

# Marketing Code of Conduct

Approved for the purposes of  
the *Electricity Supply Act 1995* (NSW)  
and the *Gas Supply Act 1996* (NSW)  
by the NSW Minister for Energy

1 January 2011

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# 1. FOREWORD

## 1.1 Introduction

The NSW Treasury and the Ministry of Energy and Utilities, on behalf of the Minister for Energy (**Minister**), previously developed the Electricity Marketing Code of Conduct and the Gas Marketing Code of Conduct to protect small customers in light of full retail competition in electricity and gas in NSW. Both Codes were approved by the Minister, with the Electricity Marketing Code taking effect on 1 January 2001 and the Gas Marketing Code on 1 January 2002. Both these Marketing Codes are now revoked and replaced by a single Energy Marketing Code of Conduct (the **Code**) to apply to the retail marketing of gas and electricity by “Marketers” in NSW. Accordingly, for acts or omissions by electricity and gas Marketers on or after 1 June 2002, this Code replaces:

1. The Code approved for the purposes of the Electricity Supply Act 1995 (NSW) (**ES Act**) gazetted on 29 December 2000 (Government Gazette No 170) and amended on 21 December 2001 (Government Gazette No 196); and
2. The Code approved for the purposes of the Gas Supply Act 1996 (NSW) (**GS Act**) gazetted on 16 November 2001 (Government Gazette No. 175).

While currently applicable only within NSW, the Code may be amended to apply to other jurisdictions or on a national basis, as the need arises.

The Code specifies the minimum level and quality of information to be provided by “Marketers” to “Small Retail Customers” so that those Customers can make informed choices. The Code also aims to protect Customers against any unethical or unscrupulous behaviour by Marketers. “Marketers” is taken to mean all suppliers and all persons who act as agents or intermediaries between Small Retail Customers and suppliers of gas or electricity. A “Small Retail Customer” is defined as a Customer consuming 160 megawatt hours or less of electricity per annum (see section 92 of the ES Act and clause 7 of the Electricity Supply (General) Regulation 2001 or 1,000 gigajoules or less of natural gas per annum (section 33R of the GS Act and clause 8 of the Gas Supply (Natural Gas Retail Competition) Regulation 2001).

The Code was developed in consultation with NSW and interstate market participants, the Electricity and Water Ombudsman of New South Wales (**EWON**), the New South Wales Department of Fair Trading (**DFT**), the Independent Pricing and Regulatory Tribunal (**IPART**) and other stakeholders.

## **1.2 Legislative framework – gas and electricity**

### **1.2.1 Governance**

The Code is approved under section 63G of the ES Act and section 33N of the GS Act by the NSW Minister for Energy, as the Marketing Code of Conduct that applies to electricity and gas Marketers in NSW. The Minister is the initial Code administrator, meaning that the Minister will be responsible for monitoring compliance with the Code and for approving any changes to the Code. Eventually, a dedicated industry Code administrator may be established to take over the ongoing development and governance of the Code.

### **1.2.2 Enforcement**

The Code is enforceable as a matter of law and imposes statutory obligations on all persons who engage in electricity or gas Marketing to comply with the Code (Section 63H, ES Act; Section 33O, GS Act) in so far as it affects dealings with Small Retail Customers. Additionally, for all Retail Suppliers, the ES Act requires compliance with the Code as a condition of licence (Section 63I(a)) and the GS Act requires compliance with the Code as a condition of authorisation (Section 33P (a)).

A Small Retail Customer is able to refer (at no cost to the customer) a complaint in relation to the conduct of an electricity or gas Marketer to the Ombudsman. This right is supported by requirements in both Acts for Retail Suppliers to be members of an approved Ombudsman scheme and to comply with any decision of the Ombudsman. A Customer with a complaint in relation to the marketing activities of a supplier needs, in the first instance, to refer that complaint to the Retail Supplier for resolution. The Ombudsman may alert the Code Administrator and/or IPART to a Marketer's alleged non-compliance with the Code.

Where electricity or gas Marketers are not licensed/authorised Retail Suppliers, the Acts make provision for non-licensed/authorised Marketers to be bound by any decision of the Ombudsman with respect to a complaint made by a Small Retail Customer. A decision of the Ombudsman in these circumstances may also set out the Ombudsman's costs in dealing with the Customer's complaint that will be required to be paid by the Marketer.

Penalties apply under both Acts for a breach of the Code. A Marketer that contravenes or fails to comply with a requirement of the Code with respect to either a gas or electricity Customer is liable to pay a maximum penalty of \$22,000 in the case of a corporation and \$5,500 in all other cases (or any amended amounts as provided in the legislation subsequent to gazettal of the Code).

### 1.2.3 Other obligations

Further obligations are imposed under the ES Act and GS Act on Retail Suppliers who have Customers referred to them by another Marketer. The Acts require that in these circumstances, before a Retail Supplier can enter into a negotiated Customer Supply Contract, it must be satisfied that the Marketer who has referred that Customer has complied with the Code (Section 63I, ES Act; Section 33P, GS Act).

Given the above requirement, both Acts impose a corresponding obligation on Marketers that are not licensed Retail Suppliers to provide a Retail Supplier with a written statement to the effect that the Marketer has complied with the Code where it introduces a Small Retail Customer to a Retail Supplier or facilitates or arranges a Customer Supply Contract (Section 63J, ES Act; Section 33Q, GS Act).

In addition to the Code, the Acts provide for Small Retail Customer protection through the application of minimum conditions in Customer Supply Contracts for Small Retail Customers. For example, electricity Retail Suppliers must agree to arrange provision of connection services if a new connection, reconnection or increase in capacity is requested by the Small Retail Customer and Retail Suppliers must provide an emergency services number to Customers on their bills.

## 1.3 Australian Consumer Law

Part 3-2 Division 2 of the Australian Consumer Law (*Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*) replaces the existing State and Territory laws on door-to-door selling and telemarketing with harmonised provisions regulating unsolicited consumer agreements.

The Marketing Code of Conduct has been updated to ensure consistency with the Australian Consumer Law. The Australian Consumer Law sets a minimum standard, and the Marketing Code reserves the right to impose stricter obligations on Retailers and Marketers.

## 1.4 Legislation

The key sources of legislation affecting marketing practices in gas and electricity are:

- *Electricity Supply Act 1995* (NSW)
- *Gas Supply Act 1996* (NSW)
- *Electricity and Gas Supply Legislation Amendment (Retail Price Disclosure and Companion) Act 2010*
- *Trade Practices Act 1974* (Cth)

- *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*
- *Fair Trading Act 1987 (NSW)*
- *Door-to-Door Sales Act 1967 (NSW)*
- *Contracts Review Act 1980 (NSW)*
- *Electronic Transactions Act 2000 (NSW)*
- *Privacy Act 1988 (Cth)*

The Code supplements and does not limit any rights, obligations or liabilities a person may have under any existing legislation or under common law.

## 2. DEFINITIONS

In this Code:

**“Code Administrator”** means the Minister for Energy in the State of New South Wales;

**“Customer Connection Services”** has the meaning given in the ES Act;

**“Customer Supply Contract”** means a Standard Form Customer Supply Contract or a negotiated Customer Supply Contract with a Small Retail Customer within the meaning given in the ES Act, where applicable to a contract for electricity, and within the meaning given in the GS Act, where applicable to a contract for gas;

**“Contact Number”** means the complaints and enquiries telephone number of a Marketer;

**“Energy”** means electricity and/or natural gas;

**“ES Act”** means the Electricity Supply Act 1995 (NSW);

**“GS Act”** means the Gas Supply Act 1996 (NSW);

**“Marketer”** has the same meaning as “electricity marketer” in the ES Act and “gas marketer” in the GS Act, which means any of the following persons:

- a person who is a Retail Supplier;
- a person who acts as an agent of a Retail Supplier for the purposes of obtaining new Customers, or retaining existing Customers, for the Retail Supplier;

- a person who acts as an agent of one or more Customers in respect of the retail supply of Energy ; and
- a person who acts as an intermediary in any other capacity between one or more Customers and a Retail Supplier in respect of the retail supply of Energy;

**“Marketing”** includes, but is not limited to, advertising, sales, promotion, market research, public relations and negotiations by any means, whether solicited or unsolicited, for the purposes of entering into a Supply Arrangement;

**“Ombudsman”** has the meaning given in the ES Act where applicable to a contract for electricity, which means, an electricity industry Ombudsman appointed under an approved electricity industry Ombudsman scheme; or the meaning given in the GS Act, where applicable to a contract for gas, which means, a gas industry Ombudsman appointed under an approved gas industry Ombudsman scheme;

**“Premises”** includes the Customer’s residential premises and the Customer’s workplace premises;

**“Previous Codes”** means the Electricity Marketing Code of Conduct and the Gas Marketing Code of Conduct in force prior to this Code

**“Regulations”** means:

- in relation to electricity, the Electricity Supply (General) Regulation 2001; and
- in relation to natural gas, the Gas Supply (Natural Gas Retail Competition) Regulation 2001;

**“Retail Supplier”** means:

- in relation to electricity, a person who holds a retail supplier's licence for the supply of electricity under the ES Act; and
- in relation to natural gas, a person who holds a supplier's authorisation for the supply of natural gas under the GS Act;

**“Small Retail Customer”** means:

- an actual or prospective small retail customer within the meaning of the ES Act; or
- an actual or prospective small retail customer within the meaning of the GS Act;

**“Standard Form Contract”** means:

- in relation to electricity, a standard form customer supply contract within the meaning given to that term in the ES Act; and

- in relation to natural gas, a contract that is declared by the regulations under the GS Act to be a standard form contract;

**“Supply Arrangement”** includes, but is not limited to, an actual or potential agreement or contract between a Retail Supplier and a Customer for the supply of Energy to the Customer.



### **3. INTERPRETATION AND COMMENCEMENT**

- 3.1 The Code takes effect on 1 June 2002.
- 3.2 In relation to any Marketing by an Energy Marketer after 1 June 2002 and before 1 August 2002, an Energy Marketer is taken to comply with this Code if the Energy Marketer complies with the applicable requirements of the Previous Codes.
- 3.3 The Code supplements and does not limit any rights a person may have under any statutory instrument or under the common law or at equity.

### **4. OBJECTIVES**

The objectives of the Code are to:

- Protect Small Retail Customers from unscrupulous Marketing conduct.
- Ensure that Marketers act in accordance with standards necessary to promote and enhance consumer confidence in the retail energy market.
- Promote an environment of honesty and fairness within the retail energy market by defining standards of acceptable marketing behaviour.
- Promote effective relationships between Customers, Marketers, suppliers (to the extent they are not Marketers), regulators and other industry participants.
- Ensure Customers have access to the product and service information needed to make informed choices, thereby facilitating entry into Retail Supply Arrangements.
- Ensure consistency with the Australian Consumer law and maintain energy consumer protection standards in NSW.

### **5. MARKETER RESPONSIBILITIES**

#### **5.1 Compliance**

- 5.1.1 A Marketer must comply with the Code.
- 5.1.2 A Marketer must ensure that any person who:
  - a) is employed by or authorised by the Marketer to carry out Marketing activities on behalf of the Marketer, and
  - b) could reasonably be considered by a Customer to represent the Marketer and is engaging in Marketing activity,

## **5.2 Obligations to the Code Administrator**

### **5.2.1 A Marketer must:**

- a) monitor and keep a record of complaints made by Customers in relation to the Marketing activities of the Marketer;
- b) conduct audits at least on an annual basis to verify that they are complying with the Code; and
- c) upon request, or if directed to do so by the Code Administrator, provide to the Code Administrator any information relating to Code compliance, including information the Marketer is required to keep under the Code.

## **5.3 Obligations to the Ombudsman**

### **5.3.1 A Marketer must, on request or if directed to do so by the Ombudsman in relation to a complaint by a Customer:**

- a) provide to the Ombudsman, any information, including information the Marketer is required to keep under the Code, relating to the complaint;
- b) pay any relevant Ombudsman fees and other amounts in accordance with a decision made by the Ombudsman in relation to the complaint; and
- c) agree to be bound by any relevant decision of the Ombudsman in relation to the complaint.

## **5.4 Statement to Suppliers**

5.4.1 A Marketer that is not a Supplier must provide a written statement of compliance with the Code to a Supplier where the Marketer introduced a Customer to the Supplier or where the Marketer arranged or facilitated a Supply Arrangement for that Supplier.

5.4.2 A Marketer must not give to a Supplier a statement in relation to a Supply Arrangement arranged or facilitated by the Marketer that is false, misleading or deceptive, knowing it to be false, misleading or deceptive.

## 6. STANDARDS OF CONDUCT

### 6.1 General

- 6.1.1 A Marketer must not, when carrying out Marketing, engage in misleading, deceptive or unconscionable conduct whether by act or omission.
- 6.1.2 A Marketer must comply with all applicable laws.
- 6.1.3 A Marketer must comply with the permitted hours of contact (as per section 73 of the Australian Consumer Law)
- 6.1.4 A Marketer must ensure that any information that this Code requires a Marketer to provide to Customers is in plain language and designed to be readily understood by Customers.
- 6.1.5 Customers must be able to contact a Marketer on the Marketer's Contact Number during the normal business hours of the Marketer.
- 6.1.6 All Supply Arrangements must be in writing and, except for Standard Form Contracts, must be signed by the relevant Customer to evidence the Customer's acceptance of the Supply Arrangement as a Customer Supply Contract.
- 6.1.7 A copy of the Supply Arrangement must be given to the customer within the legislated timeframes (as per section 78 of the Australian Consumer Law).

If any requirement under this Code is met electronically in accordance with the *Electronic Transactions Act 2000* (NSW), the Marketer must, prior to the electronic transaction, explain to the Customer how the electronic transaction is to operate and that as appropriate the Customer will:

- a) be bound to that electronic transaction; or
- b) be recognised as having received the information contained in the electronic transaction.

### 6.2 Marketing by telephone

- 6.2.1 In any telephone call made by or on behalf of a Marketer to a Customer for the purposes of Marketing, the caller must, as soon as practicable, clearly identify their purpose and identity (as per section 74 of the Australian Consumer Law):
- 6.2.2 A Marketer must ensure that if a telephone call is commenced within the hours permitted by section 5.2.2, the call must not continue for more than 15 minutes beyond the permitted times without the Customer's agreement.
- 6.2.3 A Marketer must maintain the following records in relation to all telephone calls involving Marketing to Customers:

- a) the names and telephone numbers of the Customers;
- b) the name of the person that made and/or dealt with each call on behalf of the Marketer; and
- c) the times and dates of telephone calls

6.2.4 The records required to be kept under section 6.2.3 must be kept for at least one year after the date of the last telephone call for the purpose of Marketing.

### **6.3 Marketing at Customer's Premises**

6.3.1 In any visit to a Customer's premises made by or on behalf of a Marketer to a Customer for the purposes of Marketing, the caller must, as soon as practicable, clearly identify their purpose and identity (as per section 74 of the Australian Consumer Law):

6.3.2 A Marketer must maintain the following records in relation to all Marketing conducted at Customers' Premises:

- a) the addresses of the Premises visited;
- b) the name of the Marketer's representative(s) visiting the Premises; and
- c) the times and dates of visits.

6.3.3 The records required to be kept under section 6.3.2 must be kept for at least one year after the date of the last visit for the purpose of Marketing.

### **6.4 Marketing via Internet or e-mail**

6.4.1 Where a Marketer engages in Marketing via Internet or e-mail, the Marketer must provide the following information to Customers:

- a) the Marketer's business name, company name Australian Business Number, address and the Marketer's Contact Number; and
- b) the Marketer's e-mail address or other means of electronic contact.

6.4.2 Marketer must maintain the following records (where provided) in relation to all correspondence via Internet or e-mail with Customers for the purpose of Marketing:

- a) the Customers contact details (including e-mail address); and
- b) the times and dates of such contacts.

6.4.3 The records required to be kept under section 6.4.3 must be kept for at least one year after the date of the last contact with that Customer for the purpose of Marketing.

6.4.4 For the purposes of the Code, Marketing conducted by means of Internet or e-mail is not to be taken as Marketing at the Customer's Premises.

## **6.5 Marketing by personal contact outside the Customer's Premises**

6.5.1 Where a Marketer makes personal contact with a Customer and engages in Marketing at a place other than at the Customer's Premises, the Marketer must:

- a) display an identity card that shows his or her full name and photograph, and the business's name, address and Australian Business Number and the Marketer's Contact Number;
- b) advise the Customer of the purpose of the visit (as per section 74 of the Australian Consumer Law); and
- c) ask the Customer if the Customer wishes to proceed further (as per section 74 of the Australian Consumer Law).

6.5.2 A Marketer must maintain the following records (where provided) of all personal contact made by the Marketer with Customers for the purpose of Marketing:

- (i) the names and addresses of Customers contacted;
- (ii) the addresses of the premises where Marketing was conducted; and
- (iii) the times and dates on which Marketing was conducted.

6.5.2 The records required to be kept under section 6.5.1 must be kept for at least one year after the date of the last contact for the purpose of Marketing.

## **6.6 Conduct when Customers do not wish to proceed or to be contacted**

6.6.1 Where a Customer has indicated, in any way, to a Marketer that the Customer does not wish to proceed with the Marketing, the Customer must not be contacted in any way for the purpose of Marketing for the time frame set out in s75 (2) of the Australian Consumer Law, unless requested to do so by the Customer or unless the Customer otherwise agrees.

6.6.2 A Marketer must keep a permanent record of all Customers who indicate that they do not wish to be contacted again ("not to be contacted list"). The not to be contacted list must include the name and address of relevant Customers and must be provided to the Ombudsman on its request and to the Code Administrator on its request.

6.6.3 A Marketer must abide by "Do Not Mail", "No Junk Mail", "Do Not Call" and "No

Canvassing” or similar notices placed on or near a Customer's Premises.

- 6.6.4 Nothing in sections 6.6.1, 6.6.2, 6.6.3 and 6.6.4 preclude a Marketer from contacting a Customer on the not to be contacted list for purposes other than for the purpose of Marketing.

## **7. INFORMATION PROVISION**

### **7.1 Minimum requirement**

- 7.1.1 Before or at the time that a Customer enters into a Supply Arrangement that was arranged or facilitated by a Marketer, the Marketer must obtain the Customer's written acknowledgment that the Marketer has provided to the Customer all the information items outlined in section 7.1.7.
- 7.1.2 The Customer's written acknowledgement may be contained in the Supply Arrangement.
- 7.1.3 The Customer's written acknowledgement must be in accordance with either:
- a) Appendix 1; or
  - b) by incorporation of a statement in the place where the Customer's signature is required in the Supply Arrangement, to the effect that in signing the Supply Arrangement the Customer acknowledges that the Marketer has provided the Customer with all the information items outlined in 7.1.7.
- 7.1.4 Where the Customer's written acknowledgement is obtained in accordance with section 7.1.3(b), prior to the Customer signing the Supply Arrangement the Marketer must provide the Customer with a list of all the information items as set out in Appendix 1.
- 7.1.5 Marketers must keep a record of Customers' written acknowledgements for at least one year after they were obtained.
- 7.1.6 Sections 6.1.1 to 6.1.5 do not apply to Standard Form Contracts.
- 7.1.7 Before or at the time that the Customer enters into any Supply Arrangement, as a minimum and in addition to any other information or documents that may be required elsewhere in the Code to be supplied to a Customer, a Marketer must provide the following information to a Customer:
- a) the name, street address (PO Box number is not sufficient), Contact Number, fax number and email address of the Marketer and, if different, the Supplier with whom the Supply Arrangement will be entered into;
  - b) the existence of any fee or commission that the Marketer is entitled to receive

from a Supplier pursuant to the Marketer's role in arranging or facilitating the Supply Arrangement with the Customer

- c) the premises to which the Supply Arrangement is to apply;
- d) the time period for which the acceptance of the offer to enter into the Supply Arrangement is valid;
- e) the duration of the Supply Arrangement, including any available extension and the terms and conditions, including any fees applicable, of any such extension of the Supply Arrangement;
- f) the extent to which the price offered is inclusive of all costs, with regard to both the amount and the reason for the cost,. If the price offer does not include all costs, then those costs that are not included, together with how they will be charged, must be disclosed;
- g) information on the availability of a Price Comparison Service run by the Independent Pricing and Regulatory Tribunal. This should include the nature of the service and how to access the service, through both the appropriate website, and the complementary phone service.
- h) the Customer's right to an applicable Standard Form Contract
- i) the name, street address and contact number of the person responsible for arranging Customer Connection Services, if not the Customer;
- j) any requirements for security deposits to be paid by the Customer and when such deposits will be payable, any penalties or charges that may be imposed on the Customer for variation in load, early termination or otherwise (as applicable);
- k) the Customer's right to bring complaints to the Ombudsman;
- l) the existence of the Code and the fact that it is binding on Marketers;
- m) details of conditions relating to the Customer's entitlement to any cooling-off period;
- n) the expected date of commencement of the supply of Energy under the Supply Arrangement;
- o) notification that the Customer's signing of a Supply Arrangement constitutes the Customer's written consent to transfer to the Supplier of the Customer's choice;
- p) any other information reasonably necessary for the Customer to make an informed decision about whether or not to enter into the Supply Arrangement

offered by the Marketer;

- q) if the Customer is applying for supply under a Standard Form Contract, the Customer's right to enter into a negotiated contract with a retail supplier of choice; and
- r) if requested by a Customer, the information set out in section 7.2.

7.1.8 A Marketer must provide the Customer with a copy of the Supply Arrangements in accordance with the Regulations.

## **7.2 Additional information**

7.2.1 A Marketer must, if requested to do so by a Customer, clearly explain to the Customer:

- a) all terms and conditions of any Supply Arrangement offered by that Marketer to the Customer;
- b) the Customer's rights under the terms and conditions of any applicable Standard Form Contract;
- c) the Customer's entitlements to any concessions or rebates;
- d) the arrangements that are in place for competition in the supply of electricity and/or gas (if applicable) in the jurisdiction in which that Customer's premises is located; and
- e) the Customer's rights and Marketer's obligations under the Code.



## APPENDIX 1

### CUSTOMER WRITTEN ACKNOWLEDGEMENT

**Marketer:**

**Customer Name:**

**Supply Address:**

**Relationship to supply address (owner/occupier):**

**By signing this document I declare that I have been made aware of or received the following information:**

- a) the existence of the Price Comparison Service run by IPART, including the nature of the service and how to access it;
- b) the name, street address (PO Box number is not sufficient) and Contact Number of the Marketer and, if different, the Supplier with whom the Supply Arrangement will be entered into;
- c) the existence of any fee or commission that the Marketer is entitled to receive from a Supplier pursuant to the Marketer's role in arranging or facilitating the Supply Arrangement with the Customer;
- d) the premises to which the Supply Arrangement is to apply;
- e) the time period for which the acceptance of the offer to enter into the Supply Arrangement is valid;
- f) the duration of the Supply Arrangement, including any available extension and the terms and conditions, including any fees applicable, of any such extension of the Supply Arrangement;
- g) the extent to which the price offered is inclusive of all costs. If the price offer does not include all costs, then those costs that are not included, together with how they will be charged, must be disclosed;
- h) my right to an applicable Standard Form Contract;
- i) my rights and obligations as prescribed by the Regulations following the cooling-off period;
- j) the name, street address and contact number of the person responsible for arranging Customer Connection Services for electricity;
- k) any requirements for me to pay security deposits and when such deposits will be payable;
- l) any penalties or charges that may be imposed on me for variation in load, early termination or otherwise (as applicable);
- m) my right to bring complaints to the Ombudsman;
- n) the existence of the Code and the fact that it is binding on Marketers;
- o) details of conditions relating to my entitlement to any cooling-off period;
- p) the expected date of commencement of the supply of Energy under the Supply Arrangement;
- q) notification that by signing a Supply Arrangement, I am providing written consent to transfer to the Supplier of my choice;

- r) any other information reasonably necessary for me to make an informed decision about whether or not to enter into the Supply Arrangement offered by the Marketer;
- s) where I am applying for supply under a Standard Form Contract, my right to enter into a negotiated contract with a retail supplier of choice;
- t) if the Supply Arrangement has been negotiated, the date on which I will receive a copy of the Supply Arrangement; and
- u) where requested, I have received the following information
  - i) all terms and conditions of any Supply Arrangement offered to me by the Marketer;
  - ii) my rights under the terms and conditions of any applicable Standard Form Contract;
  - iii) my entitlements to any concessions or rebates;
  - iv) the arrangements that are in place for competition in the supply of electricity and/or gas (if applicable) in the jurisdiction in which my premises are located; and
  - v) my rights and the Marketer's obligations under the Code.

**Signature**

**Date**