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Submitted by email to paymentdifficulties@esc.vic.gov.au

18th November 2016

Response to Draft Decision: Safety Net for Victorian Consumers Facing Payment Difficulties

The Australian Energy Council (the Energy Council) welcomes the opportunity to make a submission to the Essential Services Commission's (ESC's) Draft Decision *Safety Net for Victorian Consumers Facing Payment Difficulties.*

The Energy Council is the industry body representing 21 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

Overall, we are concerned about the ESC's process in its development of this policy reform, including the rigour of its analysis. We would also like to be clear that given the delays to the process, the implementation date of 1 July 2017 is neither achievable nor desirable. The eventual implementation date for the new payment difficulties framework needs to allow for an appropriate cost-benefit analysis, and for retailers and other parties who assist consumers to be in a position to provide consistent advice and support.

Please see the attachment to this submission for a detailed response on the substance of the proposed payment difficulties framework, as well as proposed changes to drafting.

Any questions about our submission should be addressed to Panos Priftakis, Policy Adviser by email to panos.priftakis@energycouncil.com.au or by telephone on (03) 9205 3115.

Yours sincerely,

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Australian Energy Council

A. General comments

The Energy Council notes that there have been several changes to the payment difficulties framework since the March 2016 version in the ESC's Hardship Inquiry Final Report.

On the one hand, we welcome many of these changes, and recognise that the framework provided in October's Draft Decision is much more streamlined than previous versions. Although this is unlikely to be a significantly cheaper framework to implement, we acknowledge that the approach is clearer in intent and more comprehensible than earlier versions.

On the other hand, the path to get to where we are has been circuitous and uncertain. Further, while the greater clarity of the framework since March is an improvement, this also is relative: the original model was *extremely* complex, with many moving parts.

The ESC has also not presented evidence – in any of its versions of the framework – about why certain positions have been taken. This is particularly relevant for the ESC's mandated payment plan amounts and timeframes.

The result is a framework in the ESC's Draft Decision that may be simpler than before, but still appears to be untested with stakeholders in terms of its ability to meet policy objectives and to be implemented. The consultation process has not been consistent with the ESC's stated aims to be open and transparent in decision-making under its Charter of Consultation,[1] and outcomes have not been consistent with the Victorian Auditor-General's principles of best practice consultation.[2] The Department of Treasury and Finance's *Guide to Regulation*[3] provides a useful point of comparison, where it requires 'stringent and formalised policy development and evaluation processes, which are based on an analytical cost benefit framework'. (p. 2). As will be shown this submission, this has not occurred in the development of the draft payment difficulties framework.

Given that we are now only a few weeks away from the release of a Final Decision, the Energy Council is concerned about the ability for its members and other stakeholders to be able to participate fully in this formal period of consultation, and for the ESC's Commissioners to be able to reach a genuinely informed view about the proposed framework.

Finally, it is unclear whether the payment difficulties framework we are now reviewing in the Draft Decision is actually part of the original Hardship Inquiry or a new process altogether. The original Terms of Reference for the Inquiry have not actually been met, particularly with regard to the cost-effectiveness of the framework. It might be argued that this is beside the point given the Inquiry concluded in March, but if this is the case, the new framework from October 2016 would then appear to be an entirely new policy project. The lack of clarity on even this point is concerning and adds to the confusion for all stakeholders about how to consider and respond to this current draft of the payment difficulties framework.

1. Process

1.1. Consultation to this point

After significant changes were made from its September 2015 Hardship Inquiry Draft Report, the ESC's Final Report was released in March 2016. The process from then was intended to focus on implementation of the

[1] Essential Services Commission (2013) *Charter of Consultation and Regulatory Practice.*
[2] Victorian Auditor-General's Office (2015) *Public Participation in Government Decision-making: Better Practice Guide*, January, Melbourne.
[3] Government of Victoria (2014) *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne. See http://www.dtf.vic.gov.au/publications/victoria-economy-publications/victorian-guide-to-regulation.

Inquiry's recommendations. However, this was not in truth an implementation process: there was significant policy detail yet to be clarified and the ESC itself was still working through the implications of its own proposals.

As a result, the ESC ran two 'informal' stakeholder consultation processes to address policy issues. The first informal consultation (May to June) saw changes to the framework from the March version, and, after silence from the ESC for several months, the second informal consultation (late September to late October) reflected even more radical change across most areas of the framework.

The May-June period of consultation introduced a number of new concepts and policy documents which the Energy Council and its members commented on. The ESC put forward two principles-based drafts of the relevant sections of the Retail Code, as well as drafts of two new detailed 'Guidance Notes' under the ESC's Compliance and Enforcement Policy. Energy Council members spent many hours with the ESC during this period in an attempt to understand the thinking behind the approach and address operational issues. The ESC also stated on numerous occasions that it would seek to understand the industry's concerns about implementation by undertaking a systems and process sub-project – a programme of work that did not occur.

The second period of consultation commenced with a new draft of Part 3 of the Retail Code, released on 21 September. This draft was claimed by the ESC to be much simpler for all to understand and much less costly for retailers to implement, although we have not seen evidence that this claim of lower cost is substantiated. Much of the complexity of the earlier versions had been taken out (including the proposed Guidance Notes), but the ESC had added new measures to the payment difficulties framework, with no apparent discussion or testing of the issues. There were also gaps relating to other sections of the Retail Code.

This period of informal consultation was inadequate, with little ability for stakeholders to exchange views in discussions with the ESC (retailers and consumer representatives were kept apart) or have a meaningful discussion with the ESC itself. Any one stakeholder only attended one workshop, with each workshop only an hour in duration and key ESC staff not in attendance for every workshop. The level of secrecy associated with the few workshops held was also unprecedented, with the ESC actively refusing to advise stakeholders how many workshops there were, when they were, who was invited, or what was on the agenda.

After another revised version of the framework was released on 3 October (again, with further changes and little to no explanation about the ESC's rationale), we now have the official version in the Draft Decision, as of 21 October. This version of framework (as mostly set out in a revised Part 3 of the Retail Code) has positively addressed some of the concerns recently raised by Energy Council members, particularly regarding new policy introduced by the ESC in September/October that undermined the existing business practices for billing and payment plans.

However, there are still a number of elements of the revised Retail Code that require more comprehensive examination and discussion with the ESC as to its policy intent and how the proposed changes meet public policy objectives.

Importantly, this version of the Retail Code has again introduced new policy: with some recent changes there are again new systems issues and even a fundamental change to the current flexibility allowed under the Retail Code for collections cycles. It can be argued that some of these changes go beyond the intent of the Hardship Inquiry. They certainly introduce complexity for retailers, who are now expected to respond within a four week period on costs and benefits.

1.2. Required work to arrive at a robust Final Decision

The submission period for the current formal consultation ends on 18 November, with a Final Decision due in December (as advised in the Draft Decision, page 3). We note the ESC's statements to Energy Council members that the Final Decision will be released in the first week of December.

With a Final Decision due at some point in December we can see that there are approximately two to five weeks for the ESC to:

- assess all stakeholder submissions and form a view about necessary further changes to the Retail Code and supplementary instruments and materials;

- undertake a cost-benefit analysis, which the ESC has advised it would do; and
- have the ESC Commissioners formally approve the process and recommendations.

This period of time would be optimistic if all that was occurring was an assessment of submissions and development of the resulting changes to the Retail Code and other documents, and for the internal approvals process to be completed. This period is completely unrealistic for a robust cost-benefit analysis to also be included.

Addressing the cost-benefit analysis in more detail, we note that there was no such assessment in the Final Report. Some statements about assumed (and unquantified) costs and benefits were made, but these seemed to be provided as an afterthought rather than as a central element to the work. There has not been any further assessment undertaken to our knowledge. The ESC has said in the past that there would be no point in undertaking this analysis while the policy itself was not locked down, which may be reasonable in principle. However, we now stand at a point where a Final Decision is imminent, and there has been no formal (or adequately informal) cost-benefit analysis.

There also does not seem to be an ESC appetite to undertake an appropriate cost-benefit analysis, which we can see not only from the time allocated to the process but also from the words in the Draft Decision. Although the ESC's Draft Decision requests information from stakeholders about costs and benefits, it does not refer explicitly to the ESC undertaking an actual assessment of costs and benefits as might befit an economic regulator.

We note the ESC has an obligation under the *Subordinate Legislation Act* 1994 to undertake a regulatory impact statement (RIS) in making the changes to the Retail Code to provide for the payment difficulties framework. This is because the Energy Retail Code is a legislative instrument.

In its *Guide to Regulation*, the Victorian Department of Treasury and Finance[4] states:

> …it needs to be clear that the costs of any regulatory intervention – no matter how small the burden imposed may appear – are at least offset by the benefits to society. This expectation is formalised in Victoria through the requirement for a RIS to be prepared if a proposed statutory rule imposes a significant economic or social burden on a sector of the public, unless an exemption provision applies. A RIS must also be prepared in Victoria if a proposed legislative instrument imposes a significant economic or social burden on a sector of the public, unless an exemption provision applies. Generally, proposals that impose gross costs of $2 million or more a year on any sector of the public would be considered to meet this RIS threshold. The legislative backing for these requirements (including exemption criteria) is the Subordinate Legislation Act. (p. 4)

Page 8 of the *Guide to Regulation* sets out the steps towards developing a RIS. These include:

1 **Identify the problem or issue:** There must be a clear and demonstrable problem or issue that needs to be addressed.

2 **Specify desired objectives:** In addressing the problem, what are the outcomes that the government wants to achieve?

3 **Identify viable options to achieve the objectives:** Outline the different approaches that could be taken to achieve the desired outcomes.

4 **Assess the costs and benefits of the options:** To make a decision about how to achieve the outcomes in the most efficient and effective way, the options need to be compared and contrasted in an objective, consistent, and transparent way.

4a **Assess the impact on small business:** The Government is committed to reducing regulatory burden, and small business is often disproportionately affected by regulation. Therefore, it is important that the impact of each option on small business be an explicit consideration during the design of any government intervention.

4b **Undertake competition assessment:** Any regulatory proposal needs to be scrutinised carefully to assess whether it will have an adverse impact on the ability of firms or individuals to enter and participate in the market.

[4] Government of Victoria (2014) *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne. See http://www.dtf.vic.gov.au/publications/victoria-economy-publications/victorian-guide-to-regulation.

5 **Identify the preferred option and describe its effect:** To ensure that the most effective tool to achieve the desired outcome is selected, it is important to analyse how the preferred option will function in practice.

6 **Develop an implementation plan for the preferred option:** Successful implementation of the preferred option requires up front consideration of a range of practical issues involved in putting the preferred option into action.

7 **Detail the evaluation strategy:** Consistent with the government's commitment to continuous improvement, mid-term and ex-post evaluations of regulatory activities will be conducted with a view to enhancing the efficiency and effectiveness of meeting government objectives and ensuring that there is a robust evidence base for future decision-making.

To support section 4 above, the Victorian Government's *Toolkit 2: Cost-benefit analysis*[5] outlines the various types of cost-benefit analysis and the issues to be considered.

It is clear that a RIS is required (and further, this should be a 'high impact' RIS as defined in the Guide) to address the draft changes to the Retail Code that implement the payment difficulties framework. This is because the impacts of the new framework are material; they will be felt by all Victorian energy consumers, and particularly by the most vulnerable consumers. The framework changes the way that all Victorian retailers will do business, with effects felt most in debt management, cash flow and in the ability to meet known customer needs. Cost increases to implement system, process, correspondence and reporting changes will be borne by all consumers, as will any increases to manage new risk. The framework will also affect the way that concessions and emergency relief are provided to consumers – a topic that has not been discussed by the ESC at all.

We also note with some concern that even if the ESC was able to undertake a RIS and rigorous cost-benefit and competition analysis (as required under point 4 above) within the period of a week or two, it is unlikely to have the necessary input to assess. An unfortunate effect of the ESC's constant changes to policy and the truncated process for the Final Decision is that retailers are unlikely to be in a position to fully test and cost the latest version of the framework in order to be able to provide sufficiently comprehensive and reliable data in the timeframe allowed.

In summary, the period to the end of the year is demonstrably insufficient to undertake the necessary work to complete the policy aspect of the payment difficulties framework. Reasonable standards of evidence and consultation demand more from the ESC to demonstrate the net benefits of its proposals for Victorian consumers and to enable all stakeholders to be in a position to understand and respond meaningfully.

1.3. The implementation timeframe

The ESC continues to advise that the implementation date for the new payment difficulties framework will be 1 July 2017. This was the date provided by the Minister for Energy upon the release of the Hardship Inquiry Final Report in March 2016.

Energy Council members were concerned about their ability to make the necessary systems, process and procedure changes for 1 July 2017 many months ago, and have stated this formally to the ESC throughout our discussions. This was at a point when we were expecting a Draft Decision in July/August 2016 and a Final Decision in September/October 2016, as we had been advised by the ESC. We are clearly in a much more rushed position now, with the original schedule having slipped by up to three months. What was previously extremely difficult for some retailers is now largely impossible for most.

The ESC has responded to these concerns to date by stating that it would be flexible in enforcing retailers' implementation of the framework, with a 'soft start' and potentially staggered implementation based on retailers' capacity. A programme of work to develop individual retailer implementation plans (originally intended for the end of this year but now shifted to 2017) is still expected to clarify how each retailer complies.

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[5] Government of Victoria (2014) *Victorian Guide to Regulation, Toolkit 2: Cost-benefit analysis*, July, Melbourne. See http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation.

It is possible that a soft start would have been manageable if:

- most retailers could comply fully by 1 July 2017, and if others could be in a compliant position shortly afterward;
- a consumer education campaign could be delivered on time and could prepare consumers adequately;
- other necessary changes to legislation (such as changes to hardship legislation) and government processes were in place (such as delivery of concessions and emergency relief); and
- other stakeholders could be in a position to understand the framework and assist consumers (such as welfare agencies and financial counsellors).

However, this is not our current situation. The current timeframe gives everyone only six months to absorb and implement/accommodate the changes required by the Final Decision, and perhaps less in reality given the holiday period in December and January. If we focus on retailer needs only, this is a much shorter period than even the most aggressive systems change schedules. We note that other significant energy policy IT changes are being implemented at the same time, such as the comprehensive Power of Choice changes. Further, it is not only systems changes that need to be made, but a full programme of process, training and scripting changes, as well as engagement with other support services and government departments.

In short, given where we are, the implementation date of 1 July 2017 is not achievable or even desirable. A soft start for such a major reform is highly problematic when the likelihood of material compliance across the industry for the stated implementation date is so slim. Not only will most retailers struggle to manage compliance by this date, but there is a significant risk of confusing consumers and consumer intermediaries who regularly assist vulnerable consumers.

As a consequence of the inadequate consultation to date, the insufficient time to undertake the necessary analysis, and the likely impossibility of implementing the framework in any consistent manner for 1 July 2017, we recommend a revision of the consultation and implementation timetable.

We believe that the implementation date should be extended by 12-18 months, to allow the appropriate work to be undertaken. We are happy to discuss with the ESC what this work would entail, but would expect that at the least it would address the RIS and cost-benefit analysis discussed above, and modelled evidence of the effectiveness of the proposed framework to meet consumer needs. The outcomes of these processes should then inform the eventual policy approach taken, which we note may require substantive amendment to the current payment difficulties framework.

2. Interpretation of the Code

2.1. Allowing for innovation

We note that the ESC has stated in its Draft Decision that retailers have the flexibility to innovate in their service delivery. Although we acknowledge that the current draft Retail Code changes are more flexible than those proposed during the year, there still seems some ambiguity in what the ESC believes it is allowing *for*.

The ESC appears to believe that if the Retail Code states a retailer 'must' provide a particular option that the retailer might provide 'extra assistance' (clause 99). It is not clear what 'extra assistance' means, and retailers have very different perceptions of the issues and compliance risks presented by the ESC's approach. This is a significant problem to have at this late stage of proceedings: *the entities responsible for delivering the framework and for communicating with their customers have different understandings of what the framework actually does.* This confusion has been reinforced by the ESC's continuing changes to the framework and the fact that there are still major policy issues that may or may not be drafting errors in the draft Retail Code provisions in the Draft Decision, as discussed later in this submission.

The costs to innovation of the new regulation is also an important element of the RIS process as noted above in section 1.2, where the Victorian Department of Treasury and Finance[6] states:

> Increasing regulation, and its growing complexity, can place a major burden on the parties being regulated. Regulation not only creates additional paperwork, but it can distort decisions about inputs, stifle entrepreneurship and innovation, divert managers from their core business activity, prolong decision-making, and reduce flexibility. Furthermore, poorly designed regulation can result in unintended, undesirable side effects. (p. 2)

This leads to the questions: What assumptions have been made by the ESC about opportunities for innovation in service delivery? What consideration has been given to stifling innovation that may benefit consumers and the consumer experience, and how have the ESC's views been tested? To this point the detail of innovation has not been discussed with industry in any meaningful way, which of course had a role to play in the industry uncertainty about the ESC's intent.

There is also a legal interpretation issue: it is possible that the Retail Code being silent on certain practices actually prohibits them, particularly when the Retail Code is read as a whole. An example of this is the recent change to Immediate Assistance that appears to take away the requirement for monthly payments of both arrears and ongoing use. The previous versions of Immediate Assistance provided for customers to automatically go on to these monthly payments (implying either monthly billing or smoothed payment plans), and the Retail Code requirement to have explicit informed consent for such a shift was going to be amended for this purpose. In contrast, the current draft only explicitly provides for *arrears* to be paid monthly, which will mean that quarterly bills for ongoing use will also be maintained. It is possible that the ESC was assuming that silence on the matter of payment for energy use would simplify the drafting, but it actually creates a different problem for implementation. Now consumers will experience a mix of differently timed and potentially confusing payment requirements, and retailers' cash flows will be negatively affected.

We note that this change was not identified or explained by the ESC – as with most, if not all, changes between drafts. This has meant that stakeholders have themselves had to read the detail of every draft and recognise where changes of substance have been made. Further, stakeholders have had to make assumptions about why the changes have been made, rather than understanding what was intended by the ESC versus what was merely a misunderstanding or a drafting error. The Energy Council has identified within its own membership that members have viewed these changes differently, which complicates everyone's understanding and takes time that might otherwise have been spent more productively in addressing the intended substance of the Draft Decision. There are likely to be other examples, which is why retailers and other stakeholders require more time to understand the issues and the ESC's intent.

2.2. Enforcement and compliance

The ESC has repeatedly stated that it will be reasonable and flexible in its enforcement of retailer compliance with the new framework, and the new Compliance and Enforcement Policy provides some comfort about this intention. However, we also note that the ESC's powers have increased, as have penalties for wrongful disconnection. The ESC will need to demonstrate to its own stakeholders that it is using these powers, which means that retailers are not entirely confident about the notion of enforcement flexibility.

This is complicated by the ESC's move from a prescriptive to a more principles-based regulatory style. The current draft of the Code is quite high level, and so there is room for interpretation in practice. Although we support this flexibility it does mean that retailers feel exposed in the current environment: on the one hand we have a new framework that is largely untested, and on the other hand we have a new approach to enforcement that provides little direction and increased penalties for compliance breaches. Again, given these circumstances, it would seem reasonable that the ESC takes the time to test the policy in an empirical sense and discuss the effects of the changes with retailers and other stakeholders.

Related to this, the ESC has stated that its Customer Advice Manual itself plays a role in regulatory interpretation. This is a new approach and also introduces uncertainty into the regulatory regime because the

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[6] Government of Victoria (2014) *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne. See http://www.dtf.vic.gov.au/publications/victoria-economy-publications/victorian-guide-to-regulation.

Manual is not a formal legal document and can be changed by the ESC apparently at will. It is also not clear why an interpretation clause is required for Part 3 of the Retail Code when no other Part has this requirement.

The Manual itself is also likely to require more discussion with stakeholders about its purpose, as discussed below in section C. This is particularly as the ESC appears to consider that approved hardship policies are also required, and that these are also provided to customers.

3. Changes to other instruments

3.1. Hardship legislation

Section 43 of the *Electricity Industry Act* 2000 and section 48G of the *Gas Industry Act* 2001 require retailers to develop hardship policies, and the Acts include a range of criteria to be addressed, such as the need to submit the policies to the ESC for approval, and for deemed licence requirements relating to hardship policies.

Despite the ESC's earlier informal consultation with stakeholders that acknowledged the ultimate need for legislative change to ensure consistency, this has not been addressed at all in the Draft Decision. Instead, the ESC has noted on page 6 of the Draft Decision that the new Part 3 of the Retail Code would 'constitute guidelines' for the purposes of the hardship policy sections of Acts. This would seem to imply that retailers will still be required to submit hardship policies to the ESC for approval.

We expect that the ESC will discuss with government the need to amend the legislation so that retailers are not required to simultaneously comply with two different approaches to customer hardship/payment difficulties. Surely the ESC itself does not want a dual approach: not only is this inefficient, but the ESC's desire to cease using the language of hardship so as to not label customers is at odds with the hardship provisions of the legislation.

If there is a concern that there is insufficient time for the legislation to be changed, we note that there are already several compelling reasons (as discussed above) for the implementation date of the payment difficulties framework to be extended. Such an extension would also allow for the necessary legislative process to be completed.

3.2. Wrongful Disconnection Operating Procedure

The ESC had previously discussed with stakeholders that the Wrongful Disconnection Operating Procedure would be replaced with a Guidance Note on disconnections under the Compliance and Enforcement Policy. The Draft Decision does not have a plan for the previously proposed Guidance Notes, and does not address what will happen to the Operating Procedure.

We would anticipate that the Operating Procedure will remain in place, but with amendments to account for the changes to Code arising from the new payment difficulties framework. This is particularly important to clarify given the increased penalties for wrongful disconnections.

B. Specific comments on the payment difficulties components

The comments provided below are reasonably high level, to address the particular matters concerning Energy Council members. Retailers will also provide separate comments on these and other matters. We believe that all of the issues raised below support the need for an extended timeframe for evidence gathering and consultation.

1. Immediate Assistance

Immediate Assistance is the 'automatic' part of the payment difficulties framework, to which all Victorian residential customers have an entitlement if they have not paid their energy bill in full by the end of the reminder

period. Immediate Assistance provides for an unpaid bill to be repaid in equal portions (such as in thirds) on a monthly basis.

This concept has not changed since the ESC's Hardship Inquiry Final Report. However, the ESC has made changes to the detail of Immediate Assistance in recent drafts:

- in the 21 September version:
    - reminder notices were mandated, to be sent a maximum of five business days after a bill's pay-by date;
    - there was a new rule that once a reminder notice was issued, customers could only go on to a payment plan under Tailored Assistance or Connection Support;
    - a further change was made regarding billing for use which we address in the next section; and
- in the 21 October version there was a change to mandate six business days as the reminder notice period.

1.1. Billing for ongoing use

As noted earlier in this submission, the ESC has recently changed Immediate Assistance to take away the requirement for monthly payments of both arrears and ongoing use. The current draft only explicitly provides for *arrears* to be paid monthly, which will mean that quarterly (electricity) and two-monthly (gas) bills for ongoing use will be maintained.

This creates a problem for implementation, where customers will experience a mix of differently timed and potentially confusing payment requirements, and retailers' cash flows will be negatively affected.

It is also likely that a mismatch between repayments of debt and payments for ongoing usage will disadvantage consumers who may be struggling with payment difficulty. For example, the below shows what happens to a quarterly billed electricity customer on Immediate Assistance under the current version of the payment difficulties framework:

- **Month 0**: electricity bill issued for $270 for the past quarter's consumption.
- **Month 1**: after bill is not paid in full, Immediate Assistance entitlement commences. This starts approximately one month after the bill's date of issue (adding 13 business days for the pay-by date, 5 days to issue a reminder notice, 6 business days for reminder notice period).
- **Month 1.5**: $30 due under Immediate Assistance payment plan, where $30 is one ninth of the bill.
- **Month 2.5**: next $30 due under Immediate Assistance payment plan.
- **Month 3**: new electricity bill issued for $270 for past quarter's consumption.
- **Month 3.5**: next $30 due under Immediate Assistance payment plan with new bill's due date falling around the same time. *Now the customer owes $300*.

It would seem that if a customer on Immediate Assistance is to avoid periods of lump sum payments (which may put customers further into difficulty) consumption should be paid on a monthly basis and start when the first Immediate Assistance debt repayment is due. This is what had always been intended by the framework prior to September 2016. According to this approach, the customer in the above example would pay around $120 at Month 1.5 to keep up to date with use and pay $30 towards their debt.

It is not clear what the ESC intended by splitting use from arrears in the drafting. There is clearly a need for more time for evidence gathering and consultation so that there can be a common understanding of the issues and regulatory intent.

1.2. Commencement of entitlement and impact on customers

The changes to reminder notice issue dates and payment periods mean that all customers who have not paid in full or entered into another plan by 11 business days after their bill pay-by date receive Immediate Assistance.

There are two main problems with this from our perspective.

First, retailers have repeatedly stated to the ESC that many customers pay over a longer period than it takes to trigger Immediate Assistance, and several retailers have provided confidential data to the ESC to demonstrate that this is the case. These customers not only take longer to pay, but when they pay they do so in full. What this means is that the application of Immediate Assistance for these customers – which draws out their repayment over three, six or nine months, depending on their billing cycle – will mean that debt is repaid more slowly than in the current circumstances. This outcome would appear to be directly in conflict with the ESC's own core principle of not allowing customer debt to accrue.

Second, the adjustments to the collection cycle are significant in themselves. The current provisions of the Retail Code – which we note have been in place in one version or another since the advent of competition in 2002 – only provide minimum periods for collection stages. As a result, retailers have been free to develop their own collection cycles, with some retailers providing customers with more time to pay because this meets customer needs. As noted above, experience with customers has shown that a significant number choose to pay their bills in full later in the collection cycle, and later than the minimum periods of the current Code allowed.

Energy Council members acknowledge the ESC's desire and ability to adjust the way that the industry assists customers experiencing payment difficulties. However, the recent changes have been made by the ESC with what appears to be no evidence base. Collection cycles are a fundamental part of all retailers' business models and of managing customer expectations. The cost of over-capturing customers in the Immediate Assistance category will include cash flow costs and increased customer debt (and risk of default if customers switch during the plan). Higher debt carried by businesses will in turn have implications for retailers' cost of capital.

It is also possible that customers as a whole *do not want* this kind of plan, will be surprised by it, or do not want it to apply as soon as it does, and will complain in large numbers to retailers and to EWOV. This will be costly to retailers in both a financial and reputational sense.

We would expect that a policy of this sort would warrant some evidence of customer needs and its value against its costs, particularly given the claims of the Customer Advice Manual that 'The core of the safety net is *a payment plan that works for you*' (p. 7).

It might be argued that 11 days is sufficient time for retailers to communicate with customers about an unpaid bill, and the ESC appears to be of this view. The ESC is clear that nothing stops retailers from contacting customers in this period and making offers of other plans. While we acknowledge that retailers and customers can make other arrangements prior to the commencement of Immediate Assistance, this has been the case all along and retailers have nonetheless provided evidence that this will not meet customer needs.

If we break down the 11 days, we see the time that is actually available:

- There is a five day period after the pay-by date to issue a reminder notice; however, retailers would need to wait for two of these days to allow payments under BPay to process, and as many as three days for in-person payments to be processed from Australia Post. Sending reminder notices prior to this time is unnecessarily costly for retailers and is alienating for customers who have already paid. This leaves two days, which many retailers might feel they need to cut short in order to provide a compliance buffer at the other end, particularly with the use of mail houses. Of this less than two day period, the retailer has flexibility to make other offers. This is not flexible compared with the current approach.
- There is then a six day period after the reminder notice has been issued, for a customer and retailer to agree a plan under Tailored Assistance or Connection Support, depending on what the customer advises the retailer. Again, this will likely be less than six days if retailers are to have reliable processes in place for Immediate Assistance entitlements to be identified and processed on time. We do not

agree that an end date for a reminder notice period should be mandated. However, if a period must be mandated it should be a range of days, with a maximum of greater than six days. Further, a new problem also emerges with this mandated reminder notice period, as discussed below: Tailored Assistance does not allow the appropriate flexibility for current plans – plans that customers both want and are accustomed to.

We believe that further data and consultation are required to address the need for, and operation of, Immediate Assistance. This would include:

- discussion with retailers about customers' current payment behaviours;
- consultation with customers about their preferences; and
- evidence of the relative effectiveness of different mandated periods for both sending out the reminder notice and the reminder notice period end date.

2. Tailored Assistance

The ESC has changed Tailored Assistance significantly from the version in the Hardship Inquiry Final Report and as discussed in the first informal consultation. Two types of payment difficulty have been merged into one, with a more streamlined approach.

In the 21 September version the ESC advised this change for the first time, with a new payment plan period and with the advice as noted above that eligibility for Tailored Support now commences from the issuing of the reminder notice. After several new and potentially costly additions were made to the rules under Tailored Assistance in the 21 September and the 3 October versions, the 21 October version is a relative improvement.

The key issue with Tailored Assistance as it is currently drafted is that it locks customers into a monthly payment plan. This means that all current and future plans with a different period – say, fortnightly – have been prohibited. This is a serious problem for all customers who want and expect different payment plans, such as those customers with fortnightly salaries who seek salary payment alignment with energy payment plans. It is also inconsistent with the application of Centrepay and many direct debit payments. For example, the frequency for Centrepay payments is fortnightly or weekly,[7] and aligns to the customer's Centrelink pay cycle.

It is reasonable that a customer should have an entitlement to a monthly arrangement, but that more frequent payments can be provided for according to the customer's needs (which include their Centrepay arrangements). Note that this is not matter of a customer choosing to pay more frequently when they feel like it, but retailers 'systems needing to provide for a payment arrangement to match the Centrepay amount and frequency.

We assume that locking Tailored Assistance into monthly payments was not an intended outcome. However, we note that the issue has been raised with the ESC a number of times this year.

Another example of an apparently unintended outcome is that the drafting of the revised Retail Code overlaps, and is inconsistent, with the current bill smoothing provisions of the Retail Code. Clause 23 of the Retail Code already sets out that bill smoothing is based on an estimate of 12 months' consumption, and it also provides for an adjustment at seven months. It would seem that the new clause 98(2) is irrelevant and that clause 23 already covers what is required; although we note an explicit informed consent provision applies to bill smoothing under clause 23, which introduces new uncertainty for retailers about the intent of the ESC and the attendant compliance risk for retailers.

This issue is particularly relevant for Tailored Assistance given the application of clause 82(2), which appears to provide for bill smoothing, and for which bill smoothing would seem to be a necessary approach.

[7] Some customers receive two Centrelink payments on alternating weeks (e.g. low income one week, family tax one week).

3. Connection Support

Connection Support has also changed significantly since retailers participated in the informal consultation process earlier in the year. The version from 21 September had:

- a new 'Promise to Pay' plan that allows for customers to have some flexibility in repayments if they cannot pay for use;
- a revised 'Energy Costs' plan which became a fortnightly plan, and where the customer must repay more than 66 per cent of use (which we assume includes both variable and fixed costs as they apply to the customer's contract),
- new fortnightly reporting on use against payments under Energy Costs;
- a revised 'Pay-as-you-go' plan which became a fortnightly plan, and where the retailer could move to disconnect the customer if their use exceeded pre-payments by more than 10 per cent in two consecutive fortnights; and
- new out-of-cycle bills.

This changed for the 3 October version and again for the 21 October version. The version from 21 October appears to be an improvement in some ways, such as the removal of the new out-of-cycle bills. However, there are now fundamental problems with the operation of Connection Support as a whole.

3.1. The customer experience

There are a number of practical and/or drafting issues with Connection Support in the Draft Decision.

First, under clause 90, a retailer can only place a customer on an Energy Costs plan if they can pay at least 66 per cent of their actual fortnightly usage. A strict reading of this would suggest a retailer is not allowed to elect to accept a payment plan with payments below 66 per cent. It remains unclear whether a retailer allowing a lower payment would be offering extra assistance under 99(1). This is an important point for the ESC to clarify.

So what happens when a customer cannot pay 66 per cent and the retailer cannot/will not offer an alternative? This is where the second issue arises, where the drafting of clause 95 would indicate that the customer has nowhere to go, as they must have 'failed' Energy Costs to move to Pay-as-you-go. This is surely unintended and must be resolved so that a customer who is not able to pay 66 per cent can go straight to Pay-as-you-go with no need to first fail a plan.

The third problem with the drafting arises from what a recent change made in the 21 October version, where the customer can now nominate what they can pay when they first start on Pay-as-you-go under clause 96(1). This removes the contradiction referred to above where under the previous version a customer who could not pay 66 per cent of their ongoing fortnightly use was then expected to pay 100 per cent. However, the problem is now how the revised clause 96(1) sits alongside clause 96(2), where a customer who uses more than 10 per cent than their plan allowed for within a fortnight (and 'at any time') needs to be advised about this and 'invited' to pay the full amount of their use or potentially face disconnection. Surely the customer cannot on be told that they can pay only what they can afford, and then be told within a fortnight that they must now pay 100 per cent of their use or be disconnected. This is not an obviously easy drafting fix because the policy itself needs to be clarified.

We note that the drafting of clause 111(2) regarding disconnection will also need to be amended to address the eventual policy intent.

In summary, these issues demonstrate that the drafting of the Retail Code provided in the Draft Decision has not been considered or tested sufficiently.

3.2. Objection to debt

The Hardship Inquiry Final Report advised that customers on Connection Support would not be able to transfer retailer within the first three months. This was not then addressed by the ESC in subsequent drafts, but retailers advised the ESC that the process for objections to transfer for reasons of debt may not be consistent with the ESC's intentions.

After silence on this issue in the draft payment difficulties framework from 21 September, the version from 3 October added a responsibility on a winning retailer to not submit a request for the transfer if the customer was receiving an Energy Costs payment plan (clause 104), with no apparent consideration of the fact that a winning retailer would not have the relevant information about the customer's payment plan.

We then saw a revised clause 105 in the draft of 21 October that put the obligation to object to a transfer back on the customer's current retailer, which is logical. However, the current transfer rules do not explicitly allow for the kind of transfer that the ESC has contemplated. For example, the electricity Transfer Code clause 5.1(b) states 'an objection using CATS[8] code "DEBT" must not be made by an existing retailer unless the debt is certified debt'. Certified debt is defined as:

> an aggregate sum of $200 or more:
> (a) net of any refundable advance held by the retailer; and
> (b) not including any debt owing by a customer to a retailer for which restructured payment terms have been agreed by the customer and adhered to for at least three months,
> owing by a relevant customer to a retailer in respect of a NMI which:
> (a) is not in dispute;
> (b) has been outstanding for at least 40 Victorian business days;
> (c) is in respect of the supply and sale of electricity or connection services;
> (d) remains despite the customer having been offered, in writing, restructured payment terms for its repayment (of the sort contemplated by the Electricity Retail Code).

Similarly, the gas Procedure states at clause 4.3.1(C)(ii): 'a FRO may only deliver an objection notice in relation to that transfer request to AEMO where… at the time the objection notice is delivered to AEMO, an aged debt is owing to that FRO by the person who is then purchasing gas at the supply point to which the transfer request relates'. In this case 'aged debt' is defined as:

> an amount or amounts owed by that person to a Market Participant for the sale of gas by the Market Participant to that person where, at that time, the amount or the aggregate of those amounts: (a) exceeds $100; and (b) has been due and payable for more than 40 business days.

While the Transfer Code is administered by the ESC and could be amended in line with the ESC's standard consultation process, the Procedure is an industry document which may only be amended in line with the process approved under section 35 of the National Gas Rules.

Beyond these issues, according to the CATS, retailers objecting to a customer transfer must do so within the same business day that the transfer is raised. This will require a systems solution for most retailers as it will simply not be practical to assess all transfer requests manually within the required timeframe.

Again, there is evidence here that the ESC has not grappled with the complexity of its policy proposals. We recognise the intent for this clause was likely to protect a retailer from losing a customer for whom they had acted in good faith. However the solution seems worse than the problem.

[8] CATS means the Customer Administration and Transfer Solution, a component of the Market Settlement and Transfer Solution, a system operated by AEMO.

3.3. Systems, processes and procedures

The ESC has stated that the revised payment difficulties framework from 21 October will result in lower costs than previous versions. We do not doubt that this is the case, but it does not necessarily follow that the costs will be *significantly* lower, particularly as there have been new rules drafted that also have systems implications. For example, the new requirement under Connection Support for fortnightly reports on energy use is likely to be onerous (clause 91), as is the change to 96(2) that requires retailers to advise customers about greater than 10 per cent differences between payments and use. Further, much of the framework will involve increased communications costs.

We reiterate that the systems sub-project that the ESC repeatedly advised it would undertake has not actually occurred.

Energy Council members recognise that costs are inevitable with this process. However, as we have stated throughout this submission, given the significance of the change and the lack of evidence for decisions made, we believe that further time is required and the need for a rigorous cost-benefit assessment is beyond doubt.

C. Customer Advice Manual

The latest edition of the Customer Advice Manual is 28 pages long. This calls into question whether a customer, or a representative for the customer, has the ability to understand the information provided. We note that other versions are to be made available, but without seeing these versions it is difficult to support the Manual either in concept or as presented.

This document (and any other versions) needs to be simplified once the payment difficulties framework has been finalised. The revised documentation must also be assessed on the following aspects at the very least:

- retailer and consumer advocate experience about consumer engagement with these types of documents, and what purpose the manual is to serve in practice, including the target audience(s);
- the level of consumer sophistication/literacy that must be catered for;
- a detailed assessment of the Manual against the Code to ensure consistency;
- focus group testing of the Manual with consumers across consumer types with different needs.