

Your Ref: 1323/05
Our Ref: 050049

4 October 2006

Mr R Dumas
Chairman
Gas Marketing Code Consultative Committee
GPO Box 8469
Perth Business Centre WA 6849

RECEIVED			
Economic Regulation Authority			
FILE No:	1323/05		
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ACTION:		MIKE S	

Dear Mr Dumas

Review of the Gas Marketing Code 2004

Thank you for your letter of 11 August 2006 forwarding the Gas Marketing Code Consultative Committee's Draft Report for Review of Gas Marketing Code of Conduct 2004 (the Draft Report) and inviting comment on the Draft Report.

I note that as part of its review the Gas Marketing Code Consultative Committee (GMCCC) has sought and obtained a legal review of the Code from Lavan Legal. I also note that Lavan Legal has recommended that the Code be repealed and that the GMCCC has also recommended that the Code be repealed.

The Draft Report also recommends that an Energy Code of Conduct be implemented through a regulatory instrument incorporated into gas and electricity licences.

I note that the development of an Energy Code of Conduct would be consistent with the approach in NSW and Victoria. NSW has a Marketing Code of Conduct approved for the purposes of the *Electricity Supply Act 1995* (NSW) and the *Gas Supply Act 1996* (NSW) by the NSW Minister for Energy. Victoria has a Code of Conduct for Marketing Retail Energy. Further, pursuant to Regulation 2A of the *Door to Door Trading Regulations 1987* (WA), the *Door to Door Trading Act 1987* (WA) does not apply to an electricity supply contract or a gas supply contract. In the absence of protection for energy consumers under the *Door to Door Trading Act 1987*, I believe a Code of Conduct for energy retailers in WA is highly desirable. If such a Code is to be developed it would also appear prudent that this be done prior to the existing Gas Marketing Code being repealed, otherwise energy consumers in WA may be left unprotected in the interim.

I will now deal with each of the GMCCC's recommendations.

Recommendation 1

The Gas Marketing Code of Conduct 2004 should be repealed by the Authority.

Lavan Legal's analysis concludes that the Code contains Overlap, Administrative, Record Keeping and Market Conduct provisions. Lavan Legal believes the "overlap" provisions overlap or duplicate the common law, Commonwealth laws or other State laws and regulations and may therefore be removed from the Code. Secondly, Lavan Legal suggests that the record keeping requirements be dealt with as licence conditions and be removed from the Code. Lavan Legal also suggest that the market conduct conditions duplicate provisions of the Trade Practices Act 1974 (Cth) (TPA) and the Fair Trading Act 1987 (WA) (FTA) and for this reason these provisions can also be removed from the Code. Lavan Legal argues that with the removal of the Overlap, Record Keeping and Market Conduct provisions from the Code the Administrative provisions would not be necessary and the Code could therefore be repealed.

Clause 10(b) of the Code requires a responsible marketer to "on request by the gas industry ombudsman in relation to a particular complaint, give to the gas industry ombudsman information that this Code requires the responsible marketer to keep, and any other information that the responsible marketer has relating to the complaint".

Comment:

If the Gas Code is repealed and this requirement is not part of a replacement Energy Code then another mechanism that requires marketers to provide such information as described above to the Gas Industry Ombudsman will be necessary.

Clause 13(3) of the Code requires that "the terms and conditions of a standard customer contract that is not entered into a result of door to door marketing must be available to the customer on request at no charge". Lavan Legal notes that clause 13(3) is not entirely clear.

Comment:

If it is decided to clarify this clause then it is suggested that the clause could require that a copy of the terms and conditions be mailed to the customer on request at no charge to the customer. It could also be a requirement that the terms and conditions be published on the supplier's web site in a print friendly format. If the Gas Code is repealed and this requirement is not part of a replacement Energy Code then these requirements could be included in the Energy Coordination (Customer Contract) Regulations 2004 (CC Regulations).

Clause 14(2)(c) of the Code requires the marketer to give the customer “the details of any right the customer may have to rescind the contract during a cooling-off period and the charges that may apply if the customer rescinds the contract.”

Comment:

If the Gas Code is repealed and this requirement is not part of a replacement Energy Code then this requirement could be included in the CC Regulations.

Clause 14(2)(d) of the Code requires the marketer to provide information on “how to make a complaint to the responsible marketer or the gas industry ombudsman, and a copy of the complaint handling and dispute resolution procedures of the responsible marketer if the customer requests one”.

Comment:

If the Gas Code is repealed and this requirement is not part of a replacement Energy Code then this requirement could be included in the CC Regulations.

Clause 14(3)(a) of the Code requires that for a standard customer contract not entered into as a result of door to door marketing “the information in sub-clause (2) may be given before the customer enters into the contract, but must, if not given before, be posted to the customer within 2 business days after the day on which the customer entered into the contract or be given by some other quicker means”. Alinta Sales Pty Ltd has proposed that this requirement be amended to read “no later than with a customer’s first bill” rather than “within 2 business days”. It is noted that the amendment is considered to be consistent with clause 2.7(2) of the Code of Conduct (For the Supply of Electricity to Small Use Customers) and would result in a significant reduction in cost to Alinta Sales Pty Ltd.

Comment:

The proposed amendment appears reasonable and if the Gas Code is repealed and this requirement is not part of a replacement Energy Code then the amended requirement could be included in the CC Regulations.

Clause 15 of the Code deals with misleading, deceptive or unconscionable conduct. Under Clause 9.3(b) of the Charter of Energy Industry Ombudsman (Western Australia) Ltd the Ombudsman must inform the authority of any substantial breaches of “the code of conduct under Part 2C of the Energy Coordination Act 1994”.

Comment:

If the Gas Code is repealed and not replaced with an Energy Code the existing requirement should, in our view, be covered by the terms of the Energy Ombudsman's MOU with the Authority.

Clause 17 of the Code deals with marketing at a person's premises. Lavan Legal notes that Clause 17(1) "is extremely prescriptive...". However, we note that similar provisions apply in the Codes for NSW and Victoria.

Comment:

It is suggested that because the *Door to Door Trading Act 1987* does not apply to energy contracts in WA some form of protection under a Code or similar instrument would be desirable to protect energy consumers in WA.

Clause 21 of the Code deals with the collection and use of personal information. Lavan Legal claims Clause 21 is not needed in light of the National Privacy principles under the *Privacy Act 1988* (Cth) (PA).

Comment:

However, it is not clear that all prospective licensees are covered by the PA. For example, organisations that are State authorities appear to be exempt. This is an area that may warrant further attention.

Recommendation 2

A Regulatory instrument should be developed by the Authority, based on advice from the GMCCC, which would include those elements of the Code not duplicated in other laws and other relevant requirements.

Comment:

Agreed.

Recommendation 3

A condition should be inserted into the gas trading licences by the Authority requiring compliance with the regulatory instrument outlined under recommendation 2.

Comment:

Agreed.

Recommendation 4

A consumer education document should be developed by the Authority based on advice from GMCCC, advising consumers of their rights concerning gas marketing and providing other relevant information.

Comment:

Agreed.

Recommendation 5

At the completion of the review of the Code of Conduct (For the Supply of Electricity to Small Use Customers), the Authority should establish a committee with appropriate representation to discuss the development of an Energy Code of Conduct covering both gas and electricity licensees, with implementation of this Code through a regulatory instrument incorporated into the gas and electricity licences.

Comment:

The Energy Ombudsman strongly supports this recommendation.

I appreciate the opportunity to provide these comments and would be very happy to discuss them further with you as necessary.

Yours sincerely



Deirdre O'Donnell
ENERGY OMBUDSMAN