



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Applications for authorisation**

**lodged by**

**Energy Assured Limited**

**in respect of**

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

**Date: 11 April 2011**

**Authorisation no.: A91258 &  
A91259**

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

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Walker  
Willett  
Dimasi

## Summary

The ACCC proposes to deny authorisation to Energy Assured Limited (EAL) for its members to adopt and comply with a proposed scheme to regulate door to door energy sales that are undertaken on behalf of electricity and gas retailers.

The ACCC is not satisfied that the claimed public benefits of the scheme submitted by EAL will be realised in the absence of effective compliance and sanctions processes. In addition, the ACCC considers that the scheme will create additional complexity and consumer confusion as it offers a lower level of protection to consumers relative to the protection offered by existing regulation.

On 29 October 2010, Energy Assured Limited (EAL) lodged applications for authorisation A91258 and A91259 with the ACCC.

Authorisation is sought for a proposed scheme to self regulate door to door energy sales that are undertaken on behalf of energy and gas retailers. The scheme purports to ensure better standards in door to door 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.

### Consultation

The ACCC engaged in an extensive public consultation process in response to EAL's application for authorisation.

The ACCC and a number of interested parties raised significant concerns with the EAL scheme. In response to these concerns EAL submitted an amended application for authorisation, on 11 February 2011.

Submissions also raised concerns about the extent of consultation undertaken by EAL in developing the scheme prior to lodging their application for authorisation.

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 will agree to extend the statutory timeframe for release of a final determination until 30 June 2011.

It is this amended scheme that is now before the ACCC for consideration.

### Assessment

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.

Door to door selling in the energy sector raises a number of complex and inter-related issues. 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.

Door to door selling in the energy sector occurs in a context of information asymmetry between energy retailer sales agents and consumers. More generally, consumers may lack information about alternatives available in the market when they are approached by a door to door sales agent. This is a form of market failure that can result in consumers accepting terms that they would not accept had they been fully and properly advised. Further, given that sales agents are rewarded by sales commissions, both sales agents and energy retailers share a strong financial incentive to entice and encourage consumers to switch energy retailers. In the context of door to door selling, consumers are often susceptible to making hasty and possibly unintended decisions that they subsequently regret. Complaint data indicates that inappropriate and pressure selling is common throughout the industry and is becoming more prevalent.

In recognition of these issues, door to door selling in the energy sector is currently regulated by State, Territory and Commonwealth laws, and regulation and enforcement of these legal requirements can be undertaken by State, Territory and Commonwealth regulators and energy-specific ombudsmen. Despite this regulatory framework, complaints about door to door selling in the energy sector continue to rise.

Given this framework, any new regulatory scheme, whether self-regulatory or not, must add to the consumer protection regime already in place, and not simply add to the complexity of existing arrangements so as to cause added confusion for consumers and potentially undermine the effective operation of existing regulatory protection.

In assessing this application, the ACCC is also 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”.<sup>1</sup>

For the reasons outlined in chapter 4 of this draft determination, the ACCC is not satisfied that the proposed scheme, as it currently stands, is likely to achieve its stated objective of improving consumer confidence. The ACCC acknowledges that EAL has made a number of revisions and amendments to the original scheme with the purpose of addressing concerns previously raised by both the ACCC and consumer groups. However, while acknowledging that these revisions seek to improve the scheme in a number of respects, the ACCC remains of the view that the majority of public benefits asserted by EAL are either unlikely to be realised or do 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 does not extend protection beyond the requirements in existing laws and regulations, and indeed in many respects do not go as far as those provisions).

The ACCC’s fundamental concern with the scheme is that energy retailers who benefit from the activities of door to door sales agents are not sufficiently accountable for the actions of the agents that they employ. This manifests in a number of ways. For example, consumer groups and consumers are unable to make a complaint about energy retailers or marketers under the scheme, and there is limited public accountability for non-compliance with the scheme.

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<sup>1</sup> Medicines Australia [2007] ACompT4 [128]

Further, while the scheme's requirements for recruitment and training standards for sales agents, and sales agent accreditation are welcome and have the potential to realise public benefits, this potential is dependent on the accountability, sanctions and enforcement processes applicable to EAL members under the scheme. As the scheme currently stands the ACCC is not confident that the sanctions applicable for breaches of the scheme are sufficient to disrupt the incentives for both sales agents and energy retailers to engage in unfair selling practices to maximise their financial interests.

Further, the ambiguity and discretion provided in relation to the events that may trigger an investigation and the application of sanctions weakens the claim of public benefit arising from this aspect of the scheme, particularly regarding the sanctions processes that will be applied to members for breaches of the scheme.

Similarly, while the scheme introduces some mechanisms for independent compliance audits and determinations by a code manager and/or code panel independent of the EAL member being reviewed, there remain a number of issues of ambiguity and lack of clarity as to how these processes will be implemented in practice. These aspects weaken the incentives for EAL members to comply, or to invest in the resources required to ensure full and effective implementation of the scheme.

Against this, the scheme is complex and its various documents contain some internal inconsistencies. Further, as already noted, implementation of the scheme is ambiguous, and in an environment where consumers are currently experiencing confusion about energy regulation the ACCC considers that the scheme as currently proposed simply introduces a new layer of complexity without sufficient associated benefits for consumers.

Although in considering EAL's application for authorisation, the ACCC is of the view that the scheme in its present form would not deliver a public benefit and could create additional public detriment, the ACCC considered whether it would be appropriate to grant authorisation subject to conditions. However, as the scheme submitted by EAL is not sufficiently developed, the ACCC considers it would be difficult to articulate effective conditions at this stage. Therefore this approach was not adopted.

For these reasons, and the detailed reasons outlined in chapter 4 of this draft determination, the ACCC is not satisfied that the conduct for which authorisation is sought is likely to result in any material public benefit that would outweigh the public detriment.

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

Given the issues outlined above that remain outstanding, the ACCC considers that authorisation of the scheme will not generate any significant public benefit and may in fact generate a public detriment.

While the scheme purports to deliver public benefits by improving consumer confidence, the ambiguity and discretion provided in the compliance and sanction provisions of the scheme mean that the ACCC cannot be confident that the public benefits of the scheme will be realised. To the extent that the scheme doesn't realise these public benefits, this may dampen consumer confidence in the scheme.

The ACCC considers 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 will lead to a public detriment. Given the existing regulatory requirements, it is important that another layer of regulation or self regulation offer benefits above the level provided by the status quo and enhances consumers' understanding of their rights.

On balance the ACCC is not satisfied that the likely benefits that will arise from the proposed scheme will outweigh the public detriment. Accordingly the ACCC proposes to deny authorisation

### **Next steps**

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision.

The applicants or any interested party may also request a conference to make oral submissions on the draft determination.

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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 four documents: EAL constitution, EAL code of practice, EAL procedures and guidelines, EAL complaints process
Tribunal	Australian Competition Tribunal
UCA	Uniting Care Australia



# 1. The application for authorisation

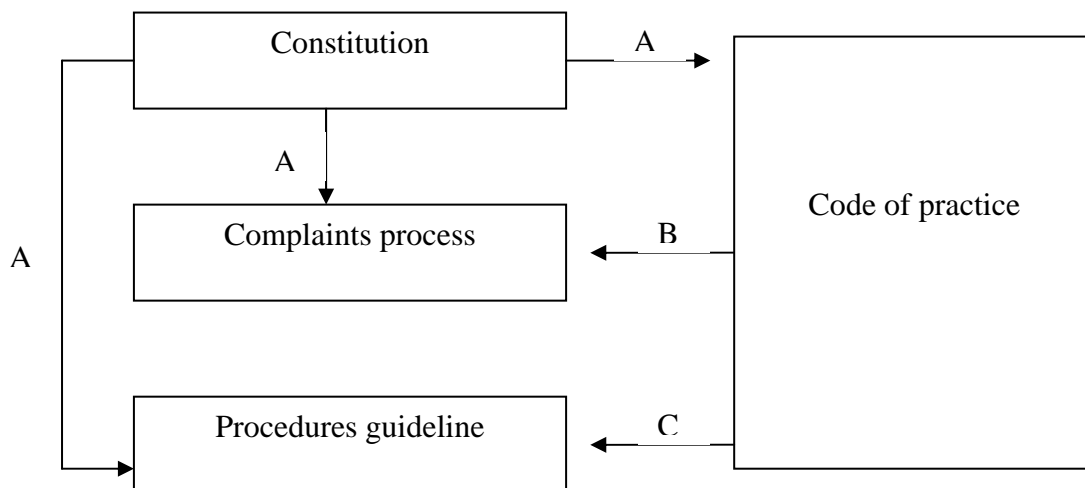
- 1.1. On 29 October 2010, Energy Assured Limited (EAL) lodged applications for authorisation A91258 and A91259 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act)<sup>2</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 energy sales that are undertaken on behalf of electricity and gas retailers.
- 1.6. The scheme is designed to improve the standard and effectiveness of 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.
- 1.7. The scheme consists of four documents: the EAL constitution, the EAL code of practice, the EAL procedures and guidelines, and the EAL complaints process. Copies

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<sup>2</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*.

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<sup>3</sup>**



**A:** The EAL constitution binds all members to the code of practice, complaints process and procedures guideline.

**B:** The code of practice sets out the processes for monitoring sales agent and member compliance with the code. Where a member establishes that a sales agent has breached the code then the member must make an application to de-register the sales agent under the EAL complaints process (managed by the independent code manager). If a member has breached the code, the EAL complaints process will be activated for possible sanctioning of the member.

**C:** The Procedures guidelines sets out the procedures, principles and processes that underpin the code for the registering and maintenance of sales agents on the EAL register and recruiting, training and assessing of sales agents.

Each of these documents is discussed below.

#### *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.

#### *EAL code of practice*

- 1.9. The EAL code of practice sets out the rights and obligations on sales agents and members.
- 1.10. It sets out the standards of behaviour that sales agents must comply with and the information that they must disclose when entering into contracts with consumers, and when in contact with consumers, at the doorstep. For example, it requires sales agents to take appropriate steps to ensure that the consumer has the authority to enter into a

<sup>3</sup> EAL presentation in support of application, 22 February 2011

contract at the premises, and that the consumer is aware that they are entering into a contract to transfer their energy supply to the retailer. It requires sales agents to produce an identity card and to be courteous and polite.

- 1.11. Members are also responsible for ensuring that sales agents comply with these required standards of behaviour. 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. The scheme also includes a separate process for considering complaints against EAL members as described below.
- 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 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 or member to appeal a decision to deregister a sales agent.
- 1.18. The code sets out arrangements for monitoring and reporting on member compliance including that energy retailer members must report monthly compliance statistics to the EAL board and submit to an independent audit each year.
- 1.19. Members are also required to promote the code. For example, members are required to display information about the code on their websites and ensure that sales agents provide detailed information about the code to consumers who enter into a contract.
- 1.20. The code also sets out various operational matters including the roles of EAL, the code manager and the code panel.

#### *EAL procedures guideline*

- 1.21. The EAL procedures guideline supports the EAL code of practice. It provides more detailed guidance to members on requirements in relation to the recruitment, registration, accreditation, training, assessment and monitoring of sales agents.

### *EAL complaints process*

- 1.22. The complaints process provides for a process for de-registering sales agents and imposing sanctions on members for breaches of the EAL code of practice and EAL procedures guidelines.
- 1.23. The process is managed and enforced by an independent code manager and where appropriate, a code panel.
- 1.24. The majority of complaints about sales agents will continue to be dealt with by members' own complaints handling systems. If consumers are not satisfied with members' response to their complaint then they will continue to have the right to seek recourse from the relevant energy ombudsman.
- 1.25. The complaints process sets out an appeals process should a sales agent or member wish to dispute a decision by EAL.

### *Changes to the original scheme by EAL*

- 1.26. As discussed in chapter 3 of this draft determination, the ACCC engaged in an extensive public consultation process in response to EAL's application for authorisation.
- 1.27. A number of interested parties raised what they considered to be 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 pro-active 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.
- 1.28. 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.
- 1.29. 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.
- 1.30. 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.

- 1.31. 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).
- 1.32. 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.
- 1.33. 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.
- 1.34. In light of these changes, and to allow the ACCC sufficient time to assess and consult on EAL's revised application for authorisation, EAL has given the ACCC an assurance that it will agree to extend the statutory timeframe for release of a final determination until 30 June 2011.
- 1.35. It is this amended scheme that is now before the ACCC for consideration and which is discussed in the remainder of this document.
- 1.36. EAL seeks authorisation for a period of ten years.

#### **Other parties**

- 1.37. 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.

## **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>4</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>4</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>5</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. Retail gas prices for ‘small consumers’<sup>6</sup> are also regulated in New South Wales and South Australia. 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 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>5</sup> A consumer has the same meaning as customer in the context of this paper.

<sup>6</sup> Small consumers are residential consumers and small business consumers as defined under national and state and territory energy legislation.

- 2.11. There are 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>7</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>8</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>9</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>10</sup> Survey information from 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>11</sup>

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<sup>7</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>8</sup> IPART, *Review of regulated retail tariffs and charges for electricity 2010-2013, Electricity – Final Report*, March 2010

<sup>9</sup> Australian Energy Regulator, *State of the Energy Market 2010*

<sup>10</sup> AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria*, First Final Report, 19 December 2007

<sup>11</sup> AEMC, *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in South*



- 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>12</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>13</sup>

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

- 2.19. As noted by the AEMC in its various reviews on the effectiveness of competition in retail energy markets, as energy is a homogenous product, residential consumers generally do not consider the time, effort and cost of searching for alternative supply options to be worth the potential gains to be made from switching supplier.<sup>14</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>15</sup> EAL report that approximately 40,000 homes are door knocked per working day by energy retailers and their representatives.<sup>16</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>17</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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*Australia*, First Final Report, 19 September, 2008

<sup>12</sup> OFGEM, *Energy Supply Probe - Initial Findings Report*, 6 October 2008

<sup>13</sup> IPART, *Review of regulated retail tariffs and charges for electricity 2010-2013, Electricity – Final Report*, March 2010

<sup>14</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>15</sup> ESCV, *2008-09 compliance report*, February 2010

<sup>16</sup> EAL submission in response to questions raised by the ACCC, 21 December 2010

<sup>17</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>18</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 in 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.
- 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.

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<sup>18</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.

### *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>19</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 conciliation between the parties. However, the energy ombudsmen do have the power to make a binding decision if necessary.

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<sup>19</sup> AER, *Position Paper, AER Retail Pricing Information Guideline*, September 2010

- 2.41. The main types of complaint about retailers relate to billing, marketing, credit, and transfer.<sup>20</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>21</sup> Similar complaints to the Energy and Water Ombudsman New South Wales (EWON) increased by 34% over the same period.<sup>22</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>23</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>24</sup>

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<sup>20</sup> See the latest annual reports by the state energy ombudsmen

<sup>21</sup> EWOV, submission on Energy Assured Limited applications for authorisation, 24 November 2010

<sup>22</sup> EWON, submission on Energy Assured Limited applications for authorisation, 24 November 2010

<sup>23</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>24</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.
- 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.

#### *Submissions in relation to 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.
  - 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.

*Submissions in relation to the amended scheme*

- 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 support the initiative proposed in the amended application. EWOV also supports the proposal but offers some recommendations to ensure that the benefits of the scheme are realised. Specifically EWOV recommends 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 welcome the amended scheme and consider that it will provide a material public benefit. In particular they argue 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 do not support the amended scheme and do not consider that it will result in a net public benefit. In general they consider that the amended scheme does not overcome the inherent conflict of interest of both sales agents and retailers to maximise sales by confusing or pressure selling retailer

energy services to consumers. Consumer groups consider that there remains inadequate consideration of the consumer in the revised scheme and that it puts too much distance between companies engaged to undertake door to door activities and the retailers who engage them.

- 3.21. Consumer groups continue 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.
- 3.22. 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](#).

## **Development of the EAL self regulatory scheme**

### **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 area of competition is:
- the market for the retail supply of electricity and/or gas to residential and small business consumers.
  - 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 energy markets for the retail supply of energy 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>25</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 submit 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>25</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.
- 4.12 The ACCC considers that some of the elements in the scheme such as benefits from training and the provision of guidance material, would lead to some realised public benefit in the counterfactual.

## **Information asymmetry and pressure selling**

- 4.13 Most consumers do not actively seek to switch energy retailers. Rather, switching energy retailers is generally driven by suppliers through direct marketing such as door to door sales by agents employed by energy retailers or marketers on behalf of energy retailers. EAL submits that over half of customers that switched retailers in the 2010 calendar year did so as a result of door to door selling.<sup>26</sup>
- 4.14 Door to door selling of energy supply contracts 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. 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. Such information failures are a form of market failure that can lead to a consumer accepting different terms than they would were they to obtain adequate information on which to base their switching decision.
- 4.15 These risks are exacerbated in the case of the energy retail sector as much of the information is conveyed to consumers through door to door sales agents who are paid a commission by energy retailers if they entice consumers to switch energy providers. 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.
- 4.16 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.

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<sup>26</sup> EAL submission to ACCC, 17 March 2011

- 4.17 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.
- 4.18 A number of submissions in response to EAL's application for authorisation have raised concerns regarding the conduct of sales agents and identified specific instances where door to door sales agents had misrepresented the features (such as length of contract and charges) associated with the new contract.<sup>27</sup>
- 4.19 While concerns regarding the complexity of information can to some extent be resolved through improving consumer awareness about the product or service being offered to enable them to make an informed decision about entering into a contract, submissions also noted that these approaches are often unsolicited and often involve high pressure sales techniques at a person's home.<sup>28</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.
- 4.20 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>29</sup>
- 4.21 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>30</sup>
- 4.22 These concerns are supported by submissions from state energy ombudsmen who have noted the increases 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>31</sup> Similarly EWON submitted that complaints about energy retailers increased 34% in 2009-10.
- 4.23 If well designed, self regulation through mechanisms like codes of conduct can be an effective tool to address these market failures, 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

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<sup>27</sup> CALC submission to ACCC, 13 December 2010

<sup>28</sup> CALC submission to ACCC, 13 December 2010

<sup>29</sup> QCOSS submission to ACCC, 24 November 2010

<sup>30</sup> ESCV, *The African Consumer Experience of the Contestable Energy Market in West Melbourne*, March 2009

<sup>31</sup> CUAC submission to ACCC, 23 November 2010

compliance with those standards, pro-active monitoring to ensure those standards are followed, a robust, 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.

- 4.24 For these reasons, 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>32</sup>
- 4.25 In response to EAL's application for authorisation, CAV noted that consumers are currently experiencing a level of confusion around codes of practice (for example the Code of Conduct for Marketing Retail Energy in Victoria) and energy regulation.<sup>33</sup> Notwithstanding that the market failures which are present can be addressed by self regulation, 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.
- 4.26 To minimise the risk that additional regulation contributes to further complexity in the energy retail space to the detriment of consumer confidence, it is important that if regulation or self regulation are adopted they are effective and address both the information asymmetry and also protect consumers from pressure selling.
- 4.27 However, the effectiveness of a self regulatory regime in addressing the conduct of door to door sales agents is difficult because both sales agents and retailers face a conflict of interest. In the first instance, sales agents have a conflict of interest between whether to provide clear and appropriate advice to potential consumers which may mean they do not entice a consumer to switch supplier, or use high pressure sales techniques so 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, rather than generating additional sales through promoting aggressive marketing strategies.
- 4.28 Therefore, where self regulation is to be used as a means of regulating sales agents behaviour it is important that the self regulatory mechanism addresses the inherent conflict of interest for energy retailers between the role of enforcing behaviour standards and the direct benefit the retailer receives from the additional consumers and contract sales generated by door to door sales agents.
- 4.29 For self regulation to be effective in such an environment, 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.
- 4.30 This issue, as it pertains to elements of the EAL scheme is discussed below in the ACCC's assessment of the public benefits of the proposed scheme.

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<sup>32</sup> ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005

<sup>33</sup> CAV submission to ACCC, 7 December 2010

## Public benefit

4.31 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>34</sup>

## The scheme

4.32 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.

4.33 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:

- ensuring industry and consumer awareness of the scheme
- clearly set out the rules and obligation of the scheme
- effective complaints handling processes
- providing an independent review mechanism for complaints
- sanctions for non-compliance
- incorporating mechanisms to collect data and monitor compliance with the scheme, and
- accountability and a regular review process to ensure objectives of the code are being realised.<sup>35</sup>

4.34 EAL submits that 'the ACCC must consider the EAL scheme that is before it. Whether or not the scheme 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>36</sup>

4.35 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. However, the extent to which the scheme operates effectively such that it delivers public benefits is relevant to the ACCC's assessment.

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<sup>34</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.

<sup>35</sup> See 'Guidelines for developing effective voluntary industry codes of conduct' ACCC 2005

<sup>36</sup> EAL submission to ACCC, 11 February 2011

- 4.36 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 retail energy as discussed in paragraphs 4.13 - 4.30.
- 4.37 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>37</sup>
- 4.38 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>38</sup>
- 4.39 EAL submits that the scheme offers significant advantages whereby 'public benefit outweighs negligible (if any) anti competitive detriment'<sup>39</sup> including:
- 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.

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<sup>37</sup> UCA submission to the ACCC, 7 March 2011

<sup>38</sup> EWOV submission to ACCC, 4 March 2011

<sup>39</sup> EAL submission to ACCC 11 January 2011

- 4.40 EAL sets out the objectives of the scheme in the EAL code of practice as ‘aimed at improving the standard and effectiveness of door-to-door marketing of energy thereby reducing sales complaints and promoting consumer confidence’.<sup>40</sup> This commitment is reinforced by EAL in a later submission to the ACCC where it is stated that ‘the EAL scheme has been developed with the protection of consumers as the key objective’.<sup>41</sup>
- 4.41 EAL submits that the objectives of the scheme ‘should be read in the context of promoting consumer confidence in sales activities of door to door energy marketers’ and that these objectives are set out in clause 5 of the EAL constitution.<sup>42</sup>
- 4.42 The objectives of EAL as set out in the constitution are:
- to establish, implement and manage an agreed standard for the door to door selling by Members of gas and electricity supply contracts to consumers
  - 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 ongoing training of door-to door sales agents
  - to administer a register of accredited door to door sales agents to ensure compliance with the code of practice, and
  - 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.<sup>43</sup>
- 4.43 Notwithstanding the broad support for the objectives of the scheme, some stakeholders have expressed concern with the operation of the scheme.
- 4.44 For example, QCOSS ‘welcomes initiatives to improve the standard of door to door marketing ...however ...several of our concerns raised in our previous submission have not been addressed in the amended application including the restriction on consumers complaining about members, weak sanctions, the lack of redress for consumers and accreditation procedures. QCOSS believes that these are fundamental flaws that undermine the proposed scheme so deeply as to render it ineffective.’<sup>44</sup>
- 4.45 In addition CSV submitted that ‘CSV does not believe that the code as presented will mitigate the inherent incentive for salespeople paid on commission to maximise sales at the expense of consumers’.<sup>45</sup>
- 4.46 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:

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<sup>40</sup> EAL code of practice, submitted 11 February 2011

<sup>41</sup> EAL submission to ACCC, 17 March 2011

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

<sup>43</sup> Clause 5.1(a) of the EAL constitution, submitted 29 October 2010

<sup>44</sup> QCOSS submission to ACCC, 4 March 2011

<sup>45</sup> CSV submission to ACCC, 7 March 2011



- 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>46</sup>

4.47 The ACCC agrees that the merits of doorstep selling and whether or not agent remuneration and incentives are appropriate fall outside the scope of its consideration of the authorisation application. 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 clause 5 of the EAL constitution as set out above.

4.48 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.

4.49 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.

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

### **Consumer awareness**

4.51 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.

4.52 The ACCC also considers it is important that the information requirement standards in the scheme as a minimum meet the standards required by law in order that consumers are not confused about their rights.

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

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<sup>46</sup> EAL submission to the ACCC, 17 March 2011

- Information that will be provided to all consumers that are door knocked
- Information that will be provided to consumers that enter into a contract or request information on the scheme.

4.54 Information disclosure obligations in legislation also vary depending on whether or not the consumer has entered into a contract.

4.55 The information that EAL proposes to provide for both consumers that enter into a contract and those that do not is discussed below by reference to the disclosure obligations in legislation.

*The information that will be provided to all consumers that are door knocked*

4.56 When coming into contact with consumers the EAL code sets out the actions that should be undertaken by sales agents. These include:

- identifying themselves, the member they represent and their purpose
- producing an identity card, which clearly displays the member's name, the sales agent's name and photograph, an expiry date for validity of the card, and the EAL logo, and
- providing the member's contact number to a consumer on request

4.57 The ACL also provides for information to be provided to all consumers before entering into a contract (see box 4.1).

**Box 4.1: ACL – Information requirements — before entering into a contract**

Section 74 of the ACL requires sales agents to:

- advise that the purpose of his or her visit is to seek the consumer's agreement to enter into an energy retail contract
- advise that he or she must leave the premises immediately on request, and
- provide his or her name, and the retailers name and address.

4.58 The ACCC notes that the scheme does not require members to comply to the same standard of conduct as the ACL in relation to the provision of information at the door step. The ACL requires a sales agent to advise a consumer as soon as practicable before entering negotiations that they are obliged to leave the premises immediately on request and particularly applies to 'unsolicited consumer agreements.'<sup>47</sup> The EAL scheme does not require sales agents to advise consumers of this right.

4.59 A number of consumer groups have expressed concern about the level of information that would be provided to all consumers about the scheme. For example, CUAC

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<sup>47</sup> Schedule 1, Clause 74 of the *Competition Consumer Act 2010*

submitted that consumers may be unaware that they can request information, and that consumers who may be subject to marketing misconduct do not always enter into a contract or request information.<sup>48</sup>

4.60 As noted by EWOV 'it is possible that consumers could experience marketing issues without signing a contract'. EWOV considered that consumers should not have to sign a contract or make a request in order to be provided with detailed information on the code.<sup>49</sup>

4.61 EWOV suggests that greater consumer awareness could be achieved through:

- pamphlets being provided to all customers who receive door to door marketing
- bill insertions by all retailer members
- a letter drop to all customers, and
- details of EAL on bills.<sup>50</sup>

4.62 In response to EWOV's submission EAL argues that the cost of providing information to all consumers door knocked would be prohibitive and discourage retailers and marketers from becoming members of the scheme. EAL also expressed concern that the other suggestions made by EWOV would be exceedingly expensive to undertake. EAL submitted that although it would not include these requirements in the code, members may independently elect to adopt EWOV's recommendations.<sup>51</sup> The ACCC considers that EWOV's suggestions are likely to improve consumer awareness and are worthy of additional consideration.

4.63 The ACCC considers that the minimum information requirements in the scheme should comply with the existing legislative requirements for all consumers that are door knocked so as not to confuse consumers of their rights.

4.64 In addition, the ACCC considers 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 consumers' experience with a sales agent representing an energy retailer is not compliant with EAL's code. That is, in addition to the information to be provided to all consumers already contained in the scheme (that is, the agent's name, the member they represent and the purpose of his or her visit), sales agents should also be required to provide consumers with a contact telephone number for making a complaint regarding their experience.

*The information that will be provided to consumers who enter into a contract or specifically request information*

4.65 The scheme provides for actions that sales agents must take when they are entering into a contract with consumers (see box 4.2).

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<sup>48</sup> CUAC submission to ACCC, 10 January 2011

<sup>49</sup> EWOV submission to ACCC, 4 March 2011

<sup>50</sup> EWOV submission to ACCC, 4 March 2011

<sup>51</sup> EAL submission to ACCC, 17 March 2011

4.66 The scheme also specifies the information (EAL marketing material) that sales agents must give to consumers who either enter into a contract, or specifically request information which includes:

- a summary of the EAL Standards and what the consumer can expect from sales agents
- how the consumer can make a complaint or provide feedback about a sales agent
- how a sales complaint will be treated by the energy retailer
- the consequences if a sales agent is found to have breached the EAL standards
- contact details of the energy retailer
- the EAL website address, and
- advice that the code operates separately to the state energy ombudsman scheme and that a consumer may separately utilise that scheme if they wish to.

**Box 4.2: Information to be provided to consumers that enter into a contract under the scheme**

The EAL code provides that when consumers enter into a contract with an energy retailer, sales agents must:

- explain the essential provisions of the terms of supply, so as to ensure that the consumer understands what they are committing themselves to
- take reasonable steps to ensure that the consumer has understood:
  - that they are entering into a contract to transfer their energy supply to the energy retailer
  - details of all applicable processes, charges, tariffs and service levels that will apply to the consumer, inclusive of the declaration that the price offered is inclusive of all costs, including GST
  - the length of the cooling off period as prescribed under the applicable laws
  - the existence of a right of cancellation and the actions necessary to cancel or terminate the contract, inclusive of any charges or benefits forgone
- provide the consumer with:
  - the full name, address and telephone number of the energy retailer that the sales agent represents
  - the sales agent's name, company ID number and SIDN
  - a copy of the contract and any documentation required to be provided to the consumer in accordance with applicable laws
  - information about the energy retailer's sales complaint handling process, and
  - a copy of the 'EAL marketing material'

- 4.67 Further, while not part of the authorisation application, EAL, in its latest submission, advised the ACCC that this information will be provided to consumers in the form of a ‘flyer’ and provided the ACCC with a draft of this ‘flyer’.
- 4.68 It is important that the information provided in the ‘flyer’ on the EAL standards reflects the standards of behaviour required by the scheme and that the information requirement standards in the scheme as a minimum, meet the standards required by the law so as not to confuse consumers of their rights.
- 4.69 The legislative requirements around information provided to customers that enter into a contract are contained in both the ACL (see box 4.3) and the national energy retail rules that will come into effect in July 2012 (see box 4.4) which will replace existing state energy specific consumer legislation.

**Box 4.3: Information that must be provided to consumers that enter into a contract under the ACL**

Sales agents to provide the following in writing before entering into a contract with consumers:

- the consumers right to terminate an agreement during the termination (cooling off) period, and
- how consumers may exercise that right.

After entering into a contract with consumers sales agents are to provide a copy of the contract to the consumer which must include but is not limited to the following requirements:

- the way in which the amount to be paid is to be calculated
- prominent notice on front page of agreement about right to terminate during the cooling off period
- a notice that may be used by the consumer to terminate the agreement
- supplier’s details including name, ABN, ACN, business address, residential address, e-mail address, fax number,
- details (name, address, e-mail) of person signing contract on behalf of supplier (if applicable)

- 4.70 The ACCC notes that the scheme does not explicitly provide for the standards prescribed in the legislation. For example:
- Although the scheme requires sales agents to take reasonable steps to ensure that the consumer has understood information about the cooling off and termination rights, the scheme does not meet the same standard as the ACL in relation to the disclosure of this information. This is because the scheme is not explicit about when the information will be conveyed to consumers and in what form.

- Some of the information that is required to be provided to consumers after they enter into a contract under the ACL and national energy retail rules is not required to be provided to consumers that enter into a contract under the scheme (either through the detailed information that will be provided to consumers that enter into a contract or as a general requirement of the EAL standards).

**Box 4.4: National energy retail rules - information to be provided to consumers before or as soon as practicable after the formation of the contract**

- |  |  |
|--|--|
| ▪ prices and charges   | ▪ early termination payments and penalties   |
| ▪ security deposits  | ▪ service levels   |
| ▪ concessions or rebates   | ▪ billing and payment arrangements   |
| ▪ commencement date and duration of the contract   | ▪ the availability of extension  |
| ▪ the termination of the contract if the customer moves out during the term of the contract  | ▪ the customers obligations with respect to electronic transactions  |
| ▪ customers right to complain to the retailer (and the energy ombudsman if the complaint is not satisfactorily resolved by the retailer) | ▪ rights to withdraw during the cooling off period, and how to address those rights, in the information to be provided |
| ▪ A copy of the contract when the above information is given in a written disclosure statement.  |  |

4.71 While the ACCC notes that the scheme requires sales agents and members to comply with all applicable laws the ACCC considers that the minimum information provisions in the scheme should explicitly comply with existing legislative requirements so as not to confuse consumers of their rights. These rights should be communicated in the code itself and where appropriate, the flyer so as to ensure that consumers are aware of their minimum rights and that the code does not confuse consumers about their rights.

4.72 In addition, the ACCC notes that the scheme is not explicit about the times that sales agents can and cannot call consumers as prescribed under the ACL. The ACCC considers that information that is required to be provided by the law should be reflected in the scheme.

4.73 Further, as noted in submissions from consumer groups such as UCA, the scheme does not in any way address the provision of information to consumers in languages other

than English. This is of concern as consumers from non-English speaking backgrounds are particularly susceptible to being confused or misled by a sales pitch.<sup>52</sup>

- 4.74 In response to these concerns EAL has submitted that it would be willing to display information on the code in the six most common languages on the EAL website.<sup>53</sup> Further, the draft flyer that EAL provided in its most recent submission advises consumers (in six different languages) to visit the EAL website if they want to see the information on the code in their language. While noting that these proposals are not formally part of the authorisation application, the ACCC would welcome such developments.
- 4.75 In summary the ACCC considers that the consumer awareness aspect of the scheme is underdeveloped and does not offer protection above the current regulatory environment. In addition, providing consumers with information that does not meet the minimum legislative requirements has the potential to confuse consumers and create a public detriment. This is discussed in paragraph 4.184 - 4.194.

### **Compliance**

- 4.76 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.
- 4.77 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
- 4.78 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.
- 4.79 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*

- 4.80 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

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<sup>52</sup> Ethnic Communities' Council of NSW submission to ACCC, 3 March 2011

<sup>53</sup> EAL submission to ACCC, 17 March 2011

proposing to employ the sales agent to contact that member to ascertain the sales agent's competency for reference check purposes.

- 4.81 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
  - the EAL standards
  - legislative and regulatory obligations
  - product knowledge and sales techniques
  - respecting consumer privacy, ethnicity and diversity
  - recognition and treatment of vulnerable consumers
  - 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, and
  - what the sales agent must give to and disclose to the consumer.
- 4.82 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 competence assessment. This involves a practical field assessment of sales agents to meet the required standards.
- 4.83 Sales agents are also required to pass a formal competence assessment on an annual basis once registered. Sales agents that do not pass the assessment must undertake further training or be withdrawn. Members must keep a record of sales agent assessments, including results of the formal competence assessment. The code auditor will review the competence assessment process to ensure consistency across members.
- 4.84 CSV notes that there is a general lack of detail in the off the job training requirements in relation to respecting ethnicity and diversity in the scheme.<sup>54</sup> Similarly, BSL believes there is a lack of detail in the training requirements on the recognition and treatment of vulnerable consumers. This is important because, as noted by BSL, 'the various concerns with energy retail marketing...particularly impact vulnerable customers.'<sup>55</sup>
- 4.85 UCA also expresses concern about training and consumer awareness, particularly around consumers with limited decision making capacity.<sup>56</sup>

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<sup>54</sup> CSV submission to ACCC, 7 March 2011

<sup>55</sup> BSL submission to ACCC, 3 March 2011

<sup>56</sup> UCA submission to ACCC, 7 March 2011



- 4.86 In response to concerns about the information conveyed to consumers in information packages, EAL submits it would consider requiring two round tables with consumer groups each year for the purpose of ‘gauge[ing] feedback on the development of the code and discuss[ing] appropriate training packages to address concerns’.<sup>57</sup>
- 4.87 In general, 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, a comprehensive training and accreditation program can serve to raise sales agents’ awareness about required standards of behaviour and their obligations to, and consumer’s rights under, applicable legislation.
- 4.88 The ACCC welcomes consideration by EAL to revise its training packages to incorporate feedback from consumer groups, particularly through biennial round tables.
- 4.89 However, the ACCC considers that the extent of the benefits arising from better standards of training will critically depend on the details of training to be undertaken and the manner in which it is implemented and delivered by members. This will depend on the extent to which the scheme encourages members to take responsibility for the behaviour of their sales agents and comply with the scheme overall.

#### *Sales agent registration and accreditation*

- 4.90 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.
- 4.91 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>58</sup>
- 4.92 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.
- 4.93 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 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

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<sup>57</sup> EAL submission to ACCC, 17 March 2011

<sup>58</sup> TRUenergy submission to ACCC, 3 March 2011

the deregistered agents moving between members, or the recruitment of sales agents that persistently breach the standards.’<sup>59</sup>

- 4.94 QCOSS recognises that there are benefits to tracking sales agents through 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>60</sup>
- 4.95 The ACCC considers 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.
- 4.96 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.
- 4.97 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 public benefits. However, the extent to which the public benefits of the register are realised is dependent on whether or not members are accountable for the integrity of the data and processes that underpin the register. For example, members need to be accountable to ensure that only agents who have successfully completed training and competency checks are registered. In addition the responsibility for sanctioning sales agents and recording those sanctions falls upon retailers.

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

- 4.98 Under the scheme members are required to monitor and report to the EAL appointed code manager on the behaviour of their sales agents.
- 4.99 The scheme requires members to undertake post sale verification to confirm with consumers that they have entered into a contract and that the consumer was satisfied with the way the sale was conducted. This process is intended to monitor sales agents’ behaviour in their dealings with consumers. While EAL asserts that the post-sale verification process will be ‘independent’, no details have been provided about who will undertake the independent verification or any other aspect of the independence of this process.

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<sup>59</sup> Aegis Direct submission to ACCC, 2 March 2011

<sup>60</sup> QCOSS submission to ACCC, 4 March 2011

- 4.100 The scheme also provides for random field assessments of sales agents conduct for at least one day every two months. However, as noted by CUAC '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 going to be on their best behaviour if they are aware that they are being assessed.'<sup>61</sup>
- 4.101 Independent verification of sales and random audits are both worthy compliance mechanisms in a self regulatory scheme if they operate effectively and are undertaken by members. In the absence of explicit statements in the scheme about the independence of the post-sale verification process and the random field assessment of sales agents, the incentives for retailers to undertake rigorous compliance checks on the sales agents they employ may be lessened.
- 4.102 As is discussed below, the ACCC is not satisfied that the public benefits from independent sales verification and random audits will be realised because of the lack of rigour around the sanctions processes.

## **Enforcement**

### *Non-compliance with the scheme and enforcement processes*

- 4.103 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 should energy retailers or sales agents employed by energy retailers not comply. The ACCC considers there are limitations in the processes of identifying non-compliance and that these limitations combined with the absence of effective and rigorous sanctions in the event of proven non-compliance, creates a disincentive for sales agents and members to comply with the scheme.
- 4.104 The ACCC notes that the scheme provides for sanctions on sales agents employed by members and also on members directly.
- 4.105 The scheme requires members to investigate all complaints about sales agents and deal with complaints in accordance with relevant legislation and the member's internal practices.
- 4.106 The scheme also establishes a separate complaints process to be managed by the EAL code manager to deal with complaints in relation to EAL members for breaches of the scheme and complaints in relation to individual sales agents that are considered serious enough to warrant deregistration of the sales agent. These processes are separate from the consumers' rights to lodge complaints with state energy ombudsmen about energy retailers.
- 4.107 In addition the scheme also makes provision for compliance reporting in the form of monthly compliance reporting by members, and annual reporting by the independent auditor to the code manager.

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<sup>61</sup> CUAC submission to ACCC, 4 March 2011

### *Non-compliance by sales agents*

- 4.108 The scheme provides that members are to monitor sales agent performance through customer complaints. The effectiveness of this process depends on consumers awareness and knowledge as to how to make a complaint in the event of non-compliance (see paragraphs 4.51 - 4.75).
- 4.109 The scheme provides for competence complaints about sales agents to be categorised as level one, two or three depending on the severity of the conduct. The category of the conduct, if proven, is then used to inform consequential action.
- 4.110 Clarity about the type of conduct that will fall into each category is important because the number of competence complaints by category type is also intended to inform member compliance with the scheme. In particular, a category three level complaint, if proven, is intended to result in dismissal of the agent and his or her deregistration from the EAL register by the code manager.
- 4.111 Certainty, clarity and transparency in this area is particularly important given the potential conflict of interest for members in their dual role: enforcing the sales agent complaint process and incentivising sales agents to maximise sales and revenue.
- 4.112 In response to concerns raised by the ACCC about the ambiguity of categorising the conduct of sales agents, EAL made significant amendments to the scheme by clarifying the type of conduct that will fall into each category (see table 4.1). However, the ACCC still has significant concerns about the code's provisions concerning the categorisation of complaints.
- 4.113 The BSL note that both level 2 and level 3 breaches appear to cover examples of misleading and deceptive conduct. As this conduct is likely to breach fair trading legislation and state energy legislation, the code does not submit agents to higher standards of behaviour than already exist in various consumer protection laws.
- 4.114 In addition QCOSS note that re-training and development of the sales agent where a sales agent has engaged in the type of conduct assigned to a level 2 breach does not reflect the seriousness of the breach.
- 4.115 The ACCC is 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, such conduct should be categorised as a level three breach. Further, the provision of false information of this type is unlikely to result 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>62</sup>**

<b>Sales agent complaint process – enforced by energy retailers</b>			
Type	Level 1	Level 2	Level 3 (referred to code manager)
Complaint (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>▪ Did not provide consumer with complete details of code</li> </ul>	<ul style="list-style-type: none"> <li>▪ Two level 1 breaches in 3 consecutive months</li> <li>▪ Privacy breaches</li> <li>▪ Misinformation about termination fees</li> <li>▪ Promoting a discount that does not apply</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>

4.116 The ACCC does not consider that the sanctions proposed will be effective in improving the standard of behaviour of sales agents as they do not reflect the seriousness of the conduct in all circumstances. As such, the ACCC considers that the scheme will not realise its purported public benefit in this area.

4.117 The ACCC also notes that the code provides that two proven level one breaches by an agent in different months over a three month period will constitute a level two breach and two proven level two breaches in different months over a six month period will constitute a level three breach. The code does not address circumstances where an agent breaches the code on more than one occasion within a particular month.

4.118 CSV suggests that if a sales agent has on more than two occasions breached the EAL code in the same month then the issue should be escalated.<sup>63</sup> EAL has suggested this is to protect against the possibility that a recurrent or technical breach or more than one breach arising from one course of conduct could result in a sales agent being unreasonably punished. It also notes that the retailer can impose a higher level breach if that is appropriate.<sup>64</sup>

<sup>62</sup> EAL presentation of proposed scheme, 22 February 2011

<sup>63</sup> CSV submission to ACCC, 7 March 2011

<sup>64</sup> EAL submission to ACCC, 17 March 2011

- 4.119 BSL notes that many of the sales agents are vulnerable employees often in intermittent work situations and therefore it seems unreasonable to have such a harsh sanction as deregistration as the only available punishment.<sup>65</sup>
- 4.120 The ACCC acknowledges that some discretion in sanctioning a sales agent for a single course of conduct may be appropriate in circumstances where the conduct is minor, and therefore appropriately addressed through training. However, the ACCC considers that this approach may not be appropriate for level 2 conduct as it could significantly contribute to a loss in consumer confidence.
- 4.121 The ACCC has expressed general concern about the ambiguity of the operation of the scheme in a number of instances. Another example is the treatment of conduct that breaches the scheme in a calendar month. CSV expressed concerns regarding the process for escalating non-compliant conduct within a calendar month. For example, if an agent engages in the behaviour on the 1st March and 31st March they can only be dealt with once even though the incidents are four weeks apart. But if they engage in the conduct on the 31st of March and 1st of April they are dealt with twice even though the incidents are one day apart.
- 4.122 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.
- 4.123 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 in paragraphs 4.153 - 4.157).
- 4.124 The extent to which non-compliance with the scheme and any systemic breaches will be identified depends on sales agents providing information to consumers so they are aware of the scheme and its complaints processes as well as the processes for monitoring sales agents conduct. These issues are discussed further below.

*Non-compliance with the scheme by members*

- 4.125 The EAL complaints process is the mechanism for complaints about energy retailers and energy marketers for breaches of the scheme as well as for sales agent deregistration (level 3 breach).
- 4.126 Complaints under the scheme's complaints process will be dealt with by either the code manager or code panel, depending on the conduct. The sanction imposed by either the code manager or code panel can be appealed.
- 4.127 There are a number of issues that are relevant to the consideration of whether the EAL complaints process is effective such that it improves consumer confidence and delivers a public benefit. These include:

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<sup>65</sup> BSL submission to ACCC, 3 March 2011

- who can make a complaint
- the composition of the code panel and code manager, and
- the classification of breaches of the scheme and the sanction applied.

*Who can make a complaint?*

- 4.128 EAL members, the code auditor, energy ombudsmen, regulatory bodies and state governments are able to bring a complaint against an EAL member. However, the scheme does not provide for consumers or their representatives to bring a complaint against an EAL member.
- 4.129 A number of consumer groups such as QCOSS and CALC have specifically expressed concern that under the scheme consumers are unable to make complaint about an energy retailer.
- 4.130 Indeed EWOV submitted that a number of the most frequent consumer complaints are specific to energy retailers and include claims that:
- the retailer gained the billing rights for a property without having obtained the account holders consent
  - the retailer failing to draw attention to some contract terms, and therefore not obtaining explicit informed consent, and
  - the retailer not actioning the request to cancel the contract during the cooling off period.<sup>66</sup>
- 4.131 The link between the actions of sales agents and the energy retailers and marketers that employ them was highlighted by CALC who submits that marketing misconduct is not 'limited to or entirely attributable to individual sales persons ...the energy retailer is often responsible for the conduct of an individual salesperson' for example through training or instructions given to salespersons.<sup>67</sup>
- 4.132 Furthermore QCOSS submits that 'since marketing activities are carried out on behalf of EAL members, the member should ultimately be responsible for the actions of their agents'.<sup>68</sup>
- 4.133 In response to a request from the ACCC for further information about this process EAL advised that consumers are not able to bring complaints against EAL members because consumer complaints generally arise out of a specific incident and consumers are not typically in a position to make a complaint about any systemic problems with members' compliance.<sup>69</sup>
- 4.134 Generally, the ACCC considers that complaints processes are most effective where there are not artificial limitations on who can bring a complaint about conduct.

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<sup>66</sup> EWOV submission to ACCC, 4 March 2011

<sup>67</sup> CALC submission to ACCC, 13 December 2010

<sup>68</sup> QCOSS submission to ACCC, 4 March 2011

<sup>69</sup> EAL submission to ACCC, 21 December 2010

- 4.135 In respect of the scheme, stakeholders, for example consumer groups which deal with inquiries and concerns from consumers in relation to these issues on a daily basis, as well as individual consumers, could be well placed to identify systemic problems with a member's compliance.
- 4.136 Indeed, with the possible exception of state ombudsmen, consumer groups are likely to be better placed to identify systemic issues of non-compliance than any of the parties that are currently able to bring complaints.
- 4.137 EAL has recently advised that it would consider enabling consumer associations to lodge complaints against EAL members pursuant to the EAL complaints process. While the ACCC would welcome this development, it is not part of the authorisation application and accordingly the ACCC cannot consider it in the current process.
- 4.138 Therefore the ACCC considers that the artificial limitation on who can bring complaints against EAL members under the scheme weakens the claimed public benefits.

#### *The code manager*

- 4.139 The scheme states that a code manager has been appointed by EAL to carry out the administration and day to day supervision of the scheme and that the code manager will be independent of EAL.
- 4.140 The role of the code manager includes:
- overseeing the operation of the EAL register
  - overseeing the promotion of the code
  - developing appropriate training material on the code
  - monitoring energy retailers compliance with the code and procedures guideline
  - notifying members if they are of the view that the member may have contravened an applicable law
  - ensuring that corrective action taken where members fail to meet their obligations under the code
  - receiving and referring sales complaints about sales agents to members
  - investigating complaints about the conduct of members
  - issuing guidelines to assist members and sales agents comply
  - administering complaints and sanctions in accordance with the complaints process
- 4.141 Under the scheme, the code manager receives complaints about members. On receiving a complaint the code manager establishes whether a breach has occurred, and whether the breach warrants a sanction. The code manager may impose a level 1 sanction on a member. If the code manager determines that the breach warrants a higher level



sanction it must refer the complaint to a member of the panel to review the complaint and issue a sanction.

- 4.142 CUAC notes that ‘the central role played by the code manager in the operation of the scheme is a concern. There are no checks and balances in place to ensure accountability of the code manager.’<sup>70</sup>
- 4.143 The ACCC agrees that the code manager plays a critical role in managing the complaints process. Although the code manager is independent of the EAL members, the scheme does not provide explicit guidance on either:
- the circumstances or conduct that would trigger an investigation by the code manager; or
  - the circumstances or sanctions that would lead to specific sanctions being applied by the code manager.
- 4.144 The lack of clarity in the scheme and the discretion provided to the code manager about the trigger for investigations and the sanctions process reduces the accountability of the code manager. This is exacerbated by limitations on the publication of compliance reports. (The ACCC’s concerns with the compliance reporting obligations are discussed in paragraphs 4.158 - 4.169).
- 4.145 In the ACCC’s view, for the benefits of the sanctions process to be realised, explicit guidance is required in the scheme about the exercise of the code manager’s discretion in relation to both investigations and the sanctions process.

#### *The panel*

- 4.146 A decision of the code manager or panel member to sanction a member may be appealed. The appeal may be heard by one or three members of the panel.
- 4.147 The code panel will consist of four individuals with a variety of professional backgrounds none of whom have been engaged by an EAL member in the last two years, as follows:
- one person with relevant experience, at a senior level, in the energy retailing industry
  - one person with relevant experience, at a senior level, in a regulatory or government body that administers consumer laws or marketing codes that govern door to door sales activities
  - one person with relevant experience, at a senior level, in a consumer advocacy, and
  - one person with current legal qualifications, preferably in the energy industry.
- 4.148 UCA submitted that the consumer representative appointed to the panel should be endorsed by relevant consumer groups and associations.

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<sup>70</sup> CUAC submission to ACCC, 4 March 2011

- 4.149 The ACCC considers that the general constitution of the panel is appropriate, and that independence of the panel from EAL and its members will be likely to instil confidence in EAL members and sales agents regarding the impartiality of the panel.
- 4.150 However, a number of consumer groups expressed concerns about how the panel will be chosen to hear complaints about members and sales agents, particularly regarding the involvement of the single consumer representative.
- 4.151 CUAC notes that ‘the revised 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.’
- 4.152 The ACCC considers the concern expressed by consumer groups regarding the expertise of the consumer representative on the panel and the need for explicit clarification of their role in relation to decision making about appeals and the application of sanctions applies equally to all the panel members. The ACCC considers that to the extent that most matters would be heard by a single member of the panel, the scheme would benefit from being more explicit on how panel members are to be selected for such hearings so as to address concerns about whether individual members are appropriately qualified, whether there would be any perception of bias or whether there are any possible conflicts of interest.

*Sanctions for non-compliance by members*

- 4.153 There are six levels of sanction for members. These are set out in table 4.2.

**Table 4.2:** Levels of sanctions that may be given to members for breaches of the code

Sanction 1	Member to provide undertaking not to repeat breach
Sanction 2	Independent code auditor on area of activity where the breach occurred (member to pay)
Sanction 3	Letter of admonishment (advise EAL Board of breach but not identify member)
Sanction 4	Letter of admonishment (advise Board of breach and identify member)
Sanction 5	Letter of admonishment (inform EAL Board, stakeholders and the public of the breach and identify the member)
Sanction 6	Deregister membership of EAL (permanently or temporarily) and issue a public statement

- 4.154 QCOSS notes that there is not any indication in the complaints process as to how it should be decided what level of sanction is appropriate.
- 4.155 The ACCC agrees that there is limited guidance and transparency around how the code manager or members of the code panel will decide on the level of sanction appropriate to apply to a member. This discretion may reduce consumer confidence in the effectiveness of the sanctions process.

- 4.156 CUAC notes that the publication of incidents of non-compliance where the retailer is named is limited to sanctions of a certain level (sanctions 4-6). Further, QCOSS notes that ‘there is no guarantee that identification of EAL members who have breached the code will occur through a medium that ensures the breach is widely known enough to have a significant reputational cost.’<sup>71</sup>
- 4.157 The ACCC agrees that there is limited transparency around the sanctions imposed for breaches of the scheme through levels one to four which may dilute the incentives for retailers to comply with the scheme. These concerns are exacerbated by the lack of transparency in reporting potential breaches of the existing regulation to the regulator and publication of compliance reporting audits which are both discussed below.

*Retailer reporting on compliance with the scheme*

- 4.158 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.
- 4.159 The scheme makes provision for compliance reporting via two mechanisms. The first is monthly compliance reporting by members to the EAL code manager. The second requires members to submit to an independent compliance audit on a yearly basis. Each of these compliance reporting mechanisms is discussed below.
- 4.160 The minimum monthly compliance reporting obligations to be reported to the code manager are set out in the scheme and include: the number of sales agents registered to the retailer, the number of consumers contacted by or on behalf of the retailer and the details of the complaints received.
- 4.161 Under the scheme, the code manager is responsible for assessing:
- whether retailers are applying breaches of the scheme by sales agents consistently (ie level 1, 2 or 3), and
  - whether or not an energy retailer is recording a higher level of sales complaints. (The scheme does not provide any guidance on what constitutes a ‘higher level’ of sales complaints. This is another example of the ambiguous drafting of the scheme.)
- 4.162 The ACCC supports the mechanism of monthly compliance reporting to the code manager. However, an important feature of any self regulatory scheme is the ability to identify systemic issues. The scheme is silent as to how systemic issues and problematic compliance trends will be identified and investigated as a result of these reports. The scheme is also silent as to the trigger for issues or complaints to be actioned through the EAL scheme or referred to other regulators. Presumably, it is the code manager that has discretion as to whether or not an investigation will commence in response to non-compliance identified in monthly reports.
- 4.163 EWOV considers that ‘further detail is required to highlight how systemic issues will be addressed in monthly reporting on compliance’.

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<sup>71</sup> QCOSS submission to ACCC, 4 March 2011

- 4.164 The ACCC considers that the identification and reporting of non-compliance particularly regarding systemic issues either by an individual retailer or across the industry is not sufficiently set out in the scheme and should be given further consideration.
- 4.165 The independent annual audit report will be provided to the code manager and the individual member concerned. The consolidated results of all compliance audits will be provided to the EAL Board and relevant regulators in confidence. A high level summary of the audit report will also be made available to the public in EAL's annual report.
- 4.166 EAL advised that complete annual audit reports will not be provided to relevant regulators or the EAL Board because:
- The information contained in the annual audit reports is commercial-in-confidence whereas the EAL Board is comprised of industry participants. Further, even if complete reports were provided this would be unlikely to contribute to improve the effectiveness of the audit process.
  - Energy retailers must already submit to regulatory audits pursuant to their retail licence conditions such that the benefits of regulatory scrutiny are already being realised.
- 4.167 The ACCC has concerns that there is some lack of transparency in relation to the annual audit process. For example, it is unclear how much information will be in the public 'high level' summary of the consolidated results of the compliance audits. If there is insufficient information in the public report the incentives to improve industry conduct will be reduced. The ACCC considers that greater transparency around the results of the audit would improve the effectiveness of the code through increased accountability on retailers and also improve consumer confidence in the scheme. Greater transparency would also provide a mechanism to ensure the accountability of the code manager in identifying compliance problems and taking appropriate actions should non-compliance be identified.
- 4.168 As with the monthly reports, there is also a lack of information as to how systemic issues will be identified and actioned as a result of the annual independent audits. The ACCC considers that there should be a process that allows systemic issues, including systemic issues that may arise in relation to an individual member's compliance, to be reported to the EAL Board and relevant regulators. Industry wide systemic issues that are identified from the annual audit process should be reported more publicly.
- 4.169 EAL submits that such scrutiny is unnecessary because retailers are already required to submit to audits for existing regulatory regimes. However, the relevant question for the ACCC is not the extent to which benefits such as greater accountability are being realised through other regulatory mechanisms, but the extent to which the scheme itself generates any such benefit. The ACCC notes that the EAL scheme purports to require higher standards of compliance than existing regulatory frameworks. The ACCC's view is that scrutiny could be enhanced by transparent and comprehensive reporting of the results of compliance audits.

## **Redress for consumers**

- 4.170 The ACCC notes that the sales complaint handling process contains no provisions for dealing with recourse for the consumer when the consumer has been misled. Neither does this process deal with circumstances where a sales agent has sold a consumer an inappropriate product that has left the consumer in a worse position but has not engaged in misleading conduct in doing so.
- 4.171 A number of consumer groups expressed concern that the scheme did not address circumstances where a consumer has been made worse off.<sup>72</sup> CUAC expressed concern that while ‘the scheme purports to benefit consumers, consumers who have been exposed to misconduct are not entitled to any form of compensation redress...vulnerable consumers who may have been exploited and left in a financially worse position by signing up for a an inappropriate energy product will not even be restored to the position they were previously in before the door to door experience’.<sup>73</sup>
- 4.172 CALC submits that it is essential that consumers have redress in the scheme as is the case in a similar code in Great Britain. CALC note that under the Great Britain code, provision is made for monetary compensation for serious breaches and that consumers are referred to individual member compensation policies for less serious breaches under the scheme.<sup>74</sup>
- 4.173 In response, EAL noted that compensation is being phased out of the UK code and submitted it did not consider it necessary or appropriate for the scheme to require members to provide monetary compensation for major breaches of the scheme. EAL noted the complaints processes for sales agents and EAL members and considered that ‘another avenue for the making of complaints would be to duplicate the regulatory and ombudsman complaints processes already in place and to do so would risk creating consumer confusion by providing an alternative to that external review process’.<sup>75</sup>
- 4.174 The ACCC agrees that EAL is not the appropriate body for making decisions regarding individual consumer complaints that may involve redress or compensation. Such complaints are appropriately dealt with by the relevant ombudsman scheme. It is therefore important that consumers have clear information about their access to ombudsman schemes. It is also important the there is no confusion on this issue around the EAL’s sales complaints handling process, which addresses issues of agent misconduct, rather than deciding on redress for consumers. Greater clarity about the distinction between these two complaints processes may help to reduce possible consumer confusion and thereby improve consumer confidence..

## **ACCC conclusion on public benefit**

- 4.175 The ACCC considers that a scheme that improves the standard and effectiveness of door to door marketing in the retail energy sector would be likely to deliver significant public benefits. By better informing consumers and reducing pressure selling practices, these markets are likely to work better for the benefit of consumers. However, as

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<sup>72</sup> See submissions from UCA, CALC, CUAC

<sup>73</sup> CUAC submission to ACCC, 4 March 2011

<sup>74</sup> CALC submission to ACCC, 13 December 2010

<sup>75</sup> EAL submission to ACCC, 17 March 2011

discussed above, the ACCC has significant concerns about the likely effectiveness of the EAL scheme in achieving these public benefits.

- 4.176 In particular, the ACCC is of the view that a number of the claimed public benefits submitted by EAL are not likely to be realised. For example:
- the information provided to consumers about their legal rights when in contact with a sales agent or when entering a contract falls short of existing regulatory obligations, for example under the ACL
  - consumers and consumer groups are unable to make a complaint about a retailer or marketer under the EAL complaints process
  - there is insufficient public accountability around reporting non-compliance with the scheme, particularly in relation to systemic breaches, and
  - the sanctions process is not sufficiently rigorous to deter non-compliance, particularly in regard to EAL members.
- 4.177 The ACCC considers that these characteristics of the current scheme mean that the scheme will not create sufficient incentives for retailers to ensure that the agents they employ will comply with the code standards, or that retailers will invest the resources required in training sales agents and improving consumer awareness in the scheme.
- 4.178 To the extent that the scheme does not realise these public benefits, this may dampen consumer confidence in the scheme and add complexity and the potential for confusion by consumers.
- 4.179 The ACCC's main concerns are outlined in this chapter and summarised at paragraphs 4.222 – 4.237.
- 4.180 The ACCC considers that authorisation of the scheme while these issues are outstanding will not generate a public benefit and may in fact generate some public detriment.

## **Public detriment**

- 4.181 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>76</sup>

- 4.182 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,

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<sup>76</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

requirements for accreditation of sales agents, requirements that prevent more than one sales member engaging the services of any agent and requirements in relation to not employing marketers that are not also EAL members.

- 4.183 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**

- 4.184 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.
- 4.185 In this regard, the ACCC notes that the scheme is complex in itself. The scheme is contained in four documents and the ACCC has identified inconsistencies between those documents and continues to consider that the provisions of the scheme are ambiguous in places and could be more explicit. This would provide more certainty for members and sales agents regulated by the scheme about the operation of the provisions of the scheme, as well as reduce the likelihood of customer confusion about the operation of the scheme, particularly in relation to existing consumer protection legislation.
- 4.186 The scheme creates 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 falls short of existing regulatory requirements (see paragraphs 4.51 – 4.75) such that the scheme erodes consumer protection rather than enhancing it. To the extent that the scheme submitted by EAL does not improve the level of consumer protection above the counterfactual and does not communicate this 'gap' to consumers such that it creates an expectation that the level of protection offered by the scheme is greater than it actually is, then the scheme generates a public detriment to consumers.
- 4.187 Another example of the additional confusion and complexity for consumers is 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.
- 4.188 The ACCC notes that the scheme makes provision for consumers to make a complaint to the relevant state energy ombudsman about conduct that would breach the behavioural standards of the scheme, either instead of complaining to the member or because they are dissatisfied with the outcome of their complaint when considered by the member.
- 4.189 CUAC and CALC both submit that 'the interrelationship between the scheme and the jurisdictional energy ombudsmen schemes remains unclear and that this lack of clarity could lead to customer confusion as to where consumers should lodge their complaint'.

4.190 CAV submitted that consumers are currently experiencing a level of confusion around codes of practice (for example the Code of Conduct for Marketing Retail Energy in Victoria) and energy regulation.<sup>77</sup>

4.191 EWOV also submits that further clarification about the role of EAL in relation to state ombudsman schemes and other consumer regulators is required and can be achieved by amending the code 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>78</sup>

EWOV also submits 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.

4.192 In response to these concerns EAL has advised that it would be willing to make a clear statement in the code about the role of EAL including 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. EAL have also submitted a flowchart which sets out the scheme's sales complaint handling process which it has said it would be willing to include as an annexe to the code.

4.193 The ACCC notes that these further amendments proposed to the scheme are not part of the current authorisation application. Accordingly, while the ACCC welcomes these changes it cannot have regard to them unless or until they are reflected in the scheme itself.

4.194 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. The ACCC considers that 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 will lead to a public detriment.

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

4.195 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

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<sup>77</sup> CAV submission to ACCC, 7 December 2010

<sup>78</sup> EWOV submission to ACCC, 4 March 2011



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).

- 4.196 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.
- 4.197 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.
- 4.198 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.
- 4.199 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.
- 4.200 The ACCC does not consider that precluding 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)**

- 4.201 The scheme provides that sales agents are prohibited from working for more than one retailer or marketer at any time.
- 4.202 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.
- 4.203 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)**

- 4.204 The scheme requires members to only engage energy marketers that are members of the scheme.
- 4.205 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.
- 4.206 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. However, the ACCC has significant concerns about the way in which applications for membership of the EAL scheme, both for prospective retailer members and for prospective marketer members, will be considered. These concerns are discussed in detail below.

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

- 4.207 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.
- 4.208 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.

- 4.209 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.
- 4.210 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**

- 4.211 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. However, while the scheme requires EAL to advise prospective applicants of the outcome of their application for membership, if an application for membership is rejected EAL is not required to give any reasons for the membership application being rejected. Nor is their any right of appeal or other dispute resolution process available to a rejected applicant.
- 4.212 The ACCC has concerns about the lack of transparency and procedural fairness in the EAL's application.
- 4.213 EAL has advised that it was not possible to amend the EAL constitution to address these concerns quickly enough to allow the ACCC to have regard to the amendment in its draft determination. However, EAL advised that if the ACCC required, it would be willing to amend 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.
- 4.214 The ACCC considers that these proposed amendments to EAL's constitution, if implemented, would address concerns about the possibility of the scheme's membership criteria being arbitrarily applied. However, as noted, EAL has not, to date, implemented these changes.

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

- 4.215 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.
- 4.216 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.

- 4.217 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**

- 4.218 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. The ACCC considers 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 will lead to a public detriment.
- 4.219 Although the lack of transparency and procedural fairness in the schemes provisions for accepting members do have the potential to generate some anti-competitive detriment, the ACCC notes that a simple redrafting of these provisions, as EAL has indicated a willingness to do, would address this concern.

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

- 4.220 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.
- 4.221 In the context of applying the net public benefit test in section 90(8)<sup>79</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>80</sup>
- 4.222 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.
- 4.223 Door to door selling in the energy sector raises a number of complex and inter-related issues. 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

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<sup>79</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>80</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

responsibility in relation to the information provided to potential new consumers, and the sales techniques used.

- 4.224 Door to door selling in the energy sector occurs in a context of information asymmetry between energy retailer sales agents and consumers. Furthermore, consumers may not be well informed about alternative offers available in the market. This is a form of market failure that can result in consumers accepting terms from energy retailers that they would not accept had they been fully and properly advised. In the context of door to door selling, consumers are often susceptible to making hasty and possibly unintended decisions that they subsequently regret. Given that sales agents are rewarded by sales commissions, both sales agents and energy retailers share a strong financial incentive to entice and encourage consumers to switch energy retailers, and complaint data indicates that inappropriate and pressure selling is common throughout the industry and is becoming more prevalent.
- 4.225 In recognition of these issues, door to door selling in the energy sector is currently regulated by State, Territory and Commonwealth laws, and regulation and enforcement of these legal requirements can be undertaken by State, Territory and Commonwealth regulators and energy-specific ombudsmen. Despite this regulatory framework, complaints about door to door selling in the energy sector continue to rise.
- 4.226 Given this framework, any new regulatory scheme, whether self-regulatory or not, must add to the consumer protection regime already in place, and not simply add to the complexity of existing arrangements so as to cause added confusion for consumers and potentially undermine the effective operation of existing regulatory protection.
- 4.227 In assessing this application, the ACCC is also mindful of the direction of the Australian Competition 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”.<sup>81</sup>
- 4.228 For the reasons outlined in chapter 4 of this draft determination, the ACCC is not satisfied that the proposed scheme, as it currently stands, is likely to achieve its stated objective of improving consumer confidence. The ACCC acknowledges that EAL has made a number of revisions and amendments to the original scheme with the purpose of addressing concerns previously raised by both the ACCC and consumer groups. However, while acknowledging that these revisions seek to improve the scheme in a number of respects, the ACCC remains of the view that the majority of public benefits asserted by EAL are either unlikely to be realised or do 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 does not extend protection beyond the requirements in existing laws and regulations, and indeed in many respects do not go so far as those provisions).
- 4.229 The ACCC’s fundamental concern with the scheme is that energy retailers who benefit from the activities of door to door sales agents are not sufficiently accountable for the actions of the agents that they employ. This manifests in a number of ways. For example, consumer groups and consumers are unable to make a complaint about energy

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<sup>81</sup> Medicines Australia [2007] ACompT4 [128]

retailers or marketers under the scheme, and there is limited public accountability for non-compliance with the scheme.

- 4.230 Further, while the scheme's requirements for recruitment and training standards for sales agents, and sales agent accreditation are welcome and have the potential to realise public benefits, this potential is dependent on the accountability, sanctions and enforcement processes applicable to EAL members under the scheme. As the scheme currently stands the ACCC is not confident that the sanctions applicable for breaches of the scheme are sufficient to disrupt the incentives for both sales agents and energy retailers to engage in unfair selling practices to maximise their financial interests.
- 4.231 Further, the ambiguity and discretion provided in relation to the events that may trigger an investigation and the application of sanctions weakens the claim of public benefit arising from this aspect of the scheme, particularly regarding the sanctions processes that will be applied to members for breaches of the scheme.
- 4.232 Similarly, while the scheme introduces some mechanisms for independent compliance audits and determinations by a code manager and/or code panel independent of the EAL member being reviewed, there remain a number of issues of ambiguity and lack of clarity as to how these processes will be implemented in practice. These aspects weaken the incentives for EAL members to comply, or to invest in the resources required to ensure full and effective implementation of the scheme.
- 4.233 Against this, the scheme is complex and its various documents contain some internal inconsistencies. Further, as already noted, implementation of the scheme is ambiguous, and in an environment where consumers are currently experiencing confusion about energy regulation the ACCC considers that the scheme as currently proposed simply introduces a new layer of complexity without sufficient associated benefits for consumers.
- 4.234 Although in considering EAL's application for authorisation, the ACCC is of the view that the scheme in its present form would not deliver a public benefit and could create additional public detriment, the ACCC considered whether it would be appropriate to grant authorisation subject to conditions. However, as the scheme submitted by EAL is not sufficiently developed, the ACCC considers it would be difficult to articulate effective conditions at this stage. Therefore this approach was not adopted.
- 4.235 The ACCC notes that the recent Tribunal decision in *Medicines Australia* regarding the ability of the ACCC to impose conditions above the minimum threshold to achieve a net public benefit so as to achieve more substantial benefits.

'Where there is a low to non-existent anti-competitive or other detriment the ACCC may be entitled to look closely at what it is being asked to authorise. Authorisation is a public and official act of some seriousness. It is not to be invoked for trivial cause. To grant authorisation in such cases may risk like applications with wastage of resources as well as the risk that the authority of the ACCC itself may be diminished. Similarly, where the anti-competitive detriment is low to non-existent the ACCC may be entitled to say, as a matter of discretion, that it would only authorise the conduct if the public benefit to be derived from it, beyond that necessary to outweigh the anti-competitive detriment, or satisfy the *per se* conduct test is substantial. That is to say 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 ...the ACCC may impose a condition on its authorisation which effectively requires that the relevant contract, arrangement, understanding or conduct yield a more substantial public benefit than is required to get over the threshold of the necessary conditions comprising s 90. Alternatively, it may

impose a condition requiring that the public benefit identified be enhanced in terms of the likelihood of its realisation.’<sup>82</sup>

4.236 For these reasons, and the detailed reasons outlined in section 4 of this draft determination, the ACCC is not satisfied that the conduct for which authorisation is sought is likely to result in any material public benefit that would outweigh the public detriment.

4.237 For these reasons, and the detailed reasons outlined in section 4 of this draft determination, the ACCC is not satisfied that the conduct for which authorisation is sought is likely to result in any material public benefit that would outweigh the public detriment.

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<sup>82</sup> Medicines Australia [2007] ACompT4 [128]

## 5. Draft determination

### The application

- 5.1. On 29 October 2010, EAL lodged applications for authorisation A91258 & A91259 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91258 was made using Form A, Schedule 1, of the Competition and Consumer Regulations 2010. 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.
- 5.3. 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).
- 5.4. In particular, EAL seeks authorisation for implementing a scheme to self regulate door to door energy sales.
- 5.5. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this draft determination, the ACCC is not 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.
- 5.7. The ACCC is not satisfied that the conduct for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.8. The ACCC therefore **proposes to deny** authorisation to applications A91258 and A91259.
- 5.9. This draft determination is made on 11 April 2011.



5.10. The attachments to this determination are part of the draft determination.

### **Further submissions**

5.11. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## **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

# 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>83</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>84</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>85</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>86</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>87</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>88</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>83</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>84</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>85</sup> Section 91(3).

<sup>86</sup> Section 88(10).

<sup>87</sup> Section 88(6).

<sup>88</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>89</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>90</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>91</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>92</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>93</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>94</sup>

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

<sup>90</sup> Subsection 87ZD(1).

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

<sup>92</sup> Subsection 91B(3)

<sup>93</sup> Subsection 91C(1)

<sup>94</sup> Subsection 91C(3)