

Gas Marketing Code Consultative Committee

Draft Report for Review of the Gas Marketing Code of Conduct 2004

11 August 2006

Economic Regulation Authority



WESTERN AUSTRALIA

A full copy of this draft report is available from the
Economic Regulation Authority website at www.era.wa.gov.au.

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Executive Summary

The *Gas Marketing Code of Conduct 2004* (Code) commenced operation on 31 May 2004. Under the *Energy Coordination Act 1994* (EC Act), a review of the Code is required to be undertaken after twelve months of operation of the Code. Pursuant to the EC Act, the Gas Marketing Code Consultative Committee (GMCCC) is required to undertake this review and provide a report to the Economic Regulation Authority (Authority). The Authority is the Code Administrator.

On 3 January 2006, the Authority issued a Principles Paper which had been prepared by the GMCCC. This Principles Paper outlined the background, principles and process proposed for the Code review including a proposed approach for undertaking the review. Interested Persons, as identified by the Authority and the GMCCC, were provided with an eight week period to make submissions on the Principles Paper.

Three submissions were received on the Principles Paper. These submissions were from the Consumers Association of Western Australia (Inc), Energy Ombudsman of Western Australia and Western Power Corporation. These submissions have been placed on the Authority's website www.era.wa.gov.au.

Following receipt of these submissions, the GMCCC proceeded to undertake a review of the Code to identify any overlap between the Code and existing State and Commonwealth laws. This review was carried out by Lavan Legal.

Following consideration of the report by Lavan Legal on legal overlap and taking into account the submissions received, the GMCCC proposes to make the following recommendations to the Authority.

Proposed Recommendations

Recommendation 1

The Gas Marketing Code of Conduct 2004 should be repealed by the Authority.

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.

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.

Recommendation 4

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

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.

Next Stage

Submissions on this Draft Report will be invited from Interested Persons for an eight week period following the release of this report.

Subsequent to this eight week submission period, the GMCCC will consider the comments received in the submissions and prepare a Final Report for consideration and endorsement by the Authority. The Authority, as Code Administrator, would then implement the recommendations arising from the Final Report.

1 Introduction

The *Gas Marketing Code of Conduct 2004* (Code) came into operation on 31 May 2004 along with a number of other measures designed to provide for gas full retail contestability in Western Australia.

The Code regulates and controls the conduct of the holders of gas trading licences and gas marketing agents with the object of protecting customers from undesirable marketing conduct and defining the standards of conduct in the marketing of gas to customers.

2 Requirement for Review

Under section 11ZPV of the *Energy Coordination Act 1994* (EC Act) the Gas Marketing Code Consultative Committee (GMCCC) is required to undertake a review of the Code as soon as practicable after the first anniversary of its commencement.

The object of such a review is to re-assess the suitability of the provisions of the code of conduct for the purposes of section 11ZPM(2) of the EC Act. Section 11ZPM(2) of the EC Act stipulates that:

The code of conduct is to regulate and control the conduct of –

- (a) the holders of gas trading licences; and
- (b) gas marketing agents;

with the object of -

- (c) protecting customers from undesirable marketing conduct; and
- (d) defining standards of conduct in the marketing of gas to customers.”

Under the Code the Committee must:

- In accordance with section 11ZPW of the EC Act, give any Interested Person an opportunity to offer comments relevant to the review.
- Take into account any comments received from Interested Persons in carrying out the review.
- Prepare a report based on the review and give it to the Code Administrator the Economic Regulation Authority (Authority).

3 Background

3.1 Establishment of the GMCCC

The Authority is responsible for administering Part 2C of the EC Act (Code of Conduct for Marketing of Gas to Small Use Customers). The EC Act provides for the Authority to establish a committee to advise it on matters relating to the Code. This committee also has responsibility for carrying out reviews of the Code under the provisions of the EC Act. Consistent with this requirement the Authority reconvened the GMCCC which was originally established by the Minister for Energy to assist in developing the Code.

The Authority, as the Code Administrator, has the power under the EC Act to amend, repeal or replace the Code subject to the referral of any such proposals to the GMCCC for advice.

The current GMCCC membership is as follows:

Chairman	Russell Dumas (Authority)
Executive Officer	Michael Styles (Authority)
Members	Gary Newcombe (Department of Consumer & Employment Protection) Ray Wills (Chamber of Commerce & Industry of WA) Lisa Baker (WA Council of Social Services) Ray Myles (Alinta Sales Pty Ltd) Brendan McColl (Wesfarmers Kleenheat Gas Pty Ltd) Lawrence Teo (BRW Power Generation (Esperance) Pty Ltd)

The GMCCC held its first meeting on 26 May 2005. The Committee considered that the review should be undertaken based on the following principles:

- delivering comprehensive, best-practice consumer protection that meets the objectives of the Code;
- efficient regulation to keep compliance costs at a minimum, without compromising effectiveness;
- the benefits of simple, clear and concise codes for both gas consumers and retailers; and
- the ability of the Authority to maintain oversight through regular compliance monitoring.

After a series of meetings, the GMCCC prepared a Principles Paper for comment by Interested Persons. Under the EC Act, the GMCCC is required to invite submissions on the review from Interested Persons selected by the GMCCC and the Authority as likely to have a particular interest in the review.

The Principles Paper was endorsed by the Authority and published on the Authority's website on 3 January 2006.

3.2 Principles Paper

3.2.1 *Proposed Approach for the Review*

The Principles Paper outlined the background to the Code review and suggested a proposed approach for undertaking the review. The proposed approach was as follows:

The Authority has proposed to the GMCCC that it consider undertaking a legal review of the Code which would include the identification and removal of any duplication with existing State and Commonwealth legislation (such as the State Fair Trading, Door to Door Trading and Credit Acts and the Commonwealth Trade Practices Act). Depending upon the extent of regulation remaining in the Code following such a legal review it may be possible to eliminate the Code altogether and to incorporate the remaining regulation into an internal compliance document for which the gas trading licensees are responsible. The internal compliance documents may be in the nature of guidelines that detail the existing

legislative and conduct requirements to assist parties. The Authority would then monitor compliance with these internal compliance documents through annual audits or other similar mechanisms.

The Principles Paper also provided an outline of the proposed Code review process, as follows:

Step 1

GMCCC to seek submissions on the Principles Paper from Interested Persons (8 week submission period).

Step 2

GMCCC to evaluate the Interested Persons submissions and prepare a Draft Code Review Report.

GMCCC to submit the Draft Code Review Report to the Authority for consideration and endorsement.

GMCCC to seek submissions on the Draft Code Review Report from Interested Persons (8 week submission period).

Step 3

GMCCC to evaluate the Interested Persons submissions and prepare a Final Code Review Report.

GMCCC to submit the Final Code Review Report to the Authority for consideration and endorsement.

The Authority, as Code Administrator, to implement changes to the Code arising from its consideration of the Final Code Review Report.

3.2.2 Submissions Received

On 3 January 2006 the Authority published a notice on its website, together with the Principles Paper. This notice informed the public of the review and detailed the review process being undertaken by the GMCCC. At the same time the GMCCC wrote to each of the Interested Persons providing them with an eight week period to make submissions on the Principles Paper with submissions closing on 28 February 2006. The list of Interested Persons invited to comment on the Principles Paper was as follows:

- Australian Competition and Consumer Commission
- Australian Direct Marketing Association
- Consumers' Association of Western Australia (Inc)
- Consumer Credit Legal Service Western Australia
- Consumers' Federation of Australia
- Chamber of Minerals and Energy of Western Australia
- DBNGP (WA) Transmission Pty Ltd
- Energy Ombudsman of Western Australia
- Energy Retailer's Association of Australia
- Perth Energy
- Standards Australia
- Western Australian Sustainable Energy Association
- Western Power Corporation

3.2.2.1 Submissions on the Principles Paper

Three submissions were received on the Principles Paper. These submissions were from the Consumers Association of Western Australia (Inc), Energy Ombudsman of Western Australia and Western Power Corporation. These submissions have been placed on the Authority's website (www.era.wa.gov.au).

All three submissions supported the approach proposed for undertaking the Code review outlined in the Principles Paper.

A brief summary of the submissions is provided below.

The **Consumers Association of Western Australia (Inc)** believed that the proposed legal review outlined in the Principles Paper would greatly assist interested persons in identifying any duplication with State and Commonwealth legislation. The Association also believed that the outcome of the legal review needed to be accessible and transparent to all stakeholders, including consumers, to enable appropriate consultation and consideration before any final decision which may involve elimination of the Code.

The **Energy Ombudsman of Western Australia** considered the proposed approach for the Code review including the process as outlined in the Principles Paper to be sound and if followed, would give Interested Persons an opportunity to contribute to the review.

Western Power Corporation strongly supported the proposal to undertake a legal review of the Code to remove duplication of legislative instruments and associated reporting requirements. Western Power also supported potential alignment of the Code with the Code of Conduct (for the Supply of Electricity to Small Use Customers) which came into operation on 31 December 2004, noting that a highly efficient and effective compliance environment would provide benefits of clear and simple codes for all energy consumers and retailers.

3.2.2.2 Other Submissions

The Authority also received an earlier submission from **Alinta Sales Pty Ltd** concerning section 14(3)(a) of the Code dealing with information to be given at the time of entering into a customer contract. Alinta Sales Pty Ltd has proposed that section 14(3)(a) of the Code be amended to allow a marketer to provide the information set out in clause 14(2) for a standard customer contract that is not entered into as a result of door to door marketing no later than with a customer's first bill rather than within two days after the customer enters into such a contract. This proposed amendment would 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.

The GMCCC will be writing to Interested Persons seeking comments on Alinta Sales Pty Ltd's proposal.

4 Legal Review

4.1 Brief for Legal Review

Following receipt of submissions, the GMCCC proceeded to undertake a legal review of the Code. A brief of the work required was developed by the GMCCC for the purpose of employing a consultant to undertake the legal review.

The brief prepared for the legal review was as follows:

1. Identify relevant legislation that covers the same or similar areas as the Code.
2. Review the Code to identify:
 - areas of overlap with relevant legislation;
 - areas of inconsistency with relevant legislation;
 - the relevancy of the Code provisions, in particular, consistency with the objectives of the Code;
 - whether the Code provisions achieve the objective of the Code and, if not, whether they should be amended or deleted; and
 - any areas which could be considered a regulatory barrier to competition.
3. Review submissions to the GMCCC concerning the Code using the agreed principles contained in the Principles Paper.
4. Provide a report to the GMCCC recommending amendments and deletions to the Code.

4.2 Overlap of the Code with Existing Legislation

Lavan Legal was commissioned by the Authority, on behalf of the GMCCC, to undertake the legal review of the Code based on the scope of work outlined under 4.1 above.

The outcome of Lavan Legal's review was that there are many clauses of the Code that overlap with State and Commonwealth legislation or relevant common law principles. Further, many of the obligations in the Code duplicate provisions that are required by the *Energy Coordination (Customer Contract) Regulations 2004* (CC Regulations) to be in the standard form contract or non-standard form contract.

A copy of Lavan Legal's report on its legal review of the Code is contained in Appendix 1. This report identifies the following provisions of the Code which overlap or duplicate State or Commonwealth legislation or the provisions of the standard form contract or non-standard form contract:

- Clause 6 - No contracting out of this Code;
- Clause 7 - Responsible marketers to ensure representatives comply with this Code;
- Clause 8 - Training marketing representatives;
- Clause 9 - Written information must be easy to understand;
- Clause 13 - Entering into customer contracts;
- Clause 14(2), (4) and (5) - Information to be given at time of entering into a customer contract;
- Clause 15 - Misleading, deceptive or unconscionable conduct;
- Clause 19 - Marketing by the internet or by email;
- Clause 21 - Collection and use of personal information;
- Clause 22 - Dispute resolution;
- Clause 23 - Presumption of Authority.

In Lavan Legal's view, the overlap is such that the GMCCC could recommend the overlap provisions be removed without reducing the level of consumer protection or the effectiveness of the Code. If such a course were adopted it would simplify the regulation of gas marketing while simultaneously ensuring the level of customer protection was not diluted.

4.3 Remaining Elements in the Code

4.3.1 Overview

Lavan Legal noted that, the remaining provisions of the Code where duplication with existing legislation did not occur fell into one of the following categories:

- administrative;
- record keeping; and
- conduct of marketers.

The clauses that Lavan Legal grouped into 'administrative' provisions concern the operation of the Code. That is, they are necessary to ensure the Code operates effectively. For example clause 5 relates to breaches of the Code.

The clauses referred to as 'record keeping' contain obligations on the responsible marketer to keep certain records for a specific period of time. For example, visits by marketers made to a person's premises (17(6) of the Code).

The clauses termed 'conduct of marketers' contain obligations on marketers to act in a particular way when dealing with customers. For example, a marketer must not make a telephone call to a person outside the permitted call times (clause 16(3) of the Code).

The specific clauses in the Code which fall under each of the three categories above are listed in Table 1 below.

Table 1 Clauses of Code Not Duplicated

Administrative	Record keeping	Conduct of marketers
Clauses 1 - 4 – Preliminary provisions.	Clause 10 – Information about complaints and compliance with this Code.	Clause 14(1) and (3) - Information to be given at time of entering into a customer contract.
Clause 5 - Complying with this Code.	Clause 11 - Records to be kept.	Clause 16(1) to (4) - Marketing by telephone.
	Clause 12 - Contact details of marketers.	Clause 17(1) to (5) - Marketing at a person's premises.
	Clause 16(5) - Marketing by telephone.	Clause 18(1) and (2) - Marketing by personal contact other than at the person's premises.
	Clause 17(6) - Marketing at a person's premises.	Clause 20(1) and (4) - Conduct when a person does not wish to be contacted.
	Clause 18(3) - Marketing by personal contact other than at the person's premises.	
	Clause 20(2) and (3) - Conduct when a person does not wish to be contacted.	

4.3.2 Record keeping

In Lavan Legal's view, consideration should be given to moving the record keeping obligations to a retail supplier's licence. This will place the obligation on the retail supplier, as opposed to the responsible marketer (if they are different entities). However, as a matter of contract, a prudent retail supplier would ensure that a responsible marketer employed by it was bound to comply with the obligations.

Lavan Legal recommended this approach, as a licence obligation is a flexible instrument compared to a Code provision. That is, it is easier for the Authority to add or modify the record keeping requirements in relation to a licence obligation.

Lavan Legal also noted that if a licence condition is breached the Authority has wider powers to ensure compliance. In particular, the Authority has the power to cause the contravention to be rectified rather than ordering the licensee to pay a monetary penalty.

Section 11ZPP of the EC Act 1994 provides that "[i]t is a condition of every trading licence that the licensee is to comply with the provisions of the code of conduct that apply to the licensee." However, the record keeping provisions apply to a "responsible marketer" which may not be the retail supplier. Therefore, although a retail supplier may be liable for a breach of the Code under clause 5(3) of the Code, it is not entirely clear that a breach of the Code by a responsible marketer would be a breach of licence condition by the retail supplier.

Lavan Legal notes that the electricity licences contain wide powers for the Authority to demand information from a licensee. The standard provision in the licence titled "provision of Information" states:

The licensee must provide to the Authority any information that the Authority may require in connection with its functions under the Act in the time, manner and form specified by the Authority.

4.3.3 Conduct of Marketers

Retail suppliers, responsible marketers and marketers must comply with the provisions of the *Trade Practices Act 1974* (TP Act) and the *Fair Trading Act 1987* (FT Act). Both the TP Act and the FT Act have a broad prohibition against engaging in misleading or deceptive conduct. Further, the TP Act and the FT Act contain a prohibition against engaging in unconscionable conduct.

In Lavan Legal's view, consideration should be given to whether the level of detail prescribed in the Code is necessary to ensure that consumers are protected given the provisions in the TP Act, FT Act and the existence of the energy industry ombudsman. That is, if a marketer is prohibited from engaging in misleading or unconscionable conduct is it necessary to prescribe the steps preventing the marketer from engaging in the conduct.

Further, it is highly likely that any disputes will be referred to the energy industry ombudsman or any action will be taken by the relevant enforcement agency under the TP Act or FT Act, rather than dealing with the issue under the Code. A person who contravenes the Code is liable for a penalty. However, this will not be of assistance to an aggrieved customer. The remedies available under the TP Act and the FT Act will be more likely to provide direct relief for a customer (for example the contract may be declared void *ab initio*) and therefore any action against the marketer or retail supplier would be

expected to be commenced under the FT Act or TP Act. Accordingly, the deterrent provided by the Code is likely to be of limited value.

Lavan Legal noted that if the GMCCC wanted to retain the provisions concerning the conduct of marketers, then consideration should be given to moving the obligations to a flexible document, such as an industry standard, rather than leaving them in the Code. This would allow for a more flexible approach while retaining the obligations on marketers. Compliance with the industry standard could be made a licence condition to ensure that the obligations are enforceable.

4.3.4 Administrative provisions

Lavan Legal considered that if the overlap provisions, record keeping prohibitions and the conduct of marketer provisions were to be removed from the Code then the administrative provisions would have no purpose and could also be deleted.

4.4 Conclusion

In Lavan Legal's view, the provisions of the Code it has identified as "overlap provisions" may be deleted without diluting consumer protection or taking away from the purpose of the Code. This would also reduce dual regulation of retail suppliers which, in turn, should provide for more efficiency in the market.

Lavan Legal also recommended the GMCCC examine the 'record keeping' and 'conduct of marketer' provisions identified in its review to ensure that these provisions are necessary and to consider whether the same purpose could be achieved by moving these obligations from the Code to a more flexible instrument, such as the licence.

5 Recommendations

Following consideration of the submissions received and the Lavan Legal report, the GMCCC is of the view that duplicating legislation in the Code serves little useful purpose given that the primary legislation, such as the TP Act or FT Act, carry far more force. Further, the GMCCC considers the simplification of regulation, where this is possible, to be beneficial to both consumers and industry.

Accordingly, the GMCCC view is that it is not necessary for the Code to contain those provisions identified by Lavan Legal as duplicating existing laws and that consumer protection would not be diminished by such a move.

In regard to the remaining elements of the Code not duplicated in existing laws, the GMCCC took into account the advice from Lavan Legal to the effect that the relevant elements (record keeping and conduct of marketers) could be incorporated into existing licences without reducing consumer protection. The GMCCC was also mindful that these remaining provisions constituted only a small part of the Code and that the incorporation of the remaining provisions into existing licences was likely to improve clarity and efficiency of regulation to the benefit of both consumers and industry.

Accordingly, the GMCCC view is that the remaining elements in the Code can be incorporated into existing licences, resulting in the elimination of the entire Code, in a manner which would not diminish consumer protection provided three key requirements are met as outlined under Recommendations 2, 3 and 4 below.

Recommendation 1

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

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.

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.

Recommendation 4

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

The GMCCC was also of the view that there was considerable benefit in seeking to achieve a single energy code in the future given the market trend towards retailers being able to supply both gas and electricity. While the role set out in the EC Act for the GMCCC did not allow the GMCCC to advise the Authority on this matter, members of the GMCCC agreed that suitable arrangements should be put in place at an appropriate time in the future to allow such a code to be discussed and, if agreement is reached, formulated and put into effect.

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.

Appendix 1 Lavan Legal's Legal Review of the Gas Marketing Code of Conduct 2004

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8 May 2006

Russell Dumas
Chair
Gas Marketing Code of Conduct
Review Committee
c/ Economic Regulation Authority
Level 6
197 St Georges Terrace
Perth WA 6000
By Email: russell.dumas@era.wa.gov.au

Dear Russell

Review of the Gas Marketing Code of Conduct 2004

We attach a copy of our review of the *Gas Marketing Code of Conduct 2004 (Code)* identifying areas of overlap between provisions of the Code and other legislation as well as our comments, from a legal perspective, on the relevance of the provisions of the Code.

In our view, the following provisions overlap or duplicate State or Commonwealth legislation or the provisions of the standard form contract or non-standard form contract as mandated by the *Energy Coordination (Customer Contract) Regulations 2004 (CC Regulations)*.

- Clause 6 - No contracting out of this Code;
- Clause 7 - Responsible marketers to ensure representatives comply with this Code;
- Clause 8 - Training marketing representatives;
- Clause 9 - Written information must be easy to understand;
- Clause 13 - Entering into customer contracts;
- Clause 14(2), (4) and (5) - Information to be given at time of entering into a customer contract;
- Clause 15 - Misleading, deceptive or unconscionable conduct;
- Clause 19 - Marketing by the internet or by email;
- Clause 21 - Collection and use of personal information;

Please notify us if this communication has been sent to you by mistake. If it has been, any privilege between solicitor and client is not waived or lost and you are not entitled to use it in any way.

- Clause 22 - Dispute resolution;
- Clause 23 - Presumption of Authority.

Of the remaining provisions we note they each fall into one of three categories:

- (a) administrative;
- (b) record keeping; and
- (c) conduct of marketers.

Administrative	Record keeping	Conduct of marketers
<p>Clauses 1 - 4 - Preliminary provisions.</p> <p>Clause 5 - Complying with this Code.</p>	<p>Clause 10 - Information about complaints and compliance with this Code.</p> <p>Clause 11 - Records to be kept.</p> <p>Clause 12 - Contact details of marketers.</p> <p>Clause 16(5) - Marketing by telephone.</p> <p>Clause 17(6) - Marketing at a person's premises.</p> <p>Clause 18(3) - Marketing by personal contact other than at the person's premises.</p> <p>Clause 20(2) and (3) - Conduct when a person does not wish to be contacted.</p>	<p>Clause 14(1) and (3) - Information to be given at time of entering into a customer contract.</p> <p>Clause 16(1) to (4) - Marketing by telephone.</p> <p>Clause 17(1) to (5) - Marketing at a person's premises.</p> <p>Clause 18(1) and (2) - Marketing by personal contact other than at the person's premises.</p> <p>Clause 20(1) and (4) - Conduct when a person does not wish to be contacted.</p>

The administrative provisions concern the operation of the Code. That is, they are necessary to ensure the Code operates effectively. For example, clause 5 relates to breaches of the Code.

The clauses we have grouped into "record keeping" contain obligations on the responsible marketer to keep certain records for a certain period of time. For example, visits by marketers made to a person's premises (clause 17(6) of the Code).

The clauses we have grouped into "conduct of marketers" contain obligations on marketers to act in a particular way when dealing with customers. For example, a marketer must not make a telephone call to a person outside the permitted call times (clause 16(3) of the Code).

In our view, consideration should be given to removing the “overlap provisions”, the “record keeping” provisions and the “conduct of marketers” provisions from the Code. We also recommend that the Committee consider whether the level of regulation of marketers is appropriate.

Overlap provisions

There are many clauses of the Code that overlap with State and Commonwealth legislation or relevant common law principles. Further, many of the obligations in the Code duplicate provisions that are required by the CC Regulations to be in the standard form contract or non-standard form contract. Our detailed advice on the relevant overlap provisions is contained in the attached table (**Annexure 1**).

In our view, the overlap is such that the Committee could recommend the provisions be removed without reducing the level of consumer protection or the effectiveness of the Code. If such a course were adopted it would simplify the regulation of gas marketing while simultaneously ensuring the level of customer protection was not diluted.

Record keeping

In our view, consideration should be given to moving the record keeping obligations to a retail supplier's licence. This will place the obligation on the retail supplier, as opposed to the responsible marketer (if they are different entities). However, as a matter of contract, a prudent retail supplier would ensure that a responsible marketer employed by it was bound to comply with the obligations.

We recommend this approach as a licence obligation is a flexible instrument compared to a Code provision. That is, it is easier for the Authority to add or modify the record keeping requirements in relation to a licence obligation.

We also note that if a licence condition is breached the Authority has wider powers to ensure compliance. In particular, the Authority has the power to cause the contravention to be rectified rather than ordering the licensee to pay a monetary penalty.

Section 11ZPP of the *Energy Coordination Act 1994* provides that “[i]t is a condition of every trading licence that the licensee is to comply with the provisions of the code of conduct that apply to the licensee.” However, the record keeping provisions apply to a “responsible marketer” which may not be the retail supplier. Therefore, although a retail supplier may be liable for a breach of the Code under clause 5(3) of the Code, it is not entirely clear that a breach of the Code by a responsible marketer would be a breach of licence condition by the retail supplier.

We note that the electricity licences contain wide powers for the Authority to demand information from a licensee. The standard provision in the licence titled “provision of information” states:

The *licensee* must provide to the *Authority* any information that the *Authority* may require in connection with its functions under the *Act* in the time, manner and form specified by the *Authority*.

We understand the Authority intends to release a document prescribing the types of information the Authority will require and the time in which that information must be provided. Such a system could be adopted by the Authority in relation to gas licences. This would also have the advantage of ensuring that the gas and electricity information regimes are consistent.

Conduct of marketers

Retail suppliers, responsible marketers and marketers must comply with the provisions of the *Trade Practices Act 1974 (TPA)* and the *Fair Trading Act 1987 (FTA)*. Both the TPA and the FTA have a broad prohibition against engaging in misleading or deceptive conduct. Further, the TPA and the FTA contain a prohibition against engaging in unconscionable conduct.

In our view, consideration should be given to whether the level of detail prescribed in the Code is necessary to ensure that consumers are protected given the provisions in the TPA, FTA and the existence of the energy industry ombudsman. That is, if a marketer is prohibited from engaging in misleading or unconscionable conduct is it necessary to prescribe the steps preventing the marketer from engaging in the conduct?

Further, it is highly likely that any disputes will be referred to the energy industry ombudsman or any action will be taken by the relevant enforcement agency under the TPA or FTA, rather than dealing with the issue under the Code. A person who contravenes the Code is liable for a penalty. However, this will not be of assistance to an aggrieved customer. The remedies available under the TPA and the FTA will be more likely to provide direct relief for a customer (for example the contract may be declared void *ab initio*) and therefore any action against the marketer or retail supplier would be expected to be commenced under the FTA or TPA. Accordingly, the deterrent provided by the Code is likely to be of limited value.

However, if the Committee were minded to retain the provisions concerning the conduct of marketers, in our view, consideration should be given to moving the obligations to a flexible document, such as an industry standard, rather than leaving them in the Code. This would allow for a more flexible approach while retaining the obligations on marketers. Compliance with the industry standard could be made a licence condition to ensure that the obligations are enforceable.

Administrative provisions

If the overlap provisions, record keeping prohibitions and the conduct of marketer provisions are removed then the administrative provisions have no purpose and may also be deleted.

Conclusion

In our view, the provisions of the Code we have identified as “overlap provisions” may be deleted without diluting consumer protection or taking away from the purpose of the Code. This would also reduce dual regulation of retail suppliers which, in turn, should provide for more efficiencies in the market.

We also recommend the Committee examine the “record keeping” and “conduct of marketers” provisions identified in our review to ensure that they are necessary or that their purpose could not be achieved by moving the obligations to a flexible instrument, such as the licence.

Please contact Matthew Knox on 9288 6919 if you would like to discuss this further.

Kind regards

Caroline Brown
Partner

Annexure 1: Review of Gas Marketing Code of Conduct

Provision of Gas Marketing Code of Conduct 2004		Overlap provisions	Comments
1-4	Preliminary provisions		
5	Complying with this Code		
	<p>(1) A responsible marketer (other than a retail supplier) who contravenes a provision of this Code commits an offence.</p> <p>Penalty:</p> <p>(a) for an individual, \$5 000;</p> <p>(b) for a body corporate, \$20 000.</p> <p>Note: Subclause (1) does not apply to retail suppliers as section 11ZPP of the Energy Coordination Act 1994 has the effect that a breach of this Code by a retail supplier is a breach of the retail supplier's licence.</p> <p>(2) A marketing representative who contravenes a provision of this Code commits an offence.</p> <p>Penalty: \$5 000.</p> <p>(3) If a gas marketing agent of a retail supplier contravenes a provision of this Code, the retail supplier commits an offence.</p> <p>Penalty:</p> <p>(a) for an individual, \$5 000;</p> <p>(b) for a body corporate, \$20 000.</p> <p>(4) It is a defence to a prosecution for a contravention of subclause (3) if the retail supplier proves that the retail</p>	<p>Not applicable.</p> <p>Not applicable.</p> <p>Not applicable.</p> <p>Not applicable.</p>	

Provision of Gas Marketing Code of Conduct 2004		Overlap provisions	Comments
	supplier took practicable measures to ensure that the gas marketing agent complied with this Code.		
6.	No contracting out of this Code		
	A marketer must not arrange a customer contract that purports to exclude, restrict or modify the effect of this Code.	Regulation 25 <i>Energy Coordination (Customer Contracts) Regulations 2004 (CC Regulations)</i> provides that a standard form contract or a non-standard form contract must not include a provision that purports to exclude, restrict or modify the effect of this Code and that such a provision is of no effect.	<p>Clause 6 of the Code concerns “customer contracts” which is an arrangement between a retail supplier and a customer for the supply of gas. A customer is a small use customer.</p> <p>Regulation 25 of the CC Regulations concerns standard form and non-standard form contracts. Section 11WG of the <i>Energy Coordination Act 1994 (EC Act)</i> provides that, subject to an exemption in the Regulations, it is a condition in every trading licence that a licensee must not supply gas to a customer other than under a standard form contract or a non-standard form contract.</p>
7	Responsible marketers to ensure representatives comply with this Code		
	A responsible marketer must take practicable measures to ensure that marketing representatives of the responsible marketer comply with this Code.	There is no direct overlap with this provision. However, a responsible marketer is liable for the conduct of marketing representatives under the common law principles of agency and the principles of vicarious liability.	The principles of agency and vicarious liability should ensure that a responsible marketer takes practicable measures to ensure that a marketing representative complies with any relevant legislation and other obligations of the marketer/retailer.
8	Training marketing representatives		
	(1) A responsible marketer must ensure that each marketing representative of the responsible marketer undertakes appropriate training and testing (both before starting marketing and on an ongoing basis) so that each marketing representative understands this Code and has the abilities, knowledge and understanding referred to in subclause (2).	There is no direct overlap with this provision. However, a responsible marketer is liable for the conduct of marketing representatives under the common law principles of agency and the principles of vicarious liability.	The principles of agency and vicarious liability should ensure that a responsible marketer takes practicable measures to ensure that a marketing representative complies with any relevant legislation and other obligations of the marketer/retailer.

Provision of Gas Marketing Code of Conduct 2004	Overlap provisions	Comments
<p>(2) The abilities, knowledge and understanding referred to in subclause (1) are —</p> <ul style="list-style-type: none"> (a) knowledge of the provisions of this Code; (b) the ability to explain the arrangements for competition in gas supply for small use customers in Western Australia; (c) knowledge of the product being marketed, including <ul style="list-style-type: none"> (i) tariffs, billing procedures and payment options; and (ii) the requirements for eligibility for concessions, rebates or grants; (d) knowledge of the retail supplier's obligations to customers experiencing financial hardship, including the availability of installment payment plans; (e) the ability to clearly explain the terms of each offer that may be made by a marketer in relation to a possible customer contract and to substantiate each claim made in relation to a possible customer contract; (f) knowledge of basic contractual rights, including the need for a customer's agreement to the terms of a customer contract; (g) an understanding of what is conduct that is misleading, deceptive or likely to mislead or deceive or that is unconscionable; (h) general knowledge of the principles of consumer protection law, including those in the Trade Practices Act 1974 of the Commonwealth, the Fair Trading Act 1987 and the Door to Door Trading Act 1987; and 	<p>There is no direct overlap with this provision.</p>	<p>The requirements under sub-clause (2) are prescriptive. Most will be able to be complied with if the marketer knows the terms of the contract and does not engage in misleading or deceptive conduct. Such training would be expected as a matter of course to comply with obligations under the <i>Trade Practices Act 1974</i> (Cth) (TPA) and the <i>Fair Trading Act 1987</i> (WA) (FTA), especially as the retailer will be responsible for the conduct of marketers.</p> <p>We note however, that these requirements are duplicated for the electricity industry in clause 2.2 of the <i>Code of Conduct for the Supply of Electricity to Small Use Customers</i>.</p> <p>Clause 8(2)(h) includes a reference to <i>Door to Door Trading Act 1987</i>. Regulation 2A of the <i>Door to Door Trading Regulations 1987</i> provides that the <i>Door to Door Trading Act 1987</i> does not apply to a gas supply contract (a standard form or non-standard form contract).</p>

Provision of Gas Marketing Code of Conduct 2004		Overlap provisions	Comments
	<p>(i) other similar abilities or knowledge that the Code Administrator may require.</p> <p>(3) A responsible marketer must ensure that each marketing representative of the responsible marketer is given a copy of this Code.</p>	There is no direct overlap with this provision.	
9	Written information must be easy to understand		
	A responsible marketer must ensure that any written information that must be given to a customer under this Code is expressed in clear, simple and concise language and is in a format that makes it easy to read.	Regulation 5 of the CC Regulations provides that there is a requirement for all standard form contracts or non-standard form contracts to be easy to read and expressed in clear, simple and concise language.	Clause 9 of the Code is wider than regulation 5 of the CC Regulations in that it covers all communications (not just contracts).
10	Information about complaints and compliance with this Code		
	<p>A responsible marketer must —</p> <p>(a) keep a record of each complaint made by a customer, or person contacted for the purposes of marketing, about the marketing carried out by or on behalf of the responsible marketer;</p> <p>(b) 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; and</p> <p>(c) on request by the Code Administrator, give to the Code Administrator information that this Code requires the responsible marketer to keep, and any other information that the responsible marketer has, relating to compliance with this Code.</p>	Schedule 1, clause 15 and schedule 4 of the gas trading licence provides for certain information to be sent to the Authority on an annual basis.	<p>Concerning clause 10(c), if the Code Administrator (being the Authority) wants such information, appropriate power should be in the licence for the Authority to demand such information.</p> <p>This is an issue for the Authority's review of the gas licences.</p>

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11	Records to be kept		
	A record or other information that a responsible marketer is required by this Code to keep must be kept for at least 2 years after the last time the person to whom the information relates was contacted by or on behalf of the responsible marketer.	None.	
12	Contact details of marketers		
	<p>(1) A responsible marketer must give the responsible marketer's contact details to the Code Administrator and ensure that those details are kept up to date.</p> <p>(2) The contact details are —</p> <p>(a) the name, business address and telephone number of the responsible marketer and the name, street address of the place of work and telephone number of each marketing representative of the responsible marketer;</p> <p>(b) the name, address and telephone number of each retail supplier (if any) for whom the responsible marketer carries out marketing.</p>	None.	<p>If the Code Administrator (being the Authority) wants such information appropriate power should be in the licence for the Authority to demand such information.</p> <p>This is an issue for the Authority's review of the gas licences.</p>
13	Entering into customer contracts		
	(1) A marketer must, in the course of arranging a non-standard customer contract or a standard customer contract that is entered into as a result of door to door marketing, ensure that the contract is signed by the customer.	None.	<p>A prudent marketer would ensure that a contract was signed by the customer.</p> <p>These requirements are more appropriate for the standard form contract or non-standard form contract rather than the Code.</p> <p>The Authority has power to ensure a standard form contract has a signing panel. It does not have the same power for a non-standard form contract unless the contract without a signing panel is inconsistent with a condition in the licence.</p> <p>This may be an issue for the Authority's</p>

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<p>(2) A standard customer contract that is not entered into as a result of door to door marketing need not be signed by the customer but the fact and the time of the consent of the customer must be recorded by the marketer.</p> <p>(3) The terms and conditions of a standard customer contract that is not entered into as a result of door to door marketing must be available to the customer on request at no charge.</p> <p>(4) A contract is entered into as a result of door to door marketing if the following conditions are satisfied —</p> <p>(a) negotiations leading to the formation of the contract (whether or not they are the only negotiations that precede the formation of the contract) take place between the marketer and the customer in each other's presence in Western Australia at a place other than trade premises of the marketer;</p> <p>(b) the marketer attends at that place —</p> <p>(i) in the course of door to door marketing; and</p> <p>(ii) otherwise than at the unsolicited invitation of the consumer.</p> <p>(5) For the purposes of subclause (4)(b), in determining whether an invitation is solicited or unsolicited —</p> <p>(a) any solicitation by way of advertisement addressed to the public or a substantial section of the public is to be disregarded; but</p> <p>(b) if an invitation arises from a communication initiated by the marketer (other than as described in paragraph (a)) the invitation is not to be regarded as unsolicited.</p>	<p>None.</p> <p>None.</p> <p>None.</p> <p>None.</p>	<p>review of gas licences.</p> <p>We assume a prudent operator would ensure that consent is recorded in order to enforce the contract against the customer (if required).</p> <p>This clause is not entirely clear. A contract posted on the retailer's website may be considered to be available to customers "on request at no charge".</p>
<p>14</p> <p>Information to be given at time of entering into a customer</p>		

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	contract		
(1)	Before arranging a customer contract a marketer must give the customer the following information — <ul style="list-style-type: none"> (a) that the customer is free to choose the standard customer contract offered by the retail supplier; (b) how and when the terms of the customer contract will be given to the customer; (c) the name of the marketer, and the name, address and telephone number of the responsible marketer and of the retail supplier. 	Regulation 7 of the CC Regulations requires the retail supplier details to be specified on a standard form or non-standard form contract. A marketer is required to identify themselves when marketing to a person pursuant to clause 16 and 17 of the Code.	Regulation 7 of the CC Regulations overlaps with clause 14(1)(c) of the Code if the contract is sighted by the customer before the contract is entered into. Otherwise, clause 16 and 17 of the Code ensure that a person is aware of the identity of the marketer.
(2)	The marketer must also give the following information to the customer — <ul style="list-style-type: none"> (a) the terms of the customer contract including — <ul style="list-style-type: none"> (i) the type and frequency of bills the customer will receive; (ii) the relevant prices, charges, tariffs and service levels that will apply to the customer; and (iii) the payment methods and options available to the customer; (b) the details of any energy assistance schemes which may be available to the customer; (c) the details of any right the customer may have to rescind the customer contract during a cooling-off period and the charges that may apply if the customer rescinds the contract; (d) how to make an enquiry of or complaint to the responsible marketer or the gas industry ombudsman, and a copy of the complaint handling and dispute resolution procedures of the 	Regulation 15 of the CC Regulations provides that a standard form and a non-standard form contract must contain provisions which have the same effect as provisions in the Natural Gas Customer Service Code (AG 755-1998) (AGA Code) including provisions relating to: <ul style="list-style-type: none"> (a) type and frequency of bills (clause 4.2.1 and 4.2.3 of the AGA Code); (b) contents of a bill, including services and charges supplied to a customer (clause 4.2.3 of the AGA Code); and (c) methods of making payment (clause 4.3.2 of the AGA Code). Regulation 19 of the CC Regulations states that a standard form contract or a non-standard form contract must require the retail supplier to provide contact details for obtaining information about government assistance programmes or financial counseling services. Regulation 27(5) and regulation 40(4) of the CC Regulations provide that the standard form and non-standard form contract respectively must	Clause 14(2) of the Code is substantially replicated by relevant provisions in the CC Regulations. The difference is in the timing of the information. That is, the CC Regulations specify that the information must be in the contract whereas clause 14(2)(b) to (e) contemplates that information being given as part of the contract or separately. However, subclause (3) states that the information may be given after the contract is entered into. Therefore, if the contract was posted to the customer then the customer will receive this information when they receive the relevant contract.

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<p>responsible marketer if the customer requests one;</p> <p>(e) that a marketer must comply with this Code and the general scope of this Code, and a copy of this Code if the customers requests one.</p> <p>(3) For a standard customer contract that is not entered into as a result of door to door marketing —</p> <p>(a) the information in subclause (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; and</p> <p>(b) the marketer must obtain and make a record of the customer's acknowledgment that the information that must be given before the customer enters into the contract (under subclause (1)) has been given.</p> <p>(4) For a non-standard customer contract or a standard customer contract that is entered into as a result of door to</p>	<p>contain provisions concerning rescinding the contract and payment for rescinding the contract.</p> <p>Regulation 21 of the CC Regulations provides that the standard form and non-standard form contract must have provisions about complaints handling including reference to the energy industry ombudsman.</p> <p>Regulation 50 of the CC Regulations provides that a disconnection warning must include information on dispute resolution including information about the energy industry ombudsman scheme.</p> <p>Regulation 19 of the CC Regulations provides that a standard form and non-standard form contract must require the retail supplier to provide a copy of the Code. Regulation 46 of the CC Regulations also provides that a customer must be provided with the Code if requested.</p> <p>None.</p>	<p></p> <p>We assume a prudent operator would ensure that a record is kept of the customer's acknowledgment that the information that must be given before the customer enters into the contract (under subclause (1)) has been given.</p> <p>Clause 14(3) of the Code allows the information to be sent to the customer within 2 business days. If the contract contains the relevant information in subclause (2) and is sent to a customer within 2 business days then this provision will be complied with.</p> <p>A customer who enters into a contract as a result of door to door marketing should</p>

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<p>door marketing —</p> <p>(a) the information in subclause (2) must be given before the customer enters into the contract; and</p> <p>(b) the marketer must obtain the customer's written acknowledgment that the information that must be given before the customer enters into the contract (under subclause (1) and (2)) has been given.</p> <p>(5) If a customer contract is subject to a cooling-off period the marketer must inform the customer that —</p> <p>(a) if gas is supplied to the customer before the end of the cooling-off period; and</p> <p>(b) if the customer rescinds the contract during that period,</p> <p>the customer will be liable for the gas and any other services supplied to the customer, and any other charges in accordance with the contract.</p> <p>Note: A non-standard customer contract or a standard customer contract that is entered into as a result of door to door marketing has a cooling-off period of 10 days.</p>	<p>Regulation 27 of the CC Regulations provides that a standard form contract must require the customer to pay the retail supplier for gas supplied during the cooling off period.</p> <p>Regulation 40 of the CC Regulations provides that a non-standard form contract must require the customer to pay the retail supplier for gas supplied during the cooling off period.</p>	<p>receive a copy of the relevant contract before they enter into it. The contract will contain the relevant information in subclause (2) above. Accordingly, subclause (4)(a) is redundant.</p> <p>We assume a prudent operator would ensure that a record is kept of the customer's acknowledgment that the information that must be given before the customer enters into the contract (under subclause (1)) has been given.</p> <p>The relevant “warning” is contained in the terms of the contract. The contract is also expressed in plain English (regulation 5 of the CC Regulations). Accordingly, this provision is only relevant where the customer has not sighted the contract first. However, the cooling off period will only apply where the contract is entered into as a result of door to door marketing so this situation should not occur.</p>
15	Misleading, deceptive or unconscionable conduct	
A marketer must not, when marketing, engage in conduct that is misleading, deceptive or likely to mislead or deceive or that is unconscionable.	<p>Section 52 of the TPA states ‘A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead to deceive’.</p> <p>Section 10 of the FTA states ‘A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead to deceive’.</p>	<p>Note that both TPA and FTA are relevant as FTA applies to individuals as well as corporations.</p> <p>The provisions in the TPA and FTA are more useful, as they are widely used and clearly interpreted. Further, the remedies available under the FTA and TPA are more flexible and useful to an aggrieved consumer. Finally, the penalty provisions in the TPA</p>

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		<p>TPA - Section 51AB - 'A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable'.</p> <p>FTA - Section 11 - 'A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable'.</p>	and FTA are more onerous than those in the Code.
16	Marketing by telephone		
	<p>(1) A marketer who makes a telephone call to a person for the purposes of marketing must, as soon as practicable, tell the person —</p> <p>(a) his or her name;</p> <p>(b) the name of the responsible marketer and of the retail supplier on whose behalf the call is being made;</p> <p>(c) the purpose of the call; and</p> <p>(d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier.</p> <p>(2) If, during a telephone conversation between a marketer and a person for the purposes of marketing, the person indicates that the person wishes to end the conversation, the marketer must —</p> <p>(a) end the conversation as soon as practicable; and</p> <p>(b) not attempt to contact the person for the purposes of marketing for the next 30 days unless the person agrees otherwise.</p>	<p>None.</p> <p>None.</p>	<p>Currently, there is no legislation which overlaps with this provision. However, Senator Helen Coonan, the Minister for Communications, Information Technology and the Arts, has announced that a national, legislated Do Not Call register will be created to protect consumers, and will be established by 2007. The legislation is also expected to establish national minimum contact standards for telemarketers. Those standards will cover permitted calling hours, minimum information requirements and termination of calls. These provisions are therefore likely to become obsolete with the introduction of this legislation.</p> <p>See notes under clause 16(1) above.</p>

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	<p>(3) A marketer must not make a telephone call to a person for the purposes of marketing outside the permitted call times.</p> <p>(4) A telephone conversation between a marketer and a person for the purposes of marketing must not continue for more than 15 minutes past the end of the permitted call time without the express consent of the person.</p> <p>(5) A responsible marketer must keep the following records about each telephone call made by or on behalf of the responsible marketer to a person for the purposes of marketing —</p> <p>(a) the name and telephone number of the person;</p> <p>(b) the name of the or each marketer who made or was involved in the call;</p> <p>(c) the date and time of the call.</p>	<p>None.</p> <p>None.</p> <p>None.</p>	<p>See notes under clause 16(1) above.</p> <p>See notes under clause 16(1) above.</p> <p>See notes under clause 16(1) above.</p>
17	Marketing at a person's premises		
	<p>(1) A marketer who visits a person at the person's premises for the purposes of marketing must, as soon as practicable, tell the person —</p> <p>(a) his or her name;</p> <p>(b) the name of the responsible marketer and of the retail supplier on whose behalf the visit is being made;</p> <p>(c) the purpose of the visit; and</p> <p>(d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier.</p> <p>(2) A marketer who visits a person at the person's premises for the purposes of marketing must, while at the premises, wear a clearly visible identity card that shows —</p>	<p>None. However, the details of the retail supplier including the telephone number should be stated on the standard form contract or non-standard form contract.</p> <p>None.</p>	<p>We note that this provision is extremely prescriptive and would appear to be a matter of common sense. That is, a marketer will tell the person the purpose of the visit without being compelled by the Code.</p> <p>This section of the Code could be simplified by removing the distinction between marketing at a person's premises and marketing by personal contact other than at a person's premises.</p>

Provision of Gas Marketing Code of Conduct 2004		Overlap provisions	Comments
	<ul style="list-style-type: none"> (a) his or her name; (b) a photograph of the marketer; (c) the name and business address of the responsible marketer and the name of the retail supplier on whose behalf the visit is being made (which may be printed on the back of the card); and (d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier (which may be printed on the back of the card). 		
(3)	<p>If, while a marketer is at a person's premises for the purposes of marketing, the person indicates that the person wishes to end the conversation or the marketer to leave, the marketer must —</p> <ul style="list-style-type: none"> (a) leave the premises as soon as practicable; and (b) not attempt to contact the person for the purposes of marketing for the next 30 days unless the person agrees otherwise. 	None.	
(4)	A marketer must not visit a person at the person's premises for the purposes of marketing outside the permitted call times.	None.	
(5)	A marketer must not remain at a person's premises for the purposes of marketing for more than 15 minutes past the end of the permitted call time without the express consent of the person.	None.	
(6)	<p>A responsible marketer must keep the following records about each visit made by or on behalf of the responsible marketer at a person's premises for the purposes of marketing —</p> <ul style="list-style-type: none"> (a) the name of the person and the address of the premises; (b) the name of the or each marketer who visited the 	None.	.

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	<p>person; and</p> <p>(c) the date and time of the visit.</p>		
18	Marketing by personal contact other than at the person's premises		
	<p>(1) A marketer who meets a person for the purposes of marketing, other than at the person's premises, must, as soon as practicable, tell the person —</p> <p>(a) his or her name;</p> <p>(b) the name of the responsible marketer and of the retail supplier on whose behalf the marketing is being carried out;</p> <p>(c) the purpose of the marketing; and</p> <p>(d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier.</p>	None.	This section of the Code could be simplified by removing the distinction between marketing at a person's premises and marketing by personal contact other than at a person's premises.
	<p>(2) A marketer who meets a person for the purposes of marketing, other than at the person's premises, must, while meeting the person, wear a clearly visible identity card that shows —</p> <p>(a) his or her name;</p> <p>(b) a photograph of the marketer;</p> <p>(c) the name and business address of the responsible marketer and the name of the retail supplier on whose behalf the marketing is being carried out (which may be printed on the back of the card); and</p> <p>(d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier (which may be printed on the back of the card).</p>	None.	
	<p>(3) If a person who is met by a marketer for the purposes of marketing, other than at the person's premises, gives the marketer his or her name and address, the responsible</p>	None.	

Provision of Gas Marketing Code of Conduct 2004	Overlap provisions	Comments
<p>marketer must keep the following records about the meeting with the person —</p> <ul style="list-style-type: none"> (a) the name and address of the person; (b) the name of the or each marketer who met the person; (c) the date and time of the meeting. 		
<p>19 Marketing by the internet or by email</p>		
<ul style="list-style-type: none"> (1) A marketer who contacts or attempts to contact a person for the purposes of marketing using electronic means must include the following information — <ul style="list-style-type: none"> (a) the marketer's email address or other means of electronic contact; (b) the business name, company name, Australian Business Number and business address of the responsible marketer and of the retail supplier on whose behalf the marketing is being carried out; (c) the purpose of the marketing; (d) the complaints and enquiries telephone number of the responsible marketer and of the retail supplier. (2) A responsible marketer must keep the following records about each contact or attempted contact of a person for the purposes of marketing — <ul style="list-style-type: none"> (a) the email address of the person; (b) the date and time of the contact or attempted contact; (c) any correspondence between the person and the responsible marketer. 	<p><i>Spam Act 2003</i> (Cth) - Section 17(1) - 'A person must not send, or cause to be sent, a commercial electronic message that has an Australian link unless:</p> <ul style="list-style-type: none"> (a) the message clearly and accurately identifies the individual or organization who authorised the sending of the message; and (b) the message includes accurate information about how the recipient can readily contact the individual or organization; and... <p>None.</p> 	<p>Clause 19(1) is slightly more prescriptive than section 17(1) of the <i>Spam Act</i>. However, the difference is minor. Section 17(1) of the Act achieves the objectives of the Code, which are to protect customers from undesirable marketing conduct and define standards of conduct in the marketing of gas to customers.</p> <p>The marketer must keep accurate records in order to comply with the <i>Spam Act</i>.</p>

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	(3) In this clause — “electronic means” means the internet, email or other similar means but does not include the telephone.	None.	
20	Conduct when a person does not wish to be contacted		
	(1) If a person who has been contacted by a marketer for the purposes of marketing indicates that the person does not wish to be contacted again by or on behalf of the responsible marketer, the responsible marketer must ensure that the person is not contacted by or on behalf of the responsible marketer in relation to the supply of gas by the retail supplier for whom the marketing was carried out for the next 2 years.	None.	
	(2) A responsible marketer must keep a record of each person who has indicated that the person does not wish to be contacted (as described in subclause (1)) that includes the name and address of the person at the time the person made that indication.	None.	
	(3) The responsible marketer must give a copy of the record to the gas industry ombudsman or the Code Administrator on request.	None.	
	(4) A marketer must, to the extent practicable, comply with a notice on or near a person's premises indicating that the person does not wish to receive unsolicited mail or other marketing (for example, 'No junk mail' or 'No canvassing' signs).	None.	
21	Collection and use of personal information		
	(1) A marketer must not collect or use personal information in the course of marketing except for the marketing purposes of the retail supplier who is carrying out the marketing or on whose behalf the marketing is being carried out.	<i>Privacy Act 1988</i> (Cth) - Schedule 3 - National Privacy Principles, Clause 1.1 - 'An organization must not collect personal information unless the information is necessary for one or more of its functions or activities'.	Clause 21(1) is not required, in light of Clause 1.1 of the National Privacy Principles.
	(2) When collecting personal information, a marketer must	<i>Privacy Act 1988</i> (Cth) - Schedule 3 - National	Clause 21(2) is not required, in light of

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<p>collect personal information directly from the person to whom it relates unless —</p> <p>(a) the person has given written consent to the information being collected from a particular third party; or</p> <p>(b) the information to be collected relates to the person's credit history.</p> <p>(3) A marketer must not disclose personal information, collected by or on behalf of the responsible marketer for marketing purposes, to another person (other than a retail supplier for whom the marketing was carried out) unless —</p> <p>(a) the person to whom the information relates has given written consent to the particular disclosure;</p> <p>(b) the disclosure is required by law; or</p> <p>(c) the disclosure is required for the purposes of the investigation of any suspected offence or the conduct of proceedings against any person for an offence.</p> <p>(4) A responsible marketer must take practicable measures to protect personal information held by the responsible marketer from misuse, loss, unauthorised access or modification.</p> <p>(5) A responsible marketer who holds personal information</p>	<p>Privacy Principles, Clause 1.4 - 'If it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual'.</p> <p><i>Privacy Act 1988</i> (Cth) - Schedule 3 - National Privacy Principles, Clause 2.1 - 'An organisation must not use or disclose personal information about an individual for a purpose (the <i>secondary purpose</i>) other than the primary purpose of collection unless:</p> <p>...</p> <p>(b) the individual has consented to the use or disclosure; or</p> <p>...</p> <p>(f) the organisation has reason to suspect that unlawful activity has been, or is being engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities; or</p> <p>(g) the use or disclosure is required or authorised by or under law; or...</p> <p><i>Privacy Act 1988</i> (Cth) - Schedule 3 - National Privacy Principles, Clause 4.1 - 'An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure'</p> <p><i>Privacy Act 1988</i> (Cth) - Schedule 3 - National</p>	<p>Clause 1.4 of the National Privacy Principles.</p> <p>Clause 21(3) is not required, in light of Clause 2.1(b), (f) and (g) of the National Privacy Principles.</p> <p>Clause 21(4) is not required, in light of Clause 4.1 of the National Privacy Principles.</p> <p>Clause 21(5) is not required, in light of</p>

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	that relates to a person must give the person the opportunity, on request, to review the information and correct any errors in it.	Privacy Principles, Clause 6.1 - 'If an organisation holds personal information about an individual, it must provide the individual with access to the information on request by the individual, except to the extent that:...'.	Clause 6.1 of the National Privacy Principles.
(6)	If a responsible marketer is prevented by law from giving a person the opportunity to review the information, the responsible marketer must give the person reasons why the person cannot review the information.	<i>Privacy Act 1988</i> (Cth) - Schedule 3 - National Privacy Principles, Clause 6.7 - 'An organisation must provide reasons for denial of access or a refusal to correct personal information'	Clause 21(6) is not required, in light of Clause 6.7 of the National Privacy Principles.
(7)	A responsible marketer must keep a record of each consent given by a person for the purposes of subclause (2)(a) or (3)(a).	None.	This should be standard practice in order to comply with the National Privacy Principles and does not need to be the subject of a Code provision.
(8)	A marketer must comply with the National Privacy Principles set out in Schedule 3 of the <i>Privacy Act 1988</i> of the Commonwealth (to the extent to which they are not inconsistent with this Code).	<i>Privacy Act 1988</i> (Cth) - Section 16A(2) - 'To the extent (if any) that an organisation is not bound by an approved privacy code, the organisation must not do an act, or engage in a practice, that breaches a National Privacy Principle.'	Clause 21(8) is not necessary, as s16A(2) states that an organisation must not breach any National Privacy Principle.
22	Dispute resolution		
(1)	A responsible marketer must have a complaint handling and dispute resolution procedure in relation to its marketing that — (a) complies with Australian Standard AS 4269:1995; and (b) is available at no cost to customers and other persons contacted by or on behalf of the responsible marketer.	Regulation 21 of the CC Regulations provides that the standard form contract and the non-standard form contract must include provisions about procedures for complaints handling and dispute resolution that have the same effect as clause 2.5.1 and 2.5.2 of the AGA Code. Clause 2.5.1 of the AGA Code provides that the complaint must be handled in accordance with Australian Standard AS 4269:1995.	Regulation 21 concerns disputes under the contract. Clause 22 appears to be broader and concern disputes with the marketer. However, if a person entered into the contract then the dispute resolution procedure under the contract (which has the same effect as AS 4269:1995) would apply. For disputes related to conduct of the marketer see notes under clause 22(3) below.
(2)	The procedure must include notifying such a customer or person that, if the complaint or dispute is not resolved to the customer's satisfaction, the customer or person may make a complaint to the gas industry ombudsman.	Clause 2.5.2 of the AGA Code provides that a customer may refer a complaint to an external dispute resolution body. Regulation 21(2)(b) of the CC Regulations provides that the external dispute resolution body is to be read as the gas	See notes under clause 22(1) above.

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	(3) The procedure must include review by the retail supplier of complaints and disputes that relate to marketing carried out on behalf of the retail supplier if the retail supplier is not the responsible marketer in relation to the marketing.	industry ombudsman. None.	A retail supplier should undertake a review as a matter of course as the retail supplier will be responsible for the conduct of marketers.
23	Presumption of authority		
	<p>A person who carries out any marketing activity in the name of or for the benefit of —</p> <p>(a) a retail supplier; or</p> <p>(b) a gas marketing agent,</p> <p>is to be taken, unless the contrary is proved, to have been employed or authorised by the retail supplier or gas marketing agent to carry out that activity.</p>	There will be a presumption of authority under the common law principles of agency. Further, an employer is vicariously liable for the acts of an employee.	This provision is redundant.