PAYMENT DIFFICULTY FRAMEWORK
Revised Draft Decision

9 May 2017

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PART 1: HOW WE GOT TO WHERE WE ARE TODAY

Good morning and thank you for making the time to come along this morning. As you will have seen from my correspondence, we are planning on holding at least two more such gatherings, and more if needed.

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As you well know, we released a draft decision on a new payment difficulty framework last October. I'll be honest. I was completely caught off guard by the response to that proposal. I just didn't see it coming.

But today is a new day.

I hope that over the next few hours we can set aside the past as we present a completely revised proposal.

Of course, not everyone will agree with everything we're proposing. That is never going to happen; there are simply too many interests at play. But, I trust you will be

able to see the effort to which we have gone to respond to the concerns you raised in response to our first proposal.

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I am going to spend about 20 minutes describing the evolution of our thinking. I am going to do this because when I finish, we're going to distribute copies of our revised proposal for the Energy Retail Code. I want to ensure that when you start reading it, you have some context about: where we've come from, where we are today and how (and why) we reached this point.

After I finish my introductory comments, we'll have a break for 15 minutes to give everyone some time to read through the proposed Code amendments. I'll then hand over to David who will take us on a section-by-section walk through the Code. There's no need for you to take lots of notes because David's explanation and guidance is drawn from the Draft Decision. Likewise, I will be putting my speaking notes from today on our website, in full.

Once David has finished and we've had some question time, I'll return to take you through the Draft Decision. I will include a brief discussion of the implementation proposal as well as the work we've been doing on the proposal's benefits and costs.

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Given this project has been underway for almost three years, there are various places to start this reflection, but I only have a few minutes so I'll limit myself by starting on 31 January this year.

As you'll recall we gathered in this room three months ago to reflect on what we call "DD1" — or the first draft decision we released last October. It was a long meeting and … well … it was certainly pretty tense at the start. But as the day passed, I believe that people in the room started to believe — at least, I started to believe — that we could get through this. I sensed the day ended with a lot more hope in the room than when we started. Sure, there was still some mistrust and some scepticism. I get that

and I get and I appreciate the patience you have shown with us in the three months since the forum. And I again thank you.

Okay, so what did we realise after 31 January?

I think my very first comment to the team when we headed back to my office to debrief after the forum was that we had to strip out as much of the detail as we could from the Code. We had made grave error over the previous 12 months. As the team presented various ideas to you, and you responded by challenging us, we responded by trying to codify the solutions to all those challenges. Of course, that just invited more challenges from you which drove more codification from our side, and so on it went. **It was a slippery slope and down we slid — all the way to the point where we were trying to codify how the proposed assistance arrangements should integrate with your billing, payment and credit management cycles.**

Perhaps we could have eventually solved all these coding problems, but it would have taken two, three, who-knows-how-many years to get there. As I've written to you, **I believe customers deserved better than that**. So, on the spot, three months ago, we made a U-turn and committed ourselves to the simplest possible solution. It would be as simple as possible, but no simpler.

That was a liberating moment because it made us realise, we did not need so many layers of codified assistance to achieve the objectives of the scheme. We soon realised that we didn't need *Promise to Pay*, *Connection Support, Energy Costs*, *Pay as You Go* or the dreaded 66 per cent proposal.

As we started to strip away the layers, other things started to become clearer. The most glaring example was, what we called, *Immediate Assistance*. Although it was intended as a 'back stop' to prevent customers falling through the cracks, it risked becoming a first-stop measure. Shortly, you'll see how we are proposing to fix this problem — but let me assure you, *Immediate Assistance* is gone.

Another theme that came roaring at us on 31 January was the need to focus retailers and customers, and therefore the Code itself, on **recognising and encouraging engagement between the parties**.

It was after hearing that message that I realised we had broken my own first rule of economic regulation.

What we had done by providing this highly prescriptive framework, was to interject ourselves between retailers and their customers; customers and their retailers. Anyone who knows me and who knows my views about economic regulation will know how antithetical that approach is to everything I have done while at the Commission.

You see**, a highly detailed or prescriptive approach transfers responsibility away from the parties, particularly the regulated party. It transfers responsibility away from them and on to the regulator. The regulator becomes responsible for outcomes even though the regulator is not a party to those outcomes.** I believe that to be, just about, the most fundamental mistake we could have made — yet we made it.

We made that mistake because we got distracted with codifying process, rather than focussing on outcomes; we became focussed on process rather than engagement.

I take full responsibility for that mistake but I assure you we won't be making it twice.

This time, the code is designed around outcomes and it is designed around engagement — not that you'll see the word "engagement" anywhere in the Code. But as you will see, customer engagement is the trunk off which all assistance now hangs.

As we began deconstructing DD1, I had what was almost a religious revelation — admittedly, it was at 4 am while I was lying in a hospital bed listening to three other

blokes snoring — but it was an incredibly vivid moment (and the team have the emails to prove it).

We had built an entire framework around five different types of payment difficulty. I won't recap them all now but I want to remind you of the fifth category. This was the most severe type of payment difficulty that we had identified. It involves a customer who is in arrears who also can't pay for their on-going energy use. As a result, their arrears continue to grow. We said, here's the assistance that customer needs. We said, here's the assistance that customer needs — but, then we were silent.

In my hospital bed, I suddenly realised the conspicuousness of our silence. That silence was screaming at us — through the forum, through your submissions — and it was screaming the question: What happens to customers if the assistance measures don't work?

I suspect most of you are thinking to yourselves, "Like, derrr. What else does he think we were talking about!?"

But you need to understand**, until that moment we (you and us) were operating on different wavelengths. We were hearing your words, but not your message. You were hearing our replies, but not our misunderstanding.**

And when I say you, I'm not just talking about consumer and welfare groups. Retailers were also asking, "What happens?" Retailers were telling us that they have developed mechanisms for dealing with customers in such dire straits and that they did not know how to interpret our silence.

That's what I meant in my letter to you last month when I cryptically referred to a "conveyor belt to disconnection". Our process-focussed framework, plus our silence about what happens at the end of that process, appeared to create a conveyor belt that would see customers in payment difficulty shunted along until they were inevitably disconnected.

Whereas our first Draft Decision sought to use a customer's payment profile as the sole way of objectively determining payment difficulty, our new proposal recognises that on its own, this approach is often insufficient to determine the assistance that a customer needs. In designing the revised Code, we recognise that customers' financial and personal circumstances will often be fluid and unclear, even to the customer. Customers don't necessarily know which type of payment difficulty they are experiencing.

In other words, although there are a finite and objective number of payment difficulty types, **the assistance a customer needs also depends on their circumstances**.

Our first draft decision tried to 'hardwire' assistance to the type of payment difficulty being experienced by the customer. We now recognise that this approach was too rigid.

The framework needs flexibility. Retailers need the space to work with customers. In return, **customers need space to exercise their 'agency' when dealing with retailers**. 'Agency', now there's a term I didn't know until a few months ago.

And what this means for the regulator, and the Code, is that we must focus on outcomes, not processes. We must focus on outcomes, not process — and in doing so, we can provide flexibility.

But we must also realise that doing so restores the retailer discretion that our previous approach greatly constrained. It restores retailers' discretion and in doing so, **it returns responsibility for customer outcomes to the retailers (and away from the regulator)**. This is an important characteristic that our new proposal now has in common with the present Code — or version 11. Both provide discretion to retailers.

I'll return to this discussion about responsibility in just a few moments. Before I do, I want to remind you about one of the core findings of the Hardship Inquiry.

That inquiry found that retailers already have a very broad discretion about how they provide assistance to customers. Very broad. As a result, the outcomes observed for customers are unpredictable and lack consistency. Under today's arrangements (in ERC v.11), two otherwise identical customers can end up with very, very different outcomes in terms of the assistance they receive, the debt they accrue and the circumstances of any disconnection that follows.

Although we have significantly restored the opportunity for retailer discretion in the proposal being released today, the proposed Code will bind that discretion through customer entitlements to a set of minimum standards of assistance.

While we have removed most of the detail and most the process from our proposal, there was one bridge we could not cross. **We could not retreat from our proposal to establish minimum standards of assistance in the Code**. To do so, would have seen us … well … go in a complete circle and end up back at ERC v.11 (the Code in place today); the Code which our hardship inquiry showed to be deficient.

So like in the first draft decision, today's proposal continues to be structured around customer entitlements to a minimum standard of assistance. And, just so there's no misunderstanding, when we refer to minimum standards, we mean: **"Minimum standards that must be met, not just matched."**

What this means is this: **The draft code specifies various forms of assistance that must be made available to customers in payment difficulty** but as you'll see, there is now scope in the framework for *how* that assistance is made available.

I know some retailers would prefer that we develop minimum standards that only needed to be matched, rather than met. That is, they would prefer to use their existing programs as long as they were 'equivalent to' the minimum standards.

Like I said, we consider this would be a bridge too far. There are two reasons why. First, this would not solve the problem of the current regime and its failure to deliver consistent, predictable and equitable outcomes. The second reason we did not pursue this option was because of what it would imply for businesses and the

regulator. It would require the regulator to become an authorising agent for every retailer's policies, practices and programs, and every variation to every policy practice and program, run by every retailer. The regulatory burden for retailers, and the administrative burden for us, would be horrendous — and it would invite the regulator right into the gizzards of every retailer's customer service arrangements. You don't want that, and we don't want that.

To be clear, there is nothing preventing a retailer from doing more than the minimum standard. Quite the contrary. Therefore, we intend to monitor and report on industry practices. **We would like to create an environment where innovative and exemplary efforts are recognised and celebrated.**

So while we have done as much as we believe we can to restore retailer discretion, we have also sought to guide the use of that discretion through various measures. David will expand on the different measures shortly.

A moment ago, I mentioned that with discretion comes responsibility for how that discretion is exercised. And, with responsibility comes the need for accountability. That's why the new Code makes clear that retailers will be expected to maintain records that support the discretions they have exercised. Of course, in the event of a dispute these records will greatly assist EWOV (and the Commission, if necessary) to assess a retailer's compliance with the framework.

Further, with discretion comes the need to inform customers, their agents and EWOV, about how that discretion will be exercised. Financial hardship policies are the optimal vehicle for doing this.

In our original draft decision, we assumed financial hardship policies would become redundant if we codified customers' entitlements to assistance. We now accept that **financial hardship policies have a well-accepted role in the overall regulatory framework. We are proposing that they continue to be the primary vehicle for delivering assistance to customers and explaining how that assistance will be provided.**

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We have heard the message from all sides about how complicated and how varied payment difficulty can be. And we've heard how a process-driven regulatory framework cannot possibly deal effectively with that much complexity and variability. That's why **we have removed that prescription, but doing so, returns responsibility for managing that complexity and variability to retailers.**

But, **discretion is a powerful thing. It needs to be treated carefully and respectfully**; and as I just mentioned, **with discretion comes responsibility and with responsibility comes accountability**. Discretion does not lend itself to a tick-the-box approach to accountability — and all the more so when dealing with something as complicated and as varied as payment difficulty.

So what are we looking for when we say we need retailers to be accountable for the discretion that will continue to be vested in them by our proposed framework?

The answer is this: In return for the move back towards discretion from the heavily prescribed, and criticised, approach taken in our first draft decision, **we will expect retailers to be able to demonstrate that they have actively 'turned their minds' to the challenge of achieving the outcomes described by the framework**.

And certainly in the event that a retailer disconnects a customer, we will expect the retailer to be able to demonstrate how, within the minimum standards of the new framework, they have exercised their discretion to the benefit of the customer. That's why the Code makes clear the importance of record keeping.

Like I said, we have accepted the proposition put to us that discretion is the only way to deal with the complexity and variability of payment difficulty. But like I also said, the flip side of discretion is accountability and we recognise that in complex and variable circumstances, accountability does not lend itself to a tick-the-box approach to compliance.

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In the two minutes that remain, I want to provide you with a helicopter view of the new Code before we circulate it for you to read.

The first thing you'll notice is that it is half the length of the draft we produced last year. The second thing you will notice is that there are only three level of assistance requiring only three pages of text — compared to the earlier 6-7 tiers which required 11-12 pages.

We call these three new types of: Standard Assistance, Tailored Assistance and Default Assistance.

When you look at them you will see elements that look somewhat familiar. But my strong advice to you is to avoid trying to compare this version with the draft we produced last year. They are not comparable.

As I hope is now clear, **the philosophical underpinning of today's proposal is completely different from the one we released last year.**

In other words, I'm urging you to read this proposal as though the previous one never existed.

One thing you might notice when reading the Code, although it doesn't explicitly say this, is that the three types of assistance we're proposing correspond to the nature of engagement or interaction between a customer and a retailer. Standard Assistance operates when only a very light form of engagement is required — that is, customers need easy and early access to a bit of help. Tailored Assistance addresses all the circumstances where a more involved set of interactions are required to assist the customer successfully avoid disconnection. Default Assistance represents a last effort to encourage disengaged customers to engage (before the disconnection provisions take over).

The next thing I think you'll notice is that once you get beyond the three assistance measures, the rest of the code looks very familiar — but this time, for another

reason. It will look familiar because many of these provisions are drawn directly from the current version of the code — that is Version 11 (the harmonised version).

I also draw your attention to a completely new section, section 111A, which deals with the issue of accountability that I was discussing a moment ago.

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So, overall, the 'DNA' of the Code we are about to circulate has the DNA of the current Code, the harmonised version — but, it has been genetically modified. We have inserted into that DNA a new chain of nucleotides consisting of minimum standards for three types of assistance; three types of assistance that seek to reflect the different nature of the customer-retailer relationship.

— END: PART 1 —

PART 2: A BRIEF OVERVIEW OF THE DRAFT DECISION

I would like to spend the next 10 minutes, briefly taking you through the rest of the draft decision that we're releasing publicly at 1 pm.

The draft decision consists of 8 chapters.

Chapter 1 is a just a general introduction which needs no further explanation.

Chapters 2 and 3 are dedicated to setting the scene. Chapter 2 recaps the findings of the hardship inquiry and where possible, updates some of those findings with more recent data. We have also sought to express what we are doing (and why we are doing it) more clearly than in the past. Chapter 3 describes the evolution of the Commission's approach since our first draft decision. That chapter gives coverage to the stakeholder responses to our first proposal. It doesn't do so on a clause-by-clause basis. As will now be evident, that would be a futile exercise given that, as a result of your feedback, we have replaced that earlier proposal in its entirety.

Chapters 4 and 5 lay out our new proposal for the Code. Chapter 4 provides a descriptive overview of our new proposal. Much like my talk earlier this morning, it seeks to give readers a sense of the 'look and feel' of the new code without going into great detail. Chapter 5 on the other hand, is both an explanatory note and the progenitor of the draft guidance material we will publish with our final decision. It provides a clause-by-clause exposition of the Code.

Chapter 6 discusses the benefits and costs for customers and retailers of the new proposal. It explains the approach we've taken; and it reports our preliminary results.

The results reported in this chapter are supported by work undertaken for us by two consultants, ACIL Allen and KPMG. The consultants' preliminary reports will be available on our website from 1 pm. I urge you to scrutinise their work and provide additional information to support the finalisation of that analyses.

I'll return to the issue of costs and benefits in a moment.

Chapter 7 provides our proposed roadmap for implementing the new framework. It addresses a number of matters.

I want to highlight a few of the elements discussed in this chapter.

Implementation timelines: In order to facilitate a smooth adoption of the proposed framework, while also ensuring no unnecessary delays to customers receiving the assistance to which they will be entitled, we are suggesting that the new framework be implemented in phases. This would see the first tranche of the new assistance arrangements come into force on 1 January 2018, with the Code fully operational six months later.

Transition arrangements: We are proposing that customers who are already on a payment arrangement when the scheme commences (on 1 January 2018), will have their assistance 'grandfathered'. In other words, they will remain on their existing assistance arrangements. Once the scheme is fully implemented, retailers will be able to start moving customers across (on to tailored Assistance) if they are satisfied the customer will be able to repay any outstanding amounts within two years.

Guidance material: Under our *Energy Compliance and Enforcement Policy*, we are able to issue guidance material to assist retailers' understanding of how they are expected to comply with their regulatory obligations (in this case, the Code). This draft decision provides an initial version of that guidance and we will release a draft guidance note at the time of our final decision on the proposed code amendments. That draft guidance note will then be subject to further consultation.

Fact sheets and the Customer Advice Manual: Unlike our first proposal, we are not proposing to produce a Customer Advice Manual for release with our Final Decision. We will certainly produce fact sheets for our final decision to aid in understanding the decision, but production of a Customer Advice Manual will wait till after implementation of the framework has been completed. (And to be clear, we will

certainly be consulting on the production of the Customer Advice Manual — but that's a year away.)

Chapter 8 wraps up the report calling for submissions and laying out our timelines and consultation program.

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Before finishing and opening the forum for discussion, I want to just touch on an issue that caused consternation before and after the release of our first draft decision, namely, whether the Commission intended to conduct an analysis of the costs and benefits of its proposal. Some stakeholders suggested we needed to be clearer about what we are trying to achieve; and what's the problem we're trying to fix?

These are all fair questions and they are addressed in the new draft decision. But, I want to briefly reflect on these issues before I finish- today because I think context matters, and, in hindsight, perhaps I (we) failed to convey that context clearly enough over the last year.

To do so, let me first answer the question: What are we trying to achieve?

That question is answered in the final report of the Hardship Inquiry, but admittedly, we didn't necessarily do it very succinctly and it tended to get lost in a much broader discussion. Therefore, in the new draft decision we state clearly that the outcome we are seeking is that:

> ***Customers anticipating or in payment difficulty can obtain equitable access to predictable, consistent and effective assistance.***

In which case, the problem we are trying to solve becomes:

Customers anticipating or in payment difficulty have not been gaining equitable access to predictable, consistent and effective assistance, therefore, disconnection has not been a measure of last resort.

where "last resort" is both a policy and legislative expectation regarding disconnection — as stated in the terms of reference for our Hardship Inquiry and as stated in the *Electricity Industry Act* and the *Gas Industry Act* 2001.

So, if this is the problem, then what difference are we trying to make by virtue of the new payment difficulty framework? What outcomes are we expecting?

In the interests of time, I won't describe these outcomes now, but they are clearly articulated in the draft decision.

Having laid out the problem to be solved, and the outcomes to be achieved, the draft decision proceeds to identify and estimate the benefits and costs for customers and retailers.

In today's draft decision, we provide a preliminary assessment of the benefits and costs associated with our proposal, as required by the *Essential Services Commission Act*. A final analysis of the benefits and costs will be presented in our final decision.

I know, despite our assurances, there has been some angst about whether the Commission would assess the impacts of its proposal. I regret that we never made it clearer that this is precisely what we have been doing since, well, since the day we started the hardship inquiry — and certainly all through last year, and the forum on 31 January.

While it may not have been framed in these terms, our consultation processes represented 'impact assessment in real time'. Rather than treating policy development, impact assessment and consultation as three mechanical steps with one step following the other, we sought to bring them together in a more integrated way. Whether we did it as well as we could have, or whether we did it as clearly as

we could have, or whether we did it as rigorously as we could have — well, you'll have your own views about that. But that's what we were doing.

We have been 'throwing out' ideas for the last three years and relying on your responses to inform us about the merits, the impacts, the benefits and the costs of those ideas. Sure, we didn't attach figures to those impacts — but we didn't need to.

It was through all of our discussions, and through your submissions, that we sought to draw on your judgement and your expertise — including about the costs and benefits of any proposal, even without the numbers — to guide us about what was and wasn't reasonably possible.

That's why so many ideas have come and gone over the last three years — most notably, that's why our entire first draft decision has come and gone. We developed ideas; and we tested them. We were assessing their merits in real time.

I appreciate this has sometimes looked a little chaotic but I hope you can see that what we have actually been doing is assessing the merits, the impacts, the benefits and the costs of different ideas over the *entire* course of this project. We haven't treated cost-benefit analysis as a box to tick in some regulatory process. You should expect more of us than that. I certainly hold ourselves to higher standards than being mere 'box tickers'.

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So *that* is how we arrived at the proposal that we are releasing today and *that* is how we will conclude this project over coming months. Impact assessment in real time. We rely on you and your judgements as much as any spreadsheet to help in our understanding of the impacts of our proposal.

— END: PART 2 —