8 November 2017

Dr Ron Ben-David
Essential Services Commission
Level 37/2 Lonsdale Street
Melbourne VIC 3000
Lodged online

Dear Dr Ben-David,

Draft Guidance note—Payment Difficulty and Disconnection

Origin Energy (Origin) welcomes the opportunity to provide a response to the Essential Services Commission of Victoria's (the Commission) Draft Guidance Note on Payment difficulty and disconnection (Draft Guidance). We comment on specific issues in the Draft Guidance below.

Following extensive consultations over several years, the Commission released its final decision into the Payment Difficulties Framework on 10 October 2017. Most of the Final Decision was in line with Origin's expectations following industry forums and submissions. Stakeholders have been critical of various Draft Codes for being inflexible and prescriptive. Relative to these Draft Decisions, the Commission's Final Decision represents a more flexible framework for managing customers in payment difficulty—though it is not as flexible as Version 11 of the Energy Retail Code.

Whilst Version 12 of the Code has less prescription than proposed in previous Draft Decisions, the Commission has somewhat reintroduced prescription into the Draft Guidance. There are also sections of the Draft Guidance that might be more appropriately read as best practice for retailers rather than strictly necessary for compliance. The result is a lengthy document that greatly diminishes the flexibility of Version 12 of Retail Energy Code.

Purpose of the document

The purpose of the Guidance is to provide clarification and to give retailers some direction when designing systems for compliance. In contrast, the Commission departs from this purpose by taking an exhaustive, section by section approach to the Draft Guidance. For instance, in certain sections the Commission has stated "Where the commission believes that a provision of the code can be read on its plain meaning, we provide no further comment in this guidance note." That these statements are exceptions rather that rules—and need to be stated at all—highlights the exhaustive nature of the approach that the Commission has taken. Another example demonstrates both exhaustiveness and prescription of the Draft Guidance:

> *4.6.5 If a customer proposes a payment arrangement that is shorter than two years, the retailer is expected to advise the customer to contact the retailer if the amount proposed proves difficult to maintain.*

Whilst we don't disagree with the thinking behind this section, Origin does not believe that it was intended for the Retail Code, or its Guidance, to delve into this level of granularity in retailer decision making. All it does is effectively create a new obligation that retailers need to meet. This standard of conduct may represent 'Best Practice' but should not constitute an expectation of what a retailer

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should do to be compliant. Origin is concerned that this exhaustive approach could be replicated across the Retail Energy Code if changes occur to it in the future.[1]

Where the document restates what is already in the Code without adding any additional information or clarification, the Commission should consider removing these sections for the sake of brevity.[2] For example, clause 4.2.1 and 4.2.2 merely restates the code in different language:

> *4.2.1 Tailored assistance must be made available to customers who are in arrears. Customers are entitled to payment arrangements that assist them to repay their arrears. Customers are also entitled to receive assistance to support them lowering their energy costs and to access government and non-government support services.*
>
> *4.2.2. Customers in more severe types of payment difficulty – where they cannot afford to pay for their ongoing energy use – are entitled to additional assistance, including a period of at least six months where repayment of their arrears is put on hold while they work with their retailer to lower their ongoing usage costs. Customers are also entitled to the tariff that, based on the retailer's knowledge of the customer's energy use, payment Division 3 – Tailored assistance Essential Services Commission Draft guidance note – Payment difficulty and disconnection history and known circumstances, would be most likely to help lower the customer's cost of energy use.*

This is effectively a high-level summary of Tailored Assistance; there are no issues being clarified. In our view, this kind of information is unnecessary for retailers, and the Code should be taken as read and understood in broad terms. Retailers will be referring to the Guidance to shed light on concerns that arise when implementing the code; they do not need every section explained.

A good example of relevant information compared to extraneous information is chapter seven of the Draft Guidance. Aside from Best Endeavours, which the Commission covers in section 9.8, in Origin's view only clauses 7.8.2 and 7.8.5 should be included. The rest of the chapter merely restates the Code or acknowledges that no comment is necessary. Clauses 7.8.2 and 7.8.5 are worthy of Guidance because they clarify an important issue: whether retailers can ask for information from customers given the prohibition contained in clause 91 of the Code. Accordingly, all that needed to be covered in the Guidance were those sections (in addition to Best Endeavours, which is appropriately in its own section). In our attached table, we have highlighted several sections that repeat the Code and could be removed from the Draft Guidance.

Origin is concerned that the exhaustiveness of the Draft Guidance in its current form will contribute to an increased number of wrongful disconnection disputes between the Energy and Water Ombudsman of Victoria (EWOV) and retailers. For example, when reviewing a wrongful disconnection case, the retailer must demonstrate under clause 111A(a) that each obligation has been met prior to disconnection. The inclusion of undefined terms such as 'fairly and reasonably' in 111A(a)(v) will create fertile ground for EWOV to dispute retailer actions because there is no objective standard that the Code or the Guidance provides into what this means in practice. We discuss this further below but we do note that the Commission is already aware of ongoing disputes between EWOV and retailers that are often based on differing interpretations of the current Code and the *Operating Procedures for Compensation Wrongful Disconnections*.

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[1] The Government's response to the Impendent Review into the Electricity and Gas Retail markets in Victoria might necessitate Code changes. We also note that the Commission has an ongoing role in modernising the code: see ESCV, *Submission into ACCC Inquiry into retail electricity supply and pricing,* 29 June 2017, p.4.

[2] Some other examples include, but are not limited to, clauses 3.4.1, 3.5.9. 3.5.10, 4.1.2, 4.3.1-4.3.3, all of 4.4, 4.12.11. We address

Origin's preferred approach would be for the Commission to reduce the scope of the document and to focus on the main issues where clarification is required. This will mean a shorter document that only discusses the clauses that require clarification for the sake of compliance. The Commission also needs to reconsider the purpose of the document in the process. According to the Draft Guidance, the Commission's customers are among its target audience for this document.[3] Origin believes that a separate document is warranted for customers to explain their minimum entitlements. Attempting to create a single document that combines customer information with retailer compliance will not succeed because both audiences have different needs.

Specific comments

In the sections below we discuss specific issues that arise from the Draft Guidance.

3.3.5 and 3.5.5.

The Commission states in 3.3.5 that Standard Assistance payment arrangements are not billing options. This is consistent with Origin's understanding of Standard Assistance; it is meant to make payment options more flexible *within* existing billing cycles. On our reading, section 3.5.5 of the Draft Guidance contradicts this because it suggests that retailers can base payment intervals on actual meter reads. This would constitute payment intervals becoming a billing option under Standard Assistance. Most customers in Victoria have smart meters, so this would potentially capture most of our customers that we offer this assistance to.

Origin does not support section 3.5.5 being included in the Guidance. In Origin's view, clause 76(2)(b) was intended to require retailers to offer customers the option of making payments at different times outside their billing cycle. For instance, a customer may be on monthly billing, and choose to pay each week. They would still receive their bill each month but it would incorporate those four weekly payments.

4.8.1 and 4.8.4

Origin is generally supportive of the measures listed in 4.8.4. We believe that the Guidance ought to consist of this kind of advice as it helps retailers to know what complies with clause 79(1)(e)(ii). Section 4.8.1 seems redundant considering the later section; it also introduces some ambiguity by requiring the assistance to be "capable of making a meaningful reduction" in energy use. In Origin's view, the Commission should exclude the earlier section and leave 4.8.4 as a list of compliant activities.

4.9.11

Origin appreciates that the Commission cannot state in definitive terms what "demonstrable progress" is. This being the case, it would help if the Commission did note that a marginal reduction does not necessarily constitute demonstrable progress. We think this is consistent with the intent of the Code and would provide balance to the Guidance.

4.12.15

Origin is not aware of the basis for this section. We agree that it is not good practice for customers to feel like they are "imposing on their retailer" but we cannot see the merit of this in a Guidance note.

[3] See section 1.1.1 of the Draft Guidance.

Additionally, we do not understand why the Commission would believe it is good practice for customers not to engage with retailers by advising them they should not "feel they need to contact their retailer to deal with small deviations from their agreed payment arrangements." This would not be acceptable in any industry where ongoing payments are made. It is not legitimate for customers to fill their tank at the petrol station and then not be able to pay the entire amount. In Origin's view, this expectation should be removed from the Draft Guidance as it runs contrary to all reasonable expectations of how businesses and their customers should interact. Most importantly, such an expectation may discourage customers from contacting their retailer to engage with their payment difficulty issues.

4.13.3

The Commission expects retailers to "record details of the practical assistance that a customer has implemented." This is unreasonable as we cannot compel customers to provide this information and nor can we objectively verify it. The basis upon which a retailer ought to be required to contact a customer under clause 82(3) is if their energy use does not decrease following the receipt of assistance.

4.14.9

The most relevant piece of Guidance that the Commission could provide retailers in relation to clause 83(c) of the new Code is the definition of 'payment difficulties'. Section 4.14.9 and 4.14.10 has not provided a definition. Consequently, clause 83(c) of the Code is most likely redundant with any guidance on 'payment difficulties'. (The lack of definition of payment difficulties was also discussed during the consultations following the New Draft Decision.[4]) In any event, we would appreciate the Commission providing Guidance on what constitutes 'payment difficulties'; if they cannot do so then sections 4.14.9 and 4.14.10 are probably not required.

7.8

Origin generally agrees with this section of the Guidance. However, we believe that the Commission needs to clearly state that retailers will not be held responsible for taking customer circumstances into account that they are not aware of. This means that in a dispute settlement setting, a customer cannot subsequently rely on their circumstances (such as being unemployed) unless they told retailers at the time.

9.10.1 to 9.10.4

Origin believes that section 9.10 creates new obligations on retailers and is therefore inappropriate for the Draft Guidance. The Commission has not referenced the Code in this section, and there does not appear to be any obligations in other sections of the Code that this Guidance could apply to. The obligations to contact customers arise from missed payments when a customer is in arrears. A retailer discharges their obligation to contact a customer for a revised payment proposal once they have undertaken the necessary best endeavours in clause 89. This obligation does not extend beyond disconnection in the Code, and the Commission cannot create any new obligations via the Guidance.

We also note that the implications of section 9.10.3 are to create a loop where customers that are disconnected for non-payment can expect to be re-connected if they propose a revised payment arrangement. Origin acknowledges it may be best practice in some circumstances for customers to be placed on a payment plan following reconnection; we do this for customers in appropriate

[4] See Origin Energy, Submissions into the *New Draft Decision-Energy Payment Difficulties Framework*, 16 June 2017, p.4.

circumstances. However, the Guidance implies that a customer should automatically have the right to get reconnected if they propose a revised payment arrangement. These customers could potentially do this repeatedly and accrue more debt than they pay off. Origin is concerned that this could lead to customers increasing their debt. Given clause 92 restricts debt recovery for customers receiving assistance, this provision will also impose unexpected new costs on retailers, as we will need to continue to carry this debt as long as a customer proposes a new payment arrangement after disconnection.

9.10.5

This section is difficult to understand but Origin believes that it will permit a customer who has already received assistance—but had it suspended (presumably due to disengagement)—obtaining another two-year period of assistance. As an example, a customer could have received assistance for six months, become disengaged, but then subsequently re-engaged with their retailer. In those circumstances, our reading of section 9.10.5 suggests that these customers are entitled to a new two-year period. We accept that this interpretation may not be correct—which suggests that this section needs to be rewritten. If Origin's interpretation is correct, then we are concerned that the Guidance has created a new legal obligation by requiring another two years beyond clause 79(1)(a) of the Code. Origin does not support this being in the draft Guidance; any extension of assistance beyond two years is a retailer discretion.

As we discuss above, we do not believe that customers have an entitlement to a new payment plan if they have been disconnected for non-payment. It may be best practice to do so—indeed Origin offers this—but Part 3 the Code does not extend beyond disconnection.

Partial Payments

Origin does not agree with how the Commission's approach to partial payments. In the Draft Guidance, the Commission has introduced a vague requirement for retailer flexibility (section 4.12.15) along with a more onerous expectation that it is unreasonable for a retailer to suspend assistance under clause 83 where a customer makes occasional partial payments (section 4.14.5). This raises the question: at what point do partial payments constitute non-payment in clause 83?

Origin believes that it is preferable for the Guidance to be silent on this matter rather than prescribing retailer conduct or introducing vague standards about retailer flexibility. The Code requires retailers to contact customers when they fail to make a payment. The Commission has not defined a failure to make a payment in the Draft Guidance to include a partial payment. This leaves retailers with a choice to either (a) tolerate a partial payment or (b) decide to contact a customer for a revised payment plan.

Contacting each customer has a cost to the retailer in terms of call centre resources and average handling time. Equally, a partial payment has a cost to the retailer because the payment plan has not been adhered to and customer debt has increased. Given the Code does not mention partial payments at all, Origin thinks that retailers should be left to determine whether (a) or (b) is the appropriate response because they are best placed to decide the cost they are willing to bear.

Alternatively, the Commission can define a customer failing to meet a payment in clause 82(2) to include partial payments—this will create an obligation on retailers to contact a customer, and customers will need to propose a revised payment amount. If customers don't engage then, in contradiction to the Draft Guidance in section 4.14.5, a retailer will be able to suspend assistance because a customer has not met their obligations.

Fairly and reasonably

One of the more difficult interpretation issues for retailers is the use of 'fairly and reasonably' in two clauses of the Code: 89(a) and 111A(a)(v). The inclusion in the latter clause is particularly difficult for retailers because it acts as a catch-all phrase for all retailer conduct: they must have acted fairly or reasonably at all times before disconnecting a customer.

In relation to clause 89(a), section 9.3 of the Draft Guidance discusses retailers showing courtesy towards customers. Being courteous is undoubtedly best practice but we are not sure how it assists retailers with meeting our obligations in clause 89(a) to make decisions in relation to customer circumstances by acting fairly and reasonably. Section 9.4 explains what the Commission means by customer circumstances, and outlines some useful examples of what factual circumstances might be relevant. However, there is no Guidance about what actions constitute fair and reasonable conduct in relation to those circumstances.

Without this issue being addressed in the Guidance, Origin is concerned that there is no common or firm reference point among retailers, EWOV, and the Commission, for what acting 'fairly and reasonably' is in given circumstances. Consequently, a retailer may be held retrospectively responsible for not acting 'fairly and reasonably' without the Commission having enumerated what it expects of retailers to meet this standard.

The Commission chose not to utilise hard limits in the Code because they consider them arbitrary and inflexible.[5] In Origin's view, enforcing an undefined standard against a licensee is in fact more arbitrary than enforcing a known hard limit. In practical terms, it is difficult to train staff and develop systems and processes around an undefined expectation of conduct. In the absence of hard limits, it is important that the Commission provides Guidance on what they—as arbitrators of wrongful disconnection disputes and enforcers of the Code—think constitutes fair and reasonable conduct for both clauses.

Origin would ordinarily expect a standard of reasonableness to be objective and we presume that an objective standard was in mind when this was inserted in the Code. If we are wrong, and the Commission does not have an objective standard in mind, then it should consider amending the Code to remove the requirement to act 'fairly and reasonably'. As we note above, we do not support EWOV determining what is fair and reasonable for a retailer to have done in these clauses.

Best Endeavours for Tailored Assistance and prior to disconnection

Origin does not support a common standard for best endeavours across Tailored Assistance and prior to disconnection. Contacting a customer who has missed their bill to offer them assistance should not be considered as important as contacting a customer prior to disconnection. Origin does not think that the Code treats them equivalently; disconnection is considered a "last resort" under the Purpose of Part 3 of the Code.[6]

Origin is also concerned about the extent of resources that need to be allocated to comply with best endeavours for Tailored Assistance. We have provided information to the Commission separately about the number of customers that pay by the due date, those that self-cure prior to the disconnection warning notice, and the number of customers that receive best endeavours prior to disconnection. This data indicates that there would potentially be a significant increase in the allocation of retailer resources and costs if best endeavours were to apply to a much larger number of customers relative to the small number that receive it prior to disconnection. This was not canvassed in the cost benefit work done as part of the Commission's Final Decision. However, we note at the Stakeholder Forum on 25 July 2017, retailers expressly raised concerns about the cost of best

[5] ESCV, *Final Decision: Payment Difficulty Framework*, 10 October 2017, p. 40.
[6] See clause 71 of Version 12 of the Energy Retail Code.

endeavours if the Commission used a common standard across both Tailored Assistance and prior to disconnection.

Origin believes that the Commission should reconsider this issue and provide for a separate best endeavours standard for clauses 89 and 111A. Clause 89 ought to be flexible and non-prescriptive. We suggest that the Commission require retailers to demonstrate two contact attempts. We urge the Commission to avoid prescribing what those contact methods should be. Mandating registered post is unnecessary (particularly given the cost of doing this) and SMS communications should be an acceptable contact method for discharging this obligation rather than an additional method of contact (as section 9.8.10 describes it). There is a real risk that prescribing communication methods will see the regulatory regime become out of step with changes in technology use and responsiveness. Prescribing methods also acts as a disincentive to retailers to develop better ways of communicating with customers because they will invariably develop systems around what is expected of them by the Commission. Origin would be comfortable with these contact methods being aligned with any stated customer preference.

In terms of best endeavours prior to disconnection (clause 111A), Origin believes that the Guidance should reflect a combination of Code version 11 and the *Operating Procedure Compensation for Wrongful Disconnection*. Clause 111 of the current version of the Code permits best endeavours in one of the following ways:

(i) in person;
(ii) by telephone; and
(iii) by facsimile or other electronic means.

Origin believes that this needs to be incorporated into the Guidance for Best Endeavours prior to disconnection. To some extent section 9.8.5 reflects the *Operating Procedure Compensation for Wrongful Disconnection*, but is more restrictive than the current Code and Guidance with respect to excluding (iii). A case has not been made to limit retailer options for complying with best endeavours prior to disconnection. Doing so is potentially retrograde given developments in communications technologies and changing customer responsiveness to them.

Closing

In our meeting with the Commission on 1 November, we were asked to provide examples of where the guidance note does not provide sufficient clarity over the standards of conduct for compliance with the Code. We have done so in the attached table, identifying where we believe a section is unnecessary or creates new obligations.

Should you wish to discuss the contents of this response, please contact Timothy Wilson, Manager, Regulatory Policy, on (03) 8665-7155 in the first instance.

Yours sincerely

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Attachment 1

Origin recommendations: Draft guidance note- Payment difficulty and disconnection.

Guidance Note reference	Comment	Open to interpretation/ already covered in Code	Recommendation
1.		Comments in main submission	
2.		**Division 1 – Operation of Part 3 of the Code**	
2.6.4	Prescriptive	Open to interpretation- what is the standard that determines when a customer needs advice as opposed to when it is convenient?	Delete
3		**Division 2 – Standard Assistance**	
3.4.1	Prescriptive	Code states that retailers must take steps to provide forms of assistance—we think this is covered in the first sentence, the rest of the section is additional actions that might be considered best practice. If left in, would be a new obligation because it is more than the Code requires.	Delete or move to Best Practice.
3.5.5	Prescriptive or best practice.	See submission.	Delete or clarify.
3.5.9-3.5.10	Best practice	Fair and reasonable is not defined.	Delete or clarify
4		**Division 3- Tailored Assistance**	
4.2.3	Prescriptive- use of must.	'Assistance *must* be flexible and *must* be practical'. This is repetitive and does not shed -light on clause 77 and how it might be met. No definition of 'practical' advice that will enable a customer to act on it and implement the assistance.	Delete in the absence of actual guidance.
4.3.1, 4.3.2 and 4.3.3	Repetitive	Already in Code; merely restates it.	Delete
All of section 4.4	Repetitive	This restates the code and does not provide any Guidance.	Delete
4.6.1	Repetitive	This restates the code and does not provide any Guidance.	Delete
4.6.2	Repetitive	This restates the code and does not provide any Guidance.	Delete
4.6.3	Repetitive	The first sentence restates the code and does not provide any Guidance. The second sentence is Guidance.	delete first sentence, keep the second.
4.6.7	Prescriptive	Not in the Code- offering different payment length/ amount options are retailer discretion.	Delete
4.6.8-4.6.13	Repetitive	This restates the code and does not provide any Guidance. A warm transfer is best practice, not Guidance.	Delete
4.8.1	Repetitive	Refer to submission.	Delete
4.8.2	Prescriptive	Use of the word "must" creates new obligations.	Delete or rework to be Guidance

4.8.4	Useful	Use of examples is helpful.	No issue
4.8.6	Repetitive	This restates the code.	Delete
4.8.8- 4.8.9	Repetitive	This restates the code.	Delete
All of section 4.9	Repetitive	This restates the code	Delete
4.9.6	Prescriptive	This could be considered either best practice or creating a new obligation.	Delete or make it Best Practice
4.9.11		See submission.	
4.10.1- 4.10.7	Repetitive	This restates the code	Delete
4.10.8	Repetitive and creates new obligation	This restates the code. Further 4.10.8(b) expects retailers to know if a customer is going to miss a payment—sometimes customers do not even know.	Delete
4.10.9	Prescriptive	This is best practice or an additional obligation.	Delete or make it Best Practice.
4.11.1-4.11.4	Repetitive	This restates the code	Delete
4.11.5- 4.11.6	Policy	See submission on Best Endeavours.	Delete or change
4.11.7	Prescriptive	This is either best practice or creates a new obligation.	Delete
4.12.1- 4.12.4	Repetitive	This restates the code	Delete
4.12.5-4.12.6	Useful	This is an example of Guidance	Keep
4.12.11-4.12.12	Repetitive	This restates the code	Delete
4.12.14	Repetitive	This restates the code; see also 4.9.4 to 4.9.6 above.	Delete.
4.12.15	Prescriptive	See submission. This should be deleted.	Delete
4.13.3	Prescriptive	See submission.	Delete
4.13.4	Repetitive	This restates the code	Delete
4.13.16	Prescriptive	This is either best practice or creates a new obligation. It is retailer discretion to extend this assistance.	Delete
4.14.1	Prescriptive	See submission on ‘fairly and reasonably’.	Delete
4.14.2	Prescriptive	See submission. This is either best practice or creates a new obligation.	Delete
4.14.4-4.14.6	Prescriptive	See submission on partial payments.	Delete
4.14.9-4.14.10		See submission	Delete
5		**Financial Hardship policies**	
5.2.1- 5.2.4	Repetitive	This restates the code	Delete
7		**Miscellaneous retailer obligations**	
7.1-to 7.7 inclusive	Repetitive	This restates the code	Delete
7.8	Prescriptive	See submission.	Delete
8		**Disconnection safeguards- Parts 3 and 6 of the Code**	
8.1.1-8.1.9	Repetitive	This restates the code or is context that can be located elsewhere such as a Final Decision.	Change

8.1.9-8.1.13		See submission on 'fairly and reasonably'.	
9		**Guidance for other retailer obligations under Part 3**	
9.2.7, 9.2.9, 9.2.10	Repetitive	This restates the code and the Guidance.	
9.3	Best practice	Some of this section is best practice, other parts are unnecessary and add nothing to compliance.	Delete
9.4.2 9.4.4, 9.4.5, 9.4.7		Generally good examples of useful Guidance.	
9.5.2	Prescriptive	This is either best practice or creates a new obligation. Hard to define what giving a customer the 'benefit of the doubt' is.	Delete
9.5.4	Unnecessary	Just adds to length of document.	Delete
9.6	Unnecessary	This does not always provide any Guidance. Some of it is best practice. Other parts are motherhood statements (9.6.1, 9.6.6) or simply not internally consistent (9.6.5).	Delete
9.8		On Best Endeavours, please see our submission. We believe there needs to be two sections, one for clause 89 and another for clause 111A, with separate requirements.	
9.8.10	Prescriptive	SMS/ email use should be acceptable for clause 89—see submission.	Delete or change
9.10	New obligations	See submission. This is not in the code and creates new obligations.	