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By email: khayen.prentice@esc.vic.gov.au

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Dear Ms Prentice

Submission to Retailers' obligations to customers - Energy Retail Code Amendments Consultation Paper

The Consumer Action Law Centre (**Consumer Action**) wishes to make a submission to the Essential Services Commission's (the **Commission**) Retailers' obligations to customers - Energy Retail Code Amendments Consultation Paper (**Consultation Paper**).

In short, we believe that the proposed changes to the Victorian Energy Retail Code (**Code**) are completely unnecessary and a backwards step. Further, they are ill-timed given that they involve relatively small changes to the consumer protection settings for no immediate or pressing reason (as opposed to, for example, changes in the environment related to the introduction of smart meters) when there is an impending move to a national energy consumer law framework that will replace the Code. We note that, the provisions of these new national laws regarding instalment payment plans largely correspond to the *current* Code provisions.

Background

Reading the Consultation Paper involves a feeling that one has stepped into a time machine and emerged in 2003 or 1999, when the retailers were raising the same concerns about distinguishing between "can't pay" and "won't pay" customers and talking about the need for "mutual responsibility".

In fact, the retailer concerns raised in the Consultation Paper as supposedly requiring an urgent response are not new at all, and the resolution of these issues took place many years ago after lengthy and considered debate. Resolution does not mean that any particular stakeholder must have been left completely satisfied by their resolution - indeed, we can (and due to these consultations do again below) raise ongoing concerns in relation to the unfair establishment of unaffordable instalment plans by retailers - however, it is completely wrong to assert that there is a sudden and new problem for retailers in compliance with these Code provisions. We do not consider that the retailer concerns raised in the

Consultation Paper are substantiated, and we do not support the proposed changes to the Code.

This consultation comes after a period in which, due to the transition to the national laws, the Commission has now lost most of its staff who had experience in energy regulatory matters. Corporate knowledge of these matters and the history of these past consultations and determinations has also been lost as a result, and we believe that this may have contributed to the current Consultation Paper being produced.

We also question the allocation of attention and resources, both of the Commission and thus by necessity stakeholders, to considering such Code changes, particularly at a time when more significant and immediate consumer issues bear focusing on, including significant and serious concerns about poor and unlawful energy marketing conduct and failures to comply with price and product disclosure obligations.

Summary

Consumer Action participated in the wrongful disconnection review and consultations and we are deeply concerned at the Commission's response to issues raised by retailers, which have ultimately led to this Consultation Paper and we are particularly disappointed that the Commission has initiated changes to the Code regarding payment difficulties and instalment plan provisions. These proposed changes to the Code will, quite simply, diminish consumer protections.

In our submission we highlight that the Commission's proposal to reduce retailer obligations and increase obligations on consumers is not conducive to the level of protection necessary for consumers in a competitive market. Instead, what is necessary is proactive enforcement of compliance to the existing obligations under the Code by the Commission.

We have not supported the Commission's proposed approach regarding the payment difficulties and instalment plan provisions of the Code and instead suggest closer scrutiny of current business practices be undertaken with more emphasis being placed on retailer responsibility in the face of increasing price rises and subsequent payment difficulties by customers - for an essential service.

We have strongly opposed the Commission's views in relation to the proposal to exclude retailers from their obligations to provide payment plans to those on contracts under clause 12.1 (a). This flies plainly in the face of the intent of universal protections and the obligation on retail businesses to provide instalment plans to <u>all</u> customers.

We have also strongly opposed the Commission's proposal to delete clause 15.2 (b) in relation to the absolute obligation on retailers to reconnect a customer within certain timeframes, due to the sole contract obligations between the customer and the retailer.

We have provided further comments to the questions raised in the Consultation Paper, below.

Obligation to offer more than one instalment plan - Mutual responsibility between retailers and customers

We believe that the existing obligations under the Code in relation to instalment plans are fair and appropriate for retailers to comply with, as such, the proposed changes are unnecessary.

In line with our comments in the introduction, we query why the Commission believes there is a problem with clause 13.2 at all, for the Commission has not actually pointed out which parts of the Code it might specifically amend and how it might do so. We think that potentially, this is because a proper reading of the Code shows there is not actually a problem in the scenario the retailers have outlined.

Specifically, we understand that the current drafting of 13.2 (and 11.2) adequately provides for the concerns raised by retailers in these circumstances. In clause 13.2 of the Code, retailers are obliged to try to contact the customer and offer an instalment plan, using *best endeavours*, but if the customer doesn't accept an offer within 5 days (eg by not responding to calls, personal visits, registered mail etc), the retailer can commence disconnection. It also requires retailers to comply with 11.2 in such circumstances, which in turn requires retailers to assess the information a customer provides, or that the retailer otherwise has as evidence the customer has experienced repeated difficulties in paying a bill or that a customer requires payment assistance. This is all a retailer can reasonably be expected to do, by doing these things, they subsequently are in compliance.

Further scrutiny of how retailers manage their obligations under these regulations would in fact show whether or not they are actually, currently, fulfilling all of their obligations to assist consumers to more adequately meet instalment arrangements.

If there has been a failed first and second instalment plan, it may indicate that there are systemic issues within the retailer (such as unreasonable instalment plans), or that the consumer is experiencing signficant financial difficulty. It is important to recognise that those consumers who have failed first and second instalment plans are not always those that 'won't pay', and for a retailer who deals with thousands of consumers each day, it should be increasingly apparent. Quite simply, retailers either have, or have not, met their obligations.

Consumer Action regularly receives clients through its MoneyHelp service who have experienced high energy bills or debts, specifically with electricity retailers. A number of these clients are not offered payment plans that are reasonable, or that have considered their capacity to pay. We have provided several examples of our clients in these circumstances:

> A full time carer for their disabled son, our client was receiving carer payments and family tax benefits, totalling approximately $712 per fortnight The client was paying $320 rent per week and was also caring for two stepdaughters and their unemployed partner. Following receipt of an electricity bill for $1,900, the client was placed on a payment plan with their

retailer of $100 weekly. The arrangement fell through as the client could not afford to pay.

Client is on a disability pension and receives $570 per fortnight. The client had a gas bill of $380 and an electricity bill of $1,000. The client was refused a utility relief grant by their retailer and instead was referred to a financial counsellor.

Client receives total payments, including family tax benefits, of $849 per fortnight. The client had been disconnected following receipt of an electricity bill of $1,000 (accumulated over a two year period). The client had not made a payment for a few months due to personal circumstances. The client tried to negotiate a payment plan of $30 per week, however the retailer declined and requested $70 per week and an up front payment of $200.

Client was due to be disconnected from gas and electricity, with bill amounts outstanding of $2,220 on each. The client made a payment arrangement however this fell through as retailer wanted $100 a fortnight, however the client could only pay $80 a fortnight. The client ultimately defaulted.

Client with $5,000 gas bill, client experienced relationship breakdown and there was a violent warrant out for the arrest of client's ex partner. Retailer advised client they were in debt and said they would only accept $200 minimum a week for both electricity and gas. Threat of disconnection followed.

Multiple clients where retailer requested lump sum payment followed by a payment plan. Lump sum amounts varied, examples include $285 and $1,200.

It is important to note that it is not solely the issue of 'embarrassment' that can prevent a consumer from adhering to payment plans, but the myriad of other issues in their lives such as; mental or other illness, unemployment and family difficulties. It is essential that businesses recognise that consumers will increasingly experience financial difficulty in the climate of rising energy prices and that the businesses will need to adapt their approach to proactively work with consumers to understand this. This could include an increased focus on energy efficiency audits, appliance replacement, payment matching and tariff allocation which enables consumers to have an ongoing relationship with the retailer and assists them to meet their obligations. The regulations already provide for this, businesses just need to proactively develop alternative engagement approaches.

Finally, we query why the Commission would propose to make this change now, given the pending transition to the National Energy Retail Law (NERL) and National Energy Retail Rules (NERR) – and that fundamentally the drafting of the NERR matches up with the

current Code clauses. The NERR r33 requires two payment plans before you can disconnect. This is taken seriously enough to be a civil penalty provision. So, it seems anomalous that the Commission would determine to change these provisions in the Code now, after many years under a consistent framework, and just for the transition period.

Obligation to offer more than one instalment plan - Obligations to apply to small customers

Consumer Action is dismayed by the immediacy of the Commission's views to exclude retailers from their obligations under clauses 11.2 (3) and 13.1 of the Code under clause 12.1 (a) on the basis of retailer comments. The relationship to a customer experiencing financial hardship is irrelevant to the type of contract a customer is on and a retailer's obligations in relation to payment arrangements must apply in all instances.

Further, we do not actually see what clauses the Commission needs to amend. The retailer concerns do not make sense when reading the Code. Clause 11.2 merely states that if someone is in payment difficulties, a retailer must do certain things, including offering instalment plans 11.2(3).

Clause 12 merely recognises that an instalment plan may cover paying some arrears and paying some in advance, depending on current consumption and arrears levels, and neither 12.1 (a) or (b) states whether it must relate to a market offer or a standing offer, and clause 13.1 merely states you can't disconnect until you've complied with those measures, including giving a customer the option of at least one instalment plan.

As such, the general expectation would be that both must be available under either/both contracts. The retailers shouldn't be concerned about the customer's current payment arrangements, ie whether or not the customer is currently paying by way of quarterly bills, a payment plan that covers some arrears or a payment plan that smooths payments - is basically irrelevant, other than to the extent they have a relevance to determining payment difficulties. If a customer is missing payments regardless of the arrangements, the retailer should probably need to ask whether the customer is in financial difficulties.

Further, it is essential to acknowledge that any customer, on any type of contract, can experience financial hardship at any time. Payment difficulties can be the result of a any number of life changing scenarios, such as unemployment, short or long term illness etc. The exclusion of retailer obligation under 11.2 (3) and 13.1 for those operating 12.1 (a) is potentially placing all these customers at risk.

Finally, when comparing the current Code with the NERR, r72(1)(b) requires a retailer to offer either of the two types of payment plans, and it is a civil penalty provision if they don't comply.

Obligation to reconnect customers within a certain timeframe

The primary focus of an industry code that is concerned with basic consumer protections in a market must be the outcome of its provisions for consumers. Here, the concern is to ensure that consumers are reconnected in a reasonable and prompt timeframe.

The issue of reconnection is a sole transaction between the customer and the retailer and so the Commission must look to the retailer for this outcome. We note that other laws, including the Australian Consumer Law and general guarantee laws, stipulate that the retailer must carry the responsibility of managing the relationship with its customer, so in proposing a change to the Code, this exempts electricity retailers from this responsibility, in the face of all other industry.

The combination of the Code and the Distribution Code are clear in the obligations on retailers and distribution businesses in these circumstances. To the extent that the retailer must rely on a distributor to deliver the outcome, there should be sufficient obligations and incentives to comply with retailer requests to reconnect customers – including, perhaps, that the distributor reimburse a retailer where a cost or payment to a customer was their fault. Any discrepancy or confusion is unequivocally an issue that must be managed between those businesses, but could also be *enhanced* by *additional* obligations within the distribution code.

We highlight, that the NERR r121 provides obligations on both retailers and distributors - for retailers to initiate requests within set timeframes and distributors to 're-energise' within set timeframes. This rule is a civil penalty provision – so both retailers and distributors could have to pay penalties if they don't comply with their respective responsibilities

In theory, therefore, there may be some merit in reconfiguring the Code provisions to match the NERR structure, where both have obligations as per their functions, however by deleting the retailer obligations under clause 15.2 (b) of the Code it will remove the absolute obligation on the retailer to pursue reconnection with the distributor, failure of a retailer to pursue reconnection means customers will experience detriment as a result.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. Consumer Action has been actively involved in energy advocacy work in Victoria and nationally since the 1990s. Over this time we have provided key consumer input into important energy regulatory processes for consumers, including the current Victorian smart meter rollout and initiatives relating to improved energy price and product information disclosure following the deregulation of Victorian retail energy prices.

Since September 2009 we have also operated a new service, *MoneyHelp*, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to

job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Consumer Advocacy Panel grant recipient - disclaimer

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The views expressed in this document do not necessarily reflect the views of the Consumer Advocacy Panel or the Australian Energy Market Commission.

Thank you again for the opportunity to comment on the Consultation Paper. Should you wish to discuss this submission further, please contact me on 9670 5088 or at janine@consumeraction.org.au.

Yours sincerely
CONSUMER ACTION LAW CENTRE

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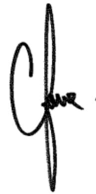

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