scheme and to in turn deliver their own on-going training of door to door sales agents
- administer a register of accredited sales agents
- develop and implement procedures and processes to monitor and assess the conduct of sales agents, and
- manage a complaints process and enforce appropriate sanctions on sales agents and members when necessary.

### **Energy retailing**

#### **Background**

2.4. Until the late 1980s, the electricity supply industry comprised publicly owned, vertically integrated monopoly suppliers.

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<sup>2</sup> The ERAA is a peak body representing electricity and gas retailers in the national energy markets.

- 2.5. In the early 1990s, Australian governments embarked on reforms to establish a competitive energy sector. These included:
- structural separation of the potentially competitive parts of the energy supply chain from the monopoly infrastructure
  - corporatisation and privatisation of government owned businesses
  - enabling access to monopoly infrastructure
  - the establishment of a wholesale national electricity market (NEM) in Victoria, New South Wales, South Australia, Tasmania and the Australian Capital Territory, and
  - the opening of retail markets to contestability.
- 2.6. The development of a competitive energy retail sector has involved the introduction of full retail contestability (FRC). Full retail contestability is achieved when all ‘consumers’<sup>3</sup> are permitted to enter a retail contract with a retailer of their choice. All states participating in the national electricity market apart from Tasmania have introduced FRC.
- 2.7. While most jurisdictions have introduced FRC, a competitive market can take time to develop. As a transitional measure price cap regulation continues to apply in several jurisdictions. All jurisdictions participating in the NEM except Victoria apply some form of price cap regulation for electricity services. New South Wales and South Australia apply similar arrangements in gas. Australian governments have agreed to review the continued use of price caps and to remove them if effective competition can be demonstrated.
- 2.8. State and territory governments are responsible for regulating retail energy markets. Governments agreed in 2004, however, to transfer several non-price regulatory functions to a national framework that the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) will administer. This national energy customer framework is expected to commence in participating states and territories on 1 July 2012. States and territories will still retain responsibility for the control of regulated prices.

### **Retail market structure**

- 2.9. Energy retailers buy electricity and gas in wholesale markets and package it with transmission and distribution services for sale to consumers.
- 2.10. Energy retailers are required to have a licence to sell energy to ‘small consumers’<sup>4</sup> in a particular state or jurisdiction. Where a retailer supplies energy to consumers it is said to be ‘active’. There are approximately 21 active retailers in states participating in the NEM at the moment.

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<sup>3</sup> A consumer has the same meaning as customer in the context of this paper.

<sup>4</sup> Small consumers are residential consumers and small business consumers as defined under national and state and territory energy legislation

- 2.11. There is a mixture of private and government owned businesses in the sector. Three privately owned retailers — AGL, Origin Energy and TRUenergy — are the three largest retailers nationally and have a presence in the majority of states. Simply Energy and Lumo Energy are significant private retailers in some jurisdictions. There are some government owned energy retailers. For example, Aurora, which provides electricity to consumers in Tasmania, is owned by the Tasmanian government. ActewAGL is a joint venture between the Australian Capital Territory government and AGL.
- 2.12. While governments introduced reforms to structurally separate the energy supply industry, the sectors have significant ownership links. In particular, significant vertical integration exists between energy retail markets and upstream energy production.
- 2.13. In addition, the Queensland and Tasmanian governments own joint distribution – retail businesses. The Australian Capital Territory government has ownership interests in both the host energy retailer and distributor. If links exist between retail and network sectors, regulators apply ring fencing arrangements to ensure operational separation of the businesses.

### **Consumer awareness and participation**

- 2.14. Research conducted in 2007 and 2008 for the AEMC shows that consumer awareness of their ability to switch energy retailer is high with 94% and 82% of residential consumers in Victoria and South Australia respectively aware of their ability to switch electricity retailer.<sup>5</sup> Similarly, the Independent Pricing and Regulatory Tribunal of New South Wales (IPART) reported that 92% of residential consumers in New South Wales are aware of their ability to switch electricity retailer.<sup>6</sup>
- 2.15. The rate at which consumers switch retailer can be used as an indicator of the level of competition in the retail energy market. The rate at which consumers switch retailers is also known as consumer ‘churn’. In 2009-10 Victoria had the highest level of churn in Australia. Over 20% of small consumers in Victoria switched their electricity retailer in 2009-10. Queensland had the second highest rate of switching in Australia with over 15% of consumers having switched their electricity retailer in 2009-10.<sup>7</sup>
- 2.16. Consumer switching in the retail energy market generally occurs as a result of an approach from the retailer. ‘A large proportion (over 70 per cent of electricity and 40 per cent of gas customers in Victoria in 2007) have been contacted by a retailer either in person, by phone or by some other means’.<sup>8</sup> Survey information from

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<sup>5</sup> AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in South Australia*, First Final Report 19 September, 2008; AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria*, First Final Report, 19 December 2007

<sup>6</sup> IPART, *Review of regulated retail tariffs and charges for electricity 2010-2013, Electricity – Final Report*, March 2010

<sup>7</sup> Australian Energy Regulator, *State of the Energy Market 2010*

<sup>8</sup> AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria*, First Final Report, 19 December 2007

South Australia in 2008 shows that 66% of customers rely on the retailer or a retailer's representative for their main source of information about energy offers, and are unlikely to undertake their own investigations.<sup>9</sup>

- 2.17. Despite high levels of switching consumers may not be getting a more favourable deal. Research and analysis in Great Britain conducted by the Office of Gas and Electricity Markets (OFGEM) showed that this was particularly the case where direct sales approaches were concerned. The OFGEM research and analysis revealed that 48% of gas consumers who switch as a result of a direct sales approach do not achieve a price reduction, and 42% of electricity consumers who switch as a result of a direct sales approach do not achieve a price reduction.<sup>10</sup> There has not been any comparable quantitative research of this nature undertaken in Australia.
- 2.18. Surveys conducted for IPART found that almost 70% of households that had entered into a negotiated contract did so because they thought it would lead to lower electricity bills. However, a 2008 survey found that only 33% felt that their bills had gone down and 18% felt that their bills had increased.<sup>11</sup>

### **Door to door marketing of energy**

- 2.19. As noted by the AEMC, because energy is a homogenous product, residential consumers generally do not consider the time, effort and cost of searching for an alternative retailer to be worth the potential gains to be made from switching.<sup>12</sup>
- 2.20. There is a significant amount of marketing undertaken by energy retailers. Retailers report that their sales agents contact thousands of consumers in their direct marketing campaigns.<sup>13</sup> EAL report that approximately 40,000 homes are door knocked per working day by energy retailers and their representatives.<sup>14</sup>
- 2.21. Door to door marketing is generally conducted by sales agents engaged directly by an energy retailer or indirectly through an energy marketer. There are approximately 16 energy marketers currently operating in Australia and approximately 1,600 sales agents operating at any one time.<sup>15</sup>
- 2.22. As consumer switching in the retail energy market is generally driven by an approach from the retailer, door to door sales can play a role in providing information about retail energy services and prices to consumers. This means that proper marketing conduct is essential to ensuring that consumers are able to make informed choices about their energy and gas retailer.

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<sup>9</sup> AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in South Australia*, First Final Report, 19 September, 2008

<sup>10</sup> OFGEM, *Energy Supply Probe - Initial Findings Report*, 6 October 2008

<sup>11</sup> IPART, *Review of regulated retail tariffs and charges for electricity 2010-2013, Electricity – Final Report*, March 2010

<sup>12</sup> See for example, *AEMC Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria*, First Final Report, 19 December 2007

<sup>13</sup> ESCV, *2008-09 compliance report*, February 2010

<sup>14</sup> EAL submission in response to questions raised by the ACCC, 21 December 2010

<sup>15</sup> EAL submission in support of application for authorisation, 29 October 2010



## **Regulation of door to door sales**

- 2.23. Door to door energy sales are currently regulated under the Australian Consumer Law (ACL) and under state and territory energy specific legislation and associated instruments.<sup>16</sup> State and territory energy specific legislation will be replaced by the national energy retail law and rules currently scheduled to commence in participating states and territories on 1 July 2012.

### *Australian Consumer Law*

- 2.24. The ACL commenced on 1 January 2011. It is set out in schedule 2 of the *Competition and Consumer Act 2010* (the Act).
- 2.25. The ACL provides for specific consumer protections around unsolicited sales practices, including door to door selling, telephone sales and other forms of direct selling which do not take place in a retail context. It contains rules regarding the way in which consumers are approached including permitted hours for calling on people; disclosure obligations on the making of an agreement; consumer rights including a cooling-off period; and supplier obligations about post-contractual behaviour.
- 2.26. More generally, the ACL also provides for protection for consumers from misleading, deceptive and unconscionable conduct, prohibits specific types of marketing practices, and renders void unfair contract terms in standard form contracts.
- 2.27. Some of the unsolicited sales provisions of the ACL are subject to transitional arrangements, to give businesses time to comply. The transitional arrangements will be phased out by 31 December 2011.
- 2.28. The ACCC and state and territory bodies previously responsible for enforcing state and territory fair trading laws are responsible for enforcing the ACL.

### *State and territory energy specific legislation*

- 2.29. Energy retailers are required to comply with energy specific legislation in each state and territory as a condition of their energy retail licences in each state or territory. This legislation is broad in scope but generally provides for rights and obligations of energy retailers in relation to the sale of energy to consumers.
- 2.30. This legislation also contains specific provisions around the marketing of energy by retailers. In a door to door sales context these provisions generally provide for requirements around the conduct of sales agents and the information that has to be provided to consumers to enable them to make informed switching decisions. Door to door sales agents are also required to provide a product information disclosure statements in some jurisdictions when entering into a contract with a consumer.

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<sup>16</sup> For the purposes of this draft determination this includes any instruments that retailers must comply with as a condition of their energy retail licences including any codes and guidelines.

- 2.31. State and territory regulators such as ESCV and the Queensland Competition Authority are responsible for monitoring compliance and enforcing state and territory energy specific legislation.

*The national energy retail law and rules*

- 2.32. The national energy retail law and rules will replace state and territory energy legislation. This law is to be implemented by participating jurisdictions in July 2012.
- 2.33. The national energy retail law and rules will specify disclosure obligations, a cooling off period and require retailers to obtain the 'explicit' informed consent of a consumer before entering into a contract. They also provide for the regulation of marketing activities such as a requirement for energy retailers to each create and maintain a no-contact list and to obey no canvassing or advertising signs at consumers' premises. Retailers are also required to keep records of marketing activities.
- 2.34. The national energy retail law and rules will also provide for a pricing information guideline developed by the AER. The purpose of this guideline is to provide guidance to retailers in the presentation of their prices, and thereby assist consumers to compare prices offered by retailers. The guidelines may specify the manner and form in which retailers prices are presented. Under the AER's current proposals retailers will be required to provide consumers with a standardised energy price fact sheet when negotiating with consumers at the doorstep.<sup>17</sup>
- 2.35. The AER will be responsible for monitoring compliance and enforcing the national energy retail law and rules.
- 2.36. The proposed EAL scheme would sit alongside the existing national and state legislation which is regulated by national and state and territory regulators.

**Complaints processes**

- 2.37. Retailers are generally required to handle complaints in line with the relevant Australian standard for complaints handling under existing state and territory energy consumer protection frameworks. There is a similar requirement in the national energy retail law.
- 2.38. A consumer may also complain to the relevant state energy ombudsman. State energy ombudsmen have the power to investigate and resolve complaints with energy retailers.
- 2.39. The relevant state energy ombudsman may decline to investigate a complaint where the consumer has not given the retailer a reasonable opportunity to address the complaint first.
- 2.40. Resolution of a complaint may involve the retailer taking corrective action or paying compensation to the consumer. Most cases are dealt with through

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<sup>17</sup> AER, *Position Paper, AER Retail Pricing Information Guideline*, September 2010

conciliation between the parties. However, the energy ombudsmen do have the power to make a binding decision if necessary.

- 2.41. The main types of complaint about retailers relate to billing, marketing, credit, and transfer.<sup>18</sup> Marketing complaints include those made about telephone marketing, door to door sales and other sales channels.
- 2.42. Retailers are currently required to report on the number of complaints by type to jurisdictional energy regulators. Retailers will be required to report this type of information to the AER on implementation of the national energy customer framework. State energy ombudsmen report on the number and type of complaints they receive at least annually.

### **Concerns about door to door energy sales**

- 2.43. Both complaints to energy retailers (as reported by state and territory regulators) and complaints to energy ombudsman schemes about marketing issues have generally increased in the last two to three years.
- 2.44. For example, marketing complaints to the Energy and Water Ombudsman Victoria (EWOV) increased by 33% in 2009/10.<sup>19</sup> Similar complaints to the Energy and Water Ombudsman New South Wales (EWON) increased by 34% over the same period.<sup>20</sup>
- 2.45. There is also concern that poor marketing practices are adversely affecting vulnerable or disadvantaged consumers. A report prepared for the ESCV in 2008 by the Footscray Community Legal Centre highlighted concerns about retailers marketing activities to newly arrived refugees, particularly members of the African community in the western suburbs of Melbourne.<sup>21</sup>
- 2.46. In Victoria, concerns about marketing conduct led to an enhancement of the compliance monitoring activities undertaken by the ESCV in this area. However, despite this increase in monitoring, research undertaken for the ESCV in June 2009 showed that consumers were still not satisfied with retailers marketing behaviour - on average consumers gave retailers marketing behaviour a score of 4.4 out of 10.<sup>22</sup>

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<sup>18</sup> See the latest annual reports by the state energy ombudsmen

<sup>19</sup> EWOV, submission on Energy Assured Limited applications for authorisation, 24 November 2010

<sup>20</sup> EWON, submission on Energy Assured Limited applications for authorisation, 24 November 2010

<sup>21</sup> Footscray Community Legal Centre and the Financial Counselling Service Inc, *The African Consumer Experience of the Contestable Energy Market in the West of Melbourne*, March 2009

<sup>22</sup> ESCV, *Energy retailers comparative performance report - pricing and the competitive market 2008-09*, December 2009

### **3. Submissions received by the ACCC**

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

#### **Prior to the draft determination**

##### **The applicant's supporting submission**

- 3.2. Broadly, EAL submits that the scheme provides for significant public benefits that outweigh any anti-competitive detriment. It submits that the scheme will provide for:
- improved standards of doorstep marketing of energy
  - improved consumer protection and consumer confidence through rigorous recruitment, training, assessment and accreditation procedures.
  - more informed consumer choice as standardised training will ensure consumers receive the highest quality of information on energy contracts offered by sales agents.
  - improved competition at the retail level as improved standards of door to door sales techniques will encourage consumer switching.
  - a standardised national regime and continuous improvement in doorstep marketing activities through the monitoring of compliance against clear parameters and the imposition of sanctions where appropriate.
  - reduced regulatory costs by reducing the number of complaints received by state ombudsmen and regulators, and by removing some of the burden on regulators to undertake monitoring and enforcement action.
- 3.3. EAL submits that the scheme will have little, if any, impact on competition. It submits that the scheme is open to all energy retailers and energy marketers and similarly, that the participation of all sales agents is encouraged.

##### **Interested party submissions on the original application**

- 3.4. The ACCC sought submissions on the original application from around 120 interested parties potentially affected by the application, including consumer groups, energy ombudsmen, industry, regulators and state fair trading departments.
- 3.5. The ACCC received submissions on the original application from:
- Consumer Action Law Centre (CALC)
  - Consumer Affairs Victoria (CAV)
  - Consumer Utilities Advocacy Centre (CUAC)

- Energy and Water Ombudsman New South Wales (EWON)
  - Energy and Water Ombudsman Victoria (EWOV)
  - Queensland Consumers Association, and
  - Queensland Council of Social Service (QCOSS).
- 3.6. A summary of the public submissions received from interested parties on the original application follows.
- 3.7. EWON and EWOV welcomed the initiative noting the increasing number of marketing cases (which includes complaints) being handled by their offices.
- 3.8. Consumer groups did not support the proposal and raised a number of concerns about the scheme.
- 3.9. At a broad level consumer groups considered that the scheme lacked a clear measurable objective and that it focused too much on individual sales agents rather than the responsibilities of energy retailers. They also raised concerns around the accessibility of the scheme submitting that the scheme as drafted would be difficult for consumers to understand and that there was no consumer guide or brochure to explain the scheme to consumers.
- 3.10. Specifically, consumer groups had concerns that the standards required of sales agents did not go beyond existing legal requirements and that the scheme relied too much on complaints as the mechanism to monitor sales agent's behaviour.
- 3.11. Consumer groups also raised a number of concerns with the complaints process. In particular they noted that it could create confusion for consumers and discourage them from making a complaint to state energy ombudsmen. They also raised concerns that under the scheme, consumers and consumer groups were precluded from lodging complaints about EAL members. Further they argued that the sanctions on members in breach of the scheme provisions were too weak.
- 3.12. As well as identifying issues with the existing content of the scheme consumer groups suggested a number of additional measures that could be included in the scheme such as the creation of a do not knock register, adopting revised salary incentives for sales agents and compensation for consumers in certain circumstances.
- 3.13. Consumer groups also had concerns with the process that EAL undertook to develop the scheme. They did not think that EAL undertook effective consultation. In particular they argued that there had been limited consultation with consumer or community stakeholders in the development of the scheme and therefore key aspects of the scheme that relate to consumer information and awareness were underdeveloped.
- 3.14. CAV expressed concerns with how the scheme would fit within the current regulatory framework and complaints mechanisms. It also argued that clear independent governance arrangements should be incorporated into the scheme and that consumer representation should be considered as part of those arrangements.

## Submissions on the revised scheme

- 3.15. Following a letter from the ACCC on 4 February 2011 which outlined significant concerns with the proposed scheme, EAL made what it described as ‘wholesale changes’ to the scheme to address the concerns raised by the ACCC and interested parties.
- 3.16. The ACCC sought further submissions on the amended scheme and received submissions from:
- Aegis Direct
  - Appco
  - Australian Power and Gas
  - Brotherhood of St Laurence (BSL)
  - Consumer Utilities Advocacy Centre (CUAC)
  - COTA Senior Voice (CSV)
  - Energy and Water Ombudsman NSW (EWON)
  - Energy and Water Ombudsman Queensland (EWOQ)
  - Energy and Water Ombudsman Victoria (EWOV)
  - Energy Industry Ombudsman South Australia (EIOSA)
  - Ethnic Communities' Council of NSW
  - Lumo Energy
  - Moreland Energy Foundation
  - Queensland Council of Social Services (QCOSS)
  - Red Energy
  - Simply Energy
  - The Smart Group
  - Truenergy, and
  - Uniting Care Australia (UCA).
- 3.17. A summary of the public submissions received from interested parties on the amended application follows.
- 3.18. EIOSA, EWOQ and EWON supported the initiatives proposed in the amended application. EWOV also supported the proposal but offered some recommendations to ensure that the benefits of the scheme were realised. Specifically EWOV recommended improvements around the structure of the scheme documents, how systemic issues will be identified and addressed, compliance reporting, consumer awareness and the role of EAL in relation to regulators and ombudsman schemes.
- 3.19. Energy retailers and energy marketers welcomed the amended scheme and considered that it would provide a material public benefit. In particular they argued that the establishment of a central register and standardised recruitment, training and monitoring of sales agents will have public benefits.

- 3.20. Consumer groups and community organisations did not support the amended scheme and did not consider that it would result in a net public benefit. In general they considered that the amended scheme did not overcome the inherent conflict of interest of both sales agents and retailers to maximise sales by confusing or pressure selling energy services to consumers. Consumer groups considered that there remained inadequate consideration of the consumer in the revised scheme and that it put too much distance between sales agents engaged to undertake door to door activities and the retailers who engage them.
- 3.21. Consumer groups continued to have a number of concerns around the promotion of the scheme to consumers, the complaints processes and sanctions, and the compliance monitoring and reporting requirements in the scheme.

### **Following the draft determination**

- 3.22. On 11 April 2011, the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to deny authorisation.
- 3.23. A conference was not requested in relation to the draft determination.
- 3.24. The ACCC received four submissions from interested parties in response to the draft determination from:
- Consumer Utilities Advocacy Centre (CUAC)
  - Public Interest Advocacy Centre (PIAC)
  - Queensland Consumers Association, and
  - Queensland Council of Social Service (QCOSS).
- 3.25. These submissions supported the ACCC's proposal to deny authorisation of the scheme.
- 3.26. The ACCC also received a submission from EAL in response to the draft determination.

### **Submissions on revised scheme**

- 3.27. In response to the draft determination EAL made further amendments to the scheme and underlying documentation.
- 3.28. The ACCC sought submissions on the amended scheme and received 10 submissions from:
- Australian Power and Gas (APG)
  - Mr Chris Connolly
  - Community Information Victoria Inc
  - Consumer Affairs Victoria (CAV)

- Consumer Action Law Centre (CALC)
- Consumer Utilities Advocacy Centre (CUAC)
- Energy and Water Ombudsman New South Wales (EWON)
- Energy and Water Ombudsman Victoria (EWOV)
- Financial and Consumer Rights Council (FCRC)
- Public Interest Advocacy Centre (PIAC), and
- Queensland Council of Social Service (QCOSS)

3.29. Consumer and community organisations generally opposed authorisation of the scheme. APG supported authorisation of the scheme as did EWON. EWOV supported authorisation subject to conditions.

3.30. The views of EAL and interested parties are outlined in the ACCC's evaluation of the arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.



## 4. ACCC evaluation

4.1 The ACCC's evaluation of the scheme to self regulate door to door energy sales is in accordance with tests found in:

- section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be allowed to be given effect to.
- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2 For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

### **The relevant area of competition**

4.3 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

- 4.4 EAL submits the relevant areas of competition are:
- the market for the retail supply of electricity and/or gas to residential and small business consumers and
  - the market for the supply of door to door sales agency services to energy retailers by energy marketers and/or sales agents.
- 4.5 The ACCC generally takes the view that there are state based markets for the retail supply of electricity and gas. However, for the purpose of assessing this application, the ACCC considers the relevant areas of competition affected by the proposed conduct are those identified by EAL.
- 4.6 EAL noted that some elements of the scheme may potentially raise competition concerns under the Act. These include requirements for accreditation of sales agents, requirements that prevent more than one member engaging the services of any one sales agent and requirements in relation to not employing marketers that are not also EAL members.

## **The counterfactual**

- 4.7 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>23</sup>
- 4.8 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.9 EAL submits the counterfactual absent the scheme to be either:
- the status quo; or
  - conduct that would not compel compliance, apply sanctions or include a register but which might include the following:
    - a set of standards and core competencies which members would be encouraged to adhere to;
    - the provision to members of materials to assist them with the training of sales agents; and
    - the display by sales agents who pass the training of an EAL logo and/or indication that they are members of an EAL scheme.

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<sup>23</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 4.10 The ACCC notes that some elements of the scheme may raise concerns under the Act. Accordingly, the ACCC considers that absent authorisation EAL and its members would be unlikely to adopt the scheme in its current form.
- 4.11 In relation to the two potential counterfactuals identified by EAL, the status quo requires EAL to comply with existing regulation which includes consumer protection. The other counterfactual identifies the adoption of standards that members would be encouraged to comply with and the development of training materials to assist members to train sales agents employed on their behalf.

### **Door to door energy marketing**

- 4.12 The ACCC considers that door to door selling in the energy sector raises a number of complex and inter-related issues.
- 4.13 Unlike many other industries, energy retailers rely predominantly on door to door marketing for the majority of their new customers. This feature of the industry means that, uniquely, consumers considering switching energy retailers will often be solely or largely reliant on the information provided to them by door to door sales agents. This fact, together with the nature of the product being sold (an essential service) and the location in which the sale takes place (in the customer's own home), means that sales agents for energy retailers have a position of considerable responsibility in relation to the information provided to potential new consumers, and the sales techniques used.

### **Information asymmetry**

- 4.14 The ACCC notes that door to door selling in the energy sector ordinarily occurs in a context where there are information asymmetries between the sales agent and the consumer. Specifically, the sales agent will generally have better information about the proposed transaction than the consumer.
- 4.15 Furthermore, door to door selling generally occurs in a context where consumers may not be well informed about alternative offers that may be available in the market and are heavily dependent on the information supplied to them by the sales agent.
- 4.16 Such information asymmetries can lead to a consumer accepting different terms than they would if they were to obtain adequate information on which to base their switching decision.

### **Conflicts of interest**

- 4.17 Door to door selling in the energy sector involves sales agents being paid a commission by energy retailers if they entice consumers to switch energy providers.
- 4.18 It is well recognised across a range of industries that remuneration structures based on sales commissions involve conflicts of interest that potentially result in conduct to the detriment of consumers.

- 4.19 In the energy retail sector, the ACCC considers that sales agents face a potential conflict between providing clear and appropriate advice to consumers (which may mean they do not entice a consumer to switch supplier) and using high pressure sales techniques (which means that they entice the consumer to switch and get paid commission). Retailers also face a conflict of interest between ensuring that their sales agents behave in an appropriate and compliant way (which may mean fewer sales) and allowing aggressive marketing strategies (which generate additional sales).
- 4.20 EAL states that any conflict of interest arising here applies in all industries and under all sales channels. EAL submits that 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 and argued that it is not in a retailer's best interest to benefit from an agent's sales, where the sale has occurred unlawfully or through the use of high pressured tactics.
- 4.21 Similarly, APG argues that while retailers benefit from a successful sale, a non-compliant sale or customer complaint results in significant costs for retailers in managing and resolving the customer issue. Further if the non-compliance results in an Ombudsman complaint the cost to retailers can exceed several hundreds of dollars.
- 4.22 The ACCC notes the comments by EAL and APG, and in particular, accepts that sales agents who engage in misconduct can create costs (including reputational damage) for retailers.
- 4.23 However, the ACCC remains of the view that the remuneration structure in this area (i.e. commission selling) particularly in the context of door to door sales creates an inherent conflict of interest for both energy retailers and their sales agents which has the potential to result in conduct that adversely affects consumers.

### **Pressure selling**

- 4.24 As noted above, both sales agents and energy retailers share a strong financial incentive to entice and encourage consumers to switch energy retailers.
- 4.25 In the context of door to door selling, consumers are often susceptible to making hasty and possibly unintended decisions. Unless carefully managed, commission sales can provide an incentive for agents to pressure sell or mislead consumers, particularly in the absence of regulation that includes consequences or sanctions for such conduct. The harm associated with pressure selling can occur even where consumers are well informed.
- 4.26 Inadequate information and pressure selling techniques may lead to consumers purchasing goods or services that they do not want or later regret purchasing, or paying a higher price for the good or service because they are unable to assess the claims or benefits of the good or service offered relative to a comparable service.
- 4.27 For example, consumers may be uninformed as to the differences between peak and off-peak pricing and may be unable to make an informed decision as to how specific energy packages could best meet their needs and what alternatives are

available in the market. Consumers may also have difficulty assessing the reliability of the claims made by the sales agent making the sales pitch to them.

- 4.28 A number of interested party submissions raised concerns regarding the conduct of sales agents and identified specific instances where door to door sales agents have misrepresented the features (such as length of contract and charges) associated with the new contract.<sup>24</sup>
- 4.29 Interested party submissions also noted that door to door sales approaches are often unsolicited and often involve high pressure sales techniques at a person's home.<sup>25</sup> These sales techniques may place undue influence on consumers so that they enter into a contract which they later regret, or in some cases, enter into a contract unwillingly. This pressure from door to door sales can complicate decision making for the consumer as the consumer may be uncomfortable with the sales agent being on their doorstep and eager for them to leave, such that they do not rationally analyse the information and service presented by a sales agent to make an informed choice. This form of pressure is not as prevalent in other forms of direct sales or consumer initiated sales.
- 4.30 In addition, submissions from consumer groups highlighted concerns about the impact on vulnerable groups in the community who are susceptible to pressure selling techniques.<sup>26</sup>
- 4.31 Submissions from CUAC and BSL referenced a study undertaken for ESCV which identified concerns with door to door sales agents and their interaction with vulnerable consumers such as the African community in the west of Melbourne. This study indicated that of a sample of 20 consumers, 10 had signed door to door sales contracts and had not been informed of, or understood, their right to a cooling off period and six consumers had not understood they had entered into a contract at all.<sup>27</sup>
- 4.32 These concerns are supported by submissions from state energy ombudsmen who have noted the increase in the number of market and transfer complaints. For example, EWOV noted that complaints had risen from 4,089 cases in 2007-08 to 11,528 cases in 2008-09.<sup>28</sup> Similarly EWON submitted that complaints about energy retailers increased 34% in 2009-10.

### **Role of the scheme**

- 4.33 The ACCC considers that well designed self regulation (through mechanisms like codes of conduct) can be an effective tool to address the market failures discussed above, thereby generating significant benefits for both consumers and the market. For example, prescribing standards of behaviour that sales agents must follow, committing resources such as training to promoting compliance with those standards, pro-active monitoring to ensure those standards are followed, a robust,

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<sup>24</sup> CALC submission to ACCC, 13 December 2010

<sup>25</sup> CALC submission to ACCC, 13 December 2010

<sup>26</sup> QCOSS submission to ACCC, 24 November 2010

<sup>27</sup> ESCV, *The African Consumer Experience of the Contestable Energy Market in West Melbourne*, March 2009

<sup>28</sup> CUAC submission to ACCC, 23 November 2010

transparent and independent complaints process to deal with consumer concerns if standards are not followed, and meaningful sanctions to promote compliance will all assist in minimising incentives to engage in such conduct.

- 4.34 Accordingly, the ACCC supports efforts by industry to improve outcomes for consumers and the efficient operation of markets through the adoption and enforcement of self regulatory mechanisms like codes of conduct.<sup>29</sup>
- 4.35 CAV notes that consumers are currently experiencing a level of confusion around codes of conduct (for example the Code of Conduct for Marketing Retail Energy in Victoria) and energy regulation.<sup>30</sup> The ACCC agrees that it is important that any new self regulatory mechanisms enhance consumer understanding of their rights and do not confuse consumers about their rights through the creation of unnecessary additional complexity.
- 4.36 For self regulation to be effective in addressing the market failures outlined above, the ACCC believes that there needs to be rules that are unambiguous, transparent and enforceable. Robust, independent oversight of the self regulatory role and effective sanctions are also vital to the effectiveness of such schemes.
- 4.37 The extent to which the EAL scheme achieves these objectives is discussed below in the ACCC's assessment of public benefits.

## **The scheme**

### **Self regulatory scheme**

- 4.38 The scheme submitted for authorisation by EAL is a self regulatory scheme. Self regulatory schemes are those which set out specific standards of conduct for an industry in relation to the manner in which they deal with the members of the scheme as well as consumers. The industry is also responsible for monitoring compliance with and enforcing those standards.
- 4.39 The ACCC's 'Guidelines for developing effective voluntary industry codes of conduct', set out some of the relevant characteristics for an effective industry code. These include:

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<sup>29</sup> ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005

<sup>30</sup> CAV submission to ACCC, 7 December 2010

- clearly set out objectives and rules
- industry and consumer awareness of the code
- administrative arrangements for implementing and developing the code
- effective complaints handling processes
- an independent review mechanism of complaints handling decisions
- commercially significant sanctions for non-compliance
- mechanisms to collect data, monitor compliance and provide accountability, and
- a regular review process to ensure objectives of the code are being realised.<sup>31</sup>

4.40 EAL submits that ‘the ACCC must consider the EAL scheme that is before it. Whether or not the EAL Code of Practice and other documentation is the ideal or preferred system of self-regulation is not a matter that goes to the likely public benefit of the arrangement that is before it.’<sup>32</sup>

4.41 As occurs with the ACCC’s assessment of self regulatory codes in other sectors, the ACCC acknowledges that it is not assessing the merits of whether self regulation is the most appropriate mechanism to address concerns about the behaviour of sales agents. Indeed, the ACCC supports efforts by industry to improve outcomes for consumers and the efficient operation of markets through the adoption and enforcement of self regulatory mechanisms like codes of conduct to address the problems of information asymmetry and pressure selling in the door to door marketing of energy.

4.42 These objectives are also supported by stakeholders including energy marketers and retailers, state energy ombudsmen and a number of consumer groups. Indeed, ‘UCA appreciates the preparedness of energy retailers to systematically and comprehensively review their approach to door to door marketing, and to recognise the difficulties that this approach poses for many consumers’.<sup>33</sup> QCOSS submits that it ‘would be willing to support a self regulatory scheme that promised to effectively address problems in energy marketing.’<sup>34</sup> EWOV welcomes EAL’s approach to the self regulation of energy retailers’ door to door marketing activities and maintains that the code is an opportunity to raise consumer confidence in retailers’ marketing practices.<sup>35</sup>

### **Objectives of the scheme**

4.43 The objectives of the scheme are also set out in the EAL code of practice which states that:

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<sup>31</sup> See ‘*Guidelines for developing effective voluntary industry codes of conduct*’ ACCC 2005

<sup>32</sup> EAL submission to ACCC, 13 May 2011

<sup>33</sup> UCA submission to the ACCC, 7 March 2011

<sup>34</sup> QCOSS submission to the ACCC, 25 May 2011

<sup>35</sup> EWOV submission to ACCC, 4 March 2011

The code creates a self-regulated industry scheme to enhance compliance with the existing Federal and State-based regulatory framework applying to the door to door marketing of energy to both residential and small business consumers. Not only does the code seek to improve the compliance of energy retailers that subscribe to the code, but also the energy marketing companies that often perform door to door sales on their behalf. EAL's membership comprises both energy retailers and energy marketers. The code aims to:

- promote consumer confidence in door to door sales in the energy industry
- provide consumers with a better overall experience in energy sales at the door
- improve the standards and effectiveness of door to door sales in the energy industry
- reduce the rate of sales complaints, and
- discipline and/or remove “rogue” sales agents.’<sup>36</sup>

4.44 These objectives are reinforced in EAL's most recent submission to the ACCC where it states that ‘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.’<sup>37</sup>

4.45 The code sets out that it seeks to achieve these objectives by:

- establishing a central register of sales agents that have been accredited under the scheme
- providing for a national scheme that ensures sales agents are recruited, trained and assessed in a consistent manner across the industry
- providing for a national scheme for the monitoring of door to door sales agents, where any proven breach of the EAL standards may result in disciplinary measures and deregistration from the register for 5 years
- providing for a scheme which ensures that when a consumer complains about the conduct of a sales agent with the EAL standards that these are handled in a consistent manner by energy retailers
- strengthening the regime of compliance to the code ensuring that members are consistently monitored independently through monthly reports and annual audits under the code (which are in addition to the regulatory reporting obligations), and
- imposing sanctions on Members that fail to comply with the requirements set out in the Code, noting that sanctions may also be imposed by the relevant energy regulator.<sup>38</sup>

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<sup>36</sup> EAL code of practice

<sup>37</sup> EAL submission to the ACCC, 2 June 2011



- 4.46 Notwithstanding the general support for the objectives of the scheme, some stakeholders have expressed concern with the operation of the scheme.
- 4.47 For example, QCOSS ‘is concerned that the proposed 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.’<sup>39</sup>
- 4.48 EAL submits that some of the concerns expressed by consumer groups are not within the scope of the matters that the ACCC should consider in assessing the public benefit of the scheme. These issues include:
- the merits of doorstep selling and whether it should be outlawed
  - avenues for consumer redress (additional to the right to complain) should seller misconduct occur
  - the appropriate structure of sales agent remuneration and incentives, and
  - the need for EAL to have a complaints handling system to receive and action complaints from consumers which would duplicate, at considerable cost, the existing ombudsmen and fair trading avenues of complaint.<sup>40</sup>
- 4.49 The ACCC agrees that the merits of doorstep selling and whether or not sales agent remuneration and incentives are appropriate fall outside the scope of its consideration of the authorisation application. The ACCC must assess the scheme that is before it. However, many of the issues identified by consumer groups remain relevant to the consideration of the public benefits arising from the scheme as they are linked to whether or not the scheme effectively protects consumers and improves market outcomes. EAL submits that the scheme seeks to achieve this very objective through the mechanisms outlined in the code of practice as set out above.

## Public benefit

- 4.50 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>41</sup>
- 4.51 EAL submits that the scheme offers significant advantages whereby ‘public benefit outweighs negligible (if any) anti competitive detriment’<sup>42</sup> including:

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<sup>38</sup> EAL Code of Practice

<sup>39</sup> QCOSS submission to the ACCC, 25 May 2011

<sup>40</sup> EAL submission to the ACCC, 17 March 2011

<sup>41</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- improved standards of door step marketing of energy
- lower rates of inappropriate or unwelcome contacts between sales agents and consumers
- an industry approach to address ‘rogue’ agents that move between energy retailers and marketers through an independent deregistration process
- a more professional approach to the selling and marketing of energy contracts
- better overall experiences for consumers
- fewer complaints to regulators and ombudsman in relation to the conduct of sales agents
- improved customer confidence
- more informed customer choice
- improved competition at the retailer level by encouraging customer switching
- the streamlining of processes and uniformity in the selection, recruitment, training and competence of sales agents industry and nation-wide thereby promoting certainty, consistency and compliance efficiencies within the industry, and
- reduced administration and enforcement costs incurred by government bodies, especially those involved in the oversight of state-based energy codes of conduct.

4.52 EAL submits that the scheme ‘will clearly deliver substantial enhancements to member compliance, consumer confidence, consumer choice and competition in the energy industry.’<sup>43</sup>

4.53 In assessing this application, the ACCC is mindful of the direction of the Australian Competition Tribunal (Tribunal) that “the ACCC can require, in the proper exercise of its discretion, that the conduct yields some substantial measure of public benefit if it is to attract the ACCC’s official sanction”.

4.54 The ACCC accepts that a scheme which improves consumer confidence in the energy retail sector by addressing the issues of information asymmetry and pressure selling by sales agents is a worthy objective with the potential to achieve public benefit.

4.55 The extent to which the scheme will realise these public benefits will depend on whether consumers are aware of the scheme and whether effective compliance and sanction frameworks are in place such that retailers who employ sales agents have an incentive to invest sufficient resources into training sales agents and monitoring compliance with the scheme. If the scheme does not achieve the benefits that it purports to achieve, the scheme may result in a loss of consumer confidence such that it creates a public detriment.

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<sup>42</sup> EAL submission to ACCC 11 January 2011

<sup>43</sup> EAL submission to the ACCC, 13 May 2011

4.56 The operation of the scheme and the ACCC's assessment of whether it delivers a public benefit is discussed below.

### **Consumer awareness**

4.57 The ACCC considers that for the EAL scheme to be effective, it is important that consumers understand the standards of behaviour governed by the scheme and the recourse available to them if they consider these standards have not been met.

4.58 There are two levels of information that will be provided to consumers under the scheme:

- information that will be provided to consumers that enter into a contract (or on request from a consumer), and
- information that will be provided to consumers that are door knocked but who do not enter into a contract.

4.59 The code itself will also be available on the EAL website and members' websites.

4.60 In the draft determination the ACCC raised concerns that the consumer awareness aspect of the scheme was underdeveloped. In particular the ACCC considered that:

- information to be provided to consumers did not explicitly meet the same standards required by legislation, and
- information on the scheme provided to consumers who are door knocked but who do not enter into a contract was not sufficient to facilitate the making of a complaint by the consumer

4.61 In addition the ACCC noted that marketing material to be provided to consumers that enter into a contract or on request from a consumer was not available in languages other than English. A discussion of each of these concerns and the extent to which EAL has addressed these concerns follows.

### ***Information to be provided to consumers did not explicitly meet the same standards required by legislation***

4.62 The ACCC considers that the information to be provided to consumers in the scheme should as a minimum meet the same standards required by the law to ensure that consumers are not confused about their rights and sales agents obligations.

4.63 In the draft determination the ACCC identified that the standards of conduct required in the scheme did not explicitly meet the same standards of conduct required of sales agents under legislation.

4.64 In particular the ACCC identified that:

- the scheme did not include a requirement for sales agents to advise a consumer as soon as practicable, but in any event before starting to negotiate, that he or she must

leave the premises following a request by the consumer as required under the Australian Consumer Law (ACL)<sup>44</sup>

- the scheme was not explicit about when sales agents have to provide information to consumers about their right to terminate during the cooling off period and in what form this information has to be provided as required under the ACL<sup>45</sup>
- the scheme was not explicit about the times that sales agents can and cannot call consumers as prescribed under legislation<sup>46</sup>, and
- information required to be provided to consumers that enter into a contract at the door step did not explicitly meet the same standards as prescribed under the ACL and the national energy retail rules<sup>47</sup>.

4.65 The ACCC noted that providing consumers with information about standards that do not meet minimum legislative requirements had the potential to confuse consumers and could create a public detriment.

4.66 In response to the draft determination EAL revised the code to incorporate legislative requirements. In particular the revised scheme now:

- includes a requirement for a sales agent to advise the consumer that he or she must leave the premises on request as soon as practicable and in any event before starting to negotiate a contract
- includes a requirement that the consumer is not to be contacted by the energy retailer *for at least 30 days* after a request to cease contact was made (this requirement reflects the ACL)<sup>48</sup>
- explicitly sets out that the sales agent is to provide the consumer with information, *in writing and before entering into a contract*, about the consumer's right to terminate the contract during applicable cooling off and other termination periods, and the way in which a consumer may exercise that right
- is explicit about the times that sales agents can and cannot call consumers as prescribed under legislation, and
- explicitly sets out information required to be provided to consumers that enter into a contract at the door step in line with the ACL and the national energy retail rules.

4.67 CAV suggests the revised code 'creates confusion around what, when and how information should be provided to consumers'. It considers that 'information described in 5.1(3)(a)-(e) of the code is information that a consumer should be made aware of

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<sup>44</sup> Schedule 1, Clause 74 of the *Competition and Consumer Act 2010*

<sup>45</sup> Schedule 1, Clause 76 of the *Competition and Consumer Act 2010*

<sup>46</sup> For example, Schedule 1, Clause 73 of the *Competition and Consumer Act 2010*

<sup>47</sup> Schedule 1, Clause 79 of the *Competition and Consumer Act 2010* and rule 64 of the *National Energy Retail Rules*

<sup>48</sup> Clause 75 of the *Competition and Consumer Act 2010* and replicated in Clause 4.1(8) of the EAL Code of Practice

before entering into a contract [and therefore] the phrase used in 5.1(3) of the code “or as soon as practicable” is problematic’.<sup>49</sup>

- 4.68 CAV suggests that ‘this phrase also creates confusion when read alongside section 5.1(4) of the code which deals with documentation that must be provided to a consumer and notes that sales agents must provide any material in accordance with the legislation and that documentation may include details outlined in section 5.1(3) of the code. To be compliant with section 5.1(4) of the code and meet ACL requirements regarding the provision of documentation to consumers, agents would have to provide documentation that sets out information such as price immediately after an agreement is entered into. This creates confusion when read in conjunction with the phrase “or as soon as practicable” used in section 5.1(3).’<sup>50</sup>
- 4.69 The ACCC notes CAV’s concerns. The ACCC also notes that the term “as soon as practicable” is used in the national energy retail rules regarding the provision of information.<sup>51</sup> To avoid confusion, and in response to a request for further information from the ACCC, EAL agreed to remove the phrase ‘before or as soon as practicable after the formation of a contract’ in clause 5.(1)(3) of the code and replace it with ‘in accordance with all applicable laws, including the ACL...’
- 4.70 The ACCC considers that this change reduces the likelihood of consumer confusion around their rights and sales agents obligations in relation to the provision of information when entering into a contract.
- 4.71 Overall, the ACCC considers that EAL’s revisions have brought the code in line with legislative requirements and thereby minimised the risk of consumers being confused about their rights and sales agents’ obligations.

***Information on the scheme provided to consumers who are door knocked but who do not enter into a contract to facilitate the making of a complaint***

- 4.72 Information to be provided to consumers that enter into a contract (or on request from a consumer) includes ‘EAL marketing material’. This sets out the standards required of sales agents under the scheme, contact details for the energy retailer and contact details for the ombudsman amongst other matters.
- 4.73 Consumers that are door knocked but who do not enter into a contract are advised of the name of the sales agent, the member they represent and their purpose. Sales agents are also required to produce an identity card to these consumers. However, these consumers will not be provided with any material on the scheme.
- 4.74 In the draft determination the ACCC stated that for the scheme to achieve the objective of improving consumer confidence, sales agents should be required to provide all consumers door knocked with sufficient information to facilitate the making of a complaint in the event that the consumer’s experience with a sales agent representing an energy retailer is not compliant with the code.

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<sup>49</sup> CAV submission to ACCC, 30 May 2011

<sup>50</sup> Ibid

<sup>51</sup> Rule 62, *National Energy Retail Rules*

- 4.75 The ACCC suggested that in addition to providing the agent's name, the member they represent and the purpose of his or her visit as required under the scheme, sales agents should also be required to provide all consumers door knocked with a contact telephone number to facilitate the making of a complaint regarding their experience. The ACCC also considered that other means of improving consumer awareness of the scheme should be considered by EAL such as providing pamphlets to all consumers door knocked and bill insertions by all retail members.
- 4.76 In response to the draft determination the ACCC notes that the revised scheme includes a requirement for the identity card to be produced by a sales agent to include contact details of the energy retailer. There is also a new requirement for sales agents to explain that if the consumer is not happy with the way they have been dealt with, they can contact the retailer or energy ombudsman to make a complaint.
- 4.77 In response to the revised scheme EWOV continues to maintain that information about the EAL scheme should be provided to all consumers and suggested that this should be a condition of authorisation.<sup>52</sup> PIAC argues that 'without proactive information provision at the point of contact, the code provides little benefit to consumers who have not entered a contract but have been subjected to marketing misconduct.'<sup>53</sup> CUAC is concerned that consumers who are door knocked but who do not enter into a contract will not be provided with the EAL marketing material.<sup>54</sup>
- 4.78 In response to submissions EAL repeats its view that it would be costly and impractical to provide every consumer door knocked with information about the code. EAL estimates that 40,000 premises are knocked on each day in the energy industry which amounts to 12 million premises per year (assuming selling occurs 6 days per week). It estimates that approximately 750,000 customers switched retailers due to door to door sales in the 2010 calendar year.<sup>55</sup>
- 4.79 EAL also notes that it will embark on other promotional, marketing or advertising campaigns to ensure that the code is understood and visible to all parties including consumer groups. EAL also states that retailers may elect to adopt some of the additional means of promoting the code but that to enshrine such requirements in the code as a condition of authorisation would be cost prohibitive on members and may impede participation in the scheme, particularly by smaller energy retailers.<sup>56</sup>
- 4.80 The ACCC accepts that providing all consumers door knocked with the EAL marketing material is likely to be costly and impractical and could impede participation in the scheme. However, the ACCC considers that consumers that express an interest in obtaining more information but who do not enter into a contract should, as a minimum, be provided with the contact details of the retailer in the event that they wish to make an enquiry or complaint about the sales agent.
- 4.81 The ACCC sought further information from EAL on this issue. In response EAL has inserted a new clause in the code which requires the EAL marketing material to be

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<sup>52</sup> EWOV submission to the ACCC, 27 May 2011

<sup>53</sup> PIAC submission to the ACCC, 24 May 2011

<sup>54</sup> CUAC submission to the ACCC, 25 May 2011

<sup>55</sup> EAL submission to the ACCC, 2 June 2011

<sup>56</sup> Ibid

provided to consumers if requested by the consumer or where a consumer expresses an interest in obtaining more information.

- 4.82 The ACCC is satisfied that this is an outcome that will promote consumer awareness of the scheme in a cost efficient and practical way. The ACCC notes that in addition to requirements on sales agents to provide EAL marketing material to consumers that enter into a contract, or express an interest in obtaining more information, retailers (particularly the larger retailers) may also elect to promote the scheme by additional means.
- 4.83 The ACCC also notes that EAL has revised the scheme to include a requirement that the 'EAL marketing material' will be made available in six common languages. The ACCC welcomes this change as it considers that it will assist in improving consumer awareness of the scheme and consumers' rights and sales agents responsibilities under the scheme.
- 4.84 In summary, the ACCC considers that the consumer awareness aspect of the scheme now provides a better basis for consumers to be aware of and understand their rights and sales agents obligations under the scheme. The information requirement standards in the scheme now meet the minimum information requirement standards in the law. In addition, the ACCC considers that a large number of consumers will become aware of the scheme and their rights and sales agents responsibilities through the mechanisms identified in the scheme. The ACCC therefore considers that the consumer awareness aspect of the scheme has the potential to realise a significant public benefit.
- 4.85 The ACCC notes that the regulatory environment, including the Australian Consumer Law and the new national energy retail law, is at an early stage of development. In light of this, the ACCC considers that the operation of the consumer awareness mechanisms in the scheme warrant careful review at the end of the authorisation period in the event that EAL seeks reauthorisation at that time.

## **Compliance**

### ***Monitoring sales agents***

- 4.86 The scheme proposes to improve sales agents' conduct in the door to door marketing of energy and sets out standards of behaviour that agents must comply with in the code.
- 4.87 The scheme requires retailers to ensure that their sales agents comply with the code by requiring retailers to:
- undertake recruitment, training and accreditation of sales agents in accordance with the code
  - maintain a central register of sales agents, and
  - monitor sales agent behaviour.
- 4.88 The scheme prescribes that the conduct of sales agents will be monitored by receiving and recording complaints and using proactive measures such as independent verification checks and random field audits. Each of these mechanisms for ensuring compliance is discussed below.

4.89 EAL submits that this training and accreditation regime, aimed at instilling and enforcing the EAL standards can be expected to significantly improve the quality of doorstep marketing of energy.

#### *Recruitment and training*

4.90 The code requires that all prospective sales agents are screened using a 100 point identification check and a criminal history check. If a sales agent has been previously registered on the EAL register to another member, the code allows the member proposing to employ the sales agent to contact that member to ascertain the sales agent's competency for reference check purposes.

4.91 The code requires that all new sales agents must undergo off the job and on the job training before undertaking sales activities on behalf of the member. Off the job training must be provided on the following matters:

- the operation of the code, in particular the monitoring, sales complaint, disciplinary procedures and the levels of breaches as well as the operation of the EAL register
- the EAL standards and all the relevant laws and regulation
- the legislative and regulatory obligations applying to the supply of energy in the jurisdiction in which the sales agent is to operate, including the energy retailer's obligations and consumer rights
- information about the member necessary to fulfil the role
- product knowledge and sales techniques to effectively perform the role
- changes in the market and to products/services
- respecting consumer privacy, ethnicity and diversity
- recognition and treatment of vulnerable consumers
- safety as it relates to the consumer and the sales agent
- the role of the energy ombudsman
- examples as to what constitutes misleading, deceptive or unconscionable conduct and false representation (inclusive of coercion and harassment) in the energy industry
- what the sales agent must give to and disclose to the consumer, and
- any matters identified through consultation.<sup>57</sup>

4.92 On the job training is conducted out in the field with an experienced sales agent. After successful completion of the training, sales agents are required to complete a formal

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<sup>57</sup> EAL Code of Practice



competence assessment. This involves a practical field assessment of sales agents to meet the required standards.

- 4.93 In response to the ACCC draft determination EAL has also included a requirement for the stakeholder working group under the scheme to discuss appropriate training packages to address concerns about door to door sales. These packages can be recommended for adoption in the scheme.
- 4.94 In response to the revised scheme Mr Chris Connolly suggested that 'identifying authority to enter into a contract, and recognising and managing complaints should also be included in the list of training matters. QCOSS queried EAL's willingness to act on the recommendations of the stakeholder working group noting the lack of clarity around this process.'<sup>58</sup>
- 4.95 While noting that the suggestions by Mr Chris Connolly may improve the scheme, the ACCC maintains the position that it took in the draft determination. That is, the ACCC considers that the training subject matters that are identified in the scheme are comprehensive and have the potential to realise a public benefit. Further, the ACCC considers that a comprehensive training and accreditation program could serve to raise sales agents' awareness about required standards of behaviour and their obligations to, and consumer's rights under, applicable legislation. In addition, while noting QCOSS's concerns, the ACCC welcomes the requirement for the stakeholder working group to recommend training packages to address concerns about door to door sales to EAL.

#### *Sales agent registration and accreditation*

- 4.96 Under the scheme, EAL will establish a central database to record the details and accreditation status of each sales agent. Members will be precluded from engaging sales agents who are not registered on the EAL database. If a sales agent is found to not comply with the EAL standards and their non-compliance cannot be remedied by retraining and development, a member may ask the code manager to deregister the sales agent. Deregistration will last for five years.
- 4.97 EAL submits that this will prevent 'rogue' sales agents from being able to operate in the industry. TRUenergy submits that the most important benefit of the self regulatory code is the tracking of door to door sales agents that have been dismissed from another retailer for contravening industry rules or for poor behaviour, and that the only way to mitigate instances of 'rogue' doorknocking is with the establishment of a register which includes all retailers' sales agents/doorknockers.'<sup>59</sup>
- 4.98 The EAL register will automatically change a sales agent's accreditation status from 'provisional' to 'approved' four weeks after the sales agent's start date in the register. Further the same clause sets out that the EAL register will automatically renew a sales agents approved accreditation status for a further 12 months unless the member advises that the sales agent has not passed the formal competence assessment.
- 4.99 Aegis Direct 'strongly supports that the code will introduce public benefits through the establishment of an industry central register and its various accreditation statuses.' It

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<sup>58</sup> QCOSS submission to the ACCC, 25 May 2011

<sup>59</sup> TRUenergy submission to ACCC, 3 March 2011

states that ‘where proven breaches are recorded on the register [the code allows] members to review a sales agent’s accreditation history at recruitment which prevents the deregistered agents moving between members, or the recruitment of sales agents that persistently breach the standards.’<sup>60</sup>

- 4.100 APG states that ‘the registrations system will ensure that agents who do not come up to standard or who wilfully conduct themselves in contravention of the required standard are deregistered. Therefore under the scheme any such agent will no longer be able to operate in the market. This is a vast improvement on the current position where an agent (who is not up to standard) is free to move between retailers...’ Similarly, EWON states that ‘of particular benefit is the proposal to register marketing agents and to bring some oversight to the source of the majority of complaints concerning misleading marketing, the agents actually engaged in the misleading activity.’<sup>61</sup>
- 4.101 QCOSS recognises that there are benefits to tracking sales agents though the EAL register. However, it submits that the onus should be on members to advise when a sales agent has passed their competence assessment prior to the accreditation status being changed or renewed rather than the status automatically being changed and it being up to the member to advise when the competence assessment has not been passed.<sup>62</sup>
- 4.102 The ACCC maintains its view in the draft determination that maintaining a register of sales agents, and the requirement that members not employ deregistered agents, is potentially an effective means of preventing sales agents that have engaged in ‘wilful or gross misconduct’ (being the test for deregistration) from continuing to undertake doorstep sales. To the extent that the registration process prevents sales agents that have engaged in wilful or gross misconduct from engaging in doorstep sales, the ACCC considers this to be a public benefit.
- 4.103 The ACCC also notes that the scheme enables members to view the accreditation history of agents with the permission of the sales agent. If a sales agent has been previously registered on the EAL register to another member, the scheme makes provision for the member proposing to engage the sales agent to contact the previous employer/member for reference check purposes.
- 4.104 The ACCC considers that the EAL register has the potential to be effective in providing a central database for monitoring the competence of sales agents employed by members of the scheme and realise significant public benefits.

#### *Mechanisms to monitor sales agents’ behaviour*

- 4.105 Under the scheme members are required to monitor and report to the EAL appointed code manager on the behaviour of their sales agents.
- 4.106 In addition to receiving and reporting on complaints received from consumers the revised scheme requires retailers to undertake:

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<sup>60</sup> Aegis Direct submission to ACCC, 2 March 2011

<sup>61</sup> EWON submission to the ACCC, 25 May 2011

<sup>62</sup> QCOSS submission to ACCC, 4 March 2011

- an independent post sale verification on all consumers that enter into a contract with a sales agent to confirm with consumers that they have entered into a contract and that the consumer was satisfied with the way the sale was conducted
  - monthly random assessments of 5% of sales agents that have obtained an approved accreditation status, and
  - an annual formal competency assessment of an accredited sales agent.
- 4.107 In the draft determination the ACCC noted ambiguity around how these processes would operate. For example, the ACCC noted that no details had been provided about who will undertake the independent post sale verification process or any other aspect of the independence of this process. In addition there was ambiguity about the nature and frequency of the random assessments on sales agents.
- 4.108 In response to the draft determination EAL has clarified that the post sale verification process will be conducted by a call centre that is independent to the member or a separate verification team contained within the members' business.
- 4.109 EAL has also clarified that 5% of sales agents will be subject to monthly random assessments and that these may include: the "mystery shopping" of a sample of consumers that were contacted by sales agents but did not enter into a contract, and assessments of sales agents while the sales agent performs sales activities where the sales agent is randomly selected and the assessment is done by an approved assessor.
- 4.110 In response to the revised scheme CUAC suggested that 'the code should stipulate a sampling process that ensures that all sales agents are captured for assessment over time'.<sup>63</sup>
- 4.111 The ACCC considers that the mechanisms identified above are appropriate compliance mechanisms in a self regulatory scheme. In addition, the ACCC notes the improved clarity around these processes in the revised scheme. The ACCC considers that these processes have the potential to generate a public benefit.

## **Enforcement**

- 4.112 The ACCC considers that for the code to achieve the objective of increasing consumer confidence there needs to be compliance with the standards prescribed in the scheme, and effective sanctions in the event that energy retailers or sales agents employed by energy retailers do not comply.
- 4.113 The scheme provides for sanctions on sales agents employed by members and also on members directly. The scheme also makes provision for sales agent and member sanctions to be appealed and for reporting on compliance.

## ***Non-compliance by sales agents***

- 4.114 The scheme provides that where it is proven, upon investigation, that a sales agent has breached the code, the breach is to be categorised as a level one, two or three breach

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<sup>63</sup> CUAC submission to the ACCC, 25 May 2011

depending on the severity of the conduct. The category of the conduct, if proven, is then used to inform consequential action. See table 4.1

- 4.115 Clarity about the type of conduct that will fall into each category is important because the number of complaints by category type is also intended to inform member compliance with the scheme. It is also important because, a category three level complaint, if proven, is intended to result in the dismissal of the agent and his or her deregistration from the EAL register by the code manager.
- 4.116 Certainty, clarity and transparency in this area is particularly important given the potential conflict of interest for members in their dual role of enforcing the sales agent complaint process and incentivising sales agents to maximise sales and revenue.
- 4.117 In the draft determination the ACCC raised significant concerns about the code’s provisions concerning the categorisation of breaches by sales agents. In particular, the ACCC was of the view that providing false information about exit fees or promising discounts that do not apply is serious misleading conduct and would contravene a series of consumer protection laws. Accordingly, the ACCC considered that such conduct should be categorised as a level 3 breach. Further, the ACCC considered that the provision of false information of this type was unlikely to result merely from a lack of training, which is the sanction applicable for a level two breach.

**Table 4.1: Levels of breaches for sales agents<sup>64</sup>**

<b>Sales agent sanctions – enforced by energy retailers</b>			
Type	Level 1	Level 2	Level 3 (referred to code manager)
Breach (as defined by EAL)	Minor	Serious or persistent	Wilful or gross misconduct
Sanction	Coaching or retraining	Retraining and change status in register to ‘development’	Register reflect ‘suspension’ or ‘deregistration’ and sent to code manager
Examples of conduct	<ul style="list-style-type: none"> <li>▪ Agent did not display ID badge</li> <li>▪ Agent was flippant or rude to the consumer</li> </ul>	<ul style="list-style-type: none"> <li>▪ Two level 1 breaches in 3 consecutive months</li> <li>▪ Misinformation about termination fees by genuine mistake</li> <li>▪ Promoting a discount that does not apply by genuine mistake</li> </ul>	<ul style="list-style-type: none"> <li>▪ Two level 2 breaches in 6 consecutive months</li> <li>▪ Forgery and fraud</li> <li>▪ Intentionally misleading or deceptive conduct</li> <li>▪ Taking advantage of consumers circumstances</li> </ul>

- 4.118 Similarly, the ACCC also noted concerns in submissions about the process for establishing the level of breach to be attributed to a sales agent where non-compliant conduct is repeated. For example, the ACCC noted that level 1 breaches will be

<sup>64</sup> Adapted from EAL presentation of proposed scheme, 22 February 2011

escalated to level 2 breaches if the conduct is repeated across different months but not if the conduct occurred in the same month. In this scenario a sales agent that engages in level 1 non-compliant behaviour on 31<sup>st</sup> March and 1<sup>st</sup> April it will be assigned a level 2 breach. Whereas a sales agent that engages in non-compliant behaviour on 1<sup>st</sup> March and 31<sup>st</sup> March will be assigned a level 1 breach.

- 4.119 In summary, the ACCC did not consider that the sanctions on sales agents would be effective in improving the standard of behaviour of sales agents as the sanctions did not reflect the seriousness of the conduct in all circumstances. As such, the ACCC considered that the scheme would not realise its purported public benefit in this area.
- 4.120 In response to the ACCC draft determination EAL has clarified that a level 2 breach will be imposed on a sales agent that provides false information about termination fees or promising discounts that do not apply by genuine mistake. Intentional misleading and deceptive conduct will result in a level 3 breach. In addition, EAL has simplified the process for establishing the level of breach to be attributed to a sales agent where non-compliant conduct is repeated.
- 4.121 In response to the revised scheme CAV submits that ‘the ACL makes no such distinction when it comes to a trader providing false or misleading information [and that this distinction] may cause confusion for consumers, particularly when it comes to understanding the sort of behaviour they should expect from sales agents, and what their rights and options for recourse are when an agent engages in false or misleading behaviour.’<sup>65</sup>
- 4.122 CALC notes the lack of reference to the impact on consumers in relation the different levels of breaches. It considers that ‘many of the breaches in levels 1 and 2 are equally as serious [as those in level 3] 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 consumers.’<sup>66</sup>
- 4.123 In response to these submissions and in response to further information from the ACCC, EAL submitted that ‘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.’<sup>67</sup>
- 4.124 The ACCC has some concerns about the credibility of distinguishing between mistaken and intentional misleading and deceptive conduct. In addition the ACCC notes that the key provisions of the ACL do not distinguish between intentional and mistaken behaviour. However, in the context of applying sanctions, the ACCC considers that EAL may have a legitimate concern that in some cases it may be unfair for a sales agent to be deregistered for a single incident of providing false information

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<sup>65</sup> CAV submission to the ACCC, 30 May 2011

<sup>66</sup> CALC submission to the ACCC, 31 May 2011

<sup>67</sup> EAL submission to the ACCC, 2 June 2011

unintentionally as a result of a genuine mistake. In addition, as noted by EAL, if this conduct is repeated more than once in the course of a six month period then this would result in a level 3 breach and deregistration of the sales agent under the scheme.<sup>68</sup>

- 4.125 On balance the ACCC does not consider this to be an issue that would necessarily undermine the effectiveness of the scheme. However, if breaches of this type were regularly categorised as ‘unintentional’ then this would be a significant concern. This aspect of the scheme is therefore something that the ACCC considers requires careful monitoring by the EAL code manager and code auditor. In addition, this is an aspect of the scheme that the ACCC will review at the end of the initial authorisation period to assess its effectiveness.
- 4.126 In addition to sanctions for sales agents, 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. The ACCC considers that any non-compliance by sales agents may be linked to the resources that retailers and marketers invest in training. For example systemic breaches of the code by a large number of sales agents may be evidence of the retailer not fulfilling their training obligations under the code. Incentives for retailers to fulfil these obligations and comply with the scheme will depend on the effectiveness of the sanctions process for members (discussed below).
- 4.127 Overall, the ACCC considers that the revisions made by EAL mean that the sanctions in the scheme more appropriately reflect the seriousness of the corresponding conduct and therefore, are likely to assist in improving the standard of behaviour of sales agents.

### ***Non-compliance by members***

#### *Monitoring member compliance*

- 4.128 Member compliance will be monitored by an independent code manager appointed by EAL. The revised scheme provides for member compliance with the scheme to be monitored by:
- monthly reporting to the code manager by retailers
  - annual compliance audits on members, and
  - receiving complaints about members
- 4.129 The code manager must investigate all potential breaches of the code by members raised through these mechanisms.
- 4.130 The annual compliance audits will be undertaken by an independent auditor engaged by EAL and will cover matters such as:
- issues relating to contacting and contracting with consumers and ethical conduct of sales agents

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<sup>68</sup> EAL submission to the ACCC, 2 June 2011

- the adequacy of recruitment, training, assessment and monitoring of sales agents, and
  - the consistency and accuracy of the member's categorisation of breaches by sales agents
- 4.131 The compliance audit may include random checks (on both energy retailers and marketers) and surprise field checks on sales.
- 4.132 The scheme has been set up such that members, energy ombudsmen, consumer advocacy groups, energy regulators, regulatory bodies, or the government can raise a complaint about a member under the code.
- 4.133 In the draft determination the ACCC noted the critical role played by the code manager in monitoring compliance with the scheme. With this in mind, the ACCC considered that there was a lack of guidance to the code manager on how it will identify systemic issues in monthly reporting on compliance by retailers for investigation.
- 4.134 In response to the draft determination, EAL clarified in the revised code that retailers themselves will identify systemic issues through monthly reporting to the code manager and that the code manager must investigate all potential breaches of the code through the mechanisms identified.
- 4.135 The ACCC notes that a retailer will be exposed to sanctions for not reporting systemic issues to the code manager and that this is provided as an example of a systemic breach which attracts a level 3 sanction in the code. However, given that the identification and reporting of breaches by retailers relies on retailers to act in good faith, the ACCC considers that this is something that should be closely monitored by the code auditor and reviewed by the ACCC should EAL seek reauthorisation of the scheme at the end of the initial authorisation period.
- 4.136 The ACCC also raised a concern that consumers, and in particular, consumer groups could not make a complaint to EAL about a member under the scheme. In response to the draft determination EAL has changed the revised code so that consumer advocacy groups can raise a complaint about a member under the scheme. The ACCC also notes that while individual consumers are still precluded from directly raising a complaint with EAL, the code has been clarified to ensure that energy ombudsmen or regulators can raise a complaint about a member that arise from an individual consumer's complaint..
- 4.137 EAL argues that consumers should more appropriately complain to the retailer, the relevant energy ombudsman or the regulator and that providing consumers with an additional avenue of complaint will create confusion for consumers. In addition, it argues that consumer complaints made to the energy retailers under the sales complaint handling process will become known to EAL through monthly report and audit processes. Further, EAL noted that the energy ombudsman or relevant energy regulator can raise complaints from consumers to EAL about a member.
- 4.138 The ACCC welcomes the fact that consumer advocacy groups can now raise a complaint about members under the scheme as these organisations can be well placed to identify systemic issues of non-compliance.

- 4.139 The ACCC notes that the code now explicitly states that a complaint received by the code manager from an individual consumer will be referred back to the member to resolve directly (if the consumer has not already attempted this), or will be referred to the relevant energy ombudsman or regulator if the consumer is dissatisfied with the response.<sup>69</sup> The code has also been revised to clarify that energy ombudsmen or regulators can raise a complaint about a member under the scheme that might have arisen as a result of a complaint from an individual consumer.
- 4.140 The ACCC expects that energy ombudsmen in particular will play an important role in ensuring that complaints from individual consumers that suggest a breach of the code are referred to EAL for investigation.
- 4.141 Therefore, while the ACCC notes that consumers themselves are still precluded from directly raising a complaint with EAL, there are clear avenues for complaints from individual consumers to be actioned and taken forward. Further, the ACCC considers that providing an additional avenue of complaint for individual consumers may add unnecessary costs to the administration of the scheme by duplicating existing complaints mechanisms and could potentially confuse consumers.
- 4.142 In general, the ACCC considers that mechanisms to monitor member compliance have the potential to be effective in encouraging retailers to comply with the scheme. The scheme now provides for clear processes around how compliance will be monitored and by whom.

#### *Process for sanctioning members*

- 4.143 The revised code sets out the following process for the sanctioning of members.
- 4.144 Where an issue of non compliance is identified by the code manager then the code manager must issue the responsible member(s) with a notice warning them that they have suspected of having breached the code and recommending that remedial action be undertaken to address the issue.
- 4.145 If the member fails to meet the obligations imposed on it under a warning notice or the code manager has not waived the requirement to comply with the warning notice (because the member satisfies the code manager that the suspected code breach didn't occur for example) the code manager must impose a sanction on the member.
- 4.146 The scheme provides for six levels of sanction that may be imposed on members. The code manager determines the level of sanction based on the following criteria:
- The type of breach (these are classified as: minor operational, serious operational, material, systemic, or failure to meet action plans imposed by previous sanctions) (see table 4.2)
  - Whether the member has had any previous warning notices or sanction imposed in the past two years
  - Previous sanctions on other members to promote consistency

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<sup>69</sup> Clause 26(2), EAL Code of Practice



- The costs of compliance to members to ensure that any action required is proportionate to the issue that it seeks to remedy (the attitude of the member will also be considered)

**Table 4.2 Types of breach for each level of member sanction**

<b>Sanction</b>	<b>Description of breach</b>	<b>Example</b>
Sanction 1	<ul style="list-style-type: none"> <li>▪ Minor operational breach</li> </ul> <p><i>Operational and minor but does not have a direct public facing impact. A small technical or superficial breach of the operations of the code.</i></p>	Minor failures in maintaining the EAL register properly.
Sanction 2	<ul style="list-style-type: none"> <li>▪ Serious operational breach</li> </ul> <p><i>Operational and serious but does not have a direct public facing impact. More than a technical or superficial breach of the operations of the code and is a clear contravention of a member's obligations.</i></p> <ul style="list-style-type: none"> <li>▪ Material breach, or</li> </ul> <p><i>A significant breach of the EAL standards that is isolated in nature yet has impacted, or has the potential to impact, a large number of consumers. Where the member can demonstrate that the breach was not an inherent issue with the member's compliance to the code.</i></p> <ul style="list-style-type: none"> <li>▪ Three level 1 sanctions in 3 months.</li> </ul>	<p>Serious operational breach:</p> <p>Not undertaking the adequate training of sales agents.</p> <p>Material breach:</p> <p>A sales agent breaches the code and on investigation it was found that the sales agents was deregistered</p>
Sanction 3	<ul style="list-style-type: none"> <li>▪ Systemic breach</li> </ul> <p><i>A breach of the EAL standards that is not isolated in nature and may have affected, or have the potential to affect a large number of consumers. Where a member cannot demonstrate that the breach is not an inherent overall issue with the member's compliance to the code.</i></p>	Quantity of level 1, 2 or 3 sales agent breaches exceeds 1% of the number of consumers contacted for the month.
Sanction 4	<ul style="list-style-type: none"> <li>▪ Three or more sanction 2s in six months</li> <li>▪ Two sanction 2's and one sanction 3 in six months, or</li> <li>▪ Two sanction 3's in six months.</li> </ul>	N/A
Sanction 5	<ul style="list-style-type: none"> <li>▪ Member has failed to comply with agreed action plan arising from audit conducted under sanction 4, or</li> <li>▪ Two sanction 4's in 12 months</li> </ul>	N/A
Sanction 6	<ul style="list-style-type: none"> <li>▪ One sanction 5 and continues to fail to comply with the agreed action plan arising from the audit under sanction 4</li> <li>▪ Two sanction 5's in 12 months.</li> </ul>	N/A

- 4.147 Where a breach is attributable to the energy marketer the code manager may determine that:
- both the energy retailer and energy marketer is subject to the sanction
  - a different sanction is imposed on the energy marketer as is to the energy retailer, or
  - only the energy marketer receives the sanction.
- 4.148 Unless immediate remedial action is required the code manager will provide an opportunity for the member to discuss the circumstances of the failure to meet its obligations under the warning notice and the proposed sanction, and if possible, resolve points of difference. The code manager will then issue a notice of breach.
- 4.149 Where the sanction proposed is more significant than a sanction 1, one member of the code panel must approve the sanction before it can be imposed. The code panel can uphold the determination of the code manager or substitute the decision with his or her own decision.
- 4.150 The member may appeal a decision of the code manager or code panel. One or three members of the code panel will hear the appeal depending on the level of sanction to be imposed and at the election of the member.
- 4.151 In the draft determination the ACCC identified the critical role played by the code manager and the code panel in enforcing the code on members. With this in mind, the ACCC identified that there was a lack of guidance to the code manager in its role of triggering the sanctions process having identified a breach. Similarly the ACCC identified a lack of guidance to the code manager and the code panel around the level of sanction to be applied. The ACCC considered that this lack of guidance and discretion would reduce the accountability of the code manager and code panel. The ACCC also considered that the scheme would benefit from being more explicit about how panel members are to be selected for hearings as to address concerns about whether individual members are appropriately qualified, whether there would be any perception of bias or whether there are any other possible conflicts of interest.
- 4.152 EAL states that in response 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...’
- 4.153 In response to these changes CUAC suggests that ‘the classification of what constitutes the different types of breaches needs clarification.’
- 4.154 EWOV is concerned that the example in the scheme of a systemic breach does not adequately describe a systemic issue as it requires the breach to have been conducted by numerous sales agents. EWOV suggests that systemic issues in marketing can result from the conduct of a single sales agent which then potentially affects large numbers of customers. It considers that clarification to the breach example is required so that all types of systemic issues are actively identified, and appropriate action taken to prevent further complaints arising.
- 4.155 EAL submits that ‘to define a systemic issue as suggested by EWOV is unwarranted and impracticable under the code. If EWOV’s recommendation were to be adopted

there is an unacceptable risk that Level 2 or 3 breaches [by sales agents] 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 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 Sanction 4 will be triggered. To enshrine this [EWOV's] definition in the code would be cost prohibitive on members and will impede participation in the scheme.'

4.156 The ACCC notes and understands EAL's concerns. However, the ACCC also accepts EWOV's submission that a systemic issue in marketing can be reflected in the conduct of a single sales agent which then potentially affects large numbers of consumers.

4.157 After further consideration, EAL has amended the example of a systemic breach in the code from:

Statements that are intentionally misleading or deceptive in nature being made consistently in relation to a particular matter by **numerous** Sales Agents as opposed to being an isolated incident and reported to the Code Manager under clause 26.1 (3).

to

Where under clause 26.1 (3) the Code Manager receives a Member Complaint of statements that are intentionally misleading or deceptive in nature being made consistently in relation to a particular matter by **one or more** Sales Agents **and the Member, to which the Member Complaint relates, cannot demonstrate that the breach was not an inherent issue with the Member's compliance to the Code** or due to a specific, individual or isolated factor.

4.158 The ACCC considers that this revision ensures that the scheme now appropriately covers a range of circumstances that may constitute a systemic issue.

4.159 Overall, the ACCC considers that the revised scheme now provides an appropriate level of clarity around:

- when the code manager will impose sanctions and the level of sanction to be imposed
- the role of the code manager and the code panel in their dual role of enforcing the code and
- how members of the panel will be determined to take part in appeals.

#### *Rigour of sanctions on members*

4.160 In the draft determination the ACCC also raised concerns about the rigour of the sanctions to be imposed on members noting that the public will only be informed about a sanction if a level 5 and level 6 sanction had been imposed. The ACCC noted that this limited transparency may dilute the incentives for retailers to comply with the scheme.

4.161 In response to the draft determination EAL revised the sanctions that may be imposed on members for breaches of the code. As well as changing the general nature of the sanctions at each level EAL has also increased the transparency around when member sanctions are imposed. In particular the ACCC notes that:

- the EAL Board is now notified of a level 1 sanction without identifying the member (previously the EAL board was not notified of a level 1 sanction)
- the EAL Board is now notified of a level 2 sanction including the identification of the member (previously the EAL Board was not notified of a level 2 sanction)
- the EAL Board, the relevant energy regulator and the energy ombudsman are now notified of level 3 and level 4 sanctions on a member (previously only the EAL Board were identified of a breach at these levels), and
- the public will continue to be informed about level 5 and level 6 sanctions as before.

4.162 Table 4.3 sets out the levels of sanction and a description of the sanction at each level.

**Table 4.3 Sanctions that may be imposed on members in the code**

<b>Sanction</b>	<b>Description of sanction in the code</b>
Sanction 1	Member to provide undertaking not to repeat breach. EAL Board is notified of the breach (member not named)
Sanction 2	Formal letter of admonishment is issued to member. Member details to the code manager its strategy to rectify the issue and implements an agreed action plan to prevent the problem reoccurring at its cost. EAL Board is notified of the members breach.
Sanction 3	As sanction 2 except that EAL Board, the relevant energy regulator and the energy ombudsman are notified of the members breach.
Sanction 4	Member appoints an independent code auditor to audit the areas of activity where the breach occurred at the members cost. Member details to the code manager its strategy to rectify etc. Formal letter of admonishment. EAL Board, relevant energy regulator and the energy ombudsman are notified of the breach.
Sanction 5	As per sanction 3 except that in addition other stakeholders and the public will also be notified of the breach.
Sanction 6	Member deregistered (permanently or temporarily) and membership cancelled. A public statement will be issues that identifies the member, states the section of the code breached and the period of deregistration.

4.163 QCOSS submits that ‘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...Even if sanctions are imposed, it is unlikely that members would ever face any real penalty for breaching the EAL code.’

4.164 The ACCC recognises QCOSS’s concern but notes that the code manager must consider any previous warning notice or sanction imposed on the member in the past two years when considering whether to impose a sanction on a member. Further, the ACCC notes that the General Insurance Code of Practice allows for sanctions to be

imposed where members have failed to correct a breach.<sup>70</sup> However, this is an aspect of the scheme that the ACCC will consider at the end of the authorisation period should EAL apply for reauthorisation of the scheme.

- 4.165 Mr Chris Connolly submits that the ‘the overriding requirement for the code manager and code panel to consider compliance costs to retailers in determining sanctions undermines the entire sanctions process... There is no similar requirement on the code manager to consider the damage that the breach might have had on the reputation of the industry or the impact on consumers of the breach.’<sup>71</sup>
- 4.166 The ACCC notes Mr Connolly’s concerns. In this context, the ACCC notes that the code manager will need to take into account a variety of factors to ensure that the compliance action required is proportionate to the issue that it seeks to remedy. The ACCC considers that it will be appropriate to review this approach once the code is more established and stakeholders have had experience with its operation. Accordingly, the ACCC notes that this is an issue that warrants close review at the end of the authorisation period should EAL apply for reauthorisation of the scheme.
- 4.167 The ACCC welcomes the increased rigour relating to the nature of the sanctions and the increased transparency of sanctions imposed on members, particularly in relation to informing the energy ombudsman and energy regulator about sanctions. As noted earlier, effective sanctions are necessary for the code to achieve the objective of increasing consumer confidence.

#### **Reporting on compliance by members with the scheme**

- 4.168 Reporting on compliance is important because it creates incentives for retailers to comply with the scheme, thereby encouraging a culture of compliance. This is likely, in turn, to lead to improved standards of behaviour by sales agents which should improve consumer confidence. Reporting is also important because it provides information about the performance of the scheme as a whole and provides accountability to the code manager and the code panel in their functions of monitoring compliance and enforcing the scheme.
- 4.169 Public reporting is the most effective form of reporting in terms of encouraging members to comply with the scheme as it exposes the member to reputational risk. Reporting on member compliance to other key stakeholders such as the regulator also provides incentives for retailers to comply with the scheme.
- 4.170 The revised scheme provides for reporting at different levels and to different stakeholders. It provides for:
- Monthly reports prepared by retailers provided to the code manager (as discussed above)
  - Quarterly updates provided to the EAL Board, members, energy ombudsmen and energy regulators

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<sup>70</sup> General Insurance Code of Practice, May 2010

<sup>71</sup> Mr Chris Connolly oral submission, 24 May 2011

- Detailed annual compliance reports provided to individual members, the code manager and the energy regulator
- Consolidated annual compliance reports provided to the EAL Board, members, the code panel and at the next meeting of the stakeholder working group. The code is silent on whether this report will identify individual members.
- An annual public report.

4.171 The ACCC also notes that:

- the code manager will engage with the relevant energy ombudsman to share information on member issues identified and the levels of sales complaints received, and
- that level 2 and level 3 sales agent breaches will be reported to the energy regulator (where applicable) including the action that was taken to address the breach, the remedial steps implemented and, if appropriate, the proposed consumer redress.

4.172 The monthly reports will be provided to the code manager and will include:

- Details of sales complaints received in the month
- Details of breaches attributed to sales agents in the month
- Any systemic issues identified by the retailer and the corrective action undertaken, and
- The outcome of reviews of consumer contracts, as provided for under the code, where a level 2 or 3 breach is recorded against a sales agent

4.173 The quarterly updates to the EAL Board, members, energy ombudsmen and energy regulators will include information on:

- The number and nature of warning notices and sanctions on members and the reasons for those sanctions being proposed, and
- The result of the warning notices being imposed.

The ACCC understands that these updates will not identify individual member compliance.

4.174 The detailed audit annual audit reports will:

- set out the results of the review
- identify areas of non-compliance, and
- prescribe action plans agreed with the energy retailer to address areas of non-compliance by the energy retailer

4.175 The consolidated audit report will summarise:

- the extent and type of breaches of the EAL standards
- the procedures and documentation that were reviewed, an outline of any major or important instances of non-compliance, inclusive of potential industry wide systemic issues identified
- corrective measures that have been prescribed to address compliance issues, and
- any other relevant observations.

The consolidated report will be provided to the EAL Board, members, the code panel and at the next meeting of the stakeholder working group.

4.176 The annual report will include amongst other matters:

- an overview of the compliance audits undertaken, and
- statistics on sales agents such as the number of proven sales agent breaches, deregistration applications, and the number of appeals by sales agents heard for example
- statistics of sales complaints made to an energy retailer as a proportion of consumers contacted (naming the energy retailer)
- statistics of breaches by members, sanctions imposed on members and appeals by members (without naming the member except where a sanction 5 or 6 has been imposed)
- statistics on the number of sanctions and appeals considered and heard by each panel member

4.177 In the draft determination, the ACCC raised concerns about how much information will be in the high level summary of the compliance audits in the public report and suggested that greater transparency around the results of the audit would improve the effectiveness of the code through increased accountability on retailers.

4.178 EWOV acknowledges that some stakeholders are provided with information on potential breaches but considers that this information needs to be made available to all stakeholders. It suggests that EAL should report publicly on compliance every six months.<sup>72</sup>

4.179 PIAC submits that ‘the code outlines that statistics on the issuing of warning notices for suspected code breaches, the imposition of sanctions, and the number of appeals heard, will be included in the annual report; however the members involved will not be named.’<sup>73</sup>

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<sup>72</sup> EWOV submission to the ACCC, 27 May 2011

<sup>73</sup> PIAC submission to the ACCC, 24 May 2011

- 4.180 The ACCC notes and welcomes the additional information that EAL has committed to providing in the annual report. In particular the ACCC welcomes the commitment by EAL to report retailer statistics on sales complaints received relating to door to door energy sales. The ACCC notes that this information goes beyond the information currently reported by regulators on complaints as it will distinguish those complaints that relate specifically to door to door sales as opposed to marketing more broadly.
- 4.181 The ACCC also notes and welcomes that the detailed reports of the annual compliance audits will now be provided to the energy regulator and that the regulator will also receive quarterly updates on compliance with the code. However, the ACCC notes that the annual report will continue to only contain limited information on member compliance with the scheme. For example it will not provide information on breaches of the code by individual members. The ACCC also notes that the regulator will only be provided information on member compliance with the scheme annually (through the detailed audit reports).
- 4.182 The ACCC considers that an increase in public reporting on member compliance with the scheme will increase the incentive on retailers to comply with the scheme which would increase the effectiveness of the scheme. The ACCC considers that more frequent reporting of member compliance with the scheme to the regulator would also increase the incentive for retailers to comply with the scheme and improve the effectiveness of the scheme.
- 4.183 However, the ACCC considers that requiring additional reporting on sanctions, particularly public reporting on individual members, may be overly burdensome. Further, the ACCC notes that retail industry self regulatory codes such as the Code of Banking Practice, the General Insurance Code of Practice, and the Telecommunications Consumer Protections Code provide some discretion around identifying members for breaches of the code and in some instances do not identify members.
- 4.184 Overall, the ACCC considers that the level of public reporting is appropriate at this stage of the scheme's development. It may be the case that a more detailed level of reporting will be appropriate in the future once the scheme is more established.

## **Other issues**

### ***Consumer redress***

- 4.185 Where a complaint is substantiated the scheme requires energy retailers to redress the complaint in accordance with applicable laws and the energy retailers internal practices. The scheme does not provide any further guidance to retailers about consumer redress.
- 4.186 Mr Chris Connolly is of the view that EAL should be a dispute resolution body and therefore EAL should not simply be referring consumer complaints received by it.
- 4.187 In response to the draft determination the ACCC notes that EAL has provided greater clarity about the rights of consumers to access the energy ombudsman schemes and that EAL is not a dispute resolution scheme.



4.188 The ACCC welcomes this clarification and maintains its view in the draft determination that EAL is not the appropriate body for making decisions regarding individual consumer complaints that may involve redress or compensation. The ACCC considers that such complaints are appropriately dealt with by the retailer or the relevant energy ombudsman scheme.

#### **ACCC conclusion on public benefit**

4.189 The ACCC considers that the revised scheme is likely to result in public benefit by:

- improving the levels of compliance with laws applying to the door to door selling of energy to consumers
- better informing consumers about their rights and sales agents' obligations in door to door selling of energy and
- reducing the impact of pressure selling practices

4.190 The ACCC also considers that the scheme effectively addresses the potential conflicts of interest faced by sales agents and energy retailers as a result of the remuneration structure and the characteristics of door to door selling.

4.191 The ACCC considers that the realisation of these benefits depends on:

- consumer awareness of the standards of behaviour governed by the scheme and the recourse available to them if they consider these standards have not been met
- compliance by sales agents with the standards prescribed in the scheme and
- effective sanctions in the event that sales agents or energy retailers do not comply with the standards prescribed in the scheme.

4.192 The ACCC is of the view that EAL has satisfactorily addressed the concerns in each of these areas as set out in the draft determination:

- there are a number of mechanisms which are likely to promote consumer awareness of the scheme, and the scheme now largely meets the same standards required by the law, thereby minimising the risk of consumer confusion
- the central register of accredited sales agents, and standardised recruitment, training and monitoring are likely to ensure compliance with the scheme and improve the conduct of sales agents working in the industry, with the potential to increase consumer confidence
- the scheme contains appropriate sanctions on both sales agents and energy retailers which are likely to incentivise members to comply with the scheme.

4.193 The scheme also provides for reporting on compliance. On balance, the ACCC considers that the level of public reporting is appropriate at this stage of the scheme's development, although a more detailed level of reporting (particularly more detailed reporting on individual member compliance) may be warranted in the future once the scheme is more established. This is something that the ACCC will review at the end of the authorisation period should EAL seek reauthorisation of the scheme.

## **Public detriment**

4.194 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>74</sup>

4.195 EAL submits that the proposed self-regulatory scheme will have little, if any impact on competition and that all participants will be on a level playing field provided they comply with the requirements of the scheme. However, EAL did identify some elements of the scheme that may potentially raise concerns under the Act. In particular, requirements for accreditation of sales agents, requirements that prevent more than one member engaging the services of any agent and requirements in relation to not employing marketers that are not also EAL members.

4.196 In considering any potential public benefit generated by the scheme the ACCC has proceeded on the assumption that, as envisaged by EAL, the vast majority of energy retailers and marketers will participate, or at least seek to participate, in the scheme.

## **Complexity of the scheme and consumer confusion**

4.197 In an environment where consumers are currently experiencing a level of confusion around energy regulation, it is important that any new self regulatory mechanism enhances consumers' understanding of their rights and does not create additional confusion through the creation of unnecessary additional complexity.

4.198 In the draft determination, the ACCC noted that the scheme is complex in itself, being contained in four documents with inconsistencies between those documents.

4.199 In response to the draft determination, EAL has simplified the scheme documentation so that it now consists of one key document, the Code of Practice. While the Procedures Guideline and the Constitution are part of the scheme documentation, the Code of Practice is the focal document for the scheme.

4.200 The ACCC considers that the changes implemented by EAL now mean that the scheme strikes a more appropriate balance between the detail required to establish an effective self regulatory mechanism, and the clarity required to reduce the likelihood of consumer confusion about the operation of the scheme.

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<sup>74</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.201 In the draft determination, the ACCC also noted that the scheme as it stood then created the likelihood of consumer confusion as the requirements around the provision of information to consumer's about their rights when engaging with sales agents or entering into contracts fell short of existing regulatory requirements such that the scheme eroded consumer protection rather than enhancing it.
- 4.202 As noted earlier under **Public benefit – Consumer awareness**, EAL has revised the code to specifically incorporate legislative requirements. The ACCC considers that these revisions mitigate the risk that the scheme will generate a public detriment by creating an expectation that the level of protection offered by it is greater than it actually is.
- 4.203 A third example of confusion and complexity identified in the draft determination was the operation of the complaints handling processes and the circumstances in which consumer complaints should be directed to the retailer, the relevant state ombudsman or other enforcement agency which are not made explicit in the scheme. This issue was raised not only by the ACCC but also interested parties including CUAC, CALC and EWOV who suggested that the code be amended to specifically include the following statements:
- EAL is not a dispute resolution body
  - EAL will refer consumers back to their retailer to resolve their dispute directly if they have not contacted the retailer previously
  - EAL will also refer complaints to the relevant energy ombudsman if they are dissatisfied with the retailer's response to their complaint, and
  - EAL will investigate breaches and maintain a register with their members.<sup>75</sup>
- EWOV also suggested that EAL should develop a flowchart to assist consumers identify the responsibilities of the various industry players including the contact details of each of those parties.
- 4.204 In response to the draft determination, EAL has amended the code to specifically state that it is not a dispute resolution body and that it will refer consumers to their retailer or the relevant energy ombudsman if they have already been to their retailer and are dissatisfied with it's response.
- 4.205 EAL has also submitted a flowchart which sets out the scheme's sales complaint handling process.
- 4.206 The ACCC welcomes these changes and considers that they assist in reducing the potential for consumer confusion around the complaints handling process.

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<sup>75</sup> EWOV submission to ACCC, 4 March 2011

**Members can only engage sales agents that are registered and accredited under the scheme (the accreditation provision)**

- 4.207 The scheme requires members to only engage sales agents that are registered and accredited under the scheme. Thus sales agents that are not registered and accredited would not be able to engage in sales activities for any retailer that is a member of the scheme (i.e. any member of EAL).
- 4.208 EAL submits that the scheme is open to any person seeking to engage in door to door sales activities as a sales agent, subject to criminal history and reference checks and subject to the sales agent completing the schemes training requirements. Ongoing registration is contingent on the sales agent undertaking periodic retraining as required under the scheme and complying with the schemes behaviour standards. EAL also submits that deregistration of a sales agent that does not comply with these behavioural standards is not indefinite and the agent can apply for re-registration after five years.
- 4.209 As such, EAL submits that requiring members to only employ sales agents that are registered under the scheme will not unduly restrict competition. Rather, EAL submits that the restriction will improve the standard of door to door energy marketing and promote consumer confidence and choice.
- 4.210 The ACCC considers that a vetting, registration and training and ongoing monitoring process, including provisions to exclude persons who do not meet or maintain requisite standards, is a necessary component of any self regulatory scheme aimed at regulating the behaviour of sales agents. The requirement that scheme members only engage sales agents that are registered and accredited under the scheme is the mechanism by which the behavioural standards required by the scheme are enforced.
- 4.211 In this respect, while the agreement between EAL members to only employ accredited sales agents is likely to have the effect of precluding sales agents who do not meet and maintain requisite standards from engaging in door to door sales in the energy sector, the ACCC considers this restriction to be a necessary pre-condition for the objectives of the scheme, maintaining and improving the behaviour of door to door sales agent, to be realised.
- 4.212 The ACCC does not consider that excluding sales agents who do not meet these standards from engaging in door to door sales generates a public detriment.

**Sales agents can only represent one member at a time (exclusive representative provision)**

- 4.213 The scheme provides that sales agents are prohibited from working for more than one retailer or marketer at any time.
- 4.214 EAL submits that its register cannot operate appropriately and the necessary competence monitoring and training cannot occur if more than one member is responsible for a sales agent at any one time. EAL argues that without this requirement its ability to administer the scheme and deliver the intended public benefits would be significantly hampered. Further, EAL submits that given any sales agent is eligible to become a scheme participant and be engaged by any member and given that a sales agent is free to move between members at any time, the requirement will have little impact on the allocation of sales agents.

4.215 The ACCC accepts that allowing sales agents to work for more than one member at any given time would add complexity to the administration of the scheme. In addition, where there are concerns about the behaviour of sales agents they are likely to be more effectively addressed where a single member is responsible for the training, monitoring and, if necessary, sanction, of the sales agent. The ACCC does not consider that this limitation will result in additional public detriment.

#### **Energy retailer members can only engage energy marketers that are members to undertake sales activities on its behalf (member provision)**

4.216 The scheme requires members to only engage energy marketers that are members of the scheme.

4.217 EAL submits that given any energy marketer is eligible to become a member of EAL, this requirement would be unlikely to have any meaningful impact on the manner in which the services of energy marketers are acquired by members. Additionally EAL submits that without this provision, an energy retailer member cannot ensure that it is complying with the scheme as if it engages an energy marketer that is not a member there is no mechanism for ensuring that the member is engaging sales agents that are accredited on the register and recruited, trained and assessed accordingly.

4.218 The ACCC notes that all energy marketers are eligible to become a member of the scheme. Accordingly, provided the eligibility requirements are applied fairly and transparently the ACCC considers that the requirement that retailer members only employ marketers that are also scheme members would be unlikely to generate any significant public detriment.

#### **Sanctioning of sales agents and EAL members**

4.219 As discussed, sales agents and members that fail to comply with the requirements of the scheme will be subject to sanctions which may ultimately include deregistration. EAL submits that:

- All members and sales agents are on a level playing field with respect to eligibility for the scheme and the requirement to comply with the scheme.
- To not sanction a member and/or sales agent for failure to comply would significantly diminish the ability of the scheme to promote compliance and accordingly achieve the public benefits.
- It is envisaged that the imposition of sanctions that meaningfully affect a person's ability to operate in the door to door energy sales sector will be extremely rare. The complaints process indicates that the removal of member and sales agent privileges will only occur in extreme cases of misconduct where the justification for the punishment outweighs any effect on competition.

4.220 Additionally, EAL states that the decision to impose sanctions rests with the code manager and the code panel which are independent of EAL members. EAL argues that additional protection is provided by the appeal mechanism under the complaints process that permits an aggrieved member or sales agent to request that a first instance decision be reviewed.

- 4.221 As with the scheme's initial accreditation requirements, the ACCC considers that the ability to sanction and potentially expel members or sales agents are important aspects to promoting compliance with the scheme.
- 4.222 As such, the ACCC does not consider that the ability to impose sanctions, including expulsion for the scheme on members and sales agents in and of itself would generate a public detriment (provided sanctions are applied in an open, transparent and consistent manner and only in accordance with the promotion of the standards of behaviour required by the scheme).

### **EAL membership criteria**

- 4.223 As discussed in paragraph 2.2, membership of EAL will be open to any energy retailer or marketer. Applications for membership are considered by the EAL Board and the scheme requires EAL to advise prospective applicants of the outcome of their application for membership.
- 4.224 The original version of the scheme did not require EAL to give any reasons where an application for membership was rejected by EAL. Nor was there any right of appeal or other dispute resolution process available to a rejected applicant.
- 4.225 In the draft determination, the ACCC expressed concerns about the lack of transparency and procedural fairness in EAL's application process.
- 4.226 In response to the draft determination, EAL has amended its constitution to address the ACCC's concerns so that EAL membership will not be refused unless:
- the applicant does not meet the conditions for membership (being relevant registrations and payment of application fee),
  - the applicant is insolvent (or equivalent), or
  - the applicant is currently under a period of suspension from participating in the EAL scheme as a result of being sanctioned under the complaints process.
- 4.227 EAL states that it will formalise the constitutional amendment by obtaining relevant approvals and submitting it to ASIC should the ACCC authorise the EAL Scheme.
- 4.228 As flagged in the draft determination, the ACCC considers that these amendments to EAL's constitution address concerns about the possibility of the scheme's membership criteria being arbitrarily applied.

### **Costs of implementing the scheme**

- 4.229 As noted by industry, the development and implementation of the scheme is not costless. There are a number of upfront direct costs that will be incurred from the development of the sales agent accreditation register, as well as ongoing costs related to administration of the scheme, such as resourcing the code manager and auditor, training of sales agents and other functions.

- 4.230 The ACCC considers that the full costs of training sales agents and audit/reporting functions should not be attributable to the development of the scheme as the existing regulatory framework (see chapter 2) already sets out a number of obligations with which retailers and their sales agents should be compliant. Fulfilment of these obligations is likely to include training as well as monitoring compliance and reporting.
- 4.231 The ACCC also noted EAL's argument that the scheme will reduce regulatory costs by improving the standards of sales agent's behaviour. This issue is discussed in the ACCC's assessment of the public benefit of the arrangements.

### **ACCC conclusion on public detriment**

- 4.232 Given existing regulatory requirements, it is important that another layer of regulation or self regulation offers benefits above the level provided by the status quo and enhances consumers' understanding of their rights, rather than confusing consumers about their rights through the creation of unnecessary complexity.
- 4.233 The ACCC considers that EAL's revisions to the scheme address the potential for public detriment arising from consumer confusion, or a lack of transparency and procedural fairness. As such, the ACCC is now of the view that the scheme is likely to result in limited public detriment.

### **Balance of public benefit and detriment**

- 4.234 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.235 In the context of applying the net public benefit test in section 90(8)<sup>76</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>77</sup>
- 4.236 The ACCC supports efforts by industry to improve outcomes for consumers and the efficient operation of markets through the adoption and enforcement of self regulatory mechanisms like codes of conduct.
- 4.237 For the reasons outlined in this chapter the ACCC considers that the scheme is likely to result in public benefit by:
- improving the levels of compliance with laws applying to the door to door selling of energy to consumers
  - better informing consumers about their rights and sales agents' obligations in door to door selling of energy and

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<sup>76</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>77</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- reducing the impact of pressure selling practices
- 4.238 The ACCC also considers that the scheme effectively addresses the potential conflicts of interest faced by sales agents and energy retailers as a result of the remuneration structure in the context of door to door selling.
- 4.239 The ACCC considers that the scheme contains a number of features which are likely to contribute to the effectiveness of the scheme and ensure that the public benefits are likely to eventuate.
- 4.240 The ACCC is of the view that the scheme is likely to result in limited public detriment.
- 4.241 Accordingly, the ACCC considers that the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A), 90(5B), are met.

## **Length of authorisation**

- 4.242 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in light of any changed circumstances.
- 4.243 In this instance EAL seeks authorisation for ten years.
- 4.244 EAL submits that significant investment by EAL and its members to establish the scheme would be lost if the scheme could not remain in place for the period sought. EAL further submits that the scheme's operation would be compromised in that the consistent application of marketing standards may be reduced thereby diminishing the ability of the scheme to realise the public benefits which it aims to achieve.
- 4.245 As noted earlier, the ACCC considers that the realisation of public benefit will depend on the extent to which the key factors – consumer awareness, compliance and effective sanctions – are effective in practice. Given that the scheme is newly developed and therefore there is uncertainty about how it will operate in practice, the ACCC considers that an early review of the scheme is warranted. Accordingly, the ACCC grants authorisation to the scheme for three years.
- 4.246 It is open to EAL to reapply for authorisation at the expiration of this authorisation and to seek re-authorisation for a longer period on the basis of the experience in this initial period.
- 4.247 A three year authorisation period is consistent with the approach that the ACCC has taken in relation to other codes in their early stages of development, such as the Generic Medicines Industry Association Code of Practice and the Australasian College of Cosmetic Surgery Code of Practice. This is also consistent with the fact that many other industry codes have regular review periods built into them. Indeed, the ACCC notes that the EAL code includes a two year review mechanism. Typically, industry code reviews result in amendments to the code for which authorisation is sought.



4.248 The ACCC also considers that three years is an appropriate timeframe in which to review the operation and interaction of the code with the Australian Consumer Law and national energy retail law scheduled to be implemented in participating jurisdictions on 1 July 2012.

4.249 As identified above, should EAL seek re-authorisation of the scheme after three years the ACCC considers that the following issues warrant careful review at that time:

- the consumer awareness aspects of the scheme
- the categorisation of sales agent breaches by members (particularly the extent to which there are any instances of unintentional or mistaken misleading and deceptive conduct)
- the extent to which retailers self-report systemic issues to the code manager
- the definition of systemic issues under the scheme
- the use of warning notices in the sanctions process
- the effect on sanction decisions of the requirement for the code manager to consider compliance costs to retailers in determining sanctions
- the level of reporting on member compliance to the public and to the regulator

## 5. Determination

### The application

- 4.250 On 29 October 2010, EAL lodged applications for authorisation A91258 & A91259 with the Australian Competition and Consumer Commission (the ACCC).
- 4.251 Application A91258 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974.<sup>78</sup> The application was made under subsection 88(1) and 88(1A) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
  - make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 4.252 Application A91259 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) / 88(1A) of the Act to:
- make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
  - make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 4.253 In particular, EAL seeks authorisation for implementing a scheme to self regulate door to door energy sales.

### The net public benefit test

- 4.254 For the reasons outlined in Chapter 4 of this draft determination, the ACCC is satisfied that the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 4.255 The ACCC is satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 4.256 The ACCC therefore proposes to grant authorisation to applications A91258 and A91259.

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<sup>78</sup> The title of the relevant trade practices regulations has changed. As of 1 January 2011, the Trade Practices Regulations 1974 are now cited as the *Competition and Consumer Regulations 2010*.

## **Conduct for which the ACCC grants authorisation**

- 4.257 Authorisation extends to Energy Assured Limited for its members to adopt and comply with a proposed scheme to self regulate door to door sales that are undertaken on behalf of electricity and gas retailers.
- 4.258 Further, the authorisation is in respect of the scheme as it stands at the time authorisation is granted. Any changes to the scheme during the term of the authorisation would not be covered by the authorisation.
- 4.259 This determination is made on 23 June 2011.
- 4.260 Section 90(4) requires that the Commission state in writing its reasons for a determination. The attachments form part of the written reasons for this determination.

## **Date authorisation comes into effect**

- 4.261 This determination is made on 23 June 2011. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 15 July 2011.

## Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B — chronology of ACCC assessment for application A91258 & A91259**

<b>DATE</b>	<b>ACTION</b>
29 October 2010	Application for authorisation lodged with the ACCC.
24 November 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
10 December 2010	ACCC letter to EAL outlining concerns with application and requesting additional information.
21 December 2010 and 11 January 2011	Submissions received from EAL in response to interested party submissions and ACCC letter.
4 February 2011	ACCC letter to EAL outlining concerns with application.
11 February	Revised application for authorisation submitted to the ACCC.
4 March 2011	Closing date for submissions from interested parties in relation to the revised application for authorisation.
17 March 2011	Submission from EAL in response to submissions from interested parties .
11 April 2011	Draft determination.
13 May 2011	Revised application for authorisation submitted to the ACCC.
25 May 2011	Closing date for submissions from interested parties in relation to the revised application for authorisation.
3 June 2011	Submission from EAL in response to submissions from interested parties, including further revisions to scheme.
21 June 2011	Submission from EAL with further revisions to the scheme.
23 June 2011	Final determination.

# Attachment C — the tests for authorisation and other relevant provisions of the Act

## Competition and Consumer Act 2010

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
  - (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
  - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
  - (b) the proposed covenant were given, and were complied with; or
  - (c) the proposed conduct were engaged in;

as the case may be.

- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
- (a) make a determination granting:
    - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
    - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
    - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
    - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
  - (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
    - (i) a significant increase in the real value of exports;
    - (ii) a significant substitution of domestic products for imported goods; and
  - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

## Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(5A), 90(5B), 90(6) and 90(7) on the one hand and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of

those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>79</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>80</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>81</sup>

## Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>82</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>83</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>84</sup>. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

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<sup>79</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>80</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>81</sup> Section 91(3).

<sup>82</sup> Section 88(10).

<sup>83</sup> Section 88(6).

<sup>84</sup> Section 90(10A)



## Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>85</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>86</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

## Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>87</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>88</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>89</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>90</sup>

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<sup>85</sup> Subsection 91A(1)

<sup>86</sup> Subsection 87ZD(1).

<sup>87</sup> Subsection 91B(1)

<sup>88</sup> Subsection 91B(3)

<sup>89</sup> Subsection 91C(1)

<sup>90</sup> Subsection 91C(3)