



13 December 2010

By email: adjudication@acc.gov.au

Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Jones

Energy Assured Limited applications for authorisation A91258 & A91259

Consumer Action Law Centre (**Consumer Action**) is pleased to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) consultation process for the Energy Assured Limited (**EAL**) applications for authorisation A91258 & A91259 (the **applications**) for an EAL Code of Practice and Complaints Process (together the **Code**).

We are concerned that EAL's proposal for an energy marketing code of practice not only inherently creates anti-competitive detriment, but is also unlikely to provide much public benefit, if any, and in fact will potentially cause public detriment.

Below we outline the nature of our concerns with the applications.

As an initial matter, we note that door to door energy marketing is an issue that has raised, and continues to raise, significant public concern.

We would welcome effective initiatives to address the problems associated with door to door energy marketing, but we do not consider that the EAL proposal in this matter is such an initiative. However, we would support an opportunity to work with the energy industry on developing a new, more effective, proposal that provided greater protections and fairer outcomes for consumers, for adoption across the whole industry, to be resubmitted to the ACCC for consideration for authorisation at a future date.

The proposed Code, in large part, mirrors the EnergySure Code developed in the United Kingdom by the UK Energy Retail Association in relation to energy marketing

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issues they were experiencing.¹ However, the EAL has omitted the key elements of the UK EnergySure Code which make it a more effective code in the UK.

Instead of considering, and consulting on, how a code might be developed to address the significant problem of direct marketing of energy, the EAL has identified one small part of a solution and developed a code focussed only on that part.

Further, and significantly, we would like to highlight the failure of EAL to consult stakeholders, particularly consumer representatives, in the development of the Code to date. As a result, we expect that the ACCC will receive submissions making detailed comments on the provisions of the Code, not merely the overall thrust of the applications. These sorts of issues should have been addressed earlier in the process rather than been left to the ACCC to work through under its broader process for making an assessment of whether to authorise the Code, and suggest that the Code is not yet at a stage where the ACCC could comfortably conclude that it has been developed taking into account community views and is in the public interest.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. Consumer Action has been actively involved in energy advocacy work in Victoria and nationally since the 1990s. Over this time we have provided key consumer input into important national and Victorian energy regulatory processes for consumers, including the current Victorian smart meter rollout and the national smart meter program, initiatives relating to improved energy price and product information disclosure following the deregulation of Victorian retail energy prices, and the transition to national non-price retail regulation via the national energy customer framework.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Energy marketing and selling - a background

Door to door marketing and selling of energy services is currently a matter of significant public concern. Energy is an essential service and all households consume energy.

¹ The Association of Energy Suppliers, UK, *EnergySure Code of Practice for the face-to-face marketing of energy supply*, October 2010, available at: <http://www.energy-retail.org.uk/documents/code030910v5Oct2010.pdf>.

As the ACCC is aware, in the past all Australian household electricity and gas services were provided by government authorities or government-owned entities and consumers did not have a choice of supplier. However, over the past decade there has been significant energy market reform in this country. In several states, the retail energy market has now been opened to competition, meaning that many consumers have a choice of electricity and gas retailer and, accordingly, may be the subject of marketing efforts by retailers to attract their business.

In Victoria specifically, the entire retail energy market has been open to competition since October 2002.² There are currently 13 electricity businesses and 8 gas businesses that retail energy to domestic customers in Victoria.³ Issues associated with poor energy marketing and sales conduct in Victoria have been raised frequently, and reports highlighting the impacts of this conduct and including case studies have been produced by Consumer Action⁴ and more recently by the Footscray Community Legal Centre and Financial Counselling Service.⁵

Further, as of 1 January 2009, following a recommendation by the Australian Energy Market Commission (**AEMC**) made largely on the basis that high customer switching rates in Victoria signified an effectively competitive market, prices have been deregulated in Victoria.

In the competitive market, energy retailers pursue customer retention and/or growth. Energy retailers, particularly newer market entrants, actively engage in marketing and selling practices, including door to door sales and telemarketing, to pursue new customers, and the larger incumbent retailers defend their market share through ongoing sales practices.

We understand that many energy retailers believe that direct marketing, especially through door-to-door sales, is necessary to interest or engage consumers in what is a homogenous product. Energy industry regulators appear also to believe that direct marketing is necessary for markets involving 'relatively low involvement products such as energy' and that such marketing is necessary for effective competition.⁶

At the same time, however, there has been little effort to assist consumers to engage proactively in the retail energy market of their own accord, and in a manner that would enable them to make an informed decision choosing between more than one offer at a time. For example, the Victorian government energy choice website originally meant to provide a comparison service now advises consumers to ask each individual retailer for summaries of their deals. Further, the summaries provided by each retailer are in different formats, making comparison difficult, and they do not always disclose all relevant information, for example they may state peak and off peak prices without informing the reader what times of the day and night these periods cover. It is

² Electricity was opened to competition prior to gas, in January 2001.

³ <http://www.esc.vic.gov.au/NR/rdonlyres/48DC6645-E236-424B-BE3D-92BCA9DDFCD9/0/RetailersforDomesticandSmallBusiness09.pdf>.

⁴ <http://www.consumeraction.org.au/downloads/EnergyMarketinginVictoria-Finalv.3.pdf>.

⁵ <http://www.esc.vic.gov.au/NR/rdonlyres/EF10AA77-A792-4907-B5B3-8A4512CB1AA9/0/TheAfricanConsumerExperienceoftheContestableEnergyMarket20090716.pdf>.

⁶ AEMC, *Review of the effectiveness of competition in retail electricity and gas markets in Victoria – First Draft Report*, October 2007, p 66.

therefore difficult to determine how consumers would behave if shopping around behaviour was facilitated more effectively, and there is substantial scope for the industry to develop better practices in this regard.

In any case, the result of the above situation is that most marketing and selling of energy in Victoria is conducted through direct marketing, primarily through door-to-door sales, but also through telephone sales. These approaches are unsolicited and often involve high pressure sales techniques at a person's home. Some of the concerns relating to energy door to door marketing include:

- misrepresentations made by salespersons about the purpose for the visit or the offer terms;
- unconscionable conduct in procuring a customer, for example signing up customers who may not understand the contract they are entering into;
- salespersons being employed on a commission sales remuneration basis rather than a fixed salary basis, which provides a heavy incentive to the salesperson to make a sale using the tactics above; and
- the pressure on consumers faced with a doorstep sales pitch not to take time to consider the offer and the inability to shop around to compare the offer being made with other available deals.

Below are some case studies based on complaints Consumer Action has received this year.

Misrepresentations at the door

Robert told us he usually asks door to door salespersons to leave his premises, but one day he got talking to an energy sales person due to his frustration with high prices of power and gas.

The salesperson told Robert that the retailer he represented already supplied power to Robert's current retailer, who then on-sold it to Robert for a profit. He also told Robert that Robert could sign with them for no fixed contract term and Robert was shown particular rates.

Robert signed up but he felt unsatisfied with the exchange and decided to do some research into the claims made by the salesperson. He discovered that he had been lied to about the new retailer's relationship with his old retailer, the rate he would be paying and the contract term (it was 2 years).

Robert telephoned his new retailer to cancel the agreement over the phone, but they tried to change his mind and said that the door knocker may simply have mis-explained the terms. Robert said he had to be firm and tell the retailer to stop negotiating and simply cancel the contract.

Sales agent instructed to ignore no canvassing signs

Maureen had a Consumer Action "Do Not Knock" sticker in place next to her front door for about a month. Over this period it had been effective in deterring door to door marketers.

One evening, however, at 7.55pm, Maureen was putting her children to bed when the doorbell rang. She answered the door to an energy retailer's agent, who was not visibly wearing a name tag. When he asked to look at Maureen's recent energy bills, she realised that the person was trying to sell her energy. Maureen pointed to the fact that she had a "Do Not Knock" sticker clearly displayed above her door bell and that he had unlawfully ignored it.

The salesperson continued to try to engage Maureen in talking about his energy product. Maureen stated she was not interested and requested that he leave her property given he had knocked on her door when there was a sign visible. The marketer then claimed he had not seen the sticker as it was dark, but once Maureen pointed out that her sensor lights lit up the area very well he stopped making that claim.

Maureen told us that the salesperson then proceeded to spend several minutes saying that it was not illegal to knock when there is a sign and that his boss had told him to ignore the signs if he saw them.

He continued to try to engage Maureen in conversation about the service he was selling and Maureen said she had some difficulty getting him to leave.

Deceptive conduct about the purpose of the visit

Simon was door knocked by two agents one evening at 6.30pm. Upon answering the door, the agents introduced themselves by telling Simon they had been sent by his energy retailer to check that he was on the correct tariff, as there had been two increases this year and some people were on the wrong one.

Simon immediately said that he was happy with his current retailer and did not wish to change. He started to close the door.

The marketers told Simon they did not require him to change retailers, they just wanted to check that he was on the correct tariff due to the increases. They told Simon that his other neighbours had made the same mistake of thinking they were energy marketers.

The marketers then asked to see one of Simon's electricity bills so that they could check a code. Simon again said that he was not interested in changing retailers and they again repeated that this was not their intention, so Simon went and collected an electricity bill.

On examining Simon's bill, the marketers told Simon was on an incorrect tariff and should be on a lower one. They asked to see a gas bill as well, so Simon went to collect one.

Upon returning to the door, Simon saw that one of the agents was copying his address details onto a form. Simon again told them that he did not want to change retailers and now the second agent told Simon that it would be ok because while he was changing retailers he would still be supplied energy by his current supplier and would still call the same number for faults.

At this point, Simon yet again reminded the agents that he did not want to change retailers. He retrieved his electricity bill and also asked for the form on which his details were being recorded, which was handed over.

Simon told us that he later examined this form and discovered that the agents were marketers from another retailer. He noticed that there was the possibility he would be charged exit fees if he had left his current retailer and that he would have needed to change his direct debit details, none of which was explained to him. He did some research online and discovered that he should also have been given some information about the tariffs under the offer the marketers were selling.

The regular occurrence of marketing misconduct suggests that consumers are not currently able to drive competition in our retail energy markets effectively through the making of informed decisions. This represents a failure in the current market.

Further, we do not believe that marketing misconduct is limited to, or entirely attributable to, individual energy salespersons – so-called “bad apples”. In the case where an individual marketer has committed poor conduct, we highlight the training or instructions given to these salespersons (sometimes verbal rather than in writing) and the incentives offered to marketers through the commission salary structure. While there may well be “bad apples”, the energy retailer is also often responsible for the conduct of an individual salesperson.

There are a number of laws and regulatory provisions that currently regulate marketing in the competitive energy market both nationally and in each jurisdiction. These include the *Trade Practices Act 1974* (Cth) and state *Fair Trading Acts* or equivalent (soon to be harmonised as the Australian Consumer Law).

Some jurisdictions also have additional energy-specific regulation of marketing. For example, in Victoria the Energy Retail Code,⁷ the Code of Conduct for the Marketing of Retail Energy⁸ and the Energy Product Disclosure Guideline⁹ all have relevance to energy marketing. Victorian consumer protections in relation to energy marketing conduct include cooling off periods, marketer behaviour requirements, contract regulation and the requirement to obtain ‘explicit informed consent’ from consumers.

These laws often cover the types of marketing misconduct complained about by consumers, suggesting that some of the current market failures could be addressed

⁷ Essential Services Commission (ESC), *Energy Retail Code – version 3*, May 2007.

⁸ ESC, *Code of Conduct for Marketing of Retail Energy*, November 2004.

⁹ ESC, *Guideline 19 – Energy Product Disclosure*, 2005

through more active enforcement of existing regulation. However, there may also be the potential for further industry rules to assist in improving energy marketing conduct.

Anti-competitive detriment versus lack of public benefit

EAL's proposal must offer the potential for public benefit that outweighs its detriment before the ACCC can authorise its application.

Given that door to door energy marketing is an issue of current community concern, as described above, there is the potential for an initiative related to addressing these issues to generate public benefit.

However, for the reasons set out in this submission we strongly consider that EAL's current application is not such an initiative. We doubt that it will generate much public benefit at all, let alone sufficient to outweigh the inherent anti-competitive detriment generated by allowing for collusion in this area.

The potential benefits of an industry proposal to improve standards for energy door to door marketing might include more informed decision-making by consumers and a fairer balance of power on the door step, and an easier ability of consumers to avoid such marketing conduct if they wished.

In order to realise such benefits, however, an industry code would require a strong complaints handling process, provisions that go beyond those already provided for in the law, and an ability for complaints to be made against energy retailers not just individual salespersons. We would also expect that such a code would meet other basic standards for an effective industry code, including being developed in consultation with stakeholders to ensure its effectiveness. The Code proposed in the applications does not meet these standards.

Indeed, we believe that EAL's proposal instead has the potential to increase detriment in several ways.

First, it could generate consumer confusion as to complaints handling in relation to energy marketing. The Code incorporates no plan for how it will work alongside existing complaints handling processes such as the jurisdictional energy Ombudsman schemes.

Secondly, it could hide rather than address systemic issues relating to energy marketing, by focusing on individual salespersons to the exclusion of systemic practices by businesses. The Code creates a significant new (collusive) scheme to allow for the inclusion and exclusion of individual sales agents from the industry, while by contrast it is not easy to enforce the Code against the actual signatories to the Code. This is a very different emphasis to the UK EnergySure Code.

There is also a risk that consumers will be confused by the fact that the Code is "authorised by the ACCC", assuming this means the quality of the Code provisions

themselves are reasonable and appropriate, when, in fact, the Code has not been developed through a proper process of community consultation.

Finally, the Code could increase business costs of subscribers, which are ultimately passed on to consumers, without providing for rights or obligations additional to those provided under current laws.

Effective Industry Codes

As outlined by the ACCC in its *Guidelines for developing effective voluntary industry codes of conduct* (the **ACCC Guidelines**):¹⁰

Effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business. To achieve this they must be well designed, effectively implemented and properly enforced. In contrast ineffective codes may place compliance burdens on business without any realisable benefits and potentially making signatories to it less competitive.

Consumer Action agrees that there are significant differences between what an effective code and an ineffective code may deliver in terms of costs and benefits. We therefore recommend that the ACCC take into account the likely effectiveness of the EAL proposal for an industry code in determining whether it is sufficiently in the public interest to attract authorisation.

In our view, a practical way for an industry to ensure that a code of conduct they are developing is effective would be for the industry to follow the advice in the ACCC Guidelines and in the guidelines of similar bodies such as in the Australian Securities and Investments Commission (**ASIC**) regulatory guide on the approval of financial services sector codes of conduct.¹¹ These guidances highlight a range of matters that should be incorporated in order to achieve an effective code of conduct. Some of these matters are:

- Consultation

Before drafting an industry code of conduct, the ACCC Guidelines state that an important step the industry should take is 'identifying and consulting with the relevant stakeholder groups within the industry, consumer affairs agencies and relevant user, consumer and public interest groups—this will assist in identifying and gaining an understanding of the problems that the code should address'.¹²

ASIC also considers that certain steps should be followed in developing a code, including 'identifying at the outset all relevant stakeholders, including affected consumers, relevant community and consumer groups, industry participants and their peak bodies, and relevant regulators and government departments' and then

¹⁰ ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, February 2005.

¹¹ ASIC, *Approval of financial services sector codes of conduct*, Regulatory Guide 183, March 2005, available at: [www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps183.pdf/\\$file/ps183.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps183.pdf/$file/ps183.pdf).

¹² ACCC, above n10, p.5.

‘effectively consulting with all stakeholders to identify the issues and debate appropriate responses’.¹³

- Clear objectives

The ACCC Guidelines state that a code must be drafted to include ‘clearly spelled out objectives [that] help explain to stakeholders and any interested party why the code was established and what it intends to achieve. A clear statement of objectives can be written in such a way that it is measurable. This means that when the code is reviewed its success or failure can be accurately assessed’.¹⁴

ASIC agrees that ‘[a] code should clearly set out the objectives it intends to meet. The standards in the code must do more than simply restate the law. For example, if a code objective is to reduce undesirable practices within an industry, the code should as far as possible describe how subscribers would actually avoid such practices’.¹⁵

- Consumer understanding and awareness

It is important that the intended beneficiaries of a code are aware of the code’s existence and their rights under that code. The ACCC Guidelines point out that it should be easy for stakeholders to understand their rights and obligations under a code, and using plain English in drafting the code’s provisions helps to prevent ambiguity and vagueness and instil confidence and certainty.¹⁶

The ACCC Guidelines also note that it is not sufficient simply to draft the Code using clear language, stating that to be effective a code also needs to incorporate a strategy that will raise consumers’ awareness of the code and its contents, including its complaints handling provisions.¹⁷

ASIC provides similar advice. It considers that a code’s consumer commitments should be set out in a freestanding, plain language document and that there must always be mechanisms to ensure that the code is appropriately promoted.¹⁸ Both the ACCC Guidelines and the ASIC regulatory guide also advise that there must be training and promotion of the code to industry staff so that they can follow it in their dealings with consumers.¹⁹

- Coverage or scope

An industry code that merely restates existing legal rights and obligations may impose additional costs on industry participants without contributing much additional benefit to stakeholders. The ACCC Guidelines note that a code should have a wide coverage, both in terms of the number of industry participants who sign on and the issues to be

¹³ ASIC, above n11, §183.51

¹⁴ ACCC, above n10, p.6.

¹⁵ ASIC, above n11, §183.57

¹⁶ ACCC, above n10, p.6.

¹⁷ ACCC, above n10, p.11.

¹⁸ ASIC, above n11, §183.99, §183.77.

¹⁹ As above, §183.77; ACCC, above n10, p.11.

addressed. The rules in the code should be designed to address common complaints and concerns and may establish best practice (rather than merely repeat minimum legal obligations).²⁰

ASIC believes that the primary role of a code is to raise standards and to complement the legislative requirements that already set out how the entities ASIC regulates must deal with consumers. ASIC states very clearly that '[t]he standards in the code must do more than simply restate the law. For example, if a code objective is to reduce undesirable practices within an industry, the code should as far as possible describe how subscribers would actually avoid such practices.'²¹ ASIC explains that it expects an effective code will do at least one of:

- (a) address specific industry issues and consumer problems not covered by legislation;
- (b) elaborate upon legislation to deliver additional benefits to consumers; and/or
- (c) clarify what needs to be done from the perspective of a particular industry or practice or product to comply with legislation.²²

- Enforceable against subscribers

Experience has shown that community confidence in the effectiveness of industry codes is largely reliant on consumers being able to seek and obtain redress under the code and, further, the code being seen to be enforced against non-compliant subscribers.

The ACCC Guidelines capture this experience clearly, stating that '[c]ommercially significant sanctions will be necessary to achieve credibility with and compliance by participants, and also engender stakeholder confidence in the industry code'.²³ The sorts of sanctions that the ACCC considers may be appropriate when a code signatory breaches a code rule include direct remedies or compensation to an aggrieved consumer and non-compensatory penalties such as censures, corrective advertising, fines and expulsion from the code or the relevant industry association.

ASIC, too, sets out enforceability of the code as a threshold criterion, and states that subscribing members must agree to be contractually bound by the terms of the code.²⁴ ASIC considers that the minimum remedies available for code breaches should include compensation for direct financial loss or damage and directions to the subscriber to take action to rectify a breach. However, like the ACCC it also considers that sanctions which go beyond providing compensation or rectification to individual consumers should also be available for code breaches, listing examples similar to the ACCC such as warnings, fines, corrective advertising and expulsion from the industry association.²⁵

²⁰ ACCC, above n10, pp.7, 9, 16.

²¹ §183.57

²² ASIC, above n11, §183.5.

²³ ACCC, above n10, p.11.

²⁴ ASIC, above n11, §183.15.

²⁵ ASIC, above n11, §§183.67-69.

Additional matters that both the ACCC and ASIC consider are important when assessing whether a code is effective include:

- code administration – the code should provide for the establishment of a body to administer and monitor the code, independent of the industry and comprised of representatives from different stakeholder groups;
- complaints handling – the code should include effective complaints handling procedures; and
- monitoring, accountability and review – the code should provide for the code administration body to monitor and collect data about the operation of the code and code breaches and to produce annual reports about the code’s operation, and there should be provision for independent reviews of the code at regular intervals.

We do not believe that the EAL proposal follows the advice set out above regarding the development of an effective industry code. Consequently, we consider that the Code does not address many of the issues which it would need to in order to be effective. In fact, we are not convinced that it should be classed as a code at all, appearing more like an industry operational guideline. Below we give more detail on the nature of our concerns with the applications.

Comparison with the UK EnergySure Code

As a first point, we noted above that the Code is similar to an industry code developed in the United Kingdom called the EnergySure Code. It appears that the UK EnergySure Code has been followed, verbatim in some places, to form the basis of the EAL’s proposed Code. However, the UK EnergySure Code also appears to provide a more comprehensive commitment to improving the energy marketing landscape and has articulated both its purpose and intended benefits for consumers more clearly. The EAL has cherry picked only some aspects of the UK EnergySure Code, removing other elements that are of value to consumers and thus undermining its potential effectiveness.

An example of this is the first clause of the Code on its Scope, which reads as an objectives clause. It provides that the Code is aimed at promoting ‘Consumer confidence in Sales Activities’, but fails to provide any commitment to consumers beyond this. This wording seems to have been taken directly from the UK EnergySure Code, which also states that it is aimed at promoting consumer confidence in sales activities, but then goes on to add ‘and providing consumers with standards of protection over and above those provided by law’.²⁶ Note that the Objects of EAL itself as set out in its Constitution also fail to focus on what should be the goals of the Code if it is to be effective in providing benefits to consumers, instead listing only operational objectives.

We also highlight section 1.3 of the UK EnergySure Code, which outlines the intended benefits of the code in more detail as follows:

²⁶ *EnergySure Code of Practice*, above n1, s.1.2.1.

1.3 Benefits of the Code

1.3.1 Adherence to the Code will ensure that high standards are achieved in face to face sales to consumers. Specific benefits to consumers, over and above those provided by law include:

1.3.1.1 Rigorous selection and training of Sales Agents.

1.3.1.2 Protection of all domestic consumers whatever their circumstances.

1.3.1.3 Sales practices which place the onus on Sales Agents to avoid consumer misunderstanding.

1.3.1.4 Compensation where applicable caused by failure to meet these standards.

1.3.1.5 Action taken against the Member if standards are not met.

1.3.2 Members' performance in meeting these standards will be audited by an independent Code Auditor, who will report to the Code Manager.

1.3.3 Members intend application of the Code to eliminate misselling in Sales Activities and deliver low complaint levels.

These details are simply not included in the EAL's Code and represent a glaring omission. They also provide evidence that the Code does not meet the requirements for clear objectives in particular, discussed below.

As another example, the Code seems to copy select aspects of the UK EnergySure Code but is noticeably more complex and difficult to read, and comprises several different documents which must be read together. This makes it much less accessible to the public than the UK version.

Assessment against guidance for an effective industry code

In our view, the Code proposed in the applications does not meet the key elements for an effective industry code of practice detailed above.

Consultation

We are not aware that the EAL members, either individually or through their industry association, the Energy Retailers Association of Australia Ltd (**ERAA**), engaged in any consultations with consumer or community stakeholders regarding the development of the Code and its contents before lodging their application for authorisation with the ACCC.

Upon learning that the industry was developing a code of conduct, Consumer Action even made a few attempts to initiate consultation with various participants in the industry code development process, in the belief that it was essential that consumer

input be provided into its development. At no time, however, was our input sought by the ERAA or EAL.

The ERAA did make a presentation to consumer representatives at a meeting of the National Consumer Roundtable on Energy shortly before the applications were submitted to the ACCC, however, this presentation merely outlined the contents of the already-developed and drafted Code and invited feedback through the ACCC authorisation process.

We do not believe that this process in any way sufficiently incorporates effective consultation with stakeholders. It has also shifted the costs of such consultation from the industry to the taxpayer through a misplaced expectation that the ACCC will engage in consultation over the details of the Code provisions. We do not believe that the ACCC should be expected, in the authorisation process, to make detailed recommendations regarding amendments to a proposed code or complaints process being proposed by an applicant.

Clear objectives

As it stands, the Code merely states that it intends to increase consumer confidence in energy sales activities. It does not set out any measurable objectives for achieving better practice as advised to do by the ACCC Guidelines, in contrast to the UK EnergySure Code, for example by intending to eliminate mis-selling and deliver low complaint levels.

We are also concerned about the substance of the Code's objectives to the extent that they are set out. The Code seems to be aimed at weeding out "rogue" individual sales agents, focusing principally on the conduct of individuals by establishing a process for registering and providing training to individuals and de-registering them if required.

We firmly believe, however, that the focus on "rogue" energy marketers - "bad apples" - is often engaged in by energy retailers at the expense of taking some responsibility for the marketing practices undertaken by their staff or agents.

Consumer Action has received complaints about energy marketing practices that appear to be more systemic in nature than merely the poor conduct of one rogue energy marketer, for example because the agents have been instructed to act in a certain way or use certain sales scripts.

One of the case studies above, Maureen's story, involved a sales representative who said that he had been instructed to ignore do not knock stickers. This is a breach of the Code of Conduct for Marketing Retail Energy in Victoria, which states that 'Retailers must respect no canvassing signs'.²⁷ We received several other complaints regarding that issue around the time we received Maureen's complaint, from consumers in different parts of Victoria, suggesting this issue was not caused by one rogue energy marketer.

²⁷ Essential Services Commission, *Code of Conduct for Marketing Retail Energy in Victoria*, January 2009, cl.2.3.

We have also been told many times that sales agents have not given consumers offer summaries, sometimes not having been supplied with copies or not even knowing what such documents are, despite the fact that they are lawfully required to provide consumers offer summaries when engaging in any marketing activity.²⁸

While the proposed Code might allow individual sales agents to be excluded from the industry, it would not address the broader issue that retailers should also have some responsibility for poor conduct by their representatives. In fact, in Victoria retailers have responsibility for ongoing training and testing of these agents and failure to do this is a breach of the law.²⁹

Consumer understanding and awareness

As noted above, a good industry code should use plain language and incorporate a plan for communication to consumers.

The EAL's Code contains some confusing language that ordinary consumers are unlikely to understand. One example is that it requires the Code Manager to review complaints applying 'the *Briginshaw* standard of proof'. We do not understand why the applicants have chosen to use such technical legal language, particularly when recent court decisions have pointed out that 'each of the expressions "the *Briginshaw* standard" and "the *Briginshaw* test" should be avoided because of its tendency to mislead'³⁰ and modern evidence legislation has succeeded in adopting the formulation in the *Briginshaw* case but expressing it in plain language.³¹

²⁸ Essential Services Commission, *Guideline No. 19: Energy Price and Product Disclosure*, Issue 3 June 2009, cl.4.1.

²⁹ See Essential Services Commission, above n27, at cl.1:

Retailers shall provide initial and ongoing training and testing of **marketing representatives** to ensure all representatives understand and comply with this **Code** and maintain their understanding and compliance. In their training **retailers** will provide information on and examples of:

- the principles of **consumer** protection laws, such as those set out in the *Trade Practices Act* 1974 and the *Fair Trading Act* 1999 and in particular Part 4 Off-Business-Premises Sales and other sales of the *Fair Trading Act* 1999 and other relevant legislation;
- what is misleading, deceptive or unconscionable conduct and false representation (including what is coercion and harassment); and
- basic contractual rights and the meaning and importance of the need for a **consumer's explicit informed consent** to a **contract**.
- the ability to clearly explain the arrangements for competition in energy supply in Victoria;
- the **consumer's** right to freely choose a **retailer**;
- product knowledge, including:
 - o tariffs, billing procedures, payment options;
 - o eligibility requirements for concessions, rebates or grants;
 - o knowledge of **retailer's** policies for customers experiencing financial hardship; and
 - o availability of instalment plans.
- understanding of basic contractual rights and the meaning and importance of the need for a **consumer's explicit informed consent** to a **contract**;
- customer service skills including dealing with **consumers** with special needs and those without or with limited English language skills;
- the terms and requirements of this **Code**; and
- other areas as directed by the Commission.

³⁰ See Branson J in *Qantas Airways Limited v Gama* [2008] FCAFC 69 at §§123-139.

³¹ See, eg, *Evidence Act 1995* (Cth) s.140; *Evidence Act 2008* (Vic) s.140.

More importantly, nowhere in the applications is there a proposed consumer guide or brochure to explain the Code to consumers. This is particularly problematic given that, as touched on earlier, the full Code in fact consists of the Code of Practice and also a separate Complaints Process document and a Procedures Guideline and, in addition, a new company has been established to administer the Code and it has its own set of rules in its Constitution.

There is also no broader communications plan proposed in the applications, let alone in the Code itself, to ensure the Code is properly communicated to the public. We therefore do not believe that, if the Code were authorised and came into force, any material number of consumers would be aware of the Code's existence, their rights under the Code or how to make a complaint under the Code.

Coverage or scope

We are concerned that the Code studiously avoids going beyond the existing legal obligations on the industry. As noted above, even the objectives of the Code copy the UK EnergySure Code except for the phrase regarding the intention to provide consumers with standards of protection over and above those provided by law.

There are clear cost implications for members to support the EAL company financially, which are ultimately passed on to consumers. However, these costs bring little benefit to consumers if they receive no additional rights or protections to those already afforded them.

Consumer Action is therefore very concerned that the limited scope of the proposed Code, together with its narrow focus on individual "rogue" energy marketers as described above, will increase costs for consumers for minimal benefit.

Enforceable against subscribers

The enforceability of an industry code, through the availability of both consumer redress and sanctions against subscribers, is critical to its effectiveness.

However, the Code does not propose any form of compensation or redress be available to consumers for a breach of the Code. Before the Code could be considered likely to be effective, it would be essential to give consumers access to redress under the Code, to provide drivers for compliance as well as confidence to consumers that the member businesses take their obligations under the Code seriously.

We note that this is another way in which the Code differs from its UK counterpart. The UK EnergySure Code has a dedicated section on Compensation, providing for monetary compensation for some of the more serious code breaches and referring to individual member compensation policies for lesser breaches.

The Code also proposes a different process for making complaints against individual sales agents versus complaints against actual EAL members – an energy retail

business or an energy marketing business. While any person can make a complaint about an individual sales agent, complaints about a breach of the Code by an EAL member cannot be made by a consumer. This distinction means that consumers cannot ask for the Code to be enforced or complaints about a breach to be resolved against members. In our view, this issue alone would mean the current Code proposal does not have sufficient public benefit to be authorised.

Other matters

Other aspects of the Code also detract from its potential effectiveness. For example, as noted above we are concerned that the Code, if authorised, could increase public detriment by creating consumer confusion about complaints handling in the energy industry. The Code does not state how it will work in conjunction with the jurisdictional Ombudsman schemes, which already accept complaints from consumers about breaches of the law by energy retailers and their representatives.

The Code needs to be clearer in terms of the role of its complaints handling process – the fact that this concentrates on Code breaches, whereas a consumer can also seek to resolve a dispute with an Ombudsman scheme or to make a complaint about a breach of the law with a regulator.

This confusion is compounded by the fact that the Code does not, as noted above, appear to add to existing legal obligations on energy retailers in relation to marketing. This means it is hard to see why a consumer would prefer a complaint to EAL over a complaint to an Ombudsman scheme or to a regulator – especially given that the Ombudsman schemes also have more redress powers than EAL and the regulators have more powers to sanction.

We would be deeply concerned if EAL members used the existence of the Code to steer consumers with complaints about energy marketing away from the Ombudsman schemes or from government regulators and towards making a complaint to EAL about an individual salesperson.

This is also a concern because of the poor monitoring, accountability and review provisions of the Code. Unlike complaints made to external bodies, complaints made to EAL about the Code would not be subject to proper reporting requirements. EAL and the Code Manager are not required to produce public reporting of the Code's operations, including on complaints and Code breaches. The Code's provision on reviews of the Code is completely inadequate, stating that the Code will be reviewed 'periodically', by the Code Manager and Code Panel rather than an independent body, and in consultation with members but not other stakeholders.

Recommendation

Consumer Action recommends that the ACCC refuse to authorise the applications given their current form.


There is the potential for the industry to develop effective measures to help address current problems associated with door to door energy marketing. Some examples might include establishing a consumer do not knock register, taking on additional marketing and sales training and monitoring requirements, adopting revised salary incentives for sales agents and/or placing an onus on the seller to ensure that the consumer has understood what has been presented. These could form part of a more effective industry code, one which has clear consumer objectives, imposes obligations beyond existing legal requirements, and has a more effective complaints process and sanctions regime.

However, measures such as these have not been considered properly to date. We would support the industry beginning a process of developing a new and more effective proposal to return to the ACCC for authorisation at some point in the future, but the current applications simply do not constitute an initiative that we believe could justify ACCC authorisation at this time. They could lead to increased public detriment without corresponding public benefit.

Should you have any questions about our submission, please contact Janine Rayner of our Centre on 03 9670 5088.

Yours sincerely

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