



Gas Marketing Code Consultative Committee

2013 Review of the Gas Marketing Code of Conduct

Final Review Report

13 September 2013

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1 Executive Summary

This Final Review Report (**report**) presents the findings of the statutory review of the *Gas Marketing Code of Conduct 2012* (**Code**) carried out by the Gas Marketing Code Consultative Committee (**GMCCC**).

The *Energy Coordination Act 1994* (**Gas Act**) requires that the GMCCC undertake a review of the Code every two years and provide a report to the Economic Regulation Authority (**Authority**). The Gas Act states that the purpose of the review is to 're-assess the suitability of the provisions of the code of conduct for the purposes of section 11ZPM(2)'.

Section 11ZPM(2) relates to the objective of the Code which is to:

...regulate and control the conduct of gas trading licensees and gas marketing agents with the object of protecting customers from undesirable marketing conduct and defining standards of conduct in the marketing of gas to customers.

Under the Gas Act, the GMCCC must give any interested person an opportunity to offer comments relevant to the review. The GMCCC published a Draft Review Report for public consultation on 14 June 2013. The public consultation period closed on 8 July 2013. A total of three submissions were received.

Following consideration of the issues raised in submissions, the GMCCC makes the following recommendations:

Recommendation 1 – That the Authority deletes the definition of 'Do Not Call Register Act' from clause 1.5 of the Code.

Recommendation 2 – That the Authority replaces reference to 'Do Not Call Register Act' in the explanatory note under clause 1.7 of the Code with 'Do Not Call Register Act 2006 (Cth)'.

Recommendation 3 – That the Authority deletes the definition of 'telemarketing calls' from clause 1.5 of the Code.

Recommendation 4 – That the Authority deletes the definition of 'Telemarketing Industry Standard' from clause 1.5 of the Code.

Recommendation 5 – That the Authority replaces reference to 'Telemarketing Industry Standard' in the explanatory note under clause 1.7 of the Code with 'Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 (Cth)'.

Recommendation 6 – That the Authority amends the definition of 'TTY' in clause 1.5 of the Code to read 'teletypewriter'.

Recommendation 7 – That the Authority renumbers clause 2.8(2) to become a separate clause (clause 2.9).

Recommendation 8 – That the Authority inserts the heading 'Records to be kept' in new clause 2.9.

Recommendation 9 – That the Authority inserts the following explanatory note under new clause 2.9:

[Note: Clause 13.1(1) of the *Compendium* sets out the record keeping obligations that apply to retailers in relation to records to be kept under this *Code*.]

Recommendation 10 – That the Authority amends the definition of ‘cooling-off period’ in clause 1.5 as follows:

means the period specified in the **contract** as the cooling-off period.

Recommendation 11 – That the Authority inserts the following new clause (clause 2.6):

No canvassing or advertising signs

A **retailer** or **gas marketing agent** who visits a person’s **premises** for the purposes of **marketing** must comply with any clearly visible signs at a person’s **premises** indicating –

- (a) canvassing is not permitted at the **premises**; or
- (b) no advertising or similar material is to be left at the **premises** or in a letterbox or other receptacle at, or associated with, the **premises**.

Recommendation 12 – That the Authority develops a new webpage regarding the use of do-not-knock stickers.

Recommendation 13 – That the Authority writes to all gas retailers advising them that:

- (i) the GMCCC saw merit in the development of standardised energy price fact sheets;
- (ii) the GMCCC at this time did not make a recommendation to make the development of energy price fact sheets mandatory but will reconsider the need for mandatory fact sheets as part of the next Code review;
- (iii) the Authority encourages gas retailers to prepare pricing information in accordance with the AER’s Retail Pricing Information Guideline; and
- (iv) the Authority encourages gas retailers to make this information available to customers before they enter into a new contract.

Recommendation 14 – That the Authority deletes clauses 2.2, 2.3 and 2.4 from the Code and inserts instead the following new clauses:

2.2 Entering into a standard form contract

(1) When entering into a **standard form contract** that is not an **unsolicited consumer agreement**, a **retailer** or **gas marketing agent** must –

- (a) record the date the **standard form contract** was entered into;
- (b) give, or make available to the **customer** at no charge, a copy of the **standard form contract** –
 - (i) at the time the **standard form contract** is entered into, if the **standard form contract** was not entered into over the **telephone**; or
 - (ii) as soon as possible, but not more than 5 **business days** after the **customer's** the **standard form contract** was entered into, if the **standard form contract** was entered into over the **telephone**.

(2) Subject to subclause (3), a **retailer** or **gas marketing agent** must give the following information to a **customer** no later than on or with the **customer's** first bill –

- (a) how the **customer** may obtain—
 - (i) a copy of the **Code** and the **Compendium**; and
 - (ii) details on all relevant tariffs, fees, charges, **alternative tariffs** and service levels that may apply to the **customer**;
- (b) the scope of the **Code**;
- (c) that a **retailer** and **gas marketing agent** must comply with the **Code**;
- (d) how the **retailer** may assist if the **customer** is experiencing **payment difficulties** or **financial hardship**;
- (e) with respect to a **residential customer**, the **concessions** that may apply to the **residential customer**;
- (f) the **distributor's** 24 hour **telephone** number for faults and emergencies;

- (g) with respect to a **residential customer**, how the **residential customer** may access the **retailer's** —
 - (i) multi-lingual services (in languages reflective of the **retailer's customer** base); and
 - (ii) **TTY** services;
 - (h) how to make an enquiry of, or **complaint** to, the **retailer**; and
 - (i) general information on the **retailer's gas customer safety awareness program**.
- (3) For the purposes of subclause (2), a **retailer** or **gas marketing agent** is taken to have given the **customer** the required information if —
- (a) the **retailer** or **gas marketing agent** has provided the information to that **customer** within the preceding 12 months; or
 - (b) the **retailer** or **gas marketing agent** has informed the **customer** how the **customer** may obtain the information, unless the **customer** requests to receive the information.

2.3 Entering into a non-standard contract

- (1) When entering into a **non-standard contract** that is not an **unsolicited consumer agreement**, a **retailer** or **gas marketing agent** must —
- (a) obtain and make a record of the **customer's verifiable consent** that the **non-standard contract** has been entered into, and
 - (b) give, or make available to the **customer** at no charge, a copy of the **non-standard contract** —
 - (i) at the time the **non-standard contract** is entered into, if the **non-standard contract** was not entered into over the **telephone**; or
 - (ii) as soon as possible, but not more than 5 **business days** after the **non-standard contract** was entered into, if the **non-standard contract** was entered into over the **telephone**.
- (2) Before entering into a **non-standard contract**, a **retailer** or **gas marketing agent** must give the **customer** the following information —
- (a) that the **customer** is able to choose the **standard form contract** offered by the **retailer**;
 - (b) the difference between the **non-standard contract** and the **standard form contract**;
 - (c) details of any right the **customer** may have to rescind the **non-standard contract** during a **cooling-off period** and the charges that may apply if the **customer** rescinds the **non-standard contract**;
 - (d) how the **customer** may obtain—
 - (i) a copy of the **Code** and the **Compendium**; and
 - (ii) details on all relevant tariffs, fees, charges, **alternative tariffs** and service levels that may apply to the **customer**;
 - (e) the scope of the **Code**;
 - (f) that a **retailer** and **gas marketing agent** must comply with the Code;
 - (g) how the **retailer** may assist if the **customer** is experiencing **payment difficulties** or **financial hardship**;
 - (h) with respect to a **residential customer**, the **concessions** that may apply to the **residential customer**;
 - (i) the **distributor's** 24 hour **telephone** number for faults and emergencies;
 - (j) with respect to a **residential customer**, how the **residential customer** may access the **retailer's** —
 - (i) multi-lingual services (in languages reflective of the **retailer's customer** base); and
 - (ii) **TTY** services;
 - (k) how to make an enquiry of, or **complaint** to, the **retailer**; and
 - (l) general information on the **retailer's gas customer safety awareness program**.
- (3) For the purposes of subclauses (2)(d)-(l), a **retailer** or **gas marketing agent** is taken to have given the **customer** the required information if —
- (a) the **retailer** or **gas marketing agent** has provided the information to that **customer** within the preceding 12 months; or
 - (b) the **retailer** or **gas marketing agent** has informed the **customer** how the **customer** may obtain the information, unless the **customer** requests to receive the information.
- (4) Subject to subclause (3), the **retailer** or **gas marketing agent** must obtain the **customer's verifiable consent** that the information in clause 2.3(2) has been given.

Recommendation 15 – That the Authority replaces ‘the holder of a trading licence’ with ‘a retailer’ in the definition of ‘gas marketing agent’ in clause 1.5 of the Code.

Recommendation 16 – That the Authority deletes clauses 1.6(a) and (c) from the Code.

Recommendation 17 – That the Authority deletes reference to ‘distributors’ from clause 1.7 of the Code.

Recommendation 18 – That the Authority replaces ‘Australian Consumer Law’ with ‘*Fair Trading Act 2010 (WA)*’ in the explanatory note under clause 1.7.

Recommendation 19 – That the Authority deletes clause 2.5(2) from the Code.

Recommendation 20 – That the Authority deletes clause 2.6(2)(a) from the Code.

Recommendation 21 – That the Authority deletes clauses 2.6(3) and (4) from the Code.

Recommendation 22 – That the Authority replaces references to ‘retailers’ and references to ‘gas marketing agents’ with ‘retailers and gas marketing agents’ as appropriate throughout the Code.

Recommendation 23 – That the Authority deletes all instances of ‘other party’ from the Code.

Appendix 1 contains a mark-up version, and **Appendix 2** a clean version, of the Code incorporating the GMCCC’s recommendations.

2 Background

2.1 Gas Marketing Code of Conduct

The Code is made under section 11ZPM of the Gas Act. The Code regulates and controls the conduct of gas trading licensees and gas marketing agents with the object of protecting small use customers from undesirable marketing conduct and defining standards of conduct in the marketing of gas to customers.¹

The initial Code was approved by the Minister for Energy and commenced operation on 31 May 2004. Under the Gas Act, the GMCCC is required to review the Code and provide its findings to the Authority. A review is required to be undertaken every two years.

The object of the review is to re-assess the suitability of the provisions of the Code for the purposes of section 11ZPM(2) of the Gas Act.²

Since the initial approval, the GMCCC has undertaken two reviews of the Code. The most recent version of the Code, the [Gas Marketing Code of Conduct 2012](#), took effect on 1 July 2012.

2.2 Gas Marketing Code Consultative Committee

In 2013 the Authority approved amendments to the GMCCC Terms of Reference (**Appendix 4**).

The GMCCC Terms of Reference allow for the GMCCC to comprise:

- a Chairperson (from the Authority's Secretariat), who has no voting rights;
- an executive officer (from the Authority's Secretariat), who has no voting rights;
- a government agency representative from the Department of Commerce;
- a government agency representative from the Public Utilities Office;
- three consumer organisation representatives; and
- three industry representatives.

Current members of the GMCCC are:

- Mr Paul Kelly, Economic Regulation Authority (chairman)
- Dr David Leith, Economic Regulation Authority (executive officer)
- Mr Gerry Milford, Department of Commerce (government agency representative)
- Mr Alex Kroon, Public Utilities Office (government agency representative)
- Mr Andrew Canion, Small Enterprise Network (Chamber of Commerce & Industry) (consumer representative)

¹ Section 11ZPM(2) of the Gas Act

² Section 11ZPV(2) of the Gas Act

- Mr Brent Savage, Western Australian Council of Social Service (consumer representative)
- Mr Charles Brown, Financial Counsellors' Association of WA (consumer representative)
- Ms Catherine Rousch, Alinta Energy (industry representative)
- Mr Simon Thackray, Synergy (industry representative)
- Ms Melanie Gordon, Wesfarmers Kleenheat Gas (industry representative)

Industry representative Mr Brendan McColl resigned in July 2013 and was replaced by Ms Melanie Gordon from Wesfarmers Kleenheat Gas.

The GMCCC Terms of Reference provide detail regarding the decision-making model to be employed by the GMCCC.

2.3 Review Process & Code Amendment Requirements

The Secretariat of the Authority prepared a Discussion Paper for the consideration of the GMCCC in April 2013. The GMCCC met to discuss the issues outlined in the Discussion Paper as well as other issues raised by GMCCC members and subsequently approved the Draft Review Report.

As required by the Gas Act, the GMCCC sought comment from interested parties on the Draft Review Report. On 14 June 2013, the report was published on the Authority's website and an email was sent to all those registered with the Authority as interested parties. On 19 June, an advertisement seeking written submissions on the Draft Review Report was placed in *The West Australian*.

The closing date for submissions on the Draft Review Report was 8 July 2013.

Submissions were received from:

- WACOSS (**Appendix 4**)
- Synergy (**Appendix 5**)
- Alinta Energy (**Appendix 6**)

Following receipt of the submissions, the GMCCC met to consider the issues raised and subsequently approved this report.

After consideration of this report the Authority may decide to propose amendments to the Code. Part 2C of the Gas Act sets out the Code amendment process.

3 Outstanding issues from 2011 Code Review

In its Final Review Report on the 2011 Review of the Gas Marketing Code of Conduct, the GMCCC recommended that the Authority write to the Minister for Energy regarding the following three issues.

3.1 Energy Coordination (Customer Contracts) Regulations 2004 – Australian Gas Association Customer Service Code

During the 2011 Review of the Code, one of the GMCCC members noted that the *Energy Coordination (Customer Contracts) Regulations 2004* (**contract regulations**) contain multiple references to the Australian Gas Association (**AGA**) Customer Service Code (**AGA Code**). The AGA ceased publishing the AGA Code in 2002 and handed responsibility to Standards Australia which has not released a replacement code. It is widely recognised in the gas industry that the AGA Code has been defunct since that time and contains provisions that are no longer current or relevant to the gas market in Australia.

The GMCCC member proposed that references to the AGA Code be removed from the contract regulations so as not to cause confusion in relation to obligations within the Code. The GMCCC agreed that the continuing reference to the AGA Code is an issue and recommended that the Authority write to the Minister for Energy regarding the issue.³

Consistent with the GMCCC's recommendation, the Authority wrote to the Minister for Energy expressing its support for amendments to the contract regulations. The GMCCC understands the issue is currently under consideration.

3.2 Energy Coordination Act 1994 – Definition of 'marketing'

During the 2011 Review of the Code, a number of gas licensees argued that the definition of marketing included in the Code captures an overly broad spectrum of contact with the customer. They expressed concern that the definition did not only capture contact for the purpose of marketing, but also routine contact, such as checking a customer's concession eligibility.

The GMCCC recommended that the Authority narrow the definition of 'marketing' within the Code to read:

marketing includes engaging or attempting to engage in any of the following activities by any means, including door to door or by telephone or other electronic means -

- (a) negotiations for, or dealings in respect of with a customer or potential customer, for the purpose of entering into or varying, a contract for the supply of gas to a customer; or
- (b) advertising, promotion, market research or public relations in relation to the supply of gas to customers.

³ Gas Marketing Code Consultative Code, *2011 Review of the Gas Marketing Code of Conduct – Final Review Report*, 14 September 2011, p.14 (recommendation 7)

The Authority rejected the recommendation on the basis that any amendment to the definition should first occur in the superior legislation before amendment of the subsidiary legislation is considered.

The Authority resolved to raise the issue with the Minister for Energy. In December 2011, the Authority wrote to the Minister for Energy encouraging the Minister to consider the issues associated with the definition of 'marketing' in section 11ZPL of the Gas Act. The GMCCC understands the issue is currently under consideration.

3.3 Energy Coordination (Tariff) Regulations 2000 – Obligation to offer to supply under a standard form contract

Clause 2.3 of the Code relates to the information to be given to the customer before entering into a contract and includes subclause (1) which states:

- (1) Before arranging a contract, a marketing representative must give a customer the following information —
 - (a) that the customer is free to choose the standard form contract offered by the retailer;

The same clause was amended in the *Code of Conduct for the Supply of Electricity to Small Use Customers (Electricity Code)*. The clause now only applies to Synergy and Horizon Power as the obligation to offer the standard form contract under Regulation 40 of the *Electricity Industry (Customer Contracts) Regulations 2005* only applies to Synergy and Horizon Power and not all electricity retailers.

In preparation for the 2011 Review of the Code, the Authority considered whether clause 2.3(1)(a) could be deleted from the Code. In doing so the Authority sought legal advice regarding the obligation to offer the standard form contract in gas. The advice indicated that it is uncertain whether a requirement to offer a standard form contract exists within the gas industry.

The Authority wrote to the Minister for Energy regarding this issue. The GMCCC understands the issue is currently under consideration.

4 Recommendations

4.1 Achieving Consistency with the Electricity Code

In 2012, the Authority made a number of amendments to the *Code of Conduct for the Supply of Electricity to Small Use Customers (Electricity Code)*. Some of the amendments related to Part 2 of the Electricity Code which addresses the marketing of electricity.

The GMCCC agreed to recommend that the following amendments be made to the Code to ensure consistency between the marketing provisions included in the Code and the Electricity Code.

4.1.1 Definition – Do Not Call Register Act

Recommendation 1

That the Authority deletes the definition of ‘Do Not Call Register Act’ from clause 1.5 of the Code.

Recommendation 2

That the Authority replaces reference to ‘Do Not Call Register Act’ in the explanatory note under clause 1.7 of the Code with ‘Do Not Call Register Act 2006 (Cth)’.

The Electricity Code does not include a definition of the ‘Do Not Call Register Act’. The definition is currently only used in the explanatory note under clause 1.7 of the Code.

4.1.2 Definition – Telemarketing calls

Recommendation 3

That the Authority deletes the definition of ‘telemarketing calls’ from clause 1.5 of the Code.

The Electricity Code does not include a definition of ‘telemarketing calls’. The definition is currently not used in the Code.

4.1.3 Definition – Telemarketing Industry Standard

Recommendation 4

That the Authority deletes the definition of ‘Telemarketing Industry Standard’ from clause 1.5 of the Code.

Recommendation 5

That the Authority replaces reference to ‘Telemarketing Industry Standard’ in the explanatory note under clause 1.7 of the Code with ‘Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 (Cth)’.

The Electricity Code does not include a definition of the ‘Telemarketing Industry Standard’. The definition is currently only used in the explanatory note under clause 1.7 of the Code.

4.1.4 Definition – TTY

Recommendation 6

That the Authority amends the definition of ‘TTY’ in clause 1.5 of the Code to read ‘teletypewriter’.

The definition of ‘TTY’ in the Electricity Code has been amended to read ‘teletypewriter’. The definition in the Code still refers to ‘telephone typewriter’.

4.1.5 Clause 2.8(2) – Record keeping

Recommendation 7

That the Authority renumbers clause 2.8(2) to become a separate clause (clause 2.9).

Recommendation 8

That the Authority inserts the heading ‘Records to be kept’ in new clause 2.9.

Recommendation 9

That the Authority inserts the following explanatory note under new clause 2.9:

[Note: Clause 13.1(1) of the *Compendium* sets out the record keeping obligations that apply to retailers in relation to records to be kept under this *Code*.]

Clause 2.8(2) addresses the issue of record keeping. It requires a gas marketing agent to keep records or other information that the gas marketing agent is required to keep under the Code for at least 2 years.

Although clause 2.8(2) is included under the heading ‘Gas marketing agent complaints’, the clause does not only relate to complaints but to any types of records.

The GMCCC agreed to recommend that clause 2.8(2) should become a stand-alone clause to clarify the general nature of the record-keeping obligation and that a new heading should be inserted.

4.2 Achieving Consistency with the Australian Consumer Law

Recommendation 10

That the Authority amends the definition of ‘cooling-off period’ in clause 1.5 as follows:

means the period specified in the **contract** as the cooling-off period.

The Australian Consumer Law (**ACL**) prescribes a cooling-off period of 10 business days for all unsolicited consumer agreements. For door-to-door contracts, the contract regulations provide for a cooling-off period of 10 days.

In its Draft Review Report, the GMCCC recommended that the definition of cooling-off period be amended to read ‘the period specified in the contract as the cooling-off period’. The amendment ensures that the definition captures both the cooling-off period under the ACL and under the contract regulations.

In its submission, WACOSS argued that the cooling-off period should be set at 10 business days for all contracts.

The GMCCC agreed that the Code should not set the cooling-off period at 10 business days for all contracts as this would be inconsistent with the contract regulations. The GMCCC believes that this matter ought to be addressed by the Public Utilities Office as part of its review of the contract regulations (also see Section 3.1 of this report).

4.3 The National Energy Customer Framework

The Ministerial Council on Energy (**MCE**) (now Standing Council on Energy and Resources or **SCER**) has developed the National Energy Customer Framework (**NECF**). The NECF is a set of laws and rules governing retail and distribution non-price regulation in the National Energy Market (**NEM**). Whilst the WA Government participates in the SCER the GMCCC understands that there is no intention of implementing the NECF in WA at this stage.

The NECF was originally scheduled to be implemented on 1 July 2012 by all States and Territories, with the exception of Western Australia and the Northern Territory. Although Tasmania and the ACT implemented the NECF on 1 July 2012 as scheduled, all other States opted to delay the implementation of the NECF.

South Australia and New South Wales implemented the NECF on 1 February 2013 and 1 July 2013 respectively. The Secretariat understands that Victoria will implement the NECF, subject to the resolution of state-specific issues, while Queensland aims to implement the NECF in 2014, subject to SCER agreeing to state-specific variations to support customers outside of south east Queensland.⁴

During the 2011 Review of the Code, the GMCCC considered the provisions of NECF that related to marketing and whether any of these provisions should be implemented through the Code. The GMCCC agreed that, given the fact that the NECF had not yet been implemented, it would be premature to propose anything other than noting the NECF changes.

As the NECF has now taken effect in some jurisdictions, the GMCCC reconsidered the issue whether any NECF provisions that relate to marketing should be implemented through the Code.

4.3.1 **Clause 2.4(2)(i) – Gas Customer Safety Awareness Program**

Clause 2.4(2)(i) of the Code requires a retailer or gas marketing agent to provide a customer with general information on the retailer's gas customer safety awareness program. No equivalent provision exists in either the Electricity Code or the NECF.

In its Draft Review Report, the GMCCC recommended the deletion of clause 2.4(2)(i) of the Code.

One of the GMCCC members requested that the GMCCC reconsider the deletion of this clause. The member argued that it should not be onerous on retailers to provide information on their safety program to customers when they enter into a new contract as

⁴ SCER, *National Energy Customer Framework*, <http://www.scer.gov.au/workstreams/energy-market-reform/national-energy-customer-framework/> (accessed 4 September 2013)

licensees must have a safety program under the Compendium and make information on it available to customers in any event.

The GMCCC agreed to recommend that clause 2.4(2)(i) of the Code be retained.

4.3.2 No contact lists

Rule 65 of the National Energy Retail Rules requires a retailer to create a 'no contact list' of customers who have indicated that they wish to be placed on the list. Retail marketers are not allowed to make contact with small customers whose names are on the 'no contact' list for a period of 2 years. The Rule only applies to marketing in person at a customer's premises or marketing by mail. It does not apply to telemarketing calls or e-marketing activities as these forms of marketing are covered by the Do Not Call Register Act and the Spam Act.

The 2008 version of the Code contained a clause that prescribed a retailer's and gas marketing agent's conduct when a customer does not wish to be contacted. The clause was deleted as part of the 2011 Review of the Code to remove any duplication with the ACL, the Do Not Call Register Act and the Spam Act. However, it is arguable whether the ACL, the Do Not Call Register Act and the Spam Act provide customers with the same rights as previously included in this clause.

In its Draft Review Report, the GMCCC invited comments on whether a new clause should be included in the Code requiring retailers and gas marketing agents to create a 'no contact list' and refrain from contacting customers on the list for a period of two years.

The GMCCC received submissions from Synergy and Alinta Energy on this issue. Both Synergy and Alinta Energy opposed the re-introduction of 'no contact lists'. According to Alinta Energy, the use of 'do-not-knock' stickers is a more efficient and effective option which provides customers with the same level of choice but at a much lower cost to industry. Synergy further noted that there is no evidence of market failure in this area to warrant the costs associated with establishing a 'no contact list'.

Synergy also expressed concern that the current wide definition of marketing (see Section 3.2 of this report) would mean that retailers and gas marketing agents would not only not be allowed to contact customers for the purpose of entering into a contract, but also for any other 'dealings in respect of a contract' such as to confirm contact details.

The GMCCC agreed that as there is no evidence that door-to-door marketing (in person) is currently an issue in WA, no recommendation for amendment should be made at this stage. The GMCCC further agreed to reconsider this issue as part of the next Code review.

4.3.3 No canvassing or advertising signs

Recommendation 11

That the Authority inserts the following new clause (clause 2.6):

No canvassing or advertising signs

A **retailer** or **gas marketing agent** who visits a person's **premises** for the purposes of **marketing** must comply with any clearly visible signs at a person's **premises** indicating –

- (a) canvassing is not permitted at the **premises**; or
- (b) no advertising or similar material is to be left at the **premises** or in a letterbox or other receptacle at, or associated with, the **premises**.

Recommendation 12

That the Authority develops a new webpage regarding the use of do-not-knock stickers.

Under the NECF, a retailer must comply with any signs at a customer's premises indicating that canvassing is not permitted at the premises, or that no advertising or similar material is to be left at the premises.⁵

A similar clause was included in the *Gas Marketing Code of Conduct 2008*. The clause was removed as part of the 2011 Review of the Code.

The Australian Consumer Law does not include provisions that specifically prohibit canvassing or leaving of advertising material.

In its Draft Review Report, the GMCCC recommended that a new clause be inserted in the Code which requires a gas marketing agent or retailer to comply with any signs at a person's premises indicating that canvassing is not permitted at the premises; or that no advertising or similar material is to be left at the premises or in a letterbox or other receptacle at or associated with the premises.

The GMCCC received submissions from Alinta Energy and Synergy regarding this recommendation. Alinta Energy supported the recommendation but proposed that guidelines be developed regarding the appearance and use of do-not-knock stickers.

Synergy did not support the recommendation. According to Synergy, there is no evidence that WA retailers are deliberately ignoring do-not-knock stickers. Synergy also expressed concern regarding the costs involved in complying with this recommendation.

The GMCCC agreed to recommend that a new clause on 'no canvassing and advertising signs' should be included in the Code.

In response to Alinta Energy's request that guidelines be developed regarding the appearance and use of do-not-knock stickers, the GMCCC agreed to include the words 'clearly visible' into the proposed new clause. The GMCCC further agreed to recommend that the Authority develop a new webpage regarding the use of do-not knock stickers. This webpage could, for example, include a link to the ACCC's website from which customers can download a copy of the ACCC's do-not-knock sticker. The webpage could also provide guidance on where customers should consider placing their sticker and what the use of the sticker means for them.

4.3.4 Energy Price Fact Sheets

Recommendation 13

That the Authority writes to all gas retailers advising them that:

- (i) the GMCCC saw merit in the development of standardised energy price fact sheets;
- (ii) the GMCCC at this time did not make a recommendation to make the development of energy price fact sheets mandatory but will reconsider the need for mandatory fact sheets as part of the next Code review;

⁵ Rule 66 of the National Energy Retail Rules.

- (iii) the Authority encourages gas retailers to prepare pricing information in accordance with the AER's Retail Pricing Information Guideline; and
- (iv) the Authority encourages gas retailers to make this information available to customers before they enter into a new contract.

WACOSS proposed in its submission that retailers be required to produce a critical information fact sheet and provide a copy of the fact sheet to customers before they enter into a new contract.

Under the NECF, retailers must produce an Energy Price Fact Sheet for each standing offer or market offer that the retailer offers to new small customers. The Australian Energy Regulator's [AER Retail Pricing Information Guideline](#) specifies what information must be included in an Energy Price Fact Sheet and the manner and form in which this information must be presented by retailers. Energy Price Fact Sheets aim to make it easy for customers to compare different offers of the same or different retailers.

The GMCCC agreed that there would be value in retailers developing a standardised fact sheet and agreed to reconsider during the next Code review whether the development of standardised fact sheets should be made mandatory.

In the interim, the GMCCC agreed to recommend that the Authority write to all gas retailers advising them that the GMCCC will reconsider the need for mandatory energy price fact sheets as part of the next Code review. The GMCCC further recommends that in its letter the Authority also encourages retailers to prepare pricing information in accordance with the AER's Retail Pricing Information Guidelines and to make this information available to customers before they enter into a new contract.

4.4 Level of protection

Recommendation 14

That the Authority deletes clauses 2.2, 2.3 and 2.4 from the Code and inserts instead the following new clauses:

2.2 Entering into a standard form contract

- (1) When entering into a **standard form contract** that is not an **unsolicited consumer agreement**, a **retailer** or **gas marketing agent** must –
 - (a) record the date the **standard form contract** was entered into;
 - (b) give, or make available to the **customer** at no charge, a copy of the **standard form contract** –
 - (i) at the time the **standard form contract** is entered into, if the **standard form contract** was not entered into over the **telephone**; or
 - (ii) as soon as possible, but not more than 5 **business days** after the **standard form contract** was entered into, if the **standard form contract** was entered into over the **telephone**.
- (2) Subject to subclause (3), a **retailer** or **gas marketing agent** must give the following information to a **customer** no later than on or with the **customer's** first bill –
 - (a) how the **customer** may obtain—
 - (i) a copy of the **Code** and the **Compendium**; and
 - (ii) details on all relevant tariffs, fees, charges, **alternative tariffs** and service levels that may apply to the **customer**;
 - (b) the scope of the **Code**;
 - (c) that a **retailer** and **gas marketing agent** must comply with the **Code**;
 - (d) how the **retailer** may assist if the **customer** is experiencing **payment difficulties** or **financial hardship**;
 - (e) with respect to a **residential customer**, the **concessions** that may apply to the **residential customer**;
 - (f) the **distributor's** 24 hour **telephone** number for faults and emergencies;

- (g) with respect to a **residential customer**, how the **residential customer** may access the **retailer's** —
 - (i) multi-lingual services (in languages reflective of the **retailer's** customer base); and
 - (ii) **TTY** services;
- (h) how to make an enquiry of, or **complaint** to, the **retailer**, and
- (i) general information on the **retailer's gas customer safety awareness program**.
- (3) For the purposes of subclause (2), a **retailer** or **gas marketing agent** is taken to have given the **customer** the required information if —
 - (a) the **retailer** or **gas marketing agent** has provided the information to that **customer** within the preceding 12 months; or
 - (b) the **retailer** or **gas marketing agent** has informed the **customer** how the **customer** may obtain the information, unless the **customer** requests to receive the information.

2.3 Entering into a non-standard contract

- (1) When entering into a **non-standard contract** that is not an **unsolicited consumer agreement**, a **retailer** or **gas marketing agent** must —
 - (a) obtain and make a record of the **customer's verifiable consent** that the **non-standard contract** has been entered into, and
 - (b) give, or make available to the **customer** at no charge, a copy of the **non-standard contract** —
 - (i) at the time the **non-standard contract** is entered into, if the **non-standard contract** was not entered into over the **telephone**; or
 - (ii) as soon as possible, but not more than 5 **business days** after the **non-standard contract** was entered into, if the **non-standard contract** was entered into over the **telephone**.
- (2) Before entering into a **non-standard contract**, a **retailer** or **gas marketing agent** must give the **customer** the following information —
 - (a) that the **customer** is able to choose the **standard form contract** offered by the **retailer**;
 - (b) the difference between the **non-standard contract** and the **standard form contract**;
 - (c) details of any right the **customer** may have to rescind the **non-standard contract** during a **cooling-off period** and the charges that may apply if the **customer** rescinds the **non-standard contract**;
 - (d) how the **customer** may obtain—
 - (i) a copy of the **Code** and the **Compendium**; and
 - (ii) details on all relevant tariffs, fees, charges, **alternative tariffs** and service levels that may apply to the **customer**;
 - (e) the scope of the **Code**;
 - (f) that a **retailer** and **gas marketing agent** must comply with the **Code**;
 - (g) how the **retailer** may assist if the **customer** is experiencing **payment difficulties** or **financial hardship**;
 - (h) with respect to a **residential customer**, the **concessions** that may apply to the **residential customer**;
 - (i) the **distributor's** 24 hour **telephone** number for faults and emergencies;
 - (j) with respect to a **residential customer**, how the **residential customer** may access the **retailer's** —
 - (i) multi-lingual services (in languages reflective of the **retailer's customer** base); and
 - (ii) **TTY** services;
 - (k) how to make an enquiry of, or **complaint** to, the **retailer**; and
 - (l) general information on the **retailer's gas customer safety awareness program**.
- (3) For the purposes of subclauses (2)(d)-(l), a **retailer** or **gas marketing agent** is taken to have given the **customer** the required information if —
 - (a) the **retailer** or **gas marketing agent** has provided the information to that **customer** within the preceding 12 months; or
 - (b) the **retailer** or **gas marketing agent** has informed the **customer** how the **customer** may obtain the information, unless the **customer** requests to receive the information.
- (4) Subject to subclause (3), the **retailer** or **gas marketing agent** must obtain the **customer's verifiable consent** that the information in clause 2.3(2) has been given.

The Code offers different levels of protection depending on whether the contract is a standard form contract, a non-standard contract, an unsolicited consumer agreement or a 'solicited' consumer agreement.

In its Draft Review Report, the GMCCC expressed the interim view that the current provisions should remain as is. The GMCCC invited submissions as to whether the obligations included in clauses 2.2, 2.3 and 2.4 could be rationalised and, if so, how they ought to be rationalised.

The GMCCC received submissions from Alinta Energy and Synergy on the issue of rationalisation.

Alinta Energy recognised in its submission that different levels of protection may be necessary depending on the type of contract involved. It proposed that rationalisation should be considered as the gas market further develops. Alinta Energy also queried the wording of some clauses.

Synergy recommended replacing clause 2.3 with Rule 16(2)(b) of the National Energy Retail Rules⁶ (as appropriately modified). According to Synergy, the current requirement under the Code to obtain the customer's verifiable consent to the standard form contract information disclosure is onerous on retailers and an unnecessary cost to customers.

The GMCCC considers the current drafting of clauses 2.2 to 2.4 of the Code to be complex. The GMCCC agreed to recommend the restructure of clauses 2.2 to 2.4 in two new clauses: 2.2 and 2.3.

New clause 2.2 includes the requirements for entering into a standard form contract, while new clause 2.3 includes the requirements for entering into a non-standard contract. These new clauses aim to improve customer protection by creating greater clarity regarding the obligations imposed on retailers and gas marketing agents.

The proposed new clauses are set out in Recommendation 14 above.

In agreeing to recommend new clauses 2.2 and 2.3, recommendations 7, 8, 13, 15, 17, 19 and 22 of the GMCCC's Draft Review Report have become redundant.

As part of the restructure of clauses 2.2 to 2.4, the GMCCC also agreed that some of the obligations in clauses 2.2 to 2.4 required amendment. These amendments can be summarised as follows:

Consent requirements for non-standard contracts

Clause 2.2(1) currently requires non-standard contracts entered into as a result of the internet⁷ to be signed by the customer. All other non-standard contracts require the customer's verifiable consent.⁸

⁶ Rule 16(2)(b) reads as follows:

(2) If the retailer is the designated retailer for the premises, the retailer:

(b) must advise the customer of the availability of the retailer's standing offer, unless the customer is a small market offer customer.

⁷ Clause 2.2(1) of the Code provides that 'a gas marketing agent must, in the course of arranging a non-standard contract, other than in accordance with subclause (2), ensure that the contract is signed by the customer'. Subclause (2) applies to non-standard contracts initiated by the customer. Clause 2.2(1) is further subject to subclause (5) which provides that the clause does not apply to non-standard contracts

The GMCCC agreed that the same consent requirements should apply to all non-standard contracts and recommends that the customer's verifiable consent should be required when entering into any non-standard contract.

Providing a copy of the contract to the customer

The Code contains a number of clauses regarding the provision of the contract to customers. The GMCCC agreed to rationalise these clauses into a single obligation and recommends that retailers be required to give, or make available, a copy of the contract at no charge to each customer when entering into a contract.

The new obligation no longer allows a retailer to only provide, or make available, a copy of the contract if the customer accepts the retailer's offer to do so. A copy of the contract must now always be given, or made available, to the customer. The GMCCC does not believe that the amended obligation is substantially more onerous on retailers as the words 'make available' allow a retailer to simply refer a customer to the retailer's website.

The amendment ensures that all customers who enter into a non-standard contract which is not in a 'template' format (and not available from the retailer's website) will always be given a copy of their contract.

When a copy of the contract must be provided to the customer

Clause 2.4(1) currently provides that, if a customer accepts a retailer's offer for a copy of the contract, the retailer must give, or make available, a copy of the contract as soon as possible, but no more than 28 days later.

The GMCCC agreed that the maximum timeframe of 28 days for providing a copy of the contract was excessive. The GMCCC was particularly concerned that for contracts subject to a cooling-off period, this could result in the customer being provided with details of the cooling-off period *after* the cooling-off period had expired.

The GMCCC agreed that the timeframe for giving, or making available, copies of contracts should be consistent with the timeframes specified within the ACL and recommended that for contracts entered into other than by telephone a copy of the contract should be provided at the time the contract is entered into. For contracts entered into over the telephone, the contract should be provided within 5 business days of the customer entering into the contract.

Advising a customer about the availability of a standard form contract

At present, clause 2.3(a) and (b) requires a retailer to tell a customer, before arranging a contract, that the customer is free to choose the retailer's standard form contract and the difference between a standard form contract and a non-standard contract.

The GMCCC agreed there is no need to provide this information to a customer before arranging a standard form contract. In particular, as a retailer is not obliged to offer a customer a non-standard contract, a retailer should not be required to tell a customer

that are unsolicited consumer agreements. In practice, clause 2.2(1) only applies to non-standard contracts entered into as a result of the internet; however this is not apparent from reading the clause.

Clause 2.2(1) is an example of complex drafting within the Code which the GMCCC was keen to simplify.

⁸ Clause 2.2(2) of the Code

about the difference between a standard form contract and a non-standard contract when arranging a standard form contract.

The GMCCC agreed to recommend that the information specified in clause 2.3(a) and (b) should only be provided before a customer enters into a non-standard contract.

Cooling-off periods

Clause 2.4 currently requires a retailer or gas marketing agent to give a customer information on any applicable cooling-off periods. For non-standard contracts, the information has to be provided before the customer entered into the contract unless the information has already been provided to the customer within the preceding 12 months. Alternatively, a retailer or gas marketing agent could opt to tell a customer how the customer could obtain this information.

The GMCCC agreed that it was undesirable that information on cooling-off periods could in some instances be given to a customer after the cooling-off period had ended and recommends that this information should always be provided before a customer enters into a non-standard contract.

In relation to standard form contracts that are not unsolicited consumer agreements, the GMCCC notes that cooling-off periods do not apply to these types of contracts. The GMCCC therefore agreed to recommend deletion of the requirement that retailers must provide information on cooling-periods for these types of contracts.

Information requirements for standard form contracts

Clause 2.4(3)(b) currently requires a retailer or gas marketing agent to provide specified information to customers before they enter into a standard form contract that is an unsolicited consumer agreement. For all other standard form contracts this information may be provided with the customer's first bill.

As the specified information does not affect the terms of the contract, there is no apparent reason as to why this information should be provided *before* a customer enters into a standard form contract that is an unsolicited consumer agreement.

The GMCCC agreed to recommend that the specified information could be provided with the first bill for all standard form contracts.

Consent requirements for the provision of specified information

Clause 2.4(3)(b) further requires a retailer or gas marketing agent to provide the specified information before a customer enters into a non-standard contract and to obtain the customer's written acknowledgement that this information has been provided.

As the specified information does not affect the terms of the contract, the GMCCC agreed to recommend that written acknowledgement could be replaced with verifiable consent. This would ensure consistency in the consent requirements throughout new clause 2.3.

4.5 Other

4.5.1 Definition – Gas marketing agent

Recommendation 15

That the Authority replaces ‘the holder of a trading licence’ with ‘a retailer’ in the definition of ‘gas marketing agent’ in clause 1.5 of the Code.

In its submission, Synergy proposed that the definition of ‘gas marketing agent’ should be amended to exclude a retailer.

The GMCCC understands that the definition of ‘gas marketing agent’ does not include retailers because an agent is defined as ‘a person who acts on behalf of the holder of a trading licence’. The interpretation posed by Synergy would undermine the distinction made between retailer and gas marketing agent throughout the Gas Act and Code. The GMCCC agreed that no recommendation for an amendment should be made.

The GMCCC notes that the definition of ‘gas marketing agent’ refers to ‘the holder of a trading licence’. Throughout the Code, the holder of a trading licence is referred to as a ‘retailer’. For reasons of consistency, the GMCCC agreed to recommend that the reference to ‘the holder of a trading licence’ in the definition of ‘gas marketing agent’ be replaced with ‘a retailer’.

4.5.2 Clauses 1.6(a) and (c) – Application

Recommendation 16

That the Authority deletes clauses 1.6(a) and (c) from the Code.

Clauses 1.6(a) and (c) of the Code provide that the Code applies to customers and distributors.

Section 11ZPM(2) of the Act provides that the Code is to regulate and control the conduct of retailers and gas marketing agents. As currently drafted, the Code does not impose any obligations upon customers or distributors.

The GMCCC agreed that the Code does not apply to customers and distributors and recommends that clauses 1.6(a) and (c) be deleted from the Code.

4.5.3 Clause 1.7 – Purpose

Recommendation 17

That the Authority deletes reference to ‘distributors’ from clause 1.7 of the Code.

Recommendation 18

That the Authority replaces ‘Australian Consumer Law’ with ‘Fair Trading Act 2010 (WA)’ in the explanatory note under clause 1.7.

Clause 1.7 of the Code provides that the Code regulates and controls the conduct of gas marketing agents, retailers and distributors.

Section 11ZPM(2) of the Act provides that the Code is to regulate and control the conduct of retailers and gas marketing agents; it does not include reference to distributors. The Code itself does not impose any obligations upon distributors.

The GMCCC agreed that the Code does not regulate and control the conduct of distributors and recommends that reference to 'distributors' be deleted from clause 1.7 of the Code.

The GMCCC further agreed to recommend that the reference to the ACL in the explanatory note under clause 1.7 should be replaced with a reference to the '*Fair Trading Act 2010 (WA)*' as this is the relevant Act which implements the ACL in WA.

4.5.4 *Clause 2.5(2) – Non-standard contracts to be in writing*

Recommendation 19

That the Authority deletes clause 2.5(2) from the Code.

Clause 2.5(2) of the Code requires a retailer or gas marketing agent to ensure that non-standard contracts that are not unsolicited consumer agreements are in writing. Alinta Energy noted in its submission that clause 2.5(2) may be better placed in *Division 3 – Information to be provided to customers*.

As discussed in Section 4.4, the GMCCC recommends that a copy of the contract is given, or made available, to all customers when entering into a contract. The GMCCC agreed that this effectively requires all non-standard contracts to be in writing, making clause 2.5(2) redundant.

The GMCCC agreed to recommend the deletion of clause 2.5(2) of the Code.

4.5.5 *Clause 2.6(2)(a) – Telling a customer the purpose of the contact*

Recommendation 20

That the Authority deletes clause 2.6(2)(a) from the Code.

Clause 2.6(2)(a) of the Code requires a retailer to tell a customer the purpose of the contact when negotiating a contract that is not an unsolicited consumer agreement with the customer face to face. In practice, the clause only applies to 'solicited' contracts entered into face to face at the retailer's business or trade premises.

The GMCCC agreed that if a customer enters into a 'solicited' contract at the retailer's premises, the purpose of the contact should be readily apparent to the customer. Therefore, the GMCCC agreed to recommend the deletion of clause 2.6(2)(a).

4.5.6 *Clause 2.6(3) & (4) – Record keeping*

Recommendation 21

That the Authority deletes clauses 2.6(3) and (4) from the Code.

Each time a retailer initiates contact with a customer for the purpose of marketing, it must keep a record of the name of the customer, the gas marketing agent involved and the date and time of the contact.

In its submission, Synergy reiterated its concerns with the current definition of marketing. According to Synergy, the current definition of marketing captures an overly broad spectrum of contact by retailers with customers. Synergy proposed that clause 2.6(3) be

amended to reflect that records only need to be kept for contact made for the purpose of entering into a contract.

Synergy also noted that the clause is inconsistent with National Privacy Principle 8⁹ as it makes no allowance for anonymity. According to Synergy it is further impractical for a retailer to comply with clause 2.6(3) in certain circumstances. For example, if a retailer approaches a person at a shopping centre and provides that person with a brochure detailing their product offerings, the retailer is legally obliged to obtain that person's name.

The GMCCC noted Synergy's concerns and considered the purpose for which these records may currently be collected under clause 2.6(3).

The GMCCC could not discern a persuasive reason to require a retailer to keep these types of records. The GMCCC considered whether these records may be necessary for complaints handling purposes. However, clause 2.8(1) of the Code and clause 13.3 of the Compendium already require a gas marketing agent and retailer to keep records of any complaints received.

The GMCCC further sought advice from the Energy Ombudsman as to whether it currently makes use of these records in the resolution of marketing complaints. The Energy Ombudsman advised that deletion of clauses 2.6(3) and (4) would not affect its operations.

The GMCCC agreed to recommend the deletion of clauses 2.6(3) and (4) from the Code.

4.5.7 Clarification of provisions that apply to the retailer and the gas marketing agent

Recommendation 22

That the Authority replaces references to 'retailers' and references to 'gas marketing agents' with 'retailers and gas marketing agents' as appropriate throughout the Code.

The GMCCC was concerned that certain references in the Code to retailers apply to retailers and gas marketing agents. Conversely, certain references to gas marketing agents apply to gas marketing agents and retailers.

The GMCCC agreed to recommend that amendments should be made to rectify incorrect references.

4.5.8 References to 'other party'

Recommendation 23

That the Authority deletes all instances of 'other party' from the Code.

The GMCCC sought to clarify provisions in the Code that apply to retailers and the gas marketing agents. A related matter is the references to 'other party' in the Code. These references appear to be a hangover from when the Code purported to apply to consumer representatives (i.e. marketers who act on behalf of consumers rather than retailers). These have been removed, as the definition of 'gas marketing agent' no longer includes

⁹ Where possible, organisations must give individuals the opportunity to do business with them without the individual having to identify themselves.

consumer representatives. Further, there is an issue with enforcement. It is difficult to see how the Authority could meaningfully enforce the Code against a party other than a retailer.

The GMCCC agreed to recommend that references to 'other party' should be deleted from the Code.

5 Other issues raised in submissions

A number of other issues were raised in the submissions received. Following consideration of those issues the GMCCC has decided not to make any recommendations to the Authority. These issues are detailed below.

5.1 Social media

Retailers are increasingly using social media, such as Facebook and Twitter, as a means of communicating with their customers. The GMCCC considered the safeguards that are currently in place around the use of social media, in particular the Spam Act.

In its Draft Review Report, the GMCCC noted that the use of social media in the marketing of products and services is not limited to the marketing of gas. According to the GMCCC, any rules or regulations in this regard should therefore not be limited to gas marketing, but should be considered on a state-wide or national basis.

The GMCCC further noted that the Code and Spam Act provide well-defined safeguards for the use of social media by gas marketing agents and retailers in their communications with (prospective) customers. Considering the above, the GMCCC did not propose any changes to the Code in its Draft Review Report.

The GMCCC received a submission from WACOSS on the issue of social media. In its submission, WACOSS expressed concern regarding the endorsement by 'independent individuals' of products and services where that individual does not disclose he or she receives a benefit, financial or otherwise, for promoting those products or services.

The GMCCC understands that the behaviour described by WACOSS would be captured under section 18 of the ACL ('A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive').

The GMCCC agreed not to make a recommendation regarding the use of social media in the marketing of gas.

5.2 Comparator websites

WACOSS raised the issue of comparator websites in its submission. A comparator website generally requires a customer to enter in their usage data and requirements. The site then presents the relevant offers of different providers, and (in some instances) may suggest which deal might be best for the customer.

The revenue of many comparator websites originates from commissions provided by retailers for signing up customers to contracts. According to WACOSS, many people do not realise that there are usually commercial arrangements in place so that certain deals are presented in a more positive light than others.

WACOSS recommended that the GMCCC consider how the Code applies to comparator websites and whether there should be obligations placed on comparator websites to ensure that their marketing practices are fair and transparent and comply with the relevant provisions of the Code.

WACOSS further suggested that the Authority develop its own (official) comparator website.

The GMCCC believes that the role of comparison sites is akin to other advertising mediums, where a person is paid to 'pass-on' information and promote particular products, and as such would fall outside the scope of 'gas marketing agent'.

Further, if a comparison site were to promote itself as being independent while it accepted commissions, or where it provided false or misleading information to represent particular products in a more positive light, the matter would likely be in breach of the ACL and could be reported to the ACCC.

The GMCCC agreed that no recommendation for an amendment should be made.

APPENDICES

Appendix 1 – Proposed new Code (with track changes)

Appendix 2 – Proposed new Code (clean copy)

Appendix 3 – GMCCC Terms of Reference

Appendix 4 – Submission: WACOSS

Appendix 5 – Submission: Synergy

Appendix 6 – Submission: Alinta Energy