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Payment Difficulties Framework Guidance Note.

Simply Energy welcomes the opportunity to comment on the Draft Guidance Note issued under the new Payment Difficulties Framework, (the Guidance Note). This Guidance Note for Simply Energy raises more questions than it answers in terms of the operation of the Energy Retail Code, (the Code). Throughout this submission Simply Energy will highlight a number of specific examples of the impacts the interpretation will have on the operational delivery of the Payment Difficulties Framework including where there are additional obligations imposed as part of the interpretive guidance.

At the workshop held on the 24th of October, the question of fitness for purpose was posed and debated amongst the participants, and while there may have been two clear views of whether it does or doesn't meet the stated objective, the simple fact that retailers cannot operationalise the obligations from the Code in conjunction with the guidance because of a lack of clarity or see additional obligations being imposed should indicate that the purpose has not been met. 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.

The purpose statement also suggest that there is no regulatory weight in the guidance note yet the Commission will, if retailers have acted in good faith with the guidance note, not take enforcement action. In particular, Section 1.1.1 states that it outlines 'what the commission considers to be better practices that retailers may adopt', whereas Section 1.1.3 states that 'where retailers have in good faith relied on this guidance note, by acting consistently with the examples of compliant conduct included in this note, we will not take enforcement action'. Taking any form of enforcement action on a condition that is only contained within a guidance document makes the enforcement action somewhat questionable.

Simple Energy takes that to mean retailers must comply with the examples on a consistent basis to ensure compliance otherwise, face enforcement action for non-compliance with practices that a retailer 'may adopt' rather than taking enforcement action on actual obligations from the retail code that retailers are required to comply with.

New obligations

The following table highlights areas in which Simply Energy foresees additional costs implications and or regulatory obligations that are the result of the interpretive guidance, or that are imposed by interpreting the provisions with terminology that has a meaning elsewhere.

Guidance	Obligation	Foreseeable Impact
Section 3.5.2 If a retailer elects to provide the option of equal payments, for customers on standard retail contracts, the retailer must provide the assistance in accordance with	Clause 76(2), (a) Standard assistance made available must include at least 3 of the following:	The application of this type of interpretation has the effect of increasing the numbers of bills issued to align to the payment frequency.

Guidance	Obligation	Foreseeable Impact
clause 23 of the Code (bill smoothing provision).	(a) making payments of an equal amount over a specified period;	If the customer elects for a fortnightly payment to align to payments they receive, consistent with Section 3.5.4, that equates to 22 bills over a 12 month period more than currently required.
Section 4.12.13 Retailers must use their best endeavours (see section 9.8 of this guidance note) to discuss a revised payment arrangement with a customer who does not make a scheduled payment. If after the retailer uses its best endeavours, the customer does not put forward a revised payment arrangement, the retailer may issue the customer with a disconnection warning notice (providing a reminder notice had already been issued and the reminder notice period had lapsed)	Clause 81,(6) If a residential customer receiving assistance under this Division fails to make a payment by the date on which it was payable, the retailer must contact the customer to discuss their putting forward a revised proposal under this clause.	<p>The application of 'best endeavours' as a concept for contacting a customer when the customer has missed a payment and an onerous task and could easily been seen as contrary to objectives of the section.</p> <p>Because Section 9.8 of the Guidance Note includes a field or site visit as necessary for best endeavours (subject to the 60km radius) the context reads that to follow up on each missed payment requires the retailer to attend the customers property to negotiate a new arrangement.</p> <p>This is also not reflected in the actual code requirements that 'best endeavours' is a requirement for a missed payment under Payment Arrangements section.</p>
Section 4.10.9 Retailers should also advise customers how they treat partial and late payments (and what constitutes a late payment), in relation to payment arrangements.	Clause 80 (2) A residential customer who has not paid a bill by its pay-by date and who has arrears of more than \$55 (inclusive of GST) is entitled to be contacted by the retailer, within 21 business days after that pay-by-date, and given information about the assistance to which the customer is entitled under this Division and how to access it.	The entire section related to Clause 80 (2), in the Guidance Note is seemingly unrelated in any way to guidance on the clause requirements. This suggest that there are new expectations imposed that are not included in the actual Code obligations. This is an example of the potential expansion of an obligation that is not present and that is arguably new.
Section 4.11.5 If a retailer cannot successfully contact a customer by telephone, the retailer must provide information about the assistance under Division 3 via registered post to meet its best endeavours obligations	Clause 80 (3) (3) The retailer must allow the customer no less than 6 business days to consider the information given under subclause (1) or (2), request further information, and	This section of the Guidance Note is contradicted by section 9.8 of the Guidance Note that requires a site visit to have met best endeavours and the terms best endeavours are also not a requirement of the obligation

Guidance	Obligation	Foreseeable Impact
	put forward a payment proposal under clause 81.	under 80 (3) of the Code, to which this section refers.
<p>Unsuccessful contact for best endeavours</p> <p>Section 4.11.6 – Refer to section 9.8 of this guidance note for more information.</p>	Various Clauses	This is another significant variation from the defined ‘best endeavours’ terminology as the Guidance Note section 9.8 includes the use of a site visit in place of a registered letter.
<p>Section 4.10.9 Retailers should also advise customers how they treat partial and late payments (and what constitutes a late payment), in relation to payment arrangements.</p>	No relevant clause	The clause referenced in the Guidance Note is 80 (2) however this clause relates to the customer being entitled to assistance and information about the types of assistance whereas the material guidance is about how retailers handle part payments, not the entitlement.
<p>Section 9.8.1 Retailers must use the information available to them, including known customer circumstances, when fulfilling their obligations to use their best endeavours to contact customers and provide them with assistance under Division 3, including:</p> <p>a) to provide tailored assistance (clauses 80(2) and 89(c))</p> <p>b) to revise a payment arrangement under tailored assistance when a customer does not make a payment according to the payment schedule (clauses 81(6) and 82(2))</p> <p>c) to establish a new implementation timeframe for practical assistance where the retailer knows that the customer has not taken steps to implement the practical assistance, as agreed between customer and retailer, and</p>	Various Clauses	<p>The Guidance Note in this case is suggesting that ‘best endeavours’ is a standardised term that has no material variation in context whereas, as outlined below the code in its current form, holds a number of contextual variations and is also inconsistent with Section 4.11.6 outlined above.</p> <p>These variations and non-standard or additional applications for ‘best endeavours’ impose obligations and or costs that had not been factored into the cost benefit analysis. For example, the application of best endeavours for implementing new steps for a customer under subsection c) or enter into a new payment, revised payment under subsection b).</p>

Guidance	Obligation	Foreseeable Impact
<p>documented by the retailer (clause 82(3))</p> <p>d) following issuing a disconnection warning notice and prior to disconnection (clause 111A(a)(iv).</p>		

'Best endeavours' is a generic term that is used in differing context throughout the Code to suggest areas where effort is expected by the obliged party. The level of effort in context is significantly variable and the obliged party changes in each context which is why it is such a difficult set of terms to define. For example, the term is used in clause 20 (2) to describe the obligation to ensure that a reading is taken at least once in every 12 month period, would that then require a site visit by a retailer to satisfy the obligation if defined in the Guidance Note. The point is that defining the term without consideration for context, where a payment is missed, creates regulatory creep. This should be avoided, especially where the Code itself does not require 'best endeavours' to achieve the outcome and or establish that effort should be applied.

Simply Energy is also concerned that these additional obligations that have been imposed through interpretation will impact on the Commissions ability to measure success. For example, where a customer has missed a payment and the retailer has met its best endeavours prior to disconnection, but the missed payment occurs before the disconnection, is the retailer in breach because it didn't undertake a secondary best endeavours activity to follow up on the payment prior to disconnection, which is where interpretive guidance would be necessary.

Providing guidance is valuable where the Commission can outline how it would reach a decision on the nature of a situation and what they would expect to be done as a fair and reasonable action. For example, in 2012 the Commission, in consultation with industry, consumer groups and EWOV, provided interpretive guidance on the code obligations around offering a second instalment plan to customers' who had failed an initial instalment plan and the implications that had on wrongful disconnection payments. The outcome was that a retailer was considered to have met its obligations if it used its best endeavours to contact the customer even though the second instalment plan could be considered offered without having consideration the customer's capacity to pay. That was valuable guidance on how the Commission would have made a decision in those circumstances and retailers could take that guidance in implement that into their systems and processes. In contrast guidance here presents conflicting views of the same issue, attempts to provide definition without context and applies additional obligations that are not reflected in the Code obligations.

As stated earlier, these are the general themes that Simply Energy has concern with or that are seen as imposing additional regulatory obligation by interpretive guidance rather than providing decision making guidance that would be helpful for retailers to in implementing systems and processes that will ensure the right outcomes for customers as is intended.

If there are any questions regarding this material and or the Commission would like to discuss these matters further please feel free to contact Ross Evans

Regards,

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