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Chairman
Essential Services Commission
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Submitted electronically to: paymentdifficulties@esc.vic.gov.au

Dear Dr Ben-David

Thank you for the opportunity to provide a submission in response to the revised Draft Decision on the Victorian Payment Difficulties Framework. Momentum Energy is a 100% Australian-owned and operated, energy retailer. We pride ourselves on competitive pricing, innovation and outstanding customer service. We retail electricity in Victoria, New South Wales, South Australia, Queensland, the ACT, and the Bass Strait Islands. We offer competitive rates to both residential and business customers along with a range of innovative energy products and services. We also retail natural gas to Victorian customers.

Momentum Energy is owned by Hydro Tasmania, Australia's largest generator of renewable energy - generating hydro and wind power.

Introduction

Momentum considers that the second draft decision (DD2) on the Payment Difficulties Framework represents a more workable framework than that which was proposed in the original draft decision (DD1). This said however, in its current form, the framework lacks clarity in a number of the concepts, problematic definitions and in our view will cause significant difficulty for retailers and customers alike. The framework also leads to a number of adverse outcomes for some of the very consumers which it seeks to assist. DD2 is a step towards a more workable framework than what was proposed in DD1, however, we do not believe that the ESC has demonstrated that it is likely to lead to better outcomes for customers than the status quo.

We are pleased the ESC has demonstrated a greater commitment to working with stakeholders since the release of the draft decision, but we are concerned that the issues which exist are a long way from being resolved. Although retailers and consumer representatives are constantly raising issues with ESC, given the history of this project to date, Momentum is not confident that these will be adequately addressed in the final decision, particularly given the ESC's reluctance to commit to suggestions raised by retailers and consumer groups to address these issues.

The following submission outlines what we see as the immediate issues which must be addressed in order to deliver a workable framework. This includes elements which we believe will lead to poor

consumer outcomes and the areas where the ESC's vision has not been articulated in a manner which will allow retailers to be assured that they are building systems and processes which will be deemed compliant. We believe the issues could have been avoided through greater dialogue between the ESC and stakeholders have arisen as a direct consequence of process failings which have occurred to date.

While our first priority in making this submission is to assist in the development of a framework to assist consumers who are at risk of disconnection, our broader purpose is to highlight the process failings which have occurred throughout this reform in order to ensure that future regulatory changes do not follow the same arduous path.

The Proposed Framework

At the numerous forums since the release of DD2, stakeholders have sought to demonstrate and resolve a number of "showstopper" issues. Feedback from retailers and consumer groups have not sought to dismantle elements of DD2, but instead to demonstrate that despite the good intentions of the ESC, fundamental issues prevent the framework from achieving the desired outcomes. In many cases these issues can be addressed with reasonably simple solutions. We have been dismayed however, that when these solutions, developed in cooperation between retailers and the consumer sector, are put to the ESC, we are advised that "they are on the table" for consider in the ESC's final decision.

We are cognisant that the ESC is determined to commence the framework within a very short timeframe, (this is discussed later in this submission), and consequently are frustrated they do not appear willing to provide some certainty of the way forward towards the final decision for stakeholders. As a result of this, considerable time and effort is being expended on a proposal which is unlikely to be implemented in its current form and which we know will have to look vastly different in the Final Decision. We consider that the current consultation being lead by the ESC should be used to firm up a common understanding of what the proposal will evolve into and evaluating that. This approach from the ESC is particularly frustrating in light of a narrative from the Commission that time is of the essence, and the implication that somehow this is the fault of retailers.

The Australian Energy Council's submission in response to DD1 outlines the delays which had plagued the process up to that point. These arose from changes in policy, the issuing of multiple drafts which bore little similarity from one to the next, "silence from the ESC for several months,"¹ and of course the need to issue of second draft decision. The fact that you indicated to an audience of consumer representatives and retailers that you were "caught off-guard" by the overwhelmingly negative response to DD1 is concerning as all sectors has attempted to communicate to the ESC, the Department and indeed the Minister that the proposed approach was flawed.

The ESC has sought to bring stakeholders together more often in the wake of DD2 however their willingness to take on stakeholder feedback and provide clear direction has not improved. In light of this, we are fearful that the Final Decision will not deliver a meaningful safety net to Victorian consumers.

While the fundamental issues with DD2 have already been outlined to the ESC, and in many cases pragmatic solution presented, the following section reiterates our key concerns which prevent DD2 from being a workable regulatory framework.

¹ AER Submission to Draft Decision 1, Page 3

Definition of Arrears

We acknowledge the need for a defined point to trigger the commencement of assistance. To their credit, the ESC has attempted to resolve previous concerns that payment difficulty safety net was too broad ranging however, by defining the concept of Arrears as being "...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" additional issues are created.

Momentum has been present at discussions where the issues arising from this definition have been outlined to the ESC and are hopeful that these issues are now well understood. We are also hopeful that the ESC will adopt the solution proposed by a consumer representatives and retailers that the definition be replaced by a dollars outstanding amount. As it is clear that the proposed definition is not workable and that a suitable definition has been proposed, it is unclear why the ESC is unable to indicate to stakeholders at this stage whether the dollar amount definition will feature in the Final Decision or whether it considers that there is another viable alternative.

Renegotiation of Payment Plans

Momentum supports the customer's right to renegotiate a payment plan if, after the initial payment proposal has been agreed, it becomes apparent that the plan is not affordable. We believe that this is particularly important under a framework where the retailer has a limited ability to make an assessment of a customer's capacity to pay. We are concerned that many customers who will make payment proposals, will face challenges with financial literacy and evidence from within our hardship team has shown that customers will propose more than they can afford out of pride. These plans will need to be renegotiated, however, this in itself is not a concern as it reflects current practice.

The issue with the framework as proposed in DD2 is that there do not appear to be limits to the scope for the customer to renegotiate. This leads to concerns that customers will accrue completely unsustainable amounts of debt as they seek to 'kick the can down the road' by missing payments and promising to pay more next time.

This issue will also lead to significant retailer costs incurred through increased debt and increased customer handling time as customers continually call in to renegotiate.

Momentum completely agrees with Consumer Action's assertion that "The fact that unaffordable or unsustainable payment plans is a common feature in EWOV complaints about payment plans suggests that energy retailers are not appropriately assessing their customers' capacity to pay²". We are interested in the rationale for the ESC's decision to allow consumer to make proposals without any reference to capacity rather than seeking to identify what currently exists as good practice within the industry and working within this existing paradigm.

We are also curious as to whether the accrual of debt has been modelled under the proposed framework. We note that the ESC's Supporting Customers, Avoiding Labels report outlined that a regulatory framework for payment difficulty should have clear purpose "To assist customers experiencing payment difficulty to avoid long-term energy debt, and repay debt that does accrue,

² Consumer Utilities Advocacy Centre 2015, Submission to the Essential Services Commission Inquiry into the financial hardship arrangements of energy retailers, Submission to Commission issues paper, May, p. 3.

while wherever possible maintaining access to energy as an essential service.”³ In the current proposal the ESC appears to have disregarded the very purpose of this reform, or at least, and perhaps even more worryingly, inadvertently developed a framework which is completely contrary to its stated purpose.

Momentum notes that unlike the definition of arrears, a universally agreed solution has not been put forward by consumers and retailers, which in our opinion indicates that this is a significant fault in the architecture of the framework which the ESC will need to address. We do not believe that it is appropriate that a final decision is the first time stakeholders should have an indication of the ESC’s intentions in regard to this issue.

Splitting Arrears and Ongoing Consumption

Retailers and consumer groups were initially unclear whether the ESC’s decision to separate arrears from consumption in payment plans was intentional or a drafting error, such are the poor customer outcomes it can lead to. At workshop on 29 May however, the ESC appeared to confirm that the decision to establish payment arrangements on the basis of arrears only without consideration of ongoing usage was deliberate. David Young stated, “Making an offer to repay arrears is the minimum standard. The non-substitutable standard necessary to deliver certainty and consistency for customers.” Mr Young elaborated that retailers are able to make an additional offer which covers arrears and ongoing consumption.

We are concerned that, despite representations from retailers and consumer advocates alike in response to the DD1, the ESC has determined this to be appropriate. As with DD1, splitting arrears and ongoing usage in this manner leads to significant customer detriment through the convoluted stream of communications which will be required to outline the customer’s payment obligations at any point in time. A customer will be unable to easily determine just how much they are required to pay to be completely debt free, will receive seemingly contradictory demands for payment and will face “lumpy” repayment requirements which will be difficult for many to manage.

A mapping workshop conducted on 2 June with ESC Staff, consumer representatives and retailers demonstrated that even a “plain vanilla” customer scenario would result in significant confusion, non-sensical outcomes and accrual of debt if arrears and ongoing consumption were required to be split.

Although under the DD2 proposal the retailer (and by extension the customer) will have a choice of whether to offer/accept a “smoothed” proposal, we consider it likely that this will be adopted as the arrears only option will allow the customer to make a smaller immediate payment. For a customer facing payment difficulty, this is likely to be their primary concern, without regard for the fact that it may not be in their best interests. Momentum is not purporting to know what is best for the customer in all circumstances, however we believe that when a customer is feeling under immediate threat of disconnection, they will take the easiest option to ensure that they are able to maintain supply. At the time of choosing between whether to make a repayment for a small amount and then deal with their next bill in full when it comes in, the customer is likely to be unaware of the future ramifications of this decision.

³ Essential Services Commission 2016, Supporting Customers, Avoiding Labels. Energy Hardship Inquiry, Final Report, February 2016

Once again a universally agreed solution, *requiring* rather than *allowing* payment plans to be constituted of both arrears and ongoing has been presented to the ESC however retailer planning for implementation continues to be stifled by the ESC's unwillingness to commit to the common sense approach prior to releasing their final decision. While the ESC has continued to cite a number of the findings of its increasingly out of date report into customer hardship, it appears to have disregarded the very purpose of this reform, or at least, and perhaps even more worryingly, inadvertently developed a framework which is completely contrary to its stated purpose.

Retailer Knowledge of Customer Circumstances

The ESC has constantly stated that it wants a framework which it can objectively enforce. Momentum is concerned about elements of the DD2 proposal which are in fact completely subjective. These elements relate to retailer knowledge of customer circumstances, specifically, that tailored assistance provisions apply 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".⁴

We are greatly concerned about what a retailer should reasonably have known. Does this provision relate to our own statistical analysis which suggests that if a customer has not paid a bill by a certain number of days after the due date, there is an increased likelihood that they will fall into arrears? It could be argued that merely because the customer is from a low socioeconomic area and/or as a surname which could suggest a migrant background that the retailer could reasonably know that the customer could likely be in arrears.

The need to make assumptions of this sort do not appear to be the basis for an objectively enforceable framework. Furthermore, any sort of knowledge of this sort relies on the sophistication of each retailer's customer segmentation and credit analytics and as such cannot be consistently applied from one retailer to the next.

This departure from the DD1 philosophy where it could be not only be determined that the customer was facing payment difficulty, but in fact what type of payment difficulty they are facing raises significant compliance risk for retailers. When wrongful disconnections are reviewed, it will inevitably be with 20/20 hindsight that the retailer did not have the benefit of at the time a decision was made. We agree that if there is knowledge of a potential payment difficulty, that the retailer should seek to provide the customer with appropriate assistance, but to make subjective assessments on what a retailer should or should not have known is inappropriate.

Objecting to Customer Transfers

Momentum understands the ESC's rationale for objecting to customers transferring to another retailer when they are receiving assistance under the framework. While we do not have a strong view on whether or not this is appropriate, we are disappointed that the ESC has not acknowledged the issues raised in response to DD1 which outlined that retailers are unable to raise objections without the amendment to the Customer Acquisition and Transfer Procedures and the ESC's own Customer Transfer Code.

If this requirement is to be maintained in the final decision, we seek a commitment from the ESC that retailers will not be deemed non-compliant if the ESC has not taken the required steps to make these consequential amendments.

⁴ 78(2) of the draft changes to the Energy Retail Code

The Process

Beyond the significant issues with the proposal itself, Momentum has two concerns about the process used to arrive at this point, and the proposed road forward.

Cost Benefit Analysis

While it is clear that ESC and its broader stakeholders will not agree on the ESC's obligations to ensure that changes to the Energy Retail Code are appropriately and independently scrutinised in line with statutory requirements, Momentum reiterates its view that the Energy Retail Code is a legislative instrument. The Subordinate Legislation Act 1994 creates a number of procedures that must be complied with in preparing and making a legislative instrument. This includes a requirement that a Regulatory Impact Statement (RIS) be prepared.

Exemptions exist for Codes of Practice created by the ESC, however, the ESC has advised stakeholders that the Code is not a Code of Practice made under S47 of the Essential Services Commission Act 2001. Momentum therefore maintains its view that a RIS is required.

This appears consistent with the ESC's own view in relation to Energy Retail Code Version 11 which was gazetted as a legislative instrument in July 2014 (S241). It is Momentum's view that any changes to the Energy Retail Code may be invalid unless a RIS is conducted.

Momentum believes that appropriate scrutiny is absolutely crucial to ensure that Victorian customers receive the assistance they deserve. We request that in its final decision, the ESC provide the rationale for its belief that a RIS is not required.

Regardless of statutory obligations which may exist, we consider that the failure to undertake a rigorous assessment contravenes the ESC's own Consultation Charter. The Charter states that "the ESC have a commitment to implementing best practice regulatory approaches consistent with the Victorian Guide to Regulation". We feel that the approach taken to date falls well short of this benchmark.

While we acknowledge that the ESC has appointed reputable consultants to undertake an assessment of the costs and benefits, we do not believe that this assessment meets the statutory requirements or community expectations.

The reports produced by even the best consultants can only ever be as good as the inputs that go into them. On that count, the reports produced by ACIL Allen and KPMG are a product of very poor inputs, incorrect assumptions and an overarching lack of understanding of how the framework will operate. Given that retailers and consumer groups are unclear about how the framework will operate, we cannot imagine how a disinterested party has managed to develop a coherent view. Even though retailers will be providing cost estimates to ACIL Allen to inform the next stage of the cost benefit process, the uncertainties in the framework, which will not be addressed until after the data is submitted by retailers will lead to the provision of inaccurate data.

Furthermore, we are concerned about other inputs to the process, namely the report prepared by TBS Consulting. While we have no reason to doubt the competency of the consultant, the fact remains that we have had no interaction with any representatives from the ESC in relation to our IT costs. This is despite requests from the ESC for retailers to provide details of an appropriate IT representative and a commitment from them that they would discuss systems issues with each retailer. We fail to see how any sort of estimation of IT costs can be made without speaking to retailers and are concerned that

retailers subsequently providing cost data which varies greatly from that which was previously provided by TBS will allow the ESC to dismiss it as was they did with the costs provided by retailers in the True Value of Distributed Generation inquiry.

In its submission to the Review of the Electricity and Gas Retail Markets in Victoria, Momentum identified the Victorian regulatory framework and its administration as the biggest contributor to the price differentials between Victoria and other jurisdictions. We stand by this view and are disappointed that the ESC is not prepared to invite the same level of scrutiny that retailers have welcomed through this review and the recently commenced ACCC review into retail markets.

We recognise that developing a regulatory impact statement will further delay the implementation of the framework however, industry has been consistent in its calls for a RIS since the commencement of this process, and we feel that had these calls been heeded, an appropriate framework may have been developed by now.

Implementation

Retailers have consistently advised the ESC that an implementation date of 12 months following the final decision was required. With this in mind we are concerned that the Commission still believes that an implementation date of 1 January 2018 is achievable. We appreciate the ESC's consideration of a staged implementation and understand that this approach has been taken for retailers' benefit however, it is once again emblematic of the approach to consultation where decision making has not been based on genuine dialogue with stakeholders.

The staged approach as outlined in DD2 misunderstands the implications of the model and oversimplifies the impact of the architecture on retailer systems. To suggest that various components of the framework can be implemented independently of others ignores the fact that they are inexorably linked. As the entire framework is predicated on the customer having "Arrears" (regardless of how it is defined) the only possibility for de-coupling elements of the framework for the purposes of a staged implementation is to identify the elements which occur before Arrears have been accrued, and those after. Put simply, Standard Assistance can be implemented separately to Tailored and Default, but individual elements of the various types of assistance cannot.

Further, we note the comments from Ms Jo Benvenuti at the 3rd Stakeholder Forum, that training and education is needed across the consumer sector to ensure that financial counsellors and emergency relief workers are able to provide vulnerable consumers with accurate advice on how to access the assistance which they need.

In the opening remarks at the forum, stakeholders were told "It is now over three years since we hosted the disconnection roundtable and it will soon be three years since the then-government initiated the project which eventually became our hardship inquiry. And we still have some time to go before we reach a final decision — and then, of course, it will take time for the industry to implement the new framework. That adds up to four years. Four years. ...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 that⁵".

We believe that these comments are disingenuous as they ignore the collaborative approach that industry and the consumer sector have taken throughout this process, and the fact that delays in the

⁵ Chairman's opening remarks at 3rd forum

development of a workable Payment Difficulties Safety Net lay squarely at the feet of the Essential Services Commission. To rush implementation risks jeopardising customers and sets retailers up to fail to meet their compliance obligations.

The comments also ignore the fact that retailers had already reprioritised IT resources to accommodate the ESC's delays, and had scheduled major systems upgrades to work in conjunction with the ESC's plans. We agree that customers deserve better and are already working to give them better, but are being hampered by a view that retailers can drop all other initiatives in order to accommodate the ESC.

Momentum maintains that at least 12 months from the final decision is required to implement a reform of this nature. To ensure that this comment is not misconstrued, we consider that a final decision will contain all the guidance material retailers need to understand their obligations and the ESC's position on a number of issues and consequential amendments to other instruments which create a compliance paradox for retailers.

Summary

While significant issues must be addressed before the framework could be considered an implementable solution, we consider that DD2 is a more realistic attempt to address the needs of vulnerable consumers. We will continue to work with the ESC in good faith to ensure that the a framework which suits customer needs is ultimately developed. Given the history of this project to date, however, we believe that is incumbent on the ESC to show the same good faith to their stakeholders. Your remarks in response to the outcry over DD1 demonstrate that the views of stakeholders have not been heard, and in our opinion this continues to be the case.

We are not confident that the Final Decision will represent an effective improvement to current customer protections without a willingness to develop the solution in genuine consultation with impacted parties and to take on board the views expressed by stakeholders. While we commit to complying with any regulatory amendments ultimately put forward by the ESC, we will not take responsibility for the poor outcomes which result if the framework is not developed with the best interests of consumers genuinely in mind. This can only be done if the ESC is prepared to listen to the parties who deal with consumers on a daily basis.

If you wish to discuss any of the issues raised in this submission in further detail, please contact me on

Yours sincerely

Joe Kremzer
Regulatory Manager