

Our Ref: 52670  
Contact Officer: Tanya Hobbs  
Contact Phone: 02 6243 1029



**Australian  
Competition &  
Consumer  
Commission**

19 December 2013

Ms Anne Whitehouse  
Chief Executive Officer  
Energy Assured Limited

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Dear Ms Whitehouse

**Energy Assured Limited application for revocation of authorisations A91258 & A91259 and substitution of new authorisations A91390 & A91391 - issues**

I refer to the above mentioned application for authorisation lodged with the Australian Competition and Consumer Commission (the ACCC) on 5 November 2013.

**Request for further information**

As discussed with Tanya Hobbs on 19 December 2013, to assist in its assessment of your application for re-authorisation, the ACCC requires additional information in order to better understand the claimed benefits and to assess the extent to which any potential anti-competitive detriment may arise from the conduct. In particular, the information requested will assist the ACCC is assessing the effectiveness of EAL's self regulatory scheme in ensuring better standards in door to door (and now all face to face) energy sales and thereby the realisation of the public benefits EAL submits result from the scheme.

The information requested is outlined at Attachment A. Please provide this information by **24 January 2014**. Please note in your response any aspects which you would like to be excluded from the public register. Subject to any claims for confidentiality, once we have received your response, this letter and your response will be placed on the ACCC's public register.

If you wish to discuss any aspect of this matter, please do not hesitate to contact Tanya Hobbs on 02 6243 1029.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Richard Chadwick'.

Dr Richard Chadwick  
General Manager  
Adjudication Branch

## Attachment A – Information Request

### Corporate governance and transparency

1. Please provide a copy of EAL's current constitution or confirmation that the constitution has not changed since the version provided to the ACCC on 13 May 2011.
2. EAL's 2012/13 annual report includes a statement of comprehensive income and a statement of financial position. Please provide an explanation of EAL's funding arrangements. In particular:
  - For revenue received through member subscriptions as provided for in EAL's constitution, the level of subscription levied for each class of membership and details of which members fall within each class of membership.
  - Any other sources of revenue.
3. Please explain how EAL determines the level of funding necessary to undertake its continuing operations for each year.
4. Please provide details of the number of staff employed by EAL and each staff member's role within the organisation.
5. To the extent that EAL's revenue in any year may be insufficient to finance ongoing operations (for example, if it has to engage in more extensive compliance efforts to resolve a particular issue than anticipated at the time its budget was set) please explain how EAL would resolve this issue.
6. Please provide a list of the members of the Code Panel.
7. Please provide a copy of each annual report prepared by an external auditor since the scheme was authorised in June 2011 and the KPMG review of the Code of Practice.
8. Clause 9.6 of the Code of Practice requires EAL's annual report to, at a minimum, address the 12 matters prescribed in clause 9.6. Please indicate where each of these matters is addressed in the 2012/13 annual report and in particular, where the matters prescribed in clauses 9.6(6), (8), (9), (10), (11) and (12) are addressed. To the extent that any of these matters are not addressed in the annual report, please provide information addressing these matters.
9. I note that EAL proposes to replace independent auditing with reviews by EAL of members' actions. The ACCC considers that the main justification for this change submitted by EAL, the decreasing level of complaints to regulators that EAL submits has occurred, does not necessarily justify removal of independent auditing of compliance with the Code of Practice.

The ACCC also has concerns about this the removal of independent auditing from the Code of Practice in light of the issues raised below about:

- the levels of compliance with the Code of Practice, and
- the apparent significantly higher rate of non-compliance reported in the independent auditors report compared to EAL's own statistics.

Therefore EAL may wish to provide further information in relation to this proposed change.

### **Accurate recording of issues**

10. Please provide the raw figures upon which EAL's statistics in the table in paragraph 18.1 of EAL's submission are based.
11. I note that there has been a relatively small number of warnings and sanctions applied to EAL members compared to the number of sales agents deregistered or otherwise sanctioned by EAL. Please provide a view as to why this is the case. In particular, the significant number of deregistered sales agents would appear to indicate either the existence of significant issues across the industry or a high level of non-compliance by some EAL members.
12. While acknowledging the possibility of differences in interpretation and focus, there also appears to be a discrepancy between the relatively low level of sanctions applied to EAL members compared to the serious ongoing issues involving door to door sales by energy retailers and marketing companies which have been investigated and litigated by the ACCC. I therefore invite EAL to also discuss this discrepancy.
13. Clause 9.6 of the Code of Practice requires annual reports produced by EAL to provide details of any industry wide systemic issues and how these issues have been resolved. I also note that no such information is provided in the 2011/12 or 2012/13 annual reports. Please advise of any systemic issues which have arisen, EAL's solutions and the results of the implementation of its solutions.
14. I note that the information provided by EAL about the results of the 2012 independent audit suggest a significantly higher level of non-compliance than the data in the table of complaints at paragraph 18.1 of EAL's submission. I invite EAL to comment on the difference in the incidents of non-compliance indicated in the independent auditors report compared to EAL's statistics.
15. Please provide details of the sanctions and warnings imposed by EAL on its members as noted at paragraph 19.1 of EAL's submission, including the identity of the member, the nature of the breach and the sanction imposed.
16. Please explain how and why the Code Manager considers compliance costs in imposing sanctions.

17. I note that the Electricity and Water Ombudsman NSW expressed a concern, in its submission dated 28 November 2013, that retailers and comparators may not record complaints from non-customers without an account which have been approached on their behalf by a sales agent. Please confirm that these types of complaints to retailers and comparators are recorded.
18. The Code of Practice requires members to investigate and rectify the five sales made by a sales agent immediately before and immediately after a sale which resulted in a breach. Please clarify whether members engage in a broader investigation of all of a sales agent's sales should any of these ten sales also be found to have breached the Code of Practice or the law.

### **The role of sub-agent principals**

19. On the information currently available to the ACCC it appears that sub-agent principals are more similar in terms of the role they play in face to face sales to marketing companies than to sales agents. However, the Code of Practice appears to treat sub-agent principals as analogous to sales agents by requiring registration. Accordingly, please provide more details regarding the role of sub-agent principals within the industry.
20. Please also explain the sanctions which apply to sub-agent principals in relation to breaches of the Code of Practice. For example, if one of ten sales agents engaged by a sub-agent principal is deregistered, is the sub-agent principal also automatically deregistered? How would this affect the registrations of the other nine sales agents?
21. There appears to be limited integration into the Code of Practice of sub-agent principals. For example there appears to be no provision for this class of entity within the sections relating to disciplinary procedures and appeals. Accordingly, I invite EAL to consider additional changes which might be made to the Code of Practice to better integrate sub-agent principals. In particular, EAL may wish to consider whether sub-agent principals are better accommodated under the Code of Practice in a manner similar to marketing companies.
22. I note that the Code of Practice contains a significant amount of detail regarding members' obligations, sales agents' obligations and members' obligations in relation to their sales agents' actions. However, there are few details regarding obligations which related to sub-agent principals. I invite EAL to provide an explanation for this difference.

### **Comparators**

I note that the test for reauthorisation of the Code of Practice is different to the test which formed the basis upon which the variations to the Code of Practice (which were related to comparators) were authorised in March 2013. Accordingly, an aspect of the ACCC's review of the authorisation application includes reviewing the adequacy of the changes in the revised Code of Practice in relation to comparators.

There are two central issues related to the inclusion of comparators within the Code of Practice that the ACCC wishes to explore further. The first is whether an effective mechanism exists to resolve complaints which relate to comparators. The second is that the Code of Practice ensures that the basis upon which comparisons are made is transparent.

23. The Code of Practice currently relies upon the complaint resolution system provided by energy ombudsmans offices to resolve complaints about comparators. However, the ACCC understands that complaints regarding comparators can rarely be dealt with through this system due to its focus upon individual retailers (since comparators are likely to represent a number of retailers). Accordingly, I invite the EAL to consider additional avenues or changes which might be made to the Code of Practice to resolve complaints in relation to comparators.

24. The Code of Practice and the procedures guidelines do not appear to contain any measures specifically aimed at ensuring that comparators' websites (a primary sales tool used by comparators engaged in face-to-face selling) do not mislead consumers, are impartial, disclose all relevant commissions or other arrangements between comparators and retailers, and all assumptions on which comparisons are made.

Accordingly, I invite the EAL to make submissions regarding its processes in this regard and whether additional changes might be made to the Code of Practice specifically focused on comparator websites and their use by sales agents. I also note in this regard the high level principles released by the Consumer Utilities Advocacy Centre regarding a potential voluntary code of conduct for switching sites, principles which may also be applicable to face to face sales which rely upon the information provided by a comparator's website.

In particular, the ACCC considers that the Code of Practice would benefit from clarification of the role of comparators in undertaking face to face sales, including in relation to issues such as disclosing relevant commissions or other arrangements between comparators and retailers and assumptions which form the basis of comparisons are made.

### **Drafting issues**

25. EAL may wish to make submissions or comment on the following issues:

- a. the definitions in clause 28.3 contain significant circularity due to the lack of definition of 'operational' and imprecision due to the reference to 'large number of customers';
- b. it is unclear how a material breach can be both isolated and also impact a large number of customers;
- c. it is unclear which examples in the table in clause 28.2 are intended to correspond to 'serious operational breach';

- d. it is unclear whether the numbers of level of 1, 2 or 3 breaches for the purposes of examples of systemic breach are additive or not;
- e. the double negative in the definition of systemic breach is confusing; and
- f. the use of 'systemic' in the Code of Practice to refer to both industry wide issues and also to a class of issues which may affect only a single member is confusing.