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OBLIGATIONS TO CUSTOMERS:

DISCONNECTION AND RECONNECTION

FINAL DECISION

FEBRUARY 2012

An appropriate citation for this paper is:

Essential Services Commission - *Obligations to customers: disconnection and reconnection – Final Decision*, February 2012 (C/12/5781)

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1 INTRODUCTION

The Energy Retail Code ("the Code") sets out the rights and obligations of the Victorian energy retailers and their residential and small business customers in the competitive energy market.

In late 2009, the then Minister for Energy and Resources requested the Essential Services Commission (the Commission) to review the statutory wrongful disconnection payment provisions. A draft report was released. In their submissions to the draft report, retailers raised concerns that certain regulatory obligations left retailers open to potential claims of wrongful disconnection despite their best endeavours to engage with customers to avoid disconnection action. The Commission undertook to review the relevant obligations to ensure that retailers were able to comply with the regulation.

The Commission held a stakeholder workshop, received submissions on a Consultation paper and a Draft Decision, and agreed to meet with retailers. The Commission now releases this Final Decision on amending the Energy Retail Code and the Electricity Distribution Code.

1.1 Purpose of this paper

The paper considers a request by retailers to vary obligations on them in certain circumstances under the Energy Retail Code which require them:

- to offer more than one instalment plan to assist customers with payment difficulties before taking disconnection action; and to meet certain detailed requirements for instalment plans [clauses 11.2(3), 12 and 13.1(a)].
- to reconnect a smart meter customer within a certain timeframe, regardless of the fact that it is not the retailer's role to perform the reconnection [clause 15.2].

In considering submissions on the Consultation Paper, the Commission was concerned by advice from the Energy and Water Ombudsman Victoria (EWOV) that

approximately 50 per cent of disconnection cases are found to be wrongful. In preparing the Draft Decision, the Commission regarded this as sufficient reason to not vary the obligations on retailers without compelling evidence. Submissions on the Draft Decision were invited.

While preparing the Draft Decision, the Commission separately received a report titled "**Customers of Water and Energy Providers in financial hardship: a Consumer Perspective**", from Hall and Partners / Open Mind ("the Report"). It was circulated to stakeholders and placed on the Commission website.

The Commission prepared the Draft Decision to consult on proposals addressing issues relating to the ***original matters*** raised by retailers and ***other matter***s raised by stakeholders, and also to consult on measures addressing the ***new matters*** raised by the Report and by EWOV. Each of these areas is discussed in this Final Decision.

1.2 Regulatory Provisions

Disconnection

There are a number of regulatory obligations contained in the Energy Retail Code (the Code) covering instalment plans (plans) and the obligations placed on retailers when disconnecting and reconnecting residential energy supplies.

Clause 11.2(3) states that, when a domestic customer is identified as having difficulties in paying their bills, the retailer must offer a further plan unless:

- the customer has in the previous 12 months failed to comply with two plans; and
- the customer does not provide reasonable assurance that they are willing to meet the requirements of a further plan.

The customer is also required to accept the plan within five business days of the retailer's offer.

Clause 12 sets out detailed requirements on the retailers with respect to the nature of the plans.

Clause 13.1 prohibits the retailer from disconnecting any domestic or small business customer for failure to pay a bill, if the failure relates to a payment under the customer's first plan.

Clause 13.2 makes additional provisions for domestic customers. Where their failure to pay a bill "occurs through lack of sufficient income", this clause requires retailers to undertake specific steps before disconnection, including complying with clause 11.2.

Reconnection

The Code outlines the obligations placed on retailers in relation to reconnection timeframes for energy supplies.

Clause 15.1 lists reasons for permissible disconnection of customers, including non-payment of a bill, an inaccessible meter, illegally obtaining supply and refusal to provide acceptable identification or a refundable advance when requested.

Where a customer rectifies the situation within 10 business days after disconnection, clause 15.1 requires retailers to reconnect them. Clause 15.2(a) specifies different time limits for retailers to achieve this reconnection, based on whether the customer has an accumulation meter or a smart meter.

Clause 15.2(b) relates to the obligation on retailers to achieve reconnection of smart meter customers within two hours, where it is safe to undertake reconnection.

1.3 Consultation

In December 2010, we conducted a workshop with retailers, consumer representatives and the Energy and Water Ombudsman, Victoria (EWOV). This workshop provided the opportunity for retailers to outline the barriers to them meeting their regulatory obligations, for consumer representatives to provide the customers' perspectives and for EWOV to provide insights from their casework experience.

In March 2011, the Commission issued a Consultation Paper on disconnection and reconnection of electricity and gas supplies, titled Retailers' Obligations to Customers: Energy Retail Code Amendments[1] (the Consultation Paper).

Having considered submissions on the Consultation Paper, the Commission made a Draft Decision in July 2011. Further written submissions were received and retailers met with staff to explain their views.

[1] Retailers' obligations to customers – Energy Retail Code Amendments Consultation Paper, March 2011

Submissions on the Draft Decision by consumer advocates offered strong support for the Commission's proposals, as the approaches taken on both the original matters and the new matters promoted consumer protection.

In submissions on the Draft Decision and at retailer forums, the businesses have strongly objected to:

- the Commission's proposals addressing their original matters.
- the addition of new matters at Draft Decision stage.
- the Commission's proposals addressing those new matters.

Several retailers also called for this consultation process to cease entirely.

Some retailers considered the proposed changes will be costly and not worthwhile, as they will come into effect shortly before the National Energy Customer Framework (NECF) is implemented in July 2012.

The Commission is required to remain an effective industry regulator until its responsibilities transfer to the Australian Energy Regulator.

Where possible, the Commission will ensure that its Decisions are consistent with the NECF, but in any event, where matters are discussed that are not covered by NECF, we hope that our Decisions might prompt review and discussion at the national level.

1.4 Structure of this paper

The remainder of this paper is divided into the following sections:

Section 2 explores specific disconnection issues from the Draft Decision, and sets out the Commission's final decisions in relation to them.

Section 3 addresses removal of the retailers' obligation to reconnect smart meter customers within two hours.

Section 4 discusses other matters raised during consultations, including amendment of the Electricity Distribution Code.

Section 5 summarises the Final Decisions made on disconnection and reconnection.

Appendix A shows relevant excerpts from the Energy Retail Code and the Electricity Distribution Code.

2 DISCONNECTION

Retailers are required under regulation to assist customers with financial difficulties to pay their bills and avoid disconnection of supply. The original issue raised by retailers concerned the need to offer a second instalment plan when the customer does not engage following the failure of the first plan. Consultation on the need to offer a second instalment plan and several other related issues raised during this consultation are addressed in this section.

2.1 Offering a second Instalment Plan

The Code requires at least two detailed plans to be offered before a customer is disconnected. Both plans must be based on an assessment of the customer's capacity to pay. The primary issue raised by retailers centred on their inability to make this assessment of capacity to pay when a customer does not engage with them. As a result, retailers cannot offer a second full detailed plan.

The Commission considered that the obligation to offer two detailed plans should remain, however it noted that the lack of engagement did make it difficult to offer a second plan. In circumstances where the customer did not engage, the Draft Decision noted the Commission would take into account the retailer's attempts to engage the customer in determining compliance with the Code.

The relevant draft decisions the Commission sought views on were:

Draft Decision:

For the avoidance of doubt, the Commission considers that by providing comprehensive documented evidence of unsuccessful efforts to contact the customer, retailers are more likely to be able to demonstrate compliance with their obligations under clauses 11.2, 12.1 and 13 to contact the customer.

The Commission will continue to review this evidence through regulatory audits and performance monitoring.

Where contact with a customer has not been established despite a retailers' best endeavours to visit the customer's premises, the retailer must make one final effort via registered mail (or similar) to encourage the customer to contact it to discuss financial assistance including instalment plans.

This final letter must contain a statement confirming the retailer's intentions to negotiate a new instalment plan and providing the customer with a final opportunity to contact it to discuss the matter further and avoid possible disconnection.

Submissions

The proposals attracted widely differing views. EWOV was in favour of the Draft Decision. Organisations representing consumer interests strongly supported it.

Retailers generally disagreed with the approach taken.

Several retailers considered that the proposal did not address the primary issue on which they had sought guidance - when a customer does not engage despite a retailer's best endeavours and this prevents the retailer assessing capacity to pay, how can the retailer avoid a disconnection being found wrongful?

Retail submissions sought confirmation that they need not send a second detailed plan to customers who do not engage. Instead, they would prefer to send a letter stating that a detailed plan could be arranged.

Most retailers saw the Draft Decision proposal as costly and onerous. It was viewed as having little benefit, in that a further letter would not engage the non-responsive customer.

Turning to the specific submissions, strong support for the Draft Decision came from EWOV[2], which recommended that the proposal for a final letter should be adopted and the letter should include a detailed second plan.

The Consumer Action Law Centre (CALC)[3] and the Consumer Utilities Advocacy Centre (CUAC)[4] also endorsed the Commission's approach in the Draft Decision.

[2] Energy and Water Ombudsman Victoria (EWOV) submission, 29 August 2011, pages 2 - 3

[3] Consumer Action Law Centre (CALC), submission 16 September 2011, page 4

[4] Consumer Utilities Advocacy Centre (CUAC), submission 31 August 2011, page 6

CUAC urged the Commission to monitor retailer compliance with the proposed requirements.

Retailers generally disagreed with the proposals in the Draft Decision. Their submissions requested greater guidance on how capacity to pay can be assessed without customer engagement. Origin, AGL, Lumo and Simply Energy emphasised this.

Origin[5] commented that the issue is a matter of interpretation and drafting, however it did not see new regulations as the answer.

Retailers agreed that a first detailed plan should be offered to customers in financial difficulty. Where a customer does not engage, many retailers recommended that a second detailed plan not be prepared. Retailers[6] suggested that in these circumstances, they should only be required to write and advise that a second plan can be made available, without providing specific details of that plan.

Lumo[7] called on the Commission to uphold the retailers' right to disconnect and to withhold reconnection where a customer does not engage. The business sought greater clarity on whether it was sufficient to merely advise a customer that a plan could be arranged. Lumo believed that adding a procedural step would not decrease wrongful disconnections, would achieve little and still require interpretive guidance. The retailer considered the proposal was suggesting that retailers have not used best endeavours.

Alinta[8] perceived a conflict between the Draft Decision requiring detailed plans to be offered and the Draft Decision stating that documented attempts to contact a customer would fulfil the retailer's obligation to make contact. Alinta called for documented attempts to suffice.

Simply Energy[9] believed that a final letter would not get customers to engage. The business sought further clarity on whether a detailed second plan was required, or

[5] Origin Energy (Origin) submission 31 August 2011, page 6

[6] Lumo Energy (Lumo), submission, undated, page 3; AGL submission 31 August 2011, page 4; Origin submission, page 5; Australian Power & Gas, submission 30 August 2011, page 3; Simply Energy, submission 31 August 2011, page 3.

[7] Lumo submission, pages 5 - 6

[8] Alinta Energy (Alinta), submission 31 August 2011, page 1

[9] Simply Energy submission, pages 2 - 3

whether it would be sufficient to merely advise the customer that a second plan could be arranged.

Neighbourhood Energy[10] believed sending a final letter would not add value, nor engage the customer. The retailer considered it would only be costly, delay disconnection and increase customer debt. The retailer expressed concern that a further letter might constitute harassment.

Australian Power and Gas[11] regarded the final letter as a costly extra step which would do little to encourage contact by customers.

Dodo Power and Gas (Dodo)[12] submitted that the proposal was costly and said it would complicate wrongful disconnection cases.

AGL criticised the sending of a final registered letter (or similar) as a needless extra step. AGL considered that an additional step prior to disconnection would be inconsistent with the intention of the review on how to offer a second detailed plan when a retailer cannot contact the customer. The business found this an onerous additional obligation beyond present requirements. They recommended the current obligation to offer a detailed second plan be varied to merely advising that a second plan could be arranged.

Commenting specifically on the requirement for a final registered letter, Origin noted that,

> *If the point was to deliver a view that the second offer of an instalment plan must be made (in the registered letter) but does not need to show actual dollars then this is the interpretation retailers were looking for.*

In addition, Origin noted that the letter need not be registered, as there was no suggestion of unreliable mail deliveries by Australia Post.

Discussion

The original request by retailers focussed on clause 11.2 of the Code, which requires that at least two plans be offered to customers in hardship. Retailers sought clarity to avoid wrongful disconnection in the circumstance where a

[10] Neighbourhood Energy, submission 31 August 2011, pages 3 - 4

[11] Australian Power and Gas submission, page 3

[12] Dodo Power and Gas (Dodo), submission 8 September 2011, page 2

customer cannot be offered a detailed plan due to the customer not engaging with the retailer.

We are surprised that retailers were strongly opposed to the requirement for a final attempt at engagement to offer a plan (via registered letter or similar), as the Draft Decision proposal was intended to assist retailers when customers do not engage. That is, where there was no engagement, the Commission agreed that a second plan could not be negotiated and attempts made by the retailer would be taken into account in assessing whether the Code obligation had been met.

There was no suggestion that the final registered letter (or similar) would include a further detailed plan. The intent was that this final attempt would advise that arrangements could be negotiated if the customer chose to respond to avoid disconnection for non-payment. The Draft Decision proposal was to provide definitive proof of attempted contact, not to suggest any possibility of unreliability of mail deliveries.

The aim of retailer communication with the customer is to seek engagement and agree changed payment arrangements to assist the customer to stay on supply. The Commission considers that retailers are entitled to disconnect energy supply for non-payment provided they comply with their regulatory obligations.

Neighbourhood Energy submitted that sending a final letter may constitute harassment as defined by the "*Debt Collection Guideline: For Creditors and Collectors*"[13]. The Commission does not agree, rather we see this letter as a legitimate attempt to assist the customer to negotiate an appropriate payment arrangement to remain on supply.

The Commission notes that CUAC and CALC supported the Draft Decision. We further note the comment from Origin (reproduced on the previous page) and confirm the intent of the Draft Decision was a letter including the "offer of a second instalment plan (which) does not need to show actual dollars".

The Commission notes that retailers may be unable to fully develop a second detailed plan, including an assessment of capacity to pay, without further

[13] The Guideline is a joint publication by the Australian Competition and Consumer Commission (ACCC) and the Australian Security and Investment Commission (ASIC). The Guideline can be found at www.accc.gov.au

information from the customer. In addition, we consider that when a customer does not engage the retailer is placed in a position where it cannot remain compliant with the Code. This circumstance should be addressed.

Where the retailer can demonstrate that the customer hasn't engaged with it, the Commission accepts that further guidance is needed. However we retain the view that the existing obligation remains on retailers to engage with hardship customers, and offer two detailed plans before proceeding to disconnection.

Where the customer does not engage with the retailer, the Commission will adopt the following principle:

- The retailer must make legitimate and documented attempts to engage the customer, including one final attempt by registered letter or similar. The primary purpose of these attempts to engage the customer is to negotiate an appropriate payment arrangement that takes account of the customer's circumstances.

The Commission considers that by applying this principle, retailers can adequately demonstrate that they have made genuine attempts to notify and engage the customer to negotiate a second instalment plan. If genuine attempts to engage are made and the customer ***does*** engage, the Commission requires a second instalment plan to be negotiated. If genuine attempts to engage are made and the customer ***does not*** engage, with the retailer to negotiate a second plan, then the Commission will note these genuine attempts as evidence to support that the retailer should be relieved of the obligation to offer a second detailed instalment plan.

FINAL DECISION 1: Offering a second Instalment Plan

In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principles in their dealings with customers and that in the event of any escalated dispute, these principles will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute:

- Where a customer ***has*** engaged with the retailer since coming to attention for non-payment, the retailer must offer a second detailed instalment plan which fulfils all the requirements of clause 12, or the disconnection will be found to be wrongful;

- Where a customer ***has not*** engaged with the retailer since coming to attention for non-payment, by having failed to:
  a) make some payment under a first instalment plan before it failed; and
  b) engage in discussion when telephoned or visited; and
  c) reply to correspondence from the retailer; and
  d) otherwise contact the retailer –

  then in order to avoid a subsequent disconnection being found wrongful, the retailer must have already offered a first detailed instalment plan which fulfils all the requirements of clause 12 and made genuine attempts to engage the customer, including (as a final step before a disconnection warning) sending a registered letter or similar, separate from any bill or demand.

  The final letter must actively encourage the customer to contact the retailer to discuss payment arrangements, all forms of financial assistance and their hardship program, giving the customer five business days to respond to avoid disconnection for non-payment.

  Provision by the retailer of comprehensive evidence of attempts to contact the customer, including a letter meeting the above specifications, will be deemed by the Commission to have fulfilled the requirement under clause 11.2 for a second detailed instalment plan to have been offered, despite it not reflecting the customer's capacity to pay, as specified by clause 12.2(a).

2.2 Obliging customers to respond

One of the matters on which retailers originally approached the Commission was seeking guidance for when a customer did not engage. Several aspects of the Draft Decision addressed this matter, including the following:

Draft Decision:

Lack of customer engagement with the retailer does not lessen a retailer's obligations, particularly in matters which may lead to disconnection of energy supply.

Submissions

Stakeholders responded to this Draft Decision as follows:

CUAC[14] supported the decision.

Lumo[15] called on the Commission to uphold the retailers' right to disconnect and to withhold reconnection where a customer does not engage.

Alinta[16] perceived a conflict between one Draft Decision which required detailed plans and another Draft Decision stating that documented attempts to contact a customer would fulfil the retailer's obligation to make contact. Alinta called for documented attempts to suffice.

Discussion

Alinta suggested there was a conflict between two Draft Decisions. The Commission does not see any conflict, as the Draft Decisions read together proposed that attempts to offer detailed plans should be made so as to encourage a customer to respond.

We note that this Draft Decision is closely linked to the matters considered in section 2.1 ("Offering a second Instalment Plan"). Those matters include various aspects of communication specifically when a customer does not engage with the retailer. The Commission emphasises that the preferred outcome is for the retailer to offer a second plan, however we recognise that this may not be possible if the customer does not engage.

The principles outlined in Section 2.1 provide sufficient clarity to retailers and consumers and the Commission does not need to make a further Final Decision on this specific matter.

[14] CUAC submission, pages 9 - 10

[15] Lumo submission, page 7

[16] Alinta submission, page 1

2.3 Obligations to residential and small business customers

Clause 12.1 requires retailers to offer domestic customers two kinds of payment plans:

- to make regular payments towards future bills [under 12.1(a)] ; and
- to pay off accumulated debt [under 12.1(b)].

The issue being considered is whether the protections offered by the Code for customers on a plan under clause 12.1(a) and for those under 12.1(b), should be restricted to those under 12.1(b) only.

In the Draft Decision, we considered that the obligation to offer these plans to domestic customers should not be amended, and that obligations relating to small business customers need no further amendment.

The relevant draft decision was:

Draft Decision:

The present obligations on retailers under clause 12 of the Code will be retained, relating to offering instalment plans to a domestic customer.

Submissions

Retailer submissions principally recommended that customers on different types of plans should be treated differently by regulations.

AGL[17] referred to its Consultation Paper comments in which it stated that domestic and small business customers may enter plans for convenience, apart from financial difficulty. AGL considered these customers should not have the same protections as customers in difficulty who are on plans.

Lumo[18] considered that existing protections for small business customers under the Energy Retail Code should not be extended.

Dodo[19] stated that the Commission should recognise that there are clear differences between payment plans offered to manage energy payments and those that are required for customers in difficulty. Dodo said that the Commission should

[17] AGL submission, page 6

[18] Lumo submission, page 7

[19] Dodo submission, page 1

consider an approach where additional provisions are included that deal with general plans.

Discussion

We note that customers under both types of plans can fall into payment difficulties, and that the current protections of the Code apply to both. We find that no compelling information was provided in response to the Draft Decision for us to change our decision, especially in relation to the view that customers who choose a plan under clause 12.1(a) "usually … do so for convenience, rather than as a result of having insufficient income".[20]

We note Dodo's comment that there are differences between payment plans offered to different categories of customers, however we are not persuaded that additional provisions are required to be drafted for customers on general instalment plans.

Existing protections for small business customers are contained in clause 12.3 of the Code. The clause states that retailers must consider any reasonable request from a business customer for an instalment plan, and may impose an additional retail charge for that plan. No additional information was provided in responses for the Commission to amend or extend these provisions. The Commission therefore maintains its view that there will be no change to the current protections for small business customers.

The Commission's Final Decision in relation to small customer instalment plans is as follows:

FINAL DECISION 2: Obligations to Small Customers

The present obligations on retailers under clause 12 of the Code relating to offering instalment plans to domestic and small business customers will be retained.

[20] Simply Energy submission, page 3

2.4 Issues raised by the Commission

During the consultation process, the Commission raised other matters and sought stakeholder feedback. These are discussed below.

2.4.1 Financial Counsellor's Advice

The Draft Decision included varying retailers' obligations prior to disconnection, by proposing that retailers developing instalment plans should follow a financial counsellor's advice where available.

The relevant Draft Decision was:

Draft Decision:

When offering an instalment plan, a retailer should act in accordance with any advice of a financial counsellor with respect to a customer in hardship, except in extraordinary circumstances, and in that case must record the extraordinary circumstances which apply in the particular case.

Submissions

Consumer representatives supported the proposal and called for retailers to do more. Retailers preferred current regulatory arrangements. They submitted that the proposal was problematic, would be costly and would complicate their operations.

CALC[21] welcomed the Draft Decision on acting in accordance with a financial counsellor's advice and called for retailers to expedite the handling of telephone calls from financial counsellors.

CALC noted[22] that many customers would not be represented by financial counsellors, but conduct their own negotiations with retailers. CALC urged retailers to give due regard to an assertion by a customer that the person could not sustain a payment plan.

[21] CALC submission, pages 1 - 2

[22] CALC submission, page 2

AGL[23] accepted that financial counsellors' advice should be taken into account, but said such advice should not be followed if the resulting payment did not cover ongoing consumption.

Australian Power and Gas[24] stated that assessing capacity to pay encompasses more than just the advice from a financial counsellor. Noting the Draft Decision that such advice should be followed except in "extraordinary circumstances", the business considered the phrase subjective and more costly. The business said this would make disconnection more difficult.

CUAC[25] supported the proposal and said the Commission should audit retailers' reliance on the "extraordinary circumstances" exemption proposed in the Draft Decision. The consumer organisation also suggested retailers should impartially fund financial counsellors.

CUAC considered[26] that retailers should tailor plans where payments cannot provide adequately for current usage. They also suggested retailers should more frequently waive debts, assist applications for Utility Relief Grants (URGs), and provide energy efficiency audits and appliances.

Alinta Energy (Alinta)[27] supported current Code requirements regarding plans and financial hardship, provided the customer and retailer are in direct contact.

EWOV[28] believed that a financial counsellor's advice must balance consumption and capacity to pay.

Discussion

In light of the opposing submissions received about the use of financial counsellors' reports, the Commission is concerned that direct reliance on such advice and the application of the 'extraordinary circumstance' provision may not provide the balanced outcomes that it was seeking for customers and retailers.

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[23] AGL submission, page 2

[24] Australian Power and Gas submission, pages 2 - 3

[25] CUAC submission, pages 4 - 5

[26] Australian Power and Gas submission, pages 5 - 6

[27] Alinta Energy, submission 31 August 2011, page 1

[28] EWOV submission, page 3

The Commission believes that a financial counsellor's advice can assist the retailer assessing a customer's capacity to pay, and it is useful for retailers to refer customers for a financial counsellor's advice.

The Commission has resolved not to proceed with a decision on this issue. Rather, in examining an alleged wrongful disconnection, we will look for documentation of whether the retailer paid proper regard to financial counsellor's advice, where it is available.

2.4.2 Capacity to Pay

The Draft Decision consulted on proposals for both instalments and lump sums to be set to reflect the customer's capacity to pay. These complementary proposals are discussed in sections 2.4.2(a) and 2.4.2(b), below.

2.4.2 (a) Capacity to pay Instalments

Customers on a payment plan agree to pay by regular instalments. The instalment amount is set by the retailer to do two things: pay off accumulated arrears and cover ongoing consumption. The Code obliges retailers to consider the customer's capacity to pay as one of the factors when setting the instalment amount. EWOV's submission on the Consultation Paper recommended minimum criteria which retailers might use in making this assessment of capacity to pay. These criteria were included in the Draft Decision and put out for comment.

The relevant Draft Decision was:

Draft Decision:

An instalment plan should reflect the customer's capacity to pay. When considering a customer's capacity to pay for a proposed instalment plan, reasonable criteria for the retailer to base its assessment on include at least the following:

- Previous instalment plans
- Current usage
- History of payments
- Arrears accumulated.

Submissions

Although consumer representatives supported the proposal, they were not satisfied that it would adequately cover the issue. Retailers were less supportive. They also held differing views on which factors might be considered when assessing capacity to pay instalments. Retailers offered several suggestions on the merit of the proposed criteria and recommended various other possible criteria. Retailers differentiated between criteria for the initial assessment of capacity to pay, and the subsequent setting of a dollar amount for instalments under a plan.

CUAC[29] urged that it be mandatory for retailers to consider capacity to pay when setting payments. CALC[30] emphasised that assessment of capacity to pay must take into account the customer's income and expenses. It called for the Commission to assess the reasonableness of plans.

AGL[31] believed that the minimum criteria for assessing capacity to pay, as proposed in the Draft Decision, mixed customer needs with actual capacity to meet payments. The business suggested assessment should be based on just the customer's previous plans and payment history. AGL stated that instalments must at least cover consumption. The business considered that, if implemented, the proposal would be onerous on retailers and still require interpretation.

Neighbourhood Energy[32] stated that capacity to pay should be assessed without regard to accumulated arrears or current usage, as these do not affect the amount of money available to pay the retailer. For setting plans, the business recommended clause 12.2(a) be amended to add a focus on arrears, so that setting instalments reflects "consumption needs, arrears and capacity to pay".

Origin[33] commented on setting amounts for a plan. The business was concerned that focusing on capacity to pay may under-emphasise the customer's ongoing consumption needs. Clause 12.2 of the Code requires attention to both. Origin added that in previous discussions with Commission staff the retailer had been advised that it can balance consumption needs and capacity to pay.

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[29] CUAC submission, page 7

[30] CALC submission, page 2

[31] AGL submission, page 5

[32] Neighbourhood Energy submission, pages 4 - 5

[33] Origin submission, pages 9 - 11

Origin had concerns that the Draft Decision appeared to assert that there was a retailer obligation to accept whatever a customer says they can pay. The business advised that it may carry out a more detailed assessment of capacity to pay beyond information the customer provides. Origin saw value in capacity to pay being interpreted to cover previous plans and payment history, saying that where a customer is non-communicative this will be the last information available. The business found that this is a useful start to managing the interpretation/drafting issue originally raised by retailers, and stressed the importance of clear regulatory wording.

However, Origin did not support the Draft Decision proposal that the main criteria for assessing capacity to pay should also include arrears and current usage. Origin considered these latter criteria would be more relevant for the subsequent decision on setting an instalment amount.

Origin preferred to leave the term "capacity to pay" unchanged as meaning what a customer is capable of paying, and that drafting make it clear that retailers making the subsequent decision on setting an instalment amount have a right to reflect consumption and arrears and capacity to pay.

Lumo[34] considered that the proposed criteria for assessment of instalments were too narrow and suggested expanding them to include at least the following **:** income and expenditure, arrears, other loans or debts, and provision for ad hoc expenses which may be encountered. Lumo stated that all these factors affect the money available to pay the energy retailer. The business was concerned that the proposal would reduce payments to retailers.

Discussion

The Commission accepts that assessing capacity to pay is a difficult issue and requires retailers to account for a number of inputs, mostly provided by the customer. The Draft Decision proposed several criteria for stakeholders to consider. All stakeholders considered an assessment of a customer's capacity to pay was important, however most retailers considered the proposed criteria did not provide the required guidance. Retailers generally did not agree that an assessment of arrears provided any guide to a customer's capacity to pay future

[34] Lumo submission, page 6

bills, with most noting that instalments need to reflect consumption. CALC noted that a customer's income and expenses need to be considered.

The Commission considers that an assessment of capacity to pay is integral to setting a second plan. The assessment is facilitated by customer engagement. Such engagement is necessary if a customer is to avoid disconnection. We consider that this engagement, if robust, will allow the retailer access to sufficient information to adequately assess capacity to pay and that this review must include an assessment of the customer's income and expenses. The Commission notes that clause 12.2 of the Code already includes reference to the assessment of a customer's consumption and arrears.

After consideration of submissions we will not nominate specific criteria at this stage for retailers assessing capacity to pay instalments but will as part of any review of any alleged wrongful disconnection, consider the adequacy of the retailer's assessment in all the circumstances.

FINAL DECISION 3: Capacity to pay Instalments

In lieu of further amendment to the Energy Retail Code, the Commission as part of any review of alleged wrongful disconnection, will consider the adequacy in all the circumstances of the retailer's assessment of the customer's capacity to pay instalments.

The Commission expects that this articulation of its approach (should a matter be referred) will assist the Energy and Water Ombudsman Victoria to finalise disputes.

2.4.2 (b) Capacity to pay Lump Sums

Setting lump sums at a level customers can afford would assist in encouraging engagement by customers. This proposal was based on input at the stakeholder workshop and submissions to the Consultation Paper, notably by EWOV.

The relevant Draft Decision was:

Draft Decision:

When requesting payment or part payment by lump sum, the amount of the lump sum should also reflect the customer's capacity to pay, reasonable criteria for the retailer to base its assessment on include at least the following:

- Previous instalment plans
- Current usage
- History of payments
- Arrears accumulated.

Submissions

Retailer responses highlighted a number of difficulties with the proposal for lump sums. Consumer representative organisations were more in favour than retailers, but also suggested other factors which could be assessed. Several alternate methods of assessing capacity to pay were canvassed by retailer submissions, however they generally viewed the proposal as unjustified.

AGL[35] considered this a new matter which was onerous for the industry. However, the retailer believed that assessing capacity to pay based on previous plans and history of payments seems reasonable, in circumstances where the customer does not engage and there is no additional information on which to base an assessment. AGL stressed that the customer's consumption needs must be weighed with capacity to pay, wherever possible.

Australian Power and Gas[36] advised that it seeks lump sums prior to reconnection, but hardship cases are referred for Utility Relief Grants. Customers having payment difficulty, but who are willing to pay, are handled through the hardship program. The retailer felt that the proposed requirement to assess capacity to pay a lump sum indicated the Commission had presumed a disconnection to be wrongful.

[35] AGL submission, page 5

[36] Australian Power and Gas submission, page 3

CUAC[37] urged that it be mandatory for retailers to consider capacity to pay when setting lump sums.

CALC[38] emphasised that assessment of capacity to pay must take into account the customer's income and expenses.

Lumo[39] considered that the proposed criteria for assessment of lump sums were too narrow and suggested expanding them to include at least the following**:** income and expenditure, arrears, other loans or debts, and provision for ad hoc expenses which may be encountered. Lumo stated that all these factors affect the money available to pay the energy retailer.

Origin[40] believed assessing capacity to pay could be problematic for lump sums. The retailer could not support the proposal without evidence of any systemic issue requiring new regulations.

Discussion

In proposing that capacity to pay lump sums be assessed, the Commission made no presumption about disconnections being wrongful.

The Commission is pleased that submissions have provided additional information on this issue, but it is clear that there is no widely accepted consensus on the best way to proceed.

Submissions have displayed a wide range of views. While consumer organisations supported the proposal, some retailers regarded it as unwarranted. Those making submissions on which aspects were relevant to setting lump sums highlighted many different factors that could be considered.

We have been convinced by the arguments that the Draft Decision would not have provided significant improvements in the assessment of a customer's capacity to pay a lump sum. Instead, when examining any alleged wrongful disconnection, the Commission will consider whether the retailer has assessed the customer's

[37] CUAC submission, page 7

[38] CALC submission, page 2

[39] Lumo submission, page 6

[40] Origin submission, pages 11 - 12

capacity to pay a lump sum, and the adequacy of that assessment in all the circumstances.

FINAL DECISION 4: Capacity to pay a Lump Sum

In lieu of further amendment to the Energy Retail Code, the Commission when examining any alleged wrongful disconnection, will consider whether the retailer has assessed the customer's capacity to pay a lump sum, and the adequacy of that assessment in all the circumstances.

The Commission expects that this articulation of its approach (should a matter be referred) will assist the Energy and Water Ombudsman Victoria to finalise disputes.

2.4.3 Acceptance of payments

The Draft Decision noted suggestions in the Hall and Partners / Open Mind report of some retailers' reluctance to accept payments other than agreed instalment amounts under a plan. This may impede good customer service to those customers experiencing financial difficulty.

The Draft Decision proposed that retailers accept payments which are:

- Overpayment on an instalment
- Additional payments during a plan
- Limited part payment of instalments.

Draft Decision:

The Code will be amended to require that:

- If a customer offers to pay more than the amount agreed for a payment under an instalment plan, the retailer must accept this additional amount and credit the customer accordingly.

- If a customer offers to make an additional payment of some amount separate from the regular payments required under an instalment plan, the retailer must accept this additional payment and credit the customer accordingly.
- Where a customer is unable to pay the full amount of an instalment under an instalment plan and offers part payment on that occasion, the retailer must accept the part payment and may add the unpaid amount of that instalment to the amount outstanding under the plan, unless:

(a) this payment is the third consecutive instalment to be underpaid; or

(b) this instalment if the fifth instalment to be underpaid in any 12 month period.

If (a) or (b) apply, this would constitute failure of the payment plan.

Submissions on the Draft Decision can be reviewed in two categories - overpayments and additional payments; and situations where part payments might be accepted. Each of these is addressed below.

2.4.3 (a) Overpayments and Additional payments

Submissions

AGL[41] noted that clause 7.3 of the Code already requires acceptance of payments in advance. The business advised that it does credit such payments to the customer's next bill. AGL sought clarification on any systemic non-compliance with clause 7.3 of the Code.

Origin[42] advised that it does accept additional payments.

Neighbourhood Energy[43] commented that they already accept additional payments, and saw no need for the proposed amendment.

[41] AGL submission, pages 2 - 3

[42] Origin submission, page 8

[43] Neighbourhood Energy submission, page 2

Discussion

The Commission notes that clause 7.3 of the Code requires acceptance of payments in advance. The report by Hall and Partners / Open Mind found that some customers on plans were declined when offering to pay extra on an instalment, or make an additional payment. The Commission believes that accepting money should not be an unacceptable burden to any retailer. Indeed, several retailers subsequently confirmed that businesses would welcome this.

Retailers should accept a customer's offer of over-payment on an instalment if extra money is available during a plan. Equally, retailers should accept a customer's offer of an additional payment between scheduled instalments. Failure to do these things could exacerbate the customer's financial difficulties.

The Commission is of the view that Clause 7.3 of the Energy Retail Code is sufficient to support the recommendations of the Hall and Partners / Open Mind report and that its findings indicate a potential compliance failure, rather than a Code inadequacy.

2.4.3 (b) Part payments

Submissions

Several retailers advised that they already accept part payments as a matter of course. Most felt the more formalised proposal was not justified and should not proceed. They also believed that it would have significant cost. CUAC also countered the proposal, recommending that retailers should have more flexibility in dealing with customers.

AGL[44] referred to clause 12.2(c) of the Code, which requires retailers to have fair and reasonable procedures to address payment difficulties. The business considered that this includes accepting part payments. AGL advised that this should be limited to accepting payments directly, not through an agent such as Australia Post.

Australian Power and Gas[45] regarded the proposal as costly to business and likely to increase customer debt. The retailer believed the proposal should have

[44] AGL submission, page 3

[45] Australian Power and Gas submission, page 4

thorough cost benefit analysis, and be compared against government policy and good regulatory practice.

CUAC recommended that retailers view part payments as a trigger to contact a customer in financial difficulty, before declaring the plan to have failed. CUAC also believed retailers should accept payment through the Centrepay system, offered by Centrelink, to facilitate payments by customers in financial difficulty.

Lumo regarded the definition of what constituted failure of a plan to be subjective and requiring further guidance. The business stated that retailers' internal procedures on what constituted plan failure had never been regulated before. Lumo was also concerned at the associated cost of implementing these steps.

Neighbourhood Energy considered the proposal for limited part payments to be of no value, costly to implement and would have limited duration, given transition to the National Energy Customer Framework.

Origin advised that it does accept part payments. The business regarded the proposal as lacking clarity on how it could be applied. The retailer considered that specifying the third consecutive instalment and fifth instalment to constitute failure of a plan seemed arbitrary. Origin was concerned that the proposal would require costly system changes which it considered were not worthwhile, given planned transition to the National Energy Customer Framework.

Discussion

The Commission notes the disparate views and practical concerns raised in submissions about the Draft Decision for accepting part payments, particularly about the proposal that customers be allowed some limited flexibility to enable part payments before a plan is declared to have failed.

Some retailers submitted that accepting part payment of instalments from customers would ultimately increase the customer's overall debt and potentially place them in a worse off position. While this appears counter intuitive, we assume it is based on a view that accepting part payment leaves an unpaid balance to be accrued and extends the period of the overall instalment plan. The Commission recognises a retailer's right to eventual payment in full.

The Hall and Partners / Open Mind report suggested that some customers have been disadvantaged by retailers refusing to accept what money they were able to

offer on occasion, instead telling them they would owe a double-instalment amount next time. The Report noted that these customers would have had little prospect of amassing a double-instalment amount for the next occasion, particularly where medical and other expenses intervene. Where circumstances prevent them meeting this double payment, their indebtedness would increase further.

We note that AGL and Origin Energy already accept part payment. Generally the Commission would expect that it would be in the retailer's (and the customer's) best interest to accept any payment from the customer and retailers should have fair and reasonable procedures to address payment difficulties. The Commission considers that the acceptance of part payments is an element in addressing payment difficulties and would provide the retailer the opportunity to further discuss payment options with the customer.

These discussions may identify specific issues and may help determine hardship status and provide information on the customer's capacity to pay. As a customer offering part payment is likely to be in hardship, we encourage the retailer to accept such payments.

Part payments should not automatically constitute failure of an instalment plan. The Commission acknowledges that each retailer has an internal process for determining when a plan is no longer viable. We would expect retailers' training processes to ensure consistency of application across all business units. Any decision by a retailer to declare that a plan has failed must be reasonable in all the circumstances.

The Commission has assessed stakeholder views and makes the following Final Decision.

FINAL DECISION 5: Over payments, Additional payments and Part payments

The Commission confirms for the avoidance of doubt that clause 7.3 of the Energy Retail Code applies to instalment plans. This requires retailers to accept the overpayment of instalments and to accept additional payments during an Instalment plan.

In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principles in their dealings with customers and that in the event of any escalated dispute, these principles will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute:

Where a customer is unable to pay the full amount of an instalment under an instalment plan and offers part payment on that occasion, the retailer should accept the part payment and use the opportunity to discuss further payment options or instalments plans. The Commission expects retailers' policies on instalment plans to clearly address the acceptance of part payments.

2.4.4 Requiring lump sum as a condition prior to taking action

The Draft Decision considered that it was unreasonable for a retailer to make payment of a lump sum a condition for obtaining an application form for a Utility Relief Grant (URG), or for having electricity or gas reconnected. The Draft Decision was:

Draft Decision:

A retailer must not request a customer to make a lump sum payment prior to providing assistance to a customer in applying for a Utility Relief Grant, or as a condition for reconnection to supply.

Submissions

No submissions objected to prohibition of lump sums as a condition for an URG.

AGL[46] noted clause 15.1 of the Code obliges the retailer to reconnect a customer who enters a payment arrangement or applies for an URG (among other things).

[46] AGL submission, page 4

The business stated that it does not require lump sums in URG applications and recommended the Commission take up the matter with retailers who do.

AGL also stated that it is reasonable for retailers to seek a lump sum to cover reconnection charges and the first payment under a plan.

Lumo[47] sought further consultation on what type of lump sum retailers might require their customers to pay. The business said it was only seeking evidence of customer commitment and reasonable assurance of willingness to pay. The retailer stated that, without the leverage of imposing a condition for reconnection, it is forced to cycle through disconnection and reconnection with no customer obligation to actually enter an agreement.

Lumo felt the Commission was assuming all disconnected customers would be entitled to an URG.

Australian Power and Gas[48] noted that when a customer requests reconnection after a non-payment disconnection, the retailer may ask for an upfront initial payment that is negotiated with the customer (the exception is for URG applicants – they move onto a hardship program).

CUAC[49] supported the Draft Decision. CUAC believed that if a lump sum is required from a customer when negotiating a payment plan, the lump sums have to be "subject to a documented process" detailing how the customer's capacity to pay the lump sum had been taken into account.

Discussion

Having considered submissions on the Draft Decision, the Commission accepts that a differentiation can be made between requiring a lump sum for a Utility Relief Grant and requiring one for a reconnection.

We maintain our view that eligible customers must not be impeded when applying for an URG and retailers should not request lump sums from these customers as a pre-condition to offering assistance with URG applications. Rather, retailers should assist eligible customers and move them onto hardship programs. The

[47] Lumo submission, pages 5 - 6

[48] Australian Power and Gas submission, page 3

[49] CUAC submission, page 7

Commission therefore confirms its draft decision prohibiting lump sums being requested from customers as a condition to receive assistance with URGs.

In relation to requiring lump sums prior to reconnection, the Commission notes that not all reconnection customers may be in hardship. The Commission considers that a retailer will need to assess each reconnection and determine if the customer is in hardship and treat the customer in line with its hardship policy.

In light of the differing types of reconnection customers the Commission will not prohibit lump sums outright prior to reconnection. However, it is a requirement that retailers' actions be reasonable in all the circumstances of the particular case.

FINAL DECISION 6: Requiring lump sum as condition prior to taking action

The Code will be amended to prohibit retailers from demanding a lump sum from a customer as a condition of applying for a Utility Relief Grant.

In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principle in their dealings with customers and that in the event of any escalated dispute, this principle will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute:

A retailer's actions in requiring a lump sum as a condition prior to reconnection must be reasonable in all the circumstances of the particular case.

3 RECONNECTION

3.1 Obligation on retailers

Another area identified by the Commission for consultation was the obligation on retailers to reconnect smart meter customers within a certain timeframe.

Retailers do not perform reconnections - they procure distributors to do so. The Electricity Distribution Code requires distributors to reconnect smart meters within two hours, where safe to do so. The Energy Retail Code has two relevant clauses:

- clause 35.1 specifies that retailers must use best endeavours to procure the distributor to reconnect.
- clause 15.2(b) overrides this with an absolute obligation on the retailer to achieve reconnection of smart meters within two hours.

The relevant Draft Decisions were:

Draft Decision:

- Clause 15.2(b) of the Code will be amended to remove the absolute obligation on retailers in relation to timing of reconnection.
- To maximise the likelihood that customers will benefit from the prompt reconnection service made possible by smart meters, clause 15.2(b) will be amended to oblige a retailer to request reconnection of a smart meter by a distributor within one hour of receiving a request from a customer, where the retailer reasonably believes it is safe for the reconnection to proceed.

Submissions

Consumer representative organisations saw the proposal as a lessening of service and did not support it. Retailers generally objected to the proposal, saying it would be costly and of little benefit. However, AGL advised that it already exceeds the proposed target for timely handling of reconnections.

CUAC's submission[50] called for retention of the absolute obligation on retailers to reconnect within two hours, with distributors to settle with retailers through a business to business arrangement.

CALC[51] said that maintaining the absolute obligation on retailers would focus their efforts. CALC believed that the customer's sole functional relationship is with the retailer, not the distributor, and making amendments would confuse the customer.

CALC could not support the Draft Decision for retailers to pass on a reconnection request to the distributor within one hour, because it was based on removal of the absolute obligation on the retailer to reconnect.

EWOV[52] was prepared to see the absolute obligation removed, provided retailers facilitate reconnection.

Submissions[53] by AGL, Alinta, Neighbourhood Energy, Simply Energy, Origin and Lumo supported removal of the absolute obligation in clause 15.2.

AGL[54] advised that they generate requests to distributors in 10 to 15 minutes.

However, there were objections to the proposal for requests to be communicated within one hour. Several retailers advised Commission staff that each have their own procedures and IT systems, so varying amounts of time are required. They stated that changing this would involve considerable expense for limited benefit.

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[50] CUAC submission, pages 10 - 12

[51] CALC submission, pages 5 - 6

[52] EWOV submission, page 3

[53] AGL submission, page 6; Alinta submission, page 2; Neighbourhood Energy submission, page 6; Simply Energy submission, pages 3 - 4; Origin submission, pages 12 - 13; Lumo submission, pages 7 - 8.

[54] AGL submission, page 6

Australian Power and Gas[55] thought that specifying one hour for passing on requests was artificial, saying that taking 61 minutes to do so would make no difference. The business asserted that retailers do not delay passing on requests.

Simply Energy's written submission[56] called for removal of the absolute obligation on retailers to reconnect within two hours and for arrangements between retailers and distributors to be left to them.

Origin[57] believed the proposal for a specified time to pass on a request was poor regulatory practice. The retailer felt the Draft Decision giving one hour to take action was arbitrary.

Neighbourhood Energy[58] suggested it would be impractical to pass on a request within one hour of the customer making it, as the retailer may still be on the phone with the customer for much of that time, negotiating a plan for example. Retailer validation processes could not be undertaken until after the call had ended. Lumo Energy shared this view[59].

Lumo[60] also referred to the first dot points of clause 15.2(a) which provide that the customer must be reconnected:

- if requested before 3.00 p.m. on a business day, on the same day; or
- if requested between 3.00 p.m. and 9.00 p.m. on a business day and any after hours reconnection charge is paid, on the day specified by the customer; or
- otherwise, on the next business day.

Lumo considered that requiring smart meter reconnection within two hours was at odds with these provisions.

Discussion

Submissions by Neighbourhood Energy and Lumo about the retailer still being on the phone with the customer are noted. We always envisaged the measurement of

[55] Australian Power and Gas submission, pages 4 - 5

[56] Simply Energy submission, pages 3 - 4

[57] Origin submission, pages 12 - 13

[58] Neighbourhood Energy submission, page 6

[59] Lumo submission, pages 7 - 8

[60] Lumo submission, page 8

any specified time period would start from the end of the phone call (or other contact) in which the customer requested reconnection. This was not made explicit in the Draft Decision as it was considered to be self-evident.

Referring to Lumo's other concern, we do not see any disparity between specifying the day on which reconnection of accumulation meters and smart meters is to occur, and specifying that smart meter reconnections be undertaken in the next available two hour period on that day. Accumulation meters can be reconnected at any time on that day.

The Commission confirms its draft decision that the absolute obligation on retailers to achieve reconnection of smart meter customers within two hours should be removed.

Having considered all submissions, we are not persuaded to change our approach regarding timely passing of requests to distributors. The Commission notes retailer submissions that they have differing IT systems and that the processing of reconnection requests currently takes varying amounts of time. However, we believe that the aim of setting standards is to bring all participants to at least a minimum acceptable performance level. Timely disconnection and reconnection is a key consumer benefit of smart meters that should be realised as soon as possible. Accordingly, the Commission confirms its Draft Decision.

Retailers will be required to pass on to distributors within one hour a customer's request for reconnection. This applies to smart meter customers where the retailer considers that reconnection is safe. The one hour period is measured from the conclusion of the interaction with the customer, during which the request was made.

FINAL DECISION 7: Reconnection

The Code will be amended to delete clause 15.2(b) and require retailers to pass on to distributors within one hour a customer's request for reconnection. This applies only to smart meter customers where the retailer considers that reconnection is safe. The one hour period is measured from the conclusion of the interaction with the customer, during which the request was made.

4 OTHER MATTERS

4.1 Electricity Distribution Code

Distributors made submissions on the original Consultation Paper calling for a complementary change to the Electricity Distribution Code. This was accommodated in the Draft Decision, where the Commission resolved to make it explicit in clause 13.1.2 of the Electricity Distribution Code that distributors may at all times decline to reconnect where they believe it is unsafe.

The relevant Draft Decision was:

Draft Decision:

In the Electricity Distribution Code, the safety discretion in clause 13.1.2(c) will be explicitly applied to all of clause 13.1.2, for the avoidance of doubt. The precise wording of the amendment will be the subject of a separate consultation prior to being implemented.

Submissions

Only the CALC made a submission on the Draft Decision in relation to this issue. CALC[61] supported the initiative.

Discussion

The Commission does not perceive a deficiency in the safety regime, under which distributors always have discretion to decline electrically unsafe actions. However, we are willing to amend the wording of clause 13.1.2 for the avoidance of doubt, to make it explicit that distributors must reconnect only where they consider it safe to do so.

[61] CALC submission, page 6

The Commission's Final Decision is as follows:

FINAL DECISION 8: Electricity Distribution Code

In the Electricity Distribution Code, the safety discretion in clause 13.1.2(c) will be explicitly applied to all of clause 13.1.2, for the avoidance of doubt.

The Commission will consult separately on the appropriate wording for this amendment.

4.2 General comments

Some submissions raised general comments, beyond the particular matters on which consultation comments were sought in the Draft Decision.

Several retailers believed the Draft Decision went beyond answering the queries initially raised by industry, and considered the new matters raised in the Draft Decision were onerous.

Neighbourhood Energy, Origin Energy and Simply Energy considered that introducing new matters in the Draft Decision was poor regulatory practice. They also submitted that the process to review the Code should cease. Origin added that industry requires enforcement of the present provisions, not additional regulation.

The new matters included in the Draft Decision were drawn from the Report by Hall and Partners / Open Mind and from EWOV. They were purposely included in the Draft Decision in order to seek comment on them. The Commission is pleased that useful input has been provided. These new matters are addressed individually elsewhere in this Final Decision.

Other general comments were made in submissions on the Draft Decision. The issues and the Commission's response are outlined below:

Comment	Response
Lumo urged the Commission not to prescribe specific details of the process leading to disconnection, but leave each retailer sufficient flexibility to deal with its unique client base.	Regulation of certain aspects is considered appropriate.
Lumo commented that the present practice of retailers visiting customers in financial difficulty within 60 km of Melbourne Central Business District prior to disconnection is problematic and should not be extended state wide.	This is not part of this Final Decision. We may consider the matter separately and will consult if we do so.
Several businesses submitted that figures from the Energy and Water Ombudsman Victoria (EWOV) on wrongful disconnections are inflated by retailers' business decision to pay out alleged wrongful disconnection cases rather than contesting them. This view was expressed by Australian Power and Gas, Neighbourhood Energy, Simply Energy and Origin Energy.	We believe this effect would not fully explain the increasing number of wrongful disconnection cases. Retailers must also ensure that their processes are not inadvertently leading to disconnections that may be wrongful.

5 SUMMARY

5.1 Final Decision

After consideration of all submissions received in relation to its Draft Decision, the Commission's Final Decision is summarised below. The Commission will consult with stakeholders over the precise wording of the required amendments to the Energy Retail and Electricity Distribution Codes.

FINAL DECISION 1: Offering a second Instalment Plan

In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principles in their dealings with customers and that in the event of any escalated dispute, these principles will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute.

- Where a customer ***has*** engaged with the retailer since coming to attention for non-payment, the retailer must offer a second detailed instalment plan which fulfils all the requirements of clause 12, or the disconnection will be found to be wrongful;

- Where a customer ***has not*** engaged with the retailer since coming to attention for non-payment, by having failed to:
  a) make some payment under a first instalment plan before it failed; and
  b) engage in discussion when telephoned or visited; and
  c) reply to correspondence from the retailer; and
  d) otherwise contact the retailer –

  then in order to avoid a subsequent disconnection being found wrongful, the retailer must have already offered a first detailed instalment plan which fulfils all the requirements of clause 12 and made genuine attempts to

engage the customer, including (as a final step before a disconnection warning) sending a registered letter or similar, separate from any bill or demand.

The final letter must actively encourage the customer to contact the retailer to discuss payment arrangements, all forms of financial assistance and their hardship program, giving the customer five business days to respond to avoid disconnection for non-payment.

Provision by the retailer of comprehensive evidence of attempts to contact the customer, including a letter meeting the above specifications, will be deemed by the Commission to have fulfilled the requirement under clause 11.2 for a second detailed instalment plan to have been offered, despite it not reflecting the customer's capacity to pay, as specified by clause 12.2(a).

FINAL DECISION 2: Obligations to Small Customers

The present obligations on retailers under clause 12 of the Code relating to offering instalment plans to domestic and small business customers will be retained.

FINAL DECISION 3: Capacity to pay Instalments

In lieu of further amendment to the Energy Retail Code, the Commission as part of any review of alleged wrongful disconnection, will consider the adequacy in all the circumstances of the retailer's assessment of the customer's capacity to pay instalments.

The Commission expects that this articulation of its approach (should a matter be referred) will assist the Energy and Water Ombudsman Victoria to finalise disputes.

FINAL DECISION 4: Capacity to pay a Lump Sum

In lieu of further amendment to the Energy Retail Code, the Commission when examining an alleged wrongful disconnection, will consider whether the retailer has assessed the customer's capacity to pay a lump sum, and the adequacy of that

assessment in all the circumstances.

The Commission expects that this articulation of its approach (should a matter be referred) will assist the Energy and Water Ombudsman Victoria to finalise disputes.

FINAL DECISION 5: Over payments, Additional payments and Part payments

The Commission confirms for the avoidance of doubt that clause 7.3 of the Energy Retail Code applies to instalment plans. This requires retailers to accept the overpayment of instalments and to accept additional payments during an instalment plan.

In lieu of further amendment to the Energy Retail Code, the Commission expects that retailers will adopt the following principles in their dealings with customers and that in the event of any escalated dispute, these principles will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute:

Where a customer is unable to pay the full amount of an instalment under an instalment plan and offers part payment on that occasion, the retailer should accept the part payment and use the opportunity to discuss further payment options or instalments plans. The Commission expects retailers' policies on instalment plans to clearly address the acceptance of part payments.

FINAL DECISION 6: Requiring lump sum as condition prior to taking action

The Code will be amended to prohibit retailers from demanding a lump sum from a customer as a condition of applying for a Utility Relief Grant.

In lieu of further amendment of the Energy Retail Code, the Commission expects that retailers will adopt the following principle in their dealings with customers and that in the event of any escalated dispute, this principle will be sufficient for the Energy and Water Ombudsman Victoria to finalise the dispute:

A retailer's actions in requiring a lump sum as a condition prior to reconnection must be reasonable in all the circumstances of the particular case.

FINAL DECISION 7: Reconnection

The Code will be amended to delete clause 15.2(b) and require retailers to pass on to distributors within one hour a customer's request for reconnection. This applies to smart meter customers where the retailer considers that reconnection is safe. The one hour period is measured from the conclusion of the interaction with the customer, during which the request was made.

FINAL DECISION 8: Electricity Distribution Code

In the Electricity Distribution Code, the safety discretion in clause 13.1.2(c) will be explicitly applied to all of clause 13.1.2, for the avoidance of doubt.

The Commission will consult separately on the appropriate wording for this amendment.

5.2 Next steps

The Commission will advise all stakeholders of its Final Decisions 1 to 5.

The Commission will consult separately on the precise wording for changes to the Energy Retail Code and the Electricity Distribution Code, to give effect to Final Decisions 6, 7 and 8.

APPENDIX A – REGULATORY PROVISIONS

Extracts from ENERGY RETAIL CODE (version 8 - April 2011)

7. PAYMENT OF A BILL

7.3 Payment in advance

On request, a ***retailer*** must also accept payment from a ***customer*** in advance.

11. PAYMENT DIFFICULTIES

11.1 Capacity to pay

A *customer* must contact a *retailer* if the *customer* anticipates that payment of a bill by the pay by date may not be possible.

11.2 Assessment and assistance to domestic customers

If:
(a) a ***domestic customer*** so contacts a ***retailer*** and they do not agree on an alternative payment arrangement; or

(b) the ***retailer*** otherwise believes the ***customer*** is experiencing repeated difficulties in paying the ***customer's*** bill or requires payment assistance,

the ***retailer*** must:

(1) assess in a timely way whatever information the ***customer*** provides or the ***retailer*** otherwise has concerning the ***customer's*** capacity to pay, taking into account advice from an independent financial counsellor if the ***retailer*** is unable to adequately make that assessment;

(2) on request, make available to the ***customer*** documentary evidence of the ***retailer's*** assessment;

(3) unless the ***customer*** has in the previous 12 months failed to comply with two instalment plans and does not provide a ***reasonable assurance*** to the ***retailer*** that the ***customer*** is willing to meet payment obligations under a further instalment plan, offer the ***customer*** an instalment plan; and

(4) provide the ***customer*** with details on ***concessions*** including the Utility Relief Grant Scheme, telephone information about ***energy*** efficiency and advice on the availability of an independent financial counsellor.

12. INSTALMENT PLANS

12.1 Options for domestic customers

In offering an instalment plan to a ***domestic customer***, a ***retailer*** must offer each of:

(a) an instalment plan under which the ***customer*** may make payments in advance towards the next bill in the ***customer's billing cycle***; and

(b) an instalment plan under which the ***customer*** may pay any amount in arrears and continue consumption.

12.2 Requirements for an instalment plan

A ***retailer*** offering an instalment plan must:

(a) specify the period of the plan and the amount of the instalments (which must reflect the ***customer's*** consumption needs and capacity to pay), the number of instalments and how the amount of them is calculated, the amount of the instalments which will pay the ***customer's*** arrears (if any) and estimated consumption during the period of the plan;

(b) make provision for re-calculating the amount of the instalments where the difference between the ***customer's*** estimated consumption and actual consumption may result in the ***customer*** being significantly in credit or debit at the end of the period of the plan;

(c) undertake to monitor the ***customer's*** consumption while on the plan and to have in place fair and reasonable procedures to address payment difficulties a ***customer*** may face while on the plan.

12.3 Business customers

A ***retailer*** must consider any reasonable request from a ***business customer*** for, and may impose an ***additional retail charge*** on the ***business customer*** if they enter into, an instalment plan.

13. GROUNDS FOR DISCONNECTION

13.1 Non-payment of a bill

A ***retailer*** may only ***disconnect*** the ***supply address*** of a ***customer***, being a ***customer*** who fails to pay the ***retailer*** by the relevant pay by date an amount billed in respect of that ***supply address***, if:

(a) the failure does not relate to an instalment under the ***customer's*** first instalment plan with the ***retailer***;

(b) the ***retailer*** has given the ***customer***:

• a reminder notice not less than 14 ***business days*** from the date of dispatch of the bill. The reminder notice must include a new pay by date which is not less than 20 ***business days*** from the date of dispatch of the bill. No reminder notice is required if the ***customer*** is on a shortened collection cycle under clause 9.1; and

• a ***disconnection*** warning:

(A) if the ***customer*** is on a shortened collection cycle under clause 9.1, not less than 16 ***business days*** from the date of dispatch of the bill.
The ***disconnection*** warning must include a new pay by date which is not less than 20 ***business days*** from the date of dispatch of the bill; or

(B) otherwise, not less than 22 ***business days*** from the date of dispatch of the bill. The ***disconnection*** warning must include a new pay by date which is not less than 28 ***business days*** from the date of dispatch of the bill;

(c) the ***retailer*** has included in the ***disconnection*** warning:

• if the ***customer*** is a ***domestic customer*** and has a ***dual fuel contract***:

(A) a statement that the ***retailer*** may ***disconnect*** the ***customer's*** gas on a day no sooner than seven ***business days*** after the ***date of receipt*** of the ***disconnection*** warning and the ***customer's*** electricity on a day no sooner than 22 ***business days*** after the ***date of receipt*** of the ***disconnection*** warning; and

(B) a statement that ***disconnection*** of the ***customer's*** gas may result in a variation of the ***tariffs*** and terms and conditions of the ***dual fuel contract*** as provided for in the ***dual fuel contract***. If no variation is provided for in the ***dual fuel contract*** and neither does the ***dual fuel contract*** provide that there is to be no variation, the ***tariffs*** and terms and conditions of the ***dual fuel contract*** are to be varied such that on and from then:

(i) the timeframe for ***disconnecting*** the ***customer's*** electricity is the timeframe stated in the ***disconnection*** warning;

(ii) the supply and sale of electricity otherwise continues at the ***tariff***, and on the terms and conditions, that would apply if the ***customer*** were party to a ***deemed contract*** under section 37 of the ***Electricity Act***; and

(iii) the supply and sale of gas otherwise continues at the ***tariff***, and on the terms and conditions, that would apply if the ***customer*** were party to a ***deemed contract*** under section 44 of the ***Gas Act***;

• in any other case, a statement that the ***retailer*** may ***disconnect*** the ***customer*** on a day no sooner than seven ***business days*** after the ***date of receipt*** of the ***disconnection*** warning;

• for a ***customer*** with a ***smart meter***, that the ***disconnection*** could occur remotely; and

• a telephone number for payment assistance enquiries; and

(d) the ***customer*** has called the telephone number referred to in paragraph (c) and the ***retailer*** has responded to the ***customer's*** enquiry and has provided advice on financial assistance;

(e) the ***customer*** is a ***domestic customer*** and has a ***dual fuel contract*** with the ***retailer*** and the ***customer's*** electricity is to be ***disconnected***, the ***retailer*** has given the ***customer*** a further ***disconnection*** warning no less than six ***business days*** before the electricity is ***disconnected***; and

(f) the ***customer*** is on a shortened collection cycle under clause 9.1 and the ***retailer*** has contacted the ***customer*** in person or by telephone to advise of the imminent ***disconnection***, and, before ***disconnection***, the ***customer***:

(1) does not provide a ***reasonable assurance*** to the ***retailer*** that the ***customer*** is willing to pay the ***retailer's*** bills; or

(2) does so, but then:

• does not pay the ***retailer*** the amount payable by the pay by date on the relevant ***disconnection*** warning. This does not apply if the ***retailer*** and the ***customer*** have agreed to a new payment arrangement;

• does not agree to a new payment arrangement within five ***business days*** after the ***date of receipt*** of the ***disconnection*** warning; or

• does not make payments under such a new payment arrangement.

To avoid doubt, if the ***customer*** does not agree to such a new payment arrangement or does not so make payments under such a new payment arrangement, the ***retailer*** may ***disconnect*** the ***customer*** without again having to observe this clause 13.1.

13.2 Domestic customers without sufficient income

(a) Despite clause 13.1, a ***retailer*** must not ***disconnect*** a ***domestic customer*** (other than by a remote ***disconnection***) if the failure to pay the ***retailer's*** bill occurs through lack of sufficient income of the ***customer*** until the ***retailer*** has:

(i) also complied with clause 11.2; and

(ii) used its ***best endeavours*** to contact the ***customer*** in person or by telephone; and

(iii) the ***customer*** has not accepted an instalment plan within five ***business days*** of the ***retailer's*** offer.

(b) Despite clause 13.1, a ***retailer*** must not ***disconnect*** supply to a ***domestic customer's supply address*** by de-energising the ***customer's supply address***

remotely if the failure to pay the ***retailer's*** bill occurs through lack of sufficient income of the ***customer*** until the ***retailer*** has:

(i) also complied with clause 11.2;

(ii) contacted the ***customer*** in person or by telephone, or, in the case of a remote ***disconnection***, after unsuccessfully attempting to contact the ***customer*** once in person or twice by telephone, contacted the ***customer*** by mail, email or SMS; and

(iii) when contacting the ***domestic customer***, set out all the options for the ***customer***, and

(iv) the ***customer*** has not accepted an instalment plan within five ***business days*** of the ***retailer's*** offer.

15. RECONNECTION

15.1 Customer's right of reconnection

If a ***retailer*** has ***disconnected*** a ***customer*** as a result of:

(a) non-payment of a bill, and within 10 ***business days*** of ***disconnection*** either:
- the ***customer*** pays the bill or agrees to a payment arrangement; or
- being eligible for a Utility Relief Grant, the ***customer*** applies for such a grant;

(b) the ***customer's meter*** not being accessible, and within 10 ***business days*** of ***disconnection*** the ***customer*** provides access or makes available reasonable access arrangements;

(c) the ***customer*** obtaining supply otherwise than in accordance with applicable laws and codes, and within 10 ***business days*** of ***disconnection*** that ceases and the ***customer*** pays for the supply so obtained or agrees to a payment arrangement; or

(d) the ***customer*** refusing to provide ***acceptable identification*** or a ***refundable advance***, and within 10 ***business days*** of ***disconnection*** the ***customer*** provides it,

on request, but subject to other applicable laws and codes and the ***customer*** paying any ***reconnection*** charge, the ***retailer*** must ***reconnect*** the ***customer***.

15.2 Time for reconnection

(a) If a ***customer*** makes a request for ***reconnection*** under clause 15.1:

• before 3 pm on a ***business day***, the ***retailer*** must ***reconnect*** the ***customer*** on the day of the request; or

• after 3 pm on a ***business day***, the ***retailer*** must ***reconnect*** the ***customer*** on the next ***business day*** or, if the request also is made before 9 pm and the ***customer*** pays any applicable additional after hours ***reconnection*** charge, on the day requested by the ***customer***.

• where the ***retailer*** is able to ***reconnect*** the ***customer*** by re-energising the ***customer's supply address*** remotely and reasonably believes that it can do so safely, subject to the above bullet points, the ***retailer*** must use its ***best endeavours*** to ***reconnect*** the ***customer's supply address*** within two hours.

A ***retailer*** and a ***customer*** may agree that later times are to apply to the ***retailer***.

(b) Despite clause 35.1, the obligation of a ***retailer*** to ***reconnect*** a ***customer*** under clause 15.2(a) is absolute. If ***reconnection*** does not occur by the relevant time, it is not sufficient to discharge the ***retailer's*** obligation that the ***retailer*** may have used ***best endeavours*** to procure the relevant ***distributor*** to ***reconnect*** the electrical system or ***natural gas installation*** at the ***customer's supply address*** to the ***distributor's*** distribution system.

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35. INTERPRETATION

35.1 Connection, disconnection and reconnection

A ***retailer*** is not in a position to ***connect***, ***disconnect*** or ***reconnect*** the electrical system or ***natural gas installation*** at a ***customer's supply address*** to a ***distributor's*** distribution system. In this Code unless the context otherwise requires, a reference in a term or condition to a ***retailer***:

(a) having a right or not having a right to ***disconnect*** a ***customer*** is to be construed as a reference to the ***retailer*** having a right or not having a right to procure the ***distributor*** to ***disconnect***; or

(b) being obliged to ***connect***, ***disconnect*** or ***reconnect*** a ***customer*** is to be construed as a reference to the ***retailer*** being obliged to use its ***best endeavours*** to procure the ***distributor*** to ***connect***, ***disconnect*** or ***reconnect***, the electrical system or ***natural gas installation*** at the ***customer's supply address*** to the ***distributor's*** distribution system.

Extract from ELECTRICITY DISTRIBUTION CODE

(version 6 - January 2011)

13 RECONNECTION OF SUPPLY

13.1.1 If a ***distributor*** has ***disconnected*** a ***customer*** as a result of:

(a) non-compliance with this Code under clause 12.1 and within 10 ***business days*** of ***disconnection*** the ***customer*** has remedied the non-compliance;

(b) danger under clause 12.2.1 and within 10 ***business days*** of ***disconnection*** the ***customer*** has eliminated the cause of the danger; or

(c) a request from a ***retailer***,

on request by the ***customer*** or by a ***retailer*** on behalf of the ***customer***, but subject to other applicable laws and codes and the ***customer*** paying any ***reconnection*** charge (determined by reference to its ***approved statement of charges***), the ***distributor*** must ***reconnect*** the ***customer***.

13.1.2 If a ***customer***, or a ***retailer*** on behalf of a ***customer***, makes a request for ***reconnection*** under clause 13.1.1 to a ***distributor***:

(a) before 3 pm on a ***business day***, the ***distributor*** must ***reconnect*** the ***customer*** on the day of the request; or

(b) after 3 pm on a ***business day***, the ***distributor*** must ***reconnect*** the ***customer*** on the next ***business day*** or if the request also is made before 9 pm and the ***customer*** pays any applicable additional after hours ***reconnection*** charge, on the day requested by the ***customer*** or ***retailer*** and

(c) where the ***distributor*** is able to ***reconnect*** the customer by re-energising the ***customer's supply address*** remotely and reasonably believes that it can do so safely, subject to paragraphs (a) and (b), the ***distributor*** must use its best endeavours to ***reconnect*** the ***customer*** within two hours of a request being validated by the ***distributor***.

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