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Energy Assured Limited - Revocation and Substitution - A91390 & A91391

Thank you for the opportunity to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) consultation process for the Energy Assured Limited (**EAL**) applications for authorisation **A91390 & A91391** (the **applications**) of a revised EAL Code of Practice (the **Code**).

Overview

Consumer Action's 2011 submissions to the Code authorisation process recommended the ACCC refuse to authorise the applications, on the grounds that the proposal did not actually improve existing consumer protections, and could lead to increased public detriment, including costs, without a corresponding public benefit.

In the intervening two years, the energy marketing landscape has changed significantly. The key development that has shaped this change without doubt has been the ACCC's identification of energy retailer compliance with the Australian Consumer Law (**the ACL**) as an enforcement priority. We consider the decision of the three major energy retailers to stop door to door marketing to be a direct result of that enforcement action.

It remains our view that the proposed Code does not attempt to, and will not achieve, an enhancement of consumer welfare above what is already afforded them under law – meaning effectively that consumers will have to bear the cost of unnecessary regulation that is of no benefit to them.

Given that the Code fails to achieve the fundamental requirement of enhancing consumer confidence and protection, our recommendation is once again that the ACCC refuse to approve the Code.

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Where is the evidence the industry improved practices owing to the Code?

Between November 2011 and November 2013, Consumer Action's Do Not Knock campaign website hosted a Make a Complaint form, which allowed consumers to report potential breaches of the ACL. Complainants were asked to note the time of the call, whether they had a Do Not Knock sticker on display, and whether the salesperson left immediately upon request – reflecting the obligations of salespeople under the ACL.

Consumer Action compiled those complaints and reported potential breaches of the ACL to the ACCC. A staggering 40% of complaints we have passed to the ACCC pertained to the conduct of energy retailers at the door. In raw figures, 161 of the total 399 complaints provided to the ACCC pertained to retailers who would be covered by the Code. This figure doesn't include solar energy providers or energy efficiency device schemes. Even after the cessation of door to door marketing by major retailers, energy retailers continued to feature prominently in the complaint statistics.

We expect Ombudsman schemes will provide their own additional data about complaints pertaining to door to door selling, which will provide a broader view of complaints about energy marketers.

Given the intensive campaigning around door to door selling issues since the Code took effect, and the spotlight on the practices of energy retailers in particular, the fact that energy marketing still accounted for such a high proportion of complaints suggests to us the Code has not been effective.

Consumer awareness of the Code

Consumer Action has not endorsed the Code at any stage, and has not referred to it on our Do Not Knock website or in other outreach activities because it does not offer consumers additional benefits they don't already have at law.

In our assessment of the complaints made via the Do Not Knock website, it is not apparent that any of the complainants were aware of the Code. We would not anticipate that consumers have an awareness of the EAL Code – this could be tested simply by requiring a market research survey on this question to a statistically significant sample size.

However, we question whether attributing value to consumer awareness of the Code is relevant for the Code re-authorisation process, given that the Code largely reflects existing laws and consumer complaints are directed to retailers and Ombudsman schemes on EAL's Frequently Asked Questions page.

In the past two years, further evidence has emerged that consumers simply don't like door to door selling and want the ability to opt out of such a marketing channel. The code does not allow for a simple way for consumers to opt out. In February 2012, Consumer Action published research commissioned into consumer attitudes toward door to door selling. The research found:

- Only 3% have a generally positive opinion of door-to-door selling
- 77% dislike door-to-door sales
- Consumers feel misled by in-home sales
- 56% of shoppers feel the greatest pressure to purchase when visited at home

A copy of the research is at **Attachment A**.

Effective sanctions

The ACCC will already be well aware that the three of the major energy retailers – EnergyAustralia, AGL, and Origin - have voluntarily ceased door to door selling. This cessation occurred after the ACCC took legal action against a number of retailers for alleged breaches of the ACL. Consumer Action welcomed this cessation, and note that neither AGL or EnergyAustralia are members of the Energy Assured scheme.¹

Whilst the voluntary cessation is welcome, it is clear to us that the willingness of the ACCC to take enforcement action has been a clear factor in the business decisions made to stop this sales practice – in addition to the fact that energy retailers themselves already knew their customers didn't like the practice.

Significant financial penalties for breaching the ACL, the widespread use of Do Not Knock stickers, and having an avenue to complain (ie the Do Not Knock make a complaint page), has certainly influenced how retailers interact with potential customers.

Whilst some smaller energy retail marketers continue to elicit consumer complaints, we see ACCC's priorities and willingness to seek legal redress for consumers as a far greater influence on business behaviour than a voluntary, unenforceable code of practice that doesn't prioritise the needs of consumers.

Systemic misconduct of sales practices is not addressed in proposed revision

From Consumer Action's attendance at EAL Stakeholder meetings, it is clear that EAL's emphasis is heavily 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.

The conduct of salespeople in this sector is driven not just by laws and regulations, but by the need to make a sale in order to make a salary. Commission-based selling incentivises a sale above all other considerations, which as is well known, encourages mis-selling and other misleading practices. The proposed EAL Code will remain ineffective as a driver of improved salesperson behaviour because it does not address fundamental cause of consumer detriment caused by door to door sales not already addressed by the ACL.

Commission-based selling was identified as problematic in the ACCC's own research into door to door selling, as well as Footscray Legal Service's excellent *Strangers Are Calling* report, which recommended that an enhanced code of conduct address systemic misconduct in door to door sales practices, noting particularly that commission-based selling which encourages aggressive sales tactics be addressed.²

¹ <http://energyassured.com.au/member-list/> as at 19-11-2013

² Recommendation 15 http://donotknock.org.au/wp-content/uploads/2013/05/Strangers_are Calling.pdf

Conclusion

All regulation ultimately comes at a cost to end users through the pricing of their goods and services, so there needs to be some demonstrable benefit for the target audience of that regulation. The EAL Code does not meet this fundamental benchmark.

The ACCC's active enforcement of the ACL has, at least in part, resulted in an improvement in sales practices by a cessation of using this sales channel by the main users, and hopefully improvement in the conduct of other energy retailers. Addressing the systemic problem of commission based selling is the one opportunity where the EAL Code could raise the bar on industry practices. It fails to do so.

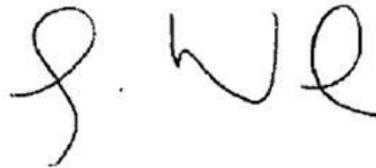
As such, Consumer Action does not support the authorisation of a voluntary, self-regulatory code that imposes costs but does not provide a benefit beyond the existing legal protection of consumers.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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