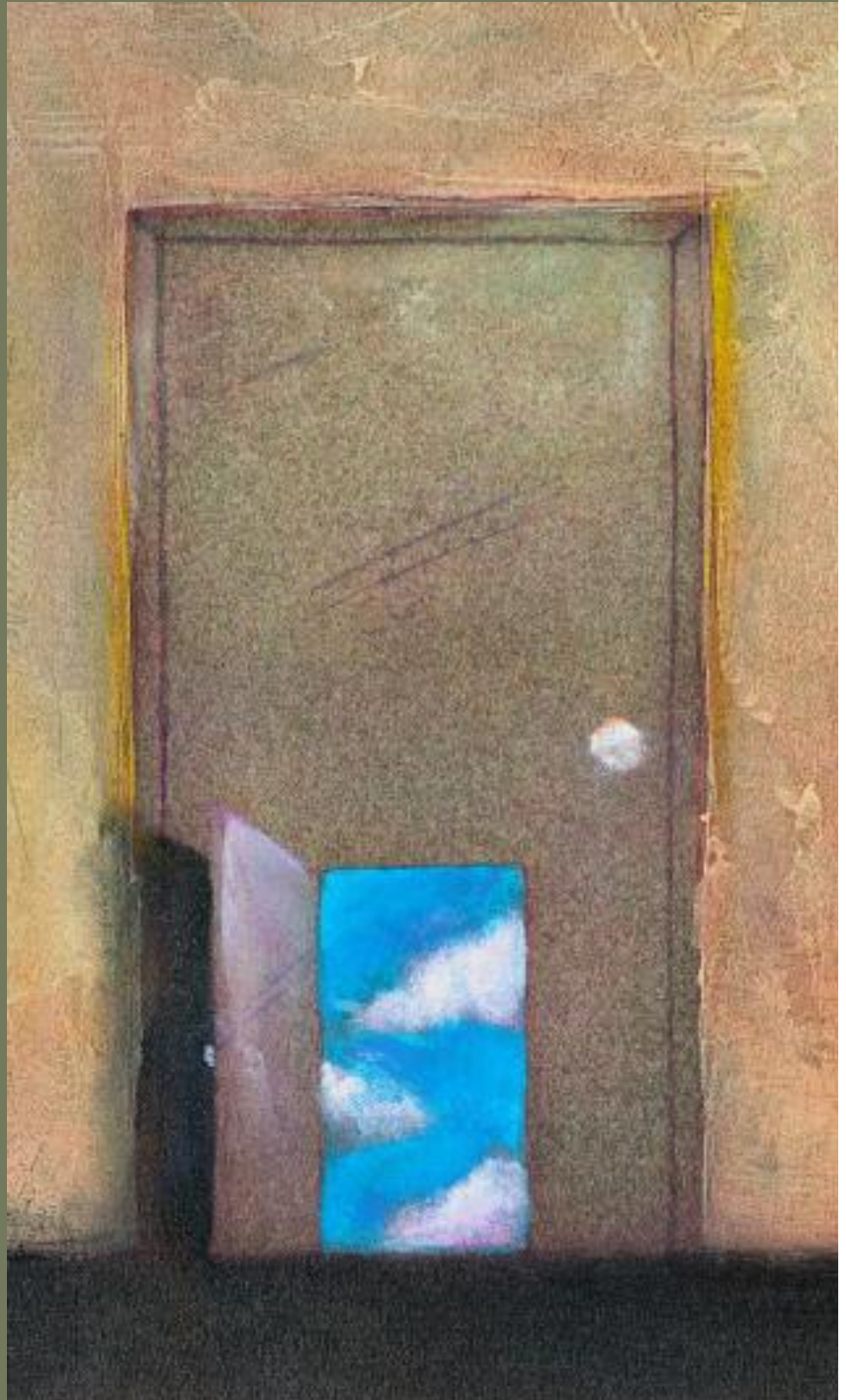


MINIMISING CONSUMER DETRIMENT FROM ENERGY DOOR-TO-DOOR SALES

A CUAC RESEARCH REPORT

December 2012





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TABLE OF CONTENTS

LIST OF TABLES AND FIGURES	2
LIST OF ABBREVIATIONS	3
EXECUTIVE SUMMARY	5
Consumer detriment – nature and extent	5
Consumer law	6
Consumer-centred approaches	7
Self-regulatory and voluntarist approaches	8
List of recommendations	9
1. INTRODUCTION	11
About the research	11
Aim	11
Design	12
Report	13
2. CONTEXT	15
What is door-to-door selling?	15
Door-to-door selling in the Victorian retail energy market	16
Development of the Victorian retail energy market	16
The Victorian retail energy market today	18
Future trends	21
Door-to-door selling and consumer detriment	21
Types of detriment	21
Assessing the extent of consumer detriment	26
Discussion and recommendations	32
Extent of misconduct	33
Financial detriment & the role of door-to-door selling in the retail energy market	33
Minimising consumer detriment from door-to-door sales	34
3. CONSUMER LAW	37
Legal and regulatory framework for energy door-to-door sales in Victoria	37
Australian Consumer Law	37
National Energy Customer Framework	41
Compliance and enforcement	43
Specific consumer protections	45
Cooling-off periods	45
Disclosure of purpose and identity and ceasing to negotiate on request	49
Information about the agreement	52

Prohibition	58
Complete prohibition.....	58
Sector-specific bans	59
Discussion and recommendations	60
Enforcement	60
Monitoring and prohibition	62
4. CONSUMER-CENTRED APPROACHES	63
Consumer education and information	63
Consumer education and information in Victoria	64
The role, effectiveness and limitations of consumer education.....	66
No Canvassing stickers and signs	69
Do Not Knock stickers (Australia)	69
Excluded zones	70
No Cold Calling Zones (UK)	70
No-contact lists and registers	72
Do Not Call Registers.....	73
Do Not Knock Register Bill 2012	76
No Contact lists	78
Discussion and recommendations	79
Consumer education and information	79
Opt-out mechanisms.....	80
5. SELF-REGULATORY AND VOLUNTARIST APPROACHES.....	83
Voluntary industry codes of conduct	83
Appropriate circumstances for a voluntary industry code	84
Features of an effective voluntary industry code.....	85
Energy Assured (Australia)	87
Energy Sure Code of Practice (UK).....	93
Voluntarism	95
Consumer Focus' <i>End of the Road</i> campaign (UK).....	95
Consumer Action Law Centre campaign (Australia).....	98
Discussion and recommendations	99
Voluntary industry codes.....	99
Voluntarism.....	100
6. THE FUTURE	103
APPENDIX A – ORIGIN ENERGY DO NOT KNOCK STICKER.....	105
BIBLIOGRAPHY	107

LIST OF TABLES AND FIGURES

Table 1:	Residential customer perceptions of competition, Victoria	17
Table 2:	Use of door-to-door sales by retailers operating in Victoria	20
Table 3:	Types of detriment associated with door-to-door sales	21
Figure 1:	Door-to-door sales pipeline	23
Figure 2:	Vulnerable or disadvantaged consumer groups	25
Table 4:	Door-to-door related EWOV cases and commentary, 2002 to 2011	30
Table 5:	Reported incidence of certain misleading and pressure sales tactics	32
Table 6:	Type 1, 2 and 3 regulatory obligations in the <i>Energy Marketing Code</i>	40
Figure 3:	ESC enforcement pyramid for regulation of Victorian energy businesses	41
Figure 4:	Australian Consumer Law, Sections 74 and 75	49
Table 7:	Type 1 breaches relating to marketing information, 2007–08 to 2010–11	53
Table 8:	<i>Energy Marketing Code</i> and <i>Guideline 19</i> regulatory audit results, 2010–11	56
Table 9:	Overseas examples of Do Not Call Registers	75
Table 10:	Energy Assured sanctions	89
Figure 5:	EWOV transfer and marketing cases, quarterly since 1 April 2011	91
Table 11:	Timeline of voluntary suspensions & cessation of unsolicited door-to-door selling	97
Figure 6:	Consumer perceptions of pressure to buy in different scenarios	98

LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
ACT	Australian Capital Territory
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
ASIC	Australian Securities and Investment Commission
CEO	Chief Executive Officer
CUAC	Consumer Utilities Advocacy Centre
CALC	Consumer Action Law Centre
CAV	Consumer Affairs Victoria
EAL	Energy Assured Limited
ESC	Essential Services Commission
EU	European Union
EWOV	Energy and Water Ombudsman (Victoria)
FCA	Financial Counselling Australia
FCLC	Footscray Community Legal Centre
FCRC	Financial and Consumer Rights Council
FRC	Full Retail Contestability
FTC	Federal Trade Commission (FTC)
NCCZ	No Cold Calling Zone
NECF	National Energy Customer Framework
NEM	National Energy Market
NERR	National Energy Retail Rules
OECD	Organisation for Economic Cooperation and Development
Ofgem	Office of Gas and Electricity Markets (UK)
OFT	Office of Fair Trading (UK)
PC	Productivity Commission
PPIS	Price and Product Information Statement
SSE	Scottish and Southern Energy (UK)
UK	United Kingdom
USA	United States of America

EXECUTIVE SUMMARY

This report looks at the role of door-to-door selling in Victoria's evolving retail energy market, the consumer detriment associated with it, and the policy approaches – both existing and potential – that may minimise detriment without compromising energy market objectives.

Consumer detriment – nature and extent

Since the introduction of Full Retail Contestability to Victoria's retail energy market a decade ago, unsolicited door-to-door energy selling has emerged and expanded, playing a major role in the transformation of the market. Today, Victoria's retail energy market has the highest switching rate of any in the world. Nearly all retailers operating in Victoria use door-to-door selling to drive this switching activity, and it is estimated that door-to-door sales account for just over half of all customer switching.

As energy door-to-door selling has grown, however, so too has concern about the ways in which this sales channel can cause consumers – particularly vulnerable consumers – financial and non-financial detriment. In terms of non-financial detriment, the time loss and the annoyance that results when uninterested consumers are interrupted by a door-to-door sales call is often fairly minor, but it is also pervasive. This probably accounts, in large part, for the negative community perceptions of door-to-door selling. Should a sales agent conduct themselves poorly, or where the consumer is vulnerable, this non-financial detriment can be much greater.

For consumers who agree to switch at the door, the aim is typically to save money. However, there is real cause for doubt that most consumers make a saving when they accept a door-to-door sales offer. In the UK, a 2008 study found that just under half of those switching at the door were actually made financially worse off by the change. This may be because door-to-door selling creates a 'situational monopoly': an environment in which the consumer is reliant on the information provided by only one supplier and cannot 'shop around' to find the best deal. Where the product or service offered involves complex terms and conditions, optimal decision-making may be even less likely.

In Victoria, we know that some of the retailers with the most extensive door-to-door sales activity also tend to have the market's more expensive offers. In the absence of any research, however, we simply do not know what proportion of consumers switching door-to-door incur financial detriment. This lack of data is a major gap in our understanding of both door-to-door selling and, more broadly, the functioning of our retail energy market. For this reason CUAC is recommending that the Victorian Government commission research to fill this critical evidence gap.

Door-to-door sales misconduct such as pressure sales, misleading claims and exploitation of consumer vulnerability can all exacerbate consumer detriment. The extent of such misconduct has been a major issue of contention between consumer groups, industry, policymakers and regulators. Industry has tended to claim that complaint numbers are low when considered in relation to the

extent of door-to-door sales activity. Consumer groups, on the other hand, have pointed to consistent feedback from their clients and members, and argued that many consumers do not complain. Again, CUAC is recommending research to address this important evidence gap on the extent of misconduct, and to provide a baseline against which the effectiveness of our policy approaches can be measured.

Consumer law

The Australian Consumer Law prohibits certain types of business conduct, such as harassing or misleading consumers and exploiting their vulnerability, that can occur both in door-to-door sales and other environments. At the same time, recognising the particular risk of consumer detriment in the door-to-door sales environment, governments have tended to subject door-to-door sales to additional requirements over and above those in general consumer law. Of relevance to door-to-door energy sales in Victoria, these include the Australian Consumer Law's unsolicited consumer agreement provisions and the *Code of Conduct for Marketing Retail Energy in Victoria*. Additional consumer protections applicable to energy door-to-door sales include, most importantly, the provision of a ten business day cooling-off period and requirements on sales agents to disclose their identity and purpose, and to leave when requested. To improve consumers' capacity to make appropriate decisions, there are also special provisions relating to the agreement information that must be provided to consumers in a door-to-door sales situation.

Throughout 2012, the Australian Competition and Consumer Commission has prioritised enforcement of the Australian Consumer Law in relation to energy door-to-door sales, filing proceedings against energy retailers and the door-to-door sales companies they had engaged. In September 2012, the Federal Court found that Neighbourhood Energy had breached the Australian Consumer Law unsolicited consumer agreement provisions, as well as its prohibition on misleading or deceptive conduct. Neighbourhood Energy and its door-to-door selling contractor, Australian Green Credits, were ordered by consent to pay penalties totalling \$1 million. Another case has been brought against AGL Energy, but, at the time of writing, was yet to be decided.

The *ACCC v Neighbourhood Energy* decision tested the scope of the Australian Consumer Law unsolicited consumer agreement provisions. It demonstrated that energy door-to-door sellers can face penalties for misleading and deceptive conduct and for failing to respect requests to leave – including those conveyed via Do Not Knock stickers. While it remains to be seen whether the ACCC's enforcement action will translate to improved compliance on the part of energy retailers, the case was widely reported and seen as a landmark. CUAC has recommended that the ACCC solidify these gains by maintaining its focus on enforcement and testing of the ACL in relation to door-to-door energy sales.

In contrast to the ACCC's active enforcement, Victoria's Essential Services Commission has taken a 'light-handed' approach to promoting compliance with its *Energy Marketing Code*. Despite ongoing breaches as evidenced by retailer self-reporting and regulatory audits, the ESC has at no time used its statutory powers to enforce compliance with requirements relating to the information that must be provided to consumers at the door.

Retailers have now had a number of years to familiarise themselves with these requirements, and have been repeatedly asked to comply voluntarily. It is crucial that consumers making switching decisions on the basis of door-to-door sales presentations are given clear, truthful and comprehensive information about the offer they are considering. CUAC is therefore recommending that the ESC take stronger enforcement action should retailers fail to comply, within the agreed timeframes, with administrative undertakings made following the most recent round of regulatory audits. We are also recommending more timely publication of audit results and evidence of subsequent corrective action.

Consumer-centred approaches

One group of approaches to minimising the consumer detriment associated with door-to-door selling can be categorised as consumer-centred. These approaches equip and rely upon consumers to protect themselves from any misconduct or detriment. Primary among this group are consumer education and information initiatives, which have been a mainstay of policy approaches to door-to-door sales. Consumer education and information initiatives aim to give consumers the knowledge, skills and confidence to participate effectively in increasingly complex and information-intensive markets. A range of regulatory and consumer bodies undertake consumer education activities, and/or produce consumer information resources relating to door-to-door sales.

There are some good examples of consumer information resources in Victoria, including non-text materials and documents in community languages. For vulnerable consumers, these resources will often be best delivered in a face-to-face context, and the report recommends that Consumer Affairs Victoria support such activities. Even so, the limits of consumer education and information in relation to door-to-door sales must also be acknowledged. Information provided to consumers will not necessarily be taken notice of and understood, particularly where information is dense or complex, and by consumers who have poor literacy skills. Where information is seen and understood, it may be difficult to translate into action. Hence, complementary policy approaches are needed to tackle misconduct at its source.

Another set of consumer-centred policy approaches aim to minimise detriment, including relatively minor but pervasive non-financial detriment, by allowing consumers to opt-out of any interaction with door-to-door sales agents. Existing and potential opt-out mechanisms include Do Not Knock and other No Canvassing signs and stickers; excluded zones such as the UK's No Cold Calling Zones, and No Contact lists and registers.

While Do Not Knock stickers now have unambiguous legal status, CUAC is not convinced that they represent the most efficient and effective opt-out mechanism for consumers. At the Federal level, the possible introduction of a Do Not Knock Register – similar to the Do Not Call Registers already in place in Australia and around the world – has recently been debated but, at the time of writing, seemed unlikely to go ahead. This is disappointing. The immense popularity of Australia's Do Not Call Register shows that consumers are strongly supportive of initiatives that allow them to avoid intrusive marketing practices. A Do Not Knock register would provide a very simple mechanism for doing so, and would efficiently and appropriately allocate costs to retailers rather than consumer groups and government.

Both Victoria's Energy Marketing Code and the National Energy Customer Framework require individual retailers to maintain No Contact lists to which consumers who do not wish to be marketed to can request to be added. While CUAC supports the intent of these provisions, they are unpublicised, unnecessarily complex (since a consumer must request addition to each retailer's list separately), and probably ineffective. CUAC is recommending that the ESC develop an online tool, hosted on its Your Choice website, that would allow consumers to request addition to retailers' No Contact lists via a single, centralised form. This tool would transform existing No Contact list provisions into a potentially effective opt-out mechanism.

Self-regulatory and voluntarist approaches

A final set of approaches to minimising consumer detriment from door-to-door sales relies upon industry, either collectively or at the individual business level, to manage its own behaviour in the interests of consumers. These self-regulatory and voluntarist approaches sit side-by-side with legislative and consumer-centred approaches.

Voluntary industry codes of conduct began proliferating in the 1990s, and the report discusses two examples of their use in relation to energy door-to-door sales. Australia's Energy Assured scheme began operation in January 2012. While its effectiveness has yet to be demonstrated, its design has a number, although not all, of the features that characterise potentially effective voluntary codes. More information about the operation of Energy Assured should be made publicly available, but the information that is available suggests that the scheme is being implemented as planned. Having reviewed the evidence about voluntary codes of conduct and Energy Assured specifically, CUAC concludes that the scheme has some strengths in comparison to the UK's Energy Sure Code of Practice, and has the potential to be effective. We recommend that the ACCC only re-authorise the Energy Assured Scheme should this effectiveness be realised and convincingly demonstrated.

In the UK, the consumer organisation Consumer Focus in 2011 launched a successful campaign calling on energy retailers to voluntarily agree to bring an end to door-to-door selling. Citing consumer surveys showing widespread dislike of door-to-door selling, Consumer Focus argued that the practice was eroding the reputation of energy retailers, and encouraged them to replace door-to-door selling with alternative ways of providing information and advice to consumers. Consumer Focus' campaign enjoyed strong support from consumer groups, the media and politicians, and within one year, the UK's major 'big six' retailers had agreed to cease unsolicited door-to-door sales.

In CUAC's assessment, the different conditions in Victoria mean that a similar call on retailers to entirely abandon door-to-door sales is unlikely to be successful. Nonetheless, we recommend that the Energy Retailers Association of Australia takes a leadership role in encouraging and supporting retailers to develop innovative marketing and sales methods that are better aligned with consumers' preferences, and which support effective consumer decision making. Such a shift in focus would, we believe, help to improve both competition and consumers' trust in retailers and the retail energy market.

List of recommendations

At the time of writing, the timing of Victoria's transition to the National Energy Customer Framework was still unknown. Hence, the report and its recommendations have been written primarily with regard to the current regulatory framework for retail energy in Victoria. However, a number of the below recommendations directed at the Victorian Government and the Essential Services Commission are equally relevant at the national level and should be taken into consideration by the equivalent national bodies.

Recommendation 1

That the Australian Competition and Consumer Commission develop a consumer survey which accurately measures the extent of door-to-door selling problems. This survey should:

- use a random sampling methodology with a sample large enough to allow separate analysis of key jurisdictions and of energy door-to-door sales specifically;
- be designed to give a snapshot of the 'average' door-to-door sales interaction;
- seek to determine the extent to which consumers who have had a negative experience lodge a complaint, and to whom; and
- be re-administered periodically so that changes may be observed.

Recommendation 2

That the Victorian Government commission research assessing the financial outcomes of consumer switching decisions made via door-to-door sales and other major switching channels.

Recommendation 3

That the ACCC maintain its focus on enforcement and testing of the ACL unsolicited consumer agreement provisions, including in the energy sector.

Recommendation 4

That the Essential Services Commission ensure that results from regulatory audits and evidence of subsequent corrective action be made publicly available on the ESC website within three months of their completion.

Recommendation 5

That, should retailers have failed to comply with administrative undertakings arising from 2010-11 regulatory audits within the specified timelines, the Essential Services Commission use its statutory powers to enforce compliance with *Energy Marketing Code* and *Guideline 19* requirements.

Recommendation 6

That the Victorian Government and the Essential Services Commission closely monitor consumer impacts during the widespread introduction of flexible pricing in 2013. Should this monitoring show that consumers are experiencing increased detriment from the door-to-door sale of flexible pricing offers, the *Energy Marketing Code* should be reviewed and protections enhanced.

Recommendation 7

That Consumer Affairs Victoria and the Essential Services Commission support community and consumer organisations to provide targeted, face-to-face education and information on door-to-door sales to vulnerable consumers.

Recommendation 8

That the Essential Services Commission improves the effectiveness of No Contact list requirements in the *Energy Marketing Code* by developing of an online tool through which consumers can request to be added to retailers' No Contact lists. This facility should be hosted on the ESC's *Your Choice* website.

Recommendation 9

That the Energy Assured scheme increases transparency and accountability by making more detailed information about the scheme's implementation and operation publicly available at regular intervals. This should include de-identified information about:

- any warning notices issued and sanctions applied;
- independent audit results;
- complaint levels; and
- numbers of agents de-registered and in 'suspended' and 'development' status.

Recommendation 10

That the Australian Competition and Consumer Commission only re-authorise the Energy Assured scheme if there is convincing evidence that it has been effective in producing public benefit through the reduction of energy door-to-door misselling and associated consumer detriment.

Recommendation 11

That, in an effort to move away from door-to-door selling, the Energy Retailers Association of Australia take a leadership role encouraging and supporting its members to develop alternative, innovative sales and marketing approaches that are better aligned with consumer preferences.

1. INTRODUCTION

For several decades, the practice of door-to-door selling has been an issue that receives special attention in consumer policy and consumer law. This report looks at door-to-door selling in the Victorian retail energy market, examining its role and evolution, its consequences for consumers, and the policy approaches that may minimise detriment without compromising energy market objectives.

About the research

The 2002 introduction of competition into Victoria's energy retail market saw the emergence and growth of door-to-door selling in this industry. As the practice has expanded, consumer and community organisations have heard numerous complaints about door-to-door selling misconduct, particularly in relation to vulnerable consumer groups, and have raised concerns about door-to-door sales practices. A number of research reports have investigated the consumer experience of door-to-door selling, documenting instances of misconduct as well as community attitudes towards this sales channel.

Based on feedback from the consumer and community organisations represented on our Reference Group,[†] the Consumer Utilities Advocacy Centre Ltd (CUAC) identified door-to-door selling as an area for ongoing research and advocacy in our 2011–12 Work Plan. Given that a number of research projects, including previous CUAC work, have focused on describing consumer experiences of the practice, CUAC decided, with this project, to turn its attention instead to the question of what can be done to minimise the consumer detriment associated with door-to-door selling.

Aim

With this research project, CUAC's aim was to evaluate the range of potential policy approaches to door-to-door selling, identifying those approaches most likely to be effective in minimising the detriment to Victorian consumers that arises from the use of door-to-door selling of retail energy. Based on this evaluation of effectiveness, and incorporating consideration of the implications for energy market competition, we developed a set of recommendations which, if implemented, should support wider energy market objectives while minimising the consumer detriment that can result from door-to-door sales.

This project therefore relates in the main to steps four and five of the consumer policymaking process, as described by the Organisation for Economic Cooperation and Development (OECD) in its Consumer Policy Toolkit:¹

1. Define the consumer problem and its source
2. Measure consumer detriment

[†] The CUAC Reference Group is a consultative body that advises CUAC on grassroots consumer issues.

¹ Organisation for Economic Development and Cooperation (2010) *Consumer Policy Toolkit*, OECD: Paris, p. 114.

3. Determine whether consumer detriment warrants a policy action
4. Set policy objective and identify the range of policy actions
5. Evaluate options and select a policy action
6. Develop a policy review process to evaluate the effectiveness of a policy.

Design

This report is based on the findings of a desktop review, guided in part by information gathered in meetings with key policy informants.

Meetings

Early in the project, CUAC arranged meetings with key policy informants to guide the desktop review and provide information about the effectiveness of different policy approaches. A meeting was held with Anne Whitehouse, Chief Executive Officer of the industry self-regulatory scheme Energy Assured. From Consumer Affairs Victoria (CAV), CUAC also met with Ruth Herbert, Acting Manager, Planning and Monitoring, Brian Wearne, General Manager, Planning, Monitoring and Assessment and Gina Papas, Senior Policy Advisor.

Literature Review

The project involved a comprehensive desktop review of door-to-door selling practice and policy approaches over time, both in Australia and overseas. This review aimed to identify the range of policy approaches to door-to-door selling, the effectiveness of those approaches and, to some extent, the drivers of policy change in this area. The review also highlighted patterns or commonalities in the practice of door-to-door selling and the extent and nature of misconduct in different jurisdictions and sectors.

Energy door-to-door selling was the focus of the review, meaning that most discussion of policy approaches overseas is drawn from the United Kingdom (UK), which also has a competitive retail energy market and, until recently, extensive door-to-door energy sales activity. However, given that all door-to-door selling shares some salient characteristics, and given the relative rarity of competitive retail energy markets and, consequently, energy door-to-door selling, the review included door-to-door selling of all types. Since many of the policy approaches applied to door-to-door selling are also tools of consumer policy in other areas, the literature review also incorporated research and policy documents examining the effectiveness of these approaches more broadly, or in other contexts.

The desktop review took in relevant sources of a range of types including:

- government policy documents, regulation and legislation
- academic research from economics, law, social/public policy, sociology and marketing fields
- program evaluations and policy reviews
- consumer information and education materials
- consumer and other non-government organisation documents and publications
- media releases and news reports

- case law
- consumer complaints data
- performance, compliance and audit reports.

A comprehensive bibliography can be found at the end of this report.

Report

The remainder of this report is organised into four chapters. **Chapter 2** provides the context for the rest of the report, explaining door-to-door selling and describing its role and evolution in the Victorian retail energy market. It includes an overview of the theory and evidence about consumer detriment associated with door-to-door energy sales in Victoria.

The remainder of the report deals with a range of potential policy approaches to door-to-door selling, discussing the rationale behind each approach, examples of their use and any evidence of their effectiveness. Based on this analysis, CUAC also sets out its proposals for an improved policy approach to energy door-to-door selling aimed at minimising consumer detriment while supporting competition through effective, informed consumer participation in the retail energy market.

For convenience, this discussion is grouped into three chapters, although this division is to some extent artificial: there are substantial areas of overlap within and between these broad categories. **Chapter 3** deals with consumer law, discussing provisions within the *Australian Consumer Law* (ACL), the *National Energy Customer Framework* (NECF) and the *Code of Conduct for Marketing Retail Energy in Victoria* (the *Energy Marketing Code*). This chapter covers general bans of certain kinds of business behaviour including pressure sales and unconscionable conduct, as well as door-to-door or energy-specific protections relating to, for example, cooling-off periods and information about the agreement. Prohibition of door-to-door sales across economies or in specific sectors is also discussed. **Chapter 4**, on consumer-centred approaches, discusses the range of measures that rely on consumers to protect themselves from potential detriment, covering: education and awareness initiatives; Do Not Knock stickers and signs; No Contact lists and registers and excluded zones. **Chapter 5** addresses industry self-regulatory schemes and unilateral voluntary action.

Finally, **Chapter 6** offers some concluding thoughts about the future of door-to-door selling in the Victorian retail energy market.

2. CONTEXT

Door-to-door selling, a form of direct selling in which a sales agent travels from house to house attempting to sell a product, has played a major role in the development of Victoria's competitive retail energy market. After a decade of customer choice, door-to-door selling remains a major sales channel, used by nearly all retailers to build or maintain market share.

The growth of door-to-door energy sales, however, has been accompanied by growing concern about the potential for consumer detriment, both financial and non-financial. In particular, consumer and community groups, policymakers and regulators have been concerned about the potential for detriment to vulnerable consumers. Despite this concern, there have been few efforts to collect reliable, representative data about the extent of detriment, creating a barrier to policy action to minimise detriment and hindering understanding of the effectiveness of measures already in place.

What is door-to-door selling?

Door-to-door selling is a distinctive form of direct selling in which a sales agent travels from house to house (or business to business), attempting to sell a product or service face-to-face. While some forms of door-to-door selling include prior contact to secure an appointment, energy door-to-door selling in Victoria currently takes the form of unsolicited doorknocking.

Door-to-door selling is the oldest form of direct selling: selling that takes place away from a fixed retail location and generally initiated by the seller. However, while door-to-door shares common features with other forms of direct selling, there are also important differences. In contrast to newer forms of direct selling (party plans and network marketing) which generally focus on low-value consumer products, contemporary door-to-door sales tend to involve larger, one-off purchases of a good or service. Door-to-door sales transactions therefore typically constitute a serious purchasing decision on the part of the consumer.²

The different nature of the services and products sold door-to-door and through other forms of direct selling has shaped both the structure of the high and low value direct selling industries and the types of sales techniques that are employed.³ Most direct selling is done part-time or sporadically by female sales agents who on-sell items they have taken legal title to, choosing their own level of activity and commitment.⁴ In contrast, door-to-door sales agents are predominantly male, tend to work full-time equivalent or longer hours, and are generally paid a commission for each sale, often as their only earnings.⁵

Interestingly, while door-to-door selling is a type of direct selling, direct selling industry associations usually focus largely or wholly on party plan selling and network marketing. As reported by Frost

² Bone, John (2006) *The Hard Sell: An Ethnographic Study of the Direct Selling Industry*, Ashgate: Aldershot, p. 7.

³ *Ibid* p. 8.

⁴ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry in Australia*, Frost & Sullivan, p. 21; Bone (2006) *The Hard Sell*, p. 4.

⁵ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 21; Bone (2006) *The Hard Sell*, p. 6-9.

and Sullivan in their recent study of the door-to-door selling industry for the Australian Competition and Consumer Commission (ACCC), the Direct Selling Association of Australia currently has no members involved (to its knowledge) in unsolicited door-to-door selling.⁶ The same is true of the UK Direct Selling Association.⁷ UK sociologist John Bone suggests that the non-recognition of door-to-door sellers by direct selling associations may relate to the greater aggression of this form of direct selling and the public perception of 'unscrupulous and shady practices.'⁸

Door-to-door selling in the Victorian retail energy market

Door-to-door selling has played a major role in the transformation of the Victorian retail energy market over the past decade – itself a part of a broader, global shift towards a more competitive market environment with accompanying growth in the range and complexity of available products and services. One component of this broader change has been the introduction of competition into markets for essential services, including energy, that were formerly supplied by state-owned, integrated monopoly businesses.

In its 2008 Review of Australia's Consumer Policy Framework, the Productivity Commission (PC) suggested that this change had brought with it productivity gains and consumer benefit, while also creating challenges in terms of high switching costs, complexity, and ensuring access to essential services for vulnerable and disadvantaged consumers.⁹ Before liberalisation, energy consumers were required to make few, if any, decisions. Contrastingly, energy consumers today face a complex marketplace characterised by a diversity of retailers offering a range of often complicated products that can be difficult to compare.¹⁰ It is in this environment that door-to-door selling has come to be a major mechanism by which consumers make decisions about their energy supply.

Development of the Victorian retail energy market

The move towards energy market liberalisation in Australia began in earnest in the early 1990s. A 1991 Industry Commission report recommended major reforms to energy generation and distribution. This was closely followed, in 1992, by the report of the wide-ranging *Committee of Inquiry into a National Competition Policy for Australia* (the Hilmer Review). The Hilmer Review went even further, recommending reform across the energy sector including both wholesale and retail.

Victoria was the first jurisdiction to begin implementation of such reforms. In preparation for privatisation, the early 1990s saw the corporatisation and structural separation of energy businesses, alongside the development of a new regulatory regime. The sector was progressively privatised throughout the latter part of the decade, beginning with generation and transmission and ending with retail. Initially, retail was split into five businesses, each operating in a separate distribution network area.¹¹

⁶ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 21.

⁷ Bone (2006) *The Hard Sell*, p. 5.

⁸ *Ibid* p. 9.

⁹ Australian Government Productivity Commission (2008) *Review of Australia's Consumer Policy Framework, Volume 2 – Chapters and Appendixes*, Commonwealth of Australia: Canberra, p. 7.

¹⁰ OECD (2010) *Consumer Policy Toolkit*, p. 16-17.

¹¹ Australian Energy Regulator (2007) *State of the Energy Market 2007*, Commonwealth of Australia: Canberra, p. 173.

Full retail contestability and the emerging role of door-to-door selling

Subsequently, the retail sector was opened to competition and new entrants, including both new retailers and those already established in other states, joined Victoria's 'host' retailers. By 2002, full retail contestability (FRC) was in place, with industrial, business and residential customers able to choose among retailers and offers (although retail price regulation remained in place).

While customers were able to choose, however, few were inclined to pro-actively exercise this choice. Instead, retailers began directly approaching customers. **Table 1**, below, shows that in the first year of FRC, customers were far more likely to be approached by a retailer with an offer than to contact the retailer themselves. While the frequency of both activities increased markedly over the next five years, the overall ratio remained roughly similar.

Table 1: Residential customer perceptions of competition, Victoria

Indicator	2002	2004	2007
Customers aware of choice	n/a	90%	94%
Customers receiving at least one retail offer	17%	33%	73%
Customers approaching retailers about taking out market contracts	3%	8%	10%

Source: Australian Energy Regulator (2008) *State of the Energy Market 2008*, Commonwealth of Australia: Canberra, p. 185.

In this newly competitive environment, door-to-door selling immediately emerged as an important means by which incumbent retailers sought to maintain market share and new entrants attempted to gain a foothold in the market. Energy and Water Ombudsman (Victoria) (EWOV) data show that door-to-door sales (and associated complaints) have been a feature of the market since the earliest days of FRC.¹²

Effective competition

By 2006, Victoria's small customer switching rate – that is, the proportion of small customers who changed retailer during the year – had reached 23 per cent,¹³ with this figure remaining steady the following year.¹⁴ This switching activity led to an increase in the customer base of new entrant retailers, which more than doubled their combined small customer market share from five per cent to 13 per cent between 2004 and 2006.¹⁵ By June 2007, the new entrants had captured one fifth of the small customer market.¹⁶ On the basis of this comparatively high level of switching, in 2006 Finnish think-tank VaasaEMG classified Victoria's energy market (along with Great Britain's) as the world's 'hottest'.¹⁷

Under the 2004 Australian Energy Market Agreement, Australian governments had agreed to review and remove retail price caps once 'effective competition' was achieved in states and territories' retail markets. The Australian Energy Market Commission (AEMC) was tasked with the

¹² Energy and Water Ombudsman (Victoria) (2002), *Annual Report 2002*, EWOV: Melbourne, p. 7-8.

¹³ AER (2007) *State of the Energy Market 2007*, p. 185.

¹⁴ Australian Energy Regulator (2008) *State of the Energy Market 2008*, Commonwealth of Australia: Canberra, p. 183.

¹⁵ AER (2007) *State of the Energy Market 2007*, p. 173.

¹⁶ AER (2008) *State of the Energy Market 2008*, p. 171.

¹⁷ AER (2007) *State of the Energy Market 2007*, p. 185.

role of assessing competition effectiveness in each jurisdiction, with Victoria the first to be assessed. In 2007, the AEMC conducted its *Review of the Effectiveness of Competition in the Electricity and Gas Retail Markets – Victoria*, finding that competition in Victoria was indeed effective. In coming to this finding, the AEMC placed a striking and heavy emphasis on the critical role of door-to-door selling, along with telesales.

The Review identified two key areas of evidence supporting the Commission's conclusion that effective competition was in place; both related to door-to-door selling activity. Firstly, it argued that evidence about customer behaviour – namely, that customers demonstrated 'a clear willingness to participate in the competitive retail market *if approach directly by a retailer*'¹⁸ [emphasis added] – supported its conclusion. Secondly, the AEMC held up evidence of strong retailer rivalry, primarily in the form of 'vigorous marketing rivalry,' as a marker of competition effectiveness.¹⁹ In a retailer survey conducted for the AEMC review, door-to-door selling was the only sales and marketing channel that both host and incumbent retailers rated as 'highly effective' in attracting residential customers.²⁰

In foregrounding the role of door-to-door selling and telesales in this way, the AEMC was explicit in its reasoning. Energy, the Commission argued, was a 'relatively low involvement' and undifferentiated product and consumers were uninterested in searching for the best deal or analysing the market.²¹ Indeed, its customer survey, conducted as part of the review, found that many customers lacked a strong interest in energy and 'in the absence of an active approach to marketing by retailers, are unlikely to be motivated to search for superior energy contract prices and conditions.'²²

The AEMC's finding that effective competition was in place cleared the way for retail price deregulation, which was legislated for in September 2008 and implemented in January 2009. The removal of price controls created greater scope for differentiation and therefore market activity. It appears that price deregulation also created more opportunities for errors and disputes to occur. In the 2008-09 financial year (including the first six months of price deregulation), EWOV energy case numbers jumped an astonishing 54 per cent over 2007-08 figures, the largest year-on-year increase in EWOV's operation.²³

The Victorian retail energy market today

Today, Victoria's retail energy market is still widely considered to be the world's most competitive, largely on the basis of its comparatively high switching rate. The 2012 VaasaETT *World Energy Retail Market Rankings Report* classified Victoria's retail energy market as 'super hot,' describing it as 'the most active market of all time.'²⁴ In 2010-11 there were 4.4 million electricity and gas

¹⁸ Australian Energy Market Commission (2007), *Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria – First Final Report*, AEMC: Sydney, p. ix.

¹⁹ *Ibid* p. ix.

²⁰ *Ibid*, p. 65-66.

²¹ AEMC (2007) *Review of the Effectiveness of Competition*, p. viii.

²² *Ibid*, p. 6.

²³ CUAC analysis of EWOV Annual Reports from 2001-present.

²⁴ Lewis, Phillip E. et al (2012) *World Energy Retail Market Rankings 2012*, VaasaETT: Helsinki, p. 2.

customers in Victoria, of whom approximately 1 million changed retailer during that year.²⁵ New entrants' small customer market share had also increased further, reaching 30 per cent in mid 2010.²⁶

Prevalence of door-to-door selling

The Victorian energy market has seen significant change since the 2007 AEMC *Review of Competition Effectiveness* and retail price deregulation, including the growth of third-party switching sites. Nonetheless, door-to-door selling continues to be a critical driver of switching activity, and therefore a central plank of retail competition. Based on registration figures from Energy Assured, in October 2012 there were approximately 1,181 registered sales agents selling energy door-to-door in Victoria.²⁷ A recent estimate is that 55 per cent of residential energy sales occur through the door-to-door channel.²⁸ Considered in another way, energy accounts for around three quarters of all door-to-door sales in Australia.²⁹

By and large, retailers continue to see door-to-door sales as a necessity, with almost all energy retailers operating in Victoria continuing to use the channel. All but two second-tier retailers rely at least partially on door-to-door sales to win customers. The exceptions to this rule are Click Energy and Dodo Power and Gas, and for both of these avoiding door-to-door appears to be a deliberate strategy flowing directly from their overall business model. Click Energy operates online and therefore eschews door-to-door selling. Dodo Power and Gas has used its own public disavowal of door-to-door selling as a marketing strategy, capitalising on community dissatisfaction by running television advertisements parodying door-to-door sales practices and encouraging consumers to "say no to door-knockers!"³⁰

Interestingly, although door-to-door sales are often presented as being particularly crucial to second-tier retailers who would otherwise struggle to gain a 'critical mass' of customers,³¹ this sales channel is also utilised by all three of Victoria's tier one (incumbent) retailers. Indeed, these large retailers (Origin Energy, AGL Energy and TRUenergy[†]) also engage, via third parties, some of the state's biggest door-to-door salesforces and smaller marketing companies.³² Origin Energy, with 24 per cent residential customer market share,³³ has combined the use of door-to-door sales with efforts to insulate its customers from the marketing efforts of other retailers by distributing Do Not Knock stickers to its existing customers (Appendix A).

²⁵ Essential Services Commission (2012f) *2010-11 Compliance Report: Energy Retail Businesses - April 2012*, ESC: Melbourne, p. 7.

²⁶ Australian Energy Regulator (2011a) *State of the Energy Market 2011*, Commonwealth of Australia: Canberra, p. 106.

²⁷ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 31.

²⁸ *Ibid*, p. 26.

²⁹ *Ibid*, p. 25.

³⁰ Dodo Power and Gas, 'Dodo Backs ACCC Action And Says "No" to Door Knockers,' Media Release, 17 May 2012.

³¹ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 28.

[†] In a recent change, TRUenergy is now EnergyAustralia. However, because most of the evidence we have used refers to TRUenergy, we have also referred to TRUenergy throughout the report.

³² Advice to CUAC from Anne Whitehouse, CEO, Energy Assured, 21 September 2012.

³³ CUAC calculation based on figures in ESC (2012d) *Energy Retailers Comparative Performance Report – Pricing: 2011-12*, ESC: Melbourne, p. 11.

Table 2: Use of door-to-door sales by retailers operating in Victoria

Using door-to-door sales	Not using door-to-door sales
<ul style="list-style-type: none"> • AGL Energy (including PowerDirect) • Australian Power and Gas • Lumo Energy • Neighbourhood Energy • Origin Energy • Red Energy • Simply Energy • TRUenergy • Momentum Energy • Energy Australia 	<ul style="list-style-type: none"> • Dodo Power and Gas • Click Energy

Source: Advice to CUAC from Anne Whitehouse, CEO, Energy Assured, 21 September 2012.

This level of door-to-door selling activity means that the experience of door-to-door sales is a common one for consumers. In their 2012 report, Frost & Sullivan estimate that an average of around 2.8 per cent of Australian households are doorknocked by sales agents (in any sector) each day, totalling an average of approximately eight visits[†] per household, per year. They note that in Victoria and NSW this average will be higher due to vigorous energy sales activity in those states.³⁴ These figures accord with those in a 2011 CUAC survey of around 300 Victorian consumers, which also found that energy door-to-door selling was a common experience. Of the sample, 81 per cent reported having been approached by an energy door-to-door sales agent while at home at least once – most often between three and five times – during the previous two years.³⁵

Industry structure

With the exception of Red Energy, which maintains an in-house sales force, energy retailers outsource the door-to-door selling function. Frost & Sullivan estimate that there are around 35 companies providing door-to-door selling services in Australia, many operating across states, and a number with offices in Victoria.³⁶ These companies often offer door-to-door selling as one of a range of marketing and selling services.³⁷ Contracts with door-to-door selling companies typically set out Key Performance Indicators and cover a two-year period.³⁸ Door-to-door selling companies and the trader tend to work closely together, with the trader providing training and marketing materials, determining geographical areas to be targeted and managing verification calls.³⁹

Door-to-door sales agents are typically independent contractors who are paid on a commission-only basis. They are often engaged through a third party sub-contractor rather than the marketing company itself.⁴⁰ Less commonly, sales agents are employed full-time or part-time and receive

[†] Elsewhere in the report it is estimated that a potential customer is present at home for roughly 45% of these visits.

³⁴ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 13.

³⁵ Consumer Utilities Advocacy Centre (2012) *The consumer experience of door-to-door energy sales in Victoria: Findings from a CUAC survey* – CUAC Policy Issues Paper, February 2012, CUAC: Melbourne, p.1.

³⁶ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 35, 44.

³⁷ *Ibid*, p. 41.

³⁸ *Ibid*, p. 42.

³⁹ *Ibid*, p. 41.

⁴⁰ *Ibid*, p. 43.

commissions on top of a base salary, or are engaged through and paid by a labour hire company.⁴¹

Future trends

In their study of Australia’s door-to-door selling industry, Frost & Sullivan conclude that energy market trends and the restriction of alternative sales channels (namely telesales) will continue to stimulate door-to-door sales activity.⁴² The wide-scale introduction of flexible (time-of-use) retail pricing from July 2013 may also spur further increases in market activity, including door-to-door sales, in Victoria. Flexible pricing offers will be more complex for consumers to understand and have the potential to cause financial detriment and bill shock if selected inappropriately. Hence, door-to-door selling of these products can be expected to present new challenges.

Door-to-door selling and consumer detriment

The emergence and growth of door-to-door selling in Victoria’s retail energy market has been accompanied by increasing concern about associated consumer detriment. Consumer vulnerability can be heightened in the door-to-door sales context⁴³ and hence, door-to-door selling is generally considered to carry a higher risk of consumer detriment than other types of transaction.⁴⁴

Types of detriment

The detriment that can accompany door-to-door sales is both financial and non-financial, and can accrue both to consumers who make a purchase and to those who are exposed to the sales practice but do not conclude a transaction. **Table 3**, below, summarises the main types of financial and non-financial detriment that can be associated with door-to-door sales practices.

Table 3: Types of detriment associated with door-to-door sales

Financial	Non-financial
<ul style="list-style-type: none"> • Inappropriate offer leading to: <ul style="list-style-type: none"> ○ Paying more than necessary for service and/or ○ Paying more than previously for service • Exit fees 	<ul style="list-style-type: none"> • Time loss arising from: <ul style="list-style-type: none"> ○ Sending sales agents away ○ Listening to unwanted sales presentations ○ Making a complaint ○ Reversing a wrongful transfer or cancelling a legitimate but unwanted contract during cooling-off period • Stress and annoyance arising from same factors listed above

Financial detriment

Energy consumers who switch most often do so with the aim of obtaining a lower price,⁴⁵ and ideally, a consumer who accepts a door-to-door sales offer will benefit financially from this switching decision. This outcome, however, is not guaranteed: door-to-door sales can also cause

⁴¹ *Ibid*, p. 41

⁴² *Ibid*, p. 45-6 and 78.

⁴³ OECD, *Consumer Policy Toolkit*, p. 55.

⁴⁴ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 17.

⁴⁵ Consumer Utilities Advocacy Centre (2011a) *Improving energy market competition through consumer participation*, CUAC: Melbourne, p. 64; AEMC (2007) *Review of the Effectiveness of Competition*, p. 98.

financial detriment where an inappropriate offer is selected. This may see a consumer paying more than necessary, or more than previously, for energy supply. A customer accepting a door-to-door sales offer may also be charged an exit or termination fee by their existing supplier, potentially compounding this financial loss, or outweighing any savings from a switch.

Quality information is crucial to good consumer choices in any market, and limited or deceptive information can lead to decisions which cause financial detriment.⁴⁶ This issue is pertinent to door-to-door selling because of the particular information environment it creates. Door-to-door selling precludes comparative shopping, creating a 'temporary' or 'situational' monopoly in which the customer is reliant on information provided by the sales agent and the seller has a unique opportunity to influence a consumer's decision.⁴⁷ Hence, there have been reports of cases⁴⁸ where goods have been sold door-to-door at prices more than twice as high as those for comparable goods in retail stores – a phenomenon most easily interpreted as 'a monopoly rent, earned by a supplier due to the particular selling procedure' used.⁴⁹

The essential nature of energy may mean that in contrast to some goods and services sold door-to-door, the majority of consumers have some sense of how much it should cost,[†] making such monopoly rents unlikely in the sector. Nevertheless, without access to more complete information including the offers of other suppliers, it would seem that energy consumers in a door-to-door sales situation are less likely to select a deal that is the most appropriate for their circumstances. This will be the case even if the information provided by the sales agent is accurate and understood by the consumer. If misleading or deceptive information is given (such as false claims that a special discount will be applied), the potential for detriment arising from the situational monopoly of door-to-door sales is even greater.

In its report on the door-to-door selling industry, Frost & Sullivan suggest that potential for financial detriment in the information environment of door-to-door sales is arguably increased with goods or services that require 'special technical understanding' or involve complex contracts and ongoing financial commitment.⁵⁰ This is certainly true of retail energy products, the complexity of which can be expected to intensify when Victoria sees the wider introduction of flexible pricing in 2013.

Non-financial detriment

Types of non-financial detriment associated with door-to-door sales include time loss and emotional costs such as annoyance and stress. In contrast to financial detriment from door-to-door sales, which has the potential to arise only where an offer is accepted, non-financial detriment can be incurred regardless of whether or not a sale is concluded, at most stages of the door-to-door sales 'pipeline.'

⁴⁶ OECD (2010) *Consumer Policy Toolkit*, p. 37.

⁴⁷ Duggan, Anthony (1973) 'The Cooling Off Period in Victorian Door-to-Door Sales Regulation,' *Melbourne University Law Review* 9, p. 134; OECD (2010) *Consumer Policy Toolkit*, p. 89.

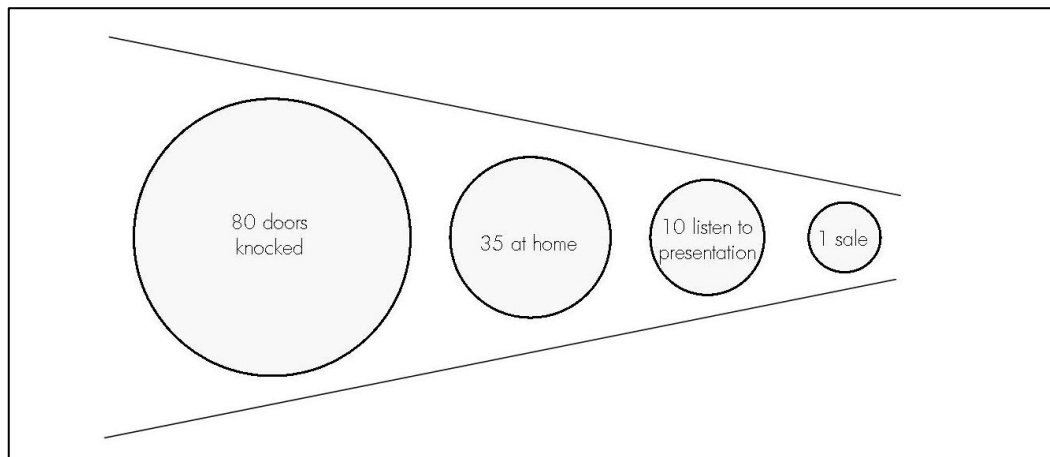
⁴⁸ See, for example: Office of Fair Trading (UK) (2004) *Doorstep selling: A report on the market study*, OFT: London, p. 9.

⁴⁹ Rekaiti, Pamaria and Roger Van den Bergh (2000) 'Cooling-off Periods in the Consumer Laws of the EC Member States – A Comparative Law and Economics Approach,' *Journal of Consumer Policy* 23, p. 378-9.

[†] Although this is likely to be conceptualised in terms of quarterly bills rather than, for example, cents per kilowatt hour.

⁵⁰ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p.17.

Figure 1: Door-to-door sales pipeline



Source: Adapted from Frost and Sullivan (2012) *Research into the door-to-door sales industry*, p. 48.

Those consumers who come to the door but decline to listen to a sales presentation, for example, will lose some time dealing with the sales agent, and may find this interruption annoying or intrusive. Those who listen to a presentation but do not make a purchase are likely to spend more time on the interaction, and, particularly if the sales agent has used high pressure sales techniques, may find the experience distressing or annoying, as might a consumer who accepts the offer. If, at any of these points, the consumer decides to make a complaint about a sales agent's behaviour, this will mean additional time loss.

It is noteworthy that a consumer's experience of non-financial detriment may be largely or entirely involuntary. Discussing policy responses to intrusive telesales in the USA, Redmond argues that most consumers would not knowingly answer a telesales call and that therefore telesales 'differs fundamentally' from types of marketing to which exposure is voluntary.⁵¹ This involuntary exposure similarly characterises unsolicited door-to-door selling.

Misconduct

The likelihood that a door-to-door sales interaction will cause detriment increases if the sales agent employs pressure selling tactics or makes misleading or deceptive claims.

Door-to-door selling has a number of intrinsic features that mean many consumers feel pressured to buy. Firstly, door-to-door selling inseparably links the functions of promotion and sale, thereby generating an 'emphasis on the need to persuade.'⁵² Secondly, the industry's employment and payment practices encourage pressure sales. Both historically and in the present, sales agents in the door-to-door sales industry are most often independent contractors who are paid either wholly or partly on a commission basis, meaning that their income is dependent upon their success in persuading consumers to purchase. Hence, door-to-door sales agents employ a range of specific sales tactics and influencing techniques, documented in a number of studies,⁵³ that can be very

⁵¹ Redmond, William H. (2005) 'Intrusive Promotion as Market Failure: How Should Society Impact Marketing?', *Journal of Macromarketing* 25(1), p. 20.

⁵² Duggan (1973) 'The Cooling Off Period,' p. 134.

⁵³ See, for example: OFT (UK) (2004) *Doorstep selling*; Bone (2006) *The Hard Sell*; Frost and Sullivan (2012) *Research into the door-to-door sales industry*.

effective in securing sales.⁵⁴ The use of such techniques may amount to harassment, coercion or unconscionable conduct prohibited under the ACL, but it is important to note that sales techniques may cause consumers to feel pressured or uncomfortable without being illegal.

The fact that door-to-door sales occur within consumers' homes may amplify the perception of pressure for consumers. The home is an environment that differs in important ways from ordinary retail environments. While consumers can fairly easily depart a retail store, they cannot leave their homes and instead must ask the sales agent to leave. Homes also have a particular psychological significance. For occupants, a transaction within the home feels less impersonal than one in a shop environment, while for skilled sales agents, information gleaned from the home surroundings is often used to identify the seller with the consumer, mimicking similarity to create trust.⁵⁵

Unsurprisingly then, research has tended to find that consumers report greater feelings of pressure in door-to-door as compared to other selling environments. A large 2011 Consumer Focus (UK) survey asked consumers in which of a range of sales channels they felt most under pressure to buy: 44 per cent identified door-to-door sales as the highest-pressure environment, followed by 27 per cent nominating telesales and 22 face-to-face street sales.⁵⁶ Similarly, an earlier customer survey conducted by the UK Office of Fair Trading (OFT) found that 34 per cent of surveyed consumers who had made door-to-door purchases felt under pressure when buying, while 85 per cent of consumers who would not purchase door-to-door felt that it involved more pressure than buying in other settings.⁵⁷ The OFT concluded that 'the combination of the home environment and face-to face interaction with a sales person creates a setting that is intrinsically different from other selling situations.'⁵⁸

The same features of door-to-door selling that encourage pressure sales – namely the need to persuade and the commission pay structure – also create the conditions in which misleading and deceptive conduct can occur. Similarly, another corollary of selling in the home is that, unlike a retail space, sales agents are not subject to any direct supervision or monitoring from managers or other staff. This lack of oversight opens the door for sales agents to make deceptive or misleading claims in order to make a sale.

In their 2007 report on consumer experiences, the Consumer Action Law Centre (Consumer Action) and the Financial and Consumer Rights Council (FCRC) argued that door-to-door selling, particularly where commissions are paid, 'inherently involves high pressure sales tactics.'⁵⁹ Certainly, there are always strong incentives for sales agents to employ pressure sales techniques, and to provide misleading information. This has been acknowledged by the ACCC which, in a recent determination regarding a self-regulatory scheme on door-to-door energy sales, noted that

⁵⁴ OFT (UK) (2004) *Doorstep selling*, p. 8.

⁵⁵ *Ibid*, p. 33, 49.

⁵⁶ Consumer Focus (UK) (2011 a) *The end of the road: Energy consumers' experiences with doorstep sellers*, Consumer Focus: London.

⁵⁷ OFT (UK) (2004) *Doorstep selling*, p. 33.

⁵⁸ *Ibid*, p. 34.

⁵⁹ Consumer Action Law Centre and the Financial and Consumer Rights Council (2007) *Coercion and harassment at the door: Consumer experiences with energy direct marketers*, CALC: Melbourne, p. 2.

commission-based sales create a conflict of interest that can result in conduct that causes detriment to consumers.⁶⁰

Vulnerable consumers

Although consumers can be vulnerable to detriment at some times and in some contexts – such as in the door-to-door sales environment – for some consumers, vulnerability is more persistent. While cautioning that care must be taken to avoid over-generalising, the OECD identifies the groups in **Figure 2** as potentially vulnerable (or disadvantaged). In many cases, compared to other consumers, those in these groups will be at a greater risk of detriment in a door-to-door sales environment.

Figure 2: Vulnerable or disadvantaged consumer groups

- Targets of discrimination (e.g. racial, ethnic or gender)
- Low education or literacy levels
- Language limitations. This concerns an individual's inability to speak, read, or write in the language of normal communication in a given country.
- Immigrants and other outsiders who do not have local knowledge (e.g. about consumer rights) and therefore may not be able to function effectively in the marketplace.
- Impaired vision, hearing, or mobility.
- Learning difficulties or cognitive impairment, such as dementia.
- Restricted mobility. Access to markets may be limited to persons without adequate transport.
- Restricted means of communication. This concerns lack of access to telephone or, for example, internet services.
- Geographical remoteness.
- Unemployment.
- Low income. Low income is frequently correlated with other types of vulnerability, such as being unemployed, retired, not working in order to care for a child or sick relative, or being otherwise unable to work. Low income could increase the impact of adverse events, as could limited savings or wealth.

Source: OECD (2010) *Consumer Policy Toolkit*, p. 55-56.

The experiences of vulnerable consumers with energy door-to-door sales have been documented in a number of consumer and community organisation reports in recent years. Consumer Action and FCRC's 2007 report on consumer experiences collated 28 case studies from consumers who had sought assistance from a financial counsellor, several of whom were elderly, from non-English speaking backgrounds, or had poor literacy and numeracy skills.⁶¹ The report argued that in many cases, vulnerable consumers were unable to meaningfully consent to energy market contracts because they struggled with the complex nature of the transaction.⁶²

In 2009, the Footscray Community Legal Centre (FCLC) published case study research into African migrants' experiences with the contestable energy market. This report identified door-to-door selling

⁶⁰ ACCC (2011c) *Determination: Applications for authorisation lodged by Energy Assured Limited in respect of a scheme to self regulate door to door energy sales*, Public Register No. C2010/970, ACCC: Canberra, p. 21.

⁶¹ CALC & FCRC (2007) *Coercion and harassment at the door*, p. 23-27.

⁶² *Ibid*, p.29.

and telesales as one of two major issues facing this group of consumers.⁶³ Like Consumer Action and the FCRC, the FCLC argued that many vulnerable consumers, including many refugees and new migrants, very elderly persons and those with an intellectual disability, were incapable of giving explicit informed consent in direct selling situations.⁶⁴ FCLC clients from the African communities were particularly susceptible to misleading claims (such as that the door-to-door seller was from the government) and, if they spoke very little English, found it difficult to communicate with utility companies.⁶⁵ For such consumers unable to cope with aggressive selling practices, the outcome was often frequent transfers, 'confusion as to the identity of the intended or preferred supplier, multiple accounts and bills and significant debts.'⁶⁶

More recently, a 2011 CUAC research project investigated the experiences of Victorian Aboriginal consumers of energy and water, primarily through discussion groups held with Aboriginal consumers, service providers and advocates. CUAC heard that, for cultural and historical reasons, many Aboriginal people are reluctant to assert themselves and tend to agree with propositions put to them – this was referred to as 'the yeah, yeah, yeah factor.' Some Aboriginal consumers' low literacy and numeracy skills also meant they were unable to understand complex energy market contracts. Such factors made Aboriginal consumers particularly vulnerable to door-to-door energy sales practices, about which participants in the research repeatedly expressed their frustration. Many recounted stories of Aboriginal consumers accepting offers that they did not understand and that were not in their interests. Others described instances of intimidating sales practices and agents' refusal to leave when asked.⁶⁷

Assessing the extent of consumer detriment

Because there are different ways in which door-to-door sales can lead to different types of consumer detriment, assessing its extent requires various types of data. In most cases, however, firm data is not available. Instead, policymakers, consumer advocates and other stakeholders have had to make inferences about the level of detriment based on imperfect information such as complaints data.

Measuring financial detriment

While complaints data gives some sense of the extent of detriment resulting from misleading and deceptive conduct, pressure sales and transfer without consent, they shed very little light on the financial consequences of door-to-door sales switching decisions for consumers. Hence, it is unknown to what extent consumers who switch in this environment benefit or otherwise from those decisions.

It is noteworthy, however, that those retailers with the most extensive door-to-door sales activity also tend to be the retailers with more expensive market offers. Victoria's three largest electricity retailers (AGL, Origin and TRUenergy) have some of the largest door-to-door sales forces. At the same time,

⁶³ Footscray Community Legal Centre and the Financial Counselling Service Inc. (2009) *The African Consumer Experience of the Contestable Energy Market in the West of Melbourne*, FCLC: Melbourne, p. 10.

⁶⁴ *Ibid*, p. 10.

⁶⁵ *Ibid*, p. 8.

⁶⁶ *Ibid*, p. 10.

⁶⁷ Consumer Utilities Advocacy Centre (2011b) *Wein, Paen, Ya Ang Gim: Victorian Aboriginal Experiences of Energy and Water*, CUAC: Melbourne, p. 105.

according to the Essential Services Commission (ESC), although the discounted market offers of Origin are occasionally the cheapest, AGL and TRUenergy discounted market offers are among the most expensive of all retailers.⁶⁸ Dodo Power & Gas, one of only two retailers that does not sell door-to-door, most often had the lowest prices.⁶⁹ Consumers switching door-to-door may nonetheless make savings by, for example, accessing a special discount or moving from a standing to a market offer. Nonetheless, it seems likely that many consumers who make switching decisions in the door-to-door sales environment are doing so without the comprehensive information that might facilitate them making the best choice for their circumstances.

While not assessing the actual financial impact of door-to-door switching decisions, CUAC's 2011 consumer survey investigated consumers' subjective evaluations of switching decisions. The survey found that switchers who had accepted a door-to-door sales or telesales offer tended to be less confident than 'proactive' switchers (who had sought out an offer) in having chosen the best deal for their circumstances. Several respondents also commented on the difficulty of making a considered decision in the door-to-door sales environment, comparing it unfavourably to other approaches.⁷⁰ Similarly, a 2012 CHOICE survey of 1,020 Australian energy consumers found that 55 per cent of those who switched in response to a direct selling offer (telesales or door-to-door selling) were not confident that they had made the best choice, compared to 48 per cent of switchers as a whole.⁷¹ In a 2012 Consumer Action survey of 1,014 consumers, one-third of those who had made a purchase at the door later thought it was a bad deal.⁷²

Overseas, research has highlighted the potential for door-to-door sales to result in financial detriment for a large proportion of consumers. A study by the UK energy regulator Ofgem in 2008 found that 'as many as one third of switchers' in the market were not achieving a price reduction, with the proportion even higher for customers switching as a result of a direct sales approach. According to the research, 42 per cent of electricity customers and 48 per cent of gas customers who switched supplier in response to a direct sales offer were actually made financially worse off by the change.⁷³ This was despite the fact that 80 per cent of those consumers had switched on the basis of claims that the new supplier would be less expensive than the existing supplier.⁷⁴

While no analogous research has been conducted in Victoria or other Australian jurisdictions, this finding certainly gives cause for doubt that all Victorian consumers in similar circumstances are necessarily moving onto a better deal, let alone the *best* deal, via their door-to-door sales transactions. Reliable data about the financial outcomes of door-to-door sales switching decisions would contribute enormously to our understanding of both door-to-door energy sales and the functioning of the retail energy market more broadly.

⁶⁸ Essential Services Commission (2012c) *Energy Retailers Comparative Performance Report – Pricing: 2011-12*, ESC: Melbourne, p. 50.

⁶⁹ *Ibid*, p. 50.

⁷⁰ CUAC (2012) *The consumer experience of door-to-door energy sales*.

⁷¹ CHOICE (2012a) 'Energy Retailers' Marketing Tactics,' CHOICE website.

⁷² Consumer Action Law Centre (2012b) *Door-to-Door Sales: Consumer Views*, CALC: Melbourne, p. 2.

⁷³ Ofgem (2008) *Energy Supply Probe – Initial Findings Report*, Ofgem: London, p. 7.

⁷⁴ Ofgem (2009) *Energy Supply Probe – Proposed Retail Market Remedies*, Ofgem: London, p. 22.

Measuring non-financial detriment

As noted above, non-financial detriment can be incurred at most stages of the door-to-door sales pipeline, and the possibility of non-financial detriment is not restricted only to customers who switch at the door. To CUAC's knowledge, no research has attempted to measure the amount of consumer time lost in sending sales agents away and listening to unwanted sales pitches, nor to rate the precise level of annoyance or distress experienced.

Data about community opinions on door-to-door selling is, however, an appropriate proxy measure for this type of relatively minor non-financial detriment. If consumers dislike door-to-door sales, this presumably reflects some experience of detriment. Several consumer surveys, in Australia and overseas, have asked consumers about their general perceptions of, and attitudes towards, door-to-door selling generally or energy door-to-door sales in particular.

In CUAC's own 2011 consumer survey, respondents who had been approached by a door-to-door sales agent at least once in the previous two years were asked to evaluate their overall experience. Nearly three-quarters of respondents described the experience as 'somewhat negative' (36%) or 'very negative' (37%). Only eight per cent reported a 'somewhat positive' (7%) or 'very positive' (1%) experience, and the remainder (19%) described it as 'neutral'.⁷⁵ In a similar result, a Consumer Action survey of 1,014 consumers in January 2012 found that 77 per cent stated unequivocally that they had a negative opinion of unsolicited door-to-door sales while only three per cent reported positive views.⁷⁶

Remarkably similar consumer views have been reported in the UK. Consumer Focus' 2011 survey of 1,008 consumers across Great Britain found that only three per cent of consumers had a positive view of any type of door-to-door sales, down from nine per cent in an earlier (2009) survey. With regard to energy specifically, four per cent of consumers had a positive view while 79 per cent reported negative views.⁷⁷

Consumer regulators may be tempted to minimise or dismiss negative consumer views towards door-to-door selling, seeing low-level detriment in the form of annoyance and time-loss as an insignificant issue. However, it should be remembered that this type of detriment, while fairly minor, is also pervasive. Discussing potential policy approaches to intrusive telesales in the United States, Redmond canvasses one unusual possibility: the creation of a 'market for annoyance.' In doing so, he argues that theoretically:

The cost per annoyed individual is approximated by the amount of money that would just serve to induce the nonconsumer [i.e. one who does not make a purchase] to answer a call that he or she knew to be from a telemarketer. This could range from a fraction of a dollar for someone with little else to do up to several dollars for someone preoccupied with, say, dinner or a movie.⁷⁸

Estimating an average amount of 75 cents and a ratio of annoyed individuals to purchasers of 1:99, Redmond suggests that a market for telesales annoyance is probably infeasible because

⁷⁵ CUAC (2012) *The consumer experience of door-to-door energy sales*, p. 4.

⁷⁶ CALC (2012b) *Door-to-Door Sales*, p. 1.

⁷⁷ Consumer Focus (UK) (2011a) *The end of the road*, p. 3.

⁷⁸ Redmond (2005) 'Intrusive Promotion as Market Failure,' p. 19.

under his assumptions, no efficient market exists.⁷⁹ Although CUAC is certainly not suggesting the creation of a market for door-to-door sales annoyance rights, we believe that particularly when considering the cost of different policy approaches to minimising such detriment, policy makers should bear in mind that pervasive, low-level detriment from unwanted door-to-door sales is not costless, and many consumers would likely be willing to pay a small amount to avoid it.

Assessing the extent of misconduct

As noted above, the potential for serious detriment to arise from a door-to-door sales interaction is greater where sales agents make misleading or deceptive claims or apply very high-pressure sales techniques. Hence, some measure of the extent of such misconduct would add greatly to our understanding of consumer detriment and energy door-to-door sales.

One way of measuring some of the detriment from door-to-door selling is to examine related consumer complaints data, including EWOV case numbers. As noted above, EWOV began receiving cases about door-to-door selling activity with the introduction of FRC in 2002. Unfortunately, EWOV's reporting on these cases does not allow door-to-door selling cases to be separately identified. These cases are spread across the 'Transfer' and 'Market conduct'/'Marketing' categories, both of which also include cases unrelated to door-to-door selling. EWOV case categories and sub-categories have changed over time, as have the distinctions between different types of 'case' (complaints, enquiries, etc.) and the reporting of 'cases' versus 'issues'. Nonetheless, an analysis of EWOV data does allow some insight into the nature, extent and trajectory of door-to-door related complaints. **Table 4** below summarises EWOV Annual Report data and commentary relating to door-to-door selling for the ten year period 2002 to 2011.

⁷⁹ *Ibid*, p. 19.

Table 4: Door-to-door related EWOV cases and commentary, 2002 to 2011

Year	Cases	Commentary
2002	<ul style="list-style-type: none"> 38 electricity Market Conduct cases 217 Transfer cases 	<ul style="list-style-type: none"> Allegations of door-to-door pressure sales, false claims, failure to inform of cooling-off rights, failure to identify retailer represented, and failure to disclose prices, fees and charges.
2003	<ul style="list-style-type: none"> 448 energy Market Conduct cases 1201 energy Transfer cases 	<ul style="list-style-type: none"> Systemic compliance issues relating to FRC include energy retailers' marketing practices.
2004	<ul style="list-style-type: none"> 405 energy Market Conduct cases (of which 200 Door-to-Door Sales) 1338 energy Transfer cases 	<ul style="list-style-type: none"> Transfer without explicit informed consent the most common FRC-related case issue, with marketing to non-account holders also occurring.
2005	<ul style="list-style-type: none"> 2,129 energy Transfer cases 855 energy Market Conduct cases (of which 470 Door-to-Door Sales) 	<ul style="list-style-type: none"> EWOV market cases prompted an investigation into misleading and deceptive conduct and pressure sales, leading to a retailer's enforceable undertaking to CAV. Marketing to non-account holders a systemic issue.
2006	<ul style="list-style-type: none"> 2,143 energy Transfer cases 1,055 Marketing cases (of which 389 Door to Door Sales) 	<ul style="list-style-type: none"> 5 per cent of cases were about sales and marketing, including pressure sales, transfer without consent, misleading and deceptive conduct and information provision.
2007	<ul style="list-style-type: none"> 1,549 energy Marketing issues (of which 778 Door-to-Door sales) 2,662 energy Transfer cases 	<ul style="list-style-type: none"> Door-to-door sales remained the marketing issue generating the most complaints. Door-to-door complaints included: selling to non-account holders and vulnerable consumers; customers asked to sign a document, unaware it was a contract; sales agents saying or implying they were from government or linesmen; and customers agreeing to receive more information but being transferred.
2008	<ul style="list-style-type: none"> 1,089 Marketing issues 3,056 Transfer issues (data no longer linked to specific sales/marketing channels) 	<ul style="list-style-type: none"> Potential compliance issues including misleading information; excessive pressure; selling to non-account holders; no explicit informed consent; transfers proceeding despite cancellation during the cooling-off period.
2009	<ul style="list-style-type: none"> 8,858 Transfer issues (of which 2,062 Without Consent, 923 Cooling-Off Rights) 2,610 Marketing issues 	-
2010	<ul style="list-style-type: none"> 8,488 Transfer issues (of which 1,093 Without Consent, 992 Cooling Off Rights) 3,451 Marketing issues 	-
2011	<ul style="list-style-type: none"> 10,761 Transfer issues (including 1052 Without Consent, 734 Cooling Off Rights) 2,624 Marketing [main] issues 	<ul style="list-style-type: none"> Identified four systemic issues related to door-to-door: <ul style="list-style-type: none"> Marked increase in marketing complaints (SI/2010/46) Significant increase in transfers in error cases (SI/2010/48) Cooling-off requests not actioned (SI/2010/47) Using misinformation about advanced (smart) meters to gain sales (SI/2010/43, SI/2010/44, SI/2011/11)

Source: CUAC analysis of 2002-2011 EWOV Annual Reports

Table 4 suggests that door-to-door related cases have grown significantly over time (as have energy cases more generally). It also demonstrates a consistent pattern of consumer complaints of pressure sales, misleading and deceptive conduct and account transfer without explicit informed consent. These issues have, at a number of different times over the period, been categorised by EWOV as 'systemic.'[†]

Similarly, performance data reported by the ESC, which regulates retail energy in Victoria, has revealed similar energy door-to-door selling problems. In its *2010-11 Compliance Report: Energy Retail Businesses*, the ESC identified various breaches of the *Energy Marketing Code* as one of three key areas of concern that year.⁸⁰ Among the related breaches were more than 750 investigated instances in which 'sales agents misled customers, allegedly fabricated consent to contracts or otherwise improperly engaged customers.'⁸¹ The Commission also received complaints about sales agents ignoring Do Not Knock stickers and failing to provide the required offer summaries.⁸²

Referring to these sources of data as well as internal complaints, energy industry players have argued that complaint numbers are low when considered in relation to the extent of door-to-door selling activity and related transfers. It is important to consider, however, the rate at which consumers who have had a negative experience of door-to-door selling lodge complaints with EWOV. Unfortunately, the data on this is limited.

A 2011 CUAC survey found that only eight per cent of respondents reporting a negative experience of energy door-to-door selling had made a complaint – and most often these were made to the energy retailer itself, rather than to EWOV. Those who had cause to complain, but did not, reported thinking that the complaint would make no difference (47%), that they did not know who to complain to (34%), that the matter was not important enough (29%) and that they were too busy or did not get around to it (20%).⁸³ While the results of this relatively small-scale survey should be interpreted with some caution, the findings do suggest that EWOV cases and complaints capture only a very small proportion of consumers' negative door-to-door selling experiences. Similarly, the 2007 Consumer Action and FCRC report detailing 28 door-to-door sales case studies, most involving serious misconduct, noted that fewer than one third of those cases resulted in an EWOV complaint. The report argued that a 'seemingly low' level of complaints was masking 'widespread' misconduct.⁸⁴ While CUAC agrees that this is likely to be the case, reliable, representative data on this critical issue simply has not been collected.

CUAC's 2011 survey did seek to assess the likelihood that any given energy door-to-door sales interaction would involve certain types of misleading and high-pressure sales tactics by asking respondents about their most recent interaction with an energy door-to-door sales agent (**Table 5**).

[†] Defined by EWOV as 'an issue, problem or change in company policy or practice that affects, or has the potential to affect, a number of customers.' See: Energy and Water Ombudsman (Victoria) (2011) *Annual Report 2011*, EWOV: Melbourne, p. 18.

⁸⁰ ESC (2012f) *2010-11 Compliance Report*, p. 6.

⁸¹ *Ibid*, p. 7.

⁸² *Ibid*, p. 59.

⁸³ CUAC (2012) *The consumer experience of door-to-door energy sales*, p. 4.

⁸⁴ CALC & FCRC (2007) *Coercion and harassment at the door*, p. 8-9.

Table 5: Reported incidence of certain misleading and pressure sales tactics (n=266)

Sales agent tactic	Incidence
Said whole area was changing to a different energy company	31%
Initially said that they had knocked for a reason <u>other than</u> to sell energy	26%
Did not leave when asked	24%
Did not state company they were representing	18%
Said the customer 'had to change' energy company	16%
Said they were from the government	14%

Source: CUAC analysis of 2011 survey data.

Table 5 shows that respondents reported substantial use of misleading and pressure sales tactics by sales agents in their most recent interaction, ranging from a low of 14 per cent of agents making the misleading claim they were 'from the government,' up to nearly one third reportedly claiming that 'the whole area was changing to a different energy company.' Given the relatively small sample size,⁸⁵ these results should be seen as indicative only. A larger, Computer Assisted Telephone Interviewing (CATI) consumer survey using a random sampling methodology would allow for more definitive conclusions to be reached. Nevertheless, these results certainly suggest that there is room for doubt of claims that misconduct is rare and isolated.

Discussion and recommendations

Speaking largely with reference to the European Union (EU) and UK, UK academic Howells argues that consumer policy:

*...seems to be often determined without significant background research and debate. The process is dominated by non-specialist civil servants consulting with interested parties. Academics have a marginal role... Despite the recent practice of developing consumer strategies at the national and European level there are few signs of a coordinated research programme to underpin these initiatives.*⁸⁶

Making reference to 2004 OFT research into door-to-door selling which commissioned a psychologist to identify and analyse sales techniques, Howells argues that such efforts 'should be welcomed and encouraged, but they remain patchy exceptions to a general dearth of research and evidence-based law reform.'⁸⁷

While the ACCC's recent commissioning of research into the door-to-door sales industry in Australia has added substantially to the evidence-base for policy, CUAC has found a similar dearth of research and evidence on door-to-door selling and related policy in Australia. In conducting desktop research for this report, we found it surprisingly difficult to locate any publicly available evidence of the serious evaluation of any of the policy approaches discussed. Often, explicit

⁸⁵ For full details of the survey methodology, see Appendix A in CUAC (2011a) *Improving energy market competition*.

⁸⁶ Howells, Geraint (2005) 'The Potential and Limits of Consumer Empowerment by Information,' *Journal of Law and Society*, 32(3), p. 369.

⁸⁷ *Ibid*, p. 370.

statements of the rationale underlying the selection of any particular approach over another were also absent.

Extent of misconduct

Related to this, there has been little apparent effort from regulators or consumer policy makers to seriously grapple with the issue of door-to-door selling misconduct. For instance, despite a lack of reliable, representative data allowing conclusions to be drawn either way, the assumption has often been made that misconduct is isolated, with evidence from case studies and consumer reports dismissed as merely anecdotal. While case studies and similar types of evidence do not allow for an assessment of the extent of misconduct, they do not constitute evidence that misconduct is limited.

To remedy the uncertainty and lack of data to inform policymaking, CUAC sees an immediate need for a well-designed consumer survey to be conducted, with the aim of offering a representative picture of the average door-to-door sales interaction. In other words, the survey must seek to determine the likelihood that any one door-to-door sales interaction will involve misconduct of different types, rather than simply eliciting overall impressions and attitudes.

This type of evidence would serve three important purposes. Firstly, it would help policymakers to determine whether more needs to be done to address door-to-door sales misconduct, or whether misconduct is indeed isolated to 'rogue' sales agents. Secondly, it would provide baseline data against which the effectiveness of current policy approaches can be evaluated in future. Thirdly, it would facilitate monitoring of door-to-door sales issues as other jurisdictions undergo major transitions in retail energy markets. In line with its current priority focus on door-to-door selling and its Australia-wide jurisdiction, we believe that the ACCC would be best-placed to develop such a survey.

Recommendation 1

That the Australian Competition and Consumer Commission develop a consumer survey which accurately measures the extent of door-to-door selling problems. This survey should:

- use a random sampling methodology with a sample large enough to allow separate analysis of key jurisdictions and of energy door-to-door sales specifically;
- be designed to give a snapshot of the 'average' door-to-door sales interaction;
- seek to determine the extent to which consumers who have had a negative experience lodge a complaint, and to whom; and
- be re-administered periodically so that changes may be observed.

Financial detriment & the role of door-to-door selling in the retail energy market

Door-to-door selling has played a major role in the development of Victoria's competitive retail energy market. Given the importance of the door-to-door sales channel to the market's high switching rates, policymakers and regulators have, unsurprisingly, been reluctant to restrict use of the channel.

However, those with responsibility for promoting effective competition in Victoria's retail energy market need better intelligence about the financial outcomes of switching decisions made door-to-door. If these decisions are not making most consumers better off – and there is at least cause for doubt on this point – then this switching activity will not drive lower prices or better services. As discussed in this chapter, in 2008 the UK regulator Ofgem, as part of its Energy Supply Probe, conducted research into the financial outcomes of door-to-door switching decisions. When this research revealed that just under half of customers who switched supplier in response to a direct sales approach ended up on a worse deal, Ofgem was prompted to introduce new reforms aimed at improving consumers' access to simple, accurate information in the door-to-door sales environment.

In CUAC's view, the absence of any similar research in Victoria and other Australian jurisdictions is a major impediment to our understanding of not only of energy door-to-door selling, but also – given the importance of door-to-door sales as a switching channel – of the effective functioning of the retail energy market more generally. Such research would be a complex undertaking requiring careful design and strong research expertise, but would provide valuable evidence for energy policy development.

CUAC is therefore recommending that the Victorian Government commission a study of the financial outcomes of switching decisions made via door-to-door sales and other major switching channels, with the findings of this research used to support efforts to assist and improve consumer decision-making. Findings should also be of interest to the AEMC as it reviews competition effectiveness in other states.

Recommendation 2

That the Victorian Government commission research assessing the financial outcomes of consumer switching decisions made via door-to-door sales and other major switching channels.

Minimising consumer detriment from door-to-door sales

The negative impacts of intrusive marketing practices such as door-to-door selling can be seen as an externality – that is, a behaviour which 'has impacts on a party that was not involved in an economic decision and whose interests were not taken into account.'⁸⁸ Consumer annoyance and instances of door-to-door sales misconduct can generate 'reputational issues' for energy retailers.⁸⁹ Negative community attitudes towards door-to-door sales, as discussed above, are probably one contributor to consumers' poor perceptions of energy retailers more generally. Nonetheless, perhaps in part due to the essential nature of energy services, it would appear that widespread consumer dislike of door-to-door sales does not create sufficient competitive pressure for energy retailers to either substantially improve or abandon door-to-door sales practices.

⁸⁸ OECD (2010) *Consumer Policy Toolkit*, p. 32.

⁸⁹ Frost and Sullivan (2012) *Research into the door-to-door sales industry*, p. 39.

Despite some crucial evidence gaps, CUAC believes there is sufficient evidence of continuing consumer detriment arising from energy door-to-door sales to warrant a re-examination of current policy approaches, as well as consideration of alternatives that may be effective. This is the theme of the remainder of the report.

3. CONSUMER LAW

Door-to-door sales in Victoria, as in other Australian and international jurisdictions, are subject to general consumer law. In addition, in recognition of the heightened risk of consumer detriment, governments have tended to subject door-to-door sales (along with other types of unsolicited consumer agreement) to regulation over and above general consumer law. This chapter begins with an overview of the legislation and regulation relevant to energy door-to-door sales in Victoria. It then goes on to discuss general consumer law protections relevant to energy door-to-door sales, including general bans on misleading and deceptive conduct, pressure sales and unconscionable conduct, as well as more specific protections relating to cooling-off rights and disclosure requirements. It ends with a brief discussion of prohibition responses to door-to-door selling.

Legal and regulatory framework for energy door-to-door sales in Victoria

At the time of writing, energy door-to-door selling in Victoria comes under the provisions of both the ACL and Victoria's *Energy Marketing Code*, with the latter likely to be superseded by the NECF in the near future.

Australian Consumer Law

The ACL is a single, national law on consumer protection and fair trading. With its commencement on 1 January, 2011, the ACL replaced a variety of national and State and Territory laws, creating a single set of business obligations and responsibilities and standardising protections and rights for consumers throughout Australia. At the Commonwealth level it is contained in a schedule to the *Competition and Consumer Act 2010*.

The ACL includes general bans on a range of behaviours of relevance to door-to-door selling, including provisions prohibiting unconscionable and misleading and deceptive conduct. In addition to these general provisions, the ACL includes a number of particular protections intended to address identified forms of business conduct. Among those are protections that apply specifically to unsolicited consumer agreements including door-to-door selling, telephone sales and other types of direct selling that occur outside of a retail environment. This national regime for unsolicited consumer agreements replaces previous State and Territory laws on door-to-door sales.

Contraventions of the ACL in relation to unsolicited consumer agreements are subject to criminal fines and civil pecuniary penalties, each of up to \$50,000 for a body corporate and \$10,000 for a person other than a body corporate. Further to this, dealers contravening the provisions may be subject to injunctions, damages, compensatory orders, non-punitive orders and adverse publicity orders, disqualification orders, redress for non-parties and public warning notices.⁹⁰

⁹⁰ Commonwealth of Australia (2010b) *The Australian Consumer Law – A guide to provisions*, Commonwealth of Australia: ACT, p. 20-25.

Compliance

Compliance and enforcement of the ACL is based on a 'one law, multiple regulators' model, meaning that it is enforced in all jurisdictions by the relevant consumer regulators, who coordinate their activities via the Standing Committee of Officials of Consumer Affairs.⁹¹ In Victoria, compliance and enforcement is the responsibility of the state-based CAV. Federal regulators the ACCC and the Australian Securities and Investments Commission (ASIC) (with regard to financial services) also have a role in ACL compliance and enforcement.

ACL regulators aim to promote compliance via awareness, providing information and advice to consumers and traders about their rights and responsibilities and avenues for redress.⁹² A range of escalating enforcement options, including civil, administrative and criminal enforcement remedies, are also available to regulators where a trader fails to comply with the ACL.

Accordingly, CAV's compliance and enforcement policy emphasises voluntary compliance via trader and consumer engagement and education. Beyond that, CAV has a range of civil, administrative and criminal enforcement remedies at its disposal. Enforcement actions include:

- dispute resolution, formal written warnings and trader meetings
- public naming, infringement notices, and adverse publicity orders
- enforceable undertakings and other administrative remedies such as disciplinary action, injunctions, asset freezing orders, cease trading injunctions and criminal prosecution.⁹³

The ACCC is Australia's peak consumer protection and competition agency. In aiming to promote compliance with the law, the ACCC uses three enforcement strategies, set out in its *Compliance and Enforcement Policy*.

- enforcement of the law, including resolution of possible contraventions both administratively and by litigation
- encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the *Competition and Consumer Act 2010*.
- working with other agencies to implement these strategies.⁹⁴

The ACCC has 'wide-ranging' powers to investigate unscrupulous sales tactics and 'can compel people and businesses to give information, obtain search warrants, issue public warning and infringement notices, accept court enforceable undertakings, and conduct litigation or refer criminal matters to the Commonwealth Director of Public Prosecutions.'⁹⁵ The ACCC regularly reviews its compliance and enforcement priorities. At the time of writing, consumer protection in the energy

⁹¹ Commonwealth of Australia (2010e) *Compliance and Enforcement: How regulators enforce the Australian Consumer Law*, Commonwealth of Australia: Canberra, p. 5.

⁹² *Ibid*, p. 7.

⁹³ Consumer Affairs Victoria (2012a) 'Compliance and enforcement policy,' CAV website.

⁹⁴ Australian Competition and Consumer Commission (2012b) *Compliance and enforcement policy*, ACCC: Canberra, p. 4.

⁹⁵ Australian Competition and Consumer Commission (2012d) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill 2012 inquiry*, Parliament of Australia: Canberra, p.14.

sector was one of the identified priority areas.⁹⁶ Recent ACCC enforcement activity in this area is discussed in detail later in this chapter.

Code of Conduct for Marketing Retail Energy in Victoria

Energy door-to-door sales in Victoria are also regulated by the ESC. The *Energy Marketing Code*, last amended on 1 January 2009, sets out standards and conditions for the marketing of energy to domestic and small business consumers in Victoria. The *Energy Marketing Code* supplements and does not limit any rights under Commonwealth or State law. When Victoria transitions to the NECF, this will supersede the *Energy Marketing Code*. Energy retailers are required to comply with the *Energy Marketing Code*, along with all other laws, codes, and guidelines, as a condition of their retail licenses.

Compliance

The ESC sets out its approach to monitoring and enforcing energy businesses' compliance with regulatory obligations in its *Compliance Policy Statement for Victorian Energy Businesses*.⁹⁷ According to this Policy Statement, the ESC's overall approach focuses on encouraging a culture of voluntary compliance.⁹⁸ Businesses are required to undertake regulatory compliance audits, report on their compliance, and notify the Commission of material breaches, and the ESC also monitors complaints and other data through liaison with the EWOV and CAV.

In relation to the *Energy Marketing Code*, the ESC's Compliance Reporting Manual identifies the following Type 1, 2 and 3 obligations on which reporting is required (**Table 6**).

⁹⁶ ACCC (2012b) *Compliance and Enforcement Policy*, p. 3.

⁹⁷ Essential Services Commission (2012a) *Compliance Policy Statement for Victorian Energy Businesses – January 2012*, ESC: Melbourne.

⁹⁸ *Ibid*, p. 7.

Table 6: Type 1, 2 and 3 regulatory obligations in the *Energy Marketing Code*

Type 1	Type 2	Type 3
Retailers must not mislead consumers, provide certain information to consumers and allow a cooling off period. The Retailer's obligations in relation to the conduct of marketing representatives and the provision of offer information to consumers. (Clause 3.2 to 3.6)	Times at which retailers may contact consumers, information to be provided to consumers, requirements to keep No Contact lists and observe them, requirement to observe No Canvassing signs. (Clause 2.1 to 2.3)	Marketing representatives must receive adequate training and testing on specified matters. Copies of training records and manuals to be retained for at least one year following training and made available for independent audit as required. (Clause 1)
Retailer must obtain explicit informed consent (EIC) of consumer and the rules regarding sales to minors and authorised consumers. (Clause 4.1 and 4.3)	Retailers shall have a dispute resolution process complying with Australian Standards and refer complainants to EWOV. (Clause 7)	Content of personal visit and telephone contact records, and retention for audit. (Clause 2.4 and 2.5)
Retailers must abide by the <i>Privacy Act 1988</i> and not misrepresent their intentions as market research and not selling. Retailers must comply with the National Privacy Principles and any relevant guidelines issued by the Commission. (Clause 6)		Information Retailers must provide consumers with information in plain English (Clause 3.1)

Source: ESC (2012b) *Compliance Reporting Manual - Energy Retail Businesses*, ESC: Melbourne, p. 9, 11, 16.

Type 1 obligations are those for which non-compliance would have a 'critical' impact on consumers that increases over time if not quickly rectified. Such breaches must be reported immediately. Type 2 obligations are reported on a six-monthly basis and are those obligations for which:

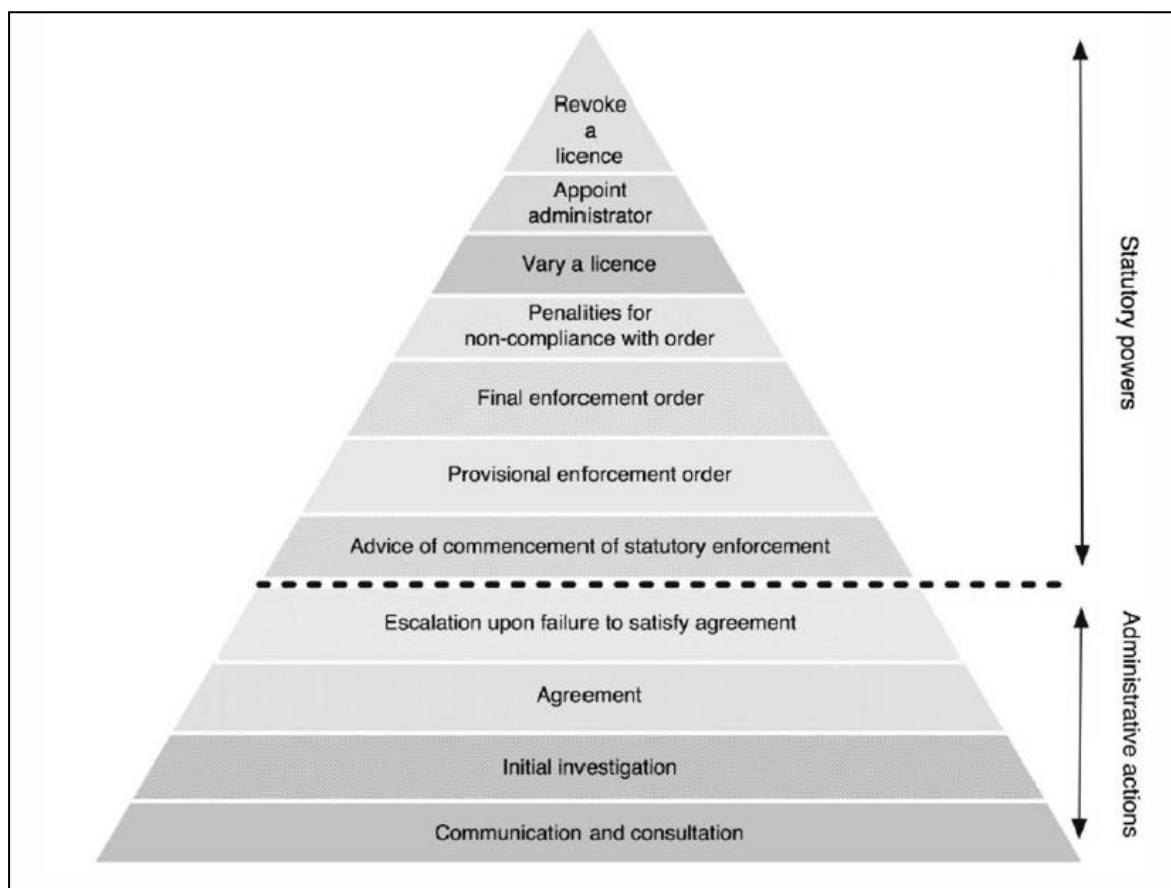
- non-compliance would seriously impact on consumers, and/or
- the obligation is new, or has not been complied with in previous years, and/or
- the impact of non-compliance increases over time.

All other obligations are categorised as Type 3, with breaches to be reported annually.⁹⁹

ESC responses to non-compliance begin with co-operative approaches before escalating up the 'enforcement pyramid' (Figure 3) if less punitive options fail.

⁹⁹ ESC (2012b) *Compliance Reporting Manual*, p. 5.

Figure 3: ESC enforcement pyramid for regulation of Victorian energy businesses



Source: ESC (2012a) *Compliance Policy Statement*, p. 19.

Should the less formal administrative options at the bottom of the pyramid fail to rectify non-compliance, under s. 53 of the *Essential Services Commission Act 2001* (Vic), the ESC is able to issue enforcement orders for non-trivial contraventions of ESC codes, including the *Energy Marketing Code*. Failure to comply with a provisional order, a final order or an undertaking to comply is an offence for which the person is liable to a penalty of up to 5,000 penalty units,[†] plus a further penalty of up to 500 penalty units for each additional day of contravention. The Commission may also apply to the Supreme Court for an injunction or declaration in respect of an enforcement order. It may vary a licence or appoint an administrator. At the tip of the enforcement pyramid, the ESC has the power to revoke a retail license.

Although the ESC has a range of statutory enforcement powers, it appears that these are used rarely, if at all. CUAC reviewed the Commission's Annual Reports for 2007–08 to 2011–12 and found no references to any energy enforcement activity using statutory powers during that five year period.

National Energy Customer Framework

The NECF, comprised of the National Energy Retail Law, National Energy Retail Rules and National Energy Retail Regulations, sets out key protections and obligations for energy businesses

[†] Approximately \$704,200 in the 2012/13 financial year.

and customers in the National Energy Market (NEM). The NECF contains specific provisions relating to the marketing activities of energy retailers, set out in Part 2, Division 10 of the National Energy Retail Rules. These industry-specific provisions complement the generic consumer protections in the ACL.

The NECF aims to streamline energy consumer protection regulation nationally. To date, it has commenced for customers in the Australian Capital Territory (ACT) and Tasmania (for electricity customers). Victoria has not yet confirmed a start date for the NECF and hence, at the time of writing, regulation remains the responsibility of the state-based ESC.

In jurisdictions where the NECF has commenced, the Australian Energy Regulator (AER), which is part of the ACCC, is responsible for monitoring and enforcing compliance. The AER's *Statement of Approach* to compliance and enforcement describes how the AER will approach its compliance and enforcement responsibilities.¹⁰⁰ The AER has also developed *Compliance Procedures and Guidelines*, setting out how and when energy businesses must report on compliance to the AER.

General consumer law protections

Door-to-door sales in Victoria, as in other Australian and international jurisdictions, are subject to general consumer law, which tends to prohibit certain types of unfair business conduct.

Australian Consumer Law

A range of business behaviours are subject to a general ban under the ACL. Prior to this, the *Trade Practices Act 1974* (Cth) and State and Territory Fair Trading Acts also included prohibitions on unconscionable conduct, harassment and undue pressure, and misleading or deceptive conduct. These prohibitions are relevant to door-to-door sales but also have a more general application. In its 2008 *Review of Australia's Consumer Policy Framework*, the PC noted that these consumer protection provisions are particularly important in protecting vulnerable and disadvantaged consumers, who are more likely to be the targets of such conduct.¹⁰¹

Victoria's *Energy Marketing Code* does not repeat these prohibitions but requires retailers to ensure sales agents comply with all applicable laws relating to misleading, deceptive or unconscionable conduct, undue pressure, harassment and coercion. They must also provide sales agents with training on these matters.

Misleading or deceptive conduct

Under Sections 18 and 19 of the ACL, it is unlawful for businesses to make statements or omissions in trade or commerce that are misleading or deceptive, or that would be likely to mislead or deceive. The ACL thus retains a general prohibition on misleading and deceptive conduct that existed in the *Trade Practices Act* and in all State and Territory Fair Trading Acts.

¹⁰⁰ Australian Energy Regulator (2011b) *Statement of approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations*, Commonwealth of Australia: Melbourne.

¹⁰¹ PC (2008) *Review of Australia's Consumer Policy Framework*, p. 296.

Unconscionable conduct

Under Part 2–2, Sections 20–22 of the ACL, a business must not act unconscionably while selling or supplying goods or services. ‘Unconscionable conduct’ refers to a statement or action so unreasonable that it defies good conscience. In the door-to-door sales context, unconscionable conduct might involve actions or statements that exploit a consumer’s vulnerability, such as false statements to a low-income consumer about the costs of a contract, or not properly explaining the conditions of a contract to a consumer who does not speak English. High-pressure tactics, such as a refusal to take ‘no’ for an answer, may also constitute unconscionable conduct.¹⁰² In substance, ACL unconscionable conduct provisions are the same as those found previously in the *Trade Practices Act 1974*.¹⁰³

Harassment and coercion

ACL prohibits certain ‘unfair practices’ in trade and commerce, with provision based on protections formerly found in Part V of the *Trade Practices Act* as well as State and Territory Laws. Under section 50 of the ACL, it is unlawful to use physical force, coerce or unduly harass someone about supply of goods or services. Undue harassment is defined as unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised. Coercion involves actual or threatened force that restricts another person’s choice or freedom to act. In the door-to-door energy sales context, for example, claims that power will be cut off unless the customer changes supplier could be considered coercion.¹⁰⁴

Compliance and enforcement

Unconscionable conduct provisions in the *Trade Practices Act* s51AB were successfully used in relation to door-to-door selling in the case *Australian Competition and Consumer Commission v Lux Pty Ltd* (2004) FCA 926.¹⁰⁵ The Federal Court found that Lux engaged in unconscionable conduct in contravention of s51AB of the *Trade Practices Act* in its sale of a vacuum cleaner to a clearly vulnerable[†] consumer. The ACCC also alleged that Lux had engaged in undue harassment or coercion, but the court did not find that this was so. Lux Pty Ltd appealed the decision but the appeal was later dismissed by consent. In a mediated outcome, a declaration was made that Lux and its agent had engaged in unconscionable conduct. Lux was ordered to reformulate its trade practices compliance program. Lux agreed to pay ACCC costs to an agreed sum, and refunded the consumer the \$945 purchase price of the vacuum cleaner.¹⁰⁶

This case offered further clarification of the types of conduct that might be regarded as unconscionable. It also enabled the ACCC to publicise the case thereby demonstrating that it was

¹⁰² Commonwealth of Australia (2010d) *Avoiding unfair business practices: A guide for businesses and legal practitioners – An Australian Consumer Law Guide*, Commonwealth of Australia: Canberra, p.12.

¹⁰³ Commonwealth of Australia (2010b) *The ACL – A guide to provisions*, p. 5.

¹⁰⁴ Commonwealth of Australia (2010f) *Sales practices: A guide for business and legal practitioners*, Commonwealth of Australia: Canberra, p. 25.

¹⁰⁵ *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (16 July 2004).

[†] The consumer was substantially illiterate and incapable of understanding commercial matters in any depth.

¹⁰⁶ Australian Competition and Consumer Commission (2005) *Lux Appeal against unconscionable conduct dismissed*, Media Release, 24 February 2005.

actively enforcing the prohibition on unconscionable conduct.¹⁰⁷ It would appear, however, that these outcomes were insufficient to ensure compliance and deter future unconscionable conduct by Lux. In May 2012, the ACCC again filed proceedings in the Federal Court against Lux Distributors Pty Ltd,[†] again alleging unconscionable conduct in relation to the sale of vacuum cleaners. The ACCC alleged that between 2009 and 2011, Lux engaged in unconscionable conduct in its door-to-door sales of vacuum cleaners to five elderly consumers, contravening the *Trade Practices Act* and the ACL. It was alleged that a Lux sales agent visited consumers offering a free 'vacuum cleaner maintenance check,' then subjecting the consumers to unfair and pressuring sales tactics.¹⁰⁸ The ACCC sought declarations, injunctions, pecuniary penalties, implementation of a trade practices compliance program and costs. The outcome of the case was not yet available at the time of writing.

In a more recent case, *ACCC v Neighbourhood Energy Pty Ltd and Australian Greens Credits Pty Ltd* (2012) FCA VID268/2012, the Federal Court found that, in addition to multiple breaches of the unsolicited consumer agreement provisions, Neighbourhood Energy and its contractor Australian Green Credits breached section 18 of the ACL prohibiting misleading or deceptive conduct. On two occasions, consumers were falsely told that the sales agents were not asking them to change suppliers, that the consumer was being overcharged by their current supplier, or that the customer had been zoned incorrectly. This case is discussed in more detail below.

Vulnerable consumers

While some enforcement action has been taken, there are limitations on generic legislation in meeting the needs of vulnerable and disadvantaged consumers. Firstly, such consumers often lack the capacity to complain to consumer regulators. Should they do so, and should litigation result, they are also likely to have difficulties presenting evidence in court. The PC highlighted this issue in its *Review of Australia's Consumer Policy Framework*. Quoting a submission from Legal Aid Queensland, the PC noted:

*Such general provisions require recourse to litigation where the facts about the description of the product or service will invariably be in dispute, there is a written document which supports the trader rather than the consumer, and our clients, because of their vulnerabilities (eg: psychological problems) face difficulty if the case is determined solely on the basis of their credibility as a witness.*¹⁰⁹

Hence, vulnerable consumers face not only increased risk of detriment while 'the nature of their vulnerability restricts their ability to access justice.'¹¹⁰ This highlights the need for complementary policy approaches to protecting vulnerable consumers.

¹⁰⁷ Sharpe, Michelle and Christine Parker (2006) *Working Paper – the ACCC Compliance and Enforcement Project: Assessment of the impact of ACCC regulatory enforcement action in unconscionable conduct cases*, University of Melbourne: Melbourne, p. 50.

[†] Lux Distributors was formed in 2007 via a merger of Lux Australia and Appliance Direct, which had been the sole Australian distributor of Lux Vacuum Cleaners from 2004. See: Lux Australia (2012) 'A Brief History,' *Lux Australia* website.

¹⁰⁸ Australian Competition and Consumer Commission (2012a) 'ACCC alleges unconscionable conduct by vacuum cleaner retailer,' Media Release, 10 May 2012.

¹⁰⁹ PC (2008) *Review of Australia's Consumer Policy Framework*, p. 296-7.

¹¹⁰ Australian Competition and Consumer Commission (2007) Submission to Productivity Commission *Review of Australia's Consumer Policy Framework*, PC: Melbourne, p. 86.

Specific consumer protections

While general bans in consumer law provide important protections for consumers in the door-to-door sales setting, the particular features of door-to-door sales have also seen governments develop special rules specifically for this and related settings. Prior to commencement of the ACL, for instance, all states and territories had introduced specific regulations on door-to-door selling, either with Fair Trading Acts, or through separate legislation.¹¹¹ Such specific protections are now contained in the ACL and apply to all unsolicited consumer agreements. Internationally, too, door-to-door sales have been subject to specific regulation.

Key protections included in such regulations typically include cooling-off rights, obligations to disclose identity and the purpose of the visit, and a requirement to leave upon request. Another set of obligations relate to the information that must be provided before and after an agreement is signed. These provisions target multiple types of detriment that can be associated with door-to-door sales, and have also in many cases been developed with special attention to the needs of vulnerable consumers.¹¹²

Cooling-off periods

A cooling-off period is a specified period of time during which a consumer may, without penalty, cancel a contract they have agreed to. Governments have mandated cooling-off periods for a range of agreement types, typically transactions involving significant amounts of money, and/or those likely to involve high-pressure sales tactics, including door-to-door sales.¹¹³ A related measure is a right to a period of deliberation during which the consumer is not able to accept the offer and conclude the contract.

Today a widely used consumer protection tool, cooling-off periods were initially developed in the 1960s with exclusive or primary application to door-to-door sales. Following a recommendation of the 1962 *Final Report of the Committee on Consumer Protection* (the Molony Report), England legislated a cooling-off period with the *Hire Purchase Act* in 1964. This Act was established with specific reference to 'overbearing' and deceptive sales agents.¹¹⁴ In Australia, Victoria's *Door-to-Door (Sales) Act 1963* introduced a five day cooling-off period for some types of unsolicited door-to-door sale. Soon afterwards, a number of states in the USA adopted cooling-off period laws, many of which targeted door-to-door sales.¹¹⁵

Dual rationale

Cooling-off periods have both a consumer protection and an economic rationale. Firstly, in recognition of the unequal bargaining position of consumers and sellers, particularly where specific sales tactics are used, they have been designed to strengthen the position of consumers, protecting them against manipulations and abuses.¹¹⁶ A cooling-off period provides an avenue for consumers

¹¹¹ PC (2008) *Review of Australia's Consumer Policy Framework*, p. 297.

¹¹² *Ibid*, p. 297.

¹¹³ OECD (2010) *Consumer Policy Toolkit*, p. 89.

¹¹⁴ Sovern, Jeff (2012) *Cooling-Off Periods*, St John's School of Law Legal Studies Research Paper Series, St John's University School of Law: New York, p. 3.

¹¹⁵ *Ibid*, p. 2-3.

¹¹⁶ Rekaiti & Van den Bergh (2000) 'Cooling-off Periods in EC Member States,' p. 373.

who have been subject to pressure sales, deception or harassment and who have therefore entered into contracts that they otherwise would not have accepted. At the same time, the threat of rescission is expected to provide an incentive for good behaviour on the part of the seller.¹¹⁷

Secondly, cooling-off periods have been justified as efficiency-enhancing tools which provide a remedy in cases of situational monopoly and informational asymmetry. For a consumer who has made a decision based on the information provided by only one supplier in a door-to-door sales situation, a cooling-off period allows an opportunity to both deliberate on the information supplied and to compare it to alternative offers, potentially cancelling the contract in favour of a preferred offer. Although this is sometimes presented as a modern interpretation and rationale of the cooling-off period,¹¹⁸ the need to provide an opportunity for comparative shopping was also emphasised by early proponents.¹¹⁹ The possibility that consumers will cancel an agreement after finding a better offer is again intended to incentivise sellers to set correct prices and disclose information about the quality and value of the product or service.¹²⁰

Cooling-off provisions applicable to door-to-door energy sales in Victoria

The ACL contains express consumer rights in relation to the termination of unsolicited consumer agreements, namely provision of a 'cooling off' period of ten business days during which the consumer may cancel the agreement. In situations where the dealer has breached certain obligations, the consumer may terminate the agreement during a longer period – either three or six months depending on which obligations were contravened.

The ACL also sets out obligations on sellers to inform consumers of their cooling-off rights. Prior to making an agreement, dealers must give the consumer certain information including information about their cooling-off rights and how to exercise them. After an (in-person) unsolicited consumer agreement has been made, dealers are required to provide the consumer with a copy of the agreement after it has been signed by the consumer. The front page of the agreement document must include set text which informs the consumer of their right to terminate the agreement in the cooling-off period and alerts them to an attached document with information about additional rights to terminate the agreement. This front page must be signed and dated by the consumer.

Cooling-off provisions internationally

In 2011 the EU *Consumer Rights Directive* (EU Directive 2011/83) was adopted by Member States in the EU Council of Ministers. The Directive brings together and amends requirements in earlier directives on distance selling and door-to-door selling, including the *Doorstep Selling Directive* (85/557/EEC). The *Consumer Rights Directive* must be implemented by member states by 13 December 2013 for entry into force before 13 June 2014. The *Consumer Rights Directive* will result in a lengthened cooling-off period of 14 calendar days, doubling the minimum seven-day cooling-off period that was provided under the previous *Doorstep Selling Directive*. Where the seller

¹¹⁷ Sovern (2012) *Cooling-Off Periods*, p. 4, 30.

¹¹⁸ Rekaiti & Van den Bergh (2000) 'Cooling-off Periods in EC Member States.'

¹¹⁹ See: Sovern (2012) *Cooling-Off Periods*, p. 5.

¹²⁰ Rekaiti & Van den Bergh (2000) 'Cooling-off Periods in EC Member States,' p. 381.

fails to clearly inform the customer about the withdrawal right, the cooling-off period is extended to a year.¹²¹

In the USA, the 1971 *Trade Regulation Rule* put in place a federally mandated three-day cooling-off period for most door-to-door sales, whether solicited or unsolicited. Sellers are required to provide written notices advising of this right.

It is noteworthy that the length of cooling-off periods varies substantially between different jurisdictions. While there appears to be no research evidence comparing the effectiveness of different cooling-off period lengths, the ten business day period provided for in the ACL would seem to strike an appropriate balance between allowing sufficient time for consideration and minimising the costs of doing business.

Take-up and effectiveness

As Sovern argues in a paper on the effectiveness of cooling-off periods, the various rationales for the use of cooling-off periods rest on the assumption that some proportion of consumers will actually exercise their cooling-off rights, cancelling agreements they have made. If, in contrast, consumers do not make use of their cooling-off rights, these provisions seem unlikely to either deter seller misconduct or to offer an effective consumer remedy where misconduct has occurred.¹²²

In the USA, some studies have sought to assess the extent to which consumers exercise their cooling-off rights. In the 1960s, a consumer survey found that a one-day cooling-off period was rarely used and that it benefitted consumers very little.¹²³ In 1981, the Federal Trade Commission (FTC) sponsored consumer and business surveys on the three-day cooling off period that had been introduced with the 1971 *Trade Regulation Rule*. With 1,400 respondents, the consumer survey found that despite fairly high awareness of cooling-off provisions, not one had cancelled a contract during a cooling-off period. The small proportion of surveyed consumers who were dissatisfied with their purchase reported failing to take action because they were not dissatisfied enough, because it was 'too much trouble', 'wouldn't do any good,' or they 'didn't want to offend the salesperson.'¹²⁴ The survey of door-to-door selling company executives similarly found very low reported rates of cancellation.

More recently, Sovern's 2010 survey of businesses subject to the three-day cooling-off rule found low reported cancellation rates: 35 per cent of businesses reported no cancellations at all; 29 per cent reported cancellations of fewer than one per cent; and a further eight per cent reported a cancellation rate of between one and two per cent. Sovern argued that these rescission rates were so low as to raise 'serious questions about the effectiveness of cooling-off periods.'¹²⁵

¹²¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹²² Sovern (2012) *Cooling-Off Periods*, p. 13.

¹²³ *Ibid*, p. 14.

¹²⁴ *Ibid*, p. 14-15.

¹²⁵ *Ibid*, p. 18.

That few consumers apparently actively exercise cooling-off rights should not be taken to mean that consumers are necessarily confident about the benefits of the agreement they have entered into. As the OECD notes in its *Consumer Policy Toolkit*:

*[The] level of comfort provided by a cooling-off period could result in consumers not taking sufficient time to properly assess their decisions prior to purchase; they may feel obliged to continue despite the opportunity to reconsider.*¹²⁶

In its 2007 submission to the PC's *Review of Australia's Consumer Policy Framework*, the ACCC similarly noted that consumers may not use cooling-off periods to examine the terms of a contract, and that cooling-off periods may in fact have the perverse effect of encouraging a consumer to pay less attention to the terms of a contract at the time of signing.¹²⁷ Although there is in fact little firm evidence about the benefits and drawbacks of cooling-off periods,¹²⁸ research has found that consumers who purchase an item with a right to withdraw may overestimate the likelihood that they will use that right.¹²⁹ Similarly, referring to findings in the field of behavioural economics, Sovern suggests that consumers may fail to exercise cooling-off rights due to the tendency to risk-aversion when facing possible losses, the status quo effect (customer inertia), and cognitive dissonance.¹³⁰

Interestingly, however, specific conditions in the Victorian retail energy market seem to have resulted in substantially higher rescission rates following door-to-door sales than those found in US studies. Cooling-off rights are apparently used frequently due to active 'win-back' attempts by incumbent retailers. In this process, the incumbent retailer receives notice of the impending transfer and makes contact with the customer, offering another deal. According to one estimate, these win-back approaches induce just under a quarter of customers to cancel the door-to-door sales contract within the cooling-off period.¹³¹ While the absence of data about the consequences of these decisions makes it impossible to draw firm conclusions, this competitive process of door-to-door offer followed by the incumbent's 'win-back' attempt seems likely to result in positive outcomes for that cohort of consumers.

Although cooling-off provisions spur potentially beneficial competition in the Victorian energy market, it would seem unlikely that many consumers unilaterally and proactively take the opportunity to compare offers and cancel contracts. That energy is a 'low-engagement' product is widely cited as the rationale for heavy reliance on the door-to-door sales channel. If this is the case, it seems unrealistic to expect that energy consumers who have accepted a door-to-door sales offer will then develop a high level engagement, using the cooling-off period to carefully analyse the accepted offer and compare it to alternatives. Nevertheless, overall, cooling-off provisions are probably somewhat effective at mitigating the situational monopoly effects of door-to-door energy sales in Victoria because they facilitate win-back attempts.

¹²⁶ OECD (2010) *Consumer Policy Toolkit*, p. 89.

¹²⁷ ACCC (2007) *Review of Australia's Consumer Policy Framework* submission, p. 82.

¹²⁸ *Ibid.*, p. 83.

¹²⁹ Sovern (2012) *Cooling-Off Periods*, p. 26.

¹³⁰ *Ibid.*, p. 26.

¹³¹ Frost and Sullivan (2012) *Research into the Door-to-Door Sales Industry*, p. 32-3.

Disclosure of purpose and identity and ceasing to negotiate on request

Another set of door-to-door selling-specific obligations require sellers to disclose their identity and the purpose of their visit and to respect customers' requests to end the negotiation. Such requirements are contained in the ACL, as well as in the industry-specific NECF and *Energy Marketing Code*.

Taken together, these requirements are intended to enable the consumer to end unwanted door-to-door sales interactions quickly, minimising time loss and annoyance. Disclosure of the retailer's name and contact details should also facilitate the consumer making a complaint about an agent's conduct, if necessary.

Australian Consumer Law

Requirements on dealers to disclose their identity and the purpose of their visit, and to cease negotiations upon request, are set out in Sections 74 and 75 of ACL and are part of the unsolicited consumer agreement provisions.

Figure 4: Australian Consumer Law, Sections 74 and 75

74 Disclosing purpose and identity

A dealer who calls on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must, as soon as practicable and in any event before starting to negotiate:

- (a) clearly advise the person that the dealer's purpose is to seek the person's agreement to a supply of the goods or services concerned; and
- (b) clearly advise the person that the dealer is obliged to leave the premises immediately on request; and
- (c) provide to the person such information relating to the dealer's identity as is prescribed by the regulations.

Note: A pecuniary penalty may be imposed for a contravention of this section.

75 Ceasing to negotiate on request

(1) A dealer who calls on a person at any premises for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must leave the premises immediately on the request of:

- (a) the occupier of the premises, or any person acting with the actual or apparent authority of the occupier; or
- (b) the person (the *prospective consumer*) with whom the negotiations are being conducted.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

Before beginning negotiations, dealers must clearly advise of their purpose for calling and provide specified information about their identity, including their name and the address of the supplier. They must respect requests to leave and are also required to inform the consumer that they can ask the dealer to leave.

Energy Marketing Code and NECF

Similarly, Victoria's *Energy Marketing Code* requires that sales agents 'at all times' identify themselves to a consumer. Specifically, they must use best endeavours to provide their name, any relevant identification number, the name of the retailer represented, contact details to enable the

consumer to contact the retailer, and advice as to the purpose of the contact. The sales agent is also required to wear an identification badge displaying their name and photograph and the name of the retailer represented. The *Energy Marketing Code* does not explicitly state that sales agents must leave immediately upon request,[†] but does require that retailers respect No Canvassing signs and maintain No Contact lists.

The NECF, currently applicable in the ACT and Tasmania only, also includes rules relating to customers who indicate they do not wish to be subject to door-to-door sales (along with some other forms of direct marketing). Retailers are obligated to ensure that a No Contact list is created and maintained. The rules also specify that retail marketers must comply with any signs (such as Do Not Knock stickers) at a person's premises indicating that canvassing is not permitted.

Compliance and enforcement

There is evidence that some sales agents are failing to comply with requirements that they identify themselves and the retailer represented, disclose the purpose of their visit, and obey requests to leave. In the April to June 2012 quarter, for example, EWOV received 35 'Other' marketing cases, mostly related to unwanted door-to-door and telesales activity. This included cases in which the sales agent was alleged to have ignored Do Not Knock stickers.¹³²

The ESC's *2010-11 Compliance Report on Energy Retail Businesses* also identifies some examples of non-compliance, based on retailer self-report. In 2010-11, reported 'Type 2' breaches of *Energy Marketing Code* requirements that sales agents identify themselves and disclose the purpose for their visit were:

- Sales agents for Energy Australia and Simply Energy refused to show identification badges upon request to 14 consumers
- Sales agents for Energy Australia ignored No Canvassing signs at the premises of seven consumers
- Sales agents for Lumo Energy failed to take notice of one customer's Do Not Knock sign.

Retailers reported that the sales agents involved were re-trained and sometimes warned, and the ESC took no further enforcement action.¹³³

In 2012 the ACCC signalled its intention to prioritise action in a number of areas relevant to energy door-to-door sales, including vulnerable consumers and the energy industry. It also announced that it would make full use of the profound changes in the ACL, including a focus on enforcement.¹³⁴ In 2011 the ACCC and the AER wrote jointly to energy retailers, reminding them of the legal obligations in relation to door-to-door selling and advising them of the ACCC's plan to

[†] Interestingly, one 2009 ESC document suggests that customers should 'consider making a complaint' where 'a sales agent refuses to cease marketing after two or three attempts by the customer to say they are not interested,' indicating that the Commission at that time did not view a failure to leave immediately upon request as a particularly serious matter. See: Essential Services Commission (2009c) *Respecting Customers: Regulating Marketing Conduct 2009-10 Victorian Retail Energy Businesses – June 2009*, ESC: Melbourne, p. 8.

¹³² Energy and Water Ombudsman (Victoria) (2012a) *De-identified Report on Marketing and Transfer Cases received between 1 April 2012 and 30 June 2012*, EWOV: Melbourne, p.18.

¹³³ ESC (2012c) *2010-11 Compliance Report Victorian Retail Energy Businesses*, ESC: Melbourne, p. 11.

¹³⁴ Sims, Rod (2012) *Enduring Perspectives and 2012 Objectives*, Presentation to the Australia-Israel Chamber of Commerce, 20 February 2012.

focus on energy door-to-door sales. On 27 March 2012, the ACCC filed two separate proceedings against energy retailers (Neighbourhood Energy and AGL) and the door-to-door sales companies they had engaged.

In the first case to be decided, *ACCC v Neighbourhood Energy* (27 September 2012), the Federal Court found that Neighbourhood Energy and Australian Green Credits engaged in multiple breaches of the unsolicited consumer agreement provisions of the ACL (sections 74(a), 74(b), 74(c) and 75(1)(a)). While selling Neighbourhood Energy products door-to-door in 2011, some contractors did not always clearly advise consumers that they were obliged to leave the premises immediately upon request. On two instances they failed to leave upon consumers' verbal requests and through the display of Do Not Knock signs. On three occasions they did not clearly advise the purpose of their visit. Finally, while the contractors carried identification badges, these did not display all of the details required on the front of the badge.¹³⁵

Neighbourhood Energy was ordered by consent to pay a pecuniary penalty of \$850,000, while their former door-to-door selling contractor Australian Green Credits faced a penalty of \$150,000. Both parties also contributed towards the ACCC's costs. The Federal Court also granted injunctions restraining Neighbourhood Energy and Australian Green Credits from engaging in similar conduct for two years and ordered corrective advertising and the establishment or maintenance of compliance programs.

The *ACCC v Neighbourhood Energy* case was highly significant as it offered the first test of the ACL unsolicited consumer agreement provisions. Prior to the court's decision, the ACCC stated that the litigation would test the scope and application of the ACL in relation to door-to-door selling, commenting in its submission to an inquiry on the *Do No Knock Register Bill 2012*, that it was 'too early to say whether or not the ACL unsolicited selling provisions' would be interpreted by the Courts in a manner that would 'ensure that the law provides adequate protection for consumers.'¹³⁶

Following the decision, ACCC chairman Rod Sims argued that it would have a 'profound effect' on consumer protection by reinforcing door-to-door sellers' obligations to identify themselves, explain why they are visiting, and leave when requested. Importantly, the orders confirmed that display of a Do Not Knock sign constitutes a request under section 75(1) (a) that the door-to-door seller leave the premises, resolving any ambiguity about the signs' legal status.

While it is still too early to evaluate whether the ACCC's enforcement actions on door-to-door sales will contribute to increased compliance with the ACL unsolicited consumer agreement provisions, the ACCC's activity and its outcomes is being widely reported and reflected in business and legal advice. For example, describing the pecuniary penalties ordered as 'significant', the Australian Government Solicitor suggested that the *ACCC v Neighbourhood Energy* decision should 'serve as a warning ...that [door-to-door sellers] need to be stringent in ensuring compliance with ACL requirements.'¹³⁷ The decision generated substantial media coverage¹³⁸ and was widely reported

¹³⁵ Australian Government Solicitor (2012) 'Federal Court decision on unwanted doorknocking,' *Express Law – fast track information for clients*, 4 October 2012.

¹³⁶ Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Social Policy and Legal Affairs (2012) *Advisory Report: Do Not Knock Register Bill 2012*, Parliament of Australia: Canberra, p. 14.

¹³⁷ Australian Government Solicitor, (2012) 'Federal Court decision.'

in industry and legal publications.¹³⁹ It was also welcomed by consumer groups as a 'landmark' decision.¹⁴⁰

Information about the agreement

Energy door-to-door sales in Victoria are also subject to a range of disclosure requirements relating to the agreement and its specific terms and conditions. Under the ACL, where unsolicited agreements are made in person, dealers are required to provide the consumer with a copy of the agreement immediately after it has been signed by the consumer. This document must clearly state the full terms of the agreement and the total price payable or how it will be calculated.

More detailed requirements specific to Victorian energy contracts are contained in the *Energy Marketing Code*. Before entering into a contract, the customer must be provided with details of all applicable prices, charges, tariffs and service levels that will apply, inclusive of all costs including GST. Additionally, for market contracts, the consumer must be provided with information about (among other things):

- the type and frequency of bills and bill payment methods;
- rights to cancel the contract, and any charges that apply for doing so;
- all relevant information about any difference between the contract's terms and conditions and requirements in the *Energy Retail Code*; and
- the full terms of the contract including the period of the contract.

All of this information must be provided in 'plain English' and be designed to be 'readily understood by consumers,' and the consumer must be given a reasonable opportunity to consider this information before entering into the contract. Door-to-door sales agents are also bound by the requirement in the ESC's *Guideline 19 – Energy Price and Product Disclosure* that a written Offer Summary be provided on request by a customer and when providing a customer with the terms or information about the terms of any new retail contract.¹⁴¹ In addition, on or before the second business day after the relevant date in respect of a contract, the retailer must provide the consumer with a copy of the contract (or another document evidencing the contract) setting out the tariff to be charged and all of the contract's terms and conditions.

The NECF *Energy Marketing Rules*, which may apply in Victoria in the near future, also include additional disclosure obligations specific to energy market contracts, which go beyond those set out in the ACL. Under the Rule, retail marketers are required to provide customers with additional information about:

¹³⁸ See, for example: Collier, Karen, 'Court imposes \$1 million penalty for doorknockers who harass households', *Herald Sun*, 28 September 2012; Morgan, Elysse and Michael Janda, 'ACCC silences the knockers with million-dollar win', *ABC news*, 28 September 2012; Climate Spectator, 'Energy retailers feel sting of \$1m fines for illegal doorknocking' 1 October 2012.

¹³⁹ See, for example: Addisons (2012) *October 2012 Direct Selling Update*, Addisons: Sydney; EnergyCareer, 'ACCC hails win against door salespeople', EnergyCareer website, 1 October 2012.

¹⁴⁰ CHOICE (2012b) 'Federal Court Takes Action', *CHOICE* website; Consumer Action Law Centre, Financial Counselling Australia and Victoria Legal Aid (2012) 'Landmark Federal Court Decision a Ringing Endorsement of the Do Not Knock Sticker', *Do Not Knock* website.

¹⁴¹ Essential Services Commission (2009) *Guideline 19 – Energy Price and Product Disclosure*, ESC: Melbourne.

- All applicable prices, charges, early termination fees, security deposits, service levels, concessions or rebates, billing and payments and how any of these matters may be changed
- The start date and duration of the contract, availability of extensions, and termination of the contract if the customer moves during the term of the contract
- If any requirement must or can be complied with by an electronic transaction—how the transaction is to operate and, as appropriate, an indication that the customer will be bound by the electronic transaction, or recognised as having received the information contained in it.

The information must be provided either before the contract is formed (electronically, verbally or in writing) or as soon as practicable afterwards (in a single, written disclosure statement). The required information, when given in a written disclosure statement, must include or be accompanied by a copy of the market retail contract.

ESC compliance and enforcement activity

Despite evidence of breaches from retailer self-reporting, complaints data, and advice from community and consumer organisations, the ESC has been reluctant to enforce the regulatory requirements in the *Energy Marketing Code*, including those requirements relating to disclosure of agreement information. This is perhaps the most important area for ESC compliance and enforcement activity on door-to-door sales because it is the key domain in which *Energy Marketing Code* requirements go beyond the generic provisions of the ACL to cover energy-specific matters. While CAV and the ACCC might be more appropriate bodies for enforcement with regard to misleading and deceptive or unconscionable conduct and similar issues, the ESC is better-positioned to ensure that the energy retailers comply with regulatory requirements aimed at minimising consumer detriment by supporting consumers to make informed decisions, even in the situational monopoly environment of door-to-door sales.

ESC compliance reports, based on self-reporting by retailers, offer some insight into the extent to which Victorian retailers are complying with *Energy Marketing Code* requirements relating to the provision of information about an offer. **Table 7**, below, summarises data on Type 1 breaches of the *Energy Marketing Code* relating to agreement information.[†]

Table 7: Type 1 breaches relating to marketing information, 2007–08 to 2010–11

Year	Systemic	Isolated	Total	Customers affected*
2010-11	7	6	13	>2,196
2009-10	5	1	6	> 7,538
2008-09	5	4	9	>13,074

Source: Essential Services Commission (2010c) *2008-09 Compliance Report for Energy Retail Businesses*, ESC: Melbourne; ESC (2011c) *2009-10 Compliance Report for Energy Retail Businesses*, ESC: Melbourne; ESC (2012c) *2010-11 Compliance Report*.

[†] Table 7 compiles information about breaches where required agreement information was not provided within specified timeframes or at all, or where incorrect information about the offer was supplied. It does not include breaches relating to misleading statements not explicitly relating to the actual agreement. Note that the table includes both door-to-door sales and telesales breaches as these are not always identified separately.

*Note: Some reported breaches – including some systemic breaches that continued for several months - do not include any indication of the number of customers affected. Hence, these figures will be substantially lower than the actual number of customers affected.

While almost certainly an underestimate of the extent of breaches,[†] these figures do show that a substantial number of customers are not receiving the accurate information that retailers and their sales agents are required to provide, and that may be necessary if consumers are to make informed decisions in their interests. This potentially increases the likelihood that the door-to-door switching decisions made by affected customers will cause them financial detriment. However, satisfied with the actions taken by retailers to remedy these breaches, the ESC did not take further enforcement action on *Energy Marketing Code* breaches over the 2008-09 to 2010-11 period.

In 2009-10, the ESC responded to concerns about non-compliance with *Energy Marketing Code* requirements with its *Respecting Customers – Marketing Conduct Regulatory Program*. The objectives of the program were:

- To encourage and promote consumer confidence in the competitive retail market by ensuring customers are provided with truthful and accurate information in a way that allows them to make fully informed choices
- To ensure that retailers comply with their obligations to new and existing customers, and are held accountable for their marketing conduct
- To maintain the focus of senior management in the retail energy sector on reducing marketing conduct complaints
- To mitigate language and comprehension difficulties experienced by Victorians of non-English speaking background and other vulnerable communities.¹⁴²

In its first report on the *Respecting Customers* program, the ESC described the compliance and enforcement activities it had undertaken previously. They were:

- investigating complaints and issues and 'addressing' them with the retailer
- referring some 'serious breaches' of the *Fair Trading Act* to CAV[‡]
- publishing annual Compliance Reports
- encouraging voluntary compliance
- monitoring corrective actions by retailers
- conducting a consumer information campaign and consumer website
- consulting with newly arrived Australians
- running a 'Retail market conduct forum.'¹⁴³

The report also described a range of planned monitoring, consumer education, liaison and consultation activities to be undertaken as part of the program, and mentioned the possibility that 'appropriate enforcement activities' might be taken in conjunction with CAV should there be retailers 'whose sales force demonstrates systemic or serious non-compliance with the marketing

[†] For a discussion of the reliability of self-reported regulatory compliance data, see: Parker, Christine and Vibeke Nielsen (2009) 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism,' *Annual Review of Law and Social Science*, 5:45-70.

¹⁴² ESC (2009c) *Respecting Customers – June 2009*, p. 13.

[‡] On one occasion this lead to CAV securing an enforceable undertaking.

¹⁴³ ESC (2009c) *Respecting Customers – June 2009*, p. 8-12.

regulations.¹⁴⁴ It further noted that while the ESC ‘trusts these enforcement mechanisms will not be necessary’ it would ‘not hesitate to pursue enforcement action’ were customers to be systematically mistreated by retailers repeatedly breaching their regulatory obligations.¹⁴⁵

Research and consultation conducted during the course of the *Respecting Customers* program demonstrated that retailers were frequently failing to provide customers with offer and agreement information, in contravention of regulatory requirements. For example, a status report in December 2009 noted that during consultations in Melbourne’s West, customers said that generally, sales agents ‘would not give customers any written material.’ Remarkably, the ESC’s commentary on this consultation indicates that the ESC did not consider this to be a ‘significant issue’ or a ‘serious breach.’¹⁴⁶ Similarly, independent market research commissioned by the ESC in 2009 found that around 60 per cent of residential and small business customers were told they would receive a written Offer Summary, as requested in a telephone contact, but only half of the residential customers and a quarter of small business customers received them within the mandated ten business days. Three retailers provided written Offer Summaries to fewer than half of requesters,¹⁴⁷ suggesting systemic non-compliance.

Prompted by these findings, the ESC requested information from retailers about how they provided offer information and the compliance systems they had in place. In response, some retailers said they did not provide offer information until after a customer enters into a contract, and less than half described an effective compliance monitoring process. Consequently, in July 2010, the ESC again wrote to retailers seeking ‘written assurance’ of compliance with regulatory requirements on Offer Summaries, and advising that upcoming audits would consider this issue.¹⁴⁸

A review of subsequent audits shows mixed results. **Table 8** below collates retailers’ audit results concerning *Guideline 19* and the information and consent requirements (Clause 3) in the *Energy Marketing Code*, for those audits published to date.

¹⁴⁴ *Ibid*, p. 13-14.

¹⁴⁵ *Ibid*, p. 17.

¹⁴⁶ Essential Services Commission (2009d) *Respecting Customers: Regulating Marketing Conduct – Energy Retail Businesses – Status Report – December 2009*, ESC: Melbourne, p. 5.

¹⁴⁷ *Ibid*, p. 7-8.

¹⁴⁸ Essential Services Commission (2010a) *Respecting Customers: Regulating Marketing Conduct – Energy Retail Businesses – 2009-10 Final Report – December 2010*, ESC: Melbourne, p. 18-19.

Table 8: *Energy Marketing Code* and *Guideline 19* regulatory audit results, 2010–11

Retailer	EMC clause 3	G'line 19	Commentary relating to agreement information
Origin Energy	C	C	<ul style="list-style-type: none"> • <i>Guideline 19</i> requirements were not clearly documented or understood • In-house marketing information did not meet <i>Guideline 19</i> requirements • Sales agents were not trained, supervised or monitored on <i>Guideline 19</i> compliance
TRUenergy	A	B	<ul style="list-style-type: none"> • Generally compliant with EMC obligations to provide information • Sales agents supplied with & trained to provide Offer Summaries from April 2010 • Offer Summary content met requirements
Simply Energy	A-	A-	<ul style="list-style-type: none"> • Adequate compliance with marketing obligations 'overall' • Offer Summaries met requirements & expressed with plain English • Door-to-door sales agent training included requirement to provide Offer Summaries, but no incentive or control in place • Price and Product Information Statements (PPISs) did not show all required detail • Documented procedures omitted some information-related code obligations
AGL	A+	A+	<ul style="list-style-type: none"> • No commentary as this 2010 re-audit followed a more comprehensive 2009 audit showing significant non-compliance with 37 of 41 performance indicators and 12 of 22 regulatory obligations. • 2009 audit results for <i>Energy Marketing Code</i> Clause 3 and <i>Guideline 19</i> were C and D respectively
Lumo Energy	A+	A+	<ul style="list-style-type: none"> • Sales agents trained to provide Offer Summary, but no incentive or controls to ensure these routinely given to customers when marketing

Sources: Essential Services Commission (2011a) *Summary Audit Report: Regulatory Audit of Origin Energy – September 2011*, ESC: Melbourne, p. 15-16; ESC (2011b) *Summary Audit Report: Regulatory Audit of TRUenergy – December 2011*, ESC: Melbourne, p. 9-10; ESC (2012e) *Summary Audit Report: Regulatory Audit of Simply Energy – January 2012*, ESC: Melbourne; ESC (2010b) *Summary Audit Report – Regulatory Audit of AGL Energy Limited – December 2010*, ESC: Melbourne; ESC (2012d) *Summary Audit Report – Regulatory Audit of Lumo Energy – May 2010*, ESC: Melbourne.

Table 8 shows that while most retailers were found to be complying with most marketing information obligations, there was frequently no control or incentive in place to ensure that sales agents provided written offer information as a matter of course. Origin Energy, one of Victoria's largest retailers, and one engaged in extensive door-to-door sales activity, was not complying with either *Energy Marketing Code* or *Guideline 19* requirements. In responding to the results of these regulatory audits, the ESC asked retailers to make administrative undertakings that they will remedy areas of non-compliance.

In most cases, the deadline for these corrective actions and independent verification has now passed, but no further information has been made publicly available on the ESC website. For example, following its 2011 audit demonstrating major non-compliance with the *Energy Marketing Code* and *Guideline 19*, in January 2012 Origin Energy committed to a range of corrective actions and a further independent audit in July 2012.¹⁴⁹ At the time of writing, the results of this audit were not yet available on the ESC website. Similarly, while initial regulatory audits of Red Energy, Neighbourhood Energy, Australian Power and Gas and Powerdirect were scheduled for

¹⁴⁹ Origin Energy (2012) Letter to Mr David Heeps, CEO, Essential Services Commission, 4 January 2012, ESC website.

completion between April and June 2012, the results had not yet been published by the ESC as of December 2012.

Ofgem compliance and enforcement activity (UK)

The ESC's failure to enforce regulatory requirements contrasts with a far more vigorous approach taken by the UK energy regulator, Ofgem, on regulation designed to ensure that consumers switching door-to-door have the information necessary for informed choice. Research and data on information required in door-to-door sales situations, and on the financial outcomes of door-to-door switching decisions, have also been used by Ofgem to inform regulatory changes.

After its 2008 Energy Supply Probe finding that nearly half of those customers switching door-to-door were made financially worse off, Ofgem introduced new requirements on retailers to provide, prior to sale:

- A written (on paper or electronic display) estimate of annual costs under the tariff offered, based on that consumer's consumption
- For pre-payment meter customers† or where the sales agent has made a comparative claim, a comparison with the customer's current deal.

Additional requirements for point-of sale information were also introduced.¹⁵⁰

In 2012, an Ofgem investigation of EDF Energy found that it had breached aspects of these strengthened license conditions relating to information to be provided during door-to-door and telesales. Specifically, Ofgem found that EDF Energy had failed to:

- Consistently provide complete and accurate information on aspects of sale, including Principle terms
- Sufficiently ensure and control the provision of accurate estimates, comparisons and direct debit payments
- Have regard to all relevant information when estimating prospective customers' annual consumption.

While controls were in place to address these issues, Ofgem found that they were insufficient.¹⁵¹

Interestingly, Ofgem noted in its decision that while the breaches were less serious than others investigated in 2002 and 2008, the fact that Ofgem had been required to make repeated regulatory interventions regarding marketing over the decade meant that a large penalty was then appropriate.¹⁵² EDF Energy agreed to a package of payments totalling £4.5 million – the largest payment of its kind. Most of this amount was delivered to vulnerable consumers in the form of compensation payments, with the remainder contributed to the Citizens Advice Bureau's *Energy Best Deal* campaign. At the time of writing, four of the remaining 'Big Six' energy retailers were also under investigation by Ofgem for misselling.

† This appears to be used as a proxy for consumer vulnerability.

¹⁵⁰ Ofgem (2009) *Energy Supply Probe – Proposed Retail Market Remedies*.

¹⁵¹ Ofgem (2012a) *Decision of the Gas and Electricity Markets Authority to impose a financial penalty following an investigation into compliance by EDF Energy Customers plc ("EDF Energy") with the obligations under conditions 23 ("SLC 23"), 25 ("SLC 25") and 27 ("SLC 27") of the Standard Conditions of the Electricity and Gas Supply Licences*, Ofgem, London, p. 2.

¹⁵² *Ibid*, p. 2.

Prohibition

The strongest policy instrument that government may employ with regard to door-to-door selling is prohibition. Prohibiting a product or practice restricts trade and hence, banning is a measure that is the 'last resort of the consumer regulator.'¹⁵³ Because prohibition has strong effects, careful evaluation of benefits and costs, including any impacts on efficiency and consumer choice, is critical.¹⁵⁴

Arguing that there will 'always be a role' for bans, UK academic Howells describes the rationale underpinning prohibition of certain products and practices:

*The justifications for such interventions derive both from the desire to protect the consumer and to prevent society from suffering the external costs that arise when consumers suffer harm. Moreover, poor quality goods, unbalanced contract terms, and bad marketing practices may undermine confidence in the market.*¹⁵⁵

Hence, although severe, prohibition is sometimes necessary, and in many countries, unsafe and potentially harmful products as well as practices such as lying and harassment are subject to bans.¹⁵⁶

In its Consumer Policy Toolkit, the OECD sets out some criteria for effective prohibition. Among these is a requirement that an appropriate enforcement and monitoring regime is in place to discourage the formation of illicit markets.¹⁵⁷ This requirement, however, would presumably be less important were energy door-to-door sales to be banned, given energy retail's high barriers to entry and extensive regulatory requirements. More relevant is the need for community support for any ban, with consumers and firms made aware of the prohibition and its justification.¹⁵⁸

As detailed above, specific types of business conduct (within the context of door-to-door sales or elsewhere) are prohibited under the ACL. This section, in contrast, discusses the wholesale prohibition of door-to-door sales, either economy-wide or in a specific sector. It covers both prohibitions that are in place and unsuccessful attempts at banning door-to-door sales.

Complete prohibition

In some jurisdictions, unsolicited door-to-door selling has been completely prohibited, or attempts have been made to prohibit it.

Act on Certain Consumer Contracts 2004 (Denmark)

Denmark has prohibited unsolicited door-to-door selling and similar sales methods, including unsolicited telesales, under Chapter 2 of its *Act on Certain Consumer Contracts (2004)*.¹⁵⁹ Chapter 6 of the law includes provisions for penalties of a fine for violations of this ban. CUAC's review did

¹⁵³ OECD (2010) *Consumer Policy Toolkit*, p. 97; Howells (2005) 'The Potential and Limits of Consumer Empowerment,' p. 366.

¹⁵⁴ OECD (2010) *Consumer Policy Toolkit*, p. 99.

¹⁵⁵ Howells (2005) 'The Potential and Limits of Consumer Empowerment,' p. 366.

¹⁵⁶ OECD (2010) *Consumer Policy Toolkit*, p. 97-98.

¹⁵⁷ *Ibid*, p. 99.

¹⁵⁸ *Ibid*, p. 99.

¹⁵⁹ Nielsen, Ruth (2011) *Contract Law in Denmark*, Kluwer Law International: Alphen aan den Rijn, p. 99.

not uncover any other countries in which unsolicited door-to-door selling is subject to a general ban.[†]

'Green River' ordinances (USA)

In 1931 the town of Green River, Wyoming passed and approved a municipal ordinance (Ordinance No. 75) declaring door-to-door solicitation 'a nuisance.' The ordinance prohibited door-to-door solicitation unless the sales agent was 'requested or invited' by a resident, making it subject to criminal penalties. Subsequently, hundreds of other towns and cities throughout the USA adopted similar ordinances, many of which remain in place.

Soon after its introduction, Green River's ordinance was challenged in court by the Fuller Brush Company,¹⁶⁰ which claimed that the ordinance violated the First Amendment right to free speech. Although the court upheld the Green River ordinance,¹⁶¹ subsequent cases have 'whittled away at local governments' power' to protect residents from door-to-door solicitation and 'revitalized and expanded constitutional protections for doorstep speech,' including commercial speech.¹⁶² Hence, although a number of Green River ordinances remain in place, these are no longer likely to withstand challenge unless they apply only to consumers who explicitly advise (such as via a No Canvassing sign) that they do not wish to receive door-to-door sales calls.¹⁶³ In April 2012, for example, the town of Collierville was reportedly forced to lift its ban on door-to-door sales after sellers challenged its 1996 ordinance. The town planned to respond by encouraging residents to use No Canvassing signs and sign onto a local Do Not Solicit Register.¹⁶⁴

Sector-specific bans

In a number of countries, governments have prohibited (or considered prohibiting) unsolicited door-to-door sales of particular products and services. Such prohibitions typically deal with products and services that carry a heightened risk of substantial financial detriment.

Financial products and consumer credit (Australia)

Australia has prohibited the door-to-door sales of financial products and consumer credit. The *National Consumer Credit Protection Act 2009* (Cth) bans the unsolicited door-to-door sale of credit, although it does allow for in-homes sales with a prior appointment.¹⁶⁵ Similarly, under the *Corporations Act 2001* unsolicited face-to-face and telephone sales of interests in managed investment schemes, securities or other financial products are prohibited.¹⁶⁶

In their 2007 report *Coercion and Harassment at the Door*, Consumer Action and the FCRC argued that these bans '[recognise] the immense detriment that can ensue where consumers face

[†] Although door-to-door sales were apparently prohibited in China between 1998 and 2006. See: Lee, Don (2006) 'Avon calling again, as China lifts sales ban' *The Sydney Morning Herald*, December 16, 2006.

¹⁶⁰ *Town of Green River, Wyoming v. Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933)

¹⁶¹ Grubb, Marna (n.d.) '1931 Green River Ordinance,' *City of Green River* website.

¹⁶² Lukasic, Lisa (1997) 'Are "Green River" Ordinances Constitutional Under the First Amendment?' in *Local Government Law Bulletin*, Institute of Government, University of North Carolina: Chapel Hill, p 6.

¹⁶³ *Ibid*, p. 10.

¹⁶⁴ Anthony, Kontji (2012) 'Collierville to lift ban on door-to-door salesmen', WMCTV news, 12 April 2012.

¹⁶⁵ *National Consumer Credit Protection Act 2009*, Schedule 1 - National Credit Code, Part 9, s 156.

¹⁶⁶ *Corporations Act 2001*, Part 6D, Division 1, s. 736, and Part 7.8 Division 8, s. 992A and 992AA.

pressure to purchase financial products and services where the transaction has been unsolicited.¹⁶⁷ The report went on to note that energy contracts share important features in common with financial contracts, 'namely that they both involve a deferred debt to be repaid, and if not repaid, can mean a default is listed on the consumer's credit information file.'¹⁶⁸

Bans on unsolicited door-to-door and telephone sales of financial products and consumer credit are also likely to reflect acknowledgement of the complexity of these products and, consequently, the difficulty – if not impossibility – of making an informed and considered decision about such products in the unsolicited sales context. Discussing the inadequacy of a 30-day cooling-off period on insurance policy purchases, Rekaiti and Van den Bergh note that:

*Insurance policies contain complex provisions. Only specialised lawyers can explain the precise meaning of clauses affecting the value of the policy. Even if the consumer is able to get this specialised information within a month, he must still process it and apply it to his particular situation.*¹⁶⁹

Although energy agreements are certainly less complex than insurance policies, their terms and conditions are nonetheless detailed and often difficult to compare. This complexity is likely to grow with the introduction of flexible pricing in 2013.

Property Services (UK)

In response to a super-complaint by Citizens Advice, in 2004 the UK OFT published a major report on door-to-door selling. Based on OFT's investigations into the detriment associated with different types of door-to-door selling, this report included a recommendation that the Department of Trade and Industry (DTI) consult on a potential prohibition on the unsolicited door-to-door sale of property maintenance and repairs.¹⁷⁰ Following consultation, however, this recommendation was not implemented.

Discussion and recommendations

Door-to-door sales of energy in Victoria are subject to a range of obligations under ACL and Victorian energy regulations. However, the legal and regulatory requirements can only minimise consumer detriment from door-to-door selling to the extent that they are complied with. Evidence from consumer complaints, compliance and audit reports, consumer research and other sources suggests, however, that compliance is currently patchy.

Enforcement

CUAC therefore strongly supports the ACCC's recent focus on enforcing the ACL in relation to energy door-to-door sales. The ACCC has acknowledged that the ACL can only be effective if it is 'enforced and seen to be enforced.'¹⁷¹ It has welcomed strong Federal Court penalties for breaches of the ACL, suggesting that such penalties are necessary to deter poor conduct and make a 'clear, profound and lasting impact' on business behaviour, as well as to demonstrate to consumers that

¹⁶⁷ CALC & FCRC (2007) *Coercion and harassment at the door*, p. 8.

¹⁶⁸ *Ibid*, p. 8.

¹⁶⁹ Rekaiti & Van den Bergh (2000) 'Cooling-off Periods in EC Member States,' p. 388.

¹⁷⁰ OFT (UK) (2004) *Doorstep Selling*, p. 112.

¹⁷¹ Sims (2012b) *Enduring perspectives*, p. 3.

their rights are being protected.¹⁷² The ACCC's enforcement activity also reflects its acknowledgement that accounts of poor door-to-door selling behaviour are numerous enough to indicate real substance behind many complaints, as well as its recognition of the added significance of energy door-to-door misselling specifically, given energy's status as an essential service.¹⁷³

Although it is too early to assess the impact of enforcement action on energy retailers' overall compliance, this enforcement activity has led to a substantial penalty, helped to clarify the law, and garnered significant public attention. Ongoing enforcement action should solidify these gains. The ACCC has recently indicated that use of its ACL enforcement powers remains a priority.¹⁷⁴ Within this, while complaints of energy door-to-door misselling continue, CUAC believes that, with the support and collaboration of CAV, the ACCC should continue to include enforcement action on energy door-to-door sales.

Recommendation 3

That the ACCC maintain its focus on enforcement and testing of the ACL unsolicited consumer agreement provisions, including in the energy sector.

In contrast to the ACCC's approach to enforcing compliance with the ACL unsolicited consumer agreement provisions, over a number of years, the ESC has consistently argued that a 'light-touch' approach to 'voluntary compliance' generates better consumer outcomes and 'perceptions of the competitive retail market.'¹⁷⁵ During this period, however, EWOV complaints about energy retailers, including marketing and transfer complaints, have continued to escalate year on year. At the same time, commissioned research, consumer reports, independent audits and retailers' self-reported compliance all show that in many instances, retailers are not complying with marketing information requirements in the *Energy Marketing Code* and *Guideline 19*.

While emphasising its preference for voluntary compliance, the ESC has acknowledged that a credible threat of sanctions is a necessary element of a regulator's compliance and enforcement approach.¹⁷⁶ However, in reviewing compliance, audit and performance reports and other documents, CUAC found no examples of occasions on which the ESC had used any of its statutory enforcement powers in relation to door-to-door selling or other marketing activities.[†] Energy retailers have now had several years to familiarise themselves with these regulatory requirements. They have also been reminded of these obligations and asked to comply voluntarily on a number of occasions.

While the ACL unsolicited consumer agreement provisions do include some requirements to provide information about the agreement being entered into, these are not detailed or specific enough to ensure that Victorian energy consumers have access to the information enabling them to make

¹⁷² Sims, Rod (2012a) *Current ACCC Priorities*, Presentation to the Australia-Israel Chamber of Commerce Western Australia Business Leaders' Lunch, 13 September 2012.

¹⁷³ Hepworth, Annabel (2012) 'Door-to-door energy-company spruikers risking penalties,' *The Australian*, 14 September 2011.

¹⁷⁴ Sims (2012a) *Current ACCC Priorities*, p. 7.

¹⁷⁵ See, for example: ESC (2009c) *Respecting Customers – June 2009*, p. 10.

¹⁷⁶ ESC (2012a) *Compliance Policy Statement*, p. 7.

[†] Indeed, we are not aware of any recent use of the ESC's statutory enforcement powers on any energy matter.

appropriate switching decisions at the door. Hence, the marketing information requirements contained in the *Energy Marketing Code* and *Guideline 19* are critical, as is the ESC's role in ensuring compliance with them. With the impending introduction of flexible pricing making clear and comprehensive information more important than ever, CUAC believes that now is time for the ESC to take stronger enforcement action should non-compliance with these obligations continue.

Following the most recent round of regulatory audits, retailers provided assurances to the ESC that corrective actions would be undertaken to rectify areas of non-compliance, and independent verification provided to the Commission. Although these actions should now have been completed, no further information has been published on the ESC website. Similarly, initial results from four further regulatory audits which were scheduled for completion some months ago have not yet been made available. The results of all completed regulatory audits, and, where applicable, evidence of subsequent corrective action should be made publicly available in a timely fashion.

Recommendation 4

That the Essential Services Commission ensure that results from regulatory audits and evidence of subsequent corrective action be made publicly available on the ESC website within three months of their completion.

Should any retailers have failed to fulfil undertakings made following their most recent regulatory audits by the specified deadlines, stronger enforcement action should now be taken.

Recommendation 5

That, should retailers have failed to comply with administrative undertakings arising from 2010-11 regulatory audits within the specified timelines, the Essential Services Commission use its statutory powers to enforce compliance with *Energy Marketing Code* and *Guideline 19* requirements.

Monitoring and prohibition

CUAC is not, at this stage, advocating for the prohibition of energy door-to-door sales. Nonetheless, we believe this option must be kept 'on the table' should less prescriptive approaches to minimising detriment fail. At the same time, as the energy retail market changes, the suitability of door-to-door sales in the sector must be re-assessed in light of new conditions. The widespread introduction of flexible pricing, for example, will be a profound change, and one that increases both the complexity of energy agreements and, potentially, the financial detriment that may result from unsuitable choices.

Recommendation 6

That the Victorian Government and the Essential Services Commission closely monitor consumer impacts during the widespread introduction of flexible pricing in 2013. Should this monitoring show that consumers are experiencing increased detriment from the door-to-door sale of flexible pricing offers, the *Energy Marketing Code* should be reviewed and protections enhanced.

4. CONSUMER-CENTRED APPROACHES

A number of policy approaches to door-to-door selling can be categorised as consumer-centred: that is, they place the onus on consumers to, through their choices and actions, protect themselves from potential door-to-door selling misconduct and/or detriment, or to opt out of any participation in this sales channel. Consumer-centred approaches include consumer education and information initiatives, No Canvassing signs and stickers, No Contact lists and registers, excluded zones, and combinations of these approaches. There is also substantial overlap among each of these, and most approaches include a consumer education component.

Consumer education and information

Consumer education and information initiatives aim to equip consumers with the knowledge, skills and confidence they need to participate effectively in increasingly complex and information-intensive markets.¹⁷⁷ Consumer education can be formal, including training, advice and instruction provided in settings such as schools, or can occur informally, gained via everyday experience and individual research.¹⁷⁸ It is carried out by governments, but also by civil society, consumer organisations, business, educational institutions, and through the media.¹⁷⁹

Consumer education programmes and initiatives frequently target specific vulnerable consumer groups and/or specific consumer issues. For example, a targeted education program might focus on migrants, recognising that they may have difficulty interacting in the marketplace due to unfamiliarity, language barriers and a lack of access to mainstream information resources,¹⁸⁰ so a targeted education might focus specifically on educating these consumers. Specific issues that are frequently the subject of targeted education programmes include financial literacy, fraud and scams, and other deceptive practices.¹⁸¹

Consumer education and awareness initiatives are a mainstay of door-to-door selling policy in a range of sectors and jurisdictions, reflecting a more general emphasis on consumer information and education in developed economies. In its *Promoting Consumer Education: Trends, Policies and Good Practices* report, the OECD suggests that most countries see consumer education as playing a role in:

- (a) consumer protection: increasing consumers' awareness of their rights and responsibilities helps them to protect their own welfare

¹⁷⁷ OECD (2009) *Promoting consumer education: Trends, Policies and Good Practices*, OECD: Paris, p. 7-8; OECD (2010) *Consumer Policy Toolkit*, p. 78-79.

¹⁷⁸ OECD (2009) *Promoting consumer education*, p. 8.

¹⁷⁹ *Ibid*, p. 8, 30.

¹⁸⁰ *Ibid*, p. 28.

¹⁸¹ *Ibid*, p. 29.

- (b) consumer empowerment: knowledge enables consumers to participate proactively, avoid falling prey to fraudulent and deceptive practices, and make informed decisions in the marketplace, in turn boosting consumer confidence
- c) promoting the public interest: educated consumers can contribute to environmental and social objectives.¹⁸²

To achieve these goals, consumer education may be used in concert with other tools as a 'foundation.'¹⁸³

Consumer education and information in Victoria

Several government departments, regulatory agencies and consumer and community organisations produce consumer information materials on door-to-door sales, and/or conduct consumer education activities in this area. Some of these are described below.

Australian Competition and Consumer Commission

The ACCC has a statutory role in informing consumers about their rights and responsibilities under the ACL. The ACCC has produced a series of ACL factsheets including one on door-to-door sales, available in English and 20 community languages.¹⁸⁴

In addition, in August 2012, the ACCC responded to community concerns with the launch of a consumer awareness campaign on door-to-door selling. The campaign information materials themed *Knock! Knock! Who's there?* include a detailed consumer guide to door-to-door sales. The guide both describes consumers' rights under the ACL and other applicable industry laws and sets out practical tips on, for example, using Do Not Knock stickers, reading agreements before signing them, exercising 'cooling off' rights, and so on. The guide also includes information and advice specific to energy sales, including a suggestion that consumers contact their existing energy provider to check whether cancelling their existing contract will attract exit fees.¹⁸⁵ In addition to the guide, the ACCC produced a more condensed brochure, a postcard, a fridge magnet and its own Do Not Knock sticker. The ACCC received around 7,000 requests for Do Not Knock stickers and consumer guides following the launch of the campaign.¹⁸⁶

Consumer Affairs Victoria

CAV has a number of ongoing community education activities relating to door-to-door selling. CAV has officers who are available to give community presentations on door-to-door issues, including energy-specific content, and has also developed a presentation that can be delivered by communities themselves. CAV enquiry and complaints staff all are trained in unsolicited consumer agreement requirements, and information on door-to-door selling is available through its

¹⁸² *Ibid*, p. 10.

¹⁸³ OECD (2010) *Consumer Policy Toolkit*, p. 79.

¹⁸⁴ Australian Competition and Consumer Commission (n.d.) *Door-to-door sales – Your rights in Australia*, Australian Consumer Law Factsheet, ACCC: n.p.

¹⁸⁵ ACCC (2012c) *Knock! Knock! Who's There?: Door to door sales – a guide for consumers*, ACCC: Canberra.

¹⁸⁶ ACCC (2012d) *Do Not Knock Register Bill 2012* submission, p. 5.

metropolitan and regional offices. The CAV website also hosts consumer information on door-to-door sales in a number of languages and in Easy English.¹⁸⁷

In addition to these ongoing activities, in February 2012 CAV launched an Energy Marketing Campaign aimed at empowering consumers to shop around for the best energy deal, without feeling pressured to accept an offer on the spot. The campaign also promoted the use of Do Not Knock stickers to vulnerable consumers who are not confident in dealing with sales agents. The campaign disseminated its messages via metropolitan and regional media, ethnic community media, targeted presentations to vulnerable consumer groups and social media (Twitter and Facebook). The campaign achieved 56 mentions in ethnic community publications and 13 print and radio stories.¹⁸⁸ Members of CAV's Energy Marketing Working Group, which included CUAC, supported the campaign via traditional and social media.

Energy and Water Ombudsman (Victoria)

EWOV has produced a five minute *Energy Marketing and Transfers* consumer video, available on the EWOV website. In the video, an EWOV conciliator outlines key consumer rights and retailer obligations in relation to door-to-door selling and telesales.¹⁸⁹ An EWOV *Energy Marketing* factsheet sets out more detailed information about obligations under the *Energy Marketing Code* and ACL, as well as examples of the kinds of door-to-door sales problems that can occur.¹⁹⁰ In addition to its text-based and audio visual resources on a range of energy and water topics, EWOV conducts community education visits, including activities targeting specific vulnerable consumer groups.¹⁹¹

Other government and regulatory information materials

Victoria's ESC, which currently regulates retail energy in Victoria, offers consumer advice on 'Dealing with Salespeople' on its website. The ESC describes requirements in the *Energy Marketing Code* and the ACL regarding permitted hours of contact, disclosure of prices and charges and other contract terms and conditions and cooling-off periods. It also advises consumers of their right to take time to consider their decision, and to ask sales agents to leave. The ESC's 2009-10 *Respecting Customers* programme, discussed in Chapter 3, also included a substantial consumer education and information component.

More broadly, the *Your Choice* website maintained by the ESC supports consumers to compare energy retail market offers, thereby providing an alternative avenue for participation. Similarly, the Victorian Government's *Switch On* website and campaign, while not addressing door-to-door sales directly, offers information and advice to support energy market participation.

ASIC's *MoneySmart* website includes information about 'Avoiding sales pressure'. While not specific to door-to-door sales, this page describes a range of persuasion tactics commonly employed in door-to-door selling. It suggests that 'the outcome is rarely good' when a decision is

¹⁸⁷ Consumer Affairs Victoria (2012) 'Door-to-door sales,' *CAV website*.

¹⁸⁸ Consumer Affairs Victoria (2012) *CAV Annual Report 2011-12*, CAV: Melbourne, p. 10.

¹⁸⁹ Energy and Water Ombudsman (Victoria) (n.d.) 'Energy Marketing and Transfers,' (video), *EWOV website*.

¹⁹⁰ Energy and Water Ombudsman (Victoria) (2012b) *Energy marketing: information about door-to-door and telephone energy marketing*, March 2012 – Fact Sheet, EWOV: Melbourne.

¹⁹¹ EWOV (2011) *Annual Report 2011*, p. 38.

made under pressure, and advises consumers to ask for time to think, to consider their cooling-off rights, to shop around, and to make use of Do Not Knock stickers. The site also links to more detailed information about consumers' legal rights.¹⁹²

Consumer and community organisations

Consumer Action, together with Financial Counselling Australia and Victoria Legal Aid, maintains a Do Not Knock website, which offers consumers access to Do Not Knock stickers as well as information and advice on consumer rights, dealing with sales agents and making complaints.

In a relatively rare example of a non-text resource, Victoria Legal Aid has produced two short videos on 'Dealing with door-to-door sales,' available on the Do Not Knock website. The first of the videos shows an older Italian-Australian man, Marcello, interacting with a door-to-door sales person, eventually signing a contract despite his initial reluctance. The second video features a lawyer describing Marcello's cooling off rights and explaining other consumer protections related to door-to-door sales.¹⁹³

Victoria Legal Aid has also published a 'how to' guide which explains how to run a community legal education session on door-to-door sales. The guide sets out basic steps for delivering an effective and engaging session that can be tailored to different target groups including older people, people with a disability, culturally diverse and newly arrived communities, and community sector workers. The guide includes resources and speakers' notes.¹⁹⁴

The role, effectiveness and limitations of consumer education

Consumer education is a key plank of government and civil society responses to door-to-door selling, and hence, an examination of the role, effectiveness and any limitations of these approaches is important. Consumer awareness and education campaigns can be powerful policy tools, and providing consumers with information about their rights is undoubtedly beneficial. UK academic Geraint Howells argues that informational approaches are increasingly dominant in consumer policy because they appear to present a 'win-win' solution for governments concerned both with consumer protection and maintaining competitive, efficient markets:

*Consumers are given the means to protect themselves and drive up standards, whilst business is allowed flexibility to provide the goods and services the market demands without restrictive and potentially anti-competitive substantive regulatory controls.*¹⁹⁵

This dynamic is certainly apparent in relation to door-to-door sales of energy. In this policy area, educating consumers about their rights seems to strike a balance between protecting consumers and allowing the continuation of a practice which drives customer switching and is therefore widely seen as crucial to energy market competition. Howells argues, however, that the success of any

¹⁹² Australian Securities and Investment Commission (2012) 'Avoiding Sales Pressure,' *MoneySmart* website.

¹⁹³ Victoria Legal Aid (2012) 'Do Not Knock Campaign,' Victoria Legal Aid website.

¹⁹⁴ Consumer Action Law Centre, Financial Counselling Australia and Victoria Legal Aid (2012a) 'How to run a Do Not Knock community information session,' *Do Not Knock* website.

¹⁹⁵ Howells (2005) 'Potential and Limits of Consumer Empowerment,' p. 350.

particular informational strategy should not be assumed without a 'thorough examination of whether [it is] likely to truly deliver the desired outcomes.'¹⁹⁶

Evaluation strategies

Perhaps surprisingly given the prevalence of education and information approaches, however, there is little publicly available research evidence about their effectiveness. As the OECD notes, evaluating consumer education is difficult because results may take some time to materialise and are rarely visible or quantifiable.¹⁹⁷ For programmes with clearly identified aims and content, evaluation can rely on the subjective reporting of participants about, for example, the value of the information provided or the ways in which behaviours have been changed. In many cases, however, while assessing whether consumers have received advice may be fairly simple, determining 'whether the information was effective in improving consumers' decisions' is difficult or impossible.¹⁹⁸ Alternatively, evaluation can look at other measurable indications of change (such as shifting consumer complaint levels).¹⁹⁹ As discussed elsewhere in this report, however, clearly linking particular campaigns and approaches to changes on these broader indicators is difficult.

Limitations

While making information available to consumers has obvious benefits, it is also important that the limitations of information and education as a consumer protection tool are recognised.²⁰⁰ Some of these limitations are clear from an analysis of the consumer education materials and activities on door-to-door sales described above.

Firstly, it is important to note that simply providing or distributing information to consumers does not mean that that information will be taken account of and absorbed. Information provided may be ignored by consumers because they have other things going on in their lives and limited time or inclination to increase their knowledge of consumer issues.²⁰¹ For those who do devote attention to informational resources, even apparently simple and clear information can be difficult for many consumers to understand.²⁰² The OECD's *Consumer Policy Toolkit* emphasises this point in its discussion of changes to consumer markets:

*... one would expect consumers to be well-equipped to deal with today's more challenging, information-driven economy. Unfortunately, literacy levels are relatively low. Surveys carried out during the 1990s in many countries revealed that only a small proportion of respondents had skills needed to deal with many standard consumer contracts.... A larger number were judged as having skills suitable for coping with the demands of ordinary life and work. But in all countries, there was a sizeable population of persons who were ill-equipped to cope with modern-day challenges.*²⁰³

Information and education for consumers with poor literacy skills cannot take the form of dense, text-heavy documents, and information will instead need to be presented using very simple text and

¹⁹⁶ *Ibid*, p. 351

¹⁹⁷ OECD (2009) *Promoting consumer education*, p. 37.

¹⁹⁸ OECD (2010) *Consumer Policy Toolkit*, p. 82.

¹⁹⁹ OECD (2009) *Promoting consumer education*, p. 37-38.

²⁰⁰ Howells (2005) 'Potential and Limits of Consumer Empowerment,' p. 349.

²⁰¹ *Ibid*, p. 356.

²⁰² *Ibid*, p. 356.

²⁰³ OECD (2010) *Consumer Policy Toolkit*, p 22-23.

pictures, via audio-visual means, or in resource-intensive face-to-face contexts. While there are some consumer education activities and resources on door-to-door selling that meet these requirements, such as Victoria Legal Aid's video, their coverage appears to be fairly limited.

All consumers, moreover, have limits on the amount of information they can absorb and process at any one time. Hence it is important that information be provided in a manner that does not simply '[wash] over the heads of consumers.'²⁰⁴ It is unlikely, for example, that even well-educated and affluent consumers will retain information about the detail of door-to-door selling provisions such as permitted calling hours.

Even where information is absorbed and retained, it will not necessarily translate into changed behaviour. Information can be transmitted effectively, but consumers' behaviour may continue to be driven by other emotional and personal factors as well as 'behavioural biases that are difficult to overcome.'²⁰⁵ This means that simply informing consumers of a risk may not be sufficient to mitigate that risk.²⁰⁶ For example, almost all of the consumer information materials dealing with door-to-door selling explicitly tell consumers that they should not feel pressured to accept a door-to-door sales offer. It is by no means clear, however, that this instruction actually equips consumers to *feel* confident and assertive when faced with a practiced sales-agent employing sophisticated psychological persuasion tactics inside the consumer's home.

CUAC's 2011 research into the experiences and needs of Victorian Aboriginal consumers of energy and water provides an illustration of this point. Discussions with Aboriginal consumers as well as service providers and advocates illuminated some of the complex cultural and behavioural factors that influence interactions with door-to-door sales agents. CUAC heard that many Aboriginal people, for historical and cultural reasons, tend to be unassertive, and to find interactions with sales agents intimidating.²⁰⁷ While efforts should certainly be made to ensure that these consumers are informed about their rights in door-to-door selling situations, it seems unrealistic to expect that knowledge of these rights will necessarily translate into change to deeply rooted emotions, perceptions and behaviours. This in turn raises an ethical question about the extent to which it is fair and appropriate to place the onus to minimise detriment on vulnerable and disadvantaged consumers themselves, rather than on the businesses that use this sales channel.

As was noted during initial development of Australia's Do Not Call Register (discussed in detail later in this chapter), an important limitation of consumer education and awareness approaches with regard to intrusive marketing practices is that they involve consumers taking action *after* a marketing approach has been made.²⁰⁸ Other mechanisms that allow consumers to opt out of participation altogether place less demand on individuals to absorb detailed information about their rights and to translate this knowledge into particular behaviours.

²⁰⁴ Howells (2005) 'Potential and Limits of Consumer Empowerment,' p. 360.

²⁰⁵ OECD (2010) *Consumer Policy Toolkit*, p. 80; Howells (2005) 'Potential and Limits of Consumer Empowerment,' p. 364.

²⁰⁶ Howells (2005) 'Potential and Limits of Consumer Empowerment,' p. 364.

²⁰⁷ CUAC (2011) *Wein, Paen, Ya Ang Gim*, p. 28-9, 50-51.

²⁰⁸ Australian Government Department of Communication, Information Technology and the Arts (2005) *Introduction of a Do Not Call Register: Possible Australian Model – Discussion Paper*, Department of Communication, Information Technology and the Arts: Canberra, p. 8.

No Canvassing stickers and signs

One way in which consumer organisations, governments and other bodies have facilitated individual consumers' decisions to opt out of door-to-door sales is through the production and distribution of signs or stickers advising sales agents that unsolicited door-to-door sales are unwelcome and/or unlawful. If respected by sellers, these stickers enable consumers to avoid the potential financial and non-financial detriment that can arise from misselling or poor decision-making, as well as the time and annoyance costs of interacting with sales agents at all. If ignored or unnoticed by sales agents, the stickers may nonetheless boost consumers' willingness and confidence in asking sales agents to leave.

Do Not Knock stickers (Australia)

In response to client reports of door-to-door sales misconduct, in 2007 Consumer Action and Financial Counselling Australia (FCA) jointly launched a Do Not Knock sticker. The sticker, which advises sales agents that unsolicited doorknocking is 'unlawful' at a particular address, was distributed to consumers for them to affix to their doors. The stickers were re-launched in August 2011, available to consumers via free download or from a network of community agencies across Australia. According to Consumer Action, more than 200,000 stickers were distributed in the year following the re-launch.²⁰⁹ Since Consumer Action and FCA launched the Do Not Knock sticker, other community organisations, companies and government agencies (including the ACCC) have produced and distributed this and other versions of the stickers. The sticker is also available for free download via the Do Not Knock website at www.donotknock.org.au.

Applicable law and regulation

Both Victoria's Energy Retail Marketing Code and the NECF include provisions requiring that energy retailers and door-to-door sellers acting on their behalf comply with signs on a person's premises indicating that canvassing is not allowed.

At the same time, although the ACL does not make specific reference to such signs or stickers, the September 2012 Federal Court ruling on *ACCC v Neighbourhood Energy*, discussed in the previous chapter, means that such signs are considered a request to leave under the ACL. Hence, retailers are liable to a penalty of up to \$50,000 each time a representative sales agent ignores the stickers.²¹⁰

Effectiveness

The effectiveness of Do Not Knock stickers was addressed in submissions to the House of Representatives Social Policy and Legal Affairs Committee during its inquiry into the *Do Not Knock Register Bill 2012*.²¹¹ Industry and door-to-door selling companies argued that the stickers were an effective, low-cost approach to opting out, and one that they favoured over more stringent

²⁰⁹ Standing Committee on Social Policy and Legal Affairs (2012) *Advisory Report: Do Not Knock Register Bill 2012*, p. 9-10.

²¹⁰ Australian Competition and Consumer Commission (2012) *\$1 million in penalties for door-to-door sales*, Media Release, 28 September 2012.

²¹¹ Standing Committee on Social Policy and Legal Affairs (2012) *Advisory Report: Do Not Knock Register Bill 2012*, p. 3.

approaches including the use of a register.²¹² Alinta Energy argued further that a register should not be put in place unless the Do Not Knock stickers could be shown to have failed.²¹³

Consumer Action, however, argued that a Do Not Knock Register would be preferable and complementary because some sales agents ignored the stickers, while a register would carry substantial penalties for non-compliance.²¹⁴ Consumer Action noted that reports from consumers suggest an 'increasing tendency' for some sales agents to ignore the stickers, despite their being required to respect them. EWOV data for the April to June 2012 quarter includes complaints from consumers alleging that sales agents ignored Do Not Knock or No Canvassing stickers.²¹⁵ At the time of writing it remains to be seen whether the recent Federal Court decision results in greater compliance with these requirements.

Although Do Not Knock stickers have been popular with consumers, achieving a comprehensive coverage of those households that wish to opt out would appear much less likely through the use of stickers than via a register. While distribution of stickers via a collection of consumer and community organisations and government departments is a fairly complex and somewhat haphazard exercise, registering one's address on a centralised, government-run register can be made simple and fast for consumers. In a survey of Do Not Call Register users conducted by Newspoll, 95 per cent said that registering was very easy (71%) or easy (24%).²¹⁶

Excluded zones

As a collective response to unwanted door-to-door selling, some jurisdictions have seen the establishment of particular geographical areas in which the practice is discouraged or banned.

No Cold Calling Zones (UK)

In the UK, many communities have established No Cold Calling Zones (NCCZs): small residential areas, often only one street or a small cluster of houses, in which unsolicited door-to-door selling has been collectively declared unwelcome. Signs placed at the boundaries of an NCCZ advise sales agents and others that the area is designated as 'no cold calling.'

The NCCZs initiative was launched in 2005 by the UK Trading Standards Institute, an association of consumer affairs professionals, with the aim of protecting vulnerable consumers in particular. The initiative followed a number of years of unsuccessful campaigning for greater legislative protection from unsolicited door-to-door sales and a large consumer survey which found that 96 per cent of respondents did not wish to buy in the home. By 2008 there were more than 500 NCCZs across England.²¹⁷

²¹² *Ibid*, p. 10.

²¹³ *Ibid*, p. 10.

²¹⁴ *Ibid*, p. 11.

²¹⁵ EWOV (2012a) *De-identified report on marketing and transfer cases*, p. 18.

²¹⁶ Newspoll (2009) *Community Attitudes to Unsolicited Communications*, Research report prepared for the Australian Communications and Media Authority, Newspoll: n.p., p. 4.

²¹⁷ Trading Standards Institute (2008) Submission to Department of Business, Innovation and Skills (UK) *Consumer Law Review Call for Evidence*, DBIS: London, p. 33.

Operation of NCCZs

NCCZs are set up by local communities at their initiative, typically with the assistance of local government Trading Standards departments which provide guidance and materials and maintain records of designated NCCZs. The Trading Standards Institute has also produced a guide for local communities which explains how they can set up an NCCZ, including advice on selecting an area, consulting and establishing community support, enlisting partners, attracting funding, running the scheme and measuring its effectiveness. The guide recommends that a 'local champion' takes responsibility for managing the initiative and notes that success is more likely when partners such as local government, police and neighbourhood watch groups are involved.²¹⁸

The establishment of an NCCZ typically involves a substantial consumer awareness and education component. Initially, residents are consulted to ensure that there is strong community support for creation of an NCCZ. Residents are then engaged and given information about how they can deal with unwanted cold-callers through simple, brief information packs, personal visits and community meetings. Individual residents are encouraged to affix door stickers which advise cold callers that they are not welcome, and they may also be given 'no cold calling' cards that can be handed to unwanted callers. As well as discouraging the practice of unsolicited door-to-door sales, then, NCCZs can also give consumers – particularly vulnerable consumers – greater confidence in dealing with any unwanted sales approaches that are made.²¹⁹

NCCZs and energy door-to-door selling

The NCCZ initiative was initially established with the primary aim of combating doorstep crime including rogue trading and distraction burglary. Although NCCZs were also intended to discourage legal but unwanted unsolicited door-to-door selling, energy sales agents were routinely ignoring the zones, which have no special legal status. Following campaigning from Consumer Focus and the Trading Standards Institute, in May 2010 the 'big six' retailers agreed to respect both NCCZs and no canvassing stickers.²²⁰ The self-regulatory Energy Sure Code of Practice, discussed in the following chapter, was amended to reflect this:

(a) not call on premises in recognised no cold calling zones where there is a message prominently displayed from the consumer in the form of a written note or sticker indicating support by police.*

(b) not call on any premises where there is a message prominently displayed in the form of a visible, clearly worded and unambiguous notice indicating that a consumer does not wish to receive uninvited doorstep sales callers.

**Members will recognise Local Authority no cold calling zones as lawful where they meet the requirements of proportionality as set out by the Office of Fair Trading in their letter to the Association and Local Authorities dated February 2008.²²¹*

²¹⁸ Trading Standards Institute (n.d.) *Setting up No Cold Calling Zones*, TSI: Basildon.

²¹⁹ Cardiff Council (2011) *Stopping the Door-Stepper – Case Study: Welsh National Enforcement Priorities Cold-Calling Control Zones Cardiff Council*, n.p: n.p.

²²⁰ Consumer Focus (2010) 'Energy firms guarantee to respect consumers who say no to cold callers,' Media Release, 28 May 2010.

²²¹ Association of Energy Suppliers (2011) *Energy Sure Code of Practice for the face to face marketing of energy supply (Version 6)*, Association of Energy Suppliers: London, p. 8.

Effectiveness

Small-scale local evaluations tend to show that NCCZs are effective at reducing the incidence of unsolicited doorknocking and boosting residents' awareness and confidence in door-to-door situations. For example, after a six month Welsh pilot project covering two areas of approximately 200 houses, a resident survey found that 92 per cent considered the pilot a success and supported continuation. Large majorities felt that the number of cold callers had decreased, reported feeling safer in the area and said that when cold callers did come they felt more comfortable sending them away.²²²

While NCCZs appear to be fairly effective at both reducing unsolicited door-to-door selling and providing consumer education, by their nature their scope is limited. The establishment of an NCCZ requires consultation with and support from a substantial majority of included households. While this process of engagement is central to NCCZ effectiveness, this requirement naturally limits a zone's size. NCCZs are probably of most use as mechanisms to protect vulnerable consumers in particular, which is indeed how they have been used in the UK. Even so, NCCZs require some initiative from each local community, they are unlikely to achieve full coverage of disadvantaged areas. In Australian jurisdictions, where Do Not Knock stickers are considered a request to leave under the ACL, excluding entire areas would seem to offer little or no benefit over and above the distribution of stickers with accompanying consumer education messages.

The use of NCCZs as a community-level response particularly targeted at potentially vulnerable consumers also raises issues about the avenues open for these consumers to participate in competitive retail energy markets. Retailers in the UK have argued that door-to-door selling is an effective way of informing disadvantaged consumers who often lack internet access and the information that facilitates switching.²²³ As discussed above, however, 2008 Ofgem research found that almost half of those switching door-to-door ended up on a more expensive offer, raising questions about the extent to which door-to-door selling in that market enables vulnerable consumers to both 'participate' in the market and make good switching decisions. While face-to-face advice is indeed necessary or preferable for many vulnerable consumers, the benefits of this may be outweighed by the situational monopoly characteristics of the door-to-door setting.

No Contact lists and registers

Another approach to allowing individuals to exclude themselves from door-to-door selling is the use of No Contact lists and registers. Consumers register or sign up to such lists, indicating that they do not wish to be contacted by door-to-door sales agents. A private members bill for the creation of a legislated Do Not Knock register, modelled on Australia's existing telesales Do Not Call Register, was recently introduced, but, at the time of writing, seemed unlikely to progress. Under the NECF and Victoria's existing *Energy Marketing Code*, nevertheless, energy retailers are already required to maintain individual No Contact lists.

²²² Cardiff Council (2011) *Stopping the Door-Stepper*.

²²³ House of Commons Energy and Climate Change Committee (2011) *Ofgem's Retail Market Review – Sixth Report of Session 2010-12*, House of Commons: London, p. 53.

Do Not Call Registers

A recent proposal for creation of an Australian Do Not Knock Register (discussed below) referred to the success of the Do Not Call Register already in place.²²⁴ The Do Not Call Register, which allows consumers to opt out of receiving telesales calls, is one of a number of such registers around the world. While there are differences between telesales and door-to-door selling, experience with the adoption of Do Not Call Registers has lessons of relevance to any potential Do Not Knock Register.

Australia's Do Not Call Register

Maintained by the Australian Communications and Media Authority (ACMA), the Do Not Call Register is a secure database on which consumers can have their telephone and fax numbers registered at no charge. Under the *Do Not Call Register Act 2006*, businesses both in Australia and overseas are required by law to avoid contacting consumers via registered telephone and fax numbers, and may face penalties if they do so. Some public interest organisations are exempt and may continue to contact registered numbers, as can companies that have an existing business relationship with a particular consumer.

The Do Not Call Register was developed in response to increasing community concern about growth in telesales calls, which were widely perceived as inconvenient and intrusive.²²⁵ After a public consultation on potential models in 2005, the Act was passed in 2006, with the register coming into operation in May 2007. The introduction of the register was accompanied by a comprehensive consumer and industry education program.²²⁶ Reflecting this, more than 1.3 million numbers were registered during the first month of operation, while more than 1,000 firms had signed up to check their calling lists against the register.²²⁷ The number of listed numbers has grown by more than one million each year,²²⁸ and a representative survey conducted by Newspoll in 2009 found high awareness of the register: three quarters of Australian adults had heard of it.²²⁹ Among those not yet registered, interest in registering was high. By October 2012 the Do Not Call Register had reached eight million registrations, representing nearly two thirds of Australian households.²³⁰ It should be noted that this indicates an extremely high level of public support for the government's decision to establish the register.

The Do Not Call Register operates on a full direct costs recovery basis, with telesales companies charged subscription fees to 'wash' call lists against the register. This cost recovery does not include the estimated \$33.1 million cost of establishing the register,²³¹ nor the regulatory costs associated with monitoring and enforcing compliance.

²²⁴ Pyburne, Paula (2012) 'Do Not Knock Register Bill 2012,' *Bills Digest* No. 17, 2012-13, Canberra: Parliament of Australia Department of Parliamentary Services, p.4.

²²⁵ Australian Communications and Media Authority (2006) *ACMA Annual Report 2005-06*, ACMA: Melbourne, p. 47.

²²⁶ Australian Communications and Media Authority (2007) *ACMA Annual Report 2006-07*, ACMA: Melbourne, p 56.

²²⁷ *Ibid*, p. 56.

²²⁸ Pyburne (2012) 'Do Not Knock Register Bill 2012,' p.14-15.

²²⁹ Newspoll (2009) *Community Attitudes to Unsolicited Communications*, p. 3.

²³⁰ Australian Communications and Media Authority (2012b) 'Do Not Call Register tops eight million numbers!', Media Release, 16 October 2012.

²³¹ Australian Government Treasury (2012) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill 2012* inquiry, Parliament of Australia: Canberra, p. 6.

Compliance with the *Do Not Call Register Act 2006* has not been total. Consumer complaints which raise potential contraventions have tended to grow substantially year upon year, despite a drop in 2008-09 attributed to a 'significant improvement' in industry compliance.²³² Most recently, in 2011-12 consumers lodged 21,969 telesales and fax marketing complaints, of which 19,000 involved potential breaches of the Act.²³³ In response to complaints, ACMA sends advisory and warning letters before launching formal investigations, which may result in infringement notices, enforceable undertakings and formal warnings. In the 2009-10 financial year ACMA also commenced Federal Court proceedings against one company, resulting in a \$120,000 penalty.²³⁴

Despite somewhat patchy compliance, for registered consumers, the Do Not Call Register appears to be mostly effective. In the 2009 Newspoll survey, 79 per cent of those with a registered home phone number reported receiving fewer telesales calls after registration, while 16 per cent reported no change and three per cent an increase. For mobile phone users the results were slightly poorer: 65 per cent of those with a registered mobile phone said telesales calls had decreased, while 30 per cent reported no change.²³⁵ An internal ACMA survey of recent registrants in January 2010 found that 90 per cent of home and 76 per cent of mobile numbers reported a decrease in telesales calls.

Overseas Do Not Call Registers

A number of other countries have established Do Not Call Registers, and ACMA is part of an international regulatory forum on such registers.²³⁶ Some overseas examples are summarised in **Table 9**, below.

²³² Australian Communications and Media Authority (2009) *ACMA Annual Report 2008-09*, ACMA: Melbourne, p. 66.

²³³ Australian Communications and Media Authority (2012a) *ACMA Annual Report 2011-12*, ACMA: Melbourne, p. 24.

²³⁴ Australian Communications and Media Authority (2011) *ACMA Annual Report 2010-11*, ACMA: Melbourne, p. 13.

²³⁵ Newspoll (2009) *Community Attitudes to Unsolicited Communications*, p. 4.

²³⁶ ACMA (2012) *ACMA Annual Report 2011-12*, p. 94.

Table 9: Overseas examples of Do Not Call Registers

Scheme	Began	Description
UK - Telephone Preference Service	1999	Registration is free for consumers and registry costs are paid by the direct marketing industry. The Direct Marketing Association runs the register but enforcement is the responsibility of the Information Commissioner. Although compliance is a legal requirement, and despite high complaint numbers, actual enforcement activity has been limited.
United States of America (USA) - Do Not Call List	2003	Created by the US FTC. Telesales firms are required to buy the list, which funds its operation. As of January 2010, more than 191 million phone numbers had been placed on the register. The FTC has taken enforcement action against more than 30 firms, alleging violations of the regulations.
Canada - National Do Not Call List	2006	Certain public interest callers and existing business relationship calls are exempt. Consumers may register for free, with registration lasting for five years. Canadian Radio-television and Telecommunications Commission may impose fines of \$15,000 per violation for corporations. Early criticism of ineffectiveness led to changes.
India - National Customer Preference Register	2007	A National Do Not Call register had limited effectiveness and was replaced by the National Customer Preference Register in 2010. Consumers may register to block all commercial communication from seven industry categories. Telemarketers must register with the Telecom Regulatory Authority of India (TRAI) and pay a security deposit. The TRAI can impose fines or disconnect and blacklist telemarketers for repeated violations.
Netherlands - Do Not Call Register	2009	Legally binding. Consumers can place their number on the registry by phone, email or mail, and can choose to block all calls or commercial calls only. Fines of up to €450,000 can be imposed for businesses which contact registered numbers. Telemarketers are made to inform consumers that they can be added to the register 'at the outset of every call,' and must process that registration if desired. Unless otherwise requested, registration is free and permanent.

Sources: Telecom Regulatory Authority of India (2012) *Consumers Handbook on Telecommunications*, TRAI: New Delhi, p. 17; OECD (2010) *Consumer Policy Toolkit*, p. 40; Department of Communication, Information Technology and the Arts (2005) *Introduction of a Do Not Call Register*, p. 6; Canadian Radio-television and Telecommunications Commission (2012) *National Do Not Call List* website; Redmond (2005) 'Intrusive Promotion as Market Failure.'

Effectiveness of Do Not Call Registers

Internationally, Do Not Call Registers have had mixed results. One unintended consequence of the creation of the registers in some jurisdictions is that companies have simply shifted from telesales to other intrusive marketing methods. For example, although the USA Do Not Call List led into a 'new, more restrained phase' of telesales activity:

... individual telemarketers have reportedly moved call centres off shore or shifted their intrusion to e-mail spam and direct-mail campaigns. In the months preceding the initial activation of the register, telemarketers increased calls significantly in an attempt to establish 'business relationships' with consumers to be able to legally call them in the future.²³⁷

There is also some indication that the decrease in telesales calls in India was accompanied by a dramatic increase in SMS marketing.²³⁸ Similarly, Frost & Sullivan in their study of the Australian door-to-door selling industry recognise this interrelationship between telesales and door-to-door selling, identifying the restriction of telesales via the Do Not Call Register as a driver likely to

²³⁷ Redmond (2005) 'Intrusive Promotion as Market Failure,' p. 13.

²³⁸ The Economic Times (2011) 'Telemarketing Calls: What killed the 'Do Not Call' registry?' 24 April 2011.

encourage continued growth in door-to-door sales.²³⁹ These examples suggest that governments considering placing restrictions on one form of intrusive marketing activity should consider other similar channels in tandem.

Inadequate enforcement has also hampered the effectiveness of Do Not Call Registers in some countries. In its initial years of operation, Canada's National Do Not Call List was heavily criticised as ineffective, with some consumers reporting *increased* calls following registration.²⁴⁰ Although 11 fines totalling around CA\$73,000 were imposed between September 2008 and July 2010, only \$250 was actually collected.²⁴¹ However, a later survey reported in 2011, after increased enforcement activity, found that eight in ten registrants were reporting reduced telesales calls.²⁴² Similarly, inadequate enforcement powers in the UK prior to 2012 have reportedly limited the effectiveness of the Telephone Preference Service.²⁴³

Do Not Knock Register Bill 2012

In May 2012 a private member's bill for the creation of a Do Not Knock Register, modelled on the Do Not Call Register, was put forward in the Australian parliament. The *Do Not Knock Register Bill 2012* was to establish a scheme allowing individual consumers to opt-out of unsolicited door-to-door sales calls by requesting their address be added to a Do Not Knock Register. The overarching objectives of the Bill were to protect vulnerable consumers who could be taken advantage of by unscrupulous sales agents, and to give consumers choice about whether sales agents could knock on their doors. The scheme would include a complaints mechanism and provide for penalties to be applied in cases of non-compliance. The *Do Not Knock Register Bill 2012* was then referred to the House of Representatives Social Policy and Legal Affairs Committee for an inquiry.

Broadly, consumer groups, including CUAC,[†] supported the *Do Not Knock Register Bill 2012*, viewing a register as a simple, effective way for consumers to exercise their right to opt-out of door-to-door sales activity. Consumer group submissions drew attention to continued reports of misselling activity despite existing protections. Some improvements to the design of the register were also proposed. Consumer Action, for example, argued that online registration should be supplemented by other means of registration, including via outreach, if the register was to reach the most vulnerable.²⁴⁴

Retailers and door-to-door selling companies, in contrast, argued the Bill was unnecessary and premature given the existence of unsolicited consumer agreement provisions in the ACL and the use of Do Not Knock stickers.²⁴⁵ As an alternative to a Do Not Knock register, industry proposed further consumer education about ACL provisions.²⁴⁶ Similarly, the Australian Treasury noted that the ACL was due for review in 2015, and argued for any policy gaps on door-to-door selling to instead be

²³⁹ Frost and Sullivan (2012) *Research into the door-to-door sales industry*, p. 45.

²⁴⁰ CBC news (2009) 'Registered with the do-not-call list? Expect more calls, says consumer watchdog,' 23 January 2009.

²⁴¹ CBC news (2010) 'Do Not Call List 'useless', critics say,' 7 July 2010.

²⁴² Marketing Research and Intelligence Association (Canada) (2011) *Do Not Call List shows blocking power: VoxPop Survey*, MRIA: Mississauga.

²⁴³ BBC News (2012) 'Cold-call firms flout rules that block telemarketers', 1 July 2012.

[†] In addition to the Consumer Action, FCA, National Seniors Australia, the Queensland Consumers' Association and CHOICE.

²⁴⁴ Consumer Action Law Centre (2012c) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill 2012 inquiry*, Parliament of Australia: Canberra, p. 8.

²⁴⁵ Standing Committee on Social Policy and Legal Affairs (2012) *Advisory Report: Do Not Knock Register Bill 2012*, p. 15.

²⁴⁶ *Ibid*, p. 15.

addressed at that time.²⁴⁷ The Standing Committee in its Advisory Report agreed with this assessment, arguing that further regulation would only be merited should consumer education efforts 'prove ineffective, and if courts decide that the Do Not Knock sticker does not amount to a request to leave.'²⁴⁸

Cost effectiveness

Opponents of the Do Not Knock Register also drew attention to its implementation costs. Energy Assured Limited argued that the Register would be accompanied by monitoring and training costs, as well as the cost to retailers of 'wash[ing] several million households against the register each month.' Similarly, door-to-door selling provider Salmat alleged that Do Not Knock stickers were effective, whereas compliance with a Register would be 'unrealistic and unworkable' as businesses would not necessarily have the resources to comply.²⁴⁹

While checking registered addresses against doorknocking lists would undoubtedly involve administrative costs, there are arguably administrative and efficiency benefits for door-to-door sellers in the use of a Do Not Knock Register as compared to Do Not Knock stickers. For example, in selecting geographical areas to visit, energy retailers and door-to-door sellers could exclude areas in which a high proportion of households were registered, focusing instead on areas where customers were more pre-disposed to purchase. In this regard, it is worth noting that door-to-door sellers and industry frequently claim they do not wish to sell to consumers who do not want to be sold to.²⁵⁰ Sales agents themselves could efficiently skip houses listed in the register by reviewing a list, without having to spend time entering the property and sighting a Do No Knock sticker. A register would also reduce the risk to sales agents of face-to-face conflict with consumers.

While the Explanatory Memorandum to the Bill suggested that the Register would have no budgetary impact, the Australian Treasury suggested that its establishment costs were likely to be similar to those of the Do Not Call Register, which was funded by the Federal Government at a costs of \$33.1 million over four years.²⁵¹ Treasury's submission to the inquiry painted a positive picture of the door-to-door sales industry and argued that community concern about door-to-door selling was 'not proportionate' to the size of the problem given low complaint numbers and 'only a relatively low, anecdotal level of evidence...[of] consumer detriment.'²⁵² Similarly, an explanatory digest on the Bill prepared for Parliamentarians suggested that 'without further quantitative data' about how many community members require additional protection, there was insufficient policy rationale for a register.²⁵³ In September 2012 the Committee released its Advisory Report on the *Do Not Knock Register Bill 2012*, recommending that the Bill not be passed.²⁵⁴

²⁴⁷ *Ibid*, p. 15.

²⁴⁸ *Ibid*, p. 22.

²⁴⁹ *Ibid*, p. 19.

²⁵⁰ See, for example: Salmat (2012), Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill 2012 inquiry*, Parliament of Australia: Canberra, p. 5.

²⁵¹ Australian Government Treasury (2012) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill 2012 inquiry*, Parliament of Australia: Canberra, p. 6.

²⁵² *Ibid*, p. 2,6.

²⁵³ Pyburne (2012) 'Do Not Knock Register Bill 2012,' p. 20.

²⁵⁴ Standing Committee on Social Policy and Legal Affairs (2012) *Advisory Report: Do Not Knock Register Bill 2012*, p. xi.

No Contact lists

While there is at present no overarching register that allows customers to opt-out of energy door-to-door selling, both Victoria's currently applicable *Energy Marketing Code* and the NECF require energy retailers to maintain individual No Contact lists.

Energy Marketing Code and NECF provisions

Clause 2.3 of the *Energy Marketing Code* states that retailers must keep a record of consumers who have requested that they not be contacted 'at all or in a specified medium' including in person. If requested, the retailer must provide written confirmation that the consumer has been placed on the list. The Code does not set any duration for the consumers' inclusion on the list, but should the consumer change address, their details may be removed.

Similarly, No Contact lists provisions are included in Part 2 Division 10 of the National Energy Retail Rules (NERR). Under the Rules, retailers must ensure that a No Contact list is created and maintained for its marketers, whether by the retailer itself or on its behalf. A residential consumer can indicate they wish to be placed on the list by applying in person, electronically, by telephone or in writing, and once listed, the retailer must not make contact with the customer. The entry remains on the list for a period of two years, but may be refreshed. In contrast to the *Energy Marketing Code*, the list applies to door-to-door selling and direct mail but not to e-marketing or telesales calls, presumably due to the existence of the Do Not Call Register. The NERR also states that the retailer must publish a statement on its website advising of the existence of the list. At the time of writing the NECF provisions applied only to consumers in Tasmania and the ACT.

Effectiveness

CUAC reviewed the websites of all retailers that sell door-to-door in Victoria to determine whether consumers could easily access information about retailers' No Contact lists. On each website, CUAC inspected the homepage, 'Contact us' page and site map and used the sites' search functions to search for the terms 'no contact,' 'list' and 'door-to-door.' Any other pages that might potentially make reference to the list were also inspected. Following these procedures, CUAC found consumer information about the No Contact list present on only one retailer website.[†] This information was clear and comprehensive, but even so, it was not mentioned on the homepage and might easily be missed by an interested consumer.

While both the *Energy Marketing Code* and the NECF require the maintenance of no contact lists, their ultimate purpose is unclear and their effectiveness unlikely. Retailers do not promote or advertise the existence of their No Contact lists or even, it would appear, make reference to them at all. Hence, it is probable that the vast majority of consumers are unaware of this requirement on retailers. Furthermore, given that almost all energy retailers sell door-to-door, even an aware consumer who wished to opt out would need to contact and register with each retailer: a time-consuming and potentially confusing exercise.

[†] Additional retailers had links on their website to Victoria's Energy Marketing Code of Conduct, which makes reference to the No Contact list.

If the intention behind No Contact list provisions is to enable consumers to opt-out of door-to-door selling (among other forms of direct marketing), it seems clear that a centralised register like the proposed Do Not Knock Register, would be a far more effective and efficient mechanism. The No Contact list requirements would also seem to suggest that ‘washing’ door-to-door selling lists against a list of excluded addresses is feasible and indeed, already occurring, albeit it on a presumably very limited scale.

Discussion and recommendations

Consumer-centred mechanisms for minimising detriment have been a central component of policy approaches to door-to-door selling, both in Victoria and in other jurisdictions. Importantly, they have the potential to achieve consumer protection goals without excessively limiting sellers’ activities. However, these approaches also have limitations: it can be difficult to achieve wide coverage of affected consumers, and sellers’ behaviour is not directly addressed.

Consumer education and information

Consumer information and education is undoubtedly important – consumers need to be aware of their rights. Informed and empowered consumers are less likely to incur substantial detriment from a door-to-door sales interaction and, should they have a negative experience, are more likely to access avenues for redress. Nevertheless, governments and regulators need to be aware of the limits to consumer education. Its primary limitation is that it does not tackle misselling at its source, but instead places the responsibility on consumers to identify and defend themselves against poor behaviour. In doing so it may place unrealistic expectations on very vulnerable consumers to absorb, understand and, crucially, act on information about their rights.

Nevertheless, CUAC believes that vulnerable consumers should be a primary focus of education and information initiatives relating to door-to-door sales, since they are most at risk of detriment. Our review of currently available consumer information materials suggests mixed success on this point. There is information available in a number of community languages and in Easy English, but resources tend to be text-heavy and primarily available online, potentially limiting access for consumers without the internet at home. Often, these resources describe consumer rights but offer less guidance about how this information might be translated into action. Finally, CUAC’s earlier research has found that consumer information and education for vulnerable consumer groups is often most effective when delivered in face-to-face contexts. Hence we see a need for ongoing government support for consumer and community groups to deliver this education.

The task of protecting consumers from unwanted door-to-door selling and the detriment potentially associated with it should never be left to individual consumers alone – CUAC believes that policy approaches to door-to-door selling must also focus heavily on ensuring that sellers comply with their responsibilities.

Recommendation 7

That Consumer Affairs Victoria and the Essential Services Commission support community and consumer organisations to provide targeted, face-to-face education and information on door-to-door sales to vulnerable consumers.

Opt-out mechanisms

Many of the consumer-centred approaches reviewed in this chapter focus on providing consumers with a mechanism to opt-out of any participation in door-to-door sales. The most important benefit of these opt-out mechanisms is that, provided they are respected by sellers, they allow consumers to avoid all of the potential detriment associated with door-to-door selling, including the relatively minor yet pervasive time and emotional costs of sending unwelcome sales agents away. At the same time, opt-out mechanisms do not prevent sellers from undertaking door-to-door sales and should not be seen, therefore, as unnecessarily restrictive.

Although opt-out mechanisms have important benefits, not all are effective. For instance, it would appear that current requirements on retailers to maintain No Contact lists are of limited use. Retailers are not publicising the existence of these lists, meaning that consumers are unlikely to be aware of or using them. CUAC's review of retailer websites indicated that retailers may not be compliant with NECF requirements that mention be made of the lists on retailers' websites. However, even if there were strong consumer awareness of No Contact lists, they would still be an overly complex and inefficient opt-out mechanism, since they require consumers to register with each retailer individually.[†]

Although the recent *Do Not Knock Register Bill 2012* failed to gain support, CUAC's review of the evidence suggests that a register would likely be the most effective and efficient approach to opting-out. The extraordinary popularity of Australia's Do Not Call Register Bill shows that the community strongly supports mechanisms which allow consumers to avoid intrusive selling practices. This high level of uptake and support might also be taken as an indication that consumers will have some degree of 'willingness to pay' for such registers.

Regulators and policy makers have been reluctant to view the demonstrated near-universal consumer dislike of door-to-door sales as an indication of any significant detriment. However, while the time loss and annoyance costs of many individual door-to-door sales encounters may be fairly small, the extent of door-to-door sales activity means that, cumulatively, the detriment is substantial: this is what accounts, in large part, for negative community perceptions of door-to-door selling. While a Do Not Knock Register would have associated costs that may eventually be borne by consumers, it is by no means clear that consumers would be unwilling to bear those passed-through costs in order to avoid door-to-door selling.

Although industry has argued that Do Not Knock stickers are effective and low-cost, it seems unlikely that achieving equivalent coverage of interested households through the distribution of stickers would be more cost-effective than the same level of coverage achieved via a centralised register.

[†] Moreover, unlike other opt-out mechanisms they do not insulate consumers from unwanted door-to-door sales from other sectors such as telecommunications.

Moreover, while the costs of producing, publicising and distributing Do Not Knock stickers have often been borne by government agencies and resource-constrained consumer groups, a register could be largely funded via industry subscription fees. This would be appropriate and efficient given that the annoyance and time loss costs to consumers are an externality arising from sellers' decisions to use the door-to-door sales channel.

In sum, CUAC believes that the idea of a Do Not Knock Register has been ruled out too quickly and on the basis of ill-considered arguments and insufficient evidence. We will continue to support a more careful consideration of the design, implementation, costs and willingness to pay for such a register.

In the absence of a Do Not Knock Register, however, CUAC sees an important opportunity for the ESC to improve the practical effectiveness of No Contact list provisions already contained in its *Energy Marketing Code* by developing an online tool which allows consumers to request their addition to retailers' lists. Using this tool, consumers would be able to fill in their contact details and select, using check boxes, the retailers to whose No Contact lists they wished to be added. Using an automated process, the ESC could then forward these details to the consumer's chosen retailers. Hence, rather than having to identify every retailer that might market to them door-to-door, finding contact details and sending individual requests to each, this tool would give consumers a quick and simple way of opting-out of door-to-door sales. This tool should be fairly simple to develop and could be hosted on the ESC's existing *Your Choice* website. In jurisdictions where the NECF has come into effect, the AER might also consider developing a similar tool.

Recommendation 8

That the Essential Services Commission improves the effectiveness of No Contact list requirements in the *Energy Marketing Code* by developing of an online tool through which consumers can request to be added to retailers' No Contact lists. This facility should be hosted on the ESC's *Your Choice* website.

Finally, the debate about the costs of a Do Not Knock Register in relation to the level of consumer detriment provides further demonstration of the difficulties discussed in **Chapter 2** of this report, highlighting the dearth of reliable data about overall levels of door-to-door selling misconduct and the financial consequences of energy door-to-door switching decisions. Opponents of the Bill argued that existing measures were effective and that there was insufficient evidence of the need for additional protections – ignoring the fact that this results from an overall lack of reliable data, rather than positive evidence of low levels of consumer detriment. The lack of any representative picture of the average door-to-door selling interaction leaves decision-makers reliant on inadequate complaints data. This both limits the ability to evaluate the effectiveness of existing policies and undercuts efforts to improve consumer protections. CUAC will be advocating vigorously for implementation of Recommendations 1 and 2 on research and data.

5. SELF-REGULATORY AND VOLUNTARIST APPROACHES

In part of the same transformational process that saw the introduction of competition into essential service provision, the past two decades have seen a shift in emphasis away from state intervention in markets and towards self-regulation.²⁵⁵ Self-regulation refers to a situation in which ‘the rules which govern behaviour in the market are developed, administered and enforced by [those] whose behaviour is to be governed’.²⁵⁶ In most instances, this self-regulation takes the form of an industry-level organisation setting rules and standards for businesses within that industry,²⁵⁷ although it can also occur at the level of the individual business. In this report, industry-level efforts are referred to as ‘self-regulatory schemes’ while ‘voluntarism’ refers to a situation in which an individual business undertakes, unilaterally, to ‘do the right thing’.²⁵⁸

Self-regulatory and voluntarist approaches often sit side-by-side with legislative and regulatory approaches, and there may be interaction between the two. For example, Australia’s self-regulatory Energy Assured scheme, discussed in detail below, coexists with the ACL and state-based energy marketing regulations. The scheme also required ACCC authorisation due to potential competition implications, and hence sits within a wider framework of government intervention. Individual businesses’ voluntary agreements to undertake (or not undertake) particular actions are also frequently facilitated or coordinated by governments.²⁵⁹ Similarly, while self-regulatory and voluntarist approaches are most often voluntary, at least in name, there may be considerable external pressure to self-regulate,²⁶⁰ with self-regulation often prompted by the threat of government intervention.²⁶¹

Voluntary industry codes of conduct

A form of self-regulation that began proliferating in the 1990s,²⁶² codes of conduct are sets of principles and rules setting out the way in which a body should behave towards stakeholders.²⁶³ Codes of conduct vary widely in terms of applicability, authoritativeness and specificity. They may be developed by and applied to individual businesses, industries, professions or public sector

²⁵⁵ Jenkins, Rhys (2001) *Corporate Codes of Conduct: Self-Regulation in a Global Economy* – Technology, Business and Society Programme Paper Number 2, United Nations Research Institute for Social Development: Geneva, p. 1.

²⁵⁶ National Consumer Council (2000) *Models of self-regulation: An overview of models in business and the professions*, NCC: London, p. 4.

²⁵⁷ Gunningham, Neil and Darren Sinclair (1999) Regulatory Pluralism: Designing Policy Mixes for Environmental Protection, *Law and Policy* 21(1), p. 54.

²⁵⁸ *Ibid*, p. 54.

²⁵⁹ *Ibid*, p. 54.

²⁶⁰ NCC (2000) *Models of self-regulation*, p. 4.

²⁶¹ Redman (2005), ‘Intrusive promotion as market failure,’ p.17.

²⁶² Jenkins (2001) *Corporate Codes of Conduct*, p. iii.

²⁶³ Carson, A. Scott, Mark Baetz and Shelley McGill (2008) *Codes of Conduct in the Private Sector: A Review of the Academic Literature from 1987 to 2007*, Canadian Centre for Ethics and Corporate Policy: Toronto, p. 2.

organisations.²⁶⁴ They may be voluntary or mandatory, either legally or as a condition of membership,²⁶⁵ with voluntary codes falling under the category of self-regulation. While some are general statements of ethical intent, others are more substantive and prescribe specific processes and procedures, such as how a dispute resolution mechanism will work.²⁶⁶ Depending on the Code's intended purpose, development, administration and enforcement can be undertaken by code signatories, government, or a combination of the two.²⁶⁷ Where they are in place, codes of conduct are only one of several mechanisms prescribing and determining conduct; applicable laws and regulations as well as 'informal norms' also help set the framework for business conduct.²⁶⁸

In a best case scenario, voluntary industry codes of conduct may increase industry transparency and stakeholder confidence; minimise breaches of consumer law; and offer a competitive marketing advantage to signatories.²⁶⁹ At the same time, voluntary codes may have advantages over government interventions, including increased flexibility in adapting to changing industry needs. A greater 'sense of ownership' of the code may mean greater commitment from industry participants. Voluntary industry codes can also be less intrusive than government interventions, quicker and less costly to put in place, and place lower demands on government resources and reducing businesses' compliance costs.²⁷⁰

Voluntary industry codes of conduct in well-functioning markets *can* be effective. However, they are not necessarily so, and moreover, ineffective voluntary codes can actually be damaging. As the OECD cautions, ineffective codes of conduct have the potential to undermine consumer confidence if they are used where other tools, such as regulation, might have been more appropriate.²⁷¹ At the same time, the existence of a voluntary industry code may act as a barrier to adequate legislation.²⁷² Hence, they should be put in place only where the circumstances are appropriate and they are carefully designed.

Appropriate circumstances for a voluntary industry code

As with any policy tool, the OECD recommends that governments make an 'evidence-based assessment' of the likely efficacy of a voluntary code of conduct in addressing specific identified issues.²⁷³ Among the range of factors that should be considered in this assessment are:

- the nature of the industry, including its history in relation to the code's objective;
- the current degree of community and consumer trust and confidence in the industry; and
- the industry's 'commitment' to self-regulation and the willingness of the code administrator to enforce compliance.²⁷⁴

²⁶⁴ Carson et al (2008) *Codes of Conduct in the Private Sector*, p. 2.

²⁶⁵ OECD (2010) *Consumer Policy Toolkit*, p. 90.

²⁶⁶ Carson et al (2008) *Codes of Conduct in the Private Sector*, p. 2.

²⁶⁷ OECD (2010) *Consumer Policy Toolkit*, p. 90.

²⁶⁸ Carson et al (2008) *Codes of Conduct in the Private Sector*, p. 2.

²⁶⁹ Australian Competition and Consumer Commission (2011d) *Guidelines for developing effective voluntary industry codes of conduct*, Commonwealth of Australia: n.p., p. 3.

²⁷⁰ OECD (2010) *Consumer Policy Toolkit*, p. 90; ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 3; NCC (2000) *Models of self-regulation*, p. 21.

²⁷¹ OECD (2010) *Consumer Policy Toolkit*, p. 92.

²⁷² NCC (UK) (2000) *Models of self-regulation*, p. 23.

²⁷³ OECD (2010) *Consumer Policy Toolkit*, p. 92.

²⁷⁴ *Ibid*, p. 91.

Where an analysis of these factors suggests that a voluntary industry code is likely to be effective it may be an appropriate instrument for addressing a given consumer issue.

Features of an effective voluntary industry code

Even in situations where a voluntary industry code may be appropriate, poor design or implementation may compromise its effectiveness. Researchers and policy and regulatory bodies have identified a range of features that characterise the design and development of effective voluntary industry codes of conduct.

Consumer involvement

A consultative process for code development is generally considered to be an important feature of a voluntary industry code. The ACCC suggests that involvement of consumer representatives in code development will increase stakeholder acceptance and help to ensure that the code offers more robust consumer protection, while consumer involvement in code administration improves transparency.²⁷⁵ Similarly, the ASIC checklist for code approval in the financial services sector requires a consultative process for code development which includes consumer groups and, related to this, code content which addresses stakeholder issues.²⁷⁶ ASIC notes that where these procedures are not followed, a code may be less effective and fail to win stakeholder confidence.²⁷⁷ A code that has been developed with the involvement of government and consumer stakeholders is sometimes referred to as a 'negotiated code'.²⁷⁸

Industry coverage and awareness

Voluntary industry codes are more likely to be successful in circumstances where industry support is widespread.²⁷⁹ A code with only partial coverage may exclude those firms which were and continue to be the source of most consumer problems, rendering the code largely ineffective.²⁸⁰ Industry awareness is also crucial – a code with full industry coverage may be ineffective if employees are unaware of, and fail to follow, the code's provisions.²⁸¹

Exceeds legislated requirements

One of the potential strengths of self-regulatory approaches in comparison to legislation (which is usually written in negative terms) is that they can benchmark and encourage best practice.²⁸² However, voluntary industry codes will only be complementary in this way if they go beyond mandatory minimum standards, while codes which target the same level of performance as is already mandated may be considered 'redundant'.²⁸³ Arguably, however, a self-regulatory scheme that targets minimum standards but whose processes boost compliance with those standards might still be considered effective to some degree. In its regulatory guide on codes of conduct in the

²⁷⁵ ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 8.

²⁷⁶ Australian Securities and Investment Commission (2005) *Approval of financial services sector codes of conduct – Regulatory Guide 183*, ASIC: Canberra, p. 8, 14,

²⁷⁷ *Ibid*, p. 15.

²⁷⁸ NCC (2000) *Models of self-regulation*, p. 11.

²⁷⁹ ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 4.

²⁸⁰ NCC (2000) *Models of self-regulation*, p. 22; ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 9.

²⁸¹ ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 11.

²⁸² NCC (2000) *Models of self-regulation*, p. 19, 21

²⁸³ *Ibid*, p. 16.

financial services sector, ASIC notes that a code must do more than 'restate the law' and sets out its expectation that an effective code will fulfil at least one of the following criteria:

- 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 the legislation.²⁸⁴

Complaints handling and redress

Research suggests that an effective system of complaints handling contributes to the overall effectiveness of voluntary industry codes.²⁸⁵ The ACCC in its guidelines for effective industry codes suggests that complaints procedures should see complaints first considered by code signatories, and then, if resolution is not achieved, lodged with the administration committee or an independent decision-maker. Complaints handling should meet relevant standards and there should be a mechanism for independent review of complaints handling decisions,²⁸⁶ and complaints procedures should be clear, accessible and well-publicised to consumers.²⁸⁷ Adequate provisions for consumer redress are also widely considered to be an important component of an effective code.²⁸⁸ ASIC suggests that, at a minimum, provisions for redress include compensation for any direct financial loss or damage as well as binding non-monetary orders obliging a signatory to take (or not take) a particular course of action to resolve the breach.²⁸⁹

Meaningful monitoring and enforcement

Compliance is also critical to code effectiveness – a code can only succeed to the extent that businesses comply with its requirements. To this end, industry codes should include provisions for effective monitoring and for 'identifying and disciplining' businesses that do not comply.²⁹⁰ The ACCC guideline also emphasises the role of 'commercially significant sanctions' in encouraging compliance and creating credibility with participants and stakeholders.²⁹¹ In their comprehensive review of the academic literature on the use of codes of conduct in the private sector, Carson, Baetz and McGill cite a number of studies which have highlighted the importance of performance measurement, monitoring and enforceability.²⁹² Contrastingly, where rules are not 'taken seriously' by industry or enforced, voluntary codes of conduct may be seen by consumers and the community as little more than 'public relations gimmicks'²⁹³ – and justifiably so.

A voluntary industry code of conduct implemented in appropriate circumstances and incorporating these features is most likely to be effective and of benefit to consumers.

²⁸⁴ ASIC (2005) *Approval of financial services sector codes*, p. 3.

²⁸⁵ OECD (2010) *Consumer Policy Toolkit*, p. 91.

²⁸⁶ ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 9-10.

²⁸⁷ NCC (UK) (2000) *Models of self-regulation*, p. 51.

²⁸⁸ NCC (UK) (2000) *Models of self-regulation*, p.16; OECD (2010) *Consumer Policy Toolkit*, p. 92.

²⁸⁹ ASIC (2005) *Approval of financial services sector codes*, p. 17.

²⁹⁰ Jenkins (2001) *Corporate Codes of Conduct*, p. iii; OECD (2010) *Consumer Policy Toolkit*, p. 92.

²⁹¹ ACCC (2011) *Guidelines for developing voluntary industry codes*, p. 11.

²⁹² Carson et al (2008) *Codes of Conduct in the Private Sector*, p. 12, 23, 25, 26.

²⁹³ Carson et al (2008) *Codes of Conduct in the Private Sector*, p. 6.

Energy Assured (Australia)

Beginning operation in January 2012, Energy Assured is a self-regulatory industry scheme on door-to-door sales of energy in Australia. The stated intention of the scheme is to enhance compliance with the existing regulatory framework on energy door-to-door selling. In so doing, it aims to improve selling standards and the consumer experience, boost consumer confidence and reduce complaints, and to discipline or remove so-called 'rogue' agents.²⁹⁴ Energy Assured is administered by the independent company Energy Assured Limited, and has as its members both energy retailers and door-to-door selling companies that they contract.

Development of the scheme

With community dissatisfaction with energy door-to-door selling practices growing, in 2010 the Office of the Victorian Minister for Energy requested that the Energy Retailers' Association of Australia develop a voluntary code of conduct dealing specifically with the practice. Responding to community concern and government pressure, in October 2010 the industry put forward its proposal for the Energy Assured scheme. An application for authorisation of the scheme was lodged with the ACCC, which has responsibility for granting authorisation for potentially anti-competitive conduct on public benefit grounds.^{†295}

Participating in the ACCC's public consultation on the application, CUAC (along with other consumer organisations) expressed concerns about the design of the proposed scheme and argued for its rejection and re-design. We noted that Energy Assured had failed to involve consumer representatives in the design and development of the scheme which, as noted above, has been widely recognised as important – including by the ACCC in its own guidelines. We were also concerned that the EAL Code of Practice, as initially formulated, had potential to be used to discourage consumers from seeking redress via the relevant Ombudsman.²⁹⁶

In its April 2011 Draft Determination, the ACCC suggested that Energy Assured was unlikely to deliver on its objectives and produce material benefit for consumers due to deficiencies in the code. These deficiencies included consumer information requirements that fell short of legislated obligations, inadequate public accountability on non-compliance reporting and an insufficiently rigorous sanctions process.²⁹⁷ These were seen as reflecting an underlying lack of accountability on energy retailers for the behaviour of sales agents acting on their behalf and for their benefit.²⁹⁸ Following the draft determination the EAL revised the code, and in June 2011 the scheme was granted authorisation.

The Energy Assured scheme's key document is its detailed Code of Practice. The Code contains Standards with which member retailers and door-to-door sales companies as well as individual

²⁹⁴ Energy Assured Limited (2011) *Code of Practice* (Edition 1), EAL: Sydney, p. 3.

[†] The authorisation process is not specific to industry codes of conduct but instead relates to any conduct that might breach the *Competition and Consumer Act 2010*. The ACCC may authorise such conduct where it considers that public benefit is likely to outweigh public detriment.

²⁹⁵ Australian Competition and Consumer Commission (2010) *Guide to authorisation* (Revised Edition), ACCC: Canberra.

²⁹⁶ Consumer Utilities Advocacy Centre (2010) Submission to ACCC on *Energy Assured Limited applications for authorisation A91258 & A91259 – interested party consultation*, CUAC: Melbourne.

²⁹⁷ Australian Competition and Consumer Commission (2011a) 'ACCC finds door to door energy sales code wanting,' Media Release, 11 April 2011.

²⁹⁸ ACCC (2011c) *Determination: EAL Applications*, p. 5.

agents must comply. These standards reflect requirements in the ACL and NECF. It sets out the roles and responsibilities of member retailers and door-to-door selling companies and details sales agent registration, recruitment and training processes and requirements. There are procedures for complaints handling and for monitoring and disciplining sales agents, as well as provisions dealing with member reporting, audit, warning notices and sanctions. Finally, the Code sets out an appeals process for sales agents and members who have been subject to disciplinary action.

Effectiveness of the Energy Assured scheme design

Assessed against the criteria for effective voluntary industry codes described above, the design of the Energy Assured scheme has both strengths and weaknesses. Among the scheme's weaknesses is that consumer representatives were not meaningfully included in the process of its development, potentially resulting in less robust consumer outcomes. Most effective self-regulatory schemes set standards or offer protections beyond the legislated minimum, but the standards contained in Energy Assured's Code of Practice do not exceed existing requirements under the ACL or Victoria's *Energy Marketing Code*. Nonetheless, the Code of Practice does set out fairly detailed operational requirements, such as those surrounding sales agents' training and competency testing, which would appear to have the potential to increase compliance with existing standards.

Importantly, the Energy Assured scheme effectively has full industry coverage, with all energy retailers who sell door-to-door in Victoria being members of the scheme. Because member retailers are prohibited from contracting door-to-door selling services from companies which are not also members, all door-to-door energy sales in Victoria are covered by Energy Assured.[‡] CEO of Energy Assured, Anne Whitehouse, told CUAC that both retailers and door-to-door selling companies are committed to the scheme.

Energy Assured does not itself handle complaints, but requires that retailers have an internal Sales Complaint Handling Process that complies with the applicable Australian Standard on Complaints Handling. Any complaints made to Energy Assured itself are in the first instance referred to the relevant retailer, and to EWOV[†] should the customer be dissatisfied with a retailer's response. While consumers are able to have complaints about door-to-door selling dealt with, the Energy Assured scheme lacks any provision for consumer compensation, limiting consumer redress and, CUAC has argued, reducing incentives to comply with the code – although EWOV may in some cases negotiate redress for consumers in resolving complaints.²⁹⁹

The Energy Assured scheme also includes provisions for monitoring and disciplining individual sales agents, and also sets out monthly reporting and annual independent compliance audit requirements on energy retailers. The Code Manager is required to investigate all potential code breaches that are raised in monthly reports, compliance audits or in a complaint from an ombudsman, other scheme member, government or regulatory body or consumer advocacy group. Where a compliance issue is identified, the code manager must issue a warning notice describing (among other things) the breach, the remedial action to be taken, and the sanctions that will apply if action is not taken. If warning notices are not complied with, sanctions must be applied.

[‡] With the exception of those conducted by comparator services. See page 94.

[†] Or the relevant Ombudsman in other jurisdictions.

²⁹⁹ CUAC (2010) Submission to ACCC on *Energy Assured Limited applications*, p. 6.

While the Energy Assured scheme does provide for sanctions, it is not clear that these are ‘commercially significant.’ Sanctions range from written undertakings for a Minor Operational Breach (level 1) through to membership cancellation and public censure for repeated serious, material and/or systemic breaches and failure to comply (level 6).

Table 10: Energy Assured sanctions

Level	Description
1	<ul style="list-style-type: none"> Member to provide undertaking not to repeat breach EAL Board notified of breach (member not named)
2	<ul style="list-style-type: none"> Formal letter of admonishment issued Member details to code manager strategy to rectify issue & implements action plan to prevent re-occurrence EAL Board notified of breach (member named)
3	<ul style="list-style-type: none"> Formal letter of admonishment issued Member details to code manager strategy to rectify issue & implements action plan to prevent re-occurrence EAL Board, energy regulator & ombudsman notified of breach (member named)
4	<ul style="list-style-type: none"> Member-appointed independent auditor audits areas of activity where breach occurred Member details to code manager its strategy to rectify issue & implements action plan to prevent re-occurrence EAL Board, energy regulator & ombudsman notified of breach (member named)
5	<ul style="list-style-type: none"> Formal letter of admonishment issued Member details to code manager strategy to rectify issue & implements action plan to prevent re-occurrence EAL Board, energy regulator & ombudsman notified of breach (member named) Other stakeholders and public notified of breach
6	<ul style="list-style-type: none"> Member de-registered (permanently or temporarily) and membership cancelled Public statement identifies member, code section breached and period of de-registration

Source: Energy Assured Code of Practice

Sanctions are largely focussed on requiring the member to review its operations and take steps to rectify problems and prevent their re-occurrence. No financial penalties are applied at any stage, although members must bear the cost of any required activities (such as an independent audit). Furthermore, it is only at Levels 5 and 6 that information about a breach is made public.[‡] Without transparent information about breaches, consumers are unable to influence poor door-to-door selling behaviour through their choice of energy supplier.

As discussed extensively in **Chapter 3**, relevant regulators also have powers to impose sanctions on energy retailers and door-to-door selling companies. Consequently, the way in which the Energy Assured scheme interacts with regulators is significant. Energy Assured sanctions at Levels 3 through 6 require that the relevant regulator is informed of the breach. This has the potential to trigger enforcement action by the regulator. Hence, level 3 through 6 Energy Assured sanctions *might* indirectly result in commercially significant sanctions applied by the regulator.

[‡]Additionally, there is ambiguity in the Code as to whether public notification of a Level 5 breach will identify the responsible member.

An assessment of the design of Energy Assured against the criteria for effective voluntary schemes suggests that it *could* be effective, but that much rests on its implementation. Indeed, this was the conclusion reached by the ACCC in granting authorisation for the scheme, but for a period shorter than requested:

the ACCC considers that the realisation of public benefit will depend on the extent to which the key factors – consumer awareness, compliance and effective sanctions – are effective in practice. Given that the scheme is newly developed and therefore there is uncertainty about how it will operate in practice, the ACCC considers that an early review of the scheme is warranted. Accordingly, the ACCC grants authorisation to the scheme for three years.³⁰⁰

Energy Assured has a review scheduled for early 2013, to be followed by an application to the ACCC for re-authorisation of the scheme.

Energy Assured scheme in practice

At the time of writing, the Energy Assured scheme has been in operation for almost one year, allowing some preliminary assessment of how the scheme functions in practice, as well as any observable outcomes. In a meeting with CUAC in September 2012, Anne Whitehouse, CEO of Energy Assured described some of the actions to date.

With regard to sales agent accreditation, Ms Whitehouse reported that scheme members had been maintaining the EAL register and that around 2,700 agents were then registered nationwide.[†] At any one time, a few of these are in 'development' or 'suspended' status. Agents in 'development' status have committed a breach or failed a competency assessment and are supervised during sales while undergoing further training. 'Suspended' agents are unable to undertake sales while under investigation for a more serious breach. Since the establishment of the scheme, 78 sales agents had been de-registered nationally. De-registered agents cannot be engaged by any EAL scheme participants for five years, where previously their services might have been terminated by one retailer and then engaged by another. In a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs on the *Do Not Knock Register Bill 2012*, door-to-door sales company Salmat argued that potential EAL de-registration was a powerful deterrent discouraging sales agents from ignoring Do Not Knock stickers.³⁰¹

On monitoring, reporting and sanctions, Ms Whitehouse said that members had been meeting their reporting requirements under the scheme. Three warning notices had been issued in relation to operational issues, but as these had been complied with, no sanctions had been issued. Audits of each retailer are being conducted by KPMG, with individual results to be forwarded to the regulator.

Outcomes

One potential available indicator of the effectiveness of Energy Assured in terms of consumer outcomes is complaints data from both retailers and EWOV. There are, however, a number of complicating factors which make this an imperfect indicator. Firstly, as discussed at length in

³⁰⁰ ACCC (2011) *Determination: EAL Applications*, p. 58.

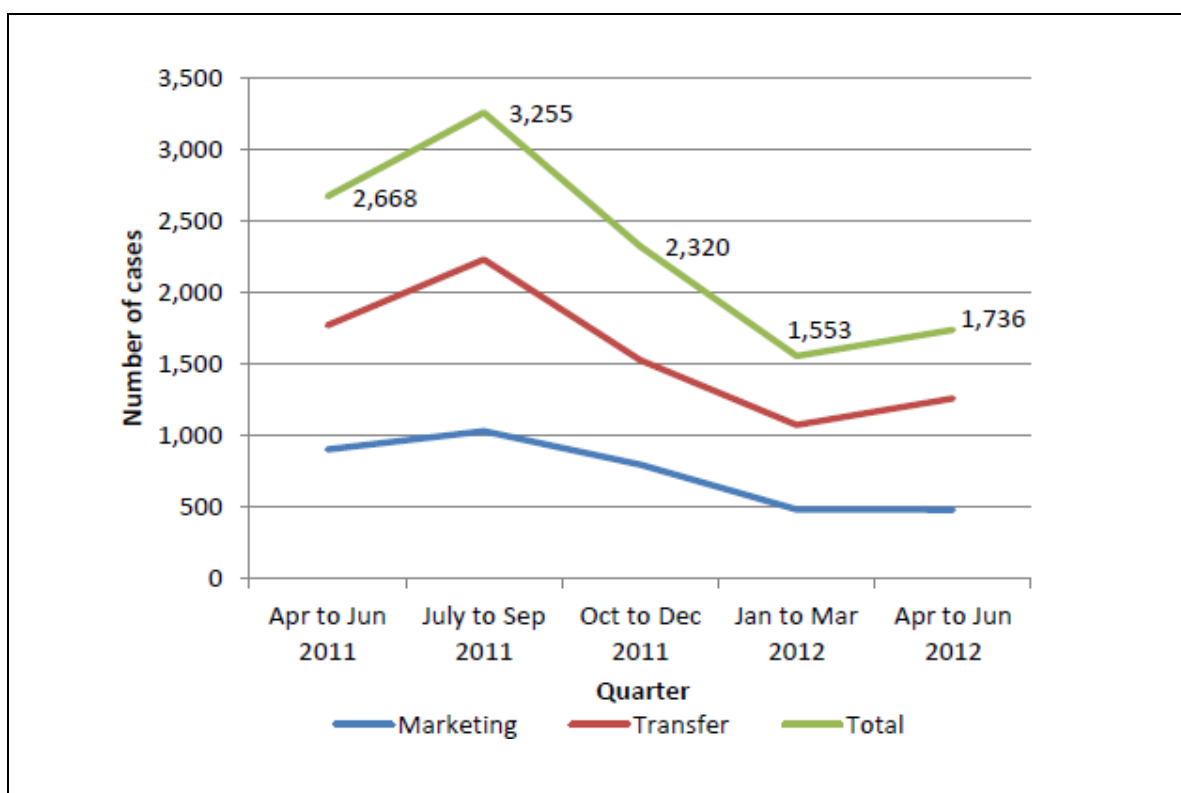
[†] At the time of the meeting. Approximately 7,000 agents had been registered at some point over the duration of the scheme.

³⁰¹ Salmat (2012) Submission to Standing Committee on Social Policy and Legal Affairs *Do Not Knock Register Bill* inquiry, p. 5.

Chapter 2, the relationship between complaints and consumer dissatisfaction/experience of misselling is unclear and contested – EWOV itself suggests that its complaints ‘should be viewed as indicative of wider dissatisfaction by a broader group of consumers.’³⁰² Secondly, the fact that consumers may make a complaint to a retailer and/or the ombudsman, and that each of these has different methodologies for recording and reporting complaints, makes developing an accurate aggregate picture impossible. Finally, because several policy approaches are all in place at any one time, complaints trends cannot be linked to any particular approach with certainty. For example, at around the same time the Energy Assured scheme was being established, the ACCC was announcing its intention to pursue enforcement action against energy retailers should investigations reveal serious misconduct.³⁰³ As discussed in Chapter 3, it has since filed court proceedings against energy retailers and door-to-door selling companies, with this action so far resulting in substantial penalties on one retailer. Despite these limitations, and in the absence of other data, complaints trends remain crucial as an indicative picture of consumer experiences.

In a meeting with CUAC, Energy Assured CEO Anne Whitehouse stated that since implementation of the scheme, door-to-door selling complaints to EWOV had decreased by around 40 per cent between January and June 2012. However, a closer analysis of EWOV data on transfer and marketing cases in Figure 5, below, suggests a more complex case trend.

Figure 5: EWOV transfer and marketing cases quarterly since 1 April 2011



Source: EWOV (2012a) *De-identified Report on Marketing and Transfer Cases*, p. 3.

³⁰² EWOV (2012a) *De-identified Report on Marketing and Transfer Cases*, p. 28.

³⁰³ Australian Competition and Consumer Commission (2011b) ‘ACCC puts energy retailers on notice over door-to-door practices’ Media Release, 13 September 2011.

Figure 5 shows that while cases declined substantially over the second half of 2011 and in January 2012 (when Energy Assured began operation), they have since begun trending upwards. Between the first and second quarter in 2012, case numbers increased by 12 per cent. This pattern in overall marketing and transfer cases is mirrored in trends for door-to-door cases specifically, which decreased dramatically in the second half of 2011, but then increased by seven per cent between the January–March and April–June quarters.³⁰⁴ Positively, as of June 2012 EWOV complaints were substantially below June 2011 levels. CUAC will be monitoring ongoing complaints trends closely.

Interestingly, in its report detailing these figures, EWOV noted that one retailer ('Retailer 8') had the most marketing and transfer cases in the April–June 2012 quarter, with the highest number of cases in five of the nine sub-categories including pressure sales and misleading marketing. Most of these misleading marketing cases arose from door-to-door sales. The retailer is not identified, precluding an assessment of whether high case numbers stem predominantly from more extensive marketing activity or from a higher rate of misconduct. If the latter, this may raise a question as to whether the Energy Assured scheme, which has not yet imposed any sanctions and has issued warning notices only for operational issues, is in practice able to detect and rectify noncompliance.

Particularly given that customers are likely to complain to retailers in the first instance, retailers' own complaints data is also an important source of information about door-to-door sales complaint levels. In discussions with CUAC, Anne Whitehouse said that member retailers' complaint numbers are low at approximately three complaints per 10,000 customer contacts.

The Energy Assured Code of Practice requires that member retailers have a complaints procedure in line with the applicable Australian standard.[†] Although this is positive, there is some cause for doubt about the accuracy of retailers' management and reporting of complaints. The ESC's most recent round of compliance audits, for example, uncovered a number of problems with the complaints reporting of Lumo³⁰⁵ and Origin.³⁰⁶ Many complaints to TRUenergy went unreported as those which were resolved on the first telephone call were not recorded as complaints. The auditor specifically found that complaints about marketing had been misclassified and therefore understated.³⁰⁷

Future scheme developments – comparator services

As of late 2012, EAL was in discussions with some comparator services about their intentions to engage in door-to-door sales and the potential extension of Energy Assured to cover such market participants,³⁰⁸ and had applied to the ACCC for a minor variation to its authorisation to allow this. Currently operating primarily on-line, these comparator services compare offers and make a recommendation to the consumer, and often facilitate the switching process.

Compared to individual retailers' door-to-door selling, comparator services' use of this channel could potentially reduce the risk of financial detriment to consumers. Because a comparator service

³⁰⁴ EWOV (2012a) *De-identified Report on Marketing and Transfer Cases*, p. 4.

[†] This is also a requirement under Victoria's *Energy Retail Code*.

³⁰⁵ ESC (2012e) *Summary Audit of Lumo Energy*, p. 7.

³⁰⁶ ESC (2011a) *Summary Audit of Origin Energy*, p. 6.

³⁰⁷ ESC (2011b) *Summary Audit of TRUenergy*, p. 5.

³⁰⁸ Energy Assured Limited (2012) *Energy Assured Limited Annual Report 2011-12*, EAL: Sydney, p. 3.

operating door-to-door would provide information about a number of retailers' offers, the situational monopoly characteristics of typical door-to-door sales transactions is eliminated or at least reduced. In this information environment, door-to-door sales switching seems more likely to see consumers moving onto better offers. Hence, extension of the Energy Assured scheme to include comparator service members could benefit consumers.

However, there are a number of issues to be considered as this takes place. Firstly, comparing a number of offers and making a recommendation to a consumer, based on their circumstances, is likely to require greater knowledge and understanding on the part of sales agents. This therefore needs to be addressed in sales agent training. Comparison of multiple offers also introduces increased complexity for consumers, emphasising both the need for skilled and well-trained agents capable of explaining the process, and the need for careful consideration as to what written material and offer information should be provided to consumers in this situation.

In 2010, CUAC conducted research into energy switching and comparator sites. The research found wide variance in the offers recommended by the sites, resulting from different calculation methodologies, difference in which retailers' offers were included, and calculation errors.³⁰⁹ Flowing from a recommendation arising from that research, CUAC, along with a coalition of public interest organisations, has recently released principles to support the development of a voluntary code of practice for price comparison and switching services. We are currently seeking the involvement of industry, switching service operators and government to progress the development of the code in the interest of improving the quality of information in the retail energy market. In extending Energy Assured to cover these new market participants, EAL should consider these principles and how they might be applied when comparator services are operating in the door-to-door sales context.

Energy Sure Code of Practice (UK)

The UK's *Energy Sure Code of Practice for the Face-to-Face Marketing of Energy Supply* (the *Energy Sure Code of Practice*), which served as a reference point in the development of Australia's Energy Assured scheme, is a second example of a voluntary industry code regulating door-to-door energy sales to domestic customers.³¹⁰ Established in 2002, Energy Sure has been in operation for a substantial period, potentially allowing for a better assessment of its effectiveness in reducing consumer detriment arising from door-to-door energy sales.

Design of Energy Sure

The stated aim of the *Energy Sure Code* is to promote consumer confidence in face-to-face energy sales and to provide consumer protection standards over and above legislated protections. In doing so, the *Energy Sure Code* focuses largely on sales agents. It sets out standards for their selection and training, and requires that members ensure that sales agents have passed competency testing. As with the Energy Assured scheme, all sales agents engaged by members must be registered on the Energy Sure database.

³⁰⁹ Mauseth Johnston, May (2010) *Energy Switching Sites: An analysis of energy price comparison and switching sites available to Victorian consumers*, CUAC: Melbourne.

³¹⁰ Energy UK (2012) 'Energy Sure Code,' *Energy UK* website.

The Code also sets out standards for sales agents' contact with consumers, prohibiting pressure sales, misleading information, misrepresentation, and conduct that exploits consumer vulnerability. Agents are required to call only in certain hours, leave immediately when indicated by the consumer, and respect No Canvassing signs and NCCZs. Provisions added in 2010 require the sales agent to provide an estimate of total annual charges and, in some circumstances, a price comparison.

Member energy retailers are required to supply monitoring reports to the Code Manager, and are subject to an annual compliance audit undertaken by an independent auditor. In cases of serious or persistent non-compliance, material infringements that cannot be otherwise resolved, or failure to act on earlier warnings, the Code Manager may apply sanctions. In applying sanctions, the Code Manager is required to take into account compliance costs and particular circumstances. The form of any sanction is not specified in the Code.

As with Energy Assured, Energy Sure does not include a customer complaints handling mechanism, and complaints are instead referred back to the retailer. The Code does require that retailers pay compensation of £250 in cases of proven forgery or fraud by a sales agent. Any other compensation is at the member's discretion.

All of the UK's 'big six' energy suppliers are members of the scheme, which is maintained by the Association of Energy Suppliers. Unlike Australia's Energy Assured scheme, third party marketing companies are not involved as members of the scheme, but retailer members are required to ensure that third parties engaged to conduct sales activities comply with the Code.

Effectiveness of the Energy Sure code

The Energy Sure Code was established at a time when consumer complaints about energy retailers' sales practices had peaked at more than 1,000 per month.³¹¹ Complaints to Energywatch about door-to-door selling then declined as a proportion of all energy complaints. At the time, a spokesperson for Energywatch attributed this drop-off in complaints to a shift away from door-to-door sales in favour of telesales.³¹² In 2004, describing a 70 per cent decline in complaints since May 2002, OFT noted that this coincided with a reduced level of marketing activity as well as Ofgem's use of new enforcement powers, attributing the decline to this combination of factors.³¹³

According to Energy UK, the trade association for the energy industry, since the establishment of Energy Sure consumer complaints about sales practices have fallen by 99 per cent.³¹⁴ Unfortunately, this claim is not referenced and nor is it clear whether it refers to internal company complaints or complaints to an independent third party, or both. Comparison is also complicated by changes to institutional arrangements over the duration of the Energy Sure Code's operation. Energywatch, which previously handled complaints, was disbanded in 2008. Today, consumers are advised to complain to their retailer in the first instance, then seek advice from Consumer Direct,

³¹¹ Consumer Focus (n.d.) *Problems with companies who mis-sell energy on the doorstep – Energy Policy into Practice: slides for advisers*, Consumer Focus: London.

³¹² Inman, Phillip (2003) 'Southern begins doorstep sales inquiry,' *The Guardian*, September 20, 2003.

³¹³ OFT (2004) *Doorstep selling*, p. 7.

³¹⁴ Energy UK (2012) 'EnergySure Code.'

and finally to lodge a complaint with the Ombudsman.³¹⁵ In 2010-11 the Ombudsman reported that sales complaints constituted 3.8 per cent of energy complaints, of which misselling complaints (2.2%) were the majority.³¹⁶

Despite the apparent drop in complaints, misselling through the door-to-door channel continued to be a problem with Energy Sure in place. Consumer organisation *Which?* has described Energy Sure as 'clearly ... not very effective,' suggesting this is in part because the scheme imposes no real penalties on companies for misselling.³¹⁷ Similarly, Consumer Focus has continued to draw attention to energy misselling and in 2011 initiated a campaign calling on energy retailers to abandon unsolicited door-to-door sales (discussed in the next section).

Since the Energy Sure Code's establishment, the UK energy regulator Ofgem has continued to uncover evidence of misselling, responding with strengthened regulations and enforcement action. Ofgem's 2008 Energy Supply Probe highlighted incidents of misselling including switching without consent, pressure sales and misleading information about offers.

Investigations and enforcement action by Ofgem also suggest that misselling did not cease with introduction of the Code. In fact, in recent years Ofgem has been vigorous in investigating misselling and applying penalties. In 2008 retailer npower was fined £1.8 million for failing to take sufficient action to prevent misselling of energy contracts, in breach of its license conditions. In September 2010 Ofgem launched misselling investigations into four of the 'big six' energy retailers, all of which are members of the Energy Sure Code: Scottish Power, Scottish and Southern Energy (SSE), EDF Energy and npower.³¹⁸ With the conclusion of the investigation into EDF Energy, the company agreed to make payments totalling £4.5 million to customers. At the time of writing, the remaining three investigations were continuing. In April 2012 a further misselling investigation, this time into supplier E.ON, was launched.³¹⁹

Voluntarism

As well as collaborating through voluntary industry codes of practice, individual firms may exercise corporate social responsibility by taking unilateral action to reduce or eliminate consumer detriment from door-to-door selling.

Consumer Focus' *End of the Road* campaign (UK)

Consumer Focus is the UK's 'statutory consumer champion,' a consumer research and advocacy body that works across the economy and has specialist expertise in energy matters.³²⁰ After a number of years campaigning against misselling in unsolicited door-to-door sales (referred to as 'doorstep cold calling' in the UK), in 2011 Consumer Focus launched a report and campaign

[†] In distinct contrast to intake procedures of the Energy and Water Ombudsman (Victoria), the Ombudsman Service in the UK may accept a complaint after the company has been allowed eight weeks to resolve the issue. Consumers are also required to fill out a written complaint form.

³¹⁵ Consumer Focus (n.d.) *How to make a complaint – You and your energy supplier*. Consumer Focus: London.

³¹⁶ Ombudsman Services (2011) *Energy – Sector Report 2010-11*, Ombudsman Services: Warrington, p. 5.

³¹⁷ Baron, Sylvia (2012) 'Are we opening the door to a new type of salesperson?', *Which?* website.

³¹⁸ Ofgem (2010) 'Ofgem launches investigation into misselling and sets up hotline for consumers to report misleading energy sales,' Media Release, 2 September 2010.

³¹⁹ Ofgem (2012) *Ofgem launches investigation into energy sales by E.ON*, Information note, 4 April 2012.

³²⁰ Consumer Focus (2012a) 'About us,' *Consumer Focus* website.

which aimed to bring an end to energy door-to-door sales through a process of voluntary agreement with retailers.

The report, *The end of the road: Energy consumers' experiences with doorstep sellers*, documented the results of Consumer Focus' most recent consumer survey on door-to-door selling. It argued that the practice was disliked and unwanted and was eroding the reputation of, and trust in, energy retailers.³²¹ Prior to the report's release, Consumer Focus shared a draft with stakeholders and attempted to reach a voluntary agreement on the cessation of unsolicited door-to-door sales, and SSE announced a suspension of door-to-door sales.³²² The report itself called upon retailers to enact immediate three-month moratoriums on the practice, during which time they were to work with consumers and consumer groups to develop alternative ways of delivering product advice and information to consumers. If this did not occur, Consumer Focus noted, they would call on the UK regulator Ofgem to consider an outright ban on energy door-to-door sales.³²³

Campaign success

Consumer Focus' campaign generated support from multiple areas. It was supported by other consumer organisations, including *Which?* and the Trading Standards Institute, which expressed dismay that after many years of campaigning, policy change, regulatory action and industry efforts to improve practices, energy misselling continued to occur.³²⁴ There was also support from politicians. For example, the House of Commons Energy and Climate Change Committee, in its July 2011 report on Ofgem's Retail Market Review, concluded that 'the continued blight of misselling should have been taken in hand years ago,' and called for industry itself to 'address these problems immediately without waiting for either Ofgem or Government to act.'³²⁵ In this environment, the Consumer Focus campaign also attracted significant media coverage.³²⁶

As shown in **Table 11** below, the report's release was quite quickly followed by the suspension or ending of door-to-door sales from five of the UK's 'Big Six' energy retailers, with the sixth retailer following suit around one year after the campaign launch.

³²¹ Consumer Focus (2011a) *The end of the road*.

³²² Consumer Focus (2011b) 'End of the Road for Cold Call Energy Doorstep Sales', Media release, 23 July 2011, p. 7.

³²³ Consumer Focus (2011a) *The end of the road*, p. 7.

³²⁴ Baron (2012) 'Are we opening the door?'

³²⁵ Energy and Climate Change Committee (2011) *Ofgem's Retail Market Review – Sixth Report*.

³²⁶ For example, see: Grice, Andrew (2011) 'MPs criticise energy firms for pushy doorstep-sales practices,' *The Independent*, 25 July 2011.

Table 11: Timeline of voluntary suspensions and cessation of unsolicited door-to-door selling

Date	Event
8 July 2011	SSE announces suspension of door-to-door sales
23 July 2011	Consumer Focus launches 'End of the Road' campaign
12 August 2011	British Gas announces suspension of door-to-door sales
7 September 2011	EDF Energy announces suspension of door-to-door sales
11 October 2011	British Gas announces ending of door-to-door sales
17 October 2011	npower announces ending of door-to-door sales
21 October 2011	Scottish Power announces ending of door-to-door sales
4 July 2012	E.ON announces proposed ending of door-to-door sales

Sources: Consumer Focus (2012b) '£1.25 million SSE fine sends message to energy industry to get it right on sales – says Consumer Focus,' Media Release, 4 May 2012; E.ON (2012) 'Customer first: Reset Review truly becoming part of E.ON's DNA,' Media Release, 4 July 2012.

Consequences

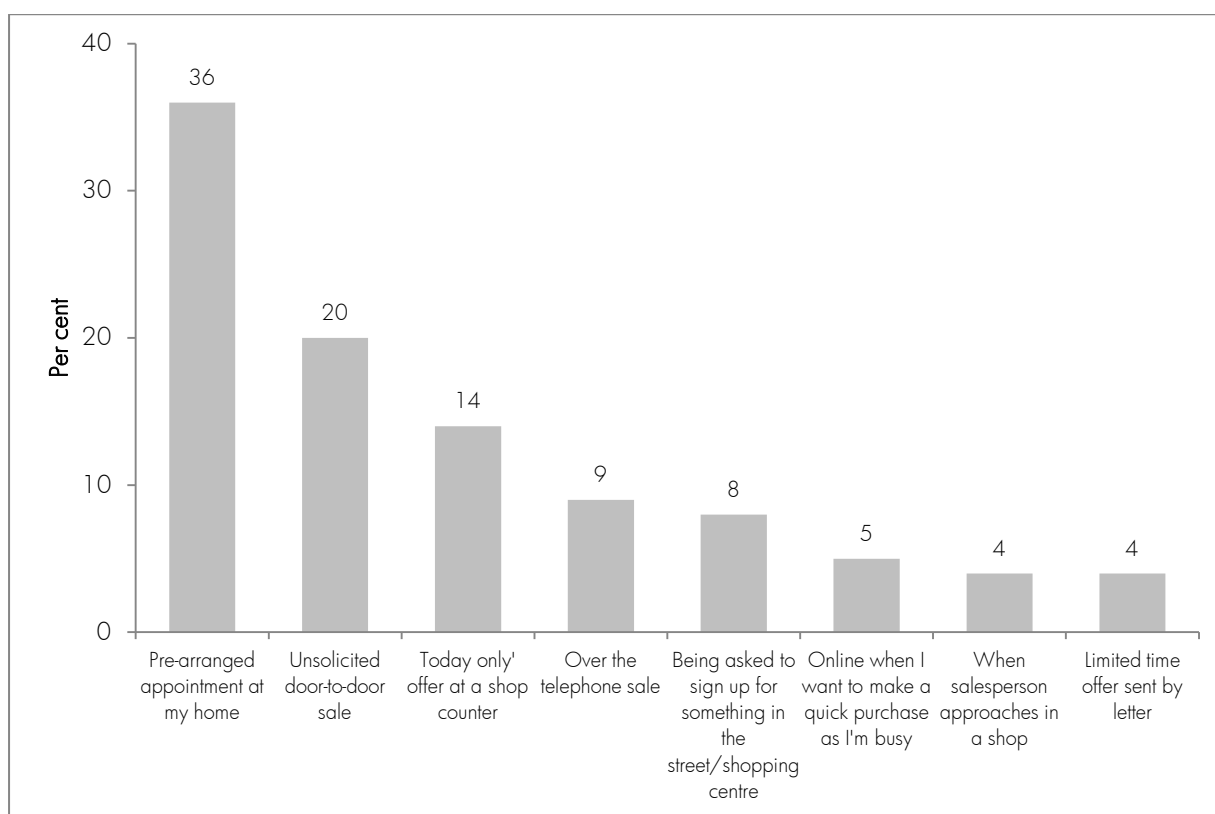
Having wound down unsolicited door-to-door sales, the UK's big six retailers are now considering alternative marketing and selling strategies, and it is not yet clear what approaches will be developed or how they will affect consumers. Consumer organisation Which? has expressed some concern that some retailers may simply switch to appointment-based in-home sales, which attracts many of the same potential disadvantages as unsolicited door-to-door sales.³²⁷ The UK OFT's 2004 report on door-to-door sales noted that consumers were as likely to regret a purchase after a solicited visit as after an unsolicited visit.³²⁸

A shift to appointment-based sales might even have the perverse consequence of increasing consumers' perceptions of pressure to purchase. In Consumer Action's January 2012 survey on door-to-door sales, respondents were asked in which of a range of possible sales scenarios they would feel the most pressure to buy (Figure 6).

³²⁷ Baron (2012) 'Are we opening the door?'

³²⁸ OFT (UK) (2004) *Doorstep selling*, p. 9.

Figure 6: Consumer perceptions of pressure to buy in different scenarios



Source: CALC (2012b) *Door-to-Door Sales*, p. 2.

Figure 6 shows that the largest group of respondents (36%) thought that they would feel most pressured where there was a pre-arranged home appointment – more than the 20 per cent who elected unsolicited door-to-door sales as the highest-pressure scenario. While appointment-based door-to-door sales eliminate the ‘surprise’ factor, it appears that consumers may feel a greater sense of obligation towards a sales agent who they have explicitly agreed to meet with. It is yet to be seen whether the UK will see a shift towards appointment-cased sales, or if retailers will seize the opportunity to develop new ways of marketing and selling to customers.

There has also been commentary on the effects of the move on switching activity. Finnish think-tank Vaasa-ETT in its *World Energy Retail Market Rankings Report 2012* states that the energy retail market in the UK has seen a ‘massive fall-off in ... established activity’, attributing this to the discontinuation of door-to-door sales by the major retailers.³²⁹

Consumer Action Law Centre campaign (Australia)

Citing Consumer Focus’ campaign, in 2012 Consumer Action campaigned for energy retailers to cease door-to-door sales. In March, Consumer Action wrote to retailers asking them to voluntarily stop unsolicited door-to-door sales. Retailers did not agree to the request but, according to the *Do Not Knock* website, some agreed to meet with Consumer Action to discuss the issues.³³⁰ The

³²⁹ Lewis (2012) *World Energy Retail Rankings 2012*, p. 27.

³³⁰ Consumer Action Law Centre, Financial Counselling Australia and Victoria Legal Aid (2012c) ‘Take Action! Sign our petition to end door-to-door energy marketing,’ *Do Not Knock* website.

March letter was followed, in June 2012, with the launch of an online petition repeating the call for retailers to abandon door-to-door sales. The petition achieved 655 signatures before its close.³³¹

Discussion and recommendations

In Australia and in the UK, government legislative and regulatory requirements on energy door-to-door sales have been accompanied by voluntary industry initiatives.

Voluntary industry codes

At this early stage, only preliminary comments can be made about the effectiveness of Australia's Energy Assured scheme on door-to-door selling. Information provided to CUAC by Energy Assured suggests that some action has been taken under the scheme in relation to both sales agents and retailer members. While EWOV marketing and transfer complaints have increased slightly during 2012 after a drop in 2011 prior to Energy Assured's commencement, it is unclear what has caused these trends. Complaints trends will need to be followed over a longer period before even tentative conclusions can be drawn about the scheme's possible impact.

More information about the implementation and operation of the Energy Assured scheme would allow external stakeholders to evaluate this activity against other data, and come to conclusions about the effectiveness of the scheme. Provided that Energy Assured is properly implemented and effective, this transparency should help to build stakeholder and community confidence both that the scheme represents a genuine effort at industry self-regulation, and that it is resulting in benefits to consumers.

Recommendation 9

That the Energy Assured scheme increases transparency and accountability by making more detailed information about the scheme's implementation and operation publicly available at regular intervals. This should include de-identified information about:

- any warning notices issued and sanctions applied;
- independent audit results;
- complaint levels; and
- numbers of agents de-registered and in 'suspended' and 'development' status.

CUAC believes that the Energy Assured scheme has some potential to improve the conduct of energy door-to-door sellers. In contrast to the Energy Sure scheme in the UK, for example, Energy Assured has important strengths, such as full industry coverage and the inclusion of a sanctions regime, albeit limited. Now that it is in place, the Energy Assured scheme should have the opportunity to be fully implemented and its effectiveness evaluated. At the same time, given that the mere existence of voluntary industry codes can undercut other efforts to address consumer problems, CUAC believes that firm evidence of the scheme's effectiveness should be required if the scheme is to continue after its initial three-year period.

³³¹ Consumer Action Law Centre (2012a) 'Australian energy retailers: Time's up for energy door-to-door marketing' on *Change.org* website.

Recommendation 10

That the Australian Competition and Consumer Commission only re-authorise the Energy Assured scheme if there is convincing evidence that it has been effective in producing public benefit through the reduction of energy door-to-door misselling and associated consumer detriment.

In this task, the ACCC would be greatly assisted by reliable data about the overall level of energy door-to-door selling misconduct, as discussed in **Recommendation 1**. Were a consumer survey to be administered now and when the re-authorisation application is being made, this would provide reliable evidence of any marked change in sales agent behaviour.

Voluntarism

At the present time, CUAC believes that calls on energy retailers to voluntarily abandon door-to-door sales in Victoria are unlikely to be successful. Although Consumer Focus' *End of the Road* campaign has enjoyed considerable success, this can probably be attributed in large part to more propitious conditions. The UK retail energy market is older than Victoria's and hence, both dissatisfaction with door-to-door selling and disenchantment with earlier attempts to improve practices have had much time to develop and grow. Consumer Focus was able to harness this dissatisfaction and sense of weariness in its large, well-resourced campaign. At the same time, a stronger enforcement approach from the UK regulator may have changed retailers' perceptions of the relative costs and benefits of door-to-door selling activity. In recent years, Ofgem has been vigorous in its enforcement efforts, launching misselling investigations into all of the 'Big Six' retailers over the past five years, and imposing large penalties in some cases. These circumstances are likely to have contributed to the success of Consumer Focus' campaign where similar efforts in Victoria have not been successful.

Should recent efforts, including the Energy Assured scheme, fail to substantially eliminate energy door-to-door selling misconduct in Victoria, CUAC sees room for a renewed campaign from an alliance of consumer and community organisations calling on retailers to agree to a moratorium of door-to-door selling in favour of other approaches. In the meantime, CUAC strongly echoes earlier calls for energy retailers to shift their focus to less intrusive and more consumer-centred sales and marketing efforts. We see substantial room for retailers to innovate in this area. For example, we believe retailers should consider how they might capture the benefits of face-to-face explanation in a way that, unlike door-to-door sales, does not create conditions in which pressure sales, misleading and deceptive conduct and unconscionable conduct are incentivised.

Recommendation 11

That, in an effort to move away from door-to-door selling, the Energy Retailers Association of Australia take a leadership role encouraging and supporting its to develop alternative, innovative sales and marketing approaches that are better aligned with consumer preferences.

At the time of writing, CUAC was in the process of developing a retailer rating scheme designed to offer consumers simple, summarised information about the non-price characteristics of different energy retailers, such as regulatory compliance and customer service. Based on the findings of

CUAC and others' energy consumer surveys, as well as our interactions with consumers and community organisations, CUAC believes that information about which retailers do and do not use door-to-door sales, and the manner in which they do so, is of much interest to consumers. Hence, we will consider the ways in which such information might be incorporated into our retailer rating scheme. For consumers who feel strongly about door-to-door sales, as many do, easy access to this information may influence choice of energy retailer and offer.

6. THE FUTURE

Over a decade of retail competition, door-to-door selling has occupied a somewhat paradoxical place in the energy market. On the one hand, it has been one of the most important avenues by which consumers have participated in the retail market. On the other, it has fuelled consumer and community dissatisfaction with, and distrust of, energy retailers, with flow-on effects for overall consumer confidence in the market.

With this report, CUAC has surveyed the range of policy approaches that can be employed in the effort to minimise the consumer detriment associated with this sales channel. Based on our review of the evidence, we have identified areas in which our current approaches appear to be working, and areas where improvements can be made to further reduce detriment.

While we believe there is room for further minimisation of consumer detriment, we also see the shortcomings of door-to-door selling as one manifestation of a more fundamental issue with Victoria's retail energy market. Discussing energy door-to-door and telesales in its *Review of the Effectiveness of Competition in the Electricity and Gas Retail Markets – Victoria*, the AEMC quoted a representative of a new retailer who claimed:

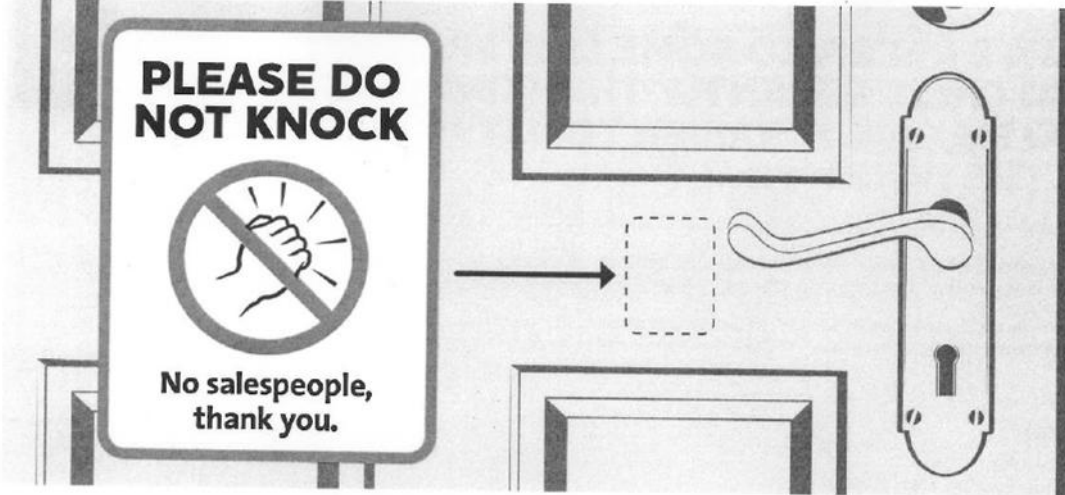
*...unless you bother someone, then you're kidding yourself. They're just not going to come looking for you.*³³²

In CUAC's view, 'bothering' consumers is not a desirable or sustainable model for ongoing and effective consumer engagement in the energy market.

While Victoria's energy customer switching rate is the world's highest, in large part attributable to door-to-door sales activity, this high level of churn is not necessarily an indication that consumers are participating effectively in the market, nor that it is operating in their best interests. In a complex retail energy market, consumers need – but do not currently have – simple, reliable and non-coercive ways of engaging effectively and making decisions that are in their own interests. We believe that we are seeing increasing recognition that a high switching rate is not the be all and end all of energy market competitiveness. A shift away from energy door-to-door sales in favour of approaches that align with consumer preferences as to how they receive marketing information would, in all likelihood, mean a drop in customer switching rates. At the same time, however, if this participation is of a higher quality, energy market competitiveness need not suffer. The missing link is the analysis of consumers' decisions: whether they are in consumers' own best interests and resulting in substantial savings, thereby driving down prices.

³³² AEMC (2007) *Review of the Effectiveness of Competition*, p. 67.

APPENDIX A – ORIGIN ENERGY DO NOT KNOCK STICKER



PLEASE DO NOT KNOCK

No salespeople,
thank you.

**WE'VE RECEIVED SOME LETTERS
AND CALLS RECENTLY THANKING US
FOR MAKING IT EASIER TO SAY 'NO'
AT THE DOOR**

It seems many people are tired of being door-knocked by salespeople at home.

To help stop door-to-door salespeople, simply display the attached 'Do Not Knock' sticker in a prominent location near your front door. Once the sticker is up, salespeople will get the message to leave you alone.

Of course, by not displaying the sticker you can choose to hear them out if you like, but be especially wary of being locked into long-term contracts and exit fees. And never be pressured to sign anything on the spot.

origin

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