



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of authorisations A91258 &
A91259 and substitution with A91390 & A91391

lodged by

Energy Assured Limited

in respect of

its Code of Practice for
face to face electricity and gas sales

Date: 8 April 2014

Authorisation numbers: A91390 & A91391

Commissioners:

Sims
Rickard
Schaper
Cifuentes
Court
Walker

Summary

The ACCC proposes to grant conditional authorisation for five years to Energy Assured Limited and its members to adopt and comply with a scheme to self regulate face to face energy sales that are undertaken on behalf of electricity and gas retailers.

Authorisation is subject to the proposed conditions C1, C2, C3, C4 and C5.

The ACCC does not propose to authorise changes to the scheme submitted by Energy Assured that would replace annual independent compliance audits of members of the scheme with compliance checks conducted by Energy Assured.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

Energy Assured has sought re-authorisation for a scheme to self regulate face to face energy sales that are undertaken on behalf of its member electricity and gas retailers, and member marketing companies who are engaged by the retailers. The scheme purports to ensure better standards in face to face energy sales through the training and accreditation of sales agents as well as self-regulating the conduct of Energy Assured members, and thus their face to face sales agents in their dealings with consumers. Broadly, the scheme requires Energy Assured members to adopt and comply with a Code of Practice and Complaints Process developed by Energy Assured.

The ACCC considers that the scheme is likely to lead to public benefits in the form of increased compliance with laws applying to face to face energy sales to consumers. In particular, the scheme assists in educating sales agents about their obligations in dealing with consumers and provides for sanctions, including ultimately deregistration, for sales agents who do not comply with the standards set by the Code of Practice. Energy Assured members agree not to employ deregistered sales agents for a period of five years.

However, it is equally important to the realisation of this public benefit that any systemic issues that lead to or contribute to poor sales practices are also addressed. The ACCC considers that there is currently insufficient focus in the scheme on the responsibilities on energy retailers and marketers to also comply with the standards of the Code of Practice beyond disciplining individual sales agents. This lack of focus on the accountability of Energy Assured members themselves has the potential to undermine the realisation of the public benefits from the Code of Practice.

Energy Assured has proposed to replace yearly independent audits of members' compliance with the Code of Practice with periodic compliance checks conducted by Energy Assured. Given the ACCC's concern about the insufficient focus in the scheme on the responsibilities on energy retailers and marketers to also comply with the Energy Assured Standards the ACCC does not propose to authorise this change to the scheme.

The ACCC also proposes to impose conditions of authorisation to address its concerns about the lack of focus in the scheme on systemic issues. Broadly, these conditions require:

- that the annual independent auditing required under the Code of Practice include auditing of whether any systemic issues arise in respect of each member and whether the steps taken to address such issues are appropriate (C2);
- members to comply with each specific standard in the Code of Practice relating to customer contacts and entering into contracts with customers that sales agents representing them are required to comply with (C3);
- changes to the sanction process for systemic breaches of the Code of Practice by members that would lower the threshold for what constitutes a systematic breach (C4); and
- Energy Assured to proactively monitor trends across members' compliance registers in order to identify and suggest solutions to systemic issues (C5).

Energy Assured has proposed changes to the scheme to cover the practice of member marketing companies engaging sub-agent principals to manage sales agents rather than engaging sales agents directly.¹ The ACCC considers that the expansion of the scope of the scheme to cover sub-agents has the potential to improve compliance with relevant laws provided the conduct of sub-agents is subject to the same oversight as sales agents. Following discussions with the ACCC, Energy Assured has indicated its willingness to make further changes to the scheme to clarify that the disciplinary processes (including sanctions and deregistration) which apply to sales agents, also apply to sub-agent principals and to sales agents employed by sub-agent principals.

Similarly, the ACCC considers that the inclusion of energy comparators who compare products offered by different energy retailers within the Energy Assured scheme has the potential to improve compliance with laws relating to face to face energy sales.² To ensure the realisation of this benefit the ACCC proposes to impose a condition of authorisation requiring that where a comparator is engaging in face to face sales and recommends a particular energy contract or retailer to a customer, and the comparator receives a higher sales commission for the recommended contract than for energy contracts against which the recommended contract has been compared, they must advise the customer of this. The comparator must also provide any further information requested by the customer about how the comparator's commission for the energy contract being recommended compares to the commission received for other energy contracts used as a point of comparison. Finally, the comparator must disclose all retailers available to the customer and highlight those retailers compared by the comparator and also disclose the underlying assumptions on which the comparison or recommendation is made (C1).

The ACCC considers that the Code of Practice also generates some public benefit by increasing consumer awareness about their rights and obligations in relation to the face

¹ A sub-agent principal is defined by the EAL Code of Practice as an entity engaged by an energy marketer to undertake sales activities on its behalf. In practice, the difference between a sub-agent principal and a sales agent is that a sub-agent principal is engaged to manage sales agents which are undertaking sales activities.

² Comparators engage in energy marketing primarily via internet websites. However, some comparators also employ face to face sales agents to approach customers. The Energy Assured scheme only applies to comparators while they are engaged in face to face sales.

to face selling of energy products. However, the ACCC considers that the extent to which the Code of Practice does result in increased consumer awareness, and the associated public benefit in doing so, is limited.

The ACCC considers that the Code of Practice is likely to lead to a small public detriment in the form of increased complexity and costs within the energy industry.

Subject to the proposed conditions, and the maintenance of the existing requirement for annual independent auditing of Energy Assured members, the ACCC is satisfied that the likely public benefits that will result from the Energy Assured scheme would outweigh the likely detriments and therefore the ACCC proposes to grant authorisation for a further five years.

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The applications for authorisation

1. On 5 November 2013, Energy Assured Limited (Energy Assured) lodged applications with the Australian Competition and Consumer Commission (the ACCC) for the revocation of authorisations A91258 & A91259 and the substitution of authorisations A91390 & A91391 for the ones revoked (re-authorisation).
2. The applications for re-authorisation were lodged because authorisations A91258 & A91259 are due to expire on 14 July 2014 and the relevant arrangements may have the effect of substantially lessening competition within the meaning of section 45 of the *Competition and Consumer Act 2010* (the Act). The arrangements may also contain exclusionary provisions (within the meaning of section 44ZZRD of the Act).
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Act. 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.³

The conduct

4. Broadly, Energy Assured seeks re-authorisation to allow the continuation of:
 - a) a varied version of the EAL Code of Practice, including the Procedures Guidelines, and
 - b) the requirement in Energy Assured's constitution for its members to adopt and comply with for the EAL Code of Practice(referred to collectively as the Code of Practice).
5. The Code of Practice is a voluntary industry code designed to self-regulate face to face energy sales conducted by Energy Assured's members. The members of Energy Assured include electricity and gas retailers and marketing companies employed by energy and gas retailers. This includes marketing companies who are comparators which provide a service comparing more than one energy retailer's offerings and which may receive commissions from more than one energy retailer for making sales in this way.
6. A version of the EAL Code of Practice, with the changes proposed by Energy Assured to the Code of Practice presently authorised in mark up, is attached at **Attachment C**. Energy Assured is seeking re-authorisation of the Code of Practice for five years.

3 Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

The applicant – Energy Assured Limited

7. Energy Assured manages the voluntary Code of Practice in relation to the door to door selling of energy products. The Code of Practice is intended to self-regulate the actions of Energy Assured members and their contracted sales agents. As part of its applications for re-authorisation Energy Assured proposes to extend the scope of the Code of Practice to cover all face to face sales of energy products outside of its members' own premises.
8. Energy Assured is a not-for-profit company limited by guarantee which is owned by its member electricity and gas retailers and energy marketing companies. The majority of energy retailers and marketers who conduct face to face energy sales are members of Energy Assured. Three of Australia's major energy retailers, AGL, Origin Energy and EnergyAustralia no longer engage in door to door sales and consequently are no longer members of Energy Assured. Energy Assured's current membership list is attached at **Attachment B**. Energy Assured employs a CEO/Code Manager, a Code Operations Manager and a part time administrative officer.
9. Energy Assured's board appoints a panel of independent individuals (referred to as the Code Panel) which meets with the Code Manager to review the strategic operations of the Code of Practice and to make recommendations for improvements. The Code Panel also hears appeals from members and sales agents in relation to sanctions imposed by the Code Manager.
10. Energy Assured has advised that the current members of the Code Panel are:
 - Barry Adams – former Energy & Water Ombudsman Queensland;
 - Gavin Dufty – Manager Policy and Research St Vincent de Paul Society;
 - Nick Hakof (Chair) – former Energy Ombudsman South Australia;
 - Terry Miller – former Group General Manager Country Energy; and
 - Vera Visevic – Partner, Mills Oakley and Member of the Fundraising Institute Australia Ethics Committee.
11. The Code Manager, who is also appointed by Energy Assured's board, manages the day to day operations of the Code of Practice. This includes, as provided for in clause 10.2 of the Code of Practice:
 - a) developing, implementing and managing an agreed standard for certain marketing activities undertaken by its members in respect of gas and electricity supply contracts with consumers;
 - b) developing and facilitating training programs to provide members with the knowledge and capabilities to maintain the competency standards required by the Code of Practice and, in turn, to deliver their own on-going training of sales agents;
 - c) administering a register of sales agents showing their accreditation status, including if they have been deregistered;
 - d) managing a complaints referral process;
 - e) developing and implementing procedures and processes to monitor and assess the conduct and activities of sales agents and the conduct of members to ensure compliance with the Code of Practice; and

- f) implementing appropriate sanctions where a sales agent or member is found to have breached the Code of Practice.

Background

The current Code of Practice

12. The current Code of Practice was first authorised in 2011. The Code of Practice sets out standards that Energy Assured's retailer and marketer members and their sales agents must comply with in conducting door to door sales. These are referred to as the EAL Standards and Energy Assured's members are responsible for ensuring that these standards are complied with. The EAL Standards include matters such as:
 - requiring a sales agent to identify themselves, the energy retailer or comparator they represent and their purpose when in contact with consumers;
 - requiring a sales agent to provide information on the consumer's right to terminate a contract during the applicable cooling-off period; and
 - the sales agent must not provide the consumer with information that is misleading or deceptive.
13. The Code of Practice also has requirements regarding the registration, accreditation, recruitment, training, assessment and monitoring of sales agents by members. In turn the Code of Practice also has arrangements for monitoring and reporting on members' compliance with their obligations under the Code of Practice. Currently this includes monthly reports, annual independent auditing and referral of unresolved complaints to the relevant energy ombudsman.
14. The EAL Standards include obligations contained in the Australian Consumer Law (ACL), the National Electricity Retail Law (NERL) and state laws. The EAL Standards apply to the extent that they are consistent with the applicable laws, which will apply to the extent of any inconsistency. In certain instances, the EAL Standards may set additional requirements, for example sales agents are:
 - required to give a more fulsome explanation of a potential customer's rights and avenues of complaint;
 - limited to spending a maximum of 1 hour at a consumer's premises in the absence of written consent from the consumer; and
 - bound, under proposed changes to the Code of Practice discussed in paragraph 20(a) below, to these standards in the case of all face to face sales including in locations such as mall kiosks, not simply at a consumer's house (the focus of current laws).
15. The Code of Practice provides for sanctions for non-compliance by both sales agents and members and sets out the process for this, including guidance on the level of sanction to be imposed. Members must comply with all EAL Standards and ensure that sales agents engaged by them also comply with these standards.
16. Clauses 20 through 22 of the Code of Practice allow the Code Manager to require its members to impose a graduated level of disciplinary actions and retraining to those sales agents which do not comply with the EAL Standards. Deregistration

from the sales agent register maintained by Energy Assured is the most serious disciplinary action which can be imposed by the Code Manager. Deregistration stays in place for five years. It is a requirement of the Code of Practice that all sales agents used by a member of Energy Assured must be registered on Energy Assured's sales agent register. Therefore, the consequences of deregistration are that a sales agent is unable to be employed for five years in a sales capacity by an Energy Assured member.

17. The Code of Practice links breaches by sales agents to consequences for members via the concepts of material breach and systemic breach. Energy Assured members also have certain administrative obligations under the Code of Practice. Clause 28 of the Code of Practice provides for graduated levels of sanctions to be imposed on members who do not comply with the Code of Practice. These sanctions range from written warnings, through to requirements to undertake remedial action to remedy breaches and ensure that they do not continue, reporting to ombudsman's offices, public naming and ultimately expulsion from membership of Energy Assured.
18. The primary focus of the Code of Practice is on compliance by sales agents, energy retailers and energy marketers with the EAL Standards and applicable laws in relation to door to door sales of energy. As noted, as part of the current application for re-authorisation it is proposed that the Code of Practice be extended to cover all face to face sales other than those conducted at the members' premises. However, the Code of Practice is not intended to cover energy retailers' other marketing channels such as telemarketing.
19. The operations of the Code of Practice are currently monitored by annual independent auditing of energy retailer compliance, currently undertaken by KPMG, and a biennial independent review of the effectiveness of the Code of Practice. The first biennial review was undertaken by Deloitte in July 2013. Copies of the two auditing reports undertaken to date and the biennial review were provided by Energy Assured at the ACCC's request. The findings of these reports are discussed in the ACCC's assessment of the application for re-authorisation.

Proposed changes to the Code of Practice

20. A number of changes are proposed to the Code of Practice, compared to the currently authorised version. The most significant of these are:
 - a) an extension of the Code of Practice to include all face to face sales, other than those conducted on a member's premises (eg sales at shopping centres) (clause 34, Dictionary). Previously the Code of Practice included only door to door sales;
 - b) instead of yearly compliance audits of members by an independent firm of auditors, Energy Assured proposes to conduct compliance checks which may include desktop audits, surprise site visits, sales agent interviews and mystery shopping. Compliance checks will be conducted periodically and at least annually (clause 24);
 - c) amendments to the Code of Practice to cover the practice by member marketing companies of engaging sub-agent principals to manage sales agents rather than engaging sales agents directly (clauses 8.2 and 40);
 - d) compliance reports by members must be submitted to Energy Assured quarterly rather than monthly (clause 25);

- e) the board of Energy Assured (the Code Panel) may be constituted by four members rather than five and the minimum number of meetings per year has been reduced from four to three (clause 12);
- f) additional provisions to ensure that deregistered sales agents can not be engaged in indirect sales roles such as managing, assessing or training sales agents (clause 7.6);
- g) updates to the EAL Standards to bring them in line with the National Energy Retail Rules, now applicable in four jurisdictions (clauses 3-6); and
- h) an update to the EAL Standard for the conduct of verification calls to ensure that a customer is not coached during the post-sale verification procedure (clause 4.1(8)).

Previous authorisations

23 June 2011 - authorisations A91258 and A91259

21. In granting authorisations A91258 and A91259, the ACCC recognised that the realisation of public benefit would largely depend upon the extent to which the key elements of the Code of Practice were effective in practice. The ACCC noted that various research reports and submissions from stakeholders which identified several concerns surrounding door to door sales in general and energy products in particular.⁴ These concerns included the lack of information possessed by consumers in comparison to sales agents and pressure selling by sales agents, both of which may lead consumers to make poor choices when considering changing energy providers.
22. The ACCC considered that well designed codes of practice can be an effective tool to address these issues, thereby generating significant benefits for both consumers and the market. Accordingly, the ACCC noted that it supports genuine efforts by an industry to improve outcomes for consumers and the efficient operation of markets through the adoption and enforcement of codes of practice. However, the ACCC concluded that for self-regulation to be effective in addressing these issues the businesses involved must take genuine responsibility for the conduct of agents.
23. In this respect, the ACCC considered that the efficacy of the Code of Practice in promoting compliance with all applicable laws largely depended on the conduct of Energy Assured's members. In particular, it depended on the extent to which each member (and Energy Assured) was pro-active in identifying and finding solutions to specific types of conduct that, if implemented either by a sales agent or by a member directly, would be a breach of an applicable law or of an EAL Standard. The ACCC considered that an industry code directed at finding and disciplining isolated 'rogue' agents without searching for and remedying any underlying systemic issues within a company or within the industry as a whole was unlikely to be effective.
24. As the Code of Practice was newly developed, and there was some uncertainty as to how it would operate in practice, the ACCC granted the authorisations for three years rather than the ten years sought. The shorter period was intended to allow an early review of the Code of Practice's operation.

⁴ A91258 & A91259 Final Determination pp 9, 10, 13, 21-24.

21 March 2013 – minor variations of A91258 and A91259

25. In November 2012, Energy Assured sought minor variations to authorisations A91258 and A91259 as Energy Assured wished to accept energy comparators as members. Energy Assured considered that some amendment to the wording was required in order to properly accommodate comparators within the Code of Practice.
26. Energy comparators engage in energy marketing primarily via internet websites which compare available product offerings from different energy retailers. However, some comparators also employ face to face sales agents to approach customers and engage their interest in the comparator and thus the retailers represented by the comparator. Comparators face an additional source of conflict of interest, compared to other marketing companies, if the different products which they compare offer different levels of fees or commissions for sales.
27. The ACCC decided to issue the variations as requested by Energy Assured so as to more effectively extend the Code of Practice to comparators. However, the ACCC also noted that authorisations A91258 and A91259 were due to expire in July 2014. The ACCC foreshadowed that, should Energy Assured seek authorisation for the Code of Practice beyond that date, the ACCC would be required to assess the likely public benefits and public detriments of the Code of Practice as a whole. This would include reassessing the changes made by the minor variations. The ACCC's reassessment would, among other matters, include consideration of the performance and effectiveness of the Code of Practice between 2011 and 2014.

Submissions received by the ACCC

28. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
29. The ACCC sought submissions from approximately 117 interested parties, including energy retailers and marketers, industry associations, small business representatives, government regulators and ombudsmen and consumer associations and representatives. A summary of the public submissions received from Energy Assured and interested parties follows.

Energy Assured

30. Broadly, Energy Assured submits that the benefits of the Code of Practice include:
 - a) improved standards of marketing of electricity and gas in face to face contexts, resulting in improved consumer protection and confidence and fewer complaints to regulatory agencies;
 - b) it allows Energy Assured members to more effectively exclude 'rogue' sales agents from the industry and efficiently comply with their regulatory obligations; and
 - c) Energy Assured members are effectively held to account through the warning notice and sanctions process.
31. Energy Assured submits that there are unlikely to be any public detriments arising from the Code of Practice and in particular no negative effect on competition.

Interested parties

32. Submissions have been received from the Government of South Australia⁵, Consumer Action Law Centre (CALC), the Energy & Water Ombudsman NSW (EWON), Energy & Water Ombudsman Victoria (EWOV), the Energy Retailers Association of Australia (ERAA), Red Energy and an anonymous interested party.
33. EWON and EWOV supported the expansion of the Code of Practice to include face to face sales including kiosk and event marketing. EWON and EWOV submitted that retailers have diversified their marketing channels and as a result customers have started making complaints about misleading or pressure marketing through these non-traditional channels. EWON also made submissions requesting clarification to some wording in the Code of Practice.
34. CALC submitted that the Code of Practice does not attempt to, and will not, enhance consumer welfare above what is already afforded under the law. CALC submitted that this means that consumers will bear the cost of unnecessary regulation without a benefit. Between November 2011 and November 2013 CALC submits that it ran a 'Do Not Knock' campaign on its website and that 40% of the complaints it received related to energy retailing.

⁵ The Hon Tom Koutsantonis MP, Minister for Mineral Resources and Energy (SA) *Submission* 12 December 2013.

35. CALC submits that the continuing issues in the industry indicate that the Code of Practice is ineffective, in part because of the lack of effective sanctions. CALC submits that its experience of attending Energy Assured stakeholder meetings is that EAL focuses upon forcing sales people which breach the Code of Practice out of the industry rather than addressing the systemic issues which lead to poor sales practices. CALC referred to a report by Footscray Community Legal Centre indicating ongoing problems suffered by the migrant and refugee community in relation to door to door sales, in particular issues of informed consent which are not addressed by the Code of Practice.⁶
36. The South Australian Government, ERAA, Red Energy and the anonymous interested party all expressed strong support for the efforts of Energy Assured in managing the issues of door to door selling. The South Australian Government submitted that the Code of Practice results in a higher standard of conduct and consumer confidence. The South Australian Government attributed this to the development under the Code of Practice of better training for sales agents, the existence of a complaints process and a process for disciplining members and sales agents. The South Australian Government submitted that the Code of Practice is complementary to the protections afforded in the Australian Consumer Law and the National Energy Customer Framework.
37. Red Energy submitted that the Code of Practice has been effective in ensuring improved face to face marketing of energy due to the streamlined, centralised and standardised monitoring and training of sales agents. Red Energy also submits that breaches have been accurately and correctly categorised and that the use of warning notices acts as a strong deterrent while fostering process improvements. The level of detail in the Code of Practice has also facilitated the development by Red Energy of clear guidelines to ensure compliance.
38. The views of Energy Assured and interested parties are considered in the evaluation section of this draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

⁶ Laura Berta, Gerard Brody and Cynthia Mackenzie *Strangers are Calling! The experience of door-to door sales in Melbourne's refugee communities* Footscray Community Legal Centre Inc (May 2013) <http://www.footscrayclc.org.au/brochures-publications/>.

ACCC evaluation

39. The ACCC's evaluation of the proposed Code of Practice is in accordance with the relevant net public benefit tests⁷ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.
40. In order to assess the effect of the proposed Code of Practice and the public benefits and detriments that are likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

41. Energy Assured submits that the relevant markets are:
- a) the market for the retail supply of electricity and/or gas to residential and small business customers; and
 - b) the market for the supply of face to face sales agency services, other than those conducted at an energy retailer's premises, to energy retailers and energy marketers by energy marketers and sales agents (respectively).
42. Energy Assured has extended the scope of the market for the supply of sales agency services from door to door sales to all face to face sales other than those conducted at the energy retailers' premises to reflect the proposed expanded scope of the Code of Practice. However, Energy Assured's view is otherwise consistent with the ACCC's assessment of the relevant areas of competition in its consideration of authorisations A91258 and A91259.
43. However, for the purpose of assessing this application and consistent with its previous assessment, the ACCC proposes to consider Energy Assured's applications for reauthorisation within the following areas of competition:
- a) the retail supply of electricity and/or gas to residential and small business customers; and
 - b) the supply of face to face sales agency services, other than those conducted at an energy retailer's premises, to energy retailers and energy marketers by energy marketers and sales agents (respectively).
44. However, the ACCC notes that it does not consider that it is necessary to precisely identify the relevant areas of competition to assess Energy Assured's application for reauthorisation.

The future with and without

45. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the

⁷ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8). The relevant tests are set out in Attachment A.

authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.⁸

46. Energy Assured has not made any submissions regarding the likely future in the absence of the Code of Practice.
47. In the absence of the Code of Practice, the ACCC considers that Energy Assured members will continue to be required to comply with existing regulation. The ACCC considers that a number of elements of the Code of Practice may raise concerns under the Act and absent authorisation would be less likely to be adopted. For example, collective monitoring of and reporting on sales agents' and members' behaviour and collective agreements regarding member sanctions and deregistration of sales agents.

Face to face energy marketing

48. Energy Assured has not outlined the market failure that the Code of Practice intends to address, but broadly submits that the provisions of the Code of Practice provides the means and the incentive for the industry's face to face selling practices to be improved.
49. The ACCC considers that 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 and other face to face 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 (often in the customer's own home), means that sales agents for energy retailers have a position of considerable responsibility in relation to the information provided to potential new consumers, and the sales techniques used.

Information asymmetries

50. Face to face selling in the energy sector ordinarily occurs in a context where there are information asymmetries between sales agents and consumers. Specifically, sales agents will generally have better information about proposed transactions and the range of alternative products available than consumers. 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.
51. Therefore, consumers are heavily dependent on the information supplied to them by the sales agent. This information asymmetry can lead to consumers accepting different terms than they would if they were to obtain adequate information on which to base their switching decisions.

⁸ *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.

52. In the case of comparators, the sales agent is also under no obligation to disclose if the different energy contracts that are being sold offer different fees and commissions to the sales agent or to the comparator. Consumers may also be more trusting of comparators as they are marketed as offering an objective comparison between a wide range of competing offers.
53. Acquirers of face to face sales services (i.e. energy retailers) also face information asymmetries. That is, it may be difficult for an acquirer of sales services such as a retailer to assess whether a potential sales agent will supply the service to a high standard.

Conflicts of interest

54. Sales agents and/or marketing companies in the energy industry are generally paid a commission by energy retailers if the sales agent entices consumers to switch energy providers. It is well recognised across a range of industries that remuneration structures based on sales commissions involve conflicts of interest that potentially result in conduct to the detriment of consumers.
55. In the energy retail sector, the ACCC considers that sales agents face a potential conflict between providing clear and appropriate advice to consumers (which may mean they do not entice a consumer to switch supplier) and using high pressure or misleading sales techniques (which means that they entice the consumer to switch and get paid commission). Comparators and their sales agents also face an additional source of conflict of interest if the different energy contracts which they sell offer different fees or commissions.
56. Retailers and marketing companies also face a conflict of interest between ensuring that their sales agents behave in an appropriate and compliant way (which may mean fewer sales) and allowing aggressive marketing strategies (if they generate profitable additional sales).

Pressure selling

57. As noted above, both sales agents and energy retailers share a strong financial incentive to entice and encourage consumers to switch energy retailers.
58. In the context of face to face 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. Although pressure selling techniques may be most effective (and therefore most harmful) in a door to door context, the ACCC considers that the techniques are also likely to be used in other face to face settings. The harm associated with pressure selling can occur even where consumers are well informed.
59. 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.

60. 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.
61. This pressure from face to face 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.

Role of the code of practice

62. The ACCC considers that well designed codes of practice can be an effective tool to address the types of market failures discussed above, thereby generating significant benefits for both consumers and the market. For example, prescribing standards of behaviour that sales agents must follow, committing resources such as training to promoting compliance with those standards, pro-active monitoring to ensure those standards are followed, a robust, 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 addressing the concerns resulting from information asymmetries, conflicts of interest and pressure selling.
63. Accordingly, the ACCC has stated that it will support genuine efforts by an industry to improve outcomes for consumers and the efficient operation of markets through the adoption and enforcement of codes of practice.⁹ However, it is important that such a code enhances consumers' understanding of their rights and does not confuse consumers about their rights through the creation of unnecessary additional complexity.
64. In addition, for self-regulation to be effective in addressing the market failures outlined above, the rules need to be unambiguous, transparent and enforceable. Robust, independent oversight of the self regulatory role and effective sanctions are also vital to the effectiveness of such schemes.
65. The extent to which the Energy Assured scheme achieves these objectives is discussed below in the ACCC's assessment of public benefits.

Public benefit

66. 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.¹⁰

⁹ ACCC, *Guidelines for developing effective voluntary industry codes of conduct* (February 2005).

¹⁰ *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.

67. In its 2011 determination, the ACCC recognised the following public benefits likely to result from the Code of Practice:
- a) improving the levels of compliance with laws applying to the door to door selling of energy to consumers by addressing the potential conflicts of interest sales agents and retailers and marketers face, and by reducing the impacts of pressure selling practices; and
 - b) better informing consumers about their rights and sales agents' obligations in door to door selling of energy.
68. The ACCC accepted 'that a scheme which improve[d] consumer confidence in the energy retail sector by addressing the issues of information asymmetry and pressure selling by sales agents [was] a worthy objective with the potential to achieve public benefit.'¹¹ However, it also considered that the 'extent to which the scheme ... realise[d] these public benefits [depended] 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.'¹²
69. Although the ACCC considered that the potential public benefits were likely, it also foreshadowed a number of issues that might reduce or negate these public benefits. The ACCC's assessment of the likely public benefits from the revised Code of Practice follows.

Improving the levels of legal compliance

Energy Assured's submission

70. Energy Assured has submitted that the threat of deregistration and improved monitoring has promoted good behaviour by sales agents and allowed members to more effectively exclude 'rogue' sales agents. Accordingly this has improved levels of compliance with laws applying to the door to door sales of energy products. Energy Assured has submitted that the proposed changes to the Code of Practice (to extend its application to face-to-face sales generally and to include sub-agent principals and comparators) will have the effect of further increasing this level of compliance.
71. Energy Assured takes the following measures to increase legal compliance in sales agents' conduct:
- a) identification and criminal history checking of sales agents;
 - b) initial training of new sales agents, which are then accompanied by experienced sales agents until they pass an assessment to allow them to work unsupervised;
 - c) every month 5% of all sales agents must be re-assessed with the results reported to Energy Assured;

¹¹ A91258 & A91259 Final Determination p 28.

¹² A91258 & A91259 Final Determination p 28.

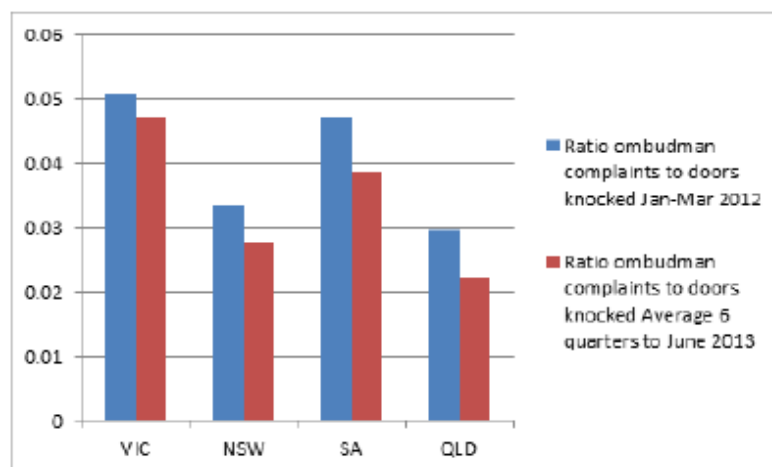
- d) annual assessment and ongoing training of sales agents to be provided by members to prevent the development of poor habits over time;
 - e) streamlining and standardising the process of recruitment and training of sales agents across the industry; and
 - f) the provision of a centralised complaints handling and competence monitoring service by Energy Assured ensures that sales agents are retrained or disciplined in a standardised way across the industry;
72. In support of its submission that the Code of Practice has and will continue to improve legal compliance, Energy Assured notes that since the Code of Practice commenced operation, Energy Assured has received 270 applications for the deregistration of sales agents from its members. Ultimately 224 sales agents were deregistered meaning that Energy Assured members are prohibited from employing these sales agents for five years following deregistration.
73. Energy Assured has also provided the following table of complaints received by members broken down by energy retailer member and seriousness of the complaint.

Table 1: complaints as a percentage of face to face contacts

Retailer	Complaint Free Contact (%)	Complaints no breach (%)	Complaint L1 (%)	Complaint L2 (%)	Complaint L3 (%)
AGL	99.98	0.018	0.000	0.001	0.001
Alinta	99.82	0.072	0.084	0.018	0.005
APG	99.98	0.013	0.004	0.002	0.001
EnergyAustralia	99.99	0.006	0.002	0.001	0.001
Lumo	99.90	0.100	0.000	0.000	0.001
Momentum	100	0.000	0.000	0.000	0.000
Origin	99.96	0.037	0.001	0.001	0.001
Red	99.98	0.000	0.000	0.003	0.014
Simply	99.93	0.069	0.002	0.001	0.002

74. Energy Assured also provided the following graph indicating that the ratio of ombudsman complaints to doors knocked in Victoria, NSW, South Australia and Queensland has decreased on average since the commencement of the Code of Practice.

Graph 1: comparison of ratio of ombudsman complaints to doors knocked



75. Energy Assured has also submitted that it has processes and procedures to hold its members (marketing companies and retailers) to account via its system of warning notices and sanctions and that members have responded appropriately to these measures. Energy Assured advised that since the Code of Practice commenced operation, it has issued 8 warning notices to members, one level 1 sanction and two level 2 sanctions (Clauses 27 and 28 of the EAL Code of Practice detail the use of warning notices and sanctions and the type of behaviour covered by each).
76. Energy Assured has submitted that its proposed changes to the Code of Practice will further improve legal compliance or create efficiencies in its operation. In particular:
- a) replacement of the annual audit by an expanded schedule of compliance checks will increase efficiency as Energy Assured submits that its members are already subject to a wide range of internal and external audits and compliance assessments which makes the annual audit redundant. The reduction in costs (by around 20% of Energy Assured's budget) will decrease the costs of membership in the context of the exit of a number of its biggest members and encourage other industry participants to join. The reduction in panel members, meetings and frequency of reporting is similarly intended to decrease costs while maintaining effectiveness;
 - b) the expansion of the Code of Practice to cover face to face sales reflects the growing numbers of retail kiosk based sales as the door to door sales channel has become less attractive. Similar issues arise across both channels and therefore are appropriately addressed through the expansion of the Code of Practice;
 - c) amendments to the deregistration provisions will ensure that a deregistered sales agent can not be employed in any sales related role by a member;
 - d) amendments to ensure that the practice of engaging sub-agent principals (who in turn engage sales agents) does not affect the application of the Code of Practice. That is, a deregistered sales agent will not be able to be re-employed in the guise of a sub-agent principal;

- e) a change to the conduct to the post sale verification procedure to disallow use of a telephone on speaker, in order to reduce the ability of a sales agent to coach a customer through the call; and
- f) updates to the EAL Standards to make them consistent with the National Energy Retail Rules (which came into operation on 1 July 2012).¹³

Interested party submissions

- 77. The South Australian Government expressed strong support for the Code of Practice, submitting that it improves legal compliance through its sales agent training, complaints process and member and sales agent disciplinary procedures. The anonymous interested party, ERAA and Red Energy also submitted that the Code of Practice improves legal compliance for broadly the same reasons.
- 78. EWOV submitted that Energy Assured appears to handle the training, accreditation, monitoring, registration, and sanction of energy sales agents aspects of its role well. EWOV also strongly supports the principle of a sales agent register and a process for the deregistration of sales agents as well as the extension to face-to-face sales. However, EWOV submitted that in its experience there was an opportunity for Energy Assured to take a broader role in investigating and addressing systemic issues with retailers and marketing companies, and for the timely reporting any potential issues to the jurisdictional regulators and Ombudsman schemes. EWOV considered that in order for Energy Assured to take on this role, it might need to widen its focus from the responsibilities of individual 'rogue' sales agents, to the wider accountability of a retailer for its agents' actions. EWON's submission generally supported the points made in EWOV's submission, although EWOV also queried some aspects of the wording of the Code of Practice.
- 79. Both EWON and EWOV noted that the significant decrease in consumer complaints in energy ombudsmen's data was not necessarily attributable to the Code of Practice. In particular, the three largest retailers have withdrawn from door to door sales channel, prominent court cases and changes to government regulations have all occurred within the same time period and these factors are likely to have affected complaints figures.
- 80. CALC submitted that the complaints data does not support the view that Energy Assured had been effective in increasing legal compliance, due to the confounding effects of the substantial number of changes in the industry. In particular, Energy Assured's emphasis is on handing out penalties to individual salespeople who breach the Code and ensuring they are forced out of the industry, rather than looking at systemic issues around high pressure selling that continue to cause consumer detriment. CALC submits that this view is based on its attendance at Energy Assured stakeholder meetings.

The Deloitte Biennial Code Review

- 81. Under clause 13, the Code of Practice must be reviewed at least every two years by an independent entity with legal or auditing expertise (or equivalent qualifications) capable of assessing the effectiveness of the Code and familiar

¹³ <http://www.aemc.gov.au/retail/national-energy-retail-rules/current-rules.html>.

with the energy industry. The scope of the review is determined by Energy Assured, the Code Manager and the Code Panel. The review is to be conducted in consultation with the energy ombudsmen and the relevant energy regulators, government agencies and consumer advocacy groups. Deloitte conducted the first code review in 2013 and reported its results in June 2013.

82. The code review found that there was general disagreement by both internal and external stakeholders that the Code of Practice reduced the number and severity of consumer complaints. There was also general disagreement that the Code of Practice had increased consumer confidence in energy contract door to door marketing practices.
83. As a result, Deloitte recommended that Energy Assured should engage with external stakeholders such as consumer groups, ombudsmen and regulatory bodies as part of the code review process to understand the nature of complaints that are within the boundaries of the Code of Practice, and whether there are any provisions that may require improvement. Or, alternatively, whether there are any trends in complaints that may be addressed by additional provisions to the Code of Practice. Deloitte also recommended that consideration should be given as to how Energy Assured can raise consumer awareness of the Code of Practice and its complaints handling provisions in order to promote consumer confidence.

ACCC consideration

84. The ACCC considers that basic preconditions for the effective operation of the Code of Practice are rigorous standards, training programs and mechanisms for Energy Assured to discover breaches of the law and the Code of Practice and impose effective sanctions or negotiate solutions with its members. In turn, this largely depends upon its member electricity and gas retailers and energy marketing companies supporting rigorous training, compliance checking and reporting and accepting sanctions and implementing solutions.
85. The ACCC considers that Energy Assured and its members have largely implemented and supported measures to train and check the compliance of sales agents. The proposed variations to the Code of Practice seek to broaden its scope to include sub-agent principals and comparators, which has the potential to increase the total public benefits.
86. However, the ACCC has concerns that:
 - the implementation of the Code of Practice to date has included insufficient focus upon the responsibilities of energy retailers and marketers to also comply with the standards of the Code of Practice beyond disciplining individual sales agents; and
 - the auditing conducted in relation to the Code of Practice has been similarly narrowly focused on members' compliance with their procedural obligations under the Code of Practice without regard to the broader issues of their compliance with the standards required by the Code of Practice.
87. The ACCC also has concerns about the variations to the Code of Practice proposed to replace independent auditing of members' compliance with compliance checks by Energy Assured.

Measures to train, monitor and register sales agents

88. The training of sales agents under the Code of Practice is intended to ensure that sales agents are competent in understanding the information required in order to sell energy products to consumers. Members are required to provide new sales agents with on-the-job training under the supervision of an experienced sales agent before the formal competency assessment. Members are also required, under clause 16.3 of the Code of Practice, to provide off-job training for new sales agents regarding:
- a. the operation of the Code of Practice, relevant laws and consumer rights;
 - b. the products to be sold and sales techniques including changes in the market and to products and services;
 - c. respecting consumer privacy, ethnicity and diversity;
 - d. recognition and treatment of vulnerable consumers;
 - e. safety as it relates to the consumer and the sales agent;
 - f. the role of the energy ombudsman;
 - g. example of misleading, deceptive or unconscionable conduct and false representation in the energy industry; and
 - h. the disclosure obligations of the sales agent.
89. For existing sales agents, members are required to conduct an annual competency assessment. Members are also required to ensure the continuing competency of their assessors and experienced sales agents.
90. The ACCC considers that, through Energy Assured's training programs, inadvertent breaches of the relevant laws by sales agents are likely to be significantly reduced. In addition, the ACCC accepts that over 200 sales agents have been identified and dismissed for deliberately breaching the Code of Practice and the relevant laws. Although some of these sales agents' activities may have been discovered in any case, it is likely that the Code of Practice has made it easier to discover breaches by sales agent and dismiss them for deliberate breaches of the laws.
91. The register of deregistered sales agents also makes it more likely that sales agents who are dismissed by a member for not abiding by the standards required by law and the Code of Practice will not be employed by another industry participant during the five year period of deregistration. The Code of Practice also requires Energy Assured members to investigate the five sales made immediately before and the five after the sale in which the breaches were initially discovered and rectify the issues if any further breaches are discovered.
92. The ACCC considers that the changes to the Code of Practice to exclude deregistered sales agents from any sales role, the changes to verification call procedures and the expansion to include all face to face sales are changes likely to further improve these processes and thereby the realisation of a public benefit through improving the level of compliance with relevant laws relating to face to face energy sales.

93. However, the ACCC also notes the influence of the incentives and actions of the retailers and marketing companies on the sales agents who act on their behalf.¹⁴ In addition, the ACCC considers that compliance measures to protect consumers (such as post sale verification calls) are likely to be implemented most effectively where retailers and marketing companies genuinely accept responsibility for the actions of their sales agents. Accordingly, the ACCC considers that measures to identify and exclude unscrupulous sales agents from the industry are an important aspect of the Code of Practice and are likely to lead to some public benefit. However, alone and in the context of a highly transient workforce they are not sufficient to promote a high level of compliance with the relevant laws.

Amendments to incorporate sub-agent principals

94. Energy Assured has proposed changes to the scheme so that it will also cover sub-agent principals. A sub-agent principal is defined by the EAL Code of Practice as an entity engaged by an energy marketer to undertake sales activities on its behalf.
95. In practice, the difference between a sub-agent principal and a sales agent is that a sub-agent principal is engaged to manage individual sales agents which are undertaking sales activities.
96. Under the proposed changes to the Code of Practice clause 8.2 requires that 'Members must ensure that Sub-agent Principals (and their respective Sales Agents) comply with the Code and the Procedures Guideline.' Clause 14.3 requires that 'Members must register all Assessors, Experienced Sales Agents and Sub-agent Principals on the Energy Assured Register.'
97. The ACCC considers that the inclusion of sub-agent principals (and their respective sales agents) has the potential to improve compliance with relevant laws by better reflecting current employment structures within the industry. In particular, under the proposed changes sub-agent principals are required to be registered on the Energy Assured register similarly to sales agents. The ACCC understands that, in part, this is intended to ensure that deregistered sales agents are unable to gain reemployment in a sales role under the guise of a sub-agent principal business. The ACCC also notes that members are required to ensure that sub-agent principals and their respective sales agents comply with the Code of Practice.
98. However, the ACCC notes that unlike registered sales agents there is no provision for sub-agent principals to be deregistered or otherwise disciplined for breaches of the Code of Practice. Although the member engaging the sub-agent principal would be able to impose disciplinary action, this is not a requirement of the Code of Practice. Nor would such disciplinary action lead to deregistration thereby ensuring the sub-agent principal could not be employed by other members. It is also unclear, due to the wording of the definition of sales agent, that sales agents engaged by sub-agent principals would be covered by the Code of Practice.
99. Energy Assured originally submitted that it is not practical or necessary for sub-agencies to become members of the Scheme due to their small size and the strong level of supervision and direction provided by the Energy Marketers

¹⁴ See eg Frost & Sullivan (August 2012) *Research into the Door-to-Door Sales Industry in Australia* Report for the Australian Competition and Consumer Commission p 63-64. Footscray.

engaging them. Energy Assured has also submitted that sales agents engaged by sub-agent principals must be registered on the Energy Assured register and will be subject to disciplinary action in the ordinary course.

100. In response to ACCC concerns raised about this issue, Energy Assured has stated that it would be prepared to amend the Code of Practice to provide that sub-agent principals, and sales agents engaged directly by sub-agent principals, are subject to the same complaints handling, competence monitoring and disciplinary processes (and have access to the same appeal and complaints mechanisms used in these processes) as apply for sales agents engaged directly by members. The ACCC considers that such an amendment would address the concerns raised above. Energy Assured has indicated that it intends to provide details of the proposed amendment shortly after the release of the ACCC's draft determination. The ACCC will review the amendment to the Code of Practice proposed by Energy Assured once it is submitted and will consider this issue further, having regard to the proposed amendment, in making its final decision.
101. Subject to Energy Assured making amendments to the Code of Practice to address this issue, the ACCC considers that the inclusion of sub-agent principals in the Code of Practice will support the achievement of public benefits in the form of increased compliance with laws relating to face to face energy sales to consumers.

Amendments to incorporate comparator marketing companies into the Code of Practice

102. As noted at paragraphs 25-27, in March 2013 the Energy Assured scheme was amended to also include comparator marketing companies. Energy Assured has submitted that no issues have arisen from the amendments incorporating comparators within the scope of the Code of Practice. Energy Assured has also submitted that widening the scope of the Code of Practice to include comparators will make it harder for 'rogue' sales agents to gain employment in the industry once deregistered.
103. The ACCC accepts that by increasing the scope of the Code of Practice to include comparators, it may become harder for 'rogue' sales agents to gain employment in the industry once deregistered. The ACCC considers that these changes will support the achievement of public benefits in the form of increased compliance with laws relating to face to face energy sales to consumers.
104. However the ACCC has concerns, as discussed at paragraphs 52 and 55, that comparators raise particular issues in relation to conflicts of interest and information asymmetries between a sales agent and a customer. That is, comparators and their sales agents may face an additional source of conflict of interest (compared to other sales agents and marketing companies) if the different energy contracts which they sell offer them different fees or commissions. In addition, comparator sales agents are under no obligation to disclose if this is the case. Consumers may also be more trusting of comparators as they are marketed as offering an objective comparison between a wide range of competing offers.
105. The ACCC understands that face to face sales agents employed by comparators may present product comparison information directly to a customer. Alternatively, they may attempt to interest the customer in the comparator's services and agree to a follow-up telephone contact or visit a website at a later time. In this situation,

the individualised product comparison information is then provided to the customer in the course of the telephone call or website visit, not by the face to face sales agent.

106. In response to concerns raised by the ACCC, Energy Assured has submitted that comparators' sales agents do not receive different commissions depending upon which contract is selected. Energy Assured also suggested that this could be made clear by an amendment to the Code of Practice requiring that the sales agent receive the same commission regardless of the energy contract selected by the customer. The ACCC considers that this addresses one source of conflict of interest but that so long as the comparator itself potentially receives different commissions from different retailers there is still a potential conflict of interest. Further, as the representations made by face to face sales agents are strongly guided by the comparator and tools used by the sales agent for comparison purposes are developed by the comparator, if the comparator receives different commissions depending on the contract selected this has the potential to influence the sales agents behaviour notwithstanding that the sales agent themselves does not receive a different commission based on the product selected.
107. Energy Assured also submitted that no comparators currently use face to face sales agents to sell energy products directly to consumers. Instead, comparators use follow up telephone calls or website visits based on leads generated by face to face sales agents. However, the ACCC notes that there is nothing that would prevent face to face sales agents working for comparators from engaging in sales directly in the future. Further, there is often not a strict division between face to face lead generation and face to face product selling.
108. The ACCC considers that any product comparison information which may be presented by a comparator's sales agents in a face to face context is analogous to any other form of marketing material provided to consumers in a face to face format. The Code of Practice currently provides in clause 4.2 of the Code of Practice that a sales agent who represents a comparator is required to:
 - (1) explain to the consumer that they represent the Comparator and that the Comparator offers a comparison service;
 - (2) show the consumer a list of all Energy Retailers the Comparator represents; and
 - (3) if the Comparator does not represent all retailers, it must tell the consumer this.
109. The ACCC considers that these provisions are likely to remedy some but not all of the potential conflict of interest and information asymmetry issues. The ACCC considers that where a comparator is engaging in face to face contacts it is appropriate that, when a comparator does recommend a particular energy contract or retailer to a customer, the comparator or its sales agent should also:
 - (a) provide the customer with a list of all retailers available to that customer (whether represented by the comparator or not), with each retailer that the sales agent is comparing for the customer being highlighted on that list, (rather than just a list of the retailers whom the comparator represents);
 - (b) if the comparator receives a higher sales commission for the recommended contract than for energy contracts against which the recommended contract has been compared, its sales agents must advise the customer of this; and

- (c) the comparator and/or sales agent should also provide any further information requested by the customer about how the comparator's commission for the energy contract being recommended compares to the commission received for other energy contracts used as a point of comparison.
- 110. The ACCC proposes to impose a condition of authorisation to this effect (condition C1a).
- 111. The ACCC also considers it appropriate to require that any comparison tools used in face to face contacts with customers must be accurate and the underlying assumptions on which the comparison is based must also be disclosed and proposes to impose a condition requiring this (condition C1b).
- 112. The ACCC notes that these conditions would only apply to comparisons made during face to face contacts, as the Code of Practice only applies to members and their sales agents when engaged in face to face selling. Therefore, the conditions would not affect the operations of comparators when they are not engaging in face to face contacts.
- 113. Subject to these conditions, the ACCC considers that the inclusion of comparators in the Code of Conduct will support the achievement of public benefits in the form of increased legal compliance.
- 114. More broadly, the ACCC is currently prioritising work in the area of comparator websites and expects to release industry guidance in this area in the second half of 2014. The ACCC encourages Energy Assured to consider an amendment to the Code of Practice once these guidelines are released to require comparators, and sales agents employed by them, to abide by the guidelines in any circumstance where they do use comparator websites in their interactions with customers in the face to face setting.

The responsibilities of member energy retailers and marketers

- 115. As noted at paragraphs 55 and 56, energy retailers and marketing companies face a potential conflict of interest between ensuring that their sales agents behave in an appropriate and compliant way and allowing aggressive marketing strategies. They also have strong financial incentives to engage in or encourage pressure selling tactics.
- 116. While the measures under the Code of Practice to train, monitor and register sales agents are important for improving compliance with laws relating to face to face selling of energy to consumers, equally important is that any underlying issues that lead to or contribute to poor sales issues are also addressed. This requires measures that go beyond dealing with the training and monitoring of behaviour of individual sales agents.
- 117. The responsibilities assumed by Energy Assured members under the Code of Practice have a strong administrative focus, including ensuring that sales agents are correctly registered, trained and supervised until fully accredited and that breaches have been correctly monitored, recorded and reported upon. As noted, these administrative actions are important to the realisation of the public benefits generated by the Code of Practice. However, less attention appears to be given under the Code of Practice to the equally important issue of members'

responsibility for the systemic outcomes of their sales forces' customer interactions.

118. In this respect, the ACCC considers the key clauses of the Code of Practice, as they apply to members, are clauses 7.2 and 7.3 which require that members must comply with Energy Assured standards and that members must ensure that sales agents engaged by them comply with Energy Assured standards. Based on the information provided to the ACCC it is difficult to form an assessment about the extent to which members have complied with these clauses.
119. For example, each member is currently required to submit to an annual independent compliance audit. However, the focus of these audits is members' adherence to Energy Assured standards in relation to the training, monitoring and registration of sales agents. The more fundamental issue of identification of any underlying issues (including systemic issues) in the conduct of the member is not a focus of this auditing. In fact, the scope of the audit does not include any assessment of members' compliance with relevant laws or the change in the level of such compliance. As the identification of systemic breaches by members otherwise largely depended on self reporting by retailers, in its original determination authorising the Code of Practice the ACCC considered that this was an area which should be closely monitored by the auditor.
120. More generally, the ACCC notes that there appears to have been a disproportionately low number of sanctions and warnings issued to members compared to the number of sales agents employed by members who have been deregistered. Since the Code of Practice commenced operation Energy Assured has issued 8 warning notices to members. One level one sanction (minor operational breach) and two level two sanctions (serious operational breach or material breach that is isolated in nature) have been imposed on members. No level three sanctions, which are applied for systemic breaches, have been imposed. Further, Energy Assured's annual reports indicate that no systemic issues have ever been identified. In the same period Energy Assured has deregistered 224 sales agents. Full Details of the sanction process for members are at clause 28.2 of the Code of Practice at Attachment C.
121. The two main areas of the Code of Practice which deal with systemic issues are clause 19 and the sanctions provisions in clause 28.
122. Clause 19 requires each member to operate a competence record register which records all established breaches of the EAL Standards arising from sales complaints made about sales agents and any breaches identified through compliance monitoring of sales agents. Under clause 19.5 and 19.6, a member is required to monitor trends in its competence record register for signs of systemic issues and correct any systemic issues thus discovered. Members are also required to report such systemic issues to the Code Manager (clause 19.7) and to the relevant energy regulator or authority if required to do so under relevant laws (clause 19.8).
123. As noted, under clause 28 of the Code of Practice a level 3 sanction is applied to a member for a systemic breach of the Code of Practice. A systemic breach results in a letter of admonishment being issued to the member. Details of a strategy to rectify the issue and implement an action plan to prevent the problem occurring (at the members cost) are provided to the Code Manager and the

Energy Assured Board, relevant energy regulator and energy ombudsmen are notified of the members breach.

124. Amongst other criteria a level 3 breach by the member is considered to have occurred where the number of level 1, 2 and 3 breaches by sales agents identified through sales complaints exceeds 1% of the number of consumers contacted in a quarter.¹⁵
125. Energy Assured advised that sales agents average over 3 million contacts with customers each quarter through face to face marketing. This means that an average size member would need to have at least several hundred sales complaints resulting in level 1, 2 or 3 breaches by sales agents in a quarter before the volume of breaches of the Code of Practice by sales agents would be sufficient to constitute a systemic breach of the Code of Practice by the member.
126. Given that some consumers are unlikely to complain, even in the case of clear breaches of the relevant laws, a much higher level of actual breaches of the Code of Practice by sales agents would need to occur before the pattern of behaviour was considered a systemic problem. Further under the criteria set for establishing what constitutes a breach by a sales agent that counts towards calculating the percentage of sales agent breaches, only breaches that stem from sales complaints (as opposed to monitoring by Energy Assured) are included.
127. The ACCC considers that the lack of focus in the Code of Practice on systemic issues has the potential to seriously undermine the effectiveness of the Code of Practice. In particular, a Code of Practice that successfully identifies sales agents who are not complying with relevant EAL Standards is still unlikely to be effective if there are underlying systemic issues contributing to a shortfall in standards amongst sales agents that go unaddressed.
128. Therefore the ACCC proposes to impose a condition of authorisation requiring that the annual independent auditing includes auditing of whether any systemic issues arise in respect of each member and whether the steps taken to address such issues are adequate (condition C2).
129. The ACCC also considers that the Code of Practice would benefit from clarification about the requirements of members to comply with the standards set out in the Code of Practice. As noted clause 7.2 contains a general requirement that members must comply with the EAL standards. Clauses 4 and 5 set out specific prescriptive standards and processes that sales agents must comply with in customer contracts and entering into a contract with a customer. The ACCC considers that Energy Assured members as the principals on whose behalf sales agents are acting should also be explicitly bound by these standards and practices.
130. The ACCC therefore proposes to impose a condition of authorisation that explicitly requires members to comply with each specific standard in the Code of

¹⁵ A level 1 breach by a sales agent involves a minor breach of the Energy Assured standards involving a technical compliance failure or behaviour arising from poor procedures. A level 2 breach involves a serious breach which is more than technical and superficial and related to the central role of the sales agent or disclosure by the sales agent. A level 3 breach involves wilful or gross misconduct that warrant dismissal and can not be remedied through training. Full details of these levels of breaches are provided in clause 20 of the Code of Practice.

Practice relating to customer contacts and entering into contracts with customers that sales agents representing them are required to comply with (condition C3).

131. In relation to the sanction process for systemic breaches of the Code of Practice the ACCC proposes to impose a condition of authorisation requiring that:
- a) all established breaches of the Code of Practice (including breaches of relevant laws) be included toward the threshold for triggering a level 3 sanction as opposed to just breaches established following complaints (condition C4a);
 - b) a level 3 sanction be applied for any systemic issue identified by the independent auditor (condition C4b); and
 - c) instead of the single 1% threshold, a gradation of thresholds with increasingly stronger warnings and sanctions should be used to signify that increasingly urgent action is required of a member (condition C4c);
 - d) the lowest threshold (which may lead only to a requirement on a member to resolve the underlying issues and no sanction) is set considerably lower than 1% of customers contacted (condition C4d);
 - e) As well as the relevant energy regulator and energy ombudsmen being notified of level 3 breaches as currently required, the ACCC also be informed of such breaches (condition C4e). Energy Assured must monitor trends across members' compliance registers in order to identify and suggest solutions to industry wide systemic issues, even if these issues have not yet crossed the lowest threshold for action in relation to any one member (condition C5).
132. The ACCC's seeks Energy Assured and interested parties' views, particularly in relation to how the gradation of thresholds under proposed condition 4c should be structured and the appropriate level at which the threshold for what constitutes a systemic breach under proposed condition 4d should be set.
133. Absent these proposed conditions, the ACCC considers that the extent to which the Code of Practice will support the achievement of public benefits in the form of increased compliance with laws relating to face to face energy sales to consumers is limited, as many of the potential significant sources of non-compliance with the EAL Standards are not meaningfully addressed by the Code of Practice.

Amendments to the responsibilities of the auditor under the Code of Practice

134. The previously authorised version of the Code of Practice includes annual compliance audits from an independent firm of auditors. Currently these audits are undertaken by KPMG. Examples of procedures to be undertaken under the compliance audit included random checks on both energy retailers and marketers and surprise field checks on sales forces.
135. Energy Assured has submitted that the annual compliance audits duplicate other forms of external audits conducted by regulators and internal audits conducted by

the members themselves.¹⁶ Energy Assured's authorisation application includes a list of some of the internal and external auditing undertaken by its members at Annexure B. This list indicates that external auditing is conducted of some members by the NSW Independent Pricing and Regulatory Tribunal (IPART), by the Victorian Essential Services Commission (ESC), and Fit2Work (a commercial provider of police and background checks). The list also indicates a range of internal auditing commissioned by members.

136. Energy Assured submits that its amendments to the Code of Practice to replace the annual audits with compliance checks undertaken by the Code Manager will reduce costs and duplication. It also submits that its compliance checking processes will cover both retailers and marketing company members, whereas the auditing only covered retailers.
137. In response to a request from the ACCC, Energy Assured provided a copy of its draft compliance check procedures. As these procedures are in draft form, the draft has not been placed on the ACCC's public register. Broadly, the proposed procedures include checks of the following topics: the previous audit or compliance check, the training program, complaint management, sales processes, registry processes, policies and procedures, governance, a sample of agents, the monthly random assessment processes and deregistration processes. Compliance checks are proposed to be undertaken by both desktop audits and site visits.
138. As noted, the Code of Practice is a self regulatory scheme aimed at ensuring better standards in face to face energy sales through requiring members, and sales agents employed by them, to adhere to certain standards in conducting face to face sales. The ACCC considers that an important element of any such scheme is that there are mechanisms in place to ensure rigorous oversight of compliance with the standards of behaviour required by the Code of Practice. The absence of such an independent check on the operation of the Code of Practice would risk undermining the effectiveness of the scheme and consume confidence in the scheme. This is particularly the case in areas such as face to face sales where, as discussed in paragraph 56, there is an inherent conflict of interest for Energy Assured members between providing clear and appropriate advice to consumers and maximising sales.
139. For these reasons, in its determination authorising the Code of Practice in 2011 the ACCC identified independent auditing as important component of the EAL scheme. In particular, the ACCC noted that given that the identification and reporting of breaches of the Code of practice otherwise relied on retailers to act in good faith, reporting of systemic issues should be closely monitored by the Code of Practice auditor and reviewed by the ACCC should Energy Assured seek re-authorisation of the scheme.
140. The ACCC accepts that the compliance checks proposed by Energy Assured would also provide a level of monitoring of member compliance with the Code of Practice. The ACCC also accepts that it would be in Energy Assured's interest to ensure that internal auditing was conducted with a sufficient degree of rigour to uphold the integrity of the Code of Practice. The ACCC also notes Energy Assured's concerns about the costs involved in engaging external auditors.

¹⁶ Energy Assured 'Final Submission in support of Application' *Authorisation Application 5* November 2013 p 19.

141. However, as discussed at paragraphs 118 to 127, the ACCC remains concerned that the current lack of focus in the Code of Practice on systemic issues has the potential to seriously undermine the effectiveness of the Code of Practice. Accordingly, the ACCC has proposed a condition of authorisation that would clarify that these are issues which the independent Code of Practice auditor should explicitly be examining as part of the auditor's annual review.
142. In these circumstances the ACCC does not consider that the role of the independent auditor should be subsumed by internal audits conducted by members themselves and the Code Manager. Nor does the ACCC consider that external audits undertaken by various regulators such as IPART and the ESC for various purposes are an adequate substitute for this process as suggested by Energy Assured.
143. It is likely that some external audits by regulators of Energy Assured's members are based on, or include, an assessment of compliance with the same laws incorporated into the Energy Assured Standards under the Code of Practice. However, the scope of these audits do not directly address compliance with the Code of Practice. Further, the focus, scope and coverage of these audits varies from regulator to regulator. For example, IPART audits are conducted across NSW energy business operations and ESC audits are conducted across Victorian business operations. The context in which energy businesses operate differs between the states and therefore the scope of the audit differs. In addition, Energy Assured would have limited access to the results of these audits. The access the ACCC has to these reports to inform its consideration of the effectiveness of the Code of Practice is also limited.
144. Accordingly, the ACCC does not consider that the external auditing currently conducted by regulators or the internal auditing commissioned by members is an adequate substitute for the independent auditing currently conducted under the Code of Practice.
145. Therefore, the ACCC does not propose to authorise the proposed changes to clause 24 of the Code of Practice to replace independent audits with compliance checks conducted by the code Manager.

Better informed consumers

Energy Assured's submission

146. Energy Assured has submitted that consumer awareness of the Code of Practice is high, since:
- sales agents representing EAL members average contact with over 1 million customers a month through face to face marketing, each of these customers are required to be informed about EAL and each sales agent wear an identity badge with the EAL logo on it;
 - marketing material provided to customers (around 1 million per year) and prospective customers (on request) includes information about the Code of Practice, EAL's standards and details about how the customer can make a complaint;

- every sale that occurs must be followed by a verification call, in which the customer is asked whether the sales agent provided them with information about EAL as required;

Interested party submissions

147. CALC has submitted that its assessment of consumer complaints submitted via its Do Not Knock website, does not indicate any awareness of the Code of Practice by consumers. CALC also submits that there is little benefit to consumer awareness of the Code of Practice given that it largely duplicates existing laws and Energy Assured refers all complaints to retailers and the ombudsman's schemes.

The Deloitte Biennial Code Review

148. In relation to consumer awareness of the Code of Practice the Deloitte Biennial Code Review commissioned by Energy Assured found that among the five external stakeholders who deal with customers consulted a part of the review there was general disagreement that there is customer awareness of the Code of Practice and its complaints handling provisions.

ACCC consideration

149. The ACCC considers that it is likely that consumers on average have a higher level of knowledge regarding Energy Assured and the standards established by the Code of Practice following face to face sales than they would have at the time the scheme was established. This is due to the requirement for this information to be provided as part of every face to face sales contact and compliance with this requirement is monitored in the follow-up confirmation telephone calls.

150. There is some question as to whether these initiatives in and of themselves significantly improve consumer awareness of the Code of Practice given that the context in which the information is provided is one where the provision of the information is not the primary focus of the contact. This is likely reflected in the findings of the Code of Practice review, where views about the extent of consumer awareness about the Code of Practice were mixed. However, the ACCC considers that these practices would lead to some increased consumer awareness of the Code of Practice.

151. The ACCC acknowledges CALC's submission that knowledge of the existence of the Code of Practice itself has little practical benefit. However, as the standards in the Code of Practice reflect or improve upon current laws, informing consumers of these standards at each contact is likely to increase consumers' knowledge about their rights and sales agents' obligations under relevant laws. The ACCC considers that, to the extent that consumers are better informed, this is likely to constitute a public benefit.

ACCC conclusion on public benefits

152. The ACCC considers that the Code of Practice is likely to lead to public benefits in the form of increased compliance with laws applying to face to face selling of energy to consumers. In particular, provisions in the Code of Practice dealing with the training, monitoring and registering of sales agents assists in educating sales agents about their obligations in dealing with consumers and in preventing sales

agents who do not meet requisite standards from face to face selling of energy products. The ACCC considers that this outcome is supported by the expansion of the scope of the Code of Practice to include sub-agent principals and comparators.

153. However, it is equally important to the realisation of this public benefit that any underlying issues that lead to or contribute to poor sales practices are also addressed. The ACCC considers that there is an insufficient focus in the Code of Practice on the responsibilities on energy retailers and marketers to also comply with the standards of the Code of Practice beyond disciplining individual sales agents. This lack of focus on the accountability of members themselves has the potential to undermine the realisation of the public benefits of the Code of Practice. The ACCC proposes several conditions of authorisation to address this issue.
154. The ACCC considers that the Code of Practice generates some public benefit by increasing consumer awareness about their rights and obligations in relation to face to face selling of energy. However, the ACCC considers that the extent to which the Code of Practice does result in increased consumer awareness, and the associated public benefit in doing so, is limited.

Public detriment

155. 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.¹⁷

156. Energy Assured submits that the Code of Practice will have little if any negative impact on competition and therefore little detriment. In particular,
- a) membership of Energy Assured and the Code of Practice is open to all energy retailers, marketers and sales agents provided that they comply with the membership requirements and the EAL Standards. Therefore, the requirement for members to only deal with registered sales agents and retailer members to only deal with marketers which are members is not a significant restriction;
 - b) the deregistration of a sales agent is not indefinite, allowing sales agents to apply for reregistration after five years;
 - c) sales agents are required to be engaged by only one member, however this is necessary for the operation of the register, competency training and monitoring provisions of the Code of Practice. The existence of comparator members means that sales agents may still represent more than one retailer while still engaged by only one member (the comparator);
 - d) the sanctions which may be imposed under the Code of Practice are necessary in order to encourage compliance with the Code of Practice. Additional protections are provided by the appeals process and the fact that

¹⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

both the Code Panel (which hears appeals) and the Code Manager (the original decision maker) are independent of Energy Assured members; and

- e) the Code of Practice does not impose significant costs over and above the existing costs imposed by legal obligations. Energy Assured has also amended the Code of Practice slightly to reduce the cost burden to members in light of operational experience over the past two years.

157. The ACCC's assessment of the likely public detriments from the Code of Practice follows.

An increase in the complexity of energy regulation

158. The ACCC notes the significant number of overlapping state and federal laws and regulatory schemes which apply to the face to face selling of energy. In 2011, the ACCC found that consumers were experiencing a level of confusion around energy regulation. Accordingly, the ACCC considered that it was important that any new self-regulatory mechanism enhanced consumers' understanding of their rights and did not create additional confusion through the creation of unnecessary additional complexity.

159. In addition, the ACCC recognised that the administration of Energy Assured and the Code of Practice imposes costs on the industry which are likely to be ongoing should the ACCC re-authorise the Code of Conduct. The ACCC noted though that some costs, such as sales agent training, are not completely attributable to the Code of Practice as these costs would be incurred even in the absence of the Code of Practice due to the requirements of the law. Other costs, such as the costs of registering sales agents, are attributable to the Code of Practice.

160. The ACCC considers that the increased complexity and costs which are due to the continuation of a further layer of regulation arising from the Code of Practice are likely to constitute a small public detriment.

Restrictions upon the conduct of members, sales agents and sub-agent principals

161. The Code of Practice imposes certain restrictions upon the conduct of members, sales agents and sub-agent principals, including:

- members can only engage sales agents and sub-agent principals which are registered with EAL;
- sales agents can only represent one member at a time (although comparators represent more than one);
- energy retailer members can only engage marketing companies which are members; and
- members and sales agents which fail to comply with the Code of Practice and the law are subject to sanctions which may include exclusion from membership or deregistration (respectively).

162. The ACCC considers that a vetting, registration and training and ongoing monitoring process, including provisions to exclude persons and entities who do

meet or maintain requisite standards, is a necessary component of any self regulatory scheme. The requirement that members only deal with other members or registered sales agents is the mechanism by which the behavioural standards required by the Code of Practice are enforced. Accordingly, the ACCC considers these restrictions to be a necessary pre-condition for the objectives of the Code of Practice to be realised.

163. With respect to the imposition of sanctions on sales agents and members the ACCC notes that this decision rests with the Code Manager and Code Panel who are independent of Energy Assured members. The ACCC also considers that the manner in which the Code of Practice provides for sanctions is consistent with the promotion of standards of behaviour required by the Code of Practice.ⁱ
164. Therefore, the ACCC does not consider that excluding members and sales agents who do not meet these standards generates any significant public detriment.

ACCC conclusion on public detriments

165. The ACCC considers that the Code of Practice is likely to lead to a small public detriment in the form of increased complexity and costs within the energy industry.

Balance of public benefit and detriment

166. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.¹⁸
167. In the context of applying the net public benefit test in subsection 90(8)¹⁹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²⁰
168. For the reasons outlined in this draft determination the ACCC is satisfied that, subject to the proposed conditions of authorisation and to the existing provisions in clause 24 of the Code of Practice relating to independent auditing being maintained, that the likely benefit to the public from the Code of Practice would outweigh the likely detriment to the public, including the detriment constituted by any lessening of competition from the Code of Practice.

Length of authorisation

169. The Act allows the ACCC to grant authorisation for a limited period of time.²¹ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the

¹⁸ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8). The applicable statutory tests are set out in Attachment A.

¹⁹ The test at subsection 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.

²⁰ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²¹ Subsection 91(1).

ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

170. The ACCC proposes to grant authorisation for five years.

Draft determination

The application

171. On 5 November 2014, Energy Assured lodged applications for the revocation of authorisations A91258 & A91259 and the substitution of authorisations A91390 & A91391 for the ones revoked with the ACCC. Applications A91390 & A91391 were made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010.
172. The application was made under subsection 91C(1) of the Act to allow Energy Assured to continue making and giving effect to a Code of Practice for energy retailers and marketers, as the Code of Practice may have the effect of substantially lessening competition within the meaning of section 45 of the Act. The arrangements may also contain exclusionary provisions (within the meaning of section 45 of the Act) and cartel provisions (within the meaning of section 44ZZRD of the Act).
173. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

174. For the reasons outlined in this draft determination, subject to the proposed conditions below, and subject to the existing requirement for annual independent auditing of Energy Assured members in clause 24 of the Code of Practice being maintained, the ACCC considers that in all the circumstances the proposed 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.
175. In addition, subject to the proposed conditions below, and subject to the existing requirement for annual independent auditing of Energy Assured members in clause 24 of the Code of Practice being maintained, the ACCC is satisfied that the proposed conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
176. The ACCC therefore **proposes to revoke** authorisations A91258 & A91259 and the **substitute** conditional authorisations A91390 & A91391 for the ones revoked.

Conditions

177. The ACCC proposes to grant authorisation subject to the following conditions.

The ACCC seeks Energy Assured and interested parties' views on the proposed conditions.

Condition C1 – Information to be disclosed by Comparators

Within 6 months of the date on which authorisation is granted, Energy Assured must amend the Code of Practice to provide that where a comparator engaging in

face to face sales recommends an energy contract or retailer to a customer, the comparator or its sales agent must:

- a) provide the customer with a list of all retailers available to that customer (whether represented by the comparator or not), with each retailer that the sales agent is comparing for the customer being highlighted on that list.
- b) if the comparator will receive a higher commission for the energy contract recommended than for energy contracts against which the recommended contract has been compared, inform the customer that this is the case, and
- c) provide any further information requested by the customer about how the comparators commission for the energy contract being recommended compares to the commission received for other energy contracts used as a point of comparison (**condition C1a**).

Within 6 months of the date on which authorisation is granted, Energy Assured must amend the Code of Practice to provide that any comparison tools used in face to face sales must be accurate and that the underlying assumptions on which the comparison is based must also be disclosed (**condition C1b**).

Condition C2 – Independent auditing of systemic issues

Within 6 months of the date on which authorisation is granted, Energy Assured must amend the Code of Practice to include new clauses 24.2(8) and 24.2(9) as follows:

24.2(8) whether any Systemic Issues have arisen.

24.2(9) where systemic issues are identified, the adequacy of steps taken to address these issues;

and to include the following definition of “Contacts” and of a “Systemic Issues” in the Code of Practice dictionary:

Contacts means the number of home visits taken from walk sheet data.

Systemic Issue means any one of the following:

- a systemic breach as defined in clause 28.3,
- any breach that attracts a level 3 sanction under clause 28.2, or
- the quantity of level 1, 2 and 3 breaches recorded against sales agents representing the Member for the quarter (as a percentage of the Member’s Contacts for the quarter) is more than double the average quantity of level 1, 2 and 3 breaches recorded against sales agents representing all Members (as a percentage of total Contacts for all Members for the quarter).

Condition C3 – responsibilities of energy retailers and marketers

Within 6 months of the date on which authorisation is granted, Energy Assured must amend clause 4.1 of the Code of Practice to provide that clause 4 applies to members by the insertion of the words “Members and” before “Sales Agents must” (**condition C3a**).

Within 6 months of the date on which authorisation is granted, Energy Assured must amend clause 5.1 of the Code of Practice to provide that clause 5 applies to members by the insertion of the words “Members and” before “Sales Agents must” (**condition C3b**).

Condition C4 – Sanctions against members for systemic breaches

Within 6 months of the date on which authorisation is granted, Energy Assured must amend clause 28.2 of the Code of Practice to provide that, in relation to level 3 sanctions:

- all established breaches of the Code of Practice, as opposed to just breaches established following complaints (including breaches of relevant laws) are to be included when determining whether the threshold for triggering a level 3 sanction has been reached or exceeded (**condition C4a**)
- a level 3 sanction must be applied for any Systemic Issue identified by the independent auditor pursuant to clause 24.2(8) of the Code of Practice unless a level 3 sanction has already been applied for the breach (**condition C4b**).

The ACCC also proposes to include conditions of authorisation in its final determination requiring the following in relation to clause 28.2:

- instead of the single 1% threshold, a gradation of thresholds with increasingly stronger warnings and sanctions should be used (**condition C4c**),
- the lowest threshold (which may lead only to a requirement on a member to resolve the underlying issues and no sanction) is set considerably lower than 1% of customers contacted (**condition C4d**).

The ACCC also proposes to include a condition of authorisation in its final determination requiring that clause 28.2 of the Code of Practice be amended to provide that where a level 3 or level 4 sanction is imposed, EAL must notify the Australian Competition and Consumer Commission of the member’s breach (**condition 4e**).

The ACCC invites Energy Assured and interested parties’ to comment on these proposed conditions and in particular the appropriate thresholds that should apply for conditions 4c and 4d.

Condition C5 – Energy Assured monitoring of systemic breaches

Within 6 months of the date on which authorisation is granted, Energy Assured must amend clause 24.6(3) of the Code of Practice to read as follows:

24.6(3) any Systemic Issues, including options for addressing those Systemic Issues (**condition 5a**).

Energy Assured must monitor the compliance registers of members in order to identify Systemic Issues (**condition 5b**).

Within 6 months of the date on which authorisation is granted, Energy Assured must amend clause 24.6(3) of the Code of Practice to provide that consolidated reports of the results of compliance checks are prepared at least annually (**condition 5c**).

Conduct for which the ACCC proposes to grant authorisation

178. Subject to paragraph 178 below, the ACCC proposes to grant authorisation to Energy Assured and its members to continue to make and give effect to Energy Assured's Code of Practice for five years.
179. Further, the proposed authorisation is in respect of the Code of Practice as it stands at the time authorisation is granted. Any changes to the Code of Practice during the term of the proposed authorisation would not be covered by the proposed authorisation.

Conduct for which the ACCC does not propose to grant authorisation

180. The ACCC does not propose to grant authorisation to the changes to clause 24 of the Code of Practice proposed by Energy Assured that would remove the requirement for yearly compliance audits of members by an independent firm of auditors.
181. This draft determination is made on 8 April 2014.

Further submissions

182. 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 - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

Subsections 90(6) and 90(7) 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- 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

- 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.

Attachment B – Energy Assured members

Energy Retailers

Alinta

Lumo Energy Australia

Momentum Energy

Origin Energy Retail

Qenergy

Red Energy

Simply Energy

Energy Marketers

Aims Marketing

Appco Group Energy

ASAP

The Communication Group

Energy Deal

FieldStar Services

Genius Direct

Redwood BC

Sales Etiquette

Sales Force Australia (Salmat)

Sales Solutions

Sales Marketing and Real Technologies

SIQ

Other

Energy Retailers Association of Australia

Energy Assured state that it is proposed that additional Energy Retailers and Energy Marketers will become members in the future.

Attachment C – Energy Assured Code of Practice

Proposed changes to the Code are marked up in tracked changes.