

Dr Ron Ben-David
Chairperson
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

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Response to *Draft guidance note: Payment difficulty and disconnection*

The Australian Energy Council welcomes the opportunity to make a submission to the Essential Services Commission's (ESC's) *Draft guidance note: Payment difficulty and disconnection* (the Guidance Note). Please see the attachment to this letter.

This submission primarily discusses the purpose of the Guidance Note and how it can best be met, but also highlights some clauses of key concern to members.

In our view, both the structure and the content of the Guidance Note require revision if the document is to meet its stated purpose. We are pleased to work with the ESC to develop an improved document.

Any questions about this submission should be addressed to Tess Fitzgerald on (03) 9205 3115.

Yours sincerely,



Sarah McNamara
General Manager, Corporate Affairs
Australian Energy Council

Response of the Australian Energy Council to the Essential Services Commission's *Draft Guidance Note: Payment difficulty and disconnection*

1 Introduction

The Australian Energy Council (AEC) and its members support the development of guidance to support the Victorian payment difficulty framework as set out in the Commission's final decision.

The Guidance Note is an important component of the overall regulatory framework. This is not only because the changes to the Energy Retail Code regarding payment difficulty and disconnection take a different substantive policy approach on the issues, but also because the consequences of non-compliance are high, for consumers and for retailers.

While the draft approach provided by the Commission makes a good start, we believe that the Guidance Note requires change if it is to achieve its purpose.

2 Purpose of the Guidance Note and design criteria

The first issue we encounter is that the purpose of the Guidance Note poses a challenge. The draft Guidance Note states its purpose as follows:

1.1. Purpose and status of this document

1.1.1. The purpose of this guidance note is to outline for energy retail licensees (retailers), holders of energy licence exemptions and Victorian energy customers, our approach to promoting and enforcing compliance with Part 3 of the *Energy Retail Code* (the Code), and associated provisions that relate to the protection of customers anticipating or facing payment difficulty. It also outlines what the commission considers to be better practices that retailers may adopt.

The statement about the intended audience shows that the Guidance Note is for energy providers *and* for energy customers. In the recent stakeholder forum on the draft Guidance Note held on 25 October, it became clear that these different audiences require different things from the Guidance Note, to the point where the one approach may not meet all requirements.

Retailers stated in the forum that the draft Guidance Note was not fit for retailer compliance purposes. The document was said to be too long, with unnecessary repetition of the Retail Code. The length and overall style were said to run the risk of masking the truly useful clarifications that retailers would need to understand. This retailer view sees the Guidance Note as needing to be a targeted document that retailer compliance and operations staff use to inform their business decisions where the Retail Code is potentially unclear.

In contrast, some consumer advocates stated that the draft would be used as a reference document for parties such as financial counsellors, and that its length and repetition of the Retail Code clauses was appropriate for this purpose. This consumer advocate view appears to see the Guidance Note as a one-stop manual for the payment difficulty framework.

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

The AEC and its members support the view put by retailers at the forum. We are concerned that the draft Guidance Note has created more complexity and compliance risk for retailers. At the least, it is inefficient for every retail business to wade through 72 pages to find the elements that add value to what is already in the Retail Code.

In our view, the purpose for the Guidance Note is to provide guidance to retailers about areas of complexity or ambiguity in the new payment difficulty framework as it is stated in the Retail Code.¹ While we do not seek to downplay the importance of the consumer objective,² it is paramount to retailers that compliance obligations are clear. The Guidance Note as currently drafted does not meet member needs in this regard.

Accordingly, the Guidance Note should be restructured according to the following design criteria:

1. Focus only on areas of complexity/ambiguity, not the entire payment difficulty framework.
2. Provide guidance on Commission interpretation of these areas, with examples.
3. Provide guidance on enforcement measures, with examples.

At the moment, the Guidance Note provides few examples, and does not address enforcement measures at all. These are significant gaps in the document.

In 2016 the Commission released draft staff documents that took the approach we have described above. These focussed on areas where stakeholders had questions of interpretation, and provided examples. They also addressed enforcement. While these documents were in an early draft and arguably for a different regulatory framework (given the changes since 2016), the approach is still a useful model for our current needs.

We also note that this Guidance Note forms a precedent for future changes to the Retail Code. The Commission has stated on several occasions that it intends to rewrite the rest of the Retail Code along similar lines to how it has drafted the payment difficulty framework. We would be extremely concerned if the outcome of this future work meant more Guidance Notes like the one addressed in this submission. Given the relative length of the rest of the Retail Code compared with the payment difficulty framework, the combined page count of future Guidance Notes could be in the hundreds.

3 Language and legal interpretation

We have significant concerns that the draft Guidance Note and amended Retail Code combine to create considerable uncertainty regarding the obligations of retailers and the rights of customers facing payment difficulty. The result is a regulatory framework with an unacceptably high level of compliance risk from a retailer's perspective, and a high degree of uncertainty around rights and 'shared' obligations from a customer's perspective.

Draft clause 1.1.2 states that the Guidance Note does not create additional obligations on retailers, as follows:

1.1.2. This guidance note is published under section 3.2(c) of the commission's *Energy Compliance and Enforcement Policy* (Policy), and constitutes a guidance note for the purposes of clause 73(b)(iv) of the Code. It does not create any additional obligations on retailers.

Under Clause 73 of the Retail Code (as amended), the Guidance Note will be used to assist in interpretation of Part 3 of the Code where words may be capable of having more than one meaning (section 73(b)(iv)). Consistent with general legal interpretative principles, words which have a clear meaning are to be construed according to their ordinary meaning.

¹ This is confirmed in the Commission's Final Decision, p. xiv: 'we will issue a guidance note under our Energy Compliance and Enforcement Policy to inform retailers about how we expect them to exercise their judgment when supporting customers facing payment difficulty'. See <http://www.esc.vic.gov.au/wp-content/uploads/2017/10/payment-difficulty-framework-final-decision-20171009.html>.

² We note that the Commission has stated that it would provide fact sheets for consumers (Final Decision, p. 116). We assume these are to replace the manual the Commission had earlier suggested would be available.

Accordingly, and consistent with its stated purpose, the draft Guidance Note seeks to explain the Commission's interpretation of obligations under the Retail Code without changing those obligations (in scope or content).

However, the draft Guidance Note in its current form fails to deliver this objective, for the reason set out below.

3.1 Restating the Retail Code in different words

We have identified above that the Guidance Note restates Retail Code obligations, which is unnecessary and runs the risk of hiding the new material provided.

Here we want to make a further point: not only is restating Retail Code obligations unnecessary, but it creates compliance risk where there is a perception that it creates a competing set of compliance obligations. This arises where the Guidance Note restates the clauses from the Retail Code, but uses different words.

For example, clause 76(1) of the Retail Code (as amended) provides that a retailer must take steps to provide to its residential customers the forms of standard assistance it elects to make available to help them avoid getting into arrears. Referring to this clause, clause 3.3.4 of the draft Guidance Note states that 'a customer is entitled to all forms of standard assistance that a retailer elects to provide, to the extent that these forms of assistance are compatible'. The drafting of the Guidance Note provision appears to create a right for customers to *all forms of assistance* provided by a retailer, whereas the drafting of the Retail Code requires that retailers provide three forms of assistance to customers (3.3.4). If this is the intent of the Retail Code amendments, that should be made clear on the face of the Retail Code. As drafted, nothing in the Retail Code would prevent a retailer from developing a form of standard assistance that it provides to some (but not all) retail customers – provided it makes three forms of standard assistance available to each customer.

In this context, the language adopted in the draft Guidance Note appears to extend the scope of the obligation on retailers which is set out in the Retail Code. It is not clear to us:

- why the Guidance Note has sought to restate provisions which are clear on the face of the Retail Code;
- whether it is the intent of the draft Guidance Note to extend the scope of obligations on retailers that are set out in the Retail Code; or
- what the legal effect of the apparent extensions to obligations would be, in circumstances where the Guidance Note is said not to impose additional obligations on retailers.

3.2 New obligations

The Guidance Note appears to impose obligations that are clearly in addition to the substance of the Retail Code.

The best example of this are the clauses relating to retailers' 'best endeavours', as follows:

- **Statement of requirements:** We note that the clauses 9.8.5 and 9.5.6 are essentially the same as the current *Operating procedure compensation for wrongful disconnection*. However, the key difference is that the Guidance Note states 'Best endeavours to contact a customer in person or by telephone requires...' while the Operating Procedure states 'Best endeavours to contact in person or by telephone could require...' (our emphasis). This shows that the Guidance Note not only goes beyond the Retail Code in specifying obligations, but that it specifically imposes obligations that are currently only provided as guidance (in the plain English sense of the word).

- **Coverage of Tailored Assistance:** Clause 9.8 states that best endeavours applies as below:

9.8. Our expectations for best endeavours – clauses 89 and 111A

9.8.1. Retailers must use the information available to them, including known customer circumstances, when fulfilling their obligations to use their best endeavours to contact customers and provide them with assistance under Division 3, including:

- a) to provide tailored assistance (clauses 80(2) and 89(c))
- b) to revise a payment arrangement under tailored assistance when a customer does not make a payment according to the payment schedule (clauses 81(6) and 82(2))
- c) to establish a new implementation timeframe for practical assistance where the retailer knows that the customer has not taken steps to implement the practical assistance, as agreed between customer and retailer, and documented by the retailer (clause 82(3))
- d) following issuing a disconnection warning notice and prior to disconnection (clause 111A(a)(iv)).

This draft clause appears to apply a 'best endeavours' obligation on retailers when providing customer assistance under Division 3, in the same form as a 'best endeavours' obligation arises in the disconnection context in clause 111 of version 11 of the Retail Code. Draft clause 9.8.5 then describes the concept of best endeavours to contact a customer in person or by telephone.

As shown in 9.8.1 (a)-(c), best endeavours appears to apply to Tailored Assistance in full; that is, in the offering of Tailored Assistance, and in the revision of payment plans and timeframes under Tailored Assistance. (This essentially draws out clause 89(c) of the Retail Code, which used to be in clause 111(a)(i).)

Further, and as noted above, the definition of best endeavours being applied is essentially the same for disconnection purposes.³

These combined issues create significant compliance burden. This is because contact under best endeavours is limited to telephone and in person, with registered mail as a backup, as the following section of the Guidance Note reinforces:

9.8.10. Retailers should use additional methods of contact, such as electronic communications including SMS and email to complement – but not substitute – their best endeavours efforts to contact the customer and provide assistance under Part 3.

With these requirements in place, we can foresee circumstances where retailers undertake *several* home visits prior to being able to disconnect a customer for non-payment. Even the costs of several pieces of registered mail can be problematic. This outcome was not addressed in consultation to this point, which means that the cost-benefit assessment also did not address the issue.

The risk of new obligations arising under the draft Guidance Note is exacerbated by sections in the draft Guidance Note which do not clearly link to specific clauses in the amended Retail Code. We are particularly concerned that section 9 of the draft Code discusses the expectations of the Commission in a general sense, and in particular clauses 9.5, 9.6 and 9.7, 9.9 and 9.10 which provide a discussion of the Commission's expectations without any link to underlying clauses in the Retail Code.

In our view, the Guidance Note should not impose obligations but inform retailers' views of how to interpret the Retail Code, including by explaining the Commission's intended approach to enforcement. This means that any clause that says a retailer 'must', or is 'required' to do something needs to be

³ Although we note that 4.11.5 states: 'If a retailer cannot successfully contact a customer by telephone, the retailer must provide information about the assistance under Division 3 via registered post to meet its best endeavours obligations' (p. 29). This would seem to indicate that in-person contact is not intended.

viewed critically about whether the content instead belongs in the Retail Code (in most cases it is already there) or should be deleted or softened in tone, including perhaps suggesting that an action may be 'best practice' (and therefore additional assistance).

Regarding best endeavours, its application should be split between Tailored Assistance and disconnection purposes – that is, 9.8.1 (a)-(c) should not be subject to the same requirements as 9.8.1 (d). We propose that best endeavours under 9.8.1 (a)-(c) should be for the retailer to contact the customer up to two times (as a minimum standard) via the customer's stated communications preference. This means that emails and SMSs would be allowed in addition to telephone calls.

4 Ambiguity in interpretation: 'fair and reasonable'

As we have already stated, in our view the Guidance Note should identify clauses and/or terms in the Retail Code that may have multiple interpretations, and should then provide guidance about how the Commission will view compliance with these clauses and/or terms, including examples. The draft Guidance Note does not do this particularly well.

The need for clarity has also increased since the draft decision: we note the Retail Code now has new terms and coverage compared with the previous version. In particular, the term 'fair and reasonable' has been added to the Code's clause 111A in a new clause (v) as follows:

111A Residential customer only to be disconnected as a last resort for non-payment

A retailer may only arrange *de-energisation* of the premises of a *residential customer* for not paying a bill if:

- (a) *the retailer*:
- (i) has complied with all of the *retailer's* obligations to the *customer* under clause 89; and
- (ii) has issued a *reminder notice* to the *customer* that complies with clause 109; and
- (iii) has issued a *disconnection warning notice* to the *customer* that complies with clause 110; 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, in so doing, provided clear and unambiguous information about the assistance available under Part 3; and
- (v) has at all times acted fairly and reasonably in relation to the *customer*, and

'Fair and reasonable' has also been added to clause 89:

89 Retailer obligations

A retailer must:

- (a) in any dealing with a *residential customer* under, or in connection with, Division 3 take into account all of the circumstances of the *customer* of which they are aware and, having regard to those circumstances, act fairly and reasonably; and...

These new clauses introduce significant uncertainty for retailers regarding what actions will be 'fair and reasonable' in the circumstances. In the consultation for this payment difficulty framework we have seen very different views of what might be considered fair and reasonable, including extreme changes in view from the Commission itself.

The new clauses are particularly concerning given the application of 'fair and reasonable' as a means of considering retailer actions is now across the whole of the retailer's conduct, and so can be considered at many different points.

In the first instance, we do not support these additions to the Retail Code because of the compliance risk they will bring. If they are to remain in the Retail Code, it is vital that the Guidance Note provides guidance about the Commission's interpretation of these terms, with relevant examples of practices that would be considered fair and reasonable, and those that would not (and which would attract compliance measures). This also includes where the Guidance Note itself introduces 'fair and reasonable', such as Guidance Note clauses 3.5.9 and 3.5.10.

5 Comments on the amended Retail Code

In the AEC's view, deficiencies in the drafting of the amendments to the Retail Code have contributed to and compounded the issues in the draft Guidance Note we have identified above.

Substantive issues in drafting include paragraph 82(3), which introduces a concept of a customer 'not meeting their responsibility to implement practical assistance'. A customer's responsibility in this respect is not articulated in the Retail Code. We agree with the draft Guidance Note that the Retail Code cannot impose obligations on customers. However, from a legal drafting perspective, the concept of shared responsibility could be better articulated through expressing the limitations on a retailer's obligations in certain circumstances. We would not ordinarily expect to see a positive obligation imposed on one party with reference to a second party's failure to perform an obligation, where that second party is not otherwise obliged to perform such an obligation.

The drafting in clause 81(1) is also unclear. That sub-clause applies clause 81 to a residential customer 'whose repayment of arrears is not on hold under clause 79(1)(f)(i)'. The question arises as to whether clause 81 is intended to apply to all residential customers except if clause 79(1)(f)(i) applies (ie, except customers whose repayment of arrears is on hold), or only to those customers who are repaying arrears, but whose repayment of arrears is not on hold under clause 79(1)(f)(i).

We further note there are technical inconsistencies in the drafting of Retail Code. For example, the relationship between paragraphs within sub-clause lists is inconsistently expressed, with the conjunctions 'and' / 'or' sometimes used at the end of every paragraph, sometimes used only once at the penultimate paragraph, and sometimes not used at all.⁴ This variety of approaches is inconsistent with the rest of the Retail Code and contrary to ordinary drafting practice.

These issues are examples of some of the ambiguities that arise as a result of the drafting of the amendments to the Retail Code. While many stakeholders who have been involved in the development of the Retail Code over a long time period are aware of the intended meaning of these provisions, it is important that the Retail Code stands up to rigorous legal analysis and can be easily understood by future legal and compliance teams within retailers.

6 Process

We would welcome further discussion with the Commission on the draft Guidance Note and amended Retail Code. In particular, the Guidance Note requires further consultation with retailers, to identify from a compliance perspective:

- what is unnecessary (because it adds nothing to the Retail Code);
- what is genuinely useful and should stay; and
- what requires further clarification, including examples.

The Guidance Note also needs to be modified to take out or amend clauses that appear to add additional requirements to the Retail Code.

This may mean that the current expected finalisation date for the final Guidance Note will need to be extended. However, these are important issues to address. It is not a matter of trying to achieve perfection but to create a Guidance Note that does not itself add complexity and uncertainty to the new payment difficulty framework.

⁴ See for example: clauses 73(b), 81(3) and (5), 83, 85, 87(3) and 87(1), where conjunctions appear at the end of each paragraph; and clauses 79(1) and 81(4) where there is no conjunction explaining the relationship between the paragraphs.