

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and  
Consumer Act 2010* (Cth) by Elgas Limited ACN  
002 749 260

December 2014

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## 1. Person giving the Undertaking

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- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Elgas Limited ACN 002 749 260 (**Elgas**) on behalf of itself and its subsidiaries.

## 2. Background

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### The parties to the proposed acquisition

- 2.1. Elgas is a major wholesaler and distributor of Liquefied Petroleum Gas (**LPG**). It uses a range of transport options and storage facilities to supply LPG in both cylinders and bulk to a variety of different customers throughout Australia. It owns and operates the Elgas Cavern, which is a major LPG import and storage facility in Sydney. Elgas also owns an extensive network of LPG depots throughout Australia.
- 2.2. Elgas is a member of the BOC Group of companies, which is owned by the Linde Group, an international gases and engineering company, with operations in over 100 countries worldwide.
- 2.3. Wesfarmers Kleenheat Gas Pty Limited ACN 008 679 543 (**Kleenheat**) is a major wholesaler and distributor of bulk and cylinder LPG for a variety of end uses in Australia. It owns a production facility in Perth and operates an extensive network of LPG depots throughout Australia. Kleenheat is a wholly-owned subsidiary of Wesfarmers Limited ACN 008 984 049 (**Wesfarmers**), a public company listed on the Australian Securities Exchange.

### The Proposed Acquisition

- 2.4. On 14 March 2014, Elgas, BOC Limited, Kleenheat and Wesfarmers Chemicals Energy and Fertilisers Limited (a division of Wesfarmers) signed an Asset Sale and Purchase Agreement pursuant to which Elgas will acquire 100% of Kleenheat's east coast LPG assets (**Proposed Acquisition**).

### The ACCC's review

- 2.5. On 10 April 2014, the ACCC commenced its public review of the Proposed Acquisition.
- 2.6. The ACCC undertook market inquiries and considered information provided by the parties to the Proposed Acquisition, industry participants and others. The purpose of the ACCC's inquiries was to assess whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act.

### The ACCC's competition concerns

- 2.7. The ACCC considered that, in the absence of the Undertaking, the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in certain markets for the distribution of non-automotive LPG in cylinder and in bulk.
- 2.8. The three major distributors of non-automotive LPG on the east coast of Australia are Elgas, Kleenheat and Origin Energy LPG Ltd (**Origin**). Kleenheat and Elgas are particularly close competitors in certain geographic areas. The ACCC was

concerned that the horizontal aggregation of two of the three largest distributors of non-automotive LPG would enhance the ability and incentive of the merged entity to raise prices and/or reduce the levels of service for the distribution of non-automotive LPG in cylinder and bulk markets.

- 2.9. The three major distributors currently each have extensive state-wide distribution networks, including through agent and/or dealer networks in metropolitan and regional areas. The aggregation of market shares between Elgas and Kleenheat would be particularly concentrated in New South Wales, the Australian Capital Territory and Victoria, resulting in the merged entity being the largest distributor by a significant margin in those states.
- 2.10. The Proposed Acquisition would also result in particularly high levels of concentration in parts of regional Victoria, regional New South Wales and the Australian Capital Territory.
- 2.11. The ACCC considered that smaller distributors would be unlikely to pose a sufficient constraint on the merged entity. The ACCC also considered that there are high barriers to entry and expansion, including:
  - (a) high capital costs required to establish a distribution network, including sunk costs, relative to the potential returns and long recoupment period
  - (b) a critical mass of customers required to support investment in a distribution network and to achieve economies of scale
  - (c) access to a competitive source of wholesale LPG which would allow new entrants to compete effectively with incumbent distributors
  - (d) high strategic barriers (whether real or perceived) for potential new entrants, or incumbents considering expansion.

#### **The Undertaking remedy**

- 2.12. Elgas does not consider that the Proposed Acquisition would be likely to substantially lessen competition in relation to the relevant markets for the distribution of non-automotive LPG in cylinders and bulk. Without admission, Elgas has offered this Undertaking to the ACCC pursuant to section 87B of the Act in order to address the ACCC's competition concerns in relation to the Proposed Acquisition.
- 2.13. After the Proposed Acquisition is completed, Elgas will be in a position to effect the divestiture of the majority of the Divestiture Assets pursuant to this Undertaking. However, pursuant to a side deed to the Asset Sale and Purchase Agreement between Elgas and Kleenheat, Kleenheat has certain obligations in relation to the Divestiture Assets post acquisition relating to third party consents, transitional services and technical assistance, and the transfer of personnel. In order to support this Undertaking, Kleenheat has also offered and the ACCC accepted an undertaking pursuant to section 87B of the Act.
- 2.14. The objective of this Undertaking is to address the ACCC's competition concerns as set out above that would otherwise arise as a consequence of the Proposed Acquisition. The Undertaking aims to achieve this objective by:
  - (a) ensuring that certain Kleenheat LPG distribution assets based in regional Victoria are divested to Origin (or to another Approved Purchaser if the divestiture does not occur within the Initial Sale Period);

- (b) ensuring that certain Kleenheat LPG distribution assets based in the ACT and regional New South Wales are divested to Renegade Gas Pty Ltd (**Renegade**) (or to another Approved Purchaser if the divestiture does not occur within the Initial Sale Period);
- (c) creating or strengthening Origin's (or an alternative Approved Purchaser's) position as a viable, effective, stand-alone, independent and long term competitor for the distribution of non-automotive LPG in cylinder and bulk by enhancing its presence in regional Victoria (including some areas across the border into New South Wales);
- (d) creating or strengthening Renegade's (or an alternative Approved Purchaser's) position as a viable, effective, stand-alone, independent and long term competitor for the distribution of non-automotive LPG in cylinder and bulk by enhancing its presence in regional New South Wales (including some areas across the border into Victoria) and the ACT;
- (e) ensuring that Origin and Renegade (or any other Approved Purchasers of the Divestiture Assets) have all the necessary related assets, personnel, transitional and other assistance and other rights to compete effectively with Elgas for the distribution of non-automotive LPG in cylinder and bulk;
- (f) maintaining the economic viability, marketability, competitiveness and goodwill of the Divestiture Assets to be divested prior to divestiture;
- (g) providing for the effective oversight of Elgas' compliance with this Undertaking; and
- (h) this clause 2.13(h) appears in clause 2 of Confidential Schedule 5.

### **3. Commencement of this Undertaking**

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3.1. This Undertaking comes into effect when:

- (a) this Undertaking is executed by Elgas; and
- (b) this Undertaking so executed is accepted by the ACCC

(the **Commencement Date**).

### **4. Cessation of Ongoing Obligations**

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#### **Withdrawal**

4.1. Elgas may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### **Revocation**

4.2. The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

#### **Waiver**

- 4.3. The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or amend the date by which any such obligation is to be satisfied.

### **Survival**

- 4.4. Unless and until this Undertaking is withdrawn in accordance with clause 4.1, clauses 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16 survive completion of the obligations in clauses 5, 6, 7, 8 and Confidential Schedules 4, 5 and 6.

## **5. Divestiture of the Divestiture Assets**

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### **Divestiture**

- 5.1. Elgas must, in accordance with this Undertaking, divest, or cause the divestiture of, the:
- (a) Kleenheat/Renegade Assets to Renegade Gas Pty Ltd (**Renegade**); and
  - (b) Kleenheat/Origin Assets to Origin Energy LPG Ltd (**Origin**).
- 5.2. Elgas must divest, or cause the divestiture of, the Divestiture Assets by:
- (a) the sale, assignment, transfer and/or licence of all of the:
    - (i) Kleenheat/Renegade Assets to Renegade; and
    - (ii) Kleenheat/Origin Assets to Origin,pursuant to the Approved Sale and Purchase Agreements and within the Initial Sale Period, otherwise clause 8 applies;
  - (b) the transfer or grant to the Approved Purchasers of all Consents pursuant to clauses 5.3 to 5.4;
  - (c) the transfer of any Transferred Personnel required pursuant to clauses 5.6 to 5.7;
  - (d) compliance with any Approved Transitional Technical Assistance Agreement required pursuant to clauses 5.8 to 5.10; and
  - (e) compliance with any Approved Transitional Supply Agreement required pursuant to clauses 5.11 to 5.13.

### **Consents**

- 5.3. Elgas must:
- (a) obtain or assist the Approved Purchasers to obtain as expeditiously as possible, all Consents as required before completion of the divestiture of the Divestiture Assets;
  - (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;

- (c) act in good faith in its negotiations with the Approved Purchasers in relation to obtaining any Consents;
  - (d) promptly pay the costs and expenses of any third party reasonably incurred in providing the Consents; and
  - (e) enter Approved Transitional Supply Agreements with the Approved Purchasers, or vary any existing Approved Transitional Supply Agreements as required by the Approved Purchasers, in relation to any goods or services that are required for the operation of the Divestiture Assets which may be affected by any failure to gain a Consent.
- 5.4. If, seven Business Days before completion of the divestiture of the Divestiture Assets, the Approved Purchasers fail to obtain or are unable to obtain one or more Consents, then Elgas must:
- (a) immediately provide to the ACCC in writing details of the:
    - (i) Consents that have not been obtained;
    - (ii) reasons why the Consents have not been obtained; and
    - (iii) information or material required to obtain the Consents.
  - (b) continue to do everything in its power to satisfy clause 5.3 as soon as possible, including after the completion of the divestiture of the Divestiture Assets (and until such time as clause 5.3 is satisfied).
- 5.5. Even if Elgas has complied with clause 5.3 to 5.4, it remains a breach of this Undertaking if Elgas is unable to effect the divestiture of the Divestiture Assets by reason of a failure to obtain Consents.

#### **Transferred Personnel**

- 5.6. At the option of the relevant Approved Purchaser, Elgas must transfer to the Approved Purchaser, or procure transfer to the Approved Purchaser of:
- (a) all employees; and
  - (b) all service providers under a contract for service;
- who are directly prior to the divestiture employed in the business directly related to the relevant Divestiture Assets and are, in the view of the Approved Purchaser, required for the Approved Purchaser to maintain, operate or conduct effectively the relevant Divestiture Assets and who consent to the transfer of their employment or contract for service to the Approved Purchaser (**Transferred Personnel**).
- 5.7. When fulfilling its obligations under clause 5.6, Elgas must:
- (a) not directly or indirectly discourage any Transferred Personnel from any obligations to provide services to Elgas.
  - (b) effective on the date of the divestiture of the relevant Divestiture Assets, release the Transferred Personnel from any obligations to provide services to Elgas;

- (c) effective on the date of the divestiture of the relevant Divestiture Assets, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the relevant Divestiture Assets or relevant Unsold Assets; and
- (d) not procure, promote or encourage the transfer of any of the Transferred Personnel from the relevant Approved Purchaser to Elgas for a period of six months after the completion of the divestiture of the relevant Divestiture Assets.

### **Technical Assistance**

- 5.8. At the option of the relevant Approved Purchaser, Elgas must supply to the Approved Purchaser, or procure supply to the Approved Purchaser, under Approved Transitional Technical Assistance Agreements, any Technical Assistance that is required by the Approved Purchaser in order to operate the relevant Divestiture Assets.
- 5.9. Elgas must ensure that any Approved Transitional Technical Assistance Agreements, and any renewal or extension of an Approved Transitional Technical Assistance Agreements, provide for the supply of Technical Assistance:
  - (a) on a transitional basis for a period that is nominated by the Approved Purchaser, and approved in writing by the ACCC; and
  - (b) at cost and otherwise on arm's length terms.
- 5.10. To avoid doubt, Elgas must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Technical Assistance Agreements. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Technical Assistance Agreement, the ACCC will have regard to the criteria set out in clauses 5.8 and 5.9.

### **Transitional Supply Agreements**

- 5.11. At the option of the relevant Approved Purchaser, Elgas must ensure the continued supply by Elgas to the Approved Purchaser, under Approved Transitional Supply Agreements, of non-automotive LPG required by the Approved Purchaser in order for the Approved Purchaser to be established or maintained as a viable, effective, stand-alone, independent and long-term competitor in the relevant markets for the distribution of non-automotive LPG in cylinders and bulk in connection with the relevant Divestiture Assets.
- 5.12. Elgas must ensure that any Approved Transitional Supply Agreements and any renewal or extension of any Approved Transitional Supply Agreements:
  - (a) are for a reasonable transitional period, to be nominated by the relevant Approved Purchaser and approved in writing by the ACCC;
  - (b) provide for the supply of non-automotive LPG at cost price; and
  - (c) are on such terms other than price which are no less favourable to the relevant Approved Purchaser than arm's length terms.
- 5.13. To avoid doubt, Elgas must seek prior written approval from the ACCC of any renewal or extension of any Approved Transitional Supply Agreements. Without



limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Supply Agreement, the ACCC will have regard to the criteria set out in clauses 5.11 and 5.12.

## **6. Approved purchasers**

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### **Purchaser approved at the time the Undertaking was accepted**

6.1. At the time this Undertaking was accepted, the ACCC considered information of the type prescribed in Schedule 2 to this Undertaking (**Proposed Purchaser Notice**) and approved:

- (a) Renegade as the Approved Purchaser of the Kleenheat/Renegade Assets; and
- (b) Origin as the Approved Purchaser of the Kleenheat/Origin Assets.

6.2. ACCC approval of Renegade as the Approved Purchaser of the Kleenheat/Renegade Assets and Origin as the Approved Purchaser of the Kleenheat/Origin Assets included approval of the:

- (a) Asset Sale Agreement between Elgas and Renegade dated 28 November 2014; and
- (b) Asset Sale Agreement between Elgas and Origin dated 28 November 2014, as the Approved Sale and Purchase Agreements.

6.3. The ACCC may revoke an Approved Purchaser's status as an Approved Purchaser if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

## **7. Divestiture Assets Protection**

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### **Protection of the Divestiture Assets**

7.1. From the Control Date, Elgas must not sell or transfer its interest, or any assets comprising part of, or used in, the Divestiture Assets (other than the sale of goods and services in the ordinary course of business) or make any Material Change, except in accordance with this Undertaking or (subject to the other terms of this Undertaking) as required to allow completion of the Proposed Acquisition.

### **Elgas' obligations in relation to the Divestiture Assets prior to completion of divestiture**

7.2. Clause 7.3 applies only if the divestiture of the Kleenheat/Renegade Assets and/or the Kleenheat/Origin Assets does not occur on the Control Date.

7.3. Without limiting this clause 7, Elgas must, from the Control Date until completion of the divestiture of the relevant Divestiture Assets, take all steps available to it to:

- (a) ensure that the businesses associated with the relevant Divestiture Assets are managed and operated in the ordinary course of business as fully operational, competitive going concerns and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the relevant Divestiture Assets at the Control Date;

- (b) minimise any risk of loss of competitive potential for the relevant Divestiture Assets;
- (c) continue to provide access to working capital and sources of credit for the businesses associated with the relevant Divestiture Assets in a manner which is consistent with the financing of the businesses associated with the relevant Divestiture Assets before the Control Date;
- (d) continue to provide administrative and technical support for the relevant Divestiture Assets in a manner which is consistent with the operation of the relevant Divestiture Assets before the Control Date and in accordance with any plans established before the Control Date;
- (e) continue existing Agreements relating to the relevant Divestiture Assets with customers, suppliers and/or other third parties that are in place at the Control Date;
- (f) renew or replace upon expiry Material Contracts for the provision of goods or services to the businesses associated with the relevant Divestiture Assets on commercial terms favourable to the businesses associated with the relevant Divestiture Assets.
- (g) maintain the supply of those goods and services related to the relevant Divestiture Assets to existing customers in a manner consistent with the supply of those goods and services as at the Control Date;
- (h) maintain the standard of manufacture, distribution, promotion and sale of those products which are related to the relevant Divestiture Assets as at the Control Date; and
- (i) carry out promotion and marketing of the products which are related to the relevant Divestiture Assets in accordance with any plans established before the Control Date.

#### **Personnel of Elgas**

- 7.4. Clauses 7.5 and 7.6 apply only if the divestiture of the Kleenheat/Renegade Divestiture Assets and/or the Kleenheat/Origin Divestiture Assets does not occur on the Control Date.
- 7.5. From the Control Date until completion of the divestiture of the relevant Divestiture Assets, Elgas will not:
  - (a) terminate or vary the terms of employment or engagement of any of the Transferred Personnel, or agree to do any of those things; and
  - (b) directly or indirectly procure, promote or encourage the redeployment of personnel necessary for the operation of the relevant Divestiture Assets as at the Control Date to any other business operated by Elgas.

- 7.6. As soon as practicable after the Commencement Date, Elgas must direct its personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with Elgas' obligations under this Undertaking.

#### **Elgas' ongoing obligations in relation to the Divestiture Assets**

- 7.7. To the extent Elgas has obligations in relation to the provision of technical assistance or continued supply pursuant to clauses 5.8 to 5.13 of this Undertaking in relation to the Divestiture Assets, Elgas must not sell, assign, transfer, and/or licence directly or indirectly any of the assets required by Elgas to fulfil such obligations without the prior written consent of the ACCC.

#### **Confidential Information**

- 7.8. Subject to clause 7.9, Elgas must not, at any time from the Commencement Date, use or disclose any confidential information about the Divestiture Assets gained through:

- (a) ownership and/or management of the Divestiture Assets; or
- (b) fulfilling any obligations pursuant to this Undertaking.

- 7.9. Clause 7.8 does not apply to information that Elgas requires to:

- (a) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements; or
- (b) carry out its obligations pursuant to this Undertaking;

provided such information is only used for that purpose and is only disclosed to those officers, employees, contractors and advisers of Elgas or its Related Bodies Corporate who need to know the information to carry out the permitted purpose.

### **8. Failure to divest the Divestiture Assets within the Initial Sale Period**

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#### **Divestiture of the Unsold Assets**

- 8.1. In the event that the divestiture of the Kleenheat/Renegade Assets to Renegade is not completed by the end of the Initial Sale Period, the Kleenheat/Renegade Assets become Unsold Assets and the provisions of Confidential Schedule 6 apply.
- 8.2. In the event that the divestiture of the Kleenheat/Origin Assets to Origin is not completed by the end of the Initial Sale Period, the Kleenheat/Origin Assets become Unsold Assets and the provisions of Confidential Schedule 6 apply.

## **9. Notification of key dates and ACCC requests for information**

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- 9.1. Elgas must notify the ACCC in writing of:
- (a) the anticipated date of the Control Date, at least five Business Days before that date;
  - (b) the anticipated date of the completion of the divestitures of the Divestiture Assets, at least five Business Days before those dates;
  - (c) the occurrence of the Control Date, within one Business Day of that date; and
  - (d) the occurrence of the completion of the divestitures of the Divestiture Assets, within one Business Day of those dates.
- 9.2. The ACCC may direct Elgas in respect of its compliance with this Undertaking to, and Elgas must:
- (e) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (f) produce documents and materials to the ACCC within Elgas' custody, power or control in the time and in the form requested by the ACCC; and/or
  - (g) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 9.3. Any direction made by the ACCC under clause 9.2 will be notified to Elgas, in accordance with clause 16.2.
- 9.4. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 9 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 9.5. Nothing in this clause 9 requires the provision of information or documents in respect of which Elgas has a claim of legal professional or other privilege.

## **10. Agreements and this Undertaking**

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- 10.1. Where there is an inconsistency between this Undertaking and any agreement between Elgas and any of Wesfarmers, Origin, Renegade or any of their Related Bodies Corporate relating in any way to the Divestiture Assets, this Undertaking shall prevail.

## **11. Disclosure of this Undertaking**

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- 11.1. Elgas and the ACCC agree that Schedules 3, 4, 5 and 6 will remain confidential until after the completion of the divestiture of the Divestiture Assets, save that:
- (a) the tables in clauses 3.9 and 4.8 of Schedule 4 (Employees) will remain confidential at all times; and
  - (b) Schedule 4 (including clauses 3.9 and 4.8) can be disclosed to Origin to the extent that it describes the Kleenheat/Origin Assets (including any relevant definitions), to Renegade to the extent that it describes Kleenheat/

Renegade Assets (including any relevant definitions) and to any other Approved Purchaser to the extent it describes the relevant Divestiture Assets to be acquired by that Approved Purchaser.

- 11.2. Elgas acknowledges that the ACCC may provide each Undertaking Appointment with a copy of this Undertaking which includes unredacted versions of Schedules 3, 4, 5 and 6.
- 11.3. Elgas acknowledges that the ACCC may, subject to clause 11.1:
- (a) make this Undertaking publicly available; and
  - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
  - (c) from time to time publicly refer to this Undertaking.
- 11.4. Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;
  - (b) permitted by section 155AAA of the Act;
  - (c) necessary for the purpose of enforcement action under section 87B of the Act; or
  - (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- 11.5. Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

## **12. Obligation to procure**

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- 12.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Elgas to take or refrain from taking some action, Elgas will procure that Related Body Corporate to take or refrain from taking that action.

## **13. No Derogation**

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- 13.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Elgas of any term of this Undertaking.
- 13.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Elgas does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

## **14. Change of Control**

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- 14.1. In the event that a Change of Control is reasonably expected to occur, Elgas must:

- (a) notify the ACCC of this expectation as soon as practicable; and
- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Elgas pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Elgas in writing that a section 87B undertaking under this clause is not required.

## **15. Costs**

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- 15.1. Elgas must pay all of its own costs incurred in relation to this Undertaking.

## **16. Notices**

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### **Giving Notices**

- 16.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Merger and Authorisation Review Division

**With a copy sent to:** [mergersucu@acc.gov.au](mailto:mergersucu@acc.gov.au)  
Attention: Director, Undertakings Compliance Unit  
Coordination and Strategy Branch  
Merger and Authorisation Review Division

- 16.2. Any notice or communication to Elgas pursuant to this Undertaking must be sent to:

Name: c/o Elgas Limited  
Address: PO Box 1336, Chatswood NSW 2067  
Email Address: [john.evans@elgas.com.au](mailto:john.evans@elgas.com.au)  
Attention: John Evans, Head of Elgas

**With a copy sent to:**

Name: c/o Ashurst Australia  
Address: Level 35, Grosvenor Place, 225 George Street,  
Sydney NSW 200  
Email Address: [liza.carver@ashurst.com](mailto:liza.carver@ashurst.com)  
Attention: Liza Carver, Partner

- 16.3. If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).

- 16.4. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

#### **Change of contact details**

- 16.5. Elgas must notify the ACCC of a change to its contact details within three Business Days.
- 16.6. Any notice or communication will be sent to the most recently advised contact details and subject to clauses 16.3 and 16.4, will be taken to be received.

## **17. Defined terms and interpretation**

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### **Definitions in the Dictionary**


- 17.1. A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
  - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

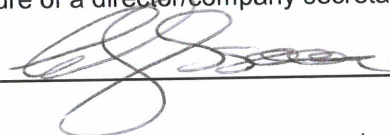
### **Interpretation**

- 17.2. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Elgas Limited ACN 002 749 260 pursuant to section 127(1) of the Corporations Act 2001 by:

Signature of director 

Signature of a director/company secretary 

Name of director (print)  
JOHN EVANS

Name of director/company secretary (print)  
COLIN ISAAC

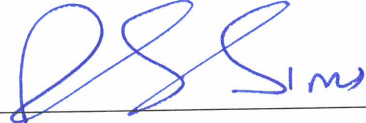
Date 15-12-14

Date 15.12.14

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 on:

17 December 2014

And signed on behalf of the Commission:



Chairman

Date 17/12/14



## Schedule 1 – Dictionary and interpretation

### 1. Dictionary

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**ACCC** means the Australian Competition and Consumer Commission.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**Approved Purchaser** means Renegade with respect to the Kleenheat/Renegade Assets, Origin with respect to the Kleenheat/Origin Assets, or any other person(s) approved by the ACCC as a purchaser of some or all of the Divestiture Assets in accordance with this Undertaking.

**Approved Sale and Purchase Agreement** means the contract(s) approved by the ACCC in accordance with the terms of this Undertaking, by which the Elgas will divest the Divestiture Assets to the Approved Purchaser(s) and Approved Purchaser(s) will acquire the Divestiture Assets from Elgas.

**Approved Transitional Supply Agreement** means any agreement, for the supply of goods or services (other than Technical Assistance) by Elgas to the Approved Purchasers, approved by the ACCC in accordance with the terms of this Undertaking.

**Approved Transitional Technical Assistance Agreement** means any agreement, for the supply of Technical Assistance by Elgas to the Approved Purchasers, approved by the ACCC in accordance with the terms of this Undertaking.

**Associated Entity** has the meaning given by section 50AAA of the Corporations Act.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of Control** means the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Elgas by Linde AG, or by a direct or indirect Holding Company of Linde AG to any other person or entity.

**Commencement Date** means the date described in clause 3.1 of this Undertaking.

**Control Date** means the date on which the Proposed Acquisition is completed.

**Consents** means any Government Consents or Third Party Consents.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Divestiture Assets** means the Kleenheat/Origin Assets and the Kleenheat /Renegade Assets.

**Elgas** means the entity referred to in clause 1.1 of this Undertaking.

**Entities Connected** has the meaning given by section 64B of the Corporations Act.

**Government Consents** means any consents from any government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Assets.

**Holding Company** has the meaning given by section 9 of the Corporations Act.

**Initial Sale Period** is defined in clause 1.1 of Confidential Schedule 5 to this Undertaking.

**Kleenheat** means the entity referred to in clause 2.3.

**Kleenheat/Origin Assets** means the assets described in clause 3 of Confidential Schedule 4 to this Undertaking and include land, contracts (including customer contracts) and associated goodwill, plant and equipment, motor vehicles, LPG cylinders, relevant records and inventory associated with the Kleenheat non-automotive LPG businesses in and around Swan Hill, Maryborough and Warrnambool (Victoria) but does not include Excluded Assets as defined in Confidential Schedule 4..

**Kleenheat/Renegade Assets** means the assets described in clause 4 of Confidential Schedule 4 to this Undertaking and include land, contracts (including leases and customer contracts) and associated goodwill, plant and equipment, motor vehicles, LPG cylinders, relevant records and inventory associated with the Kleenheat non-automotive LPG businesses in the areas in and around Dubbo, Griffith, Kempsey, Nowra, Stroud, Tamworth and Moama (New South Wales) and Canberra but does not include Excluded Assets as defined in Confidential Schedule 4.

**LPG** means liquefied petroleum gas.

**Material Change** means any change to the structure, attributes or extent of the Divestiture Assets that may affect, or impact on, the competitiveness of the Divestiture Assets.

**Material Contract** means any Agreement that is necessary for the operation of the Divestiture Assets.

**Origin** means Origin Energy LPG Ltd, ACN 000 508 369.

**Proposed Acquisition** is defined in clause 2 of this Undertaking.

**Proposed Purchaser** means a person named in a Proposed Purchaser Notice.

**Proposed Purchaser Notice** means the notice at Schedule 2 of this Undertaking.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

**Related Entities** has the meaning given to it by section 9 of the *Corporations Act 2001* (Cth).

**Related Parties** has the meaning given to it by section 228 of the *Corporations Act 2001* (Cth).

**Renegade** means Renegade Gas Pty Ltd, ACN 074 008 496.

**Subsidiary** has the meaning given by section 9 of the Corporations Act.

**Technical Assistance** includes advising on technical knowledge documentation, supporting the Approved Purchaser(s) on acquiring specific assets necessary for the ongoing use of the Divestiture Assets, providing staff with suitable experience and skills to assist and/or advise on technical issues, assisting in training for the Approved Purchaser(s)' staff, and providing guidance on regulatory and legal aspects relating to the transfer of or application for licences.

**Third Party Consents** means any Consent from any entity that is not a government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Assets.

**Transferred Personnel** has the meaning given to it in clause 5.6 of this Undertaking.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

**Unsold Assets** has the meaning given to it in clause 8 of this Undertaking.

**Wesfarmers** means Wesfarmers Limited ACN 008 984 049.

## **2. Interpretation**

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- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
  - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
  - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
  - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
  - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
  - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
  - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
  - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
  - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;

- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, Elgas will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

## Schedule 2 – Proposed Purchaser Notice Form

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Please note in relation to information given on or in relation to this form, giving false or misleading information is a serious offence.

The completed form with requested documents attached may be provided to the ACCC using the following method:

### Email

Subject line: Proposed Purchaser Notice – Section 87B undertaking in respect of Elgas' acquisition of the east coast LPG assets of Kleenheat

Address: [mergers@accc.gov.au](mailto:mergers@accc.gov.au)

Attention: Executive General Manager - Merger and Authorisation Review Division

With an email copy sent to:

Address: [mergersucu@accc.gov.au](mailto:mergersucu@accc.gov.au)

Attention: Director, Undertakings Compliance Unit Merger Coordination and Strategy Branch, Merger and Authorisation Review Division

- 1) In relation to the Proposed Purchaser, please provide the following information:
  - (a) Name of the Proposed Purchaser:
  - (b) Address:
  - (c) Contact name:
  - (d) Telephone number:
  - (e) Other contact details:
- 2) Please attach a submission containing the following information to this form:
  - (a) a description of the business carried on by the Proposed Purchaser including the locations in which the Proposed Purchaser carries on its business.
  - (b) details of the Proposed Purchaser's experience in the relevant market/s.
  - (c) the names of the directors of the Proposed Purchaser.
  - (d) details of any of the following types of relationships between Elgas and the Proposed Purchaser or confirmation that no such relationship exists whether within Australia or outside of Australia:
    - (i) Elgas and the Proposed Purchaser are Associated Entities;
    - (ii) Elgas is an Entity Connected with the Proposed Purchaser;
    - (iii) the Proposed Purchaser is an Entity Connected with Elgas;
    - (iv) Elgas and the Proposed Purchaser are Related Entities;
    - (v) Elgas and the Proposed Purchaser are Related Parties;

- (vi) any Related Party, Related Entity or Entity Connected with Elgas is a Related Party, Related Entity or Entity Connected with the Proposed Purchaser;
  - (vii) Elgas and the Proposed Purchaser have a contractual relationship or had one within the past three years, other than those attached to this form;
  - (viii) the Proposed Purchaser is a supplier of Elgas or has been in the past three years;
  - (ix) Elgas is a supplier of the Proposed Purchaser or has been in the past three years; and
  - (x) any other relationship between Elgas and the Proposed Purchaser that allows one to affect the business decisions of the other.
- (e) a section addressing the following factors, including any information adverse to the Proposed Purchaser, in the power, possession or control of Elgas:
- (i) whether the draft sale and purchase agreement is consistent with this Undertaking;
  - (ii) whether the Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
  - (iii) whether the Proposed Purchaser is of good financial standing;
  - (iv) whether the Proposed Purchaser has an intention to maintain and operate the Divestiture Assets as a going concern;
  - (v) whether the Proposed Purchaser is able to conduct the Divestiture Assets effectively; and
  - (vi) whether the divestiture of the Divestiture Assets to the Proposed Purchaser will address any competition concerns of the ACCC, including in relation to the likely long-term viability and competitiveness of the Divestiture Assets under the ownership of the Proposed Purchaser.

3) Please also attach to this form:

- (a) the finalised draft of the sale and purchase agreement for approval by the ACCC in accordance with this Undertaking.
- (b) the finalised draft of any technical assistance agreement for approval by the ACCC in accordance with this Undertaking.
- (c) the finalised draft of any transitional supply agreement for approval by the ACCC in accordance with this Undertaking.
- (d) any documents required to support the information provided by Elgas pursuant to this form.

## Confidential Schedule 3

**Confidential Schedule 4**

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**Confidential Schedule 5**

**Confidential Schedule 6**