

11 January 2011

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

By email: gavin.jones@acc.gov.au; adjudication@acc.gov.au

Dear Mr Jones,

Energy Assured Limited applications for authorization A91258 & A91259

We refer to your email of 22 December 2010 enclosing a submission made to the ACCC by the Consumer Action Law Centre dated 13 December 2010 (**CALC Submission**).

You will appreciate that EAL's letter of 21 December 2010 did not respond to the CALC Submission as EAL was not aware of the CALC Submission at that time.

Whilst the CALC Submission appears to have been made out of time, Energy Assured Limited (**EAL**) appreciates the opportunity to respond to the CALC Submission.

EAL adopts the same capitalised terms in this letter as those adopted and defined in its original Application for Authorisation.

1 Introduction

1.1 In the first six pages of the CALC Submission, it is acknowledged that:

- (1) the scope for misconduct by door-to-door energy marketers; and
- (2) overlapping and somewhat uncertain regulatory environments,

make it desirable for further initiatives to be undertaken to manage door-to-door marketing in the energy industry and that such initiatives will result in public benefit.

1.2 EAL submits that the proposed Scheme is such an initiative and notes that the CALC Submission does not specifically identify any anti-competitive detriments.

1.3 The proposed Scheme will significantly assist in improving the current state of door-to-door marketing in the energy industry, particularly given its capacity to assist members with compliance obligations. EAL does not agree with the assertion that the EAL Scheme would be of only limited public benefit. It is committed to achieving the consumer protection, monitoring and compliance benefits cited in its original Submission in support of the Application for Authorisation. The potential availability of complementary or additional initiatives does not cancel out the benefits offered by the EAL Scheme.

1.4 Accordingly, it is appropriate to focus on the substantive aspects of the Scheme and their great potential to benefit the public. Furthermore, there is little to no risk that the proposed EAL Scheme will have any meaningful anti-competitive effect.

2 **Code of Practice technically and substantively effective**

- 2.1 Much of the spotlight of the CALC Submission is devoted to the extent to which the proposed EAL Scheme complies with the ACCC's *Guidelines for Developing Effective Voluntary Industry Codes of Conduct (ACCC Guidelines)*.
- 2.2 The ACCC Guidelines constitute a very clear statement of the benefits of voluntary self-regulatory industry codes to promote transparency, stakeholder confidence, compliance, cost-effective and efficient complaint handling and good quality control. EAL submits that the proposed EAL Scheme will achieve these outcomes.
- 2.3 Whilst EAL is strongly of the view that the proposed Scheme conforms in all significant respects with the principles expounded in the ACCC Guideline (and ASIC Regulatory Guideline), EAL submits that:
- (1) focussing on strict adherence to a broad guideline distracts from the substantive issues that the EAL Scheme does, in fact, address; and
 - (2) the extent to which the EAL Scheme complies with the ACCC Guideline is not a matter necessary for determination by the ACCC in considering this Application for Authorisation.
- 2.4 Nonetheless, it is appropriate to respond briefly to the key criticisms of the EAL Scheme raised in the CALC Submission. EAL also relies on its letter to the ACCC of 21 December 2010 which already answers some of the concerns raised in the CALC Submission.

3 **Consultation was undertaken**

- 3.1 In its letter to the ACCC of 21 December 2010, EAL indicated that it undertook extensive stakeholder consultation in developing the EAL Scheme, prior to submission for Authorisation to the ACCC. As far as consumer consultation is concerned:
- (1) May 2010: the ERAA presented the proposed EAL Scheme at the Queensland Retailer Roundtable. Among others, in attendance were representatives from QCOS and the Queensland Consumers Association;
 - (2) 30 September 2010: the ERAA presented the proposed EAL Scheme at the Standing Committee of Officials, part of the Ministerial Council on Energy. Among others, in attendance were representatives from the CALC.
 - (3) September 2010: ERAA sent emails to various consumer groups, including Consumer Utilities Advocacy Centre (CUAC) and St Vincent DePaul, inviting them to a briefing at CUAC premises to inform them of the proposed EAL Scheme and inviting comment. An invitation was also extended to CALC to attend this briefing, at their request.
 - (4) 6 October 2010: ERAA met with a representative from the CUAC; however no representative from CALC attended the meeting. In discussions with CUAC the ERAA was invited to present at a consumer roundtable the following week;
 - (5) 14 October 2010: ERAA presented the proposed EAL Scheme to a Consumer Roundtable in Melbourne. Among others, in attendance were representatives from the CUAC and CALC.

Despite the various briefings, no consumer group formally approached the ERAA/EAL to discuss the proposed EAL Scheme. Only limited comment was received from consumer

groups consulted in response to the briefs provided on the proposed EAL Scheme. However, all feedback was considered and, where possible, incorporated into the EAL Scheme.

3.2 The ERAA also consulted with various regulatory representatives including representatives from:

- Victorian Government and the Essential Services Commission (Victoria) – April & August 2010
- Australian Energy Regulator – August 2010
- Energy and Water Ombudsman Victoria – August 2010
- Queensland Competition Authority – September 2010
- Queensland Department of Employment, Economic Development & Innovation – October 2010
- Queensland Energy Ombudsman - October 2010

3.3 It should also be noted that the EAL Scheme was developed with the assistance of the pre-existing UK EnergySure Scheme. Using the UK Scheme as a starting point permitted the ERAA/EAL to hone the experiences and views of a broad range of participants when developing the Australian EAL Scheme.

3.4 In light of the above, EAL disagrees with the assertion that the Code of Practice was not developed in a considered and prudent manner. EAL's Application for Authorisation was in no way premature or an abuse of the ACCC's processes.

4 **Objectives are clear**

4.1 The objectives of the EAL Scheme are stated in the EAL Constitution. They are clear and focussed. Those objectives are:

- (a) *"to establish, implement and manage an agreed standard for the door-to-door selling by Members of gas and electricity supply contracts to Consumers;*
- (b) *to develop and facilitate training programs to provide Members with the knowledge and capabilities to maintain the competence standards required by the Regime and to, in turn, deliver their own on-going training of door-to-door sales agents;*
- (c) *to administer a register of accredited door-to-door sales agents;*
- (d) *to develop and implement procedures and processes to monitor and assess the conduct and activities of door-to-door sales agents to ensure compliance with the Code of Practice;*
- (e) *to manage a complaints process and to implement appropriate sanctions where a door-to-door sales agent is found to have breached the Code of Practice; and*
- (f) *anything ancillary to the Objects set out [above]. "*

4.2 When these objectives are read in the context of the aim of promoting consumer confidence in sales activities of door-to-door energy marketers, the Scheme's goals are apparent.

5 **Focus on Sales Agents**

5.1 CALC criticises the EAL Scheme for focussing too much on the conduct of individual Sales Agents yet at the same time states that the EAL Scheme "avoids going beyond the existing legal obligations of the industry". The regime for the industry self-regulation of individual Sales Agents, through the EAL Register and the associated recruitment, training, monitoring and sanctioning process is something new and more prescriptive than is provided under the

current regulatory regime. It is an enhancement of the current regulatory regime and to this end will deliver public benefit.

- 5.2 The Scheme endeavours to make Sales Agents directly accountable for their conduct in a way that does not presently exist. Certainly, the examples of Sales Agent misconduct identified in the CALC submission (at pages 4-6) would be a) discouraged and b) directly punishable under the Code of Practice and Procedures Guideline under the EAL Scheme.
- 5.3 At the same time, however, the EAL Scheme is a dual regime that also regulates the conduct of the Marketers and Energy Retailers that the Sales Agents represent. As previously described, non-compliance with the Code of Practice has implications for both a Sales Agent and the Energy Retailer or Marketer. Members and their Sales Agents face sanctions for non-compliance under the EAL Scheme.
- 5.4 The EAL Register will operate to monitor and regulate the activities of Sales Agents. However, the maintenance of the EAL Register and the recruitment, training and monitoring of Sales Agents will be the responsibility of the EAL members. By putting the onus on members to undertake these elements and by having in place a monthly reporting program an annual audit process (as described in previous submissions), it is possible to identify systemic compliance issues as well as issues with "rogue" Sales Agents.

6 Consumer understanding and awareness

- 6.1 The CALC Submission argues that there is scope for consumers to be confused by the EAL Scheme documentation and that consumers may be misled because they may think that they no longer have recourse to complain to a relevant ombudsman or regulator following the introduction of the Scheme.
- 6.2 The EAL Code of Practice, Procedures Guideline, Complaints Process and Constitution form the internal working documents of EAL and its members. It is not intended that these documents be provided to consumers. EAL intends to prepare different materials that will be provided to the public at large and consumers when they enter into any energy contract on their doorstep. The materials will be presented clearly and simply. EAL envisages that the materials will be similar (to the extent applicable) to the UK Energy Sure Code of Practice Brochure (a copy of which was attached to EAL's letter of 21 December 2010).
- 6.3 EAL relies on its letter to the ACCC of 21 December 2010 for further information on the nature and contents of Scheme information packs.
- 6.4 EAL accordingly rejects the submission that consumers will be confused or misled by the existence of the EAL Scheme. Consumers will be aware of their rights under the Code of Practice and their ability to complain. The complaints processes under the EAL Scheme constitute an enhancement of existing regimes by offering additional recourse against the conduct of Sales Agents and the members they represent. It does not affect the existing role of the relevant regulator. As stated in the EAL letter of 21 December 2010, all documentation will make clear that the rights of the consumer to complain under the EAL Scheme are additional to and do not detract from the consumer's existing ability to refer a complaint to the relevant regulator or Ombudsman. Indeed, the Scheme will promote adherence to existing regulatory requirements to make consumers aware of such rights. This can only serve to deliver public benefit, not detract from it.
- 6.5 EAL's letter of 21 December 2010 sets out EAL's proposal for increasing consumer and industry awareness about the EAL Scheme.

7 Scheme is broader than and supplements existing regulatory regime

- 7.1 As mentioned in EAL's letter of 21 December 2010, consumer protections and benefits will be enhanced upon the introduction of the Scheme. This is for two key reasons:

Energy Assured Limited

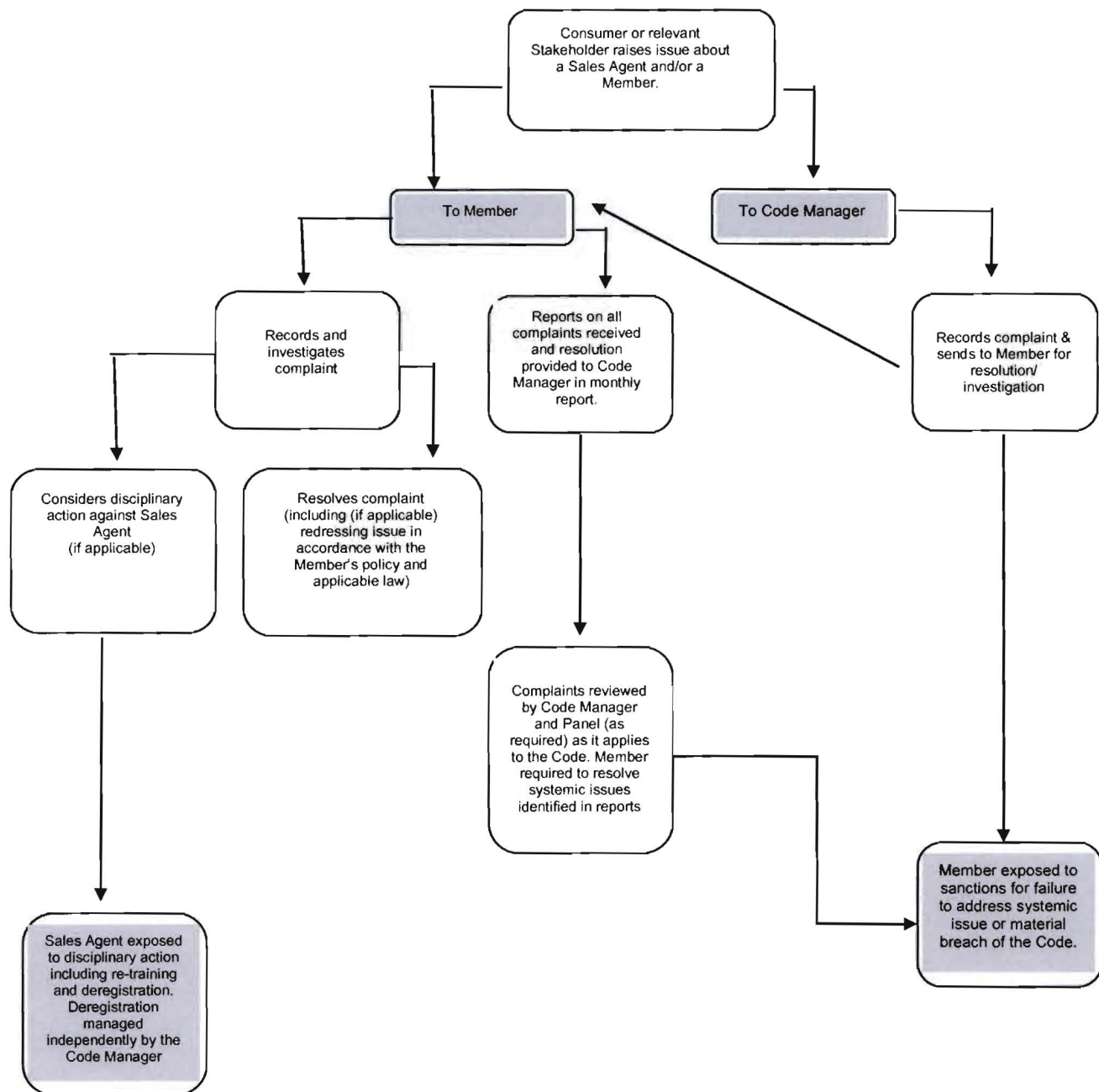
Suite 2, Level 4, 189 Kent Street Sydney NSW Australia 2000
Tel +61 2 9241 6556 Fax +61 2 9251 5425

- (1) the EAL Scheme is designed to complement existing regulatory frameworks by reinforcing to members their obligations with respect to door-to-door selling and setting out principles and norms of behaviour expected of Sales Agents and members; and
- (2) the EAL Scheme requires higher standards of compliance than existing regulatory frameworks.

For example, the Scheme prescribes, in some detail, the on-job and off-job training that must be undertaken by sales agents before they can undertake door-to-door sales and also on an ongoing basis. Also, as mentioned in part 5 above, the entire EAL Register provides for a higher level of scrutiny over the recruitment, conduct and compliance of sales agents than is currently prescribed under existing regulatory frameworks dealing with door-to-door selling.

8 **Scheme is accessible and enforceable**

- 8.1 The currently proposed EAL Scheme enables the following avenues of recourse against Sales Agents as well as Energy Retailers and Energy Marketers:



8.2 The flow chart indicates that a complaint, whether made to a member or the Code Manager and whether about an individual Sales Agent or the member they represent, will result in appropriate action being taken against the Sales Agent or member (or both). Additionally, through the member's own complaints regime and in accordance with applicable laws, the consumer may also seek compensation for wrongdoing from the member.

8.3 CALC points to the compensation regime under the UK Scheme as a precedent for use in Australia. EAL notes that the compensation regime is being phased out in the UK. In any case, EAL does not see it as necessary or appropriate for the EAL Scheme to require members to compensate consumers monetarily for major breaches of the Code of Practice. First, each member already has a complaint handling regime and policy for remedying customer complaints. The EAL regime, whereby complaints received about Sales Agents and the member are scrutinised by an auditor and referable in relevant circumstances for punishment, is a far superior enforcement mechanism. Second, to provide another avenue for

the making of consumer complaints would be to duplicate the regulatory and Ombudsman complaint processes already in place and to do so would risk creating customer confusion by providing an alternative to that external review process.

9 **Other matters**

9.1 To assist the ACCC, EAL would like to clarify some further matters raised in the CALC Submission.

- (1) The UK Scheme formed the basis and a guide for the development of the EAL Scheme. At the time of the introduction of the UK Scheme there was limited regulation of door-to-door energy marketing in the UK whereas Australia already has a detailed regulatory regime in effect. The EAL Scheme supplements and complements existing regulatory frameworks. Accordingly, not all aspects of the UK Scheme were adopted by EAL as to do so was unnecessary or would be .
- (2) CALC relies on the UK Scheme Code of Practice Brochure when asserting that the EAL Scheme is too complex and does not convey the intended benefits of the EAL Scheme sufficiently. Whilst the comparisons made between the Brochure and EAL's documentation comprise matters of form rather than substance, as stated above, the EAL documentation submitted to the ACCC is not the equivalent of the UK Brochure referred to by CALC. EAL intends to develop a similar Brochure for consumers. Additionally, EAL should not be criticised for making public its detailed underlying documentation, the equivalents of which exist in the UK and only some of which are publicly disseminated.
- (3) The EAL Scheme enshrines a right that a customer has always had to complain to their Energy Retailer or Energy Marketer about the conduct of a Sales Agent. It also enables a consumer to complain directly to the Code Manager who will then refer the complaint to the relevant Energy Retailer or Marketer (as well as the Code Auditor). A consumer's right to refer a complaint to an Ombudsman or Regulator remains and is not subverted by the Scheme.
- (4) Importantly, the significant new aspect of the Scheme is that complaints received by EAL members that would ordinarily go unchecked unless referred to an Ombudsman or regulator are scrutinised through monthly reporting and annual audit with sanctions applying for unsatisfactory compliance.

10 **Public benefit outweighs negligible (if any) anti-competitive detriment**

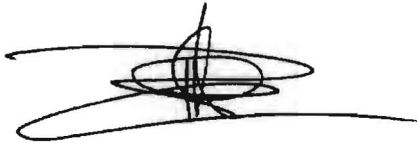
10.1 As previously submitted, the Scheme offers significant advantages including:

- (1) improved standards of door-step marketing of energy;
- (2) lower rates of inappropriate or unwelcome contacts between Sales Agents and consumers;
- (3) an industry approach to address "rogue" agents that move between energy retailers and marketers, through an independent deregistration process;
- (4) a more professional approach to the selling and marketing of energy contracts;
- (5) better overall experiences for consumers;
- (6) fewer complaints to regulators and Ombudsman in relation to the conduct of Sales Agents;
- (7) improved customer confidence;

- (8) more informed customer choice;
 - (9) improved competition at retail level by encouraging customer switching;
 - (10) 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
 - (11) reduced administration and enforcement costs incurred by government bodies, especially those involved in the oversight of state-based energy codes of conduct.
- 10.2 EAL notes that the New South Wales and Victorian Energy and Water Ombudsman have expressly put their support behind the proposed Scheme.
- 10.3 CALC has not pointed to any anti-competitive detriments of the proposed Scheme. Given the Scheme is open to all Energy Retailers, Energy Marketers and Sales Agents, all participants will be on a level playing field and any decision to sanction a member or Sales Agent will be made by independent decision-makers, there is unlikely to be any real impact on competition, certainly not enough to outweigh the benefits of the EAL Scheme.

If there is any further information you require or we can provide any assistance. Please do not hesitate to contact us.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a central vertical stroke, positioned above the typed name.

Ramy Soussou
Acting Chief Executive Officer