

Energy Compliance and Enforcement Policy: Guidance note - Payment difficulty and disconnection

Final decision

22 December 2017

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1. Introduction

Payment difficulty framework

On 10 October 2017, the commission published its final decision on the new payment difficulty framework which will come into effect on 1 January 2019. The new payment difficulty framework establishes the protections the commission considers are necessary to assist Victorian residential customers anticipating or facing payment difficulty, to avoid or repay arrears, and ensure that disconnection for non-payment of a bill is a measure of last resort.

The payment difficulty framework is designed to address the problems with the current framework, in particular the continued accrual of unmanageable arrears, and the inability to ensure that disconnection is a last resort.

The commission has a statutory objective to promote protections for customers, including assisting customers who are facing payment difficulty¹. We also have statutory obligations to promote better practice to facilitate continuity of energy supply², to have regard to community and legislative expectations that energy supply will not be disconnected solely because of a customer's inability to pay³, and to the principle that disconnection should be a last resort.⁴

In keeping with these statutory obligations, the purpose of the payment difficulty framework is:

to provide customers facing payment difficulty with a set of minimum entitlements to assistance to avoid or repay arrears, and ensure that disconnection for non-payment of a bill is a measure of last resort.

Energy Retail Code

The Energy Retail Code (the Code) has been amended to provide a set of clear customer entitlements to the minimum standards of assistance afforded by the payment difficulty framework.

¹ Section 10(c) Electricity Industry Act 2000 (Vic) and section 18(c) Gas Industry Act 2001 (Vic).

² Section 42(b) Electricity Industry Act 2000 (Vic) and section 48F(b) Gas Industry Act 2001 (Vic).

³ Section 45(2)(c) Electricity Industry Act 2000 (Vic) section 48I(c) Gas Industry Act 2001 (Vic).

⁴ Section 45(2)(d) Electricity Industry Act 2000 (Vic) section 48I(d) Gas Industry Act 2001 (Vic).

A new Part 3 has been inserted to set out the minimum standards of assistance to which residential customers anticipating or facing payment difficulties are entitled, so that disconnection of a residential customer for not paying a bill is a measure of last resort. The customer outcomes expected by Part 3 include:

- providing residential customers with an entitlement to minimum standard forms of assistance to help them avoid getting into arrears
- providing residential customers with an entitlement to minimum standards of flexible and practicable assistance that makes it easier for them to pay for their on-going energy use, repay their arrears and lower their energy costs
- setting out the minimum standards of assistance to which residential customers anticipating or facing payment difficulties are entitled, so that disconnection for not paying a bill is a measure of last resort.

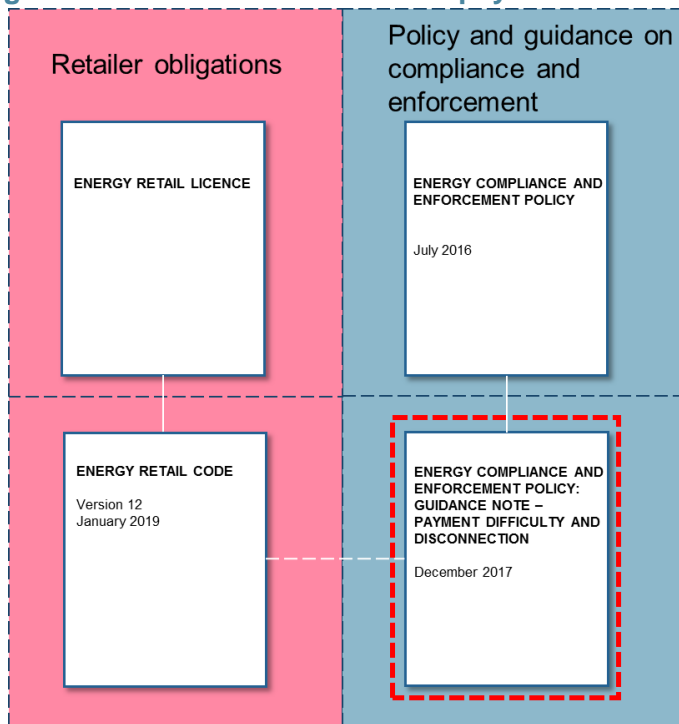
A series of consequential and related amendments to other sections of the Code that provide protections for customers facing payment difficulty have also been made. Under the new framework, a retailer may only consider disconnecting a customer for non-payment of a bill if they have provided the customer with the assistance to which they are entitled and have met all of their obligations to the customer under the Code.

Guidance note

The new payment difficulty framework deliberately places responsibility on retailers to judge the most effective way of delivering customers' entitlements to assistance, in a way that best meets the purpose of the framework. The amended Code does not provide a detailed set of rules for how this is to be achieved. Payment difficulty is too varied and too complex for every circumstance to be specifically dealt with in the Code. Instead, we have set out how the commission would approach a question of potential non-compliance with the new framework in a guidance note. The guidance note is made under section 3.2(c) of our *Energy Compliance and Enforcement Policy* and also constitutes a guidance note for the purposes of clause 73(b)(iv) of the Code.

The following diagram illustrates how the guidance note fits into the architecture of the new payment difficulty framework.

Figure 1.1 Architecture of the new payment difficulty framework



Source: Essential Services Commission

Compliance with the Code is a condition of all energy licences. The *Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection* explains how the clauses contained in Part 3 and 6 of the Code interact. It details how the commission expects the principles and objectives of the payment difficulty framework to be applied, to deliver better outcomes for customers. It includes examples that the commission considers to be compliant and non-compliant conduct in a range of customer scenarios, along with examples of better practice. It does not attempt to address every possible scenario. The *Energy Compliance and Enforcement Policy* outlines for energy licensees, holders of energy licence exemptions and Victorian energy consumers, our approach to promoting and enforcing compliance with Victorian energy legislation, including compliance with licence conditions.

The purpose of the guidance note is to outline for energy retail licensees, holders of energy licence exemptions and Victorian energy customers, our approach to promoting and enforcing compliance with Part 3 of the Code, and associated provisions that relate to the protection of customers anticipating or facing payment difficulty. It does not create any additional obligations on retailers.

Where we consider that retailers have in good faith relied on this guidance note, by acting consistently with 'our expectations of compliance' and the 'examples of compliant conduct' included in this note, we will not take enforcement action. The examples in this guidance note are illustrative only and are not exhaustive.

Disclaimer

In the event of any inadvertent inconsistency between this final decision and the guidance note, the guidance note prevails.

2. Feedback on the draft guidance note

2.1. Submissions to the draft guidance note

A draft guidance note was released for consultation in accordance with our charter of consultation⁵ on 10 October 2017. The purpose of this stakeholder consultation was to seek feedback from all interested parties on all aspects of the document, but in particular the clarity and completeness of the:

- description of obligations
- explanation of how to interpret obligations
- examples provided of obligations in operation and better practice.

Eleven parties made non-confidential submissions, these were:

- AGL
- Alinta Energy
- Australian Energy Council
- Consumer Action Law Centre and Brotherhood of St Laurence
- Energy and Water Ombudsman (Victoria)
- EnergyAustralia
- Momentum Energy
- Origin Energy
- Red Energy and Lumo Energy
- Simply Energy
- Victorian Council of Social Service.

The submissions received provided the commission with insight into the use and application of the guidance note by energy retailers, consumers, and their advocates. This feedback was provided in many submissions through a detailed section by section explanation of questions and potential issues. In some instances, suggestions for improvements were also provided. In addition to feedback on where the guidance note could be improved, some stakeholders also provided their support for both the document as a whole, and particular sections.

⁵ Essential Services Commission 2012, *Charter of Consultation and Regulatory Practice*, August.

This detailed feedback identified both strengths and limitations of the draft document, and enabled the commission to understand where and how the guidance note could be amended to ensure that it is a meaningful document for a range of stakeholders.

In addition to seeking formal submissions, the commission also held two stakeholder workshops and a series of one-on-one meetings with stakeholders to discuss both their submissions and our potential responses to the issues identified.

The feedback received centred on five key issues:

1. Document purpose, audience and length
2. Additional obligations
3. Entitlements to assistance:
 - a) missed payments
 - b) assistance suspended
 - c) disconnection/reconnection
4. Using best endeavours
5. Transition of existing hardship customers

A number of other issues were raised that the commission has sought to address where appropriate.

Table 1.1 summarises the key milestones of the consultation process.⁶

Time	Consultation step
10 October 2017	Stakeholder briefing Presentation of final decision, version 12 of the Energy Retail Code and release of draft guidance note for consultation.
24 October 2017	Stakeholder workshop 1 The purpose of the workshop was to provide stakeholders with the opportunity to ask questions and provide initial comments and suggestions on the draft guidance note.
8 November 2017	Submission period ended
30 November 2017	Stakeholder workshop 2 The purpose of the workshop was to provide an overview of the key issues raised during the consultation period and work collaboratively to develop the commission's potential responses.
20 December 2017	Release of guidance note

⁶ One-on-one meetings were also held with stakeholders throughout the consultation period.

In the following sections we explain each of the key issues raised during consultation, provide examples of the range of feedback we received, and set out how we have responded to the feedback.

2.2. Document purpose, audience and length

There were significant differences in the views of stakeholders regarding the purpose, audience and length of the draft *Guidance note – Payment difficulty and disconnection*. Many retailers held the view that the document should be primarily a resource for retailers, and should be limited to providing guidance on areas where there was ambiguity in the Code. On the other hand, community groups and their advocates expressed support for a comprehensive document that could be used by the full range of stakeholders involved in assisting customers facing payment difficulty.

2.2.1. Document purpose

Simply Energy summarised the view of most retailers that the guidance note should primarily be a resource for retailers:

This is guidance for retailers who are responsible for implementing these requirements which is the outcome is intended to be. If retailers are unable to determine how and what needs to be achieved then there cannot be any positive outcomes for consumers.⁷

Further, the Australian Energy Council believed that there is an incompatibility between the needs of retailers, and those of customers and their representatives:

In an ideal world, the Guidance Note would meet all needs. However, we can see that the Guidance Note as a relatively short and targeted document is not compatible with the Guidance Note as a comprehensive clause-by-clause manual.⁸

The Consumer Action Law Centre and Brotherhood of St Laurence set out their support for the guidance note as a resource for all stakeholders, and the benefit of non-legalistic, plain English explanations of the Code obligations:

⁷ Simply Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 1.

⁸ Australian Energy Council 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2.

... the Guidance Note must serve a variety of audiences, not simply retailers. It is important that all who may be impacted by the new framework are able to refer to a non-legalistic, plain English document to understand their rights and obligations under the payment difficulty framework.⁹

The Energy and Water Ombudsman (Victoria) also supported the guidance note as a valuable tool to assess disputes:

The guidance will be valuable for EWOV in conciliating fair and reasonable complaint outcomes where customers are in payment difficulty. The Guidance Note will also be useful and instructive when EWOV assesses retailer compliance with the *Code* prior to disconnecting a customer.¹⁰

2.2.2. Document length

Stakeholder feedback

There were also significant differences in the views of stakeholders regarding the length of the guidance note. Many retailers considered that the document was too long, and that restating the Code obligations in the guidance note decreased its usability. However, some retailers sought the inclusion of additional examples to provide clarity on the commission's expectation of customer outcomes in different scenarios. Consumer groups supported the comprehensive nature of the document given that it needs to provide guidance on a new regulatory framework.

Momentum Energy suggested that the document would be more accessible if it was less comprehensive:

Reductions to the overall length of the Guidance Note would increase its usability. These could be reduced relatively simply by removing duplication and restatement of obligations which do not require any additional explanation.¹¹

⁹ Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2.

¹⁰ Energy and Water Ombudsman (Victoria) 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 1.

¹¹ Momentum Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2.

On the other hand, the Consumer Action Law Centre and Brotherhood of St Laurence supported the comprehensive nature of the document:

...we contend that detailed guidance is not unwarranted when new reforms are being bedded down...¹²

The use of examples in guidance notes issued by the Australian Securities and Investments Commission was considered a useful model by a number of stakeholders.

Alinta Energy supported this approach:

Alinta Energy also draws attention to the sheer volume of practical examples within the ASIC Guidance Notes. It is Alinta Energy's view that more practical examples within Guidance Note that detail customer circumstances and retailer actions; would be far more beneficial than re-wording the Code and using different language to express the requirements within the Code.¹³

Significantly, many stakeholders provided valuable feedback on how to improve the accessibility of the guidance note. The importance of good design and structure was acknowledged as essential in addressing concerns of ambiguity. Specifically, better cross-referencing between sections was suggested to help improve understanding of both the Code and guidance note.

For example, Red Energy and Lumo Energy suggested that:

Without an in depth knowledge of all elements of the ERC, and each section of the guidance note, this nuance would be lost.... We strongly recommend that when the plain English re-draft also relates to guidance provided in another section of the guidance note, the link is specifically highlighted in each section.¹⁴

¹² Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2

¹³ Alinta Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5

¹⁴ Red Energy and Lumo Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2

Stakeholders further explored ways to make the guidance note more accessible at the stakeholder workshop held on 30 November. Suggestions included:

- describing the intended outcome at the beginning of each section
- removal of repetition
- the addition of simple case studies and examples of customer engagement
- inclusion of examples showing non-compliance (providing that they do not create additional obligations, or appear to water down existing obligations or entitlements).

How we have responded to stakeholder views

The commission has decided that given the new payment difficulty framework is a major reform to the Code, the guidance note should be comprehensive to assist all stakeholders involved in ensuring that customers receive their new entitlements. In forming this view the commission had particular regard to the role that the guidance note could play in helping to resolve customer disputes.

The commission recognises the need to make the guidance note as useable as possible, and has therefore made a series of changes to improve its accessibility. These include streamlining provisions, the use of sign posts and removal of unnecessary duplication between sections.

The guidance note has been streamlined to include all of the guidance relevant to each form of assistance in the one section, substantially reducing the need to cross-refer to different sections of the document.

We have introduced a standard structure within each section to clearly ‘sign post’ our guidance on each provision of the Code. Where relevant for a particular provision, the guidance describes some or all of the following:

- a) the desired outcome for the customer
- b) an explanation of how the Code aims to achieve that outcome
- c) our expectations of compliance
- d) examples of compliant conduct
- e) examples of non-compliant conduct
- f) examples of better practice.

In response to feedback from retailers on the need for additional examples to illustrate the customer outcomes the commission would expect in more complex cases of payment difficulty, we have inserted some examples in the guidance note. These additional examples have added to the length of the document. However, we consider that adding these examples, along with the new structure will improve usability.

Feedback on the draft guidance note

2.3. Additional obligations

Many retailers considered that the draft guidance note created additional obligations on retailers that are not contained in the Code, and would result in greater implementation costs for retailers than what was forecast in the impact analysis during the consultation on the new payment difficulty framework. However, consumer groups considered that the guidance note reflected the commission's expectations of retailer conduct to comply with the Code.

Stakeholder comments

EnergyAustralia considered that the draft guidance note expanded on the obligations of the Code in its explanation of compliant conduct, and raised concerns about the likelihood for these costs to be passed onto consumers:

Due to the complex and additional requirements of assistance set out under the Guidance Note, we will not be able to implement the minimum standards of the PDF, simply and through existing technology applications as we had intended. This creates the need for more staff and the loss of efficiencies that support lower costs for customers.¹⁵

Conversely, the Consumer Action Law Centre and Brotherhood of St Laurence disagreed that new and un-costed requirements had been introduced in the draft guidance note:

... we are not convinced that the Guidance Note imposes any obligations upon retailers that are not already present in the newly revised ERC.... We categorically reject the claim that parts of the Guidance Note create additional costs not covered in the consultation for the ERC.¹⁶

Nevertheless, stakeholders across the board called for the 'musts' in the guidance note to more clearly align with obligations in the Code.

To address any inconsistencies between the guidance note and the Code, the Australian Energy Council called for a review of all sections that use language suggestive of an obligation:

¹⁵ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2.

¹⁶ Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 2.

..... any clause that says a retailer 'must', or is 'required' to do something needs to be viewed critically about whether the content instead belongs in the Retail Code (in most cases it is already there) or should be deleted or softened in tone, including perhaps suggesting that an action may be 'best practice' (and therefore additional assistance).¹⁷

Commission response

The guidance note is published under section 3.2(c) of the commission's *Energy Compliance and Enforcement Policy*. The guidance note is not enforceable and therefore does not create any additional obligations on retailers.

However, as the guidance note sets out the commission's expectations of compliant and non-compliant conduct in a range of scenarios, the guidance note must be fully consistent with the Code. We recognise that the draft guidance note contained examples of compliant conduct that if followed by retailers could go beyond the standard required by the Code.

We have reviewed all of the examples provided by stakeholders in their submissions and removed inconsistencies between the draft guidance note and the Code. We have made clear our expectations of compliance, examples of compliant conduct and non-compliant conduct. Additionally, where relevant, examples of better practice have been added which demonstrate how retailers may provide customers with assistance greater than required by the Code.

In response to stakeholder feedback on providing guidance on where there are interactions between different Parts of the Code we have included examples of:

- how a retailer can act fairly and reasonably in light of a customer's circumstance when providing tailored assistance
- when a retailer needs to provide timely, clear and unambiguous information to a customer about their entitlements to assistance
- how to act fair and reasonably in light of the customer's circumstances when considering the actions of the customer to address their arrears.

¹⁷ Australian Energy Council 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5 – 6.

2.4. Entitlements to assistance

Many stakeholders were concerned that because a retailer is required to take the customer's circumstances into account and act fair and reasonably in light of those circumstances, this could result in the indefinite extension of entitlements for an engaged customer under the new framework. This has been referred to as the issue of 'loops' by some stakeholders.

Stakeholders sought guidance on the customer's entitlements to assistance when:

- an engaged customer misses payments
- an engaged customer makes partial or late payments
- a customer re-engages with a retailer following suspension of assistance; and
- a customer is reconnected following a disconnection.

2.4.1. Missed payments

Stakeholders sought guidance on when a customer's assistance could be suspended following a series of missed payments.

Stakeholder comments

Some retailers raised concerns during consultation that the guidance note suggests customers can continually miss scheduled payments, and retailers would be obligated to continue accepting revised payment arrangements.

EnergyAustralia suggested that guidance was needed on the issue of a customer repeatedly proposing new payment arrangements, but continuing to miss payments:

Take for example, the situation where a customer has proposed a TA plan, but does not make a payment. In this case, must a retailer make efforts over a period up to 21 business days to contact the customer prior to issuing the disconnection warning notice (DWN)? Or can the retailer issue the DWN shortly after the payment instalment is missed and then carry out the best endeavours for up to 21 business days?... a disengaged customer on TA2 could repeatedly make new payment arrangements under 82(2) for an indefinite period if they were also allowed to extend TA2 under 4.9.11.¹⁸

The Consumer Action Law Centre and Brotherhood of St Laurence emphasise that this issue hinges on whether the payment arrangement is suitable to the customer circumstance:

¹⁸ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 34.

Understanding a customer's circumstances and being flexible to resolve issues by responding to such circumstances is essential to achieving the purpose of part 3 of the Code and the best outcome for people in payment difficulty and their retailers. The guidance in 4.12.(7)-(9) is useful for achieving such outcomes.

Under 4.12.10, 4.13.2 and 4.13.5 the onus lies with retailers to actively invite alternative or revised assistance where repayment arrangements don't go to plan. This is wise, and the paragraphs well drafted. The rigidity of the current framework has meant that disconnection is not a last resort, and is too often implemented where circumstances have changed or where payment arrangements were too ambitious in the first place.¹⁹

At the workshop held on 30 November, stakeholders discussed what would be fair and reasonable when a customer misses a scheduled instalment. Key points made were the need to have regard to the customer's circumstances, and to work with the customer to revise the payment arrangement to make it sustainable, taking into account the customer's payment history.

Commission response

The commission acknowledges that any decision to suspend the assistance provided to a customer is a difficult one. Retailers are required to provide continued assistance to a customer unless the customer has refused or failed to take reasonable action towards paying for their ongoing energy use and repaying their arrears, or if the customer is not facing payment difficulty (clause 83).

Retailers need to use their judgement about what constitutes 'reasonable action' by a customer. By definition, a customer facing payment difficulty has an increased risk of missing payments. Therefore; the guidance note makes it clear that the commission considers that failure to make individual payments would not justify suspending assistance.

However, the Code is clear that reasonable action must be taken by the customer to address their payment difficulty. The guidance note also makes it clear that repeated consecutive failures to make payments proposed by the customer may, absent other circumstances, justify suspending assistance.

¹⁹ Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 9.

2.4.2. Partial or late payments

Stakeholders expressed interest in further guidance on the commission's expectations of retailers in responding to ongoing partial or late payments.

Stakeholder comments

It was proposed that problems are created in the guidance note by the suggestion that retailers must accommodate a customer's under and over-payments, as well as late payments. This requirement for flexibility in dealing with deviations from payment plans was explained to be costly and excessive given that customers are able to negotiate the payment amount at any time during their two year entitlement to assistance.

EnergyAustralia sought to describe the implications of catering for this flexibility in their systems and processes:

This is a complex requirement to build into IT systems or processes. i.e. IT systems would have to be configured differently for customers on the PDF to allow for a specific threshold of underpayment and late payment before flagging the payment is late. Alternatively, all underpayments or late payments for PDF customers could be flagged for manual follow up.²⁰

Further, EnergyAustralia suggested that it would be challenging to assess whether these deviations are fair and reasonable:

The people reviewing would have to assess and determine if the late or underpayments were reasonable or not. These and any other solutions we can think of are all costly to build or operate as a minimum standard.²¹

Support for the guidance on the need for retailers to respond flexibly to partial or late payments was nevertheless voiced by the Victorian Council of Social Service:

Clause 4.14.4 of the guidance note provides information about what constitutes 'reasonable customer action', which includes occasional partial payments and marginally late payments.

²⁰ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 14.

²¹ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 14.

We support this guidance, which will encourage ongoing customer engagement and help to avoid assistance being suspended for trivial reasons.²²

Commission response

The commission acknowledges concerns raised by some retailers, but as we have said since the *Hardship Inquiry Final Report*, we expect retailers to demonstrate flexibility in the delivery of assistance under the payment difficulty framework. The commission considers it reasonable that a customer in payment difficulty may at times pay late or make a partial payment by virtue of their payment difficulty, and that retailers should have some tolerance for this. Additionally, a retailer must have regard to the customer's circumstances and act fairly and reasonably at all times in providing assistance to the customer. We do not consider it unreasonable action for customers to make occasionally late or partial payments for the purposes of clause 83.

As described in the guidance note, where a retailer knows that a customer is regularly paying late or making partial payments, we consider it better practice for the retailer to contact the customer to revise the payment arrangement, including the frequency, due dates and/or amounts of payments in light of a customer's circumstances. This retailer action would be consistent with the objectives of Part 3 as it will assist the customer with maintaining a sustainable and affordable payment arrangement, and will help prevent accrual of arrears and the possible disconnection of supply.

2.4.3. Assistance suspended

Retailers were also concerned about what assistance a customer would be entitled to receive following suspension, in particular how to recalculate a payment plan in light of the two year entitlement afforded by the Code.

Stakeholder comments

Retailers sought guidance on a customer's entitlements following the suspension of assistance, in particular the impact of suspension on the two year timeframe for entitlements.

Origin Energy was concerned that the draft guidance note implied that a customer who re-engages after a period of suspension would be entitled to two more years of assistance that went beyond clause 79(1)(a) of the Code. It provided as an example:

²² Victorian Council of Social Service 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 3.

...a customer could have received assistance for six months, become disengaged, but then subsequently re-engaged with their retailer... (W)e are concerned that the Guidance has created a new legal obligation by requiring another two years beyond clause 79(1)(a) of the Code. Origin does not support this being in the draft Guidance; any extension of assistance beyond two years is a retailer discretion.²³

AGL similarly expressed concerns about additional two year payment plans being afforded to customers that have had their assistance suspended:

Clause 9.10.5 appears to also contradict the Commission's previous advice (e.g. section 9.10.3 and 4.6.6) and allows a customer to propose a revised payment arrangement of up to two years following the suspension of previous assistance.²⁴

Some attendees at the workshop on 30 November also stated that if a customer re-engages after assistance is suspended and they have received a disconnection warning notice, that it would be fair and reasonable for a retailer to discuss another payment arrangement, following a review of their circumstances and account history. Other stakeholders suggested that the retailer should be able to request partial payment of the missed payment plan before re-assessing the payment arrangement, or just re-establish the payment arrangement based on the time the customer has left of the 24 month entitlement.

Commission response

The Code provides for a period of assistance for customers facing payment difficulty of up to two years. The Code also anticipates that customers facing payment difficulty may need to change their payment arrangements to ensure that they remain sustainable in light of changing circumstances. If a customer has had their assistance suspended, they remain entitled to assistance provided they re-engage and start taking reasonable action to pay for their energy use and repay their arrears.

If a customer has had their assistance suspended after six months for failing to take reasonable action, they are entitled to revise their payment arrangements by making payments in instalments over a period of up to eighteen months (the period of the customer's entitlement to assistance

²³ Origin Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5.

²⁴ AGL Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 6.

remaining). However, if the instalment amount required exceeds what a customer considers they are able to pay, a retailer has the discretion to extend the payment arrangement. In deciding whether to exercise this discretion retailers are expected to have regard to the customer's circumstances and act fairly and reasonably in light these circumstances. Retailers must maintain records to show how it decided what was fair and reasonable in the circumstances.

2.4.4. Disconnection/reconnection

Stakeholders also sought guidance on what a customer's entitlements would be following reconnection, and in particular whether a lump sum payment could be requested from the customer as a condition of reconnection.

Stakeholder comments

Origin Energy questioned whether a customer who is disconnected for non-payment is entitled to assistance under Part 3 if they re-engage.

... the implications of section 9.10.3 are to create a loop where customers that are disconnected for non-payment can expect to be re-connected if they propose a revised payment arrangement. Origin acknowledges it may be best practice in some circumstances for customers to be placed on a payment plan following reconnection; we do this for customers in appropriate circumstances. However, the Guidance implies that a customer should automatically have the right to get reconnected if they propose a revised payment arrangement. These customers could potentially do this repeatedly and accrue more debt than they pay off. Origin is concerned that this could lead to customers increasing their debt.²⁵

EnergyAustralia proposed that retailers should be able to require a payment as a condition of reconnection:

EA accepts that large lump sums would be difficult for the customer to pay. However ... we think that it is acceptable as a minimum standard that the customer pays the missed payment instalments that were due or became due during the time they were disconnected or suspended.

EnergyAustralia also drew attention to the impact of disconnection on arrears:

²⁵ Origin Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 4 - 5.

Some time is often lost in being disconnected or suspended and for a customer on TA2, this will mean an increase in their debt. If a new payment proposal is set up at the point of reconnection or end of the suspension, then it will take perhaps a month for the first payment to become due. Therefore, requiring payment of the plan amount helps to limit the customer's debt somewhat.²⁶

On the other hand, community groups had concerns about the need for lump sums to be paid before a customer is reconnected. The Consumer Action Law Centre and Brotherhood of St Laurence strongly support the focus being on revised payment proposals:

Financial Counsellors at the National Debt Helpline often hear of retailers demanding a lump sum payment be made for a customer to avoid disconnection, often in circumstances where the customer simply cannot afford to do so. We strongly support the inclusion of paragraph 9.10.1. It will leave no doubt that retailers should not be making such demands.²⁷

AGL raised the issue of how retailers should manage the competing objectives of debt accrual versus disconnection:

Section 9.10 provides guidance following disconnection or suspension of assistance. The guidance is not clear how retailers can manage the competing objectives of disconnection as a last resort and assisting the customer to reduce their arrears and energy costs.²⁸

At the 30 November workshop some stakeholders suggested that if a customer re-engages after their supply is disconnected, it would be fair and reasonable for the retailer to work with the customer to revise their payment arrangement and accept any immediate amount the customer can afford to pay. It was also suggested that if a customer has not actively engaged with the retailer prior to disconnection, in the absence of other circumstances, they should be required to pay an amount equivalent to the all missed instalments of their last payment plan.

²⁶ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 37.

²⁷ Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 15 - 16.

²⁸ AGL Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 6.

Commission response

All customers facing payment difficulty are entitled to assistance under the Code. A customer remains a customer after they are disconnected and therefore is entitled to assistance, subject to them taking reasonable action to pay for their energy use and repay their arrears. The question is then, what is reasonable action following disconnection.

We consider that, absent other circumstances, it is not unreasonable for a retailer to require some form of payment as evidence of the customer's reasonable action prior to reconnection. However, this amount should be no greater than the sum of the instalments missed by the customer prior to disconnection. Having regard to the customer's particular circumstances, retailers should consider a lower amount, including no up-front payment at all, if fair and reasonable to do so in the circumstances.

2.5. Using best endeavours

Most stakeholders were of the view that the drafting of best endeavours in the draft *Guidance note – Payment difficulty and disconnection* was too prescriptive and would be costly to implement. Stakeholders suggested that the requirements of best endeavours should be separated between when providing tailored assistance and immediately prior to disconnection. Retailers also sought the inclusion of electronic communication and the consideration of the customer's preferred contact method when using best endeavours.

Stakeholder comments

Stakeholders generally did not support the drafting of the best endeavours requirements in the guidance note. They suggested that the approach for describing this obligation was too prescriptive, onerous, costly and out of touch with needs and behaviours of energy consumers.

Stakeholders strongly supported the need for separating and clarifying the application of best endeavours between providing tailored assistance, and engaging the customer prior to disconnection.

Origin Energy asserted that there should be a lower set of expectations for contacting a customer to inform them of their entitlement tailored assistance:

Contacting a customer who has missed their bill to offer them assistance should not be considered as important as contacting a customer prior to disconnection. Origin does not think that the Code treats them equivalently...²⁹

Stakeholders also questioned the commission's position on the required number of contact attempts, methods of customer communication and associated timelines for meeting best endeavours.

EnergyAustralia suggested that the current drafting added complexity and ambiguity to the requirements for best endeavours:

.... the Guidance Note requires a retailer to make steps to contact the customer over 21 business days including by registered post or a personal visit if the customers cannot be contacted by phone. This is an unreasonably long timeframe and amount of effort to sign a customer up to a payment plan that we will be communicating in writing to the customer through this stage..... We suggest that best endeavours for situations other than for disconnection for non-payment be left to its English language meaning. If it must be defined, then it should be a shorter timeframe and phone contact only.³⁰

AGL noted that customers are increasingly showing a preference for electronic communications and that this shift away from traditional contact methods should not be ignored by the commission:

.... the Commission has not attempted to make the best endeavours obligation 'fit for purpose'. AGL has previously provided evidence to the Commission that new technologies have resulted in new methods of communication between retailers and customers. Further, customers are now self-selecting their preferred method of communication.³¹

The effectiveness of new methods of communication was echoed by the Victorian Council of Social Service, which supported contact methods being tailored for individual customer circumstances:

²⁹ Origin Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 6.

³⁰ EnergyAustralia 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 6.

³¹ AGL Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 7.

In some circumstances, methods such as email, SMS and private social media communications may be more effective than telephone calls or letters and should be used as part of a suite of measures.³²

A major concern for a number of stakeholders was the inclusion of site visits as a requirement to meet best endeavours when telephone contact was unsuccessful in reaching customers with a supply address in the Melbourne metropolitan area.

The Victorian Council of Social Service also highlighted the potential harm that site visits would impose on customers, particularly if this was to occur at various stages of missed payment, as the drafting suggested:

.... a customer may feel harassed or intimidated by several home visits where a retailer is using its best endeavours to provide Tailored Assistance, revise a payment arrangement, and to warn of potential disconnection.³³

Commission response

The commission has decided that the requirements for using best endeavours should be different between when providing tailored assistance and when using best endeavours to contact a customer immediately prior to disconnection. The distinction between the expectations for best endeavours reflects our understanding of stakeholder views that providing information about tailored assistance and making contact prior to disconnection have very different customer impacts and cost implications for retailers. Consequently, the commission has decided that a lower standard of expectation would be compliant for when providing a customer with information about their entitlement to tailored assistance but that a higher standard of best endeavours should precede disconnection.

The revised guidance note provides examples of our expectations of compliance for best endeavours when providing information to customers about tailored assistance in section 4.2 and 9.3. In response to stakeholder feedback, the commission has decided that a site visit would not be required when contacting a customer to provide tailored assistance as this could be considered intrusive and a disproportionate response in the circumstances. Examples of compliant conduct for

³² Victorian Council of Social Service 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5.

³³ Victorian Council of Social Service 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5.

when contacting customers immediately prior to disconnection are located in section 8.3. Record keeping guidance for meeting best endeavours obligations for both providing tailored assistance and immediately prior to disconnection is contained in section 9.2.

In response to the feedback we received that electronic communication should be considered when using best endeavours to contact a customer, we have decided that given its strong preference with some customers and its success rate that this form of communication should be allowed. The guidance note has been amended to allow for the use of electronic communication in cases where a customer has provided their explicit informed consent and has advised that this is their preferred contact method. A record of consent must be maintained by the retailer to demonstrate compliance.

2.6. Transition of existing hardship customers

One stakeholder sought further guidance about the commission's expectation of how retailers were to treat customers who had pre-existing payment arrangements or were participating in a hardship program prior to the implementation of the new framework. Community groups and their advocates expressed support of the customer entitlements under the new framework being available to all customers facing or anticipating payment difficulty from 1 January 2019.

Stakeholder comments

In their written submission, AGL requested guidance on the commission's expectation of retailers when they had already offered and exhausted the entitlements required by the payment difficulty framework prior to 1 January 2019, and whether it would be expected that a retailer commence the full suite of entitlements again.

In line with the commission's position explained in the *Payment difficulty framework final decision*, the Consumer Action Law Centre and Brotherhood of St Laurence expressed strong support for the entitlements under the new framework to be available to all customers facing or anticipating payment difficulty, including those in existing hardship programs from 1 January 2019:

Customers who are assisted under the current framework are entitled to far fewer protections and should have no doubt that they have the same improved entitlements as other

customers in payment difficulty from the time the new framework becomes effective, on 1 January 2019.³⁴

Commission response

In light of questions received about the transition of customers to the new payment difficulty framework, the commission reiterates its position on this topic within the *Payment difficulty framework final decision*.

In the *Payment difficulty framework final decision* we stated that if a customer is carrying any legacy debt at the time the new entitlements take effect, a retailer will need to take this circumstance into account and act fairly and reasonably to ensure that the customer is not disadvantaged when transitioning to the new framework. We also noted that retailers must have regard to individual circumstances that would require the provision of extended periods for customers to repay their arrears or lower their energy costs.

The objectives of the new framework are to ensure that customers receive entitlements to assistance to help them pay for their on-going energy use, repay their arrears and lower their energy costs. Accordingly the commission encourages energy retailers to implement the payment difficulty framework as soon as possible. If a retailer chooses to do this, it will need to ensure that it has sufficient records for individual customers to demonstrate that it has complied with Part 3 of the Code prior to 1 January 2019. A retailer cannot include the time a customer received assistance – regardless of whether it was above the minimum standards in Part 3 – before 10 October 2017 when the commission published the *Payment difficulty framework final decision* and version 12 of the Code.

If a retailer has not provided assistance equal to, or greater than the customer entitlements in Part 3, then it cannot include this previous assistance in any assistance a customer is entitled to from 1 January 2019 under Part 3 of the Code. For example, if the customer had a pre-existing payment arrangement for six months prior to 1 January 2019, that six-month period cannot be included for the purposes of a new payment arrangement of up to two years under tailored assistance.

³⁴ Consumer Action Law Centre and Brotherhood of St Laurence 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October, p. 5

3. Guidance note implementation

This concludes the consultation of the draft *Guidance note – Payment difficulty and disconnection*.

The *Energy Compliance and enforcement policy: Guidance note – Payment difficulty and disconnection* commences on 1 January 2019 and operates in perpetuity until it is revised.

The commission will consider feedback on any further issues that have arisen during the implementation phase of the payment difficulty framework which may inform the need for any update of the guidance note. Feedback of this nature will be sought from retailers in the quarterly progress reports to be submitted to the commission during 2018.

We thank stakeholders for their continued collaboration in working with us to implement the payment difficulty framework.

Appendix A - References

AGL Energy 2017, Submission to the Essential Services Commission *Draft guidance note, payment difficulty and disconnection*, Submission to the commission consultation paper, October.

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