

4 March 2011

Mr Gavin Jones  
Director, Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne, VIC 3000

By email: [gavin.jones@accc.gov.au](mailto:gavin.jones@accc.gov.au); [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)

Dear Mr Jones,

**Energy Assured Limited Applications for Authorisation A91258 & A91259 – Interested party consultation in relation to the amended application**

The Consumer Utilities Advocacy Centre Ltd (CUAC) is an independent consumer advocacy organisation. It was established to ensure the representation of Victorian consumers in policy and regulatory debates on electricity, gas and water. In informing these debates, CUAC monitors grass roots consumer utilities issues with particular regard to low income, disadvantaged and rural consumers.

CUAC responded to the Australian Competition and Consumer Commission's ("ACCC") call for submissions on Energy Assured Limited ("EAL") Applications A91258 and A91259 ("Applications") on 23 November 2010 and provided a further response on 10 January 2011. We refer to the ACCC's letter to us dated 18 February 2011 inviting submissions on EAL's amended scheme documents (Code of Practice, Procedure Guideline and Complaints Process) which EAL has described as "wholesale changes" to their scheme.

Given the tight 4 March 2011 submission deadline, we are unable to provide a detailed submission to the amended EAL scheme at this time. We note that there will be an opportunity for interested parties to comment on the amended EAL scheme after the ACCC has issued its draft determination. We do, however, have overall comments about the amended EAL scheme which we would like to put forward for your consideration.

To start, we would like to reiterate our concern regarding EAL's lack of consultation on its proposed scheme. We believe that it is necessary to repeat this because of EAL's assertion that there has been additional consultation.

CUAC was contacted by EAL's Acting CEO Mr Ramy Soussou on 17 February 2011 regarding a proposed meeting on 22 February 2011 to provide an overview of the revised EAL scheme. We declined the offer to meet and on 18 February 2011 informed Mr Soussou accordingly. Our decision was made on the basis that:

- EAL's revisions to the EAL scheme had already been submitted to the ACCC (on 11 February 2011). There was therefore no opportunity for genuine consultation on the revised EAL scheme.

Consumer groups had, in their submissions on the Applications, raised the lack of consultation in the drafting of the EAL scheme. The same concerns were also raised at the ACCC Customer Consultative Committee ("CCC") and the Australian Energy Regulator ("AER") Customer Consultative Group ("CCG")'s meeting on 28 January 2011. Given the significant concerns raised around the lack of consultation, we are disappointed that EAL did not consult consumer groups in the drafting of its revised scheme. As such, we are still unable to see any genuine intent on the part of EAL to engage and consult with consumer groups regarding their scheme.

- We note that in the 11 January 2011 EAL response to Consumer Action Law Centre's ("Consumer Action")'s submission, EAL stated that "it undertook extensive stakeholder consultation in developing the EAL scheme, prior to submission for Authorisation to the ACCC." EAL's 11 January 2011 response also listed five separate occasions where consumer consultations are said to have occurred. CUAC is mentioned as one of the consumer organisations who were consulted.

This is a serious misrepresentation; we strongly object to EAL's assertion. As mentioned in our previous responses to the ACCC, there is a real distinction between engaging and consulting stakeholders on the drafting of a scheme, and presenting a completed scheme to stakeholders at a meeting. While EAL gave a presentation of their completed code of practice and scheme, at no stage was CUAC, or as far as we are aware, other consumer groups, consulted or involved in the actual drafting of the EAL code of practice or scheme. We declined EAL's offer to meet as we did not want to facilitate further misrepresentations of EAL having consulted CUAC. We are not prepared to meet with EAL unless there is a genuine attempt on their part to consult.

The 11 January 2011 also letter stated that "EAL is strongly of the view that the proposed Scheme conforms in all significant respects with the principles expounded in the [Guidelines for developing effective voluntary codes of practice (February

2005)].” We disagree with their statement. The lack of a genuine attempt to consult consumer groups demonstrates that EAL has failed to adhere to the spirit of the ACCC Guidelines.

### **EAL’s revised scheme**

We refer to the ACCC meeting with consumer groups on 3 March 2011, the objective of which was to determine the extent to which the revised EAL scheme addresses concerns previously raised by the ACCC and consumer groups. The comments raised by consumer groups during the meeting demonstrate that the revised EAL scheme does not sufficiently address the concerns which had been previously raised. As mentioned in CUAC’s previous submissions, incidents of marketing misconduct are a common recurring theme in CUAC’s engagement with stakeholders, notwithstanding the current rules and regulations on door-to-door marketing. Further, reports from energy ombudsman, the regulators (Essential Services Commission Victoria (ESCV) and Consumer Affairs Victoria), and press reports suggest that marketing rules and regulations are routinely breached by energy marketers in Victoria and elsewhere in Australia.

In light of the above, we believe that there is room for more active regulation and enforcement of door-to-door marketing. This includes compliance audits of door-to-door marketing practices.

CUAC is not convinced that the amended EAL scheme would result in significant consumer benefit. The scheme is also likely to be costly to administer and operate. We are concerned that considerable costs will be passed on to consumers without significant consumer benefit. We would like to emphasize the following concerns about the revised EAL scheme -

#### ***Consumer awareness of the EAL scheme and accessibility of the scheme to consumers:***

The revised EAL scheme includes obligations on members to promote the EAL scheme. We note that EAL marketing material (which includes information on how a consumer can complain under the EAL scheme; and under energy ombudsman schemes) will only be provided to customers upon request and to those who enter into a contract with the retailer. Customers with a negative door-to-door experience, who do not enter into a contract with a retailer, may be completely unaware of their right to complain under the EAL scheme or to the jurisdictional energy ombudsman. It is highly improbable that a sales agent who has committed marketing misconduct will provide the customer with information about the complaints mechanisms available.

Promotion of the EAL scheme needs to be multifaceted taking into account language and literacy issues faced by some consumer groups. For example: information about the scheme needs to be available in the main languages spoken in our community. Cultural awareness training, as well as training on the communication skills required to deal with vulnerable consumer groups (for example: people with mental disabilities, the infirmed, the aged,

young people etc) should be included as part of the training of sales agents. If information about the EAL scheme is to be put on the website, it needs to be prominently displayed.

***Mechanisms to monitor sales agent behaviour  
Standards of behaviour required of sales agents***

If the EAL scheme is intended to reduce the instances of mis-selling, the manner in which sales agents are remunerated needs to be addressed. Currently, sales agents receive a commission on each successful sale they make. A commission based approach to remuneration provides no incentive to reduce mis-selling.

Under the EAL scheme, the post-verification procedure applies to all consumers who enter into a contract with the retailer. The door-to-door experiences of customers who have not entered into a contract with the retailer should also be assessed as these customers may have been exposed to marketing misconduct. We note that the revised EAL scheme allows for random field assessments of sales agents by an assessor conducted at least one day every two months. It is unclear whether this means that every sales agent will be subject to a random field assessment one day every two months and whether the sales agent will be aware that he/she is being assessed. Sales agents are obviously going to be on their best behaviour if they are aware that they are being assessed.

***Complaints processes and sanctions***

The EAL scheme purports to benefit consumers. Yet consumers who have been exposed to marketing misconduct are not entitled to any form of compensation redress. While rogue sales agents may be disciplined by de-registration from the EAL scheme, vulnerable consumers who may have been exploited and left in a financially worse off position by signing up for an inappropriate energy product will not even be restored to the position they were previously in before the door-to-door experience.

When allegations of mis-selling are made, we observe a tendency to blame the individual sales agent, which may sometimes be appropriate, but not address what may be an underlying systemic issue in an industry that allows or even encourages poor marketing practices in some cases. The EAL scheme seems to support this approach. While consumers are able to lodge complaints against rogue sales agents, they are unable to lodge complaints against energy retailers. Complaints against retailers may, however, be lodged by jurisdictional energy ombudsman and regulators. It appears that sales agents will bear the full weight of mis-selling, while retailers may escape responsibility.

Further, the interrelationship between the EAL scheme and the jurisdictional energy ombudsman remains unclear. The lack of clarity could lead to consumer confusion as to where consumers should lodge their complaints.

The central role played by the code manager in the operation of the EAL scheme is a concern. There are no checks and balances or sanctions in place to ensure accountability of the code manager.

A single member of the code panel may hear appeals and impose sanctions in certain cases. In some cases, three members of the code panel are involved. The revised EAL scheme includes a consumer representative as one of the four members of the code panel. There are, however, no provisions which determine the extent of the consumer representative's involvement in hearing appeals or imposing sanctions.

There is a lack of transparency in monitoring and reporting non-compliance under the EAL scheme. The publication of incidents of non-compliance where the retailer is named is limited to sanctions of a certain level (sanctions 4-6). This is in stark contrast to the practice adopted by regulators such as the Essential Services Commission of Victoria, where retailers who have performed poorly in certain areas are actually named. Naming of energy businesses which have performed badly deters further bad behaviour and encourages a culture of compliance.

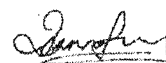
Compliance audit reports under the EAL scheme will also not be published. Instead, a consolidated report of the results of all compliance audits will be prepared by the code manager and provided to the EAL Board, members of the scheme, the code panel, energy ombudsman, regulators, and government. Except for the consumer representative who is a member of the code panel, other consumer groups or the public will not be provided with a copy of the consolidated report. It is, therefore, difficult for consumers to know how well the scheme is performing.

We thank the ACCC for their letter of 18 February 2011, and arranging the 3 March 2011 meeting for consumer groups to provide feedback on the revised EAL scheme. If you have any queries on CUAC's response, please contact the undersigned.

Yours sincerely,



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Executive Officer



Deanna Foong  
Senior Policy Officer