



16 November 2017

By email: paymentdifficulties@esc.vic.gov.au

Dr Ron Ben-David
Chairperson
Essential Services Commission

Dear Ron

Submission in response to the Draft Guidance Note - Payment difficulty and disconnection

Consumer Action and the Brotherhood of St Laurence welcome the opportunity to comment on the Essential Services Commission Victoria's (**ESC**) Draft Guidance Note (**Guidance Note**) for payment difficulty and disconnection.

We acknowledge the significant work the ESC has undertaken in drafting a comprehensive Guidance Note focused on customer outcomes. With expansion and redrafting in some areas, the Guidance Note will provide an invaluable aid for those seeking to interpret and apply the Energy Retail Code (**ERC**) in the immediate wake of significant regulatory reform. The new hardship framework is a significant step forward from the current framework, and warrants detailed guidance.

The Guidance Note will assist retailers to realise best practice in both meeting the minimum standards of the ERC, and also take further steps to implement best practice assistance for consumers experiencing payment difficulty.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

General comments on the Guidance Note

The Guidance Note emphasises that retailers must actively consider the individual circumstances of each customer and then work with each customer to ensure that disconnection is genuinely an action of last resort. This is welcome and long overdue, and will assist customers to avoid unnecessary disconnection.

Some retailers have asserted that many parts of the Guidance Note are unnecessary. These assertions generally contend that the Guidance Note is either stating the obvious, is covering

something that they already do, is repetitive or extends beyond the understood requirements of the ERC. With respect to those views, we contend that detailed guidance is not unwarranted when new reforms are being bedded down, and we are not convinced that the Guidance Note imposes any obligations upon retailers that are not already present in the newly revised ERC. We categorically reject the claim that parts of the Guidance Note create additional costs not covered in the consultation for the ERC. The intention of the ERC was clearly articulated by the ESC throughout the consultation leading to the final code.

Further, we would add that the Guidance Note must serve a variety of audiences, not simply retailers. It is important that all who may be impacted by the new framework are able to refer to a non-legalistic, plain English document to understand their rights and obligations under the payment difficulty framework.

Finance industry regulators like ASIC often generate documents to assist both industry, consumers and consumer representatives to improve regulatory understanding. Such documents are extremely useful for our organisation—we anticipate caseworkers at Consumer Action will use the Guidance Note for understanding and will also direct those consumers who do have the capacity to self-advocate to the document.

It should also be noted, as the ESC have done, that the Guidance Note will be a living document that is adjusted over time as needed. Consumer Action welcomes that approach, and looks forward to working with the ESC to resolve systemic issues and adjust the Guidance Notes as the need arises in the future. Retailers have also raised issue with the use of ‘must’ in the Guidance Note, which could be read as a legal requirement. While to our reading the use of the word ‘must’ regularly corresponds with a legal requirement being explained in the document, it may be useful to substitute for a phrase such as ‘is expected to’ given the Guidance Note is not intended to be a legal document. When read from a customer in payment difficulty’s perspective the term ‘is expected to’ may be understood as a retailer being in a position of having to justify why they did not act as expected. This would require comprehensive record keeping, and such records should be available to help determine whether there has been a breach of the ERC.

Some retailer stakeholders have also requested that examples of enforcement responses be included where a retailer breaches the code. If the ESC does decide to add this content the enforcement response stated needs to be strong enough to deter retailers from opting to breach the ERC by failing to make disconnection a last resort. Such content should also impress upon retailers that enforcement will vary according to individual customer’s circumstances and the impact of entitlements being denied or withheld.

Finally, some retailers have objected that it is unnecessary to provide guidance for processes that they already implement. However, the examples given in 4.6.8 and 4.6.9 reflect practices which are not consistent across all retailers. In our view, it is useful to include such to provide clarity to all retailers and all customers.

In seeking to provide constructive feedback to the Guidance Note, we have found that our feedback can be summarised by the following key points:

- **The ESC should maintain the comprehensive approach they have adopted in the Draft Guidance Note**

- **The Guidance Note should ensure retailers and other audiences are reminded of the need to consider individual circumstances whenever retailers are able to exercise discretion**
- **Cross-referencing sections of the Guidance Note will aid understanding, and promote holistic understanding of the document**
- **The ESC should revise the Guidance Note to facilitate appropriate warm transfers to government and non-government support agencies**
- **The ESC should consider supporting our proposal for Connections Victoria, to ensure that best endeavours as required by the ERC are effective**

We also suggest that the ESC consider giving more example scripts for best practice conversations between retailers and customers in payment difficulty, as practical guidance and to assist retailers with their staff training programs.

While the Guidance Note requires revision in some parts, on the whole it will require retailers to make changes to ensure retail staff actively consider the course of action most appropriate to a customer's circumstances. This is a laudable aim, and represents a significant step forward for Victoria's payment difficulty framework.

Our specific point by point comments are outlined below in the order they arise with reference to the relevant paragraph of the Guidance Note. Where we have not commented on a paragraph of the Guidance Note, it can be taken that we support that element of the draft or have not identified a potential issue that may arise as a result of that paragraph.

Specific responses to the Draft Guidance Note

Division 1 – Operation of Part 3 of the Code

2.4.1 - Purpose of Part 3 – clause 71; and 2.6 - Interpretation of this Part – clause 73.

We share the ESC's understanding of the purpose of the code and feel it is clearly articulated in clause 2.4.1, particularly the emphasis on disconnection as a measure of last resort.

We also welcome the clear explanation of clause 73(b) under 2.6.2 of the guidance, and the guidance for retailers to adopt a purposive approach—with clear reference to the objective of the Division, and purpose of the Part.

We also strongly support clause 2.6.4. It is essential that the ESC maintain 2.6.4 in the guidance, underlining that retailers must make genuine efforts to assist customers in need, and consider the situation from the customer's perspective. The framework is designed to make disconnection a last resort for customers facing payment difficulty. Reading guidance from such a perspective will improve the decisions retailers make towards realising disconnection as a last resort. If retailers struggle to understand these perspectives we encourage them to read the lived experiences articulated in our *Heat or Eat* report¹, VCOSS's *Power Struggles* report² as well as numerous other publications and submissions which include case studies from those in payment difficulty.

¹ See <http://consumeraction.org.au/wp-content/uploads/2015/08/Heat-or-Eat-Consumer-Action-Law-Centre.pdf>

² See <http://vcoss.org.au/media-release/power-struggles/>

Division 2 – Standard assistance

3.1.1 – Objective of Division 2 – clause 74; and 3.2 - Application – clause 75

3.1.1 states that “*standard assistance is available to all residential customers*” while 3.2.1 states that “*standard assistance is available to all residential customers anticipating financial difficulty.*”

In our view, the expression in 3.2.1 appears to erroneously narrow access to standard assistance, and should be amended to reflect the statement in 3.1.1 and avoid confusion.

3.4 - Steps to provide standard assistance – clause 76(1)

While we welcome the intent of paragraphs 3.4.1 and 3.4.2, they should be expanded upon to provide greater detail and ensure that customers with varying degrees of literacy or language needs are clearly informed of their entitlements. We reiterate our statements from a previous submission on the second draft decision for the Code:

“The current proposed provision to require retailers to make information ‘easily accessible on the retailer’s website’ (c88(3)) is likely to be interpreted by some retailers as having the same prominence as current payment and hardship assistance information.

Such information is often buried several ‘clicks’ away from the front page, making them inaccessible for customers with lower literacy, CALD backgrounds, without access to the internet or without the ability to utilise the internet.

Guidance should inform retailers that they need to clearly promote these options in plain English wherever they interact with potential customers or customers who are not yet facing payment difficulty.

Good practice in relation ‘easily accessible’ to would include a button ‘above the fold’ on a retailers home page, such as on Yarra Valley Water’s home page (see Figure 1).

Retailer’s customer service staff should also be required to discuss these options when signing up a new customer, giving people the option to get on an offer that is fit-for-purpose for their circumstances.”³

The Guidance Note should include a more extensive list containing specific examples of how this information should be readily available. Some examples could be: a retailers’ website home page, pages where payments are made, on third party payment method pages such as “Bpay.”

3.5 - Forms of standard assistance – clause 76 (2)

We are confused by paragraph 3.5.6, and request clarification. Our understanding (based on clause 24 of the ERC) is that bill smoothing involves estimated meter reads, and we therefore find it difficult to see how one is preferable to the other.

³ See page 11, Consumer Action Law Centre and the Financial and Consumer Rights Council submission in response to the Payment Difficulty Framework Draft Decision.

Division 3 – Tailored assistance

The draft guidance for this section makes it clear that retailers will need to take into account individual circumstances. We support and welcome the ESC's approach in the drafting of what we view as the most significant area of change in the final Code and request that drafting of the Guidance Note be expanded to promote and reinforce the requirement for retailers to consider individual customer circumstances, whenever retailers are in a position to exercise discretion about the steps that should be taken.

4.2 - Objective of Division 3 – clause 77

We strongly support the statement in clause 4.2.3, that tailored assistance must be flexible to accommodate the needs of individual customers. This paragraph clearly summarises why and how tailored assistance will operate to ensure the Code meets its objective.

4.3 - Application – clause 78

4.3.1 and other clauses regarding the provision of information about tailored assistance should be expanded to state that information about tailored assistance be provided separately to a disconnection warning notice.

We expressed the rationale for this in our most recent submission on the Code:

“The benefits of the offer of support under Direct Assistance will be undermined if it is combined with a Disconnection Warning Notice, which inevitably has a more threatening tone, and which will deter many consumers from making contact.

For this reason, we strongly recommend that the framework prevent retailers combining Default Assistance offers and Disconnection Warning notices, and require that these be separated by least a week.”⁴

As stated in our previous submission and provided in the form of data from the National Debt Helpline, our caseworkers regularly speak to people with unmanageable energy debts over \$2,000. These customers should not be deterred from accessing the entitlements from the new framework as it is rolled out, they will likely be in most need of assistance to ensure that disconnection is a last resort.

Some retailers have requested that changes be made to clause 4.3.4. We do not support changes to the intention of this clause but instead request that it be reworded or expanded so that it is more likely to be clearly understood by all readers.

Customers who are assisted under the current framework are entitled to far fewer protections and should have no doubt that they have the same improved entitlements as other customers in payment difficulty from the time the new framework becomes effective, on 1 January 2019.

Customers who have payment difficulty assistance under both frameworks should not be denied knowledge of their changing entitlements until two payments are missed on a payment plan that was formed before 2019. This inequitable idea was suggested within a ‘solution’ proposed by retailers at the workshop, and we strongly object.

⁴ See page 24, Consumer Action Law Centre and the Financial and Consumer Rights Council submission in response to the Payment Difficulty Framework Draft Decision.

Retailers gave the example of a customer missing the last payment in a payment arrangement of various lengths that started before 2019 then being entitled to a two-year plan as unnecessary. Such a customer should be informed of and able to access all their entitlements under the new payment difficulty framework. The hardship inquiry found that hardship assistance is currently inconsistent. It is only fair that the customers are informed of their new equitable entitlements—especially as the previous hardship framework may have disadvantaged them compared to others.

As articulated elsewhere in the framework, the aim of the Code is for customers to have entitlement for two years to repay arrears but be encouraged to do so in less time, where this aligns with their circumstances. Customers who are struggling to meet their payments as agreed to before implementation of the new entitlements in 2019 should not be denied that entitlement.

4.4 - Minimum assistance – clause 79(1)

4.4.3 appears to have a typographical error and needs to be amended for clarity. It appears there is an unnecessary full-stop that divides two sentences which should be conjoined. Our understanding is that the amended paragraph would state (amendments highlighted):

*“If a customer has a payment arrangement with separate payments for energy use and arrears under clause 81(4), and falls further into arrears by missing an energy use payment **then** we would expect **the** retailer to contact the customer and discuss changing the payment arrangement to one that includes a reasonable forecast of the customer’s energy use under clause 81(3).”*

If this is correct, we would support this paragraph reinforcing the onus on retailers to identify the need to extend beyond two years of repayments, and then contact a customer to proactively offer such assistance.

We also support 4.4.4 and 4.4.5 making it clear that the retailer must allow a customer to pay below their on-going cost in such scenarios and ensure that the customer is aware of the consequences that may have.

4.6 - Customer advice entitlement – clause 79(1)(b)-(d)

Paragraph 4.6.2 should refer readers to paragraph 9.2, to provide clear guidance around conversation that needs to be had with customers when providing tailored assistance.

4.6.3, 4.6.4, 4.6.5, 4.6.6 and 4.6.7 should be reordered and expanded to emphasise fully informing a customer of entitlements while also avoiding information overload through either too much information, or information provided in a form that it is too complex. Effective communication will assist a customer to make an effective decision about how to utilise their entitlement, but poor communication could have the opposite effect.

Customers should be aware of their entitlement to repayments over two years or longer if needed before being encouraged to work towards a shorter payment plan. There is a fine line between pressuring a customer to a shorter payment cycle and working with them, especially given the power imbalance that has been demonstrated to impact customers in payment difficulty in such situations.

We support 4.6.8 and 4.6.9 which are well worded to clearly inform the retailer of this requirement. Further expansion about the current rules around retrospective application under

the DHHS guidelines should also be included and updated regularly so customers or their representatives can quickly understand what these entitlements will mean in practice.

4.6.11, 4.6.12 and 4.6.13: as raised with the ESC, we request that the guidance around warm transfers be amended to ensure customers are effectively referred to and assisted by financial counsellors as appropriate to their needs. Warm transfers to telephone financial counsellors is workable but the guidance must clearly state:

- That retailers must ensure that the customer is aware what financial counsellors (could be substituted or broadened for other government or non-government services) role is and that they are independent from the retailer before the transfer.
- Circumstances when a customer should be legitimately referred to a financial counsellor, include when:
 - they don't know how much they can afford;
 - they can't agree on a repayment amount with a retailer;
 - it is clear the customer has complicated personal or financial circumstances, including significant other debts.
- Referring these paragraphs to other guidance should address other practices of concern reported by financial counsellors that impact their ability to effectively assist customers, including:
 - Transferring customers with an ultimatum to get assistance or face disconnection. (We note clause 93 would prohibit retailers placing conditions on a customer's entitlements if that customer does not speak to a financial counsellor).

4.7 - Finding the most appropriate energy offer – clause 79 (1)(e)(i)

We support the paragraph 4.7.4 as it highlights that pay on time discounts are misleading to customers, especially in circumstances where payment arrangements mean that discounts do not apply. However, the wording of this clause should be adjusted to ensure it is not misread as stating pay on time discounts are legitimate when it has recently been demonstrated in the ESC's quarterly market report update⁵ and the ACCC *Retail Electricity Pricing Inquiry – Preliminary Report*⁶ that undiscounted offers are often cheaper than pay-on-time offers when conditions are not met.

We note that in *ACCC v Origin Energy Ltd* [2015] FCA 55, White J held, on the basis of agreed facts, that Origin had made misleading representations as to the discounts available under certain energy plans. The misleading representations were that the discounts were overstated from the commencement of the plans, because the base rate from which Origin subtracted the discount was a different, and higher, rate than the base rates from which customers would reasonably have understood the discounts would be subtracted. Our view is that this case provides a basis for the proposition that offers involving pay-on-time discounts cannot have base rates that are higher than the same retailer's generally available undiscounted offer..

⁵ Essential Service Commission, Victorian Energy Market Report: April-June 2017 update.

⁶ ACCC Retail Electricity Pricing Inquiry: Preliminary Report

4.8 - Practical assistance, suspension of arrears & other assistance – clauses 79(1)(e)(ii)-(g)

The use of the word ‘meaningful’ in 4.8.1 needs to be clarified. We suggest that meaningful may be only truly defined by a customer’s perspective and circumstances. For this reason, the paragraph should be expanded with examples and emphasise the consideration of the customer’s circumstances.

For 4.8.2 we suggest giving an example of best practice to expand this clause. As highlighted in our submission to the second draft decision of the PDF, a case manager for people in this situation is best practice. Encouraging retailers to facilitate more meaningful conversations as part of trust-based, ongoing relationships would be aided by consistent support from a familiar contact.

We also strongly support the paragraph 4.8.3 making it clear that retailers must ensure they do not promote under-consumption such as that discussed in VCOSS’s *Power Struggles* report.⁷

The list in 4.8.4 could be further extended by suggesting transforming market renewable technology that the retailer may be able to provide a customer.

We also strongly support the clarification provided by 4.8.5, this makes clear the obligation on retailers to act, not outsource assistance to the public sector.

4.9 - Entitlement to minimum assistance – clauses 79(2)-79(5)

4.9.6 should be amended to require that customers be informed that they are entitled to extend beyond two years and entitled to assistance under clause 79(3) in these scenarios. This will make it clear that retailers must not utilise their judgement to withhold information about entitlements but instead make options available to achieve part 3’s purpose.

4.9.7 is clear and we strongly support this inclusion in the guidance to assist retailers in making decisions to expand assistance where this corresponds to a customer’s circumstances.

Extended assistance under clause 79 (1)(f) - clause (4)

We consider that 4.9.10(g) is important and that an expanded list would be counter-productive. It is clear that retailers must consider customer’s circumstances. Any further description may narrow retailer’s understanding of what circumstances could be relevant.

We welcome 4.9.11 clearly protecting those who are in an impossible financial situation from disconnection. Expanding 4.9.11 to include an example of debt waivers as best practice for customers who cannot afford long term usage would encourage better outcomes for customers and retailers.

Customer entitlement to further assistance after end of assistance under clause 79(1)(f) – clause 79(5)

We support the ESC’s drafting and including a clarification of the expectations around a customer’s entitlements under such circumstances.

⁷ See <http://vcoss.org.au/media-release/power-struggles/>

4.10 - Information about assistance available – clause 80(1)-(2)

We support 4.10.9 as drafted and believe this will be useful in avoiding unnecessary miscommunication about retailer's policy to customers and those assisting them.

4.11 - Time for customers to consider assistance – clause 80(3)

Registered post confirms that the post was received at a property but little else. We welcome a retailer being expected to use registered post as described in 4.11.5 as part of the best endeavours for offering tailored assistance. As discussed later in this submission, we do not see the use of registered post as a sufficient approach to exhausting best endeavours to contact a customer before a property is disconnected.

We will continue to develop and advocate for the establishment of an independent organisation to protect unengaged customers from unfair disconnection following home visits by trained welfare professionals. We have tentatively named this initiative "*Connections Victoria*". We encourage the ESC to participate along with retailers and other community and government organisations in workshoping how to establish best practice, and an effective roll out for such an organisation.

We support 4.11.7 as it is essential that a retailer provide written information to customers. Such information will help the customer and their worker/s resolve disputes.

The inclusion of the six-day counting period and drafting of 4.11.9(a)-(b) are sensible. Retailers following this guidance will ensure that customers have the time and flexibility that they need to be in the best position to make sustainable payment proposals.

4.11.10 is also well drafted and a necessary inclusion to provide clarity around customers access to entitlements being protected.

4.12 - Payment arrangements – clause 81

Some stakeholders have questioned the necessity of 4.12.6. We support the drafting and inclusion of 4.12.6 and believe that this reminds retailers and customers of section 23 of the Energy Retail Code.

Understanding a customer's circumstances and being flexible to resolve issues by responding to such circumstances is essential to achieving the purpose of part 3 of the Code and the best outcome for people in payment difficulty and their retailers. The guidance in 4.12.(7)-(9) is useful for achieving such outcomes.

Under 4.12.10, 4.13.2 and 4.13.5 the onus lies with retailers to actively invite alternative or revised assistance where repayment arrangements don't go to plan. This is wise, and the paragraphs well drafted. The rigidity of the current framework has meant that disconnection is not a last resort, and is too often implemented where circumstances have changed or where payment arrangements were too ambitious in the first place.

We support the inclusion of a paragraph like 4.12.15 to clearly state the tone of communications. The last sentence should be redrafted and instead state that the aim of such an approach is to foster actions consistent with customers who trust their retailers. Customers trust retailers who demonstrate that they understand and are acting in the customer's best

interests and delivering on what they say they will do. Our *Power transformed*⁸ report and CPRC's customer trust framework⁹ provide further discussion on the importance of customer trust.

The phrase "*prompt action*" should be clarified in 4.13.2 by referring to 2.6.4 and the need to approach the issue from the customer's perspective—reinforcing that "*prompt action*" reflects the time-frame during which the customer needs the guided action.

4.14 - Continued provision of assistance – clause 83

Language such as "*co-operates*" or "*reengages*" used in the drafting of 4.14.3 is strange when read from the perspective of a customer in payment difficulty and should be revised. 4.14.3 should instead acknowledge that a retailer may be unable to find a workable payment arrangement proposal with a customer in general or after being unable to establish contact with a customer.

Customers' circumstances may mean it is not appropriate to proceed to disconnection on this basis as discussed elsewhere in guidance. This revision would acknowledge that some customers in payment difficulty do struggle to remain in contact with a retailer for a variety of reasons, as is discussed in our *Heat or Eat* report.¹⁰

The new flexibility provided by clauses such as 4.14.4 is encouraging. The rigidity in the current Code enables retailers to disconnect people in payment difficulty far too easily, breaching the principle that disconnection is a measure of last resort.

In terms of expanding paragraph 4.14.4, we recommend adding the scenario in which a customer makes a payment to a different account with the same retailer. This can occur where a customer is confused by multiple documents or mistakenly pays a different bill at the post office, and should be regarded as a reasonable customer action.

Some retailers raised concerns about the example in 4.14.4(a), asking if \$80 would be the cut off. We believe these concerns misunderstand the purpose of the example, that each customer has variable circumstances which mean that some are unable to meet payment arrangements to plan. The reasonable customer actions listed in 4.14.4 are by no means exhaustive (as the paragraph itself explicitly states) and should be taken as indications of factors that should be considered—rather than black letter law requirements of what needs to be met. In the end, this is the whole point of a purposive approach that treats consumers as human beings, and takes individual circumstances into account.

As explained in our *Heat or Eat* report¹¹ and in numerous submissions made since the hardship inquiry, many customers will not be acting unreasonably given their circumstances where they do not respond to retailer's attempts to contact them to provide assistance.

Paragraph 4.14.7(b) should not lump all customers who do not respond in the category of unreasonable. A retailer should not disconnect a customer for non-payment where they are not certain if the customer's circumstances are a barrier to making contact. Disconnecting a

⁸ See <http://policy.consumeraction.org.au/2016/07/31/power-transformed/>

⁹ See <http://cprc.org.au/2017/08/25/building-customer-trust/>

¹⁰ See <http://consumeraction.org.au/wp-content/uploads/2015/08/Heat-or-Eat-Consumer-Action-Law-Centre.pdf>

¹¹ *ibid*

customer who has difficulty communicating and is therefore not engaging with their retailer does not reflect disconnection being used a last resort.

It would be useful to expand the guidance in this section and point retailers to guidance at 9.4.4 and 9.5.2 which better articulate considerations retailers should be making when payment arrangements do not go to plan or when communication breaks down.

We support the onus being on a retailer to prove that a customer is not in payment difficulty under 4.14.10, and we believe this should prevent retailers from doing the bare minimum. A reminder that a customer should not be harassed as defined by the ASIC and ACCC debt collection guideline for collectors and creditors would also be useful in this section of the Guidance Note.

4.14.11 should be amended to explain that the retailer should consider the design of disconnection warning notices and how assistance available is communicated to avoid disconnection. Cross-referencing to the redrafted 4.12.15's indication of best practice communications would be useful in the paragraph. This would help retailers to think from a customer's perspective and work towards disconnection being a last resort.

Disconnection warning notices' focus need to be on maintaining supply instead of ticking a box on the way to disconnection.

Division 4 – Financial hardship policies

5.2 - Content of financial hardship policies – clause 85

We welcome the clarification in this section and looks forward to having access to retailer's hardship policies once they are updated. These policies will likely help caseworkers understand how practices will change where they have seen detriment to financial counselling and legal clients in the past.

Customers in payment difficulty who would be entitled to practical assistance under Tailored Assistance will often be in impossible financial situations. 5.2.5(c) alludes to customers funding or partially funding measures that would fall under practical assistance.

The ESC should make it clear that if a customer's arrears are made unmanageable by being required to partially fund practical assistance measures under a retailer's financial hardship policy this would need to be considered a reason not to pursue disconnection by that retailer.

Division 6 – Miscellaneous retailer obligations

7.5 - Working cooperatively – clause 89(e)

The ESC could provide expanded guidance on clause 89(e) of the retail code.

This could take the form of practical examples, such as creating a priority phone line for Financial Counsellors who are assisting clients in payment difficulty, to assist retailer to understand ways they can co-operate effectively with government and non-government services.

7.7 - Assistance beyond minimum standards – clause 90

We support the ESC providing the example given in 7.7.2. Proactive action to provide assistance beyond that strictly required by the Code would likely benefit both the customer and retailer, potentially avoiding compounding payment difficulty.

7.8 - Restriction on conditions – clause 91

Paragraph 7.8.2 should be expanded to state that a retailer should only ask reasonable questions of the customer and keep the communication considerations outlined in 4.12.15 as well as the customers already known circumstances in mind when asking questions.

Unnecessary questions are a waste of customers' and retailers' time. Customers often complain of being disrespected by retail staff after having been "grilled" about their circumstances when speaking to financial counsellors at the National Debt Helpline. Such behaviour erodes customer trust.

We strongly support the inclusion and drafting of 7.8.(3)-(5). As outlined in previous feedback to the ESC, ultimatums that involve denying entitlements until a customer has spoken to a financial counsellor often lead to a waste of resources. These ultimatums also increase the risk of a customers in payment difficulty unfairly facing disconnection by way of unrealistic timeframes.

7.11 - Payment by Centrepay – clause 94

Some stakeholders have asserted that 7.11 should be removed from the guidance. We disagree with this view.

As stated in our general comments above, some content such as this should be included to make the guidance a comprehensive source of information for multiple audiences.

Disconnection safeguards – Part 3 and 6 of the Code

8.1 - Disconnection safeguards

We strongly support the drafting of 8.1.9 which accurately reflects the significant change that will need to occur to ensure compliance with this code.

We suggest that the use of language such as "failed" in 8.1.10 is unhelpful. This would be better expressed "*Second, the customer receiving assistance must **not have met** the conditions of that assistance (clause 83)...*" (amendment highlighted). Further a reference to the considerations outlined by paragraph 9.4.4 should be included in this section of the guidance.

8.2 - Disconnection by a retailer

It would be useful to expand 8.2.1(b) to give details as to customer rights and how to pursue them in circumstances where a distributor does disconnect a customer without authorisation from a retailer.

As previously stated, the Guidance Note should serve multiple audiences, not just those who are already familiar with such procedures.

Guidance for other retailer obligations under Part 3

9.2 - Tailored assistance conversation – Division 3

9.2.2, 9.2.3 and 9.2.6 require amendment so that a retailer is also guided to inform customers in both circumstances as close to the start of a conversation as possible about the options available to them under tailored assistance—if standard assistance will not help them pay.

This would avoid customers needing to know there is additional assistance and say the ‘magic words’ to access tailored assistance.

Limiting a customer’s options could result in them making no further contact after reasonably forming the view that assistance from their retailer is a dead end. This is not consistent with making disconnection a last resort because some customers in payment difficulty may never be informed of or pursue their entitlements.

Due to the past unfair treatment of customers in payment difficulty by retailers we would expect that many will not trust that retailers will assist them and will not make further contact after being unable to fulfil the payment arrangements that do not suit their circumstances.

It is also important that customers are informed of the entitlement to two years or more for payment arrangements in the conversations encouraged by 9.2.8, for the reasons stated above.

9.3 - Fair and reasonable treatment – clause 89(a)

We strongly support the guidance drafted in section 9.3. This section succinctly promotes the attitudes that retailers require in order to fulfil the purpose of the payment difficulty framework.

9.4 - Customer circumstances – clause 89(a)

9.4.2 We support this elaboration by the ESC and suggest that 9.4.2(c) guides retailers to collect customer’s two preferred contact methods whenever they are in contact with a customer. It is our experience that the people facing payment difficulty with energy also have payment difficulty with communications service—which means they may often need a backup contact method, where a phone or internet access is disconnected.

We strongly support the non-exhaustive list that the ESC guides retailers to consider under 9.4.4, and regard this as an extremely valuable paragraph in the context of the Guidance Note—which should be referred to frequently throughout.

Paragraph 9.4.7 should be broadened as the guidance seems to only respond to the existence of the Translating and Interpreting Service and National Relay Service. There are many more forms of communication barriers that retailers must consider when providing the assistance customers are entitled to.

Issues with literacy and numeracy are recognised under 9.4.4(p) while people experiencing severe illness (including mental health) is pointed to under 9.4.4(h) and should also be incorporated in a redrafted section which deals with communication barriers broadly, with specific signposts for available services.

We also feel that 9.4.7(b) should be reworded to reflect that the friend or family member nominated by the customer must be considered to have the capacity to be engaged. 9.4.7(b) should also be at the bottom of this list of ways to engage customers with barriers to

communication in order to avoid instances where customers are exposed unnecessarily to the impacts of abuse such as family violence or elder abuse by power imbalances.

Accepting information on face value is also crucial to overcoming issues with the current framework and for this reason we strongly support the ESC's expectation outlined in 9.4.8. To avoid doubt this paragraph should remind retailers that they must not harass customers and must observe ACCC and ASIC guidelines on debt collection.

9.5 - Repeated late payers – Part 3

This section could guide retailers towards more mindful action to take in response to someone experiencing payment difficulty. Accordingly, we strongly support the inclusion of this section.

It may be useful to cross-reference other parts of the code to 9.5.2, or expand them to reflect the same articulation of a respectful way to engage customers.

9.6 - Shared responsibility – Part 3

Several parts of this section should be revised. When read from the perspective of a customer in payment difficulty it appears to contradict many other aspects of the framework. Paragraph 9.6.4 states that retailers may withdraw assistance from customers who are '*not demonstrating good faith*.' This is far too open ended and retailers could rely on this drafting to justify disconnecting a person who the retailer finds difficult.

From a customer perspective, retailers have a significant history of failing to act in good faith. It is important to recognise that many customers have very little trust in their retailer, and with such low expectations they may act in a way that is not constructive. This does not mean that they should be disconnected from an essential service.

The beginning of 9.6.5 should be re-written to state that "*It should be made clear to customers that they should contact their retailer when facing payment difficulty...*" It should be acknowledged that a history of retailers failing to act in good faith towards customers, and the real power imbalance that exists between the two parties are barriers for customers engaging. The onus should be on retailers to ensure that customers are communicated with using best practice.

The use of '*not cooperating*' under 9.6.5 should also be revised. There is little explanation offered as to what '*not cooperating*' would look like. It should not be left open for retailers to move towards disconnection over a situation such as a disagreement with a customer which may be perfectly reasonable given the customer's circumstances.

We strongly support the drafting of 9.6.6 and feel it should be placed instead as the first paragraph of content in this section to frame the audience's reading and cross-referenced throughout the section. Each paragraph in this section should require the retailer to consider whether they have made considerations consistent with 9.6.6 before proceeding towards disconnection.

9.7 - Discreet contact – Part 3

We strongly support the drafting of 9.7.1. Retailers need to put thought into assisting each individual customer, and genuinely considering customer on an individual basis

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

In previous submission we have highlighted the need for an in-person intervention, from a qualified appropriately trained welfare staff to ensure people are not disconnected solely because they can't pay.

We proposed the establishment of a body speculatively titled "Connections Victoria". We maintain this proposal is the best way to ensure best endeavours. At the joint workshop on the draft Guidance Note we noted some retailer support for this concept as the best way to implement home visits and will continue progressing this work with relevant stakeholders.

Our proposal for developing Connections Victoria would provide an avenue to make home visits efficient and effective and could equitably include those outside 60km of the Melbourne CBD. We propose the ESC revise the drafting around home visits through a workshop between community services agencies and retailers to establish best practice and cost-effective ways to make home visits.

Some stakeholders have suggested that best endeavours should be different in instances where a retailer is offering tailored assistance as opposed to where a retailer is inviting a customer to take action which will help them avoid disconnection.

We would support the separation of 9.8.5 into separate clauses on the basis that a more stringent set of best endeavours are put in place for contacting customers before a disconnection.

These should continue to involve a home visit, and retailers must be guided to take this action where appropriate to their knowledge, or lack of knowledge, about a customer's circumstances.

Paragraph 9.8.5(a) should be expanded to encourage retailers undertaking both types of best endeavours to SMS before calling a client where they identify a mobile number. This is best practice to assist the many customers who often have to screen calls from unknown numbers because of harassment from debt collectors or unsolicited marketing. This could also be achieved by referencing paragraph 9.8.10 and redrafting that paragraph to include such a recommendation.

We tentatively support other stakeholder's suggestions that best endeavours should be guided to be technology agnostic. Paragraph 9.8.2 should guide retailers to check a customer's two most preferred contact methods at every point where in contact with the customer—from the time they sign on as a customer.

If a retailer does not attempt to contact the customer using their preferred contact methods under such a system then they could not be considered to have exhausted best endeavours.

The list provided under 9.8.11 is well drafted and will be very useful for many audiences, including retail staff.

9.10 - Customer entitlements following disconnection or suspension of assistance

Financial Counsellors at the National Debt Helpline often hear of retailers demanding a lump sum payment be made for a customer to avoid disconnection, often in circumstances where the customer simply cannot afford to do so.

We strongly support the inclusion of paragraph 9.10.1. It will leave no doubt that retailers should not be making such demands.

We also see 9.10.4 and 9.10.5 as likely to encourage retailers to act in a way that is helpful for customers, assisting them to overcome or manage payment difficulty while making disconnection a last resort.

11 - Compliance and enforcement

As articulated in our submission to the second draft decision, enforcement action taken to ensure customers receive their entitlements should be robust. Some retailers have requested examples of enforcement action that will be taken for non-compliance throughout the guidance.

We would support the ESC including examples of strong enforcement action that it intends to take in certain circumstances. We encourage the ESC to revise its own compliance, monitoring and enforcement activity wherever retailers contravene the Code and Guidance Note to ensure it serves as an effective deterrent to non-compliance.

Please contact Jake Lilley on 03 9670 5088 or jake@consumeraction.org.au if you have any questions about this submission.

Yours sincerely



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