AUSTRALIAN ENERGY COUNCIL

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Response to revised Draft Decision: Payment Difficulty Framework

The Australian Energy Council (the AEC) welcomes the opportunity to make a submission to the Essential Services Commission's (Commission's) revised Draft Decision for its Payment Difficulty Framework (PDF). The AEC and its members remain committed to developing minimum regulatory standards that establish clear and consistent outcomes for consumers facing payment difficulties to ensure disconnection for non-payment remains a last resort option. The AEC and its members have actively engaged with the Commission and consumer and community groups to reach a positive outcome.

However, we believe that the Commission has put itself and its stakeholders – including consumers – in a difficult situation. The Commission had a significant opportunity since receiving submissions in November last year to reach out to stakeholders in order to understand the issues and arrive at better policy. Instead, we again find ourselves grappling with policy that appears to not have been tested. As we outline in this submission, the revised PDF suffers from significant design flaws on a basic level. The customer experience of the revised PDF will likely be extremely poor, which should have been apparent to the Commission if it had mapped out the process it prescribes.

Despite this, retailers are being put under pressure to 'deliver', with the implication that to do anything other than get on board with the current process is to undermine the case for consumer benefit. Retailers have been asked to cost this model for a cost-benefit analysis even though it is clearly not fit for purpose. Retailers have also been asked to implement the new PDF according to unrealistic timeframes.

There is a need to maturely progress the PDF policy programme based on evidence that it should result in consumer benefit. There is also a need to listen to the industry and consumer stakeholders on the matter of the time required to prepare for the PDF, including system changes, process and procedure changes, training, and communications with customers.

In the attached submission we have provided solutions to some of the problems encountered, and have done so within the parameters of the Commission's basic PDF approach. We have focused only on the major topics of concern; AEC members will provide greater detail on other matters as well. We hope and expect that the Commission will engage with the AEC and its members on the problems and solutions, and we look forward to greater engagement on the issues.

Any questions about this submission should be addressed to me

Yours sincerely,

Sarah McNamara
General Manager, Corporate Affairs

1 Process to date

1.1 Consultation prior to the release of the revised Draft Decision

In our submission to the Commission's previous Draft Decision of October 2016 we outlined the Payment Difficulties Framework (PDF) development process to that point, and our concerns about the Commission's approach. We noted the lack of meaningful consultation, and stated that material had been provided to stakeholders in September and October with little to no explanation for some of the new decisions taken. We requested further advice on issues that reflected significant impact for retailers and their customers.

As we know, in light of stakeholder concern about the process and policy, the Commission delayed its Final Decision and held a stakeholder forum at the end of January 2017. There were subsequently individual meetings with stakeholders, and meetings with the Commission's consultants (ACIL Allen and KPMG) about a proposed cost-benefit analysis.

While in principle these sessions should have heralded a new consultative style, in practice they did not. The forum in January was very controlled and it did not involve much in the way of genuine exchange. Stakeholders were also explicitly told that submissions would not be discussed. The individual meetings with stakeholders were unhelpful – reports indicated that they were one-sided, with a limited agenda set by the Commission and key Commission decision-makers often not present. Issues raised in the November submissions about the Commission's intent remained unresolved and there was no clear testing of ideas for the revised PDF.

Similarly, ACIL Allen and KPMG were put in the odd position of running cost-benefit analysis workshops where there was no reference point at all for the policy to be tested, and stakeholders were advised that the analysis would be undertaken on the basis that the Commission's revised (unknown) new policy 'worked'.

1.2 Consultation upon the release of the revised Draft Decision

It was only when the Commission released its revised Draft Decision in May (and on the day of the release) that stakeholders were advised of the content of the new PDF and there was exchange between stakeholders and the Commission.

To be clear, *stakeholder views on the components of the revised PDF were not sought or tested until after the Commission had formally released its new version in full.* It was surprising that this should have been the outcome of the strong views put to the Commission that its previous consultation was problematic and that its lack of understanding of the issues intensified the need for meaningful input from stakeholders.

The fact that there was no discussion with stakeholders about the PDF's design elements prior to a formal release appears to reflect a major lost opportunity. Fora held after the release of the revised Draft Decision have demonstrated significant design flaws that have been acknowledged by the Commission as such.[1] They have also clearly demonstrated a willingness of stakeholders to participate and provide constructive input to resolve these design flaws.

We appreciate that the Commission has now commenced a process that is recognisable as consultation. It is too bad that this commenced after yet another formal draft was released. We

[1] Although two of the three relevant fora have been viewed as 'technical' sessions that, again, the key Commission decision-makers have not attended. We expect that material in these sessions that confirmed the seriousness of the design flaws will be considered and acted upon by the Commission.

acknowledge the Commission's recent statements to the effect that it is listening and open to new ideas about how to make the PDF work. We believe that we can work with the Commission to arrive at better policy, and have drafted this submission with solutions in mind.

1.2.1 The narrative of shared responsibility for process and consultative failure

Despite our cautiously positive views about the new direction taken by the Commission in its consultation there remains an unfortunate need to be on the record about some points made by the Commission in recent months. This is because there has been a recasting of the problems with the PDF to date – including its many delays – into a narrative of shared responsibility for failure. These statements have been released on the Commission's website and repeated in various forms at the consultative sessions, such as the following, stated by the Chairperson of the Commission on 29 May 2017:

> It only took thirteen months to build the Empire State Building, and that was in 1934. It took less than four years to privatise the entire energy sector here in Victoria. And, if someone is really keen, they can produce four-and-half human beings in four years.
>
> Yet, unless we get our skates on, we won't have even delivered a new payment difficulty framework in that time.
>
> That reflects badly on *all* of us; and as I have written a few times now, customers deserve better than that.[2]

Stakeholders (and particularly retailers) have been indirectly portrayed by the Commission as being at the heart of the delays to the PDF. Since the January forum they have been implicitly blamed for having asked questions about the PDF in 2016, with the stakeholder requests for advice characterised as intended to drive the Commission to codify everything.[3] This then led to the Commission being drawn down prescriptive paths it had not meant to follow. The implication is that the Commission was led astray by its stakeholders as they sought perfection over pragmatic outcomes.

This characterisation of stakeholder behaviour and intent is not correct. To be clear: stakeholder questions were oriented toward making some sense of the PDF on very basic matters. It was apparent to all stakeholders that the Commission had not understood the functioning of the PDF or its impacts, and it had not understood consumers' needs or basic elements of retailers' service delivery. This was not a special situation with particularly problematic stakeholders – the delays were unprecedented but the stakeholder behaviour was not.

It is also worrying that a regulator would attempt to justify its own serious procedural problems in this way. The Commission has a Charter of Consultation and an abundance of experience to draw on regarding standards of consultation and stakeholder management. This includes its own direct experience in creating and revising the Retail Code over 18 years, and its experience across other industries. Again, this should not have been a special situation.

1.2.2 Implementation for 2018

As noted, the extended PDF consultation period has been cast by the Commission as meaning that we need to 'get our skates on', with implementation of the PDF proposed for 2018 (and as early as January). The narrative of shared failure for the delay is being used to argue that we need concerted and shared efforts to get the PDF in as soon as possible. To do otherwise is implied to be an intentional delay of consumer benefit.

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[2] Ben-David, R. (2017) *Payment difficulty framework: stakeholder forum*, 29 May, pp. 5-6.
[3] See also Draft Decision page 48.

However, we already know that the revised Draft Decision needs to change on fundamental aspects, as discussed in the fora and in this submission. This is a problem for implementation: we don't actually know what is to be implemented, on even the most basic levels. It is a problem that the cost-benefit analysis seems unlikely to provide robust outcomes because of this. The fact that stakeholders will have around four months until 1 January 2018 to implement the framework (or some portion of it) as provided in a Final Decision is a problem. System and process changes for the PDF will likely require much longer than this.

The process to this point has been long, and fatiguing for all involved. But this does not mean that we can or should rush through implementation, particularly if there is a question whether customers are to be better off than they are at the moment. We return to these issues at the end of this submission.

2 Definitions and concepts

We note that the revised Draft Decision reflects important conceptual shifts from the previous Draft Decision.

First, the previous focus on the avoidance of *debt*, potentially at the risk of higher rates of disconnection, has inverted to a focus on the avoidance of *disconnection*, potentially at the risk of higher customer debt as customers are kept on supply indefinitely while continuing to use energy. The 'conveyor belt to disconnection' (as the Commission has subsequently put it) has been replaced with the 'hamster wheel of repetition' (as stakeholders have expressed to the Commission).

Second, the revised Draft Decision seems to assume that everyone who does not pay a bill should be provided extra time to pay because they may be in payment difficulty. This is different from previous versions of the PDF, where disengaged customers were supposed to be able to go down the disconnection path. We do not have a problem with the revised approach in principle given the difficulty in determining whether a disengaged customer is in difficulty or not. However, the new approach appears to introduce a range of unintended consequences.

Third, the prescription of the previous versions of the PDF has been replaced with greater flexibility in agreeing payment plans. We note that the Commission characterised this as a shift from prescription to retailer discretion, but this is not a correct characterisation. The revised Draft Decision provides retailers with little discretion, requiring them to essentially accept anything a customer proposes. The shift has been to *customer* discretion. Retailers support the general principle that a customer knows their own payment capabilities the best, and certainly better than the Commission's previously prescribed range of plans. This is why we argued for flexibility for retailers to arrange plans with customers to meet customer needs. However, the pendulum has shifted too far toward customers being able to draw out payments indefinitely, which comes back to the hamster wheel issue above.

Fourth, the revised Draft Decision has proposed that retailers' hardship programmes will be maintained, which is a change from the previous versions of the PDF that sought to eliminate the language of hardship (considered a problematic label in the Hardship Inquiry) and to replace the programmes with the new PDF. The decision to maintain hardship programmes is welcomed. However, it remains unclear how the PDF and hardship programmes can and will work together.

Finally, we have observed that the Commission has sought to shift away from term 'payment plan' in its revised PDF. This is clear from the explicit redefinition of 'payment plan' in the revised Code, and the newly introduced term of 'payment proposal'. To avoid doubt, we continue to use the language of payment plans in this submission, where this should be taken to be the schedule of payments proposed by a customer in its 'payment proposal' and accepted by the retailer. We expect that the Commission will read our submission in that light. We also believe that the shift in language is both unnecessary and illogical.

Our approach in this section is to explain these and other issues in detail, and to suggest possible solutions. We also note in each section where proposed solution should be managed; that is, whether it is an issue for the Code or for supplementary guidance.

2.1 Facing payment difficulties

Assistance under Part 3 of the draft Code is predicated on a customer 'facing payment difficulties'. This is also the case for the application of clauses 91(c) and 111A, which state, respectively:

> [the retailer] is not required to continue to provide assistance under this Part if the *retailer* becomes aware that the *customer* is not anticipating or facing payment difficulties.

and

> A *retailer* may only arrange *de-energisation* of the premises of a *residential customer* facing payment difficulties if:...

The term is also used in other places within the Code, such as the definition of 'payment plans' and use of the shortened collection cycle. However, this term is not defined.

2.1.1 The problem

Given that 'facing payment difficulties' has been used in the Draft Code as a defining feature of the PDF itself, as well as a criterion for both disconnection and the revocation of assistance, a definition of the term would seem fundamental as a matter of legal drafting. It will be impossible to objectively comply with (and enforce) the Code while there is reliance on such a loose term. The use of 'facing payment difficulties' as a defining feature of particular assistance or of other retailer actions needs to be resolved.

It is possible that the Commission's 'arrears' definition was considered as a proxy for 'facing payment difficulties'; that is, that 'facing payment difficulties' was never meant to be defined. This is consistent with the tenor of the Draft Decision overall and with recent Commission advice. However, this intent is not reflected in how the Code is actually drafted.

There is also a misalignment of the language of 'facing payment difficulties' with retailers' hardship programmes. The policy decision to maintain hardship programmes means that there are three separate terms being used; that is, we have the undefined 'payment difficulties', the defined (but problematic) 'arrears', and the undefined 'hardship' for hardship programmes. This unnecessary complexity creates muddiness in policy intent and likely problems with elements of the framework working at cross purposes.

2.1.2 A solution

The Code requires revision so that Part 3 and clauses 91(c) and 111A are instead triggered by 'arrears' (or any term or terms that replace it – see below for concerns about the arrears definition and our suggested revision), with the appropriate link to objectives regarding assisting customers facing payment difficulty. Clauses 34, 56, 92, 109, 110, 111 and 116 also require adjustment, as well as the definition of 'payment plan'.[4]

Related to this, we note that the shortened collection cycle drafting (clause 34) needs to be clear that the shortened collection cycle as it has been traditionally known now only applies to business customers. This appears to have been the Commission's intent.[5] We say this because while the Commission has stated in the Code that a shortened collection cycle potentially applies to residential

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[4] Note that we come back to the payment plan definition later in this submission.
[5] Although we note that not all retailers would agree with this intent.

customers this is only if it is consistent with the PDF.[6] Therefore the Commission is using a plain English interpretation of 'shortened' collection cycle, not a technical one. This essentially makes the Code concept as we know it to be meaningless; it would be easier to redraft clause 34 to apply only to business customers, and then provide guidance that this application does not preclude residential customers receiving anything under the PDF that may be considered a shortened collection cycle in its plain English use.

We also suggest that the coverage of hardship policies under clause 87 requires adjustment. Hardship programmes were developed for people in the greatest need, which is not a clear match with customers receiving Tailored Assistance who can pay for use. There is no match at all with customers who are offered Default Assistance. Tailored Assistance provided to customers who cannot pay for use (under clause 79(1)(c)-(f), see also 79(3)-(5)) seems a better match with both the intent of hardship programmes and the requirements under legislation.[7] We suggest that the Commission redrafts clause 87 to make it clear that it covers customers who receive assistance under clause 79(1)(c)-(f), with further coverage at a retailer's discretion. While the Commission may be resistant to this for reasons related to consistency of outcomes, we note that there is no practical effect for customers in doing this[8] because the PDF assistance will be provided regardless of whether it is considered to be within a hardship programme or not. Further, the Code already requires information to be provided about assistance to the general customer base, as well as best endeavours to provide that assistance. Hardship policies are not the main source of information to customers about the PDF.

The effect of making the change as we propose is to be more consistent with how retailers, consumers and their advocates are accustomed to the application of hardship programmes. Allowing flexibility also means that retailers who have a broader interpretation of 'hardship' are able to maintain their approach as well. A default position that everyone who is entitled to Tailored Assistance is subject to hardship policy is to stretch the intent and the operational reality of hardship programmes beyond breaking point. This amplified by considering Default Assistance part of a hardship programme – this is not meaningful in any way.

2.2 New arrears definition

The revised Draft Decision relies on a new means of implementing key parts of the PDF relative to earlier versions. The provision of both Tailored and Default Assistance measures is now triggered by a customer being in 'arrears', which is defined as follows:

> ***arrears***, in relation to a *residential customer* facing payment difficulties who is receiving assistance under Part 3, means the sum of any amounts payable by the *customer* under one or more bills that are unpaid as at the *bill issue date* for a subsequent bill.

This definition appears to require at least two bills to be received before assistance measures are required as a minimum standard. (This is unless, in the case of Tailored Assistance, the retailer knows of circumstances – or should reasonably have known of circumstances – that would be likely to lead to the customer being in arrears. This issue is returned to later in this section.)

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[6] We are ignoring the qualifier the Commission uses of a customer facing/not facing payment difficulties given the issue already identified that 'facing payment difficulties' has no meaning and the Commission's other written material and discussions to date support this.

[7] We note that in its Draft Decision (p. 105) the Commission has also outlined the likely coverage of hardship programmes in more detail. This material is better suited to customers who cannot pay for use, as is the legislation.

[8] Although we also question how the language of hardship will sit easily with the broader group that might take up Tailored Assistance or, eventually, Default Assistance.

Further, the Draft Decision taken as a whole indicates that a retailer cannot issue a disconnection warning notice without offering assistance. Disconnection activity can only occur as follows:

> **111A Residential customer facing payment difficulties only to be disconnected as a last resort**
>
> A *retailer* may only arrange *de-energisation* of the premises of a *residential customer* facing payment difficulties if:
>
> (a) the *retailer*:
>
> (i) has provided, or used their best endeavours to provide, the *customer* with the assistance that they are entitled to receive under Part 3; and
>
> (ii) has issued a *reminder notice* to the *customer*; and
>
> (iii) has issued a *disconnection warning notice* to the *customer*; and
>
> (iv) has, after the issue of the *disconnection warning notice*, used its best endeavours to contact the customer in relation to the matter; and...

2.2.1 The problem

The new 'arrears' definition presents a range of issues that need to be understood and managed. Importantly, customers might not receive assistance until they have *two* bills that they may not be able to pay. The obvious problems with this definition are as follows.

First, the current definition creates inconsistent outcomes for customers based on their billing cycle. This would appear to be contrary to one of the guiding principles of the PDF work to date, which was to address the perceived inconsistency in customer assistance outcomes.

Second, customers on longer billing cycles are more at risk of debt and disconnection, both because their bills are higher than under a shorter billing period and also because it will take longer to reach the 'arrears' stage given the need to wait for a further bill. Customers on two-monthly and quarterly billing cycles will double the debt they otherwise might have accrued before they receive a disconnection warning notice.[9] This will have serious debt implications for largely disengaged customers who do not respond to offers of assistance but who do pay their bill in full upon receiving a disconnection warning notice. These customers will be put at risk of building unmanageable (and previously avoidable) debt over cumulative bills. To be clear: under the current arrangements these customers would have paid their bills when confronted with a disconnection warning and would not have been in financial hardship. These customers are at risk of being *put into hardship* when they do not receive the disconnection warning until they have consumed significantly more. They may or may not choose to engage with Default Assistance: we have no evidence that this will encourage payments from disengaged customers and the Commission has apparently not investigated this issue (although we note the Commission's consultant assumed negligible uptake).[10]

Third, the debt issue for disengaged customers reflects a serious debt problem for retailers, both in the sense of reduced cash flow and also where customers' newly unmanageable bills may go unpaid. We also note the disengaged customer issue is managed differently now than from past PDF drafts,

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[9] The debt may be more than this if Default Assistance must be offered first. However, we note that the Commission has stated in public fora that it would be satisfied if retailers combine an offer of Default Assistance with a disconnection warning notice.

[10] In its public report written for the Commission, ACIL Allen Consulting has stated that very few customers would take up Default Assistance. ACIL Allen assumed that 0.29% of customers would be offered Default Assistance, and that 80% of those customers (0.23% of customers overall) would not respond and would be disconnected. See ACIL Allen Consulting (2017) *New framework for customers facing payment difficulties: Preliminary assessment of the retailers' costs*, Report to the Essential Services Commission, 8 May, pp. 17, 21.

where it would seem the revised PDF is not actually about payment difficulty but the presumption of payment difficulty for anyone who does not pay their bill. We acknowledge the presence of clause 91(c) which allows a retailer to cease providing assistance where a retailer 'is not required to continue to provide assistance...if the retailer becomes aware that the customer is not anticipating or facing payment difficulties'. However, we question how a retailer can prove the negative, or whether efforts to do so will be considered appropriate. We return to this issue below.

Fourth, there is the practical issue of how a customer's debt across multiple bills is managed through payment plans. Treatment of this issue is not clear to retailers. As an example, let's consider the experience of a quarterly billed customer who receives their first bill of $500 in January and does not pay or contact the retailer. The customer has previously always paid on time and has no special circumstances that the retailer would have reasonably known about. In April the customer receives their second bill of $1000 (for example) and contacts the retailer. The customer is technically in arrears for $500. However, there is now $1500 outstanding as far as both the customer and retailer are concerned. This creates unnecessary complexity in repayments:

- Under Tailored Assistance if the customer could not pay for use, $500 would be put on hold. The $1000 outstanding would only become arrears three months later.

- If the customer could afford ongoing consumption, and offered an amount that would repay their $500 arrears within 24 months, the retailer would be required to accept. The $1000 would not be repaid in this plan and a revised proposal would be required at a later date. There is no mechanism for a retailer initiated request for a revised payment.

Figure 1 in the following section maps out some of this complexity, where the combination of the arrears definition and payment plans being arrears-only appear to result in diabolical customer outcomes.

2.2.2 A solution

We consider that the problems described above can only be avoided if 'arrears' as currently defined is replaced with something else. We note that there is a need for a means of triggering the customer entitlements. Options include points in the collection cycle, unpaid bills, the size of debt and/or amounts of ongoing use. Each has its pros and cons, with the main cons for most being inconsistency in outcomes and the types of unintended consequences such as those identified above.

Before continuing, we want to reiterate that there does not appear to be evidence that Default Assistance is either necessary or useful. Modelling by ACIL Allen suggests that most customers will not become engaged or accept an offer of Default Assistance.[11] It is vital that the costs and benefits of Default Assistance are understood and assessed in light of the expected lack of customer uptake. AEC members will likely expand on this issue. For completeness, the below is provided in the context of Default Assistance being maintained; it should not be taken to constitute AEC or member support for Default Assistance.

We consider that it is worth decoupling the trigger for Tailored Assistance from the trigger for Default Assistance. This is because they are intended to solve different problems at different points in time. The below allows for each form of assistance to meet its intended customer need:

- **Tailored Assistance**: Tailored Assistance provides for a customer to propose a payment plan and should be allowed once the customer is in a position where they owe money. We suggest that the customer's formal entitlement to Tailored Assistance commences from the date of the issue of a reminder notice. Retailers' best endeavours to provide Tailored Assistance commence from this point. A retailer may make other contact with the customer to

[11] As noted at n10 of this submission.

offer Tailored Assistance at any time prior to the issuing of the reminder notice or at any point after.

- **Default Assistance**: Default Assistance is intended to be a last resort offer to all customers who are at risk of being disconnected for non-payment. If this policy is to be implemented, it makes sense that this assistance is linked to the disconnection process. A customer's entitlement would best be triggered when a customer's debt has reached the regulated minimum amount for disconnection, assuming the amount in Victoria is adjusted to match the NECF amount of $300 per fuel. Using the debt amount means that a retailer might merge the offer of Default Assistance with a disconnection warning notice, where a customer can choose to pay the payment plan, or the bill in full, or not at all (which would result in disconnection).

This approach meets the need for consistency in outcomes, as all customers have the same minimum entitlement to Tailored Assistance at the reminder notice period of their billing cycle. Coupling the entitlement to Default Assistance at the point that a customer's debt becomes 'disconnectable' also means that the purpose for Default Assistance to be a last resort option prior to disconnection is met, and also with consistency across all customer types. While it is arguable that a dollar amount is not required, we believe that this provides a 'reasonableness' test for the provision of Default Assistance and a means for the Commission to measure outcomes. We have suggested the NECF amount because this is better aligned with customer use: the current Victorian amount has remained unchanged for 20 years and has little relationship with the quarterly billed customers who it was meant to serve. The NECF amount has been the subject of recent comprehensive consultation, and it provides an additional buffer for customers to remain on supply.

These are important changes to make to the Code. If drafted clearly, further guidance may not be required. If guidance is required, it should address the application of the term 'best endeavours', which we expect would remain in place for retailer provision of assistance prior to disconnection.

2.3 Split of arrears from use

Payment plans under Tailored and Default Assistance require a plan for arrears only, as follows:

> **79 Minimum assistance**
>
> (1) Tailored assistance consists of the following measures:
>
> (a) repayment of *arrears* over a period of up to 2 years by payments at regular intervals of up to one month; ...
>
> **85 Default assistance**
>
> (1) A *retailer* must make an offer in writing to a *residential customer* for payment of their *arrears* by equal monthly payments over a period that is 3 times the length of their current billing period.

The technical interpretation of these clauses mean that a customer's ongoing use would continue to be billed in full while the customer was on an arrears-only payment plan.

The change from the Hardship Inquiry approach of plans including use was originally made late in 2016, with the Immediate Assistance plan (what is now Default Assistance in essence, but Immediate Assistance applied at the reminder notice stage of the collection cycle) turned into an arrears-only plan. The reason for the change was never explained (or even acknowledged). It is conceivable that this was an unintended change – at least in the sense that the Commission was mandating billing *plus* a payment plan – and the Commission's behaviour to this point has supported this interpretation.

2.3.1 The problem

There are three problems we would like to outline for this issue.

First, and as we have raised previously, this approach will likely confuse customers. This was made particularly apparent at the process mapping session held by the Commission on 2 June 2017. A group of retailers and consumer advocates mapped out the consumer experience as a result of the new 'arrears' definition combined with the arrears-only focus of payment plans. Figure 1 provides a version of this mapping exercise for customers who are completely disengaged and have no apparent signs of requiring assistance prior to the formal application of the 'arrears' definition. The customer in this example has had offer(s) of Tailored Assistance but has not responded. Standard Assistance for this customer is not relevant because they are disengaged.

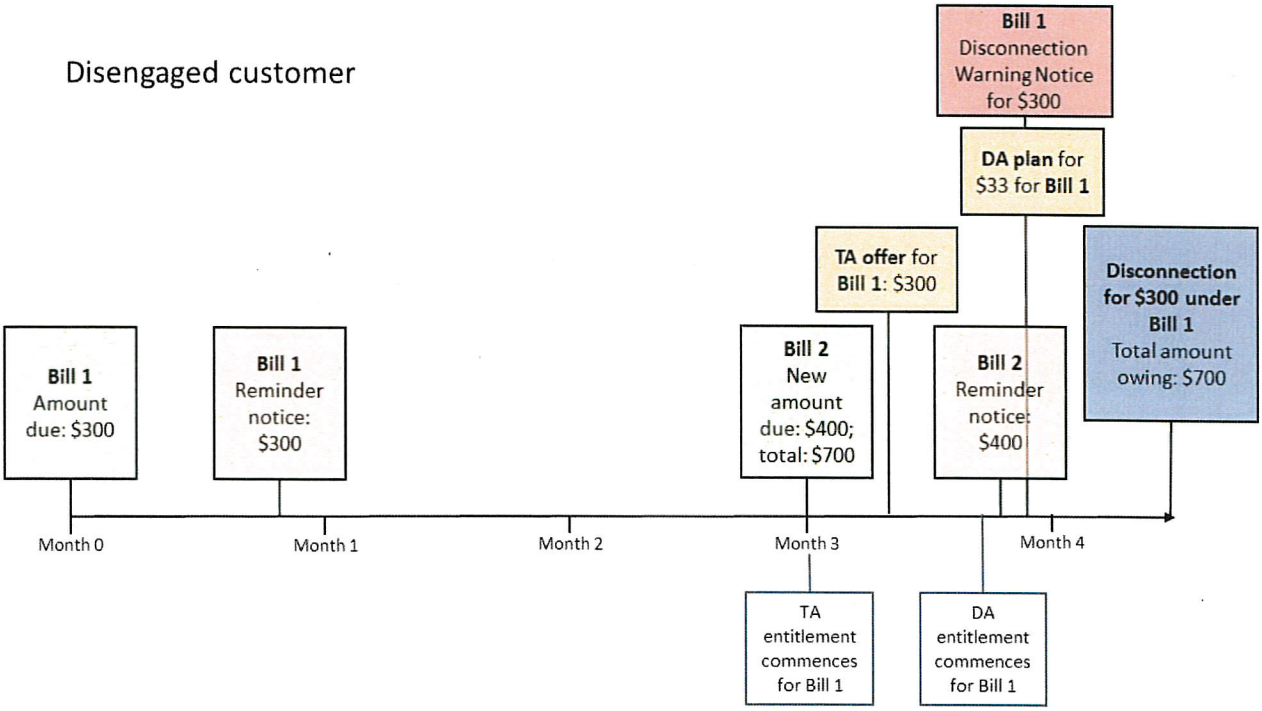

Figure 1: Minimum standard process map for customer who is completely disengaged

As Figure 1 shows, a completely disengaged customer on quarterly billing will accumulate 6 months of debt to their retailer before they can be disconnected (amounts covering two 3-monthly bills). As per the discussion in the previous section, the customer has an entitlement to Tailored Assistance upon the issuing of Bill 2, but the assistance is only for the amount from Bill 1. This customer will receive several communications from their retailer between Months 3 and 4 that address different amounts owing. This can be expected to be confusing for the customer. We note that these are the minimum standards under the revised PDF; that is, a retailer has no discretion to not make these offers on these terms.

Figure 2 on the next page shows what happens under the minimum standards if the customer takes up their entitlement under Default Assistance for Bill 1.

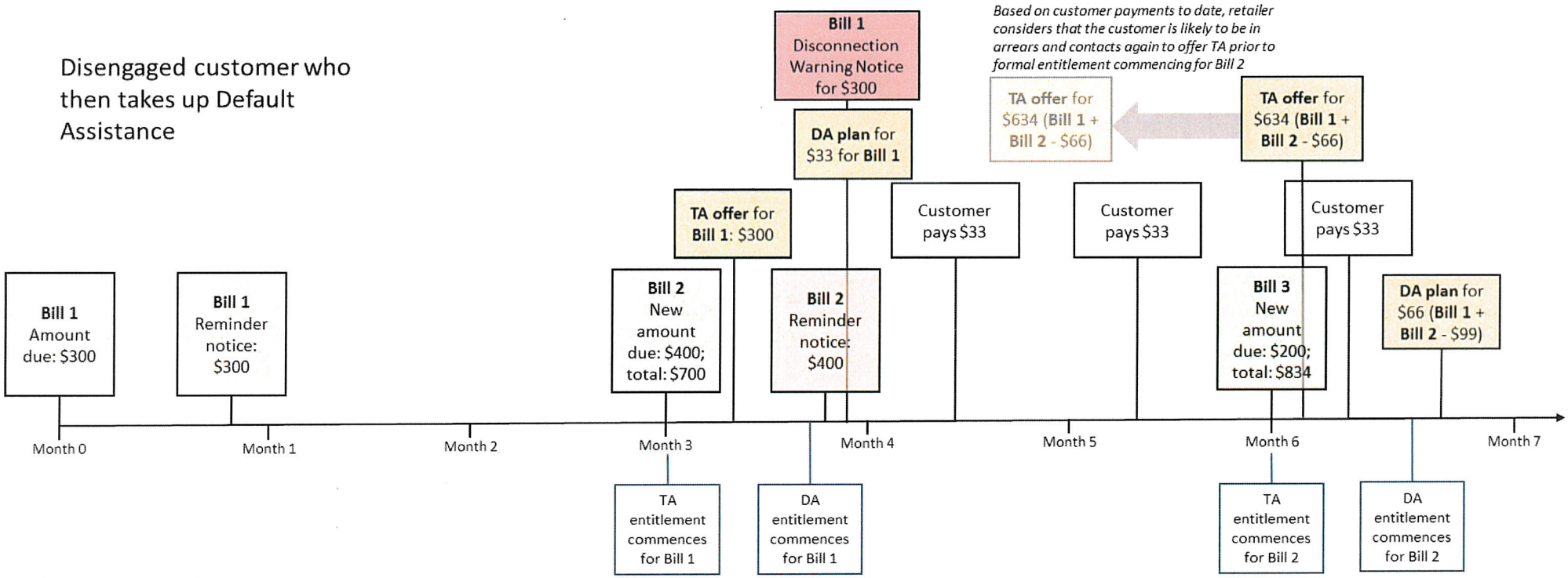

Figure 2: Minimum standard process map for customer who is disengaged but then pays Default Assistance plan

Figure 2 shows the complexity of the cascading bills and entitlements to assistance for these different bills when the customer pays a Default Assistance plan but otherwise does not engage, including paying subsequent bills. The assumption underpinning the amounts for Tailored Assistance and Default Assistance is that these combine the arrears under both Bills 1 and 2, which seems to be allowed under the revised PDF once the customer is, or is likely to be,[12] in arrears for Bill 3. We can see from Figure 2 that not only are the communications and payments messy but that the customer's obligations from Month 6 onward are unclear. What happens when the customer continues to pay their $33 from Bill 1, but the amount has now increased to the amounts owing for Bills 1 *and* 2? Is the customer obliged to pay the new amount? The revised PDF does not appear to provide for this.

The situations shown in Figures 1 and 2 only become worse for customers on shorter billing cycles. Customers receiving monthly bills have the worst experience of the new focus on splitting arrears from use, with the cascade of bills and entitlements happening on a much tighter cycle.

Customer experience is also about customer expectations being met. This leads to the second reason for not splitting arrears from use: customers are *used to* payment plans that combine arrears and future use. The current Retail Code (and all previous versions in one form or another) states that a payment plan must account for 'expected energy consumption needs' for the future. In a formal regulatory sense, the history of payment/instalment plans that allow for arrears plus forecast use dates back to 1997 (and before this with the SECV with what was known as an 'Easyway' plan). The Supply and Sale Code – the precursor to the Retail Code – provided for this kind of plan explicitly:

> **8.6 Paying by instalments**
>
> 8.6.1 A ***supplier*** must offer the following payment options to a ***residential customer*** -
>
> - an instalment plan under which a ***customer*** may make payments in advance towards the next bill in the ***customer's billing cycle*** ; and
>
> - an instalment plan under which the ***customer*** may pay arrears (including any disconnection or reconnection charges) and continuing usage.[13]

We can see that customers have been using payment plans that combine arrears and use for decades. A shift to an arrears-only plan as a default, with ongoing use paid additionally via bills, goes against consumer needs and expectations.

Finally, we would like to repeat information provided to the Commission for its previous Draft Decision, to demonstrate a fundamental process issue. When the change to an arrears-only payment plan was made to what was then known as Immediate Assistance, the AEC stated:

> ... the recent change to Immediate Assistance ... appears to take away the requirement for monthly payments of both arrears and ongoing use...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.[14]

Further, we provided an example of the problem of bill and plan misalignment.[15]

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[12] We have assumed that once the customer has not paid Bill 2, but is on Default Assistance, the retailer is likely expected to believe the customer is likely to be in arrears for Bill 2 (in the PDF technical sense that Bill 2 will be unpaid by Bill 3), so the retailer will be expected to contact the customer prior to the issuing of Bill 3.
[13] *Electricity Industry Supply and Sale Code*, effective 1 February 1997, amended 9 April 1997, p.14.
[14] Australian Energy Council (2016) *Response to Draft Decision: Safety Net for Victorian Consumers Facing Payment Difficulties*, 18 November, p.7.
[15] Ibid., p.9.

When the problem of splitting arrears from use in a payment plan was raised in recent consultation sessions with the Commission on the revised Draft Decision, the Commission responded as if hearing about the problem for the first time. The reaction appeared to support the interpretation that the change from current practice to arrears-only plans was unintended. After some repetition from stakeholders that this is a genuine concern, there seems to be some openness from the Commission to consider a change to the policy, at least at this stage. However, it is concerning that this is news given we were very clear about this problem in our submission in November 2016, and AEC members have also raised the issue separately with the Commission since then.

2.3.2 A solution

The solution to the arrears-only problem is to change the minimum standard in the Code for each of Tailored and Default Assistance to retailers providing payment plans with arrears plus forecast use (unless the customer cannot pay for use, where we are not suggesting change to the revised PDF). This provides one certain and stable payment plan amount (per instalment) for a customer to pay according to the schedule agreed with their retailer. This is not to say that a retailer might not provide something else if the customer requests it, but to do so is a matter for retailer discretion. This approach is consistent with what customers have wanted, and what they have positively responded to, for decades.

We note that with this approach the customer still has the discretion to extend a Tailored Assistance plan to any period within 2 years. However, the period of a Default Assistance plan under this model needs to be rethought – it makes no sense for Default Assistance to be split into three different time periods (the 3, 6, 9 model) based on the customer's billing cycle. Not only does the payment plan sit outside the billing cycle, but a 3, 6, 9 approach is unnecessarily complicated. Based on retailer experience of customers' payment patterns, we suggest that the last resort option of Default Assistance provides a use plus arrears plan over 6 months. If this is not appropriate for the customer they should contact their retailer and (after discussion with the retailer) propose a more appropriate Tailored Assistance plan.

We return to this solution later in this section as it also fixes some of the problems that might be experienced with customers proposing (and retailers being forced to accept) different payment amounts per scheduled payment, where the worst case scenario might be a customer proposing minimum payments until an unpayable balloon payment at the end.

2.4 Eliminating 'payment plans'

The reference to 'payment plans' has been changed in the revised Code to the following:

> ***payment plan***, in relation to a *small customer* (other than a *residential customer* anticipating or facing payment difficulties who is receiving assistance under Part 3), means a plan for the *customer* to pay a *retailer*, by periodic instalments in accordance with this Code, any amounts payable by the *customer* for the sale and supply of *energy*;

Given the problem identified above that 'facing payment difficulties' has no definition, and given that the revised PDF appears to assume payment difficulty for *any* residential customer who has not paid a bill, we can only interpret the term 'payment plan' as now applying solely to small business customers.

This interpretation appears to be confirmed by the Commission's use of 'payment proposal' for the PDF to refer what has always been referred to as a payment plan.

2.4.1 The problem

At the least, the new definition of payment plan clearly represents a legal drafting issue. If the term is to only apply to small business customers then this should be clear. However, this is a much more significant problem than poor drafting; it reflects both unnecessary policy complexity and a faulty logic about the use of the term 'proposal'.

The use of 'payment proposal' to replace 'payment plan' creates complexity because the term is unprecedented and so consumers will not be familiar with it. Surely there will be enough to communicate to consumers and the parties that deal with them (including retailers and welfare agencies) without adding unnecessary new terms? As we noted above, the term 'payment plan' (or 'instalment plan') has been in use for decades. The concept of a payment plan has been at the heart of most to all of the financial support provided to customers by retailers to date, including through hardship programmes, and this remains the case with the Commission's PDF.

The faulty logic of the replacement of 'payment plan' with 'payment proposal' is that these are not substitutable terms for the practical purposes of the PDF, at least not in any recognisable plain English sense. Unlike a 'plan', which has two meanings (something proposed *and* something that has been mapped out), a proposal is *only* something put forward for consideration. Once a proposal has been accepted it is no longer a proposal. To retain the term 'proposal' to mean the actual payment schedule and amounts that a retailer accepts and confirms to a customer in writing is to stretch the term beyond any reasonable sense of its accepted meaning.

Over the past two years of the PDF development process we have repeatedly seen the Commission introduce new (and often poorly defined) terms apparently only for the sake of doing so. Changing the term 'payment plan' for the sake of it is not consistent with the Commission's stated objective to find a policy solution that is 'as simple as possible'. In our view the Commission should be focussed on drafting (and testing) good policy for customer benefit, and *not* continue to complicate matters with unnecessary, confusing and illogical changes to the lexicon.

2.4.2 The solution

The Commission should adjust its drafting so that the definition of payment plan (for all Code purposes and small customers) is retained in its usual sense of being a schedule of payments that a customer makes to a retailer. As noted under section 2.3 this should explicitly account for arrears plus forecast consumption.

2.5 Customer discretion and no end point to assistance

Consistent with the language of a customer's 'payment proposal', the revised PDF is clearly putting the control for determining debt repayments squarely with the customer. Retailers are basically expected to accept payment proposals, with the revised Code allowing repeated revised proposals, and apparently allowing extensions of plan periods.

It has been suggested by the Commission that clause 91(c) provides an exit point for customer assistance. This clause is as follows:

> **91 Retailer obligations**
>
> At all times while a *residential customer* is receiving assistance under this Part, the *retailer*: ...
>
> (c) is not required to continue to provide assistance under this Part if the *retailer* becomes aware that the *customer* is not anticipating or facing payment difficulties.

2.5.1 The problem

There is no logical end point to a customer's minimum rights to assistance under the revised PDF. Not only is this a heavy-handed way of expressing a 'minimum' standard, it will not serve customers when their debts become unsustainably high. It might be expected that some customers will choose to put off repaying their debt regardless of need, and if they are also not covering use then their debt will rise.

Retailers did not like being forced into disconnecting customers, as appeared to be the direction of the previous Draft Decision. However, the pendulum has swung too far in the opposite direction, and retailers' inability to do anything more than accept a payment proposal is inadequate and likely does not reflect

community standards. Further, with no minimum repayment amount, there is now room for undesirable outcomes such as a customer owing a large amount proposing to pay $1 of debt a months for 23 months and then the remaining debt at month 24. This will create problems both for the customer and the retailer, particularly if the balloon payment does not eventuate. Retailers consider it critical that customer debts are not allowed to increase unnecessarily.

We are concerned that the proposed exit points – or 'off ramps' as they have been publicly referred to – are inadequate. It is not clear how clause 91(c) applies here for two reasons: first, 'payment difficulties' as a term is undefined; second, a retailer could potentially know very little about a customer and therefore not be able to ascertain whether they are facing payment difficulties. As noted earlier, it is also unclear how any retailer would prove a negative, or whether any retailer would want to be in a position where it sought to do so.

The problem of no end point also comes into play with extensions to minimum periods, such as the 6 month below use period under clause 79(4) and the extension to the 2 years under 80(1). While drafted in the Code as subject to retailer discretion, the guidance offered in the Draft Decision on pages 93 and 94 (and certain interpretations of clause 82) make extensions an obligation in broad circumstances. We are unclear in what instances a retailer would be able to refuse extensions under clauses 79(4) and 80(1), and particularly given the customer would be advising that their circumstances require it (giving rise to the application of clause 82).

Further, there does not appear to be a mechanism for a retailer to request a revised payment if it becomes aware the customer's payments will not repay the arrears at the end of the 2 year period. This happens often, such as when a customer increases their energy consumption while on a payment plan.

2.5.2 A solution

Given that the PDF reflects minimum standards, and also allows retailers to 'go beyond' the minimum standards, it makes sense that the minimum standards are not set at the extreme end of discretion for one party in the contractual relationship between a customer and a retailer. Minimum standards should be basic rights that balance a consumer's reasonable needs against those of the retailer to be paid for services already provided. It is important that these minimum standards also have regard to community values and expectations – this is all the more the case given that the cost of debt (in all its forms) will ultimately be recovered from all other consumers, including those who may be struggling but are making payments.

A suggestion for managing this issue is to provide for the following:

- **For changes to plans that are being paid**, provide for customers to propose plan period/amount revisions as often as the customer needs to do this (full customer discretion) for up to 24 months from the first scheduled payment. This will work as long as the plan is an *arrears plus forecast use* plan, as we have already proposed. This also means that proposed payments are of equal amounts per payment.[16] This will solve the 'balloon payment' issue mentioned above. It also avoids extremely costly systems changes, which we have discussed with the Commission on previous occasions (and which the Commission accepted for its October Draft Decision). To avoid doubt, we absolutely do not propose or support this level of flexibility if plans are arrears only and if they provide for different amounts per payment.

- **For plans that are broken (with payments not made, or not paid in full)**, a customer's minimum entitlement is to one Tailored Assistance plan and one offer of Default Assistance prior to disconnection. Retailers are able to provide more than this, but the intent of this minimum standard is to encourage customer engagement on a plan; noting that once a plan is on foot it can be changed as above.

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[16] The solution to the arrears-only problem to change the minimum standard in the Code for each of Tailored and Default Assistance to retailers providing payment plans with arrears plus forecast use is also consistent with the 'equal amounts' suggestion.

We also suggest that the sections regarding potential extensions are left as drafted in the Code, which means that retailers have discretion to extend a plan. The material in the Draft Decision that indicates that a retailer is *expected* to provide extensions should be rescinded for the Final Decision.

If these changes are made then the problem of identifying sufficient 'off ramps' is largely resolved. If the default policy is not 100% flexible at the customer's discretion but represents a balance of payment flexibility and payment obligation, off ramps or exit points are far less relevant.

As a last point, we note that Clause 91(c) needs to be redrafted to account for the lack of definition for 'facing payment difficulties', as discussed in section 2.1 of this submission. This clause may be a mechanism for enforcing the minimum standards we have outlined above.

2.6 Retailer knowledge of customer circumstances

The revised Draft Decision introduces the concept of what a retailer 'should reasonably have known' about a customer's circumstances, as follows:

> **Division 3 Tailored assistance ...**
>
> **78 Application of this Division**
>
> (1) This Division applies to all *residential customer*s who are in *arrears*.
>
> (2) It also applies to any *residential customer* whose circumstances the *retailer* knows, or should reasonably have known, would be likely to lead to the *customer* being in *arrears*.
>
> **82 Customer circumstances**
>
> In providing assistance to a *residential customer* in accordance with clause 79, and considering a payment proposal or revised proposal put forward by that *customer* under clause 80 or 81, a *retailer* must take into account all of the circumstances of the *customer* that are known, or should reasonably have been known, by the *retailer*.
>
> **91 Retailer obligations**
>
> At all times while a *residential customer* is receiving assistance under this Part, the *retailer*: ...
>
> (b) must, in relation to any *customer*, comply with any guideline published by the *Commission* relating to *customer*s in particular payment difficulty, including *customer*s who may be subject to family violence, if the *retailer* knows or ought reasonably to have known that the guideline was relevant to the *customer*; and ...

2.6.1 The problem

The language of 'should reasonably have known' implies that a retailer's state of knowledge will be judged by people external to the retailer (primarily the Commission and EWOV) – people who do not have a common or stable reference point for what any given retailer should or should not have known about any given customer. This clause is unenforceable while it depends on the perspective of as-yet-unknown future assessors of both what was to have be known at a particular time and whether a retailer should have known it.

Retailer segmentation on payment risk/difficulty issues will vary from retailer to retailer, and there will be inevitable differences between what each customer volunteers in terms of information that a retailer might use. There is no reference point for what anyone 'should' know other than at the most basic level, such as whether a customer paid a bill.

This leads to a further potential need for clarity: even with an acknowledgement that a retailer can only objectively know what is in its system (and for a level playing field this should only be assumed at a basic level, not based on the highly segmented systems of one or two retailers), what is the Commission's expectation of what a retailer should act on prior to the official trigger for assistance under clause 78? For example, is this everyone with a concession card? Everyone who has ever paid late or not paid? These categories are too large. Is it anyone who has been on that retailer's hardship programme? How far back in time do we go?

2.6.2 A solution

Surely all a retailer can do is form its own view based on what it knows about a particular customer (or on what it believes can be reasonably assumed) at a particular time, and to create records based on this view. On this basis there is a clear argument for the standard to shift to a retailer's 'reasonable belief'. This does not reduce the value of indicators of potential payment difficulty that retailers might be expected to account for.

The drafting of the Code on this matter must be changed. It would also seem reasonable that the Commission provides guidance on the nature of the payment plan conversations it expects to occur between retailers and customers, particularly regarding the interpretation of clauses 82 and 93. Clause 93 and the guidance on page 113 of the Draft Decision are clear that retailers cannot require customers to provide information of their financial or personal circumstances as a condition for receiving assistance. We assume that a retailer is not prohibited from asking questions about personal and financial information but a customer does not need to answer these questions to obtain a payment plan.

2.7 Overlaps of minimum standards and assistance 'beyond' the minimum standards

Standard Assistance appears to apply at any time, and potentially repeatedly. Tailored Assistance applies from the formal application of the 'arrears' definition but in practice will be taken to apply prior that point where a retailer 'should reasonably have known' a customer's circumstances would lead to arrears. This means there is an overlap between the two forms of assistance throughout their application. There is arguably also an overlap of Standard and Default Assistance.

Further, clause 92 contemplates assistance 'beyond' the minimum standards, as follows:

> **92 Assistance beyond the minimum standards**
>
> Nothing in this Part prevents a *retailer* from providing to *residential customers*, who are anticipating or facing payment difficulties, assistance in addition to the minimum standards set out in this Part.

2.7.1 The problem

The problem with the overlaps of the categories of assistance is there is no clarity about what constitutes the minimum standard for a customer at a particular point in time. That is, if we understand a *minimum standard* to be the most appropriate assistance to be provided to a defined customer type as per policy expectations, then there will be conflicting interpretations where multiple forms of assistance are applicable but are also mutually exclusive.

For example, a customer who is in arrears is eligible for Tailored Assistance, which is apparently intended to be the actual minimum standard. However, Standard Assistance remains available. If a customer was to propose a payment plan that was based on Standard Assistance, but was not compliant with Tailored Assistance, is this allowed to be accepted by the retailer? A retailer accepting the Standard Assistance proposal may be illegally substituting or 'matching' the plan (in the language of the Commission).

Related to this, it is still not clear what a retailer doing something 'in addition' to payment plan minimum standards looks like, as per clause 92. It might be suggested that a retailer *could* provide Standard Assistance under this clause; something similar was suggested by the Commission in recent stakeholder

sessions, to manage the arrears-plus-use payment plan problem. But technically the retailer in the above situation (and the one offering an arrears-plus-use plan) could not depend on clause 92 because the proposed plan is still not 'in addition' to the minimum standard but 'instead of' the minimum standard. (If the clause was amended to allow this practice it indicates that Standard Assistance is at that time *not* a minimum standard, which would need to be amended in drafting.)

More importantly, considering a plan to go 'beyond' the minimum standard of Tailored Assistance neglects the issue of whether an objectively less generous option than Tailored Assistance is possible (if we take 'generous' to mean ongoing payment extensions, and consider that good policy). Currently this does not seem possible.

2.7.2 A solution

This problem does not present a neat solution, but the situation can be improved. The Code should be clear what the actual minimum standard is for a customer at different points in their experience of the collection cycle. We have already helped simplify that with our suggestions regarding the activation of the entitlements for Tailored Assistance and Default Assistance. The Code could be further tightened to clarify that the application of Standard Assistance is for customers who have not yet missed a bill payment. Then there could be clarity provided either in the Code or in accompanying guidance that explains that customers can be offered Standard Assistance options at any time at the retailer's discretion, with the caveat that records will need to be clear that a customer choosing Standard Assistance when entitled to other assistance did so in an informed way.

Guidance is required to provide examples of what 'going beyond' the minimum standards (in a compliant sense) for payment plans looks like. At the moment it is hard to imagine what this means, given that Tailored Assistance appears 100% flexible according to the customer's preference (with all the debt accumulation problems that this entails). If our suggestions for reasonably limiting this complete flexibility are accepted, then clause 92 appears to be of more use.

3 Customer outcomes from the AEC's proposed changes

As we saw from Figures 1 and 2 earlier in the submission, there are significant undesirable customer outcomes from the Commission's current definitions of key terms. Working within the parameters of the Commission's model, we have revised these to reach better customer outcomes.

Figure 3 over the page shows the quarterly billed customer experience if we combine the solution to the arrears problem (the new definitions for assistance) with the arrears-plus-use plan. Note that we have left Standard Assistance out for convenience (the customer is disengaged); Standard Assistance would be provided as proposed by the Commission (but with a clearer sense of what a minimum standard actually is, as we have discussed).

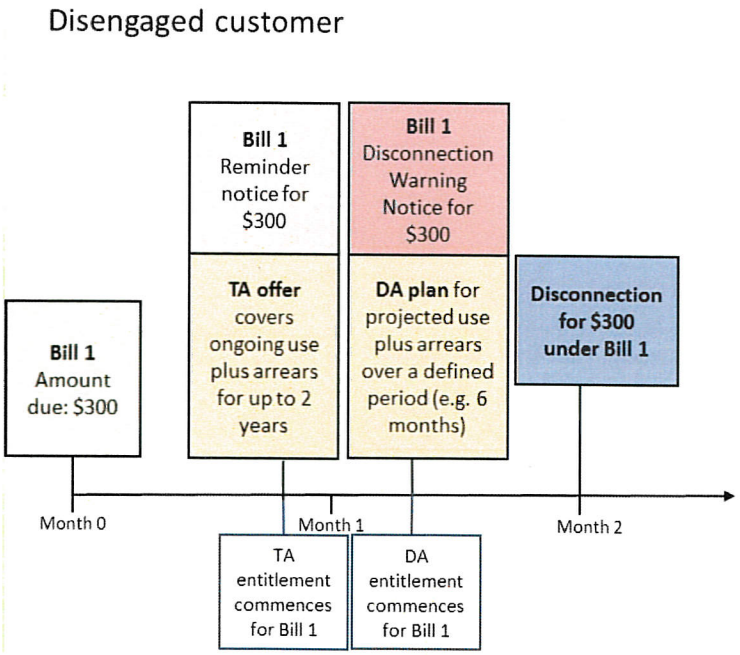

Figure 3: AEC revised minimum standard process map for customer who is completely disengaged

Our revisions mean that the retailer actively contacts the customer to advise about Tailored Assistance from the point of the issue of the reminder notice: this continues to be a best endeavours action. Retailers may also contact customers prior to this point if they reasonably believe the customer might require this assistance.

If, after best endeavours, the customer is not responsive, then a disconnection warning notice is issued. This would occur according to the current minimum periods in the Code, which we reiterate are *minimum* periods. The notice for Default Assistance is likely to be issued at the same time. The Default Assistance plan is for arrears plus projected costs.

In Figure 3, the customer does not respond at all, and so is disconnected before receiving a subsequent bill. Customers in this situation are not building unsustainable debts prior to disconnection.

Figure 4 over the page shows what happens when the previously disengaged customer starts paying their plan under Default Assistance.

Disengaged customer who then takes up Default Assistance

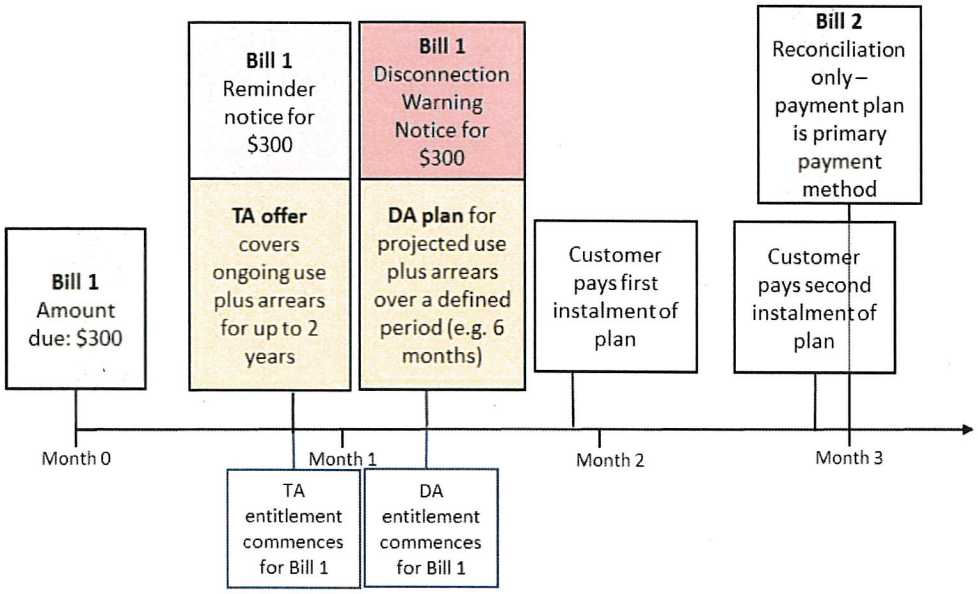

Figure 4: AEC revised minimum standard process map for customer who is disengaged but then pays Default Assistance plan

As can be seen in Figure 4, the customer receiving Default Assistance pays an equal amount per month and only receives bills as means of reconciliation, as is usual practice.

It may be argued that this model is similar to the current Code (version 11), and that there is not sufficient change to meet the desired outcomes from the new PDF. However we would argue that the revised approach does *exactly what it is supposed to* according to the Commission's standards for thinking about options (as defined on 29 May 2017). Compared to the current Code, our revised version of the PDF provides for:

- **Every residential disconnection to be a measure of last resort** – there is no longer a reliance for a customer needing to be in 'hardship' or experiencing payment difficulties to receive payment plans.
- **Equitable customer access to a consistent, minimum level of assistance** – the PDF with our revisions provides every customer to have an entitlement to the standards as defined above, at the same points of the collection cycle.
- **Scope for innovation and preservation of customer agency** – retailers and their customers still have the opportunity to address the customer's payment difficulty in different ways, with the customer having improved agency to determine their payments.

Importantly, the PDF with our revisions is:

- **Practical and realistic** – this revised version is more consistent with retailers' processes and is also likely to be consistent with customer expectations. It avoids the messy and impractical approach shown in Figures 1 and 2 of this submission.
- **As simple as possible, but no simpler** – there can be no doubt that what we have proposed is much simpler for everyone than the Commission's revised PDF, and it also achieves the policy objectives.
- **Cost-effective (in light of the benefits, impacts and outcomes)** – the AEC's revisions would provide for a more cost-effective PDF but we would still a expect cost-benefit assessment, as discussed next.

4 The Commission's cost-benefit analysis

The Commission has hired consultants ACIL Allen Consulting and KPMG to undertake work for the Commission's cost-benefit analysis (CBA). As noted at the start of this submission, each consultant held a workshop prior to the release of the Draft Decision to outline its method for considering the issues. These were extraordinary sessions, involving consultants who apparently did not know the direction of the Commission's new Draft Decision (or were not able to share that they did know) asking broad questions about broad issues with no apparent reference point. Each consultant session asked stakeholders to 'assume the PDF works'. Data for the KPMG consumer report seemed non-existent. Data for the ACIL Allen retailer report was based on data collected by ACIL for the Hardship Inquiry from 9 retailers in 2015; data that ACIL Allen readily acknowledged was out-of-date.

The reports based on these data were publicly released with the Commission's revised Draft Decision, with the Commission claiming to have used the reports to inform its revised PDF. ACIL Allen subsequently asked retailers (via the Commission) to fill out a detailed information request to inform its assessment. At the request of the AEC, a workshop on the information request was held with stakeholders on 1 June 2017. We will only discuss the ACIL Allen report in this submission.

4.1 The status of the Retail Code as a legislative instrument

It is important that we address a key issue upfront, which is the view of the AEC and its members that the Retail Code is a legislative instrument for the purposes of the *Subordinate Legislation Act* 1994 (SLA), and so should be subject to a full regulatory impact statement. We have provided this advice to the Commission on several occasions, providing legal advice that the Code has 'legislative character' and therefore falls within the definition of 'legislative instrument' under the SLA.

We note that the Code has already been treated by the Commission and by the Victorian Government as subject to the SLA. On 9 July 2014 the Commission formally gave notice under section 16A(2) of the SLA that it had gazetted the Code as a legislative instrument (see Victorian Government Gazette No. S241). Further, the Commission was granted a Ministerial exemption certificate on 19 June 2014 in respect of the Code. This certificate allowed the Commission to release the final NECF-harmonised Code for its commencement date of 13 October 2014 without having to prepare a regulatory impact statement.

Given the Code was a legislative instrument in 2014 and the current version of the Code has been gazetted as a legislative instrument under the SLA, we consider the Code is a legislative instrument.

We have not yet had any response from the Commission about why a regulatory impact statement is not required for the major policy reform that is the PDF. This may not have mattered quite so much if we had confidence that the current CBA process captured what was required. Unfortunately we do not have this confidence for the reasons outlined below.

4.2 The ability for retailers to provide reliable data to the ACIL Allen request

The fact that retailers remain unclear on the Commission's likely policy stance regarding the issues addressed this document means that it is unlikely that reliable costs can be gathered at this stage. To recap, we have discussed:

- basic definitions that address who is covered by the PDF (and when) and who might be able to be disconnected, where these definitions are either non-existent or do not make sense;
- the negative customer and retailer debt implications of waiting for two bills before providing assistance, and this (apparently) needing to occur for all customers who miss a payment;
- the negative debt and customer experience implications of splitting use from arrears in a mandated payment plan;

- full customer discretion in payments meaning that customers can pay very little for years and build up debt, as well as being able to organise variable amounts within payment plans and revise plans at will;

- the uncertainty about what retailers are expected to know about customer circumstances and the resulting risk for retailers; and

- the confusion of what is a minimum standard at a given point in time, creating confusion about which forms of assistance must be offered and in which order.

It is unclear how any retailer could cost for these issues given the wide range of interpretations that it might use to both define its service under the PDF and to understand and define the risk to be managed. Retailers will need to make judgement calls on system change costs, process costs and scripting and training costs. These will also be affected by how each retailer considers how to value their customers' negative experiences from the policy problems we have identified (including the change in language from 'payment plans' to 'payment proposals').[17] Confusing or negative customer experiences will lead to further costs in the form of complaints handling costs, including costs of engaging with EWOV.

A further major contributor to variability in costs is *when* the PDF is implemented. Earlier, faster changes to systems and processes cost more to implement than changes that have been cost-effectively slotted into an enterprise-wide change timetable. This has not been accounted for in the information request, and, as discussed later in this submission, the implementation timeframe is unclear.

The Commission has already essentially conceded in recent face-to-face sessions that the arrears definition will have undesirable and unintended consequences, and that the split of arrears from use in minimum mandated payment plans might need to change. The recent forum on process mapping showed beyond doubt that these issues create harm for customers on every billing cycle. What this means is that retailers are being asked to complete detailed cost data on a model that will not be implemented in its current form. When asked about the logic of this, the Commission's response has been that retailers should nonetheless complete the data request as asked, but that they should also feel free to also cost (undefined) alternatives. The Commission and ACIL Allen were resistant to narrowing the field: retailer requests for guidance on what might be the Commission's thinking on alternatives, or even scenarios (such as the number of times a customer might go through the hamster wheel) has resulted in instruction to just 'provide what you can'.

Retailers now appear to be in an impossible position. The CBA is vital but also appears to be of little use. Retailers cannot provide the consistent or reliable data required for ACIL Allen and the Commission to make an informed decision.

4.3 Assumptions of ACIL Allen to date

This situation is made worse by the apparent assumptions that ACIL Allen has made in its work to date. The report released by ACIL Allen has concluded that the revised PDF represents a net benefit, while also stating that the effects of the PDF on debt and disconnections is assumed to be zero. The benefit of the PDF seems to be based on assumptions of avoided costs, but the analysis is unclear.

Other retailer concerns about the report include:

- the basis for system cost estimates are unclear and unexplained;

- there is a sensitivity analysis on debts reducing, but none on debts rising;

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[17] It does not take much to imagine the confusion of a customer who thinks they have made a proposal and had it accepted to then be confronted with the language of 'proposal' as if the plan had not been agreed. Perhaps the Commission did not mean for retailers to use the new language with customers, but if this is the case the change appears even more unwarranted and nonsensical.

- the report does not appear to consider the financing costs associated with debt as material;
- the number of customers on Default Assistance appears to be very small, to the point where it seems pointless to introduce this measure; and
- there appears to be an assumption that Tailored Assistance is relatively stable; this does not capture the cost of having to be able to (a) vary payment amounts for customers at the outset by having different arrears paid at different times in the schedule and (b) varying mid-way through the customer's payment plan (either because the customer asks for it or misses a payment).

Responses from ACIL Allen and the Commission to our questions on these issues in a technical forum has again been for retailers to 'make the case' for alternative positions, and to 'provide what you can'. There appears to be a view that the assumptions and data in the report do not really matter as they will be replaced with actual retailer data based on the information request. However, as we have made clear, the current circumstances do not appear to allow for retailers to provide this data in a useable form. The value of the previous data is also highly questionable given that the data sets collected related to only 9 retailers, they were collected 2 years ago, and that they by definition do not explicitly test for the revised PDF (given that it was not known until May 2017).

4.4 Next steps for the CBA

From a procedural standpoint, this CBA does not match even the most basic standards for a cost-benefit analysis as the concept is generally understood. It is nowhere near the standard of the regulatory impact statement that we believe is required under law, either under the SLA or even the Commission's own *Essential Services Commission Act* 2001.

As we have previously noted in correspondence with the Commission, the Department of Treasury and Finance's *Victorian Guide to Regulation, Toolkit 2: Cost-benefit analysis*[18] shows that the key steps involved in undertaking a cost-benefit analysis are:

- identifying groups that will be affected;
- identifying and assessing costs and benefits from options being considered for addressing the problem;
- consideration of other issues, such as discounting of future costs and benefits; and
- selecting and applying appropriate decision criteria to assess the relative effectiveness of or to rank options (p. 1).

Further, the Toolkit advises how to consider social and environmental impacts, market distortion costs, and costs on third parties. The Toolkit also states the need to take a risk-based view that does not assume the regulation in question is effective; that is, a 'realistic assessment is required as to what is likely to be achieved' (p. 7).

The Commission's CBA work to date does not seem to have operated on these terms.

Given how important a CBA is for complex policy reform such as the PDF, it is deeply disappointing that we are in this situation. Again, if the Commission had tested some of its ideas prior to a formal release of its Draft Decision, this might have allowed for the CBA data request to make sense, and for retailer responses to make sense to the Commission and its consultant.

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[18] 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.

We believe that the options we have put forward in this submission (and other policy options) require consideration and must be formally assessed under the CBA. We acknowledge that this will delay the release of a Final Decision, but note that the current timeframe is unrealistic in any event. The Commission's problems to date with this project have arisen from its lack of practical testing of ideas and policy alternatives with stakeholders. It is time to change this approach. We certainly do not agree with the claim made by the Commission in its Draft Decision (pp. 132-133) that it has (sufficiently) engaged in 'real time impact assessment' and that the solutions proposed in the revised PDF are the right ones to meet customer needs.

5 Implementation

This submission has described a number of fundamental flaws in the PDF policy design, and the subsequent effects of these flaws remaining unresolved for the CBA. It is clear that the PDF is some way away from being at a point where it might be implemented. This is particularly if the Commission continues its pattern of seeking to resolve policy flaws in an information vacuum (and as a consequence introducing more negative unintended consequences for consumers). We only hope that our concerns are heard on these matters and that subject matter experts in the policy community are consulted before a Final Decision is released.

The Commission has advised that a Final Decision is 'possible' in late July to early August (Draft Decision, p. 163). If we assume that a Final Decision comes out at the start of August this means that there are just over four months until the suggested start date of at least some elements of the PDF for 1 January 2018. The current suggestion from the Commission is that the remaining elements of the PDF would be implemented for 1 July 2018.

It is not clear how any of this might be possible given the issues yet to be resolved, the Commission's past record in resolving issues with the PDF, and also the reality of systems change timeframes that we have repeatedly stated to the Commission. Major systems changes take 12 to 18 months to implement from a final blueprint. Implementation for July 2018 seems highly unlikely. Retailers are also facing comprehensive changes from the Power of Choice reforms.

On the matter of what might be possible for 1 January 2018, neither full nor partial implementation for 1 January 2018 will likely meet customer needs. Even if only the components that are the easiest to implement are implemented by 1 January (and there is no evidence that there would be consensus on what these components would be), it is difficult to see how this does not complicate customer communications. Surely the Minister for Energy and the Commission would seek to announce the new PDF and provide advice to Victorian consumers about their entitlements. A phased approach makes these communications unnecessarily complicated and unlikely to have their intended effect.

We believe that the PDF should be implemented later than the dates proposed by the Commission. We do not have a suggested date because there is still too much that has been unresolved. As at the time of writing we are really in no different a position than we were in November last year when we provided our submission to the previous Draft Decision.

There may be reason to believe that the Commission's new approach to consultation will reap better outcomes in future months, but this requires a concerted effort from the Commission to address the sources of the problems to date and to work with stakeholders on improved policy. This means working through and costing options for delivering the right outcomes for consumers.