ESSENTIAL SERVICES COMMISSION

HARMONISATION OF THE ENERGY RETAIL CODE AND GUIDELINES WITH THE NATIONAL ENERGY CUSTOMER FRAMEWORK

DRAFT DECISION (CONSULTATION PAPER)

JULY 2013

An appropriate citation for this paper is:

Essential Services Commission, *Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework (NECF) – Draft Decision (Consultation Paper),* July 2013

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PREFACE

The Essential Services Commission (**the Commission**) has been asked by the Victorian Government to harmonise Victorian energy regulations to the extent possible with the National Energy Customer Framework (**NECF**).

In this regard, the Commission was to adopt, as the objective of this harmonisation exercise, the policy position as represented by the NECF plus the Victorian specific derogations as provided in the National Energy Retail Law (Victoria) Bill 2012 (**NERVLA**). The Commission responded to this request by drafting a new version of the Energy Retail Code based on the National Energy Retail Rules, entitled the draft Energy Retail Code version 11 (**draft ERC v11**). This Draft Decision (Consultation Paper) responds to the submissions received by the Commission from stakeholders on the draft ERC v11.

Consistent with the Commission's charter and practice, the Commission released an issues paper in December 2012 containing the draft ERC v11 for public consultation and invited submissions from stakeholders on the extent to which the draft ERC v11 achieved its harmonisation objectives. Stakeholders have provided feedback on the draft ERC v11, both in written submissions and at workshops held by the Commission.

The submissions raised a variety of issues. Some submissions identified several errors and omissions in the drafting of the draft ERC v11. For example, consumer groups identified that the merchant service fees provision incorrectly applied to standard retail contracts. The Commission has also identified some drafting errors and omissions in the draft ERC v11, such as in the customer financial hardship provisions where certain clauses of Guideline 21 were not incorporated. The Commission also received several submissions from stakeholders requesting that certain terms be defined in the draft ERC v11 to provide additional clarity. The Commission has considered these submissions, and where the Commission determined that a definition was needed one has been included – such as defining: index read, last resort event and agreed damages term.

Over half of the submissions received by the Commission raised matters of policy – namely, outcomes that are inconsistent with the Victorian Government policy as represented by the NECF and NERLVA derogations. Reconsideration of such matters is outside the scope of this consultation. For the purposes of this harmonisation exercise, the Commission considers matter of policy to have been previously consulted upon and settled. For example, the Commission received a submission regarding retaining the Energy Retail Code version 10 (**ERC v10**) undercharging provision. The Victorian Government's stated policy position is to adopt the NECF drafting for the undercharging provision. Therefore, the Commission adopted the NECF undercharging provision in the draft ERC v11.

The Commission also received submissions from stakeholders that sought to include requirements above the current consumer protections provided in the ERC v10. The goal of the harmonisation project was to harmonise current Victorian energy regulations to the NECF to the extent possible. This consultation process was not seeking to explore new consumer protections. For example consumer groups submitted that the draft ERC v11 should require retailers to provide payment plans to any Victorian customer without regard to their ability to pay, instead of only requiring retailers to provide a payment plan to customers experiencing payment difficulties. The Commission has determined that the access to a payment plan under the draft ERC v11 is substantially similar to the access to an instalment plan under the ERC v10. Hence, requiring retailers to offer a payment plan to all Victorian customers would be beyond current consumer protections in the ERC v10 or the NECF.

Throughout the harmonisation project, the Commission has also considered how the introduction of flexible pricing would impact Victorian customers. Where the Commission determined that a current ERC v10 provision was required to ensure adequate consumer protection during the transition to a flexible pricing environment, the Commission has retained the provisions of the ERC v10. One example is the inclusion of the ERC v10 definition of '*best endeavours*'. At a later date, to be determined, the Commission will review whether these retained provisions are still required.

The Commission would like to thank retailers, consumer groups, the Energy and Water Ombudsman (Victoria) Limited (**EWOV**) and other stakeholders for their contribution to the harmonisation project.

Dr Ron Ben-David
Chairperson

CONTENTS

1 INTRODUCTION

1.1 Background

The *National Energy Customer Framework* (**NECF**) is a national regulatory regime governing the sale and supply of energy to retail customers. The NECF was established to provide a consistent framework for regulating retailers across the jurisdictions. It was anticipated that Victoria would transition to the NECF in July 2012.

However, on 13 June 2012 the Victorian Government announced that it had decided to defer Victoria's transition. In July 2012, the former Minister for Energy and Resources, Hon Michael O'Brien MP, wrote to the Essential Services Commission (the **Commission**) noting that the current Victorian regulatory regime and the proposed framework under the *National Energy Retail Law (Victoria) Bill* 2012 (**NERLVA**) were substantially equivalent in terms of protections to Victorian energy customers. The Minister requested that the Commission consider harmonising the regulations contained in its Codes and Guidelines to the extent possible with the NECF.

1.2 The Commission's approach

In response to the former Minister's request, the Commission spent considerable time establishing how to best achieve the harmonisation of Victoria's regulatory instruments with the NECF. The Commission was aware of Victoria's unique energy market, and the fact that it had a much larger number of derogations than the other states. This posed the challenge of merging the Victorian specific derogations into the NECF framework without resulting in inconsistencies between state and national instruments.

Further, Victoria differed from the other states that had similarly decided to defer their transition to NECF in June 2012 (and instead also harmonise their state instruments) for several reasons. Victoria had a deregulated market, and has been the first state to comprehensively roll out smart meters. These factors have meant that Victoria has unique issues with customer protection compared to other jurisdictions as customers familiarise themselves with the new pricing and service offerings, and retailers continue to work with smart meter regulatory requirements. Victoria will also introduce flexible pricing to customers, which has been a further consideration in the design of Victoria's regulatory framework to ensure flexible pricing's smooth launch.

The Commission also received substantial feedback from industry and consumer groups following the decision to defer Victoria's transition to NECF. Some retailers informed the Commission that they had already invested significant resources in preparing for the NECF, and that systems had been put in place to comply with the NECF from July 2012 onwards. Therefore, many retailers sought to continue to operate within the national framework where possible.

In addition to this, the Commission had been aware for some time that our current Codes and Guidelines were outdated, and often difficult for industry to use. This was resulting in resource intensive, and often expensive, negotiations to resolve issues. For example, the Commission has been regularly asked by retailers and Energy and Water Ombudsman (Victoria) Limited (**EWOV**) to help interpret the de-energisation provisions in the *Energy Retail Code version 10* (**ERC v10**). The Commission has also sought to update our *Code of Conduct for Marketing Retail Energy in Victoria – January 2009* (**Marketing Code**) for some time, as it was created during a period when industry was still developing and the national instruments were not yet in place.

Further, with the introduction of flexible pricing, the Commission proposes to harmonise our Product Price Information Sheets with the Australian Energy Regulator's (**AER**) Energy Price Fact Sheets.

It was within this unique Victorian landscape that the Commission prepared the draft Energy Retail Code version 11 (**draft ERC v11**). In drafting the new instrument, the Commission decided to replace the structure of the ERC v10 with that of the *National Energy Retail Rules* (**NERR**), as we considered that the NERR provided a more modern drafting style to the ERC v10. The Commission has also included sections of the *National Energy Retail Law* (**NERL**) where we considered it appropriate to do so.

1.3 Regulatory Powers of the Commission

The Commission has responsibility for licensing electricity and gas retailers in Victoria. The Commission's powers are outlined in the *Electricity Industry Act 2000* (**EIA**), the *Gas Industry Act 2001* (**GIA**) and the *Essential Services Commission Act 2001* (**ESC Act**).

The ESC Act outlines objectives to which the Commission must have regard in undertaking its functions across all industries. The Commission's primary objective is to protect the long-term interests of Victorian customers with regard to the price, quality and reliability of essential services. In seeking to achieve this primary objective, the Commission must have regard to the following objectives:

- to facilitate efficiency in regulated industries and provide the incentive for efficient long-term investment;
- to facilitate the financial viability of regulated industries;
- to prevent the misuse of monopoly or non-transitory market power;
- to facilitate effective competition and promote competitive market conduct;
- to ensure that regulatory decision making observes the relevant health, safety, environmental and social legislation applying to the regulated industry;
- to ensure that users and customers (including low income or vulnerable customers) benefit from the gains from competition and efficiency; and
- to promote consistency in regulation between States and on a national basis.

The Commission also has specific energy sector objectives under the EIA and GIA. These are:

- to promote a consistent regulatory approach between the electricity industry and the gas industry, to the extent that it is efficient and practicable to do so; and
- to promote the development of full retail competition.

1.4 The release of the draft Energy Retail Code version 11

On 7 December 2012, the Commission released three documents for public consultation. The first document was the '*Harmonisation of the Energy Retail Code and Guidelines with the NECF - Consultation Paper*' (**Initial Consultation Paper**), which set out the Commission's approach to this project. The second document was a track changed version of the draft ERC v11, which used the NERR as its base. The third document was a clean version of the draft ERC v11, with detailed explanatory footnotes setting out why provisions were included in, or excluded from, the instrument.

The following Guidelines and Codes were amalgamated into the draft ERC v11:

- ERC v10;
- *Electricity Industry Guideline no. 13 – Greenhouse Gas Disclosure on Electricity Customers' Bills – January 2013* (**Guideline 13**);
- *Guideline no. 19 – Energy Price and Product Disclosure – June 2009* (**Guideline 19**); and
- *Guideline no. 21 – Energy Retailers' Financial Hardship Policies – January 2011* (**Guideline 21**).

The Marketing Code was not amalgamated into the draft ERC v11, as the Commission intends to repeal this Code. There are now appropriate protections in the Australian Competition and Consumer Commission (**ACCC**) approved *Energy Assured Limited Code* (**EAL Code**) – to which most Victorian energy retailers have become signatories – and the consumer protections enshrined in the Australian Consumer Law.

The Commission's approach in preparing the draft ERC v11 was to adopt the structure and wording of the NERR, except to the extent that the NERR provisions were precluded by Victorian legislation, or were inconsistent with the Victorian Government's stated policy intentions.

The Victorian Government's stated policy intentions have been indicated through:

- the NERLVA and associated Explanatory Memoranda; and

- papers published by the Department of State Development, Business and Innovation (**DSDBI**)[1] identifying Victoria-specific consumer protections that are in addition to or different to the NECF.

1.5 Initial consultation

The Commission has undertaken extensive consultation throughout the initial stages of the harmonisation project. The Commission's approach to consultation and regulatory reviews is set out in our Charter of Consultation and Regulatory Practice which is available on the Commission's website at the following address: http://www.esc.vic.gov.au/getattachment/About-Us/Consultation-Policy/CharterofConsultationforWeb.pdf.aspx.

1.6 First round of stakeholder workshops

Following the release of the Initial Consultation Paper, the Commission held meetings with energy retailers (**retailers**) in December 2012, and the consumer advocacy groups (**Consumer Groups**) in January 2013.

During the meetings, the Commission explained the purpose of the harmonisation project, and the approach that the Commission had taken in responding to the former Minister's request to harmonise the Victorian arrangements with the NECF. The Commission also addressed stakeholders' initial questions about the proposed changes.

1.7 Submissions

In February 2013, the Commission received 13 submissions from stakeholders on the draft ERC v11, as well as a number of confidential responses from interested parties. The 12 submissions which were provided to the Commission for public viewing were from the following stakeholders:

- Alinta Energy Retail Sales Pty Ltd (**Alinta**);
- AGL Energy Limited (**AGL**);
- Australian Power & Gas Company Limited (**APG**);
- Clean Energy Council;
- Consumer Groups comprising:
  - Alternative Technology Association;
  - Brotherhood of St Laurence;
  - Community Information and Support Victoria;
  - Consumer Action Law Centre;
  - Consumer Utilities Advocacy Centre;

[1] As of 1 July 2013, the energy branch of Department of Primary Industries will be part of the Department of State Development, Business and Innovation.

- COTA Australia;
- Kildonan UnitingCare;
- National Seniors Australia;
- St Vincent de Paul Society; and
- Victorian Council of Social Service;

- EnergyAustralia Pty Ltd (**EnergyAustralia**);
- EWOV;
- Kevin McMahon;
- Momentum Energy Pty Ltd (**Momentum**);
- Northern Alliance for Greenhouse Action;
- Origin Energy Retail Ltd (**Origin**); and
- Simply Energy.

1.8 Second round of stakeholder workshops

Following our consideration of submissions, the Commission held a second round of workshops. The retailers' workshop was held on 29 April 2013 and the Consumer Groups' workshop was held on 2 May 2013.

At the workshops, the Commission provided an overview of the main issues that had been raised in the submissions, and explained the approach the Commission had taken in responding to submissions. The Commission also invited stakeholders to elaborate on their submissions, and discussed in detail their primary issues of concern.

The Commission also informed industry of the revised timeframes for implementation of the ERC v11, which is discussed at chapter 1.10.

1.9 Structure of this Paper

This paper is structured as follows:

- **Chapter 1**: **Introduction**
  - Background
  - The Commission's approach
  - Regulatory powers of the Commission
  - The release of the draft ERC v11
  - Initial consultation
  - First round of stakeholder workshops
  - Submissions
  - Second round of stakeholder workshops
  - Structure of this paper
  - Submissions on the Draft Decision (Consultation Paper)
  - Victorian energy instruments consultation

- **Chapter 2: Policy considerations**
  - This chapter sets out the Commission's approach to the consideration of policy and flexible pricing issues with respect to submissions and the draft ERC v11.

- **Chapter 3**: **Costs and benefits of the ERC v11**
  - The Commission's options for harmonisation
  - Question to industry on the financial costs and benefits to harmonise
  - Timeframes for cost submissions

- **Chapter 4**: **Summary of Amendments**
  - This chapter lists the changes that the Commission has made to the draft ERC v11 since its initial release in December 2012.

- **Chapters 5**: **General concerns raised in submissions**
  - This chapter sets out the general issues raised by stakeholders on harmonisation, which do not relate to specific clauses in the draft ERC v11.

- **Chapters 6 to 23**:
  - These chapters set out the clauses of the draft ERC v11 that were the subject of submissions, the Commission's consideration of the issues raised in the submission and the Commission's proposed action.
  - The Commission has structured this part of the draft decision to reflect the structure of the draft ERC v11 for ease of use.

- **Appendix 1: Amended clean version of the draft ERC v11**

1.10 Submissions on the Draft Decision (Consultation Paper)

The Commission invites submissions from stakeholders on this Draft Decision (Consultation Paper). The Commission again requests that stakeholders focus on the extent to which the draft ERC v11 achieves its objective to harmonise Victorian instruments with the NECF, and any technical or implementation issues which may arise by the adoption of the new instrument. We are not seeking submissions on matters of policy.

Submissions on this paper are preferred in electronic format and should be provided to the Commission by 5pm on Friday, 16 August 2013.

By email to: energy.submissions@esc.vic.gov.au

By mail to:
Level 37
2 Lonsdale Street
Melbourne VIC 3000

Submissions will be made available on our website, except for any information clearly identified as commercially confidential or sensitive. Any material that is confidential should be clearly marked as such.

The Commission proposes to publish a Final Decision by late September/early October 2013. The Commission intends to then allow a three month period for retailers to bring themselves into compliance with the draft ERC v11, resulting in the new instrument taking full effect by January 2014.

Questions regarding this Consultation can be directed to:
Ms Victoria Rosen, Energy Regulatory Manager, on (03) 9032 1379 or victoria.rosen@esc.vic.gov.au.

1.11 Victorian Energy Instruments Consultation

The Commission noted in the Initial Consultation Paper that the draft ERC v11 was limited to harmonising the Victorian regulatory instruments with the provisions of the NECF so far as they related to retailer requirements. It did not adopt the provisions of the NERR that related to distributor obligations. It was further noted that there are some retailer obligations which overlap with distributor obligations and therefore additional work would be undertaken by the Commission to identify any consequential amendments required to be made to other Victorian energy instruments as a result of the drafting adopted in the draft ERC v11.

Consequently, as part of this consultation the Commission has released a second consultation paper entitled '*Harmonisation Project: Consequential Amendments to Victorian Energy Instruments'* (**Victorian Energy Instruments Consultation Paper**). This paper outlines the Commission's approach to reviewing certain Victorian energy instruments outside the scope of the harmonisation project but which may contain retailer obligations that are inconsistent with the drafting of draft ERC v11 and therefore should be amended (**the Victorian Energy Instruments**). The Commission seeks comment on the proposed consequential amendments to the Victorian Energy Instruments as a result of the drafting adopted in the ERC draft v11.

This Victorian Energy Instruments Consultation Paper can be found at: http://www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline.

2 POLICY CONSIDERATIONS

2.1 Policy issues

In the Initial Consultation Paper, the Commission stated that we were not seeking submissions on matters of policy as part of this consultation. This was due to the fact that the policy positions represented in the NECF and the Victorian derogations had already undergone very extensive stakeholder consultation and the Victorian Government's position was settled – as provided in the NERLVA.

The NECF itself was the subject of extensive consultation during its inception. In 2008, the Ministerial Council on Energy Standing Committee of Officials prepared a Regulatory Impact Statement (**RIS**) in relation to the *'National Framework for Regulating Electricity and Gas (Energy) Distribution and Retail Services to Customers*'. The RIS considered in detail the Council of Australian Governments' decision to harmonise regulatory arrangements in the energy sector.

At a state level, departmental officials consulted with stakeholders on the Victorian derogations during its consultation in 2011. The Victorian Government decided that on Victoria's transition to NECF, these derogations were required to ensure that there was no material reduction in protections for Victorian customers.

Nevertheless, over half of the submissions the Commission received sought to engage the Commission in the re-litigation of matters of Government policy.

While the Commission has considered each of the issues raised in submissions, and addressed them in this paper, the Commission has not attempted to reopen policy debates.

Where the Commission has found that our drafting of the draft ERC v11 has resulted in unintended changes to customer protections, or misrepresented current Victorian policy, we have amended these provisions accordingly. These changes have been set-out clearly in this paper, and also in the revised draft ERC v11 (**Appendix 1**).

In determining whether an amendment has been required to the draft ERC v11, the Commission has given consideration to the consequences of perpetuating Victorian provisions which are inconsistent with the national framework given the intention of the NECF is to harmonise State-based regulatory frameworks for the energy sector into a nationally consistent set of rules. The Commission has also borne in mind the fact that the draft ERC v11 is an intermediate solution required to address systemic problems with the ERC v10 until Victoria transitions to the NECF.

2.2 Flexible pricing

The Victorian Government is introducing flexible pricing into the Victorian retail energy market. The *Advanced Metering Infrastructure (AMI Tariffs) Order in Council 2013* (the **Order**) allows electricity retailers to make available to customers flexible prices from 1 July 2013. The Order has been developed by DSDBI in consultation with industry and other stakeholders. The DSDBI has developed the Order to contain adequate consumer protections to protect Victorian customers during the introduction of flexible pricing. Some of the protections in the Order include an obligation on retailers to obtain a customer's explicit informed consent to enter into a new flexible tariff. It also allows a customer to revert to their previous tariff without incurring an early termination fee.

From the commencement of the harmonisation project in July 2012, the Commission has considered whether the adoption of the NECF provisions is affected by the transition to this new flexible pricing environment. Where the Commission has considered that a current ERC v10 provision is required to ensure that customers have the same level of protection during the transition to flexible pricing, the Commission has retained the provision.

The Commission has given particular consideration to the impact the new flexible pricing environment may have on the following matters:

- Inclusion of a definition of '*best endeavours*' (chapter 6.1);
- Payment plans (chapter 6.5);
- Explicit informed consent requirements (chapter 6.6);
- Historical billing information (chapter 10.9);
- Undercharging (chapter 10.11);
- Shortened collection cycle (chapter 10.15);
- Termination of a market retail contract (chapter 13.2);
- Customer hardship (chapter 17); and
- De-energisation for not paying a bill (chapter 18.2).

3 COSTS AND BENEFITS OF THE ERC V11

3.1 Introduction

Both the Victorian Government and the Commission recognise the benefits of aligning Victoria's retail and consumer protection arrangements with the NECF where possible. Harmonisation will capture (instead of lose) the benefit of work done prior to the Victorian Government's decision to delay implementation of that framework in this State. This will assist Victorian retailers who also operate in other states, as it will be working with consistent rules with New South Wales, South Australia, Tasmania and the Australian Capital Territory.

This process also has the added benefit of providing the Commission with an opportunity to ensure that the Commission's Codes and Guidelines are clear and current. However, the costs of introducing the draft ERC v11 have not been quantified at this stage.

Given the concerns raised by some retailers about the cost to industry of the harmonisation project, the Commission would welcome any stakeholder estimates of the costs and benefits of introducing the draft ERC v11. It is anticipated that costs borne by retailers may include costs of developing new IT and administrative procedures and the costs of training staff. It should be noted that harmonisation with the NECF cannot be achieved by non-regulatory means.

The Commission has set out below the two options that were available to the Commission when deciding how to respond to the former Minister's request to harmonise our regulatory instruments with the NECF.

The Commission seeks submissions on the approximate costs of all options to retailers and other stakeholders, so that direct comparisons can be made. The Commission is particularly interested to know what the cost difference would be to '*soft launch*' NECF now through full harmonisation, and then transition sometime in the future (Option 1), compared to the base case of making one transition to NECF at a date to be determined by the Victorian Government (without first implementing harmonisation or other changes). The Commission does not anticipate that there would be a significant difference in the cost of implementing Option 1 and the base case.

3.2 Options

Option 1: Introduction of the draft ERC v11 (as currently drafted), which would replace the current ERC v10 and its associated Codes and Guidelines.

Option 2: Introduction of an updated Energy Retail Code, which would not involve such an extensive harmonisation with the NECF. This may involve incremental, partial

change of the existing Victorian Codes and Guidelines over time to address current issues and regulatory changes, with the ultimate goal of eventually aligning Victoria with the NECF.

Assessment of Option 1:

Option 1 would involve replacing the existing the ERC v10, the Marketing Code, and Guidelines 13, 19 and 21 with the draft ERC v11.

The Commission considers that the draft ERC v11 will deliver significant benefits by harmonising Victoria's customer protection and licensing requirements where appropriate with the national requirements under the NECF. The draft ERC v11 adopts the structure and wording of the NERR, except to the extent where the NERR provisions were precluded by Victorian legislation, or were inconsistent with the Victorian Government's stated policy intentions. As such, Option 1 maximises the alignment between the Victorian instruments and the NECF.

The Commission notes that the drafting of the draft ERC v11 greatly improves the clarity of requirements. As such, it is anticipated that adoption of the draft ERC v11 would result in less confusion for retailers, EWOV and ultimately customers on the interpretation of regulatory provisions.

In addition, the Commission anticipates that by instituting all of the changes to the draft ERC v11 at once, retailers will be able to realise economies of scale during the transition process and will be able to benefit from the experience of other states and territories which have already transitioned to the NECF– that is the ACT, New South Wales, Tasmania and South Australia. This option will effectively result in a '*soft launch*' of the NECF in Victoria prior to full transition.

Assessment of Option 2:

Option 2 would involve updating the current Victorian instruments, incrementally over time, to address current issues as part of routine maintenance of the Codes and Guidelines. The Commission would also seek to eventually amend the parts of the ERC v10 which were directly inconsistent with the NECF. The initial changes would likely involve updating our marketing and de-energisation provisions to harmonise with the national provisions. The reasons for the need to update these provisions are discussed at chapter 1.2 of this Paper. We would also streamline our Energy Price and Product Disclosure requirements to align with the NECF, and make any additional changes required to effectively regulate flexible pricing from July 2013.

The gradual updating of the Codes and Guidelines would result in periods of time when the individual instruments were out of step with national arrangements. In addition, the gradual roll out would result in ongoing costs for retailers because each

round of changes would require a response including changes to administration and staff education.

3.3 Question to stakeholders

The Commission invites submissions from stakeholders on the costs and benefits associated with options 1 and 2, compared with a base case of retaining the existing arrangements and transitioning to NECF at a date to be determined. In particular, for all options:

- Please describe the changes that would need to be made to operations as a result of options 1 and 2. For example, how would the options make it easier or more difficult for you to provide retail services to customers?

- What are the additional (gross) costs associated with each option compared to the status quo, broken up into once-off and ongoing costs, and separately identifying:
    - Internal IT costs
    - Staff-related costs (wages, salaries)
    - Other internal costs
    - External costs
    - Other non-quantifiable costs

- What are the additional (gross) benefits of each option compared to the status quo, including:
    - Cost reductions:
        - Internal IT costs
        - Staff-related costs (wages, salaries)
        - Other internal costs
        - External costs
    - Revenue increases
    - Other less quantifiable benefits, including improved co-ordination and consistency, compliance benefits etc.

If it is not possible to identify the above costs and benefits for each option, at a minimum we would ask stakeholders to compare the relative costs and benefits of implementing options 1 and 2.

3.4 Timeframes for cost submissions

The Commission requests that stakeholders provide their submissions on cost by 5pm on Friday, 2 August 2013. Submissions should be provided in the same format as stated above in chapter 1.10 of this Paper.

If you would like to discuss this chapter further, please contact:

Ms Victoria Rosen, Energy Regulatory Manager
Email: victoria.rosen@esc.vic.gov.au
Phone: (03) 9032 1379

4 SUMMARY OF AMENDMENTS

As a result of the consultation process, the Commission has made approximately 70 amendments to the draft ERC v11, and half of those amendments were made to fix minor drafting errors and to ensure consistency with other Victorian instruments and sections of the draft ERC v11.

Detailed discussion of each amendment is given in chapters 5 to 20.

The list of amendments made to the draft ERC v11 are as follows:

PART 1 Preliminary

- Division 1 Introduction and definitions
  - **Clause 3 – Definitions**
    - Definitions for *'Energy Ombudsman'* and *'Commission'* have been amended. Definitions for '*agreed damages term*', '*best endeavours*', *'index read*' and '*last resort event*' have been provided. The definition of '*domestic or small business customer*' has been deleted and the definition of '*small customer*' and '*business* customer' have been amended.
  - **Clause 3C – Explicit Informed Consent**
    - The definition of '*explicit informed consent*' has been amended to require that the information be in plain English and the person providing the consent be competent to do so.
    - Subclause 2(b) has been amended to prohibit verbal explicit informed consent for clause 20.
  - **Clause 3E – No or defective explicit informed consent**
    - This clause has been added to outline when explicit informed consent is defective. This clause has been taken from section 41 of the NERL.
  - **Clause 3F – Giving of notices and other documents under this Code**
    - This clause has been added to outline how a notice or document may be served. This clause is taken from section 319 of the NERL.

PART 2 Customer retail contracts

- Division 1 Standard retail contracts – terms and conditions generally
  - **Clause 12 – Model terms and conditions for standard retail contracts**
    - Amended to include new subclause 12(3A) which will have the same effect as section 29 of the NERL.

  Division 2A Energy Price and Product disclosure
  - **Clause 16 – Pre-contractual duty of retailers**

- Subclause 16(4) – added to require the customer's explicit informed consent prior to the customer entering into a market retail contract with the retailer. This obligation is taken from section 38(b) of the NERL.

- Division 4 Customer retail contracts – billing
  - **Clause 20 – Basis for bills (SRC and MRC)**
    - Subclauses 20(1)(a)(ii) and 20(1)(b)(iv) – amended to require the customer's explicit informed consent to be billed on a basis other than based on a meter read. This reflects the requirements outlined in clause 5.1 of the ERC v10.
  - **Clause 21 – Estimation as basis for bills (SRC and MRC)**
    - Subclause 21(1) – amended to require the customer's explicit informed consent for the retailer to use estimation as the basis for bills
  - **Clause 25 – Contents of bills**
    - Subclause 25(1)(j) – amended to state that it is subject to subclause 25(1)(y), as it is not applicable where there are smart meters
    - Subclause 25(1)(o) – deleted the words *'reminder notices and'*
    - Subclause 25(1)(y) – deleted *'from 1 July 2012'* and *'or gas (in MJ)'*
    - Inserted note stating that additional obligations in relation to the provision of metering information to customers are contained in the Electricity Metering Code
  - **Clause 25A – Greenhouse Gas Disclosure on electricity customers' bills**
    - Definitions section will be moved to the beginning of the clause
    - Amended to reflect the current version of Guideline 13 dated January 2013
    - Removed all reference to Sustainability Victoria
    - Amended to insert a new subclause 25A(2) which clearly provides an option to include greenhouse gas information *or* bill benchmarking in a customer's electricity bill
    - Subclause 25A(3) – amended to state the information a retailer must include, if it decides to include greenhouse gas information
    - Subclause 25A(8) – amended to only require a retailer to raise an issue with the Commission regarding a DSDBI decision if the retailer is unsuccessful in resolving the matter with DSDBI
    - Amended to refer to the new website maintained by DSDBI
    - Inserted a note at the end of clause 25A clarifying that the Commission cannot bind the DSDBI
    - Fixed typographical errors

- **Clause 28 – Historical billing information**
  - Subclause 28(2A) – amended to refer to '*historical billing data or metering data'*
- **Clause 29 – Billing disputes**
  - Subclause 29(5)(b) – amended to state that it is subject to subclause 25(5)(c)
  - Subclause 29(5)(c) – amended to state that the customer is not required to pay when the meter is faulty
  - Subclause 29(6)(b)(iii) – deleted subclause, as it refers to refunding money paid in advance of a meter check or test, but a retailer cannot request payment in advance
  - Inserted note stating that additional obligations in relation to the provision of metering information to customers are contained in the Electricity Metering Code
- **Clause 33 – Payment difficulties**
  - Subclause 33(1) – amended to include text of 72(1A)(b)
- **Clause 35A – Additional retail charges**
  - Subclause 35(1)(a) will refer to '*market retail contract*'
  - Subclause 35A(3) will refer to clause 35A
  - Subclause 35A(4) – moved to clause 35C to reflect the current drafting of clause 7.5 of the ERC v10
  - Fixed typographical errors
- **Clause 35B – Merchant service fee**
  - Subclause 35(B)(2) - amended to not apply to standard retail contracts because merchant fees are only recoverable under market retail contracts
  - Fixed typographical errors

- Division 5 Tariff changes
  - **Clause 38 – Change in use**
    - Subclause 38(5) – deleted to address a drafting error, as provisions relating to classification and reclassification of customers set out in Orders in Council in Victoria
- Division 6 Customer retail contracts – security deposits
  - **Clause 40 – Requirement for security deposit**
    - Subclause 40(3)(c) – inserted into subclause 40(4) as subclauses 40(3)(c) and (4) appear to achieve the same outcome
    - Subclause 40(4) – amended to add *'and the retailer has otherwise complied with clause 33'* as subclauses 40(3)(c) and (4) appear to achieve the same outcome
- Division 7 Market retail contracts – particular requirements

- **Clause 46 – Tariffs and charges**
  - Amended to add a clause 46A, which replicates clause 20 of the ERC v10 with respect to variations to market retail contracts.
- **Clause 49A – Early termination charges and agreed damages terms**
  - Subclause 46A(6A) – amended to refer to charge rather than change
  - Fixed typographical errors

- Division 9 Other retailer obligations
  - **Clause 59 – Notice to small customers where transfer delayed**
    - Inserted note after clause 59 stating that additional requirements in relation to customer transfers are contained in the Electricity Customer Transfer Code
  - **Clause 59A – Standard complaints and dispute resolution procedures**
    - Inserted to address inconsistencies between the Electricity Metering Code, the NERL and the draft ERC v11, and is equivalent to clause 81 of the NERL.
- Division 11 Miscellaneous
  - **Clause 70A – Termination of a deemed contract**
    - Amended to add *"or if any of the events listed in section 39(7) of the Electricity Industry Act and section 46(7) of the Gas Industry Act occur, whichever occurs first"*
  - **Clause 70 B – Termination in the event of a last resort event**
    - Inserted to incorporate clause 24.6 of the ERC v10, which addresses termination due to a last resort event

PART 3 Customer hardship

- The Commission has retained the requirements outlined in clauses 2.1 – 2.4 of Guideline 21 in the draft ERC v11, and, for consistency, has used NECF terminology. The Commission has also specifically amended the following clauses:
  - **Clause 71A – Approval by the Commission of a customer hardship policy**
    - Amended to remove the provisions that were listed, and inserted the provisions set out in clause 2.1 of Guideline 21
    - Amended the title of the clause
  - **Clause 71B – Contents of a customer hardship policy**
    - Amended to remove provisions that were listed, and inserted the provisions set out in clause 2.2 of the Guideline 21
    - Amended the title of the clause

- **Clause 71C – Changes to customer hardship policies**
  - Inserted new clause 71C which incorporates clause 2.4 of Guideline 21
- **Clause 72 – Payment plan**
  - Subclause 72(1A)(a) – deleted as it was inconsistent with clause 33
  - Subclause 72(2A) – replaced *'instalment plan'* with *'payment plan'* and this subclause has been renumbered as 72(3)
  - Inserted a note explaining that clause 72(1) is read in light of clause 33(4)
- **Clause 72A – Debt recovery**
  - Fixed typographical errors
- **Clause 76A – Supply capacity control product**
  - Amended to a date to be determined by the Minister for Energy and Resources

PART 6 De-energisation (or disconnection) of premises – small customers

- Division 1 Preliminary
  - **Clause 108 – Definitions**
    - Deleted reference to '*extreme weather event*'
- Division 2 Retailer-initiated de-energisation of premises
  - **Clause 111 – De-energisation for not paying bill**
    - Amended to remove from subclause 111(2)(a) the words *'within 5 business days of the retailer's offer'*
    - Removed the information in brackets in subclauses 111(1)(e)(ii) and (iii) and 111(3)(c)(ii) and (iii)
    - Inserted a note stating that further guidance with respect to de-energisation is set out in the Commission's publication Operating Procedure Compensation for Wrongful Disconnection.
    - Insterted a note stating that "*other electronic means*" includes email
  - **Clause 112 – De-energisation for not paying security deposit or refusal to provide acceptable identification**
    - Subclause 112(1)(b) – replaced 10 business days with 5 business days, as DSDBI's policy intent with preserving Victorian timeframes was limited to timeframes with respect to protected periods
  - **Clause 116 – When retailer must not arrange de-energisation**
    - Deleted references to '*extreme weather event*'
  - **Clause 117** – **Timing of de-energisation where dual fuel contract**
    - Subclause 117(4) – amended to refer to 15 business days, instead of 22 business days
- Division 4 Re-energisation of premises

- **Clause 122A – Time for re-energisation**
  - Amended to require the retailer to arrange for re-energisation, as opposed to requiring the retailer to re-energise

Schedule 1 Model terms and conditions for standard retail contracts

- **Clause 8.3 – Variation of tariff due to change of use**
  - Subclause 8.3(a) – amended to add *'we notify you of the new tariff'*
  - Fixed typographical errors
- **Clause 9.3 – Estimating the energy usage**
  - Amended to require the customer's explicit informed consent
- **Clause 12.3 – Reviewing your bill**
  - Subclause 12.3(b) – amended to state that the customer may be liable for the cost of the meter check
- **Clause 14.1 – When can we arrange for disconnection?**
  - Amended to include a reference to the retailer being entitled to de-energise for failure to provide acceptable identification
- **Clause 14.3 – When we must not arrange disconnection**
  - Removed reference to '*extreme weather event*'
- **Clause 15.2 – Timeframes for re-energisation**
  - This clause has been added to Schedule 1 to incorporate re-energisation timeframes

Schedule 3 Transitional provisions

- The Commission has inserted transitional arrangements into Schedule 3 for the transition of existing standing offers and market contracts

Schedule 4 Residential Electricity Standing Offer

- Template for Residential electricity standing offer has been included

Schedule 6 Bulk Hot Water Billing Formulae

- Electric Bulk Hot Water Billing Formulae has been amended to refer to standard retail contracts and market retail contracts to address the drafting error in referring to them as standing offer contracts and market contracts

Schedule 7 Acceptable formats of greenhouse gas disclosure on customers' bills

- Amended to refer to the updated Guideline 13 and **www.switchon.vic.gov.au**

5 GENERAL CONCERNS

This chapter discusses submissions received which raised general concerns regarding the drafting of the draft ERC v11 and its implementation.

5.1 Timing of the NECF and the draft ERC v11

The Commission stated in our Initial Consultation Paper that the anticipated implementation date for the draft ERC v11 was 1 July 2013.

Submissions

AGL, Alinta, APG and EnergyAustralia raised concern that the proposed July 2013 implementation date clashed with the competing priorities of New South Wales' transition to the NECF, and the implementation of the Victorian Government's flexible pricing policy.

Some retailers submitted that the draft ERC v11 should instead be implemented in January 2014, which would result in it only coming into operation if the Victorian Government deferred its transition to the NECF beyond this date.

Retailers also submitted that they would need at least 3 months to bring themselves into compliance with the draft ERC v11 once the Final Decision was released.

Discussion

Following our consideration of the retailers' submissions, the Commission has decided to delay the full implementation of the draft ERC v11 until January 2014. As the Commission now intends to release the Final Decision in late September/early October 2013, this will allow retailers three months to bring themselves into compliance with the new Code. It will also alleviate their concern that the harmonisation project will clash with other regulatory priorities.

DRAFT DECISION

The Commission proposes to change the implementation date for the draft ERC v11 to January 2014.

5.2 Smart meter provisions

The Commission included the Victorian specific smart meter provisions into the draft ERC v11.

Submission

Momentum submitted that, while it accepted that the regulations associated with smart metering may need to sit outside NECF, the current smart meter arrangements may not deliver the best outcomes for either customers or industry.[2]

Discussion

The Commission has incorporated smart meter provisions into the draft ERC v11 as they are current Victorian Government policy. The Commission is unclear about the precise nature of Momentum's concerns regarding the inclusion of smart meter provisions in the draft ERC v11, and has seen no reason to change the current drafting in relation to these provisions.

DRAFT DECISION

The Commission proposes not to amend the smart meter provisions in the draft ERC v11.

5.3 Retention of the wrongful disconnection scheme

The Commission has the power to determine the eligibility of an energy customer to receive a payment for wrongful disconnection, following a referral from EWOV.

Submission

Momentum submitted that the wrongful disconnection scheme had not resulted in fewer de-energisations or reductions in de-energisation timeframes. If this scheme was to be retained, Momentum stated that the Victorian Government should implement all the recommendations proposed by the Commission in our '*Final Report – Review of Wrongful Disconnection Payment – January 2010'*.[3]

Discussion

It is DSDBI policy that the wrongful disconnection scheme is to be maintained in Victoria. As such, Momentum's submission is outside the scope of the Commission's consultation, and in any event the Commission has seen no reason to change the current scheme.

[2] Momentum submission, p. 4. The Commission notes that this submission was under the title of *'prepayment meters'* but, based on the content of the submission, the Commission has interpreted the submission as relating to smart meters.
[3] Momentum submission, p. 4.

DRAFT DECISION

The Commission proposes to retain the wrongful disconnection scheme.

5.4 Prohibition on late payment fees

Retailers are not permitted to charge customers late payment fees if they do not pay their bill on time.

Submission

Momentum submitted that it was a policy contradiction to prohibit late payment fees for energy, but allow water businesses to charge late payment fees.[4]

Discussion

Momentum's submission raises a policy concern that is outside the scope of this consultation. Any concern about the prohibition of late payment fees in Victoria should be raised directly with DSDBI.

DRAFT DECISION

The Commission proposes not to remove the prohibition on late payment fees.

5.5 Reference in Electricity Industry Act 2000 and Gas Industry Act 2001 to the Energy Retail Code

Compliance with the draft ERC v11 is a condition of electricity and gas retail licenses.

Submission

EWOV submitted that the EIA and GIA stated that the ERC v10, in its entirety, constituted the terms and conditions for both standard and market contracts. EWOV stated that this was inconsistent with the draft ERC v11, as under the draft ERC v11 not all provisions applied to both standard and market retail contracts. EWOV stated that it was therefore unclear whether the draft ERC v11 could remove a term and

[4] Momentum submission, p. 2.

condition for either a standard retail contract, or a market retail contract, or whether all contract terms would still apply regardless of the draft ERC v11.[5]

EWOV submitted that this inconsistency should be addressed by amending conditions 6.3 and 7.3 of the standard licences, or changing the draft ERC v11 to apply to both standard retail contracts and market retail contracts.[6]

Discussion

The Commission disagrees with EWOV's submission that there is an inconsistency between the EIA and GIA and the draft ERC v11.

The draft ERC v11 is now broader than the ERC v10 as it incorporates several guidelines discussed above. Therefore, the draft ERC v11 sets out further obligations than those relating to terms and conditions of customer contracts. The Commission has described proposed changes to retail licences in its Victorian Energy Instruments Consultation Paper which can be found at: http://www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline.

The Commission also notes that similar to the approach adopted by the ERC v10, there are various aspects of the draft ERC v11 which apply in different ways to small customers depending on the type of contracts that customers have entered into with retailers, either a standard retail contract or a market retail contract.

In the Commission's opinion, the draft ERC v11 makes it clear when certain clauses apply to a small customer who is on a standard retail contract or a market retail contract.

DRAFT DECISION

The Commission proposes not to amend the draft ERC v11 to apply to both standard and market retail contracts.

5.6 Impact of draft ERC v11 on other legislative instruments

The draft ERC v11 is one of several regulatory instruments in Victoria governing energy retailers.

[5] EWOV submission, p. 2.
[6] EWOV submission, p. 2.

Submission

EnergyAustralia submitted that updating the ERC v10 would also require the Commission to update our Compliance Reporting Manual. EnergyAustralia also said that the Commission would need to review the regulatory instruments likely to be impacted by the draft ERC v11.[7]

Discussion

The Commission has reviewed our Compliance Reporting Manual as part of the interface instruments review. The Commission's proposed changes to the manual, and other Victorian instruments, are set out in the '*Harmonisation Project: Consequential Amendments to Victorian Energy Instruments*', which is available on the Commission's website at: http://www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline.

DRAFT DECISION

The Commission has considered the consequential amendments required to the Compliance Reporting Manual and other Victorian instruments as a result of implementing the draft ERC v11, and the Commission's proposed changes are set out in the *'Harmonisation Project: Consequential Amendments to Victorian Energy Instruments'*.

5.7 Costs of complying with the draft ERC v11

The costs of implementing the draft ERC v11 have not been quantified.

Submissions

Some retailers made submissions regarding the costs of implementing the draft ERC v11 with regard to system changes required to ensure compliance, increased regulatory burden, having to operate divergent systems and processes for Victorian specific derogations, and having to update their compliance reporting systems.

Retailers stated that these costs may not be justified in light of the fact that the draft ERC v11 will only be in place for an interim period.

[7] EnergyAustralia submission, p. 3.

Discussion

The Commission has considered the retailers' submissions, and is seeking further submissions from retailers to quantify the costs of implementing the draft ERC v11. Please refer to chapter 3 of this Paper for further information.

DRAFT DECISION

The Commission has decided to seek further submissions from retailers as to the costs of implementing the draft ERC v11.

5.8 Standing offer provisions

Under the draft ERC v11, there are standard retail contracts and market retail contracts, previously referred to by industry as standing offer contracts and market contracts. These differ in tariff price and consumer protections.

Submission

Consumer Groups submitted that the draft ERC v11 should require retailers to offer both types of contracts to customers, and explain the differences between the contracts with regard to price and consumer protections.[8]

Consumer Groups also stated that a deemed offer was essentially a standing offer, and standing offer terms should be comprehensive.[9]

Discussion

The Commission disagrees that retailers should be required to offer customers both types of contracts, as Victoria is a deregulated market and customers have the choice to request the information which relates to their individual circumstances. Under the ERC v10, retailers are not currently required to offer both types of contracts and explain the differences between the contracts to all customers.

The Commission does not agree with the Consumer Groups that a deemed offer and standing offer, which create a deemed customer retail arrangement and standard retail contract respectively, are the same. These contracts are defined under the definitions provision in clause 3 of the draft ERC v11. Additionally, the Commission does not agree that the standing offer terms are not comprehensive, as the model terms and conditions outlined in Schedule 1 are extensive and require retailers to comply with the requirements of the draft ERC v11.

[8] Consumer Groups submission, p. 4.
[9] Consumer Groups submission, p. 4.

DRAFT DECISION

The Commission proposes not to amend the draft ERC v11 to require retailers to explain to customers the price and protections relating to different contracts.

5.9 Proactively informing consumers about their rights

Both retailers and consumers have a responsibility to be proactive in providing and obtaining information.

Submission

Consumer Groups submitted that the draft ERC v11 does not encourage retailers to proactively inform customers about their rights.[10] In particular, the Consumer Groups submitted that directing a customer to a retailer's website in order to review a retailer's standard complaints and dispute resolution procedures and contact details of the EWOV was not sufficient as some customers may not have access to the internet.

In relation to customer complaints, the Consumer Groups submitted that the obligations relating to customer access to EWOV were limited to those provisions in the draft ERC v11 which relate to market retail contracts. Consumer Groups also submitted that the sections where the provisions relating to EWOV are placed imply that customer access to EWOV's services is only in relation to billing for customers on standard retail contracts.[11]

Discussion

The Commission disagrees with Consumer Groups that the draft ERC v11 discourages retailers from informing customers of their rights.

In relation to access to websites, the Commission notes that, under clause 56 of the draft ERC v11, retailers are required to provide information free of charge to customers upon request.

In relation to customer complaints, clause 50, which refers to small customer complaints and dispute resolution information, is limited to market retail contracts. However, the equivalent provision for customer complaints in relation to standard retail contracts is set out in the model terms and conditions (see clause 19.2 of Schedule 1 of the draft ERC v11).

[10] Consumer Groups submission, p. 4.
[11] Consumer Groups submission, p. 5.

This approach is consistent with the NERR. The NERR includes this issue in the market retail contracts section because retailers entering into market retail contracts are not adopting the model terms and are instead required to comply with the minimum terms set out in Part 2, Division 7 – Market retail contracts – particular requirements.

The Commission has included a new subclause 12(3A) in the draft ERC v11 which provides that the terms and conditions of a retailer's standard retail contract must not be inconsistent with the provisions of the model terms.

The Commission has also included a new clause 59A in the draft ERC v11, which requires a retailer to develop a set of procedures for handling customer complaints in accordance with the relevant Australian standards. These matters are discussed in more detail in chapter 13.4 of this Paper.

The Commission disagrees that provisions relating to EWOV are limited to billing disputes, which is provided in subclause 29(7) of the draft ERC v11. Provisions which require retailers to either inform customers of their rights to refer a dispute to EWOV, or provide the contact details for EWOV, are also contained in subclause 50(1)(d) in relation to market retail contracts, clause 56 in relation to publication of EWOV's details on a retailer's website or the requirement to provide details to the customer upon request, subclause 64(1)(e) in relation to a retailer's marketing activities and clause 19.2 of the model terms in relation to standard retail contracts.

DRAFT DECISION

The Commission proposes not to change the provisions relating to EWOV in the draft ERC v11. The Commission proposes to include a new subclause 12(3A) which will have the same effect as section 29 of the NERL.

6 INTRODUCTION AND DEFINITIONS – PART 1

This chapter discusses submissions received on PART 1 Preliminary, Division 2 Introduction and definitions of the draft ERC v11. It also provides a glossary of terms and key acronyms.

Table A – Glossary of terms used in the draft ERC v11 and their equivalent in ERC v10

Draft ERC v11 term	ERC v10 term
Carry-over Customer	No Equivalent
Customer Connection Service	No Equivalent
Customer's Premises	Supply Address
Customer Retail Contract	Energy Contract, Electricity Contract and Gas Contract
Customer Retail Services	No Equivalent
Small Retail Customer	Business Customer
Deemed Customer Retail Arrangement	Deemed Energy Contract
De-Energisation	Disconnection
Disconnection Warning Notice	Disconnection Warning
Energisation	Connect
Life Support Equipment	Life Support Machine
Market Retail Contract	Market Contract
Not Used	Dual Fuel Contract
Not Used	Evergreen Contract
Not Used	Fixed Term Contract
Payment Plan	Instalment Plan
Protected Period	Period referred to in clause 14(d) of ERC v10

Draft ERC v11 term	ERC v10 term
Small Customer	Domestic Customer
Specified Retailer	No Equivalent
Standard Retail Contract	Energy Contract
Re-Energisation	Reconnection

Table B – key acronyms used in draft decision

Acronym	Meaning
DSDBI	Department of State Development, Business and Innovation
EIA	*Electricity Industry Act 2000*
GIA	*Gas Industry Act 2001*
MRC	Market Retail Contract
NECF	National Energy Customer Framework
NERL	National Energy Retail Law
NERLVA	*National Energy Retail Law (Victoria) Bill* 2012
NERR	National Energy Retail Rules
SRC	Standard Retail Contract

6.1 Best endeavours – Clause 3

The ERC v10 contains the following definition of '*best endeavours'*:

> *"best endeavours in relation to a person, means the person must act in good faith and do what is reasonably necessary in the circumstances"*.

In harmonising the ERC v10 with the national requirements under the NECF, the definition of '*best endeavours'* was not included in the draft ERC v11. This was due to the fact that neither the NERR nor the NERL contain a definition. The interpretation in

the NECF is determined by reference to common law principles of statutory interpretation.

Submission

EWOV raised concern about the absence of a definition for '*best endeavours'* submitting that this could result in *"a lack of clarity about what constitutes best endeavours for energy retailers*". EWOV noted that it has previously written to the Commission seeking greater clarity around the '*best endeavours*' requirements. In its experience resolving complaints, EWOV stated that interpretations of whether a retailer had met '*best endeavours'* varied and hence it was important to retain a definition.[12]

During the harmonisation workshop, EWOV specifically identified reasons why it was necessary to include a definition of *'best endeavours'*. In particular, EWOV said that the definition allowed it to have more meaningful conversations with retailers regarding whether they had done all that was '*reasonably necessary in the circumstances'*, which improved their ability to resolve disputes.

Discussion

The Commission considers that there would be a greater consumer benefit by not including a definition of 'best endeavours' in the draft ERC v11. The Commission also notes that no definition has been included in the NECF. It is the Commission's opinion that the ERC v10 definition does not provide the same standard that one would find in a common law definition of 'best endeavours'. Rather the ERC v10 definition provides what is effectively a test of "reasonable" endeavours.

However, after considering EWOV's submission regarding the assistance provided by the 'best endeavours' definition in resolving disputes, the Commission has been persuaded to include the ERC v10 definition. Given the introduction of flexible pricing in Victoria, the Commission also recognises that there may be a benefit in maintaining the current definition to minimise change in the new flexible pricing environment.

Consequently at this stage we have been persuaded to include the ERC v10 definition. The Commission, however, welcomes further submissions from stakeholders on this issue. It should be noted that the Commission is not seeking submissions on whether the ERC v10 definition should be redrafted. The purpose of this project is to harmonise to the extent possible, which does not include introducing new requirements outside the NECF, NERVLA or ERC v10.

[12] EWOV submission, pp. 3-4.

DRAFT DECISION

The Commission proposes to define *'best endeavours'* in the draft ERC v11.

6.2 Customer definitions – Clause 3

Clause 3 of the draft ERC v11 provides a number of definitions for customers, specifically:

> *"domestic or small business customer means a domestic or small business customer within the meaning of section 3 of the Electricity Industry Act or section 3 of the Gas Industry Act";*
>
> *"small customer means a domestic or small business customer"; and*
>
> *"relevant customer means a relevant customer within the meaning of section 36 of the Electricity Industry Act or section 43 of the Gas Industry Act"*.

Submission

The Consumer Groups found the definitions to be confusing and stated that some of the definitions overlapped. For instance, they said that the definitions of *'relevant customer'*, *'domestic or small business customer'* and *'small customer'* all appeared to mean the customer category. The Consumer Groups suggested that the various customer definitions be simplified.[13]

Consumer Groups have also submitted that the threshold for small residential customers and small business customers should be increased from 40 MWh to 100 MWh to reflect the NECF requirements.

Discussion

The draft ERC v11 refers to a number of categories of customers who have different rights, and to whom retailers have specific obligations. The relevant customer categories are:

- customers (all customers who buy or propose to buy energy from retailers);
- small customers (domestic or small business customers);
- small retail customers (the type of customers referred to under the EIA and GIA and to whom retailers are required to provide certain information when such customers make an enquiry to enter a contract. This class of persons

[13] Consumer Groups submission, p. 7.

are declared to be small retail customers for the purposes of these acts by an Order of the Governor in Council);

- relevant customers (the type of customers for whom the EIA and GIA specify that energy contracts will be void to the extent they are inconsistent with the Commission's terms; currently, relevant customers are the same as *'domestic or small business customers'*, but the definition of relevant customers could be varied in the future by an Order of the Governor in Council.); and
- domestic or small business customers (currently the draft ERC v11 does not include specific provisions for these customers, as these customers are covered by the provisions that apply to small customers).

The reason why it is necessary to refer to each of these categories of customers is to ensure that the draft ERC v11 operates in conjunction with the various other Victorian instruments that prescribe terms and conditions on retailers for the provision of energy to certain customers.

The Commission agrees that, at present, these definitions all have the same meaning. The category of *'domestic or small business customer'* is also not referred to in the body of the draft ERC v11, except to define *'small customer*'. As such, the Commission considers that the definition of *'domestic or small business customer*' should be merged into the definition of *'small customer*'. The Commission proposes to amend the definition of small customer as follows:

> *"small customer has the same meaning given to domestic or small business customer under section 3 of the Electricity Industry Act or section 3 of the Gas Industry Act"*.

The note under the definition of *'domestic or small business customer*' will be moved from its current location to immediately below the proposed new definition of '*small customer*'.

However, the Commission considers that the definition of *'relevant customer'* should be retained. This category is referred to in the body of the draft ERC v11 to explain the interaction of the EIA and GIA with the Code, and to ensure it is clear that the minimum requirements in relation to standard retail contracts set by the Code are those set for the purposes of section 36 under the EIA and section 43 under the GIA.

In addition, while the definition of *'relevant customer*' and *'small customer'* are currently the same, the definition of relevant customer may be varied in the future. If the definition is varied, retaining the definition of relevant customer would avoid the need for future amendments to the ERC v11.

The Commission has also modified the definition of '*business customer*' to mean '*a small customer who is not a residential customer*' in response to the submission from

Simply Energy in relation to clause 72. Please see our discussion at chapter 17.5 of this Paper for our reasons for this decision.

DRAFT DECISION

The Commission proposes to merge the definition of *'domestic or small business customer'* into the definition of *'small customer'*, move the note under the definition of '*domestic or small business customer*' to below the new definition of '*small customer*', and amend the definition of business customer.

6.3 Designated retailer – Clause 3

Under clause 3 of the draft ERC v11, a designated retailer is defined to mean:

> *"(a) in relation to premises and the supply of electricity, the relevant licensee in relation to the supply of electricity from the supply point for the premises determined in accordance with an Order in Council made under section 35 of the Electricity Industry Act; and*
>
> *(b) in relation to premises and the supply of gas, the specified licensee in relation to the supply of gas from the supply point or ancillary supply point for the premises determined in accordance with an Order in Council made under section 42 of the Gas Industry Act".*

Submission

Simply Energy stated that a *'designated retailer'* is defined by reference to the Order in Council and recommended that the Commission treat this definition *"… with care and ensure it is legally sound*."[14]

Discussion

The Commission notes Simply Energy's comments, but the Commission has no discretion in deciding which retailers should be *'designated retailers'* for the purposes of the draft ERC v11. This is because the Victorian Government is responsible for determining which retailers fulfil the functions assigned to designated retailers by Orders in Council made under the EIA and GIA.

[14] Simply Energy submission, p. 2.

DRAFT DECISION

The Commission proposes not to amend the definition of *'designated retailers'*.

6.4 EWOV and the Commission – Clause 3

Under clause 3 of the draft ERC v11:

"Energy ombudsman means the Energy and Water Ombudsman Victoria"

Submission

EWOV indicated that its name was written incorrectly, and should be the "*Energy and Water Ombudsman (Victoria) Limited*". EWOV also stated that there was no definition of the word *'Commission'*, which should be defined so that it was clear that the '*Commission*' referred to the Essential Services Commission.[15]

Discussion

The Commission agrees with EWOV's submission and will correct the definition of Energy Ombudsman, and add a definition of the Commission as follows:

- Energy Ombudsman means the Energy and Water Ombudsman (Victoria) Limited; and
- Commission means the Essential Services Commission under the *Essential Services Commission Act 2001*.

DRAFT DECISION

The Commission proposes to amend the definition of the *'Energy Ombudsman'* and provide a definition of *'Commission'*.

6.5 '*Payment plan*' – Clause 3 and discussion of main issues

In this chapter the Commission will discuss the submissions received from Consumer Groups and EWOV regarding the definition of '*payment plan'* in the draft ERC v11. The Commission will also discuss the general concerns raised by Consumer Groups about payment plans.

[15] EWOV submission, pp. 2-3.

Clause 3 of the draft ERC v11 defines '*payment plan'* as:

"a plan for:

(a) a hardship customer; or

(b) a residential customer who is not a hardship customer but who is experiencing payment difficulties,

to pay a retailer, by periodic instalments in accordance with this Code, any amounts payable by the customer for the sale and supply of energy".

Subclause 33(4) of the draft ERC v11 provides:

"*(4) Clause 72 applies to a residential customer referred to in subclause (1) (b) in the same way as it applies to a hardship customer."*

Subclause 72(1) of the draft ERC v11 provides:

"*(1) A payment plan for a hardship customer must:*

a) be established having regard to:

i. the customer's capacity to pay; and
ii. any arrears owing by the customer; and
iii. the customer's expected energy consumption needs over the following 12 month period; and

b) include an offer for the customer to pay for their energy consumption in advance or in arrears by instalment payments."

Submissions

The Consumer Groups raised concern that the adoption of the NECF payment plan provisions in the draft ERC v11 had resulted in the loss of protections to Victorian customers. Specifically, they said that there was no longer '*universal access*' to payment plans, which they argued had been a long standing component of the Victorian framework.

The Consumer Groups further submitted that the new definition of *'payment plan'* in the draft ERC v11 (which has replaced the ERC v10 definition of *'instalment plan'*) significantly reduced protections for Victorian customers. Consumer Groups raised particular concern regarding the introduction of the requirement that a customer must be "*experiencing payment difficulties*" before they are able to access a payment plan under the current definition of payment plan in the draft ERC v11. Consumer Groups

also noted the absence of a definition of '*instalment plan*', which was previously provided for under the ERC v10.

The Consumer Groups said that the draft ERC v11 removed retailers' current obligations to consider the following in establishing a customer's payment plan:

- capacity to pay;
- arrears; and
- the customer's expected energy consumption needs over the following 12 months.

The Consumer Groups also raised concern in relation to the obligation being on the customer to contact the retailer to advise that they were experiencing payment difficulties under the draft ERC v11. They submitted that this would result in customers not being made aware of their right to access a payment plan.

EWOV also made submissions regarding the provisions relating to payment plans under the draft ERC v11. EWOV said that the proposed changes as contained in clause 33 would result in less protection for customers who had already been provided with payment assistance. EWOV stated that the draft ERC v11 no longer required retailers *"… to proactively assess if a customer is experiencing payment difficulties. This is in stark contrast to current requirements under the ERC, in which, if a retailer believes that a customer is experiencing payment difficulties, it is required to proactively offer … a payment plan, even if two plans have not been complied with in the previous 12 months (as long as the customer provides reasonable assurance to pay)."*[16]

EWOV was also concerned about the implications of not requiring retailers to provide payment plans to customers who had been convicted of an offence involving the illegal use of energy (under subclause 33(2)(b)). EWOV said that even if such a customer repaid an outstanding debt accrued from illegal use, that customer would be prevented from receiving a payment plan for a new debt. Also, if the account was in that customer's name, subclause 33(2)(b) would result in the customer not being offered a payment plan for debt accrued from legal use of energy at a different property.[17]

Discussion

The term *'payment plan'* has been adopted in the draft ERC v11, instead of the term '*instalment plan'* (which is used under the ERC v10), as this is the term used under the NERL. Whilst the ERC v10 and draft ERC v11 refer to them by different names, it is the Commission's view that they are substantially equivalent tools.

[16] EWOV submission, p. 10.
[17] EWOV submission, p. 10.

As such, any reference to the term *'instalment plan'* was not intended to be included in the draft ERC v11. The Commission will refer to them consistently as '*payment plan*'. The Commission, however, acknowledges the use of the term in subclause 72(3) and advises that this was a drafting error which will updated accordingly.

Access to payment plans under ERC v10

At the workshop on 2 May 2013, Consumer Groups reiterated their concerns regarding the change from payment plans being '*universally accessible*' under the ERC v10, to payment plans only being available to hardship customers or residential customers experiencing payment difficulties under the draft ERC v11.

The Consumer Groups submission seems to rely on the wording in clause 12.1 of the ERC v10, which refers to offering a payment plan to a *'domestic customer'*, as the basis for their view that all customers have access to payment plans. In comparison, under the draft ERC v11, which adopts the definition under the NERL, payment plans are available to residential customers experiencing payment difficulties.

The Commission disagrees with the Consumer Groups submission that there has been a change in the access to payment plans. In the Commission's opinion, access to payment plans under Part 3 of the ERC v10 is intended to protect people experiencing payment difficulties. As such, access to payment plans under the draft ERC v11 is much the same as the access provided under the ERC v10, save for people who have been convicted of an offence involving the illegal use of energy (this issue is discussed in further detail below).

The Commission considers that the wording under clause 12.1 of the ERC v10 must be read in the context of clause 11.2 of ERC v10 which provides for the assessment and assistance of domestic customers experiencing payment difficulties. Subclause 11.2(3) of ERC v10 provides that a retailer must offer a customer a payment plan if:

- the retailer believes the customer is experiencing payment difficulties; or
- the customer contacts the retailer and they do not agree on an alternative payment arrangement.

The Commission also notes that clauses 11 and 12 both sit under 'Part 3 – Credit Management' of the ERC v10. This further supports the Commission's opinion that payment plans are not available to domestic customers who are not experiencing payment difficulties.

The Commission also notes that under subclause 11.2(3) of the ERC v10, a customer is required to contact the retailer to advise that they wish to access a payment plan (unless the retailer believes a customer is experiencing payment difficulties).

Access to payment plans under draft ERC v11

At the workshop on 2 May 2013, there was extensive discussion with Consumer Groups as to how "*experiencing payment difficulties*" would be interpreted by retailers and the regulators. The Consumer Groups' position was that "e*xperiencing payment difficulties*" would be interpreted to mean people who were currently experiencing payment difficulties, restricting who had access to payment plans. Their main concern was that a domestic customer who was trying to budget for upcoming bills (so they could avoid having payment difficulties), would not be included in the interpretation of "*experiencing payment difficulties*" under the draft ERC v11.

Clause 3 and subclause 33(1) of the draft ERC v11 outline which customers a retailer must offer and apply payment plans to. This includes hardship customers and residential customers experiencing payment difficulties. As stated in our drafting footnote to subclause 33(1)(b) in the draft ERC v11:

> "*Unlike the NERL, the Electricity Industry Act and Gas Industry Act do not specifically require retailers to enter into payment plans with customers experiencing financial difficulties. Section 43(2) of the Electricity Industry Act and section 48G of the Gas Industry Act require retailers to prepare a customer hardship policy which includes flexible bill payment options.*"

In the Commission's opinion "*experiencing payment difficulties*" would be broadly interpreted and would not be limited to difficulties that have been realised. It would extend to customers who were trying to manage their bills in anticipation of future payment difficulties. However, retailers would not be obligated to provide payment plans merely for customer budgeting purposes, as that can be achieved through a selection of different payment options under the contract.

The Commission notes that the Consumer Groups raised this issue during the NECF consultation process. As previously advised in chapter 2 of this Paper, the Commission will not be re-litigating settled policy issues. Furthermore, the Commission notes the Ministerial Council on Energy Standing Committee of Officials response to this issue that *"mandating plans where residential customers are not experiencing financial difficulty is not warranted".*[18] Moreover, subclause 33(1)(b) only requires that a customer contact their retailer and advise that they are experiencing financial difficulties. This means that it is up to the customer to decide whether they are experiencing payment difficulties, not the retailers. Under the draft ERC v11, once a customer has informed the retailer that they are experiencing payment difficulties, the retailer is required to offer the customer a payment plan.

[18] MCE SCO Responses to Key Issues Raised by Stakeholders on the Second Exposure Draft of the NECF, which was released with SCO Bulletin No. 183 on 10 September 2010.

Given the above interpretation, it is the Commission's view that:

- there is broad and appropriate access to payment plans under the draft ERC v11; and
- access to payment plans is substantially equivalent to the access to instalment plans currently provided for under the ERC v10 (save for customers who have been convicted of an offence involving the illegal use of energy).

Assessment of customer's situation in establishing a payment plan

Consumer Groups have submitted that retailers are no longer required to consider a customer's capacity to pay, arrears and the customer's expected energy consumption needs over the following 12 months when establishing a payment plan under the draft ERC v11.

The Commission disagrees with the Consumer Groups' submission. As outlined above, clause 72 of the draft ERC v11 requires a retailer to consider a customer's capacity to pay, arrears and expected consumption needs over the next 12 months in establishing a payment plan. While the Commission acknowledges that subclause 72(1) states that the section applies to hardship customers, it must be read in light of subclause 33(4) of the draft ERC v11 which provides that clause 72 applies to a residential customer experiencing payment difficulties in the same way as it applies to a hardship customer. To assist with the interpretation of the draft ERC v11, the Commission has inserted a note at the end of clause 72 advising that this clause must be read in light of subclause 33(4).

As such, a retailer is required to consider capacity to pay, arrears and energy consumption needs for both hardship customers and domestic customers experiencing payment difficulties under the draft ERC v11 (as similarly required in clause 12.2 of the ERC v10).

Informing customers of the availability of payment plans

Consumer Groups were concerned that residential customers would not be made aware of the availability of payment plans, given subclause 33(1)(b) of the draft ERC v11 requires that the customer contact the retailer to advise that they are experiencing payment difficulties. The Commission disagrees with the Consumer Groups and EWOV's submission that the current obligation for a customer to contact a retailer is problematic. As discussed earlier, the Commission considers it to be reasonable that it is up to the customer to indicate if they are experiencing payment difficulties, without relying on the retailer inviting the customer to do so.

Moreover, the Commission has decided to amend subclause 33(1)(b) to include the requirement previously outlined in subclause 72(1A)(b) that a retailer must offer a

payment plan to a customer that it believes is experiencing repeated difficulties in paying their bill, or requires payment assistance.

The Commission notes that there are further requirements included in clause 111 of the draft ERC v11 which restrict a retailer from disconnecting a residential customer's energy supply until:

- the customer has not agreed to an offer to pay the bill by instalments or, having agreed to the offer, has failed to adhere to an instalment arrangement; and
- the retailer has, after giving the disconnection warning notice, used its best endeavours to contact the customer, in connection with the failure to pay, or to agree to the offer or to adhere to the payment plan or instalment arrangement as referred to in paragraphs (a)(ii) and (b)(ii), in one of the following ways:

    - in person;
    - by telephone; or
    - by facsimile or other electronic means.

The Commission has also added to subclause 111(2) the requirement previously outlined in subclause 72(1A)(b) that a retailer must offer a payment plan to a customer that it believes is experiencing repeated difficulties in paying their bill.

In addition, clause 10.3 of the model terms and conditions provides that if a residential customer advises a retailer that they have difficulty paying their energy bill, the retailer must offer the customer the option to pay their bill under a payment plan.

Given the requirements in clause 111 for a retailer to contact a customer prior to de-energisation to inform them of the availability of payment plans, it is the Commission's view that there are adequate protections in the draft ERC v11.

Persons convicted of an offence involving the illegal use of energy

The Commission acknowledges that subclause 33(2)(b) of the draft ERC v11 is a change to the position under the ERC v10 as retailers are no longer required to offer a payment plan to people who have been convicted of an offence involving the illegal use of energy. The Commission considers this change to be in accordance with the government policy of harmonisation, and also notes that a retailer could still offer a payment plan to a customer who has been convicted of an offence involving the illegal use of energy, but there is just no mandatory requirement for them to do so. The Commission has also considered subclause 33(2)(b) of the draft ERC v11 in light of the new flexible pricing environment, but we do not consider that it has any affect on the provision.

Furthermore, there are other protections available in the draft ERC v11 which can be accessed by people excluded from payment plans. These protections included the safety net of:

- a residential customer being able to lodge a complaint with EWOV; and
- the requirements relating to customer hardship outlined in Guideline 21 which are now being carried over into the draft ERC v11 (please see chapter 17 of this Paper).

DRAFT DECISION

The Commission proposes not to amend the definition of *'payment plan'*, and considers that the draft ERC v11 provides for substantially equivalent rights to customers requiring access to a payment plan as the ERC v10.

However, the Commission proposes to amend subclauses 33(1)(b) and 111(2) to include the requirements previously set out in subclause 72(1A)(b).

The Commission proposes to insert a note at the end of clause 72 advising that clause 72 must be read in conjunction with clause 33(4).

6.6 Explicit informed consent – discussion of Clause 3C and general concerns

Clause 3C of the draft ERC v11 specifies the circumstances in which a customer is considered to have given *'explicit informed consent'* to a transaction.

"(1) Explicit informed consent to a transaction is consent given by a small customer to a retailer where:

(a) the retailer, or a person acting on behalf of the retailer, has clearly, fully and adequately disclosed all matters relevant to the consent of the customer, including each specific purpose or use of the consent; and

(b) the customer gives the consent to the transaction in accordance with subclause (2); and

(c) any requirements prescribed by this Code for the purposes of this subclause have been complied with.

(1) Explicit informed consent requires the consent to be given by the small customer:

(a) in writing signed by the customer; or

(b) verbally, so long as the verbal consent is evidenced in such a way that it can be verified and made the subject of a record under clause 3D; or

(c) by electronic communication generated by the customer."

Submissions

Consumer Groups and EWOV submitted that the definition of '*explicit informed consent'* should be drafted to ensure that a person is competent to give explicit informed consent and, include the requirement that a retailer explain in plain English all matters relevant to the customer's consent.[19] EWOV stated that the failure to carry over these two requirements from the ERC v10 definition was a decrease in consumer protections and could result in customers entering into market retail contracts without adequate understanding of the terms of the contract.[20]

The Consumer Groups noted in their submission that the ERC v10 prohibited explicit informed consent being given verbally when a customer wished to move to a shorter billing cycle, or receive an estimated bill. The Consumer Groups said that this prohibition should be maintained in the draft ERC v11.[21]

The Consumer Groups also submitted that the wording of *'explicit informed consent'* was weighed heavily in favour of retailers.[22]

Discussion

Following the Commission's consideration of the submissions and the introduction of flexible pricing in Victoria, the Commission has decided to include a requirement for explicit informed consent in the following clauses:

- clause 16 – pre-contractual duty of retailers;
- clause 20 – basis for bills;
- clause 21 – estimation as basis of bills;
- new clause 46A – variations to market retail contracts; and
- clause 9.3 of Schedule 1 – estimating the energy usage.

Further details are provided under the Commission's discussion of each specific clause below.

[19] Consumer Groups submission, p. 7-8; EWOV submission, p. 2.
[20] EWOV submission, pp. 2-3.
[21] Consumer Groups submission, p. 7.
[22] Consumer Groups submission, p. 7-8.

Definition of '*explicit informed consent'*

As stated in the Initial Consultation Paper, the definition of *'explicit informed consent'* in the draft ERC v11 was based on the definition in section 39 of the NERL. Consistent with the Commission's stated approach, the definition of '*explicit informed consent'* was drafted in accordance with the NECF provisions.

However, the Commission has decided to include the additional requirements from the definition of '*explicit informed consent*' in the ERC v10 into the definition of '*explicit informed consent*' in the draft ERC v11. The additional requirements are:

- that the person is competent to give explicit informed consent;
- to explain all matters relevant to the consent in plain English; and
- a prohibition on explicit informed consent being provided verbally for clause 20 (relating to a customer's bill not being based on an actual meter read)

The Commission has decided to include these additional requirements to ensure that customers have these ongoing protections during the introduction of flexible pricing in Victoria and in light of the submissions received from Consumer Groups and EWOV.

However, we have decided not to include the ERC v10 prohibition of allowing retailers to obtain a customer's verbal explicit informed consent when they agree to a shortened billing cycle. Instead, we have retained the NECF provisions at clauses 3C and 24. In the Commission's view, customers are increasingly finding it difficult to bring themselves out of arrears once they have been unable to pay a quarterly bill. By lowering the threshold customers need to meet to request to be moved from quarterly to monthly bills, customers will more easily be able to move to more frequent bills and reduce their large debt exposure each quarter.

Consequently, whilst retailers will still be required to obtain customers explicit informed consent to move the customer from quarterly to monthly billing, they will be able to obtain it verbally, rather than in writing. If a customer later decides that monthly billing no longer suits their circumstances, they can simply request their retailer revert them back to a quarterly billing cycle. Given this fact, the Commission does not consider that adopting this NECF provision will result in a material reduction to consumer protections. To the contrary, we consider that it should assist customers to better manage their bills. It will also assist retailers to more quickly identify customers in hardship, as they will be made aware on a monthly, rather than quarterly, basis if a customer has been unable to keep up with their energy bill payments.

Further NERL requirements being included in draft ERC v11

Following its own review of the draft ERC v11, the Commission has also decided to include further NERL requirements regarding explicit informed consent into the draft

ERC v11. This decision was based on the fact that they are current NECF protections which are intended to apply in conjunction with the NERR (even though they sit in the NERL). These requirements are:

- that a customer provide explicit informed consent prior to entry by the customer into a market retail contract with the retailer (section 38 of the NERL);
- assessment of when there is considered to be no or defective explicit informed consent and the implications of there being no or defective explicit informed consent (section 41 of the NERL); and
- if sending notices and other documents under the draft ERC v11 electronically to a small customer, the small customer must have given explicit informed consent to receiving electronically the notice or other document (section 319 of the NERL).

DRAFT DECISION

The Commission proposes to amend the definition of *'explicit informed consent'* to:

- include a reference to "plain English" in subclause (1)(a);
- insert a new subclause 1(c) that states "the person is competent to do so"; and
- insert in subclause (2)(b) a prohibition on explicit informed consent being provided verbally for clause 20.

As a result of the amendments subclause (1)(c) would become subclause 1(d).

The Commission proposes to also add the following requirements:

- a new clause 3E outlining the requirements for when there is no or defective explicit informed consent;
- a new clause 3F stating that explicit informed consent is required from a small customer prior to a retailer being able to send notices and other documents required under the draft ERC v11 to the customer electronically; and
- a new subclause (4) to clause 16 stating that a small customer's explicit informed consent is required prior the customer entering into a market retail contract.

6.7 Aggregation of business customer site consumption – Clause 5

Under Victoria's regulatory framework, definitions of customers by consumption thresholds are contained in the Orders in Council. Therefore, the Commission considered it appropriate to delete clause 5 from the draft ERC v11.

Submission

AGL submitted that clause 5 should be retained as it was the right of business customers to agree to have their consumption from different sites aggregated in order to be treated as a large customer.[23]

Discussion

Part 1, Division 2 of the NERR (including section 5) deals with *'consumption threshold matter'*. Under this division, a retailer and business customer can agree that separate business premises should be aggregated for the purpose of determining whether the upper consumption threshold has been met. This is not provided for in the current Victorian regime. It would be a decision for Government rather than the Commission to adopt the NERR position, as customer definitions in Victoria are dealt with in Orders in Council and not in Commission instruments. The Commission considers that AGL's submission is a matter for Government policy and is outside the scope of the Commission's consultation.

DRAFT DECISION

The Commission proposes not to include clause 5 of the NERR in the draft ERC v11.

[23] AGL submission, p. 2.

7 CUSTOMER RETAIL CONTRACTS – PART 2

This chapter discusses the submission received on Part 2 – Customer Retail Contracts.

7.1 Terms and conditions of Market Retail Contracts – Clause 14

Clause 14 of the draft ERC v11 provides that:

> *"(1) The terms and conditions of a market retail contract are as agreed between the retailer and the small customer, except as provided by this Code.*
>
> *(2) Nothing in this Code prevents the inclusion in a market retail contract of a term or condition that is the same or substantially the same as a term or condition of standard retail contracts that is not otherwise applicable to market retail contracts."*

Submission

The Consumer Groups stated that the draft ERC v11 should adopt the formatting of the ERC v10 with regard to including an appendix listing the clauses that can be varied in the formation of a market retail contract.[24]

Discussion

The NERR approach is to deal with the applicability of a particular clause to a standard retail contract or a market retail contract on a clause by clause basis, rather than in an appendix.

Consistent with the Commission's stated approach, clause 14 has been drafted in accordance with the NERR. The Commission considers this to be appropriate and clear drafting, and hence does not agree with the Consumer Groups that an appendix is required.

DRAFT DECISION

The Commission proposes not to amend clause 14, or attach an appendix to the draft ERC v11.

[24] Consumer Groups submission, p. 8.

8 ENERGY PRICE AND PRODUCT DISCLOSURE – DIVISION 2A

This chapter discusses the submissions received in relation to Division 2A – Energy Price and Product disclosure of the draft ERC v11.

Division 2A of the draft ERC v11 incorporates the Commission's Guideline 19, which imposes obligations on retailers to publish standing offer and market contract tariffs and contract terms and conditions on their internet sites. It also requires retailers to provide specific information to the Commission.

A similar requirement is contained under sections 24 and 37 of the NERL, whereby retailers are required to present standing offer or market offer prices in accordance with the AER '*Retail Pricing Information Guidelines*'. Nevertheless, the Commission incorporated Guideline 19 into the draft ERC v11 in place of the AER requirements as the Commission and not the AER will continue to regulate this information until Victoria transitions to the NECF.

Submissions

The Consumer Groups submitted that this division required additional provisions describing the intent and authority of the Commission's powers, which was included under paragraph 1.2 of Guideline 19. The Consumer Groups also stated that the division should apply to both standing and market retail contracts.[25]

However, Origin considered the inclusion of Guideline 19 to be unnecessary and said that it would lead to greater administrative burden on retailers.[26] Origin said that instead the Commission should streamline with the AER's Guideline.

Discussion

The Commission's view is that Division 2A should apply to both standing offer and market contracts. Division 2A serves two purposes:

- it constitutes guidelines for the internet publication of standing offers for the purpose of section 35C of the EIA and section 42C of the GIA; and
- it constitutes guidelines for the internet publication of market contracts for the purpose of section 36A of the EIA and section 43A of the GIA.

[25] Consumer Groups submission, p. 8.
[26] Origin submission, p. 1.

Division 2A follows the approach and drafting of Guideline 19, in that it deals differently with the publication requirements for standing offers and market contract offers. In relation to standing offers, it requires these to be provided to the Commission in the manner set out in Schedule 4 and it requires the retailer's internet site to have a link to its standing offer. In relation to market contract offers, it requires retailers to prepare a Price and Product Information Statement and for the retailer's internet site to have a link to the statement.

The Commission is of the view that Guideline 19 and the draft ERC v11 should be interpreted as only requiring retailers to prepare Price and Product Information Statements in respect of market contract offers and not standing offers.

Consumer Groups also submitted that Division 2A required clear intent and authority, similar to that provided by clause 1.2 of Guideline 19. The Commission notes that the purpose and application of Division 2A is set out in clause 3B of the draft ERC v11. The Commission does not consider that further explanation is required.

In June 2013, the Commission released a draft decision paper for consultation regarding proposed amendments to Guideline 19 (refer to chapter 8.2 for further discussion on this issue). The proposed amendments would allow retailers to submit an Energy Price Fact Sheet as an alternative to a Price and Product Information Statement. The proposed amendments would alleviate Origin's concern regarding the greater administrative burden on retailers.

DRAFT DECISION

The Commission proposes not to amend Division 2A.

8.1 Internet publication of standing offer tariffs – Clause 15A

Under clause 15A of the draft ERC v11:

"(1) A retailer must:

(a) publish on its internet site details of its standing offers; and

(b) provide to the ESC details of its standing offer tariffs in the manner set out in Schedule 4.

(2) The home page of the retailer's principal internet site must have a link that allows a person to access the retailer's standing offer easily and logically."

Submissions

EWOV raised concern that retailers would not be required to publish their standing offer tariffs in the Government Gazette, as presently required under section 35(1)(a) of the EIA and section 42(1)(a) of the GIA. EWOV stated that publication was valuable for customers and EWOV to confirm applicable tariffs.[27]

The Consumer Groups identified the omission of the *'Residential (electricity standing offer)'* template from Schedule 4 and suggested that it should be included.[28]

Kevin McMahon raised concerns regarding the ability of customers to compare the supply charges being passed through by the retailers from the distributors. Mr McMahon raised concerns about retailers having the ability to "*mark up or down this price rather than being asked to reveal the proper cost, so as to pass through, unaltered (+GST)*."[29] Mr McMahon submitted that the price for distribution supply charges should be fixed in each '*zone*' that each of the distributors were responsible for.

Discussion

The obligation that retailers publish their standing offer tariffs in the Government Gazette is a legislative requirement, rather than a requirement determined by the Commission. In the draft ERC v11, the Commission did not include statutory obligations which apply to retailers on the basis that these obligations are set out in separate statutory instruments and therefore it was not necessary to replicate these in the draft ERC v11. The Commission notes that ERC v10 similarly does not include this statutory obligation.

The draft ERC v11 is not intended to be a comprehensive collection of all retailer obligations which are contained in a variety of instruments. Therefore, the Commission does not consider that this requirement should be included in the draft ERC v11.

However, the Commission agrees that the template for residential electricity standing offer has been omitted from Schedule 4 and should be included in Schedule 4 to the draft ERC v11.

Mr McMahon's submission is outside of the scope of this harmonisation exercise.

[27] EWOV submission, p. 3.
[28] Consumer Groups submission, p. 8.
[29] Kevin McMahon submission, p. 3.

DRAFT DECISION

The Commission proposes not to amend clause 15A.

The Commission proposes to amend Schedule 4 of the draft ERC v11 to include the template for residential electricity standing offer.

8.2 Relevant published offers (Price and Product Information Statements) – Clause 15B

Clause 15B of the draft ERC v11 specifies in detail the retailer's obligations to prepare a Price and Product Information Statement (**PPIS**) and ensure customers have easy access to its PPIS. Clause 15B also sets out the formatting requirements of the PPIS.

Submission

EnergyAustralia stated that the Retail Pricing Information Guideline specifies the requirements for Energy Price Fact Sheets (**EPFS**), including the formatting requirements, and recommended that the formatting requirements specified in the draft ERC v11 be aligned with those outlined in the AER's Guideline 4 to minimise the cost to retailers.[30]

Discussion

The Commission agrees with EnergyAustralia that our PPIS should be aligned with the AER's EPFS. In June 2013, the Commission released a draft decision paper for consultation regarding proposed amendments to Guideline 19. One proposed amendment would allow retailers to provide an EPFS as an alternative to a PPIS. A final decision is expected to be released in early August 2013. If Guideline 19 is amended, as part of the consultation, the changes will be incorporated into the draft ERC v11.

DRAFT DECISION

This issue is currently being consulted on with stakeholders.

[30] EnergyAustralia submission, p. 4.

9 PRE-CONTRACTUAL PROCEDURES – DIVISION 3

This chapter discusses the submissions received in relation to PART 2, Division 3 – Customer retail contracts – pre-contractual procedures.

9.1 Pre-contractual duty of retailers – Clause 16

When a small customer contacts a retailer seeking to purchase energy for the premises, subclause 16(2) of the draft ERC v11 provides that:

"[i]f the retailer is the designated retailer for the premises, the retailer:

(a) may elect to offer the customer a market retail contract; and

(b) must advise the customer of the availability of the retailer's standing offer".

Submission

The Consumer Groups recommended that the Commission redraft subclause 16(2) to require retailers to first offer a standing offer to a domestic or small business customer. The Consumer Groups also submitted that retailer obligations regarding making a standing offer must continue even when a retailer offers a customer a market retail contract, and retailers should have to inform customers about the differences between a standing offer and a market retail contract.[31]

Consumer Groups also stated that a deemed offer was essentially a standing offer, and standing offer terms should be comprehensive.[32]

Discussion

Clause 16 of the draft ERC v11 requires retailers to offer to supply and sell electricity to domestic or small business customers in accordance with the retailer's standing offer as outlined in section 35 of the EIA and section 42 of the GIA. There is no requirement under section 35 of the EIA or section 42 of the GIA to inform customers of the customer protections under a standing offer as opposed to a market retail contract. The Commission disagrees that retailers should be required to offer customers both types of contracts, as Victoria is a deregulated market and customers have the choice to request the information which relates to their individual circumstances.

[31] Consumer Groups submission, pp. 8-9.
[32] Consumer Groups submission, p. 4.

Consistent with the Commission's stated approach, clause 16 has been drafted in accordance with the NERR and is in line with current EIA and GIA provisions.

The Commission has identified that section 38(b) of the NERL, which requires that a customer provide its explicit informed consent prior to its entry into a market retail contract, should be incorporated in the draft ERC v11. The Commission has amended clause 16 to insert a new subclause (4) as follows:

> *A retailer must obtain the explicit informed consent of a small customer for the entry by the customer into a market retail contract with the retailer.*

DRAFT DECISION

The Commission proposes not to amend clause 16(2).

The Commission proposes to insert a new subclause 16(4) incorporating the requirements of section 38(b) of the NERL.

9.2 Pre-contractual request to designated retailer for sale of energy (SRC) – Clause 18

The Commission received submissions in relation to subclauses 18(4) and 18(5) of the NERR. However, only subclause 18(5) of the NERR was included in the draft ERC v11.

Subclause 18(5) states that:

> *"[t]he designated retailer may include in the charges under the standard retail contract any outstanding amounts owed by the small customer to the retailer from an unpaid account (excluding unpaid amounts for premises for which the customer has an ongoing customer retail contract)."*

Subclause 18(4) of the NERR requires a small customer to provide his/her name, acceptable identification and contact details for billing purposes. The customer is also required to ensure that there is safe and unhindered access to the meter at the customer's premises.

Submissions

Simply Energy raised concern about the implications of deleting subclause 18(4) from the draft ERC v11. According to Simply Energy, without an equivalent to subclause (4), a retailer:

- cannot disconnect the customer for not providing the specified information;
- could be supplying energy to a premises where the customer has not been properly identified;
- would not be able to effectively bill the customer; and
- cannot verify that the customer has moved premises and may commence debt recovery against the wrong customer.[33]

The Consumer Groups and EWOV also made submissions regarding subclause 18(5) of the draft ERC v11. The Consumer Groups stated that the designated retailer should offer a payment plan when including charges under the standard retail contract for outstanding amounts owed from an unpaid account. They said that if a customer in debt was not offered a payment plan, the customer may commence a new contract carrying over the debt from the previous account.[34]

When read with clause 111 of the draft ERC v11 (which allows a retailer to disconnect a customer for non-payment of a bill), EWOV considered that subclause 18(5) of the draft ERC v11 enabled a retailer to disconnect a customer for debt incurred at a previous premises, which was prohibited under ERC v10. EWOV requested that this prohibition be retained under the draft ERC v11.[35]

Discussion

Clause 18 of the draft ERC v11 was amended in order to align the NERR requirement with the provisions of the ERC v10. Subclause 18(4) of the NERR relates to pre-conditions to the formation of a standard retail contract which are not provided for in the ERC v10. Subclause 18(4) of the NERR also relies for effectiveness on section 26 of the NERL which is not applicable in Victoria. Accordingly, this provision was removed from the draft ERC v11.

The Commission disagrees with Simply Energy's submission. Clause 112 of the draft ERC v11 was amended to allow a retailer to de-energise a customer's premises if the customer refuses to provide acceptable identification.

Further, the Commission does not agree with the Consumer Groups submission regarding access to payment plans under the draft ERC v11. In the Commission's opinion, a residential customer's right to access *'payment plans'* under the draft ERC v11 is substantially equivalent to a customer's right to access an *'instalment plan'* under the ERC v10. Under the draft ERC v11, a financial hardship customer or a customer who is experiencing '*payment difficulties'* is entitled to a payment plan for any amount owing to a retailer. Please see our discussion at chapter 6.5 of this Paper for our detailed response to this issue.

[33] Simply Energy submission, pp. 2-3.
[34] Consumer Groups submission, p. 9.
[35] EWOV submission, p. 13.

Consistent with the Commission's stated approach, subclause 18(5) has been drafted in accordance with the NERR. The Commission acknowledges that customers are able to be de-energised for non-payment of arrears relating to other premises under clause 111 of the draft ERC v11, which is a change from the ERC v10. However, given the protections in the draft ERC v11 for customers experiencing financial hardship or '*payment difficulties'*, the Commission considers that this change is appropriate. Please see chapter 18.2 for further discussion on a retailer's ability to de-energise for non-payment of a bill.

DRAFT DECISION

The Commission proposes not to include subclause 18(4) of the NERR in the draft ERC v11, and proposes not to amend subclause 18(5).

9.3 Responsibilities of designated retailer in response to request for sale of energy (SRC) – Subclause 19(1)

Under subclause 19(1) of the draft ERC v11, a designated retailer must provide the following information to a customer requesting the sale of energy:

"(a) a description of the retailer's standard retail contract that is formed as a result of the customer accepting the standing offer and how copies of the contract may be obtained;

(b) a description of the retailer's and customer's respective rights and obligations concerning the sale of energy under the Electricity Industry Act or Gas Industry Act, as applicable, and this Code, including the retailer's standard complaints and dispute resolution procedures;

(c) information about the availability of government funded energy charge rebate, concession or relief schemes;

(d) information in community languages about the availability of interpreter services for the languages concerned and telephone numbers for the services."

Submission

The Consumer Groups requested that subclause 19(1) be redrafted so that the designated retailer would be required to provide the customer with a copy of the

standing offer, a copy of the ERC (if the customer requests one) and information on how to access rebates and concessions as reflected in clause 26 of the ERC v10.[36]

Discussion

Consistent with the Commission's stated approach, clause 19 has been drafted in accordance with the NERR. The Commission considers this drafting to be appropriate and has not seen any convincing reason as to why it should be amended. The Commission notes that the ERC is a publicly available document which can be downloaded from the Commission's website, if required by a customer.

DRAFT DECISION

The Commission proposes not to amend clause 19.

[36] Consumer Groups submission, p. 9.

10 BILLING – DIVISION 4

This chapter discusses the submissions received in relation to Part 2, Division 4 – Customer retail contracts – billing.

10.1 Basis for bills (SRC and MRC) – Clause 20

Under clause 20 of the draft ERC v11, a retailer is required to base a customer's bill for consumption of electricity or gas on:

- metering data obtained from the meter at the customer's premises, or
- any other method agreed on with the customer.

In addition, when billing a customer for consumption of gas, the retailer may also base the bill on an actual reading of the meter or an estimation of the customer's consumption.

Subclause 20(3) stipulates that if there is no meter at the customer's premises:

> *"the retailer must base the customer's bill on energy data that is calculated in accordance with applicable energy laws."*

Submissions

The Consumer Groups raised concern that the customer's explicit informed consent was not required if the bill was to be based on a method that was not based on an actual meter reading. Consumer Groups considered that this was a reduction in consumer protection under the draft ERC v11 and suggested that the clause be redrafted so that a retailer must obtain the customer's explicit informed consent.[37]

EWOV observed that the basis of billing a customer for electricity consumption was different to that for gas.[38] EWOV also raised concern that subclause (3) specified a different basis of billing for customers with no meter at the premises and sought clarity on when this situation would arise.[39]

Discussion

The Commission can confirm that the different basis of billing a customer set out in subclause 20(1) is not the result of an error or omission. Subclause 20(1) has been drafted in accordance with the NERR.

[37] Consumer Groups submission, pp. 9-10.
[38] EWOV submission, p. 5.
[39] EWOV submission, p. 6.

The Commission acknowledges that a customer's explicit informed consent is currently not required under clause 20 if a customer's bill is based on a method other than an actual meter read. As advised above in chapter 6.6 of this Paper, after consideration of the submissions received and with the introduction of flexible pricing, the Commission has decided to amend subclauses 20(1)(a)(ii) and 20(1)(b)(iv) of the draft ERC v11 to require that a customer provide their explicit informed consent to their bill being based on anything other than a meter read.

EWOV has submitted that the circumstances in which subclause 20(3) of the draft ERC v11 is applicable is unclear and queried whether this subclause would apply in circumstances where a site has multiple dwellings.

Subclause 20(3) of the draft ERC v11 adopts the NERR drafting and provides that:

> *"[d]espite subclauses (1) and (2), if there is no meter in respect of the customer's premises, the retailer must base the customer's bill on energy data that is calculated in accordance with applicable energy laws."*

This subclause is, in the Commission's view, intended to apply to circumstances where there was an unmetered supply of energy to a customer's premises. In relation to premises on which there was one meter but multiple dwellings, these circumstances are regulated separately through a general exemption order made under section 17 of the EIA. The ERC v10 does not deal with these circumstances. The Commission considers that the draft ERC v11 reflects the current regulatory arrangements.

DRAFT DECISION

The Commission proposes to amend subclause 20(1)(a)(ii) and 20(1)(b)(iv) to require the customer's explicit informed consent prior to the customer entering into a market retail contract with the retailer.

10.2 Bulk hot water charging – Clause 20A

Clause 20A of the draft ERC v11 requires retailers to charge customers for delivery of gas or electric bulk hot water according to a detailed formula specified in Schedule 6 of the draft ERC v11, and to include certain information on the customer's bill.

Submission

Kevin McMahon has made various submissions regarding bulk hot water charging. Amongst other things, Mr McMahon's submission is that the bulk hot water charging

arrangements are unfair, do not reflect the Australian Consumer Law, and result in the customer of the bulk hot water being disadvantaged.

In his submission, Mr McMahon has raised issues relating to bulk hot water under the following specific headings:

- Not the sale of goods;
- Ascertainment;
- The valuable consideration and authority;
- Breach of privacy;
- Profiteering;
- Deeming rate;
- Others abandoned by the Commission;
- Nomenclature and lexicon under the NERL and who is the customer;
- Electric bulk hot water;
- Gas hot water supply charges – consumption supply charges;
- Shared supply charge is unfair; and
- Unregulated pass-through – non-consumption costs.

Discussion

The Commission indicated in the Consultation Paper that the requirements for retailers to bill for bulk hot water in accordance with a specified formula would be maintained in the draft ERC v11. The Commission has included bulk hot water charging in clause 20A consistent with Government policy.

As previously stated, the Commission will not re-litigate matters of stated Government policy. Furthermore, it is the Commission's opinion that the arrangements relating the bulk hot water charging are appropriate.

DRAFT DECISION

The Commission proposes not to amend clause 20A.

10.3 Estimation as basis for bills (SRC and MRC) – Clause 21

The Commission received submissions on subclauses 21(1) and 21(4).

Subclause 21(1) states that:

> *"[a] retailer may base a small customer's bill on an estimation of the customer's consumption of energy where:*

(a) the customer consents to the use of estimation by the retailer; or

(b) the retailer is not able to reasonably or reliably base the bill on an actual meter reading; or

(c) metering data is not provided to the retailer by the responsible person."

Under subclause 21(4):

"… if the retailer has issued the small customer with a bill based on an estimation and the retailer subsequently issues the customer with a bill that is based on an actual meter reading or on metering data:

(a) the retailer must include an adjustment on the later bill to take account of any overcharging of the customer that has occurred; and

(b) unless the actual meter reading or metering data could not be obtained as a result of an act or omission by the customer, the retailer must, if requested to do so by the customer, offer the customer time to pay any undercharged amount by agreed instalments, over a period being no longer than:

(i) the period during which an actual meter reading or metering data was not obtained, where that period is less than 12 months; or

(ii) in any other case, 12 months."

Submissions

The Consumer Groups raised concern that retailers were not required to obtain a customer's explicit informed consent to be billed based on estimation. Under subclause 21(1)(a) of the draft ERC v11, retailers only require the customer's consent. The Consumer Groups considered this a reduction in consumer protection.[40]

The Consumer Groups also submitted that retailers should be required to regularly ensure their bills were based on an actual meter reads as in a smart meter environment, it should be easy for retailers to comply with such an obligation.[41]

The Consumer Groups also raised concern that subclause 21(4)(b) placed the onus on the customer to request the retailer for more time to pay an undercharged bill. Under

[40] Consumer Groups submission, p. 10.
[41] Consumer Groups submission, p. 10.

the ERC v10, retailers were required to offer customers time to pay the undercharged amount.[42]

EWOV also expressed concern that the draft ERC v11 would not provide customers with at least equal time to pay an undercharged amount. Rather, customers were limited to a maximum of 12 months to repay the amount, which does not factor in individual circumstances.[43] EWOV recommended that this clause be amended so that customers had at least equal time to pay an undercharged amount when they entered into a payment plan with their retailer.

Discussion

Following the Commission's consideration of the submissions and the introduction of flexible pricing, the Commission has decided to amend subclause 21(1)(a) to require retailers to obtain a customer's explicit informed consent prior to basing their bill on estimation. The Commission will amend subclause 21(1)(a) as follows:

> *"the customer gives their explicit informed consent to the use of estimation by the retailer*".

The Commission also notes that under the draft ERC v11 retailers are required to use "*their best endeavours to ensure that actual readings of the meter are carried out as frequently as is required to prepare its bills consistently with the metering rules*". As such, retailers are required to regularly ensure that their bills are based on actual meter reads.

The Commission acknowledges that certain customers who are at fault and have been undercharged for a period longer than 12 months will have a reduced amount of time to pay their debt. However, consistent with the Commission's stated approach, subclause 21(4)(b) has been drafted in accordance with the NERR provisions. Further, the Commission considers that as clause 30 allows customers who are not at fault to have at least equal time to pay any undercharged amount, there is no basis for amending subclause 21(4) of the draft ERC v11.

The Commission also notes that subclause 30(2)(d) of the draft ERC v11 requires that a retailer "*offer the customer time to pay that amount by agreed instalments*". Therefore, retailers are required to offer a customer time to pay any undercharged amount.

[42] Consumer Groups submission, p. 10.
[43] EWOV submission, p. 5.

DRAFT DECISION

The Commission proposes not to amend subclause 21(1)(a) to require a customer's explicit informed consent prior to basing the customer's bill on estimation.

10.4 Frequency of bills (SRC) – Clause 24

Under clause 24 of the draft ERC v11:

"(1) A retailer must issue bills to a small customer:

(a) subject to paragraph (b), at least once every 3 months; and

(b) in the case of gas, at least once every 2 months in relation to the period up to 31 December 2013.

(2) A retailer and a small customer may agree to a billing cycle with a regular recurrent period that differs from the retailer's usual recurrent period where the retailer obtains the explicit informed consent of the small customer. Under the agreement the retailer may impose an additional retail charge on the customer for making the different billing cycle available."

Submission

The Consumer Groups stated that subclause 3.1(c) of the ERC v10, which specifies the billing frequency for dual fuel customers, was not included in clause 24 of the draft ERC v11. The Consumer Groups further stated that the *'additional retail charge'* was not defined in the definitions section of the draft ERC v11.[44]

As outlined above in chapter 6.6, Consumer Groups have also raised concern that the prohibition on a customer providing verbal explicit informed consent when agreeing to a shortened billing cycle (currently provided for in the ERC v10) has not been carried over in the draft ERC v11.[45]

Discussion

The position adopted by the Commission was that there was no requirement to maintain separate dual fuel provisions in the draft ERC v11 and that the NERR drafting should be used. The NERR drafting does not provide for separate dual fuel provisions,

[44] Consumer Groups submission, pp. 10-11.
[45] Consumer Groups submission, p 2.

other than in clause 117 which relates to the timing for de-energisation of dual fuel contracts.

The Commission notes that DSDBI has confirmed to the Commission separate provisions for dual fuel customers would not be retained once Victoria transitioned to the NECF.

In response to the Consumer Groups submission that *'additional retail charge'* is not defined in the definitions section of the draft ERC v11, the Commission notes that clause 35A of the draft ERC v11 incorporates both the definition of *'additional retail charge'* and clause 30 from the ERC v10. The Commission will not separately define *'additional retail charge'* in the definitions section of the draft ERC v11.

The Commission has already responded to Consumer Groups submission regarding the prohibition of a customer providing verbal explicit informed consent contained at chapter 6.6 above. Please see that chapter for further discussion.

DRAFT DECISION

The Commission proposes not to amend clause 24.

10.5 Contents of bills – Clause 25

Clause 25 of the draft ERC v11 specifies the information that must be included in a customer's bill. This information includes:

- the customer's name and account number;
- the meter identifier;
- the billing period;
- the pay-by date for the bill and the bill issue date;
- the total amount payable by the customer;
- the tariffs and charges applicable to the customer;
- whether the bill was issued as a result of a meter reading;
- meter readings at the start and the end of the billing period; and
- average daily consumption during the billing period.

Submissions

Origin submitted that subclause 25(1)(o), which requires that bill benchmarking information be included in reminder notices and electricity bills, was better placed

under subclause 109(2) of the draft ERC v11. Subclause 109(2) specifies the information that a retailer must include on a reminder notice.[46]

Origin also pointed out that subclause 25(1)(y)(iv) (subclause 25(1)(y) relates to information for customers with smart meters) referred to gas consumed. The smart meter functionality, however, does not include the reading of gas meters.[47]

The other stakeholders who provided detailed comments on this clause were the Consumer Groups, who raised the following concerns:

- the draft ERC v11 does not contain an equivalent provision to:
    - subclause 4.2(g) of ERC v10, which requires a bill to include the total amount of electricity or gas or both consumed;
    - subclause 4.2(i) of ERC v10, which ensures that if the retailer directly passes through a network charge, to indicate the separate amount of the network charge;
    - subclause 4.3 of ERC v10, requiring retailers to provide customers with information on network, retail and other charges in the amount payable under the customer's bill;
    - subclause 4.4 of ERC v10, which stipulates the information that is to be graphically presented;
- it is unclear whether subclauses 25(1)(g) and (h), which refer to tariffs and charges and the basis on which tariffs and charges are calculated, includes flexible pricing;
- subclause 25(1)(o) should be amended to read *"where the bill is a reminder notice and an electricity bill";*
- subclause 25(1)(r) refers to payment methods, whereas subclause 4.2(m) of the ERC v10 requires a bill to have *"a summary of payment methods and payment arrangement options";*
- subclause 25(1)(s) requires retailers to only *"reference the availability of government funded energy charge rebate, concession or relief schemes"* whilst subclause 4.2(n) of the ERC v10 requires the details of the availability of concessions;
- subclause 25(1)(y) mentions *'index read'*, but this term is not defined in the draft ERC v11; and
- subclause 25(2) requires a bill to include amounts billed for goods and services (other than the sale and supply of energy) in a separate bill or as a separate item in an energy bill. Whilst similar to subclause 4.2 of ERC v10, subclause 4.2 states that if directed by the customer, a retailer is to apply the payment to the charges for the supply or sale of energy before applying any part of it to the other goods

[46] Origin submission, p. 2.
[47] Origin submission, p. 2.

and services. The Consumer Groups considered the potential for payments to be directed to non-usage costs may contribute to customers entering a debt spiral.[48]

Discussion

The Commission will address each issue in turn.

In relation to Origin's submission, section 40R of the EIA requires that, as a condition of its licence, a retailer must *'provide bill benchmarking information'* to a customer (or include information concerning greenhouse gas emissions in each bill). The EIA defines *'provide'*, in relation to bill benchmarking information, as including in, or accompanying, *'a bill issued for the supply or sale of electricity to a residential customer'*. Electricity bill means *'a bill or account issued by a licensee to a customer for the supply or sale of electricity'*. Based on these definitions, it is not immediately clear whether reminder notices constitute bills under the EIA. However, leaving aside the definitional issue, the Commission notes that if reminder notices did constitute bills, then reminder notices would need to include all other information in subclause 25(1) and, consequently, section 109 would be redundant.

In light of the practical consequences which arise from including the reference to reminder notices in subclause 25(1)(o), the Commission will delete the words *'reminder notices and*' from the beginning of subclause 25(1)(o) under the draft ERC v11.

The Commission agrees with the Consumer Groups' submission that a definition of *'index read'* should be included in the draft ERC v11.

The Consumer Groups submitted that there is no equivalent to subclause 4.2(i) of the ERC v10 in the draft ERC v11. Subclause 4.2(i) of the ERC v10 provides that if the retailer directly passes through a network charge, the retailer must include the separate amount of that network charge in a customer's bill. There is no direct equivalent to subclause 4.2(i) of the ERC v10 in the draft ERC v11. Subclause 4.2(i) was omitted from the draft ERC v11 for consistency with the NERR (which does not include an equivalent clause) and on the basis of the view that matters covered by subclause 4.2(i) were adequately addressed by 25(1)(h) of the NERR which requires retailers to specify the basis on which tariffs and charges are calculated. Therefore, the Commission does not consider it necessary for this clause to be included in the draft ERC v11.

Subclause 25(1)(y) of the draft ERC v11 deals with matters which must be included in a customer's bill in relation to smart meters. Subclause 25(1)(y) was added to the draft ERC v11 to incorporate subclause 4.2(h) of the ERC v10 which deals with smart meters which are not provided for in the NERR. The position adopted by the Commission was that all provisions relating to smart meters were to be included in the

[48] Consumer Groups submission, pp. 11-12.

draft ERC v11. The Commission does not consider the clause to be redundant, as it will have ongoing operation as smart meters are rolled out in Victoria.

The Commission will also make the following amendments:

- subclause 25(1)(y)(iv) – the Commission will remove the words "*or gas (in MJ) or of both*";
- subclause 25(1)(j) – the Commission will amend to clarify that subclause 25(1)(j) is subject to subclause 25(1)(y); and
- subclause 25(1)(y) – the Commission will delete the words *'from 1 July 2012'* in sub-paragraph (y)(ii).

The Commission will also add a note after clause 25 stating that additional obligations in relation to the provision of metering information to customers are contained in the Electricity Metering Code.

DRAFT DECISION

The Commission proposes to:

- delete the words *'reminder notices and'* from the beginning of subclause 25(1)(o);
- add a definition of *'index read*' to the draft ERC v11;
- amend subclause 25(1)(y)(ii) to delete the words *'from 1 July 2012'*;
- amend subclause 25(1)(y)(iv) to delete the words *'or gas (in MJ or of both)'*;
- amend subclause 25(1)(j) to clarify that subclause 25(1)(j) is subject to subclause 25(1)(y);
- not incorporate subclause 4.2(i) of the ERC v10 into the draft ERC v11; and
- insert a note regarding additional obligations in the Electricity Metering Code.

10.6 Greenhouse Gas Disclosure on customers' bills – Clause 25A

Clause 25A of the draft ERC v11 sets out the minimum information that must be included in a customer's bill regarding greenhouse gas disclosure, including:

- the amount of disclosable emissions;
- information which must be represented by a graph;
- the website address: www.climatechange.vic.gov.au;

It also sets out the retailer's requirements for meeting the obligations outlined in this clause.

Clause 25A also states information that will be provided to the retailers by the Commission and defines some of the words used in the clause.

Submissions

EnergyAustralia submitted that the inclusion of Guideline 13 in the draft ERC v11 was a concern as it *"… codifies the requirement for a greenhouse gas emissions graph*" while leaving the benchmarking information as an option, which EnergyAustralia stated was inconsistent with DSDBI's preference and the NECF requirement for retailers to provide benchmarking information.

AGL also submitted that "*in embedding the requirement for greenhouse gas disclosure in the ERC may result in the unintended consequence that Greenhouse Gas graphs become mandatory. This would be untenable."*

Clean Energy Council stated that clause 25A should be retained in the draft ERC v11 as customers were not merely motivated by monetary factors, but should be informed about the "*… full benefits of clean energy*".

The Consumer Groups suggested that clause 25A "*should reflect the updated version of Guideline No 13 which is dated January 2013*" and stated that there are incorrect references to the following:

- the figures in Schedule 7 and the website listed in subclause 25(1)(d);
- Sustainability Victoria (**SV**); and
- SV and other authorities (referred to in the definition of '*green power*').

The Consumer Groups also raised concern that "*Commission*" was not defined.

EWOV recommended that for reader ease the definitions should be at the beginning of the clause, as opposed to the end.

Northern Alliance for Greenhouse Action submitted that the requirement for greenhouse gas emissions information on customers' bills should be retained in the draft ERC v11 because the data "*… effectively and explicitly links electricity consumption with the product choices and consumer impacts, which are not reflected in … consumption alone*", and the disclosure assists customers to understand how their consumption impacts climate change.

Origin stated that the word *'electricity'* should be inserted in front of *'bill'* under subclause 25A(1).

Simply Energy queried whether the Commission had the power to include obligations for DSDBI and SV in subclauses 25A(3), (4) and (5), and stated that these subclauses were redundant.

Discussion

Clause 25(1)(o) requires that bill benchmarks be included on bills to the extent required by section 40R of the EIA. Section 40R of the EIA is a deeming provision which provides that a licence to sell electricity is deemed to include a condition requiring the licensee to include information in a customer's bill relating to greenhouse gas emissions, *or* provide bill benchmarking information to a customer.

It seems that whilst in practice the Commission has always allowed retailers to include *either* bill benchmarking *or* greenhouse gas emissions on customers' bills, Guideline 13 was drafted in such a way to imply that a retailer *must* include both greenhouse gas information and bill benchmarking information to customers. As clause 25A is based on the Commission's Guideline 13, clause 25A also appears to imply this requirement. In order to remedy this issue, the Commission will insert a new subclause 25A(2) into the draft ERC v11, and amend subclause 25A(3) to clearly state the option envisaged in section 40R of the EIA. These amendments should alleviate AGL and EnergyAustralia's concerns.

The Commission also agrees with the Consumer Groups' submission that clause 25A does not reflect the current version of Guideline 13, which is dated January 2013, and will amend the clause accordingly. Guideline 13 was amended in January 2013 to remove SV's obligations outlined in paragraph 3.2. As such, SV no longer has any obligations under Guideline 13, and all references to SV will be removed from clause 25A of the draft ERC v11. The Commission will also redraft subclause 25A(8) to ensure the requirements of the subclause are clear.

DSDBI is now responsible for the climate change website and the address that must be included on the customer's bill is www.switchon.vic.gov.au. The draft ERC v11 will be amended accordingly.

The Commission agrees with EWOV's submission and will also amend clause 25A so that the definitions are at the beginning of the clause.

The Commission agrees with Origin's suggestion that inserting the word *'electricity'* under subclause (1) would clarify the clause, and will amend subclause (1).

In response to Simply Energy's submission, the Commission will include a note at the end of clause 25A that states:

"Neither the Commission nor this Code can bind DSDBI in the discharge of its functions, however, subclauses (4) and (5) have been included following consultation with DSDBI to properly inform retailers and customers of the role which DSDBI proposes to undertake in the scheme for increasing customer awareness through electricity bills which is set out in this Code".

DRAFT DECISION

The Commission proposes to amend clause 25A to reflect the current version of Guidelines 13 dated January 2013, remove all references to SV, and move the definitions section to the beginning of this clause.

The Commission proposes to insert a new subclause 25A(2) which clearly provides an option to include greenhouse gas information or bill benchmarking in a customer's electricity bill.

The Commission proposes to amend subclause 25A(3) to state the information a retailer must include, if it decides to include greenhouse gas information.

The Commission proposes to amend subclause 25A(8) to ensure the requirements of the subclause are clear.

The Commission proposes to amend 25A(1)(d) to reference the website **www.switchon.vic.gov.au.**

The Commission proposes to insert a note at the end of clause 25A clarifying that the Commission cannot bind the DSDBI.

10.7 Pay-by date (SRC) – Clause 26

Under subclause 26(1):

> *"The pay-by date for a bill must not be earlier than 13 business days from the bill issue date."*

Subclause 26(3) states that this clause does not apply to market retail contracts.

Submission

EWOV raised concern that the application of this clause only applied to standard retail contracts. EWOV stated that would *"mean that the pay-by date timeframe for market customers will need to be stipulated in their contract and may be substantially different to the current timeframe and standard customer timeframe under the draft ERC"*.[49]

[49] EWOV submission, p. 13.

Discussion

The Commission acknowledges that pay-by date requirements outlined in clause 26 of the draft ERC v11 do not apply to market retail contracts. Consistent with the Commission's stated approach, clause 26 has been drafted in accordance with the NERR and the Commission considers the NERR drafting and timeframes to be appropriate.

DRAFT DECISION

The Commission proposes not to amend clause 26.

10.8 Apportionment (SRC) – Clause 27

Clause 27 applies only to standard retail contracts and stipulates that:

> *"[i]f a bill includes amounts payable for goods and services other than the sale and supply of energy, any payment made by a small customer in relation to the bill must be applied firstly in satisfaction of the charges for the sale and supply of energy, unless:*
>
> *(a) the customer otherwise directs; or*
>
> *(b) another apportionment arrangement is agreed to by the customer."*

Submissions

The Consumer Groups and EWOV raised concern that clause 27 applied only to standard retail contracts, whereas the equivalent provisions in the ERC v10 (clause 4.5 and subclause 4.6(b)) applied to both standard and market retail contracts.

EWOV stated that if payments were not allocated first to the sale and supply of energy, the payments may be allocated to other goods and services, which could result in customers being threatened with de-energisation for non-payment of an energy bill, if the payment is applied to other goods or services.[50]

Discussion

The Commission acknowledges that, under the draft ERC v11, the apportionment clause only applies to standard retail contracts and leaves retailers and customers to agree on an appropriate apportionment provision for market retail contracts. This is a

[50] EWOV submission, p. 4.

change from the requirements of the ERC v10 where the apportionment clause applied to both standard retail contracts and market retail contracts.

However, consistent with the Commission's stated approach, clause 27 has been drafted in accordance with the NECF provisions, as provided for in Government policy. The Commission considers the current drafting of clause 27 to be appropriate and that there is no convincing reason to amend the clause.

DRAFT DECISION

The Commission proposes to not amend clause 27.

10.9 Historical billing information (SRC and MRC) – Clause 28

Clause 28 sets out the obligations on retailers to provide customers with their historical billing data when requested:

"(1) A retailer must use its best endeavours to provide historical billing and metering data to a small customer for the previous 2 years within 10 business days of the customer's request, or such other period they agree.

(2) Historical billing data provided to the small customer for the previous 2 years must be provided without charge, but data requested for an earlier period or more than once in any 12 month period may be provided subject to a reasonable charge.

(2A) If a customer with a smart meter makes a request for historical billing information, a retailer must provide interval data electronically, or by some other form, in a way which makes the information understandable or accessible to the customer."

Submissions

The Consumer Groups raised concern that, when compared to clause 27 of the ERC v10, clause 28 of the draft ERC v11 would significantly restrict customers' access to their historical billing and metering data. For instance:

- the ERC v10 limits customers' access to data from the previous two years only if the customer has transferred to another retailer and requests metering data from the previous retailer;
- use of the term '*historical billing information*' under subclause 28(2A) of the draft ERC v11 implies that the clause does not apply to metering data;

- the ERC v10's prohibition on retailers charging customers for the data required for handling a customer's complaint is not reflected in clause 28 of the draft ERC v11; and
- the ERC v10's requirement on retailers to retain a customer's billing data even after the contract has ended, which is important for resolving disputes between customers and their previous retailers, is also not reflected under this clause of the draft ERC v11.[51]

Simply Energy also provided a submission on clause 28, stating that it considered the retailer's obligation under subclause 28(1) to provide billing and/or metering data to customers within 10 business days to be unreasonable. Simply Energy submitted that retailers relied on distributors to provide the data in a timely manner. Without similar obligations on distributors, it may require more than 10 business days for retailers to meet a customer's request. Simply Energy suggested that the Commission either remove the timeframe, or impose an obligation on distributors to provide retailers with the requested data within 5 business days of the customer's initial request.[52]

Discussion

The Commission acknowledges that the requirements of subclauses 27(1) and 27(2)(b) and (d) of the ERC v10 are not reflected in the draft ERC v11. However, consistent with the Commission's stated approach, clause 28 has been drafted in accordance with the NERR provisions to the extent possible. The Commission considers the current drafting is appropriate and has not been persuaded to deviate further from the national provision. The Commission has also considered clause 28 in light of the introduction of flexible pricing in Victoria and determined that the clause will not be affected by the new flexible pricing environment.

The timeframe outlined in subclause 28(1) of the draft ERC v11 has been amended to reflect the current timeframe provided for under subclause 27.2(c) of the ERC v10. In the Commission's opinion, this is appropriate given that retailers are currently working under this timeframe and should have processes in place to assist with meeting this timeframe.

The Commission does acknowledge a drafting error in subclause 28(2A) where the term *'historical billing information'* is used instead of the term used by NERR *'historical billing data'*. The Commission will amend the draft ERC v11 to refer to '*historical billing data'* for consistency with the related provisions. In light of the submission from the Consumer Groups, the Commission will also amend subclause 28(2A) to include a reference to '*metering data',* in addition to the reference to '*historical billing data*'.

[51] Consumer Groups submission, pp. 13-14.
[52] Simply Energy submission, p. 3.

DRAFT DECISION

The Commission proposes to amend subclause 28(2A) to refer to '*historical billing data or metering data*'.

10.10 Billing disputes – Clause 29

Retailers have an obligation under this clause to review a bill when requested by a customer. Subclause (2) requires a retailer to:

> *"conduct the review in accordance with the retailer's standard complaints and dispute resolution procedures"*.

The retailer is required under subclause (3) to inform the:

> *"customer of the outcome of the review as soon as reasonably possible but, in any event, within any time limits applicable under the retailer's standard complaints and dispute resolution procedures."*

Submissions

Rather than referring to the retailer's standard complaints and dispute resolution procedures, the Consumer Groups suggested that subclauses (2) and (3) should be amended to refer to the relevant Australian Standards on Complaints Handling.[53]

Consumer Groups, EWOV, Origin and Simply Energy all suggested that subclause 29(5)(c) should be amended to provide that the customer should not have to pay for the cost of the test if the meter or metering data is proved to be faulty or incorrect.

Discussion

Consistent with the Commission's stated approach, subclauses 29(2) and (3) have been drafted in accordance with the NERR.

The Commission acknowledges drafting errors in subclauses 29(5)(b) and (c) of the draft ERC v11. Subclause 29(5)(b) should state:

> *"subject to paragraph (c), the customer must pay for the cost of the check or test (which the retailer may not request be paid in advance); and"*

[53] Consumer Groups submission, p. 14.

Subclause 29(5)(c) should state:

> *"if the meter or metering data proves to be faulty or incorrect, the customer must not be required to pay the cost of the check or test."*

Subclause 26(6)(b)(iii), which states that the retailer must refund to the customer any amount paid in advance if the test shows the meter reading was incorrect, will be deleted, as the retailer is not able to request the payment in advance under the draft ERC v11.

The Commission will also add a note after subclause 29(5) stating that additional obligations in relation to the meter testing are contained in the *Electricity Metering Code*.

DRAFT DECISION

The Commission proposes to:

- amend subclauses 29(5)(b) and (c) to not allow retailers to charge customers for the cost of the meter check or test if the meter is faulty or incorrect,
- delete subclause 26(6)(b)(iii) (which deals with refunding money if the meter is faulty, as retailers cannot request payment in advance under the draft ERC v11), and
- add a note after subclause 29(5) regarding additional obligations relating to meter testing.

10.11 Undercharging (SRC and MRC) – Clause 30

Under clause 30 of the draft ERC v11:

> *"(1) Subject to subclause (2), where a retailer has undercharged a small customer, it may recover from the customer the amount undercharged.*
>
> *(2) Where a retailer proposes to recover an amount undercharged the retailer must:*
>
> *(a) unless the amount was undercharged as a result of the small customer's fault or unlawful act or omission, limit the amount to be recovered to the amount undercharged in the 9 months before the date the customer is notified of the undercharging; and*
>
> *(b) not charge the customer interest on that amount; and*

(c) state the amount to be recovered as a separate item in a special bill or in the next bill, together with an explanation of that amount; and

(d) offer the customer time to pay that amount by agreed instalments, over a period nominated by the customer being no longer than:

(i) the period during which the undercharging occurred, if the undercharging occurred over a period of less than 12 months; or

(ii) 12 months, in any other case.

(2A) If during the period that a retailer has undercharged a customer the customer's tariff changes, the retailer must charge the customer at the original and changed tariffs in proportion to the relevant periods during which the original and changed tariffs were in effect."

Submission

The Consumer Groups raised the following concerns:

- customers have a maximum of 12 months to pay the undercharged amount;
- the terms *'customer's fault'* or *'omission'* referred to under subclause 30(2)(a) are subjective and undefined; and
- subclause 30(2A) allows retailers to charge a higher tariff if the customer's tariff changes during the period in which the retailer has been undercharging the customer. This has the potential of placing the customer at financial detriment.[54]

Discussion

Consistent with the Commission's stated approach, subclauses 30(1) and (2) have been drafted in accordance with the NERR. Whilst the Commission notes the concerns of the Consumer Groups regarding *'customer's fault'* and *'omission'* being undefined in the draft ERC v11, the Commission does not consider it to be appropriate to define these words.

The Commission does acknowledge that, under the draft ERC v11, where an undercharged amount is caused by the fault of the customer and the undercharging period is longer than 12 months, the customer will not be given equal time to repay the amount. This is a change from ERC v10. However, the Commission considers that this change is acceptable.

In response to the Consumer Groups' submission on subclause 30(2A), the Commission has determined that the requirements outlined in subclause 30(2A) are

[54] Consumer Groups submission, pp. 14-15.

required to be retained in Victoria. As such, subclause 30(2A) has been drafted to reflect the requirements of subclause 6.2(c) of the ERC v10, which states *"[t]o the extent necessary, the amount undercharged is to be calculated in proportion to relevant period between dates on which the customer's meter has been read"*. However, the wording has been amended to reflect its intended operation.

The Commission also notes that we have considered the impact of the introduction of flexible pricing in Victoria and determined that this clause will not be affected by the new flexible pricing environment.

DRAFT DECISION

The Commission proposes not to amend clause 30.

10.12 Overcharging (SRC and MRC) – Clause 31

Clause 31 of the draft ERC v11 specifies the retailer's obligation to a customer if it overcharges the customer. Subclause 31(4) states that:

> *"[n]o interest is payable on an amount overcharged."*

Submission

The Consumer Groups felt strongly that retailers should be required to pay to the overcharged customer interest on the overcharged amount. In their view, overcharged customers were put under significant financial strain and were entitled to the interest that the retailer would have earned on that overcharged amount.[55]

Discussion

Consistent with the Commission's stated approach, subclause 31(4) has been drafted in accordance with the NERR. The Commission does not see a basis to deviate from the NERR drafting on this issue, particularly given that this requirement is not currently included in the ERC v10.

DRAFT DECISION

The Commission proposes not to amend clause 31.

[55] Consumer Groups submission, p. 15.

10.13 Payment methods (SRC and MRC) – Clause 32

The payment methods, including via direct debit and Centrepay, available to customers are set out under clause 32 of the draft ERC v11.

Submission

The Consumer Groups suggested that retailers be required to offer alternative payment options for customers cancelling direct debit arrangements and that Centrepay should be available to all customers.[56]

The Consumer Groups also raised concern that subclause 32(4)(c) required a retailer to cancel the direct debit arrangement *"if a last resort event occurs",* but the term *'last resort event'* was undefined.

Discussion

The Commission disagrees with the Consumer Groups' submission regarding retailers being obliged to offer alternative payment arrangements. Subclause 32(1) lists the payment methods the retailer must accept from a customer. If a customer cancels a direct debit, the customer will be able to pay using one of the other forms of payment listed in subclause 32(1).

The Commission disagrees with the Consumer Groups submission that Centrepay must be available to all customers. Under the ERC v10, retailers are not currently required to permit all customers to pay by Centrepay. Consistent with the Commission's stated approach, subclause 32(2) has been drafted in accordance with the NERR.

Subclause 32(2) of the draft ERC v11 allows all customers to request to pay by Centrepay and, subject to clause 74, the retailer may elect to permit this option. In the Commission's view, subclause 32(2) permits all customers to request to pay by Centrepay and clause 74 is only triggered where the request to pay by Centrepay is made by a customer who is already a hardship customer. The Commission considers that the flexibility included in subclause 32(2) is appropriate and expects that most retailers would be willing to allow a customer to use this payment method as long as there is not a valid reason for refusing the request.

Following consideration of the submissions received, the Commission will amend the draft ERC v11 to include a definition of *'last resort event'*, which will be defined as:

> "*last resort event in respect of a retailer means when:*
> *(a) the retailer's retail license is suspended or revoked; or*

[56] Consumer Groups submission, p.16.

(b) the right of the retailer to acquire:

- *for electricity, electricity from the wholesale electricity market; and*
- *for gas, gas from a wholesale gas market or a producer,*

is suspended or terminated, whichever first occurs".

DRAFT DECISION

The Commission proposes not to amend clause 32.

The Commission proposes to include a definition of *'last resort event'* in the draft ERC v11.

10.14 Payment difficulties (SRC and MRC) – Clause 33

Retailers' obligations to customers experiencing difficulties paying their energy bills are set out in clause 33 of the draft ERC v11:

"(1) A retailer must offer and apply payment plans for:

(a) hardship customers; and

(b) other residential customers experiencing payment difficulties if the customer informs the retailer in writing or by telephone that the customer is experiencing payment difficulties.

(2) However, a retailer is not required to offer a payment plan to a customer referred to in subclause (1) if the customer:

(a) has had 2 payment plans cancelled due to non-payment in the previous 12 months; or

(b) has been convicted of an offence involving illegal use of energy in the previous 2 years.

(3) A retailer must provide information to a customer referred to in subclause (1) about the availability of government funded energy charge rebate, concession or relief schemes, including the Utility Relief Grant Scheme.

(3A) A retailer must not require the payment of any amount as a condition of providing the customer with an application form for a Utility Relief Grant.

(4) Clause 72 applies to a residential customer referred to in subclause (1)(b) in the same way as it applies to a hardship customer."

This clause applies to standard retail contracts and market retail contracts.

Submissions

The Consumer Groups raised concern that this clause did not reflect the payment difficulty provisions under ERC v10. In particular:

- under subclause 11.2 of ERC v10, obligations on retailers in relation to assessing capacity to pay, providing information on concessions and advice about the availability of financial counsellors applied to all customers who were experiencing payment difficulties, not just to hardship customers;
- payment plans were not restricted to customers who were experiencing payment difficulties or who were in a hardship program. They were also available to those who were in arrears, or who may have needed to budget and make payments in advance;
- in establishing a payment plan for customers in hardship under the ERC v10, a retailer is required to consider certain specified factors, such as capacity to pay, amount of arrears and estimated consumption. However, clause 33 of the draft ERC v11 suggests retailers only have to consider these factors for customers in a hardship program, not customers experiencing payment difficulties;
- under ERC v10, a customer would have to fail two instalment plans in the previous 12 months and not provide reasonable assurance to the retailer that the customer was willing to meet a further instalment plan before the retailer could refuse to offer the customer an instalment plan. However, under clause 33 of the draft ERC v11, the retailer no longer had an obligation to offer a customer a payment plan when the customer had two payment plans cancelled as a result of non-payment in the previous 12 months; and
- there was no reference under clause 33 to energy efficiency advice and the availability of financial counsellors, which was contained in ERC v10.[57]

The Consumer Groups also indicated that there may be a drafting error in subclauses 33(1) and 72(1A), as they did not appear to be consistently drafted. The Consumer Groups also found subclause 33(4) confusing.[58]

EWOV submitted that the proposed changes as contained in clause 33 would result in less protection for customers who had already been provided with payment assistance. EWOV said that the draft ERC v11 no longer required retailers to proactively assess if a customer was experiencing payment difficulties and offer that customer a payment plan.[59]

[57] Consumer Groups submission, pp. 16-18.
[58] Consumer Groups submission, p. 18.
[59] EWOV submission, p. 10.

As previously stated above, EWOV also raised concern about the implications of not requiring retailers to provide payment plans to customers who had been convicted of an offence involving the illegal use of energy (under subclause 33(2)(b)).[60]

Discussion

The Commission acknowledges that the drafting of subclause 33(1) and subclause 72(1A) of the draft ERC v11 are inconsistent. The Commission considers it appropriate that subclause 72(1A) be deleted from the draft ERC v11 and subclause 33(1) be amended to include the additional text in subclause 72(1A)(b).

Please see the Commission's previous discussion at chapter 6.5 of this Paper for the Commission's response to the other submissions made by EWOV and the Consumer Groups.

DRAFT DECISION

The Commission proposes to delete subclause 72(1A) from the draft ERC v11, and amend subclause 33(1) to include the text in subclause 72(1A)(b) to require a retailer to offer a payment plan if the retailer believes the customer is experiencing repeated payment difficulties or requires payment assistance.

10.15 Shortened collection cycles (SRC and MRC) – Clause 34

Clause 34 of the draft ERC v11 permits retailers to place a customer on a shortened collection cycle and specifies the conditions and procedures of placing a customer on a shortened collection cycle.

Submissions

The Consumer Groups submitted that to ensure a customer was fully aware of their obligations when placed on a shortened collection cycle, the retailer must obtain the customer's explicit informed consent, not just an agreement as provided under subclause 34(1) of the draft ERC v11. The Consumer Groups said that they do not consider it likely that a customer would agree to being placed on a shortened collection cycle if the customer did not believe it would assist in meeting the payment obligations.[61]

[60] EWOV submission, p. 10.
[61] Consumer Groups submission, pp. 19-20.

The Consumer Groups[62] and EWOV[63] both stated that the number of reminder notices a customer must receive before a retailer could place the customer on a shortened collection cycle had been reduced in subclause 34(2) of the draft ERC v11. Whereas under ERC v10 three consecutive reminder notices were required, the draft ERC v11 would require only two consecutive reminder or disconnection warning notices to have been issued. EWOV was concerned that it would become easier for customers to be placed on a shortened collection cycle. The Consumer Groups pointed out that because customers must pay three consecutive bills before they could be removed from the shortened collection cycle, retailers should be required to provide three consecutive reminder notices.

The Consumer Groups and EWOV also provided feedback on definitions:

- the Consumer Groups submitted that *'payment difficulties'* should be defined and this definition should include a reference to payment plans and capacity to pay.[64]
- EWOV stated that a customer on a shortened collection cycle may receive a *'reminder or warning notice'* that was defined as *'a reminder notice or disconnection warning notice'*. However, EWOV found that *"… it is not clear as to the differentiation of the terms, or when the draft ERC is referring to a disconnection warning notice, reminder notice or a 'reminder or warning notice'. This could cause potential customer confusion about the notification required prior to disconnection, as the draft ERC also advises that disconnection can occur 'without further reminder or warning notice'".*[65] EWOV suggested that the draft ERC v11 should be amended to resolve this confusion so customers on a shortened collection cycle would continue to receive a disconnection warning notice.

Discussion

Consistent with the Commission's stated approach, clause 34 has been drafted in accordance with the NERR, and the Commission will not challenge the policy behind the drafting of this section. Furthermore, in the Commission's opinion the requirements outlined in clause 34 are substantially equivalent to the requirements in clause 9.1 of the ERC v10. The Commission has also considered the impact of the introduction of flexible pricing in Victoria on this provision and notes that this clause will not be affected by the new flexible pricing environment.

The Commission acknowledges that the requirement to assess and assist customers experiencing payment difficulties has not been carried over in the draft ERC v11. However, subclause 34(2)(a) prevents a customer who is experiencing payment

[62] Consumer Groups submission, p. 19.
[63] EWOV submission, p. 7.
[64] Consumer Groups submission, p. 20.
[65] EWOV submission, p. 14.

difficulties from being be placed on a shortened collection cycle. In the Commission's opinion this achieves a similar outcome.

The Commission disagrees with the Consumer Groups' submission that a customer's explicit informed consent should be obtained prior to a customer being placed on a shortened collection cycle. The Commission notes that under clause 9.1 of the ERC v10, explicit informed consent is also not required. The NERR drafting has introduced the additional protection of requiring customers' agreement to go on a shortened collection cycle.

The Commission also disagrees with Consumer Groups submission' that '*payment difficulties*' should be defined. The Commission considers that a broad interpretation of payment difficulties is appropriate as discussed above at chapter 6.5 of this Paper.

The Commission acknowledges that there has been a reduction in the number of reminder notices that a customer is to be sent prior to a retailer being able to place the customer on a shortened collection cycle. However, consistent with the Commission's stated approach, subclause 34(2) is based on NERR drafting. The Commission considers that the NERR drafting is appropriate and notes that subclause 34(3) of the draft ERC v11 requires that a retailer give notice to a customer who has been placed on a shortened collection cycle that:

- the customer has been placed on a shortened collection cycle;
- the customer must pay three consecutive bills in the customer's billing cycle by the pay-by date in order to be removed from the shortened collection cycle; and
- failure to make a payment may result in arrangements being made for disconnection of the supply of energy without a further reminder notice.

Further, a key obligation under subclause 111(3)(b) of the draft ERC v11 is for the retailers to give customers on a shortened collection cycle a disconnection warning notice *before* disconnecting a customer's supply of energy. Customers on shortened collection cycles are not, however, entitled to receive a further reminder notice reminding them that payment is required (see further subclause 111(3)(a)). A retailer must also use its best endeavours to contact the customer in relation to their failure to pay before a retailer disconnects their supply of energy.

The Commission disagrees with EWOV's submission that the definition of '*reminder or warning notice'* in subclause 34(5) is not adequate. The Commission considers that the definition is not vague because the definition:

- accurately refers customers to the relevant defined terms in clause 3 of the draft ERC v11; and

- should be applied only in clause 34 where the clause refers to *'reminder or warning notice'* and not where it refers only to a *'reminder notice'*.

DRAFT DECISION

The Commission proposes not to amend clause 34.

10.16 Request for final bill (SRC) – Clause 35

Under clause 35 of the draft ERC v11:

"(1) If a customer requests the retailer to arrange for the preparation and issue of a final bill for the customer's premises, the retailer must use its best endeavours to arrange for:

(a) a meter reading; and

(b) the preparation and issue of a final bill for the premises in accordance with the customer's request."

Submission

The Consumer Groups submitted that *'best endeavours'* should be defined as they do not consider it fair to require a customer to pay a final bill that is based on an estimate, as the customer who is overcharged would have little recourse.[66]

Discussion

As stated above at chapter 6.1 of this Paper, the draft ERC v11 will be amended to include a definition for *'best endeavours'*.

DRAFT DECISION

The Commission proposes to define *'best endeavours'* in the draft ERC v11.

10.17 Additional retail charges (SRC and MRC) – Clause 35A

Retailers may charge customers additional retail charges under the circumstances specified in clause 35A of the draft ERC v11.

[66] Consumer Groups submission, p. 20.

Submissions

The Consumer Groups[67] and EWOV[68] raised the following concerns regarding clause 35A:

- the Consumer Groups pointed out that subclause 35A(1)(a) refers to a *'market contract'* rather than a *'market retail contract';*

- the Consumer Groups and EWOV indicated that under subclause 35A(3) retailers would be required to calculate the additional retail charge in accordance with clause 30, but clause 30 of the draft ERC v11 relates to undercharging. EWOV suggested that subclause 35A(3) should be amended to refer to clause 35A;

- subclause 35A(3) also provided that *'[i]n this clause additional retail charge means …',* but the Consumer Groups indicated that the term *'additional retail charge'* appeared elsewhere in the draft ERC (such as subclause 24(2));

- Consumer Groups submitted that subclause 35A(4) which allows a retailer to charge customers dishonoured payment and merchant service fees were misplaced as *"they are not fees additionally imposed by a retailer but arise because the initial payment made by the customer has been dishonoured."*[69]

Discussion

The Commission agrees that subclause 35A(1)(a) should refer to *'market retail contract'* and will amend the draft ERC v11 accordingly.

The Commission also agrees with submissions received from EWOV and the Consumer Groups that the reference to clause 30 in subclause 35A(3) was a drafting error. Subclause 35A(3) should refer to subclause 35A.

Upon further review of clause 35A of the draft ERC v11 and the submissions received, the Commission is of the opinion that subclause 35A(4) should be a new clause 35C to reflect the current drafting of clause 7.5 of ERC v10 as the application of these clauses differ depending on whether customer is on a market retail contract or a standard retail contract.

[67] Consumer Groups submission, pp. 20-21.
[68] EWOV submission, pp. 6-7.
[69] Consumer Groups submission, p. 21.

DRAFT DECISION

The Commission proposes to amend clause 35A as follows:

- subclause 35(1)(a) will refer to *'market retail contract'*;
- subclause 35A(3) will refer to clause 35A; and
- subclause 35A(4), dealing with dishonoured payments, will be incorporated into a new clause 35C to reflect the current drafting of clause 7.5 of the ERC v10.

10.18 Merchant service fees (SRC and MRC) – Clause 35B

Subclause 35B(1) of the draft ERC v11 states:

> *"[w]here a residential customer pays the retailer's bill using a method that results in the retailer incurring a merchant service fee, the retailer may recover the amount of that fee from the residential customer."*

Subclauses (2) and (3) specify that clause 35B applies to standard and market retail contracts.

Submissions

The Consumer Groups[70] and EWOV[71] submitted that the clause would allow retailers to recover merchant service fees from customers on either standard retail or market retail contracts. Under the ERC v10, this is allowed only in market contracts. Therefore, extending the recovery of merchant service fees to standard retail contracts was considered by these stakeholders to be a reduction in consumer protection.

The Consumer Groups also suggested that the merchant fee should be fair and defined by reference to the definition of *'merchant service fee'* used by the Reserve Bank of Australia.[72]

Momentum submitted that retailers should be permitted to charge fees and charges to customers on standard retail contracts, which would allow retailers to pass through to customers any merchant service fees retailers incur.[73]

[70] Consumer Groups submission, p. 21.
[71] EWOV submission, p. 4.
[72] Consumer Groups submission, p. 21.
[73] Momentum submission, p. 4.

Discussion

The Commission agrees with the submissions from EWOV and the Consumer Groups and will amend subclause 35B(2) as follows:

> *"This clause does not apply in relation to standard retail contracts."*

The Commission notes that the prohibition on being able to recover merchant service fees from standing offer customers is a Victorian specific derogation and will continue to apply once Victoria transitions to NECF.

The Commission does not agree with the Consumer Groups' submission that *'merchant service fee'* should be defined in the draft ERC v11 as the term is not defined under ERC v10, and clause 35B has been included to reflect the requirements of subclause 7.5(b) of the ERC v10 . As such, a definition for *'merchant service fee'* will not be included in the draft ERC v11.

DRAFT DECISION

The Commission proposes to amend clause 35B to not apply to standard retail contracts.

11 TARIFF CHANGES – DIVISION 5

This chapter discusses the submissions received in relation to Part 2, Division 5 – Tariff changes.

11.1 Obligations on retailers (SRC) – Clause 36

Clause 36 of the draft ERC v11 sets out what a retailer must do if, during a billing cycle, its customer changes from one type of tariff to another type of tariff.

Submission

The Consumer Groups stated that retailers should have *"to obtain the explicit informed consent of a customer prior to any tariff change on a fixed term contract"* and be *"prohibited from unilaterally varying the price"*. Additionally, the Consumer Groups argued that customers should be permitted to exit the contract without penalty when price changes occurred.

The Consumer Groups also submitted that clause 36 should apply in relation to market retail contracts *"where tariff changes may occur in relation to fixed term contracts"*.

Discussion

The Commission will not amend the draft ERC v11 to prohibit retailers from charging an exit fee in relation to a customer terminating the contract. The Commission notes that under clause 24 of the ERC v10, retailers are currently able to charge a fee in relation to a customer exiting a contract, even if the reason is due to a price change.

Consistent with the Commission's stated approach, clause 36 has been drafted in accordance with the NERR provisions where no Victorian derogation has been indicated. The Commission considers that the drafting is appropriate and does not consider that there is a reason to deviate from the NERR.

The Commission also notes that there is currently no obligation in the ERC v10 to obtain a customer's explicit informed consent prior to any tariff change on a fixed term contract. As such, the Consumer Groups' submission on this issue is outside the scope of this review.

DRAFT DECISION

The Commission proposes not to amend clause 36.

11.2 Change in use (SRC) – Clause 38

Clause 38 requires a customer to notify its retailer of a change in use of the customer's premises. The retailer can then transfer the customer to a tariff applicable to the customer's use of that premises with the new tariff taking effect when the retailer notifies the customer of the new tariff.

If the customer does not give the required notice, the retailer may transfer the customer to a new tariff, once the customer has been notified, with the new tariff taking effect on the date the change of use occurred.

Subclause 38(5) states:

> *"If a reclassification is necessary as a result of a change of use under subclause (4), the reclassification takes effect on the date on which the new tariff applies under subclause (4)."*

Submissions

The Consumer Groups stated that there is a lack of clarity regarding what constitutes a change in use.[74]

The Consumer Groups also submitted that *'reclassification'* should be defined.[75]

Discussion

The reference to *'reclassification'* in clause 38 of the draft ERC v11 is a drafting error. The Commission has not included provisions relating to classification and reclassification of customers set out in Rule 7 to 11 of the NERR because in Victoria these matters are dealt with in Orders in Council. As such, subclause 38(5) will be deleted from the draft ERC v11.

The term *'change of use'* is not defined in the NERR or the NERL and therefore a definition has not been included the draft ERC v11. In the Commission's view, it is clear from the remainder of the clause that a change in use relates to a change in the use of a customer's premises that would give rise to a change in the tariff applicable to the customer. Therefore, the Commission does not consider it necessary to introduce a new definition of '*change in use*'.

[74] Consumer Groups submission, p. 22.
[75] Consumer Groups submission, p. 22.

DRAFT DECISION

The Commission proposes to delete subclause 38(5) from the draft ERC v11, as the classification and reclassification of customers are dealt with in Orders in Council.

12 SECURITY DEPOSITS – DIVISION 6

This chapter discusses the submissions received in relation to Part 2, Division 6 – Customer retail contracts – security deposits.

12.1 Consideration of credit history – Clause 39

Clause 39 of the draft ERC v11 sets out the information retailers must request from a customer, and the factors retailers must consider, when deciding whether to require a customer to provide a security deposit.

Submissions

The Consumer Groups stated that this clause, together with subclause 40(2)(d) of the draft ERC v11, allowed retailers to take into account a customer's entire credit history, whereas ERC v10 permitted retailers to only consider any relevant defaults. The Consumer Groups considered that clause 39 should be limited to relevant defaults, and the customer's credit history should only be considered with regard to utility debts.[76]

EWOV raised a similar concern, stating that the circumstances under which a retailer could require a security deposit was significantly different to ERC v10, and would result in a lessening of Victorian customers' existing protections.[77]

Discussion

Consistent with the Commission's stated approach, clause 39 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the NERR drafting appropriate and is not convinced that there is a basis for deviating from the national provisions.

DRAFT DECISION

The Commission proposes not to amend clause 39.

[76] Consumer Groups submission, pp. 22-23.
[77] EWOV submission, p. 7.

12.2 Requirement for security deposit (SRC and MRC) – Clause 40

Clause 40 outlines when a security deposit can be requested from a customer, including a provision that a retailer must not refuse to sell energy to a customer who does not pay the security deposit.

Subclause 40(3) states:

> *"(3) A retailer cannot require a residential customer to provide a security deposit if the customer:*
>
> *(a) is identified as a hardship customer by the retailer in relation to any premises;*
>
> *(b) advises the retailer that the customer was identified as a hardship customer by another retailer in relation to any premises;*
>
> *(c) if the retailer has not complied with Clause 33; or*
>
> *(d) if the small customer has formally applied for a Utility Relief Grant and a decision on the application has not been made."*

Subclause 40(4) states:

> *"(4) A retailer cannot require a residential customer to provide a security deposit unless the retailer has offered the customer the option of a payment plan and the customer has either declined the offer or failed to pay an instalment having accepted the offer."*

Subclause 40(7) states:

> *"(7) Subject to subclause (6), payment or partial payment of a security deposit is not a pre-condition to the formation of a standard retail contract."*

Subclause 40(8) states that this clause applies to standard retail contracts.

Submissions

The Consumer Groups submitted that there were contradictions with the drafting of this clause, in particular:

- subclause 40(3)(c) seemed unnecessary in light of subclause 40(4);
- subclause 40(8) appeared to contradict subclause 40(7); and

- clause 33, which is referenced in subclause 40(3)(c), was not aligned with the outcomes of clause 11.2 of the ERC v10.[78]

EWOV raised a concern that clause 40 allowed retailers to require a security deposit when the customer owed money to a retailer, whereas in ERC v10 the customer must owe more than $120 to the retailer before a security deposit can be required.[79]

Discussion

Subclause 40(3)(c) was included in the draft ERC v11 to incorporate the requirements under subclause 8.1(b) of ERC v10. The Commission agrees that there is an overlap between subclause 40(3)(c) and subclause 40(4) of the draft ERC v11. The Commission notes that the requirements under subclause 40(4) are not as extensive as those under subclause 8.1(b) bullet point three which requires the retailer to comply with subclause 11.3 of ERC v 10 (which is covered in clause 33 of the draft ERC v11).

Following the Commission's consideration of the submissions, the Commission considers it appropriate to add the requirement to comply with clause 33 to clause 40(4) and delete clause 40(3)(c). Subclause 40(4) will be amended as follows.

> *"(4) A retailer cannot require a residential customer to provide a security deposit unless the retailer has offered the customer the option of a payment plan and the customer has either declined the offer or failed to pay an instalment having accepted the offer and the retailer has otherwise complied with clause 33."*

The Commission disagrees with the Consumer Groups' submission regarding subclauses 40(7) and (8) being inconsistent. In the Commission's opinion, subclauses 40(7) and (8) appear to serve the separate purposes of:

(a) subclause 40(7) – makes clear that payment or partial payment of a security deposit is not a precondition to a SRC; and

(b) subclause 40(8) – makes clear that clause 40 applies to SRC.

The Commission considers that there is no inconsistency between subclauses 40(7) and (8).

[78] Consumer Groups submission, p. 23-24. Please note that the Consumer Groups refer to subclause 70(7) on page 23 of their submission, but the Commission assumes that this is a typographical error and they intended to refer to subclause 40(7).
[79] EWOV submission, pp. 7-8.

DRAFT DECISION

The Commission proposes to amend clause 40 to delete subclause 40(3)(c).

The Commission proposes to add the following to subclause 40(4) *"and the retailer has otherwise complied with clause 33"*.

12.3 Payment of security deposit (SRC) – Clause 41

Clause 41 of the draft ERC v11 specifies when security deposits must be paid by the customer and how security deposits are to be maintained by the retailer.

Submission

The Consumer Groups submitted that there is no equivalent provision to clause 41 in the ERC v10 and stated that retailers should be required to provide a customer with ample time to pay the security deposit – no less than the pay-by date of a normal billing cycle or allow customers to enter into payment plans.[80]

Discussion

Consistent with the Commission's stated approach, clause 41 has been drafted in accordance with the NERR as no Victorian derogation has been indicated for this provision. The Commission considers that the drafting is appropriate and there is no reason to deviate from the national provisions.

DRAFT DECISION

The Commission proposes not to amend clause 41.

12.4 Amount of security deposit (SRC) – Clause 42

Under clause 42 of the draft ERC v11, *"a security deposit for a customer cannot be greater than 37.5% of the customer's estimated bills over a 12 month period"*.

Submissions

The Consumer Groups stated that clause 42 should also apply to market retail contracts.[81]

[80] Consumer Groups submission, p. 24-25.
[81] Consumer Groups submission, p. 25.

EWOV stated that the draft ERC v11 provided for different protection levels for standard retail contracts compared to market retail contracts.[82]

Discussion

Consistent with the Commission's stated approach, clause 42 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the drafting appropriate and there is no reason to deviate from the national provisions.

DRAFT DECISION

The Commission proposes not to amend clause 42.

12.5 Use of security deposit (SRC) – Clause 44

Clause 44 of the draft ERC v11 states:

> *"(1) A retailer may apply a security deposit to offset amounts owed to it by a small customer if and only if:*
>
> *(a) the customer fails to pay a bill and the failure results in de-energisation of the customer's premises by the retailer and there is no contractual right to re-energisation; or*
>
> *(b) in relation to the issue of a final bill:*
> *(i) the customer vacates the premises; or*
> *(ii) the customer requests de-energisation of the premises; or*
> *(iii) the customer transfers to another retailer.*
>
> *(2) If a final bill includes amounts payable for goods and services provided by the retailer other than for the sale of energy, the retailer must apply the security deposit firstly in satisfaction of the charges for the sale of energy, unless:*
>
> *(a) the customer otherwise directs; or*
>
> *(b) another apportionment arrangement is agreed to by the customer.*
>
> *(3) The retailer must account to the customer in relation to the application of a*

[82] EWOV submission, p. 7.

security deposit amount within 10 business days after the application of the security deposit.

(4) A reference in this clause to a security deposit includes a reference to any accrued interest on the security deposit."

Clause 44 also states that it applies to standard retail contracts and not to market retail contracts.

Submission

The Consumer Groups submitted that this clause should apply to market retail contracts.[83]

The Consumer Groups also stated that subclause 44(1) of the draft ERC v11 was similar to clause 8.3 of the ERC v10, except that there was a reference to the '*customer's right of reconnection'.* The Consumer Groups considered subclause 44(1)(a) of the draft ERC v11 should reference subclause 121(1) of the draft ERC v11.[84]

Discussion

Consistent with the Commission's stated approach, clause 44 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the drafting appropriate and has not been persuaded that there is a reason for deviating from the national provisions.

The Commission also notes that the equivalent subclause 8.3(c) of ERC v10 refers to a right to be reconnected under clause 15.1 of the ERC v10. Despite the differences in drafting, in the Commission's opinion the clauses achieve the same outcome.

DRAFT DECISION

The Commission proposes not to amend clause 44.

12.6 Obligation to return security deposit (SRC) – Clause 45

Clause 45 of the draft ERC v11 outlines the retailer's obligation to return a customer's security deposit with regard to when and how the security deposit must be returned.

[83] Consumer Groups submission, p. 25.
[84] Consumer Groups submission, p. 25.

This clause applies to standard retail contracts, but not to market retail contracts.

Submissions

The Consumer Groups[85] and EWOV[86] stated that clause 45 should apply to market retail contracts.

Discussion

Consistent with the Commission's stated approach, clause 45 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers that the drafting is appropriate and there is no reason to deviate from the national provision.

DRAFT DECISION

The Commission proposes not to amend clause 45.

[85] Consumer Groups submission, p. 25.
[86] EWOV submission, p. 7.

13 PARTICULAR REQUIREMENTS OF MARKET RETAIL CONTRACTS – DIVISION 7

This chapter discusses the submissions received in relation to Part 2, Division 7 – Market retail contracts – particular requirements.

13.1 Tariffs and charges – Clause 46

Under clause 46 of the draft ERC v11, some minimum requirements that apply in relation to the terms and conditions of market retail contracts are that the retailer must:

- set out all tariffs and charges;
- provide customers with notice of any variations to the tariffs and charges (notice to customers with smart meters must be 20 business days prior to the variation);
- include the retailer's obligations regarding providing notice to the customer concerning variations in tariffs and charges; and
- any variation of the terms and conditions of a market retail contract must be consistent with this Code.

Submissions

EnergyAustralia submitted that the Commission should remove from subclause 46(4) the requirement for retailers to provide smart meter customers with 20 business days notification prior to tariff and charge variations. EnergyAustralia stated that the policy intent of this obligation was based on mandatory network tariff reassignment for smart meter customers, and the subclause is no longer relevant with the Victorian Government's commitment to flexible pricing on an opt-in basis.[87]

The Consumer Groups stated that customers must be provided with assurance that the terms and conditions they sign up to do not vary within the term of their fixed term contract, or that the customer is provided with notice of the change and an opportunity to exit the contract without penalty.[88]

When the contract is not fixed term, the Consumer Groups also submitted that the retailers should not be permitted to vary the terms and conditions of the contract

[87] Momentum, p. 4.
[88] Consumer Groups submission, p. 25-26.

without the explicit informed consent of the customer with the customer having a right to exit the contract without penalty.[89]

The Consumer Groups also raised a concern as to whether this provision would permit retailers to use unfair contract terms, which the Australian Consumer Law defines as terms which allow only one party to vary the contract.[90]

Discussion

Clause 46 of the draft ERC v11 prescribes the minimum requirements under which a retailer may change the tariff under a market retail contract and is similar in effect to subclause 26.4(b) of ERC v10. The Commission disagrees with the Consumer Groups' submission that retailers should be prohibited from charging exit fees, if the customer is exiting the contract due to a tariff change, as this prohibition is not currently contained in the ERC v10.

A key minimum requirement of clause 46 (and subclause 26.4(b)) is that retailers must give notice to the customer of any variation to the tariffs and charges that affects the customer. The notice must be given '*as soon as practicable*', and in any event, in the case of customers with smart meters, '*20 business days prior to the variation*', and otherwise no later than the customer's next bill.

One of the Commission's guiding principles in the Commission's smart meter regulatory review was to assist customers to benefit from smart meters by ensuring that customers were provided with *'consumption and pricing information that was transparent, timely and useful*'. It was in this context that the Commission considered that it was no longer appropriate for customers under market retail contracts to receive notification that their tariff had changed at the same time that the change was applied to their bill and that customers should receive notification separate to their bill.

In the Commission's view, there is nothing which supports EnergyAustralia's assertion that the amendment to subclause 26.4(b) of the ERC v10 to provide for advanced notification for customers was only introduced because mandatory reassignment of network tariffs was contemplated. In fact, at the time of the Final Decision, the Commission understood that there would be processes whereby customers on standing contracts would be able to choose their smart meter tariff.

The Commission does not agree with EnergyAustralia's submission on this issue as it is not clear to the Commission how EnergyAustralia has developed an understanding that customers with smart meters would be mandatorily reassigned a tariff.

[89] Consumer Groups submission, p. 26.
[90] Consumer Groups submission, p. 26.

In response to the Consumer Groups' submission, under the Australian Consumer Law, a term in a customer contract will be unfair if it satisfies all of these conditions:

- causes a significant imbalance in parties' rights and obligations; and
- is not reasonably necessary to protect the legitimate business interests of the party who would be advantaged; and
- would cause detriment to a party (whether financial or otherwise) if relied upon or applied.

A court must also consider the transparency of terms and the contract as a whole in determining whether a term is unfair. Section 25 of the Australian Consumer Law provides a "grey" list of potentially unfair terms.

The Consumer Groups submitted, by way of example, that section 25 of the Australian Consumer Law provides that, *"a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract"* may be unfair.

Each market retail contract is likely to vary in its terms and the transparency of a potentially "*unfair term*". For example, each market retail contract may vary to the extent:

- that they include a right for the customer to immediately terminate the contract upon being given notice of a change in tariff or charges; and
- of transparency of the term, for example, whether it is presented clearly to the customer and readily available to them.

Because a court, in determining whether a term of a customer contract is unfair under the Australian Consumer Law, is required to consider the transparency of the term and the contract as a whole, the Commission does not consider it appropriate to express a conclusive view on whether clause 46 of the draft ERC v11 is an unfair term under the Australian Consumer Law. However, the Commission does note that this is an issue that exists under the NERR and is not a new issue that arises from the terms of the draft ERC v11.

With respect to the submissions regarding the lack of consent required from the customer for changes to the tariffs and charges, the Commission acknowledges that there is no minimum requirement under the draft ERC v11 to obtain the customer's consent prior to a variation to tariffs and charges.

However, under clause 20 of ERC v10, the structure and nature of a tariff may only be varied by agreement in writing between the customer and the retailer. In addition,

subclause 20(b) of the ERC v10 provides that, in relation to market retail contracts, the nature and structure of a tariff that changes in accordance with a term or condition of a market retail contract previously agreed between the customer and the retailer can only change if that term was initially included with the customer's *'explicit informed consent'*. The Commission notes that clause 20 of ERC v10 requires the customer's consent to changes in the structure and nature of a tariff (for example, whether it is a fixed or variable charge) and not to an increase in the price.

The Commission understands it is Victorian Government policy that clause 20 of ERC v10, with respect to tariff changes, was to be retained once the NECF was introduced in Victoria. The Commission considers that those relevant provisions of clause 20 should be included in the draft ERC v11. In the Commission's view, incorporating the customer's *'explicit informed consent'* to increases in tariffs and charges into the draft ERC v11 would be directly inconsistent with clause 20. Instead, the Commission considers it more appropriate to incorporate the customer's *'explicit informed consent'* to variations to the structure and nature of tariff and charges (i.e. that a new provision to the same effect as clause 20 of ERC v10 be included in the draft ERC v11).

DRAFT DECISION

The Commission proposes to add a new clause 46A to the draft ERC v11 which will include the wording of clause 20 of the ERC v10, which deals with variations to market retail contracts.

13.2 Termination of market retail contract – Clause 49

Under clause 49 of the draft ERC v11, a market retail contract terminates on:

- a date the customer and retailer agree to;
- when a new customer commences a customer retail contract at the premises;
- when the customer commences a customer retail contract with the retailer or a different retailer;
- 10 business days after the de-energisation of the customer's premises, if no contractual right to re-energisation; or
- another date or event specified in the market retail contract,

whichever event occurs first.

Subclause 49(2) states that:

"A term or condition of a market retail contract has no effect to the extent that it requires a customer to give more than 20 business days notice to terminate the contract."

This clause also states that the termination of the contract does not affect any already accrued rights or obligations and these provisions are a minimum requirement that must apply in relation to small customers who enter a market retail contract.

Submission

The Customer Groups submitted that clause 24.5 of ERC v10 should be incorporated in the draft ERC v11.[91]

Discussion

Consistent with the Commission's stated approach, clause 49 has been substantially drafted in accordance with the NERR, aside from the removal of subclause 49(b) which refers to prepayment meters. No specific Victorian derogation has been indicated for this provision. The Commission considers the drafting appropriate and is not persuaded that there is a reason to deviate from the national provision.

Further, the Commission has also considered the impact of the introduction of flexible pricing in Victoria on the provisions of the draft ERC v11 and notes that this clause will not be affected by the new flexible pricing environment.

DRAFT DECISION

The Commission proposes not to amend clause 49.

13.3 Early termination charges and agreed damages terms – Clause 49A

Clause 49A of the draft ERC v11 states:

"(1) A term or condition of a fixed term retail contract has no effect to the extent that it provides for payment of an early termination charge or agreed damages term (however described), unless:

(a) the contract includes details of the amount or manner of calculation of the early termination charge or agree damages term; and

[91] Consumer Groups submission, p. 27.

(b) subject to subclause 49A(6A), the early termination charge or agreed damages term is a reasonable estimate of the costs to the retailer resulting from the early termination or other event the subject of the agreed damages term.

(2) For the purposes of subclause (1)(b), the costs to the retailer are the reasonable costs incurred or to be incurred by the retailer, and do not include costs based on lost supply or lost profits.

(3) Subject to subclause (4), a term or condition of a market retail contract that is not a fixed term retail contract has no effect to the extent that it provides for the payment of an early termination charge (however described).

(4) Subclauses (1) and (3) do not prevent the imposition of an early termination charge due to the early termination of a fixed benefit period, even if this coincides with the termination of the market retail contract.

(5) An early termination charge (however described), payable where a customer terminates a fixed benefit period early, only has effect if:

(a) the contract includes details of the amount or manner of calculation of the early termination charge; and

(b) subject to subclause 49A(6A), the early termination charge is a reasonable estimate of the costs to the retailer resulting from the early termination.

(6) For the purposes of subclause 5(b), the costs to the retailer are the reasonable costs incurred or to be incurred by the retailer, and do not include costs based on lost supply or lost profits.

(6A) Any amount of an early termination change must be determined by reference to, and must not exceed, the total of the following direct costs incurred by the retailer in relation to that particular customer which remain unamortised at the time of termination:

(i) pro-rata costs of procuring the customer to enter into the contract; and

(ii) $20;

which comprises:

(i) the additional costs of giving effect to the early termination of the contract, final billing and ceasing to be responsible for the supply address; and

(ii) the value of any imbalance in the retailer's electricity or gas hedging program to the extent that it is directly attributable to that breach of contract.

(7) This clause is a minimum requirement that is to apply in relation to small customers who purchase energy under a market retail contract."

Submissions

The Consumer Groups submitted that the draft ERC v11 should *"[r]etain consumer protections in ERC v10 that relate to Retailer of Last Resort events."*[92]

Simply Energy submitted that any amount of an early termination change under subclause 49A(6A) should reference 'charge' not 'change'.[93]

Discussion

Calculation of agreed damages term

The Commission has drafted clause 49A of the draft ERC v11 to reflect the wording adopted in clause 31 of ERC v10. Clause 31 provides that:

"(a) Any agreed damages term, whether providing for an early termination fee or otherwise, must either include the amount that will be payable by the customer to the retailer for the customer's breach of their energy contract or include a simple basis for determining that amount.

(b) Subject to clause 31(c), the amount payable by a customer under an agreed damages term must be a fair and reasonable pre-estimate of the damage the retailer will incur if the customer breaches their energy contract, having regard to related costs likely to be incurred by the retailer."

Subclause 31(c) describes the method for determining an early termination fee which the Commission has incorporated into subclause 49A(6A). The ERC v10 does not provide a method for determining an agreed damages term beyond the requirement that it *"must be a fair and reasonable pre-estimate of the damage*" as set out in subclause (b) above.

Accordingly, as the draft ERC v11 is consistent with the existing Victorian provisions, the Commission does not consider it necessary to amend subclauses 49A(3)-(6A) to include references to agreed damages terms.

[92] Consumer Groups submission, p. 27.
[93] Simply, p. 3.

Retailer of Last Resort Event

The Commission will amend the draft ERC v11 to include a new clause 70B to incorporate subclause 24.6(a) of the ERC v10. Clause 70B will state:

> *"Where a retailer and a customer have entered into an energy contract, other than a dual fuel contract, and a last resort event occurs in relation to the retailer, that energy contract will automatically terminate and the customer will not be liable for any termination fee or other penalty."*

The Commission considers it appropriate to add this clause because the substance of subclause 24.6(a) – termination of retail contracts on occurrence of a ROLR event – is dealt with in section 141 of the NERL and there is no equivalent in the NERR. Therefore, this omission of subclause 24.6(a) of ERC v10 left a gap in the draft ERC v11 compared to the NECF.

Definition of '*agreed damages clause*'

Clause 49A of the draft ERC v11 was drafted to include references to an agreed damages term in order to incorporate clause 31 of the ERC v10, which was not otherwise provided for in the NERR.

The approach by the Commission was that in light of the overlap between clause 31 of the ERC v10 and the existing Rule 49A of the NERR, these two provisions should be combined in the draft ERC v11.

The drafting of the ERC v10 assumes that an agreed damages term may include something other than an early termination charge. For example, an agreed damages term may be payable by a customer for a customer's breach of their energy contract which does not result in termination of the retail contract.

A definition of *'agreed damages term'* is provided for in ERC v10 and the Commission considers that the definition of *'agreed damages term'* outlined in ERC v10 should be included in the draft ERC v11 to provide clarity.

Drafting error

The Commission also agrees with Simply Energy that there is a drafting error in subclause 49A(6A), which will be amended to refer to *"an early termination charge"* rather than *"an early termination change*".

DRAFT DECISION

The Commission proposes to amend subclause 49A(6A) to refer to *"an early termination charge"* rather than *"an early termination change"*.

The Commission proposes to add a new clause 70B which will incorporate subclause 24.6(a) of the ERC v10, which addresses termination in the event of a last resort event.

The Commission proposes to define '*agreed damages term*' as it is defined in the ERC v10.

13.4 Small customer complaints and dispute resolution information – Clause 50

Clause 50 of the draft ERC v11 requires retailers to provide, in the terms and conditions of market retail contracts, contact information for customer complaints. Retailers are also obliged, under clause 50, to handle the complaint and advise the customer of the outcome of the complaint.

Submission

The Consumer Groups submitted that in ERC v10 provisions similar to clause 50 applied to both standard retail contracts and market retail contracts, whereas this clause appeared to only apply to market retail contracts.[94]

The Consumer Groups also submitted that the requirement for a retailer to only publish details of complaints processes or EWOV schemes in the terms of the contract or the retailer's website resulted in *"a reduction in protections"* for Victorian customers.[95]

Discussion

Clause 50 is intentionally limited to market retail contracts. The equivalent provision for customer complaints in relation to standard retail contracts is set out in the model terms and conditions in clause 19.2 of Schedule 1 of the draft ERC v11.

Consistent with the Commission's stated approach, clause 50 has been drafted in accordance with the NERR. The Commission considers the drafting to be appropriate.

However, the Commission will add a new clause 59A which will state:

[94] Consumer Groups submission, pp. 27-28.
[95] Consumer Groups submission, pp. 27-28.

"A retailer or responsible person must develop, make and publish on its website a set of procedures detailing the retailer's or responsible person's procedures for handling small customer complaints and dispute resolution procedures. The procedures must be regularly reviewed and kept up to date. The procedures must be substantially consistent with the Australian Standard AS ISO 10002-2006 (Customer satisfaction – Guidelines for complaints handling in organizations) as amended and updated from time to time."

This addition incorporates clause 81 of the NERL, and has been inserted to address inconsistencies between the Electricity Metering Code, the NERL, and the draft ERC v11.

DRAFT DECISION

The Commission proposes not to amend clause 50. The Commission proposes to add a new clause 59A to the draft ERC v11 incorporating clause 81 of the NERL, which refers to standard complaints and dispute resolution procedures.

13.5 Liabilities and immunities – Clauses 51 and 52

Clause 51 of the draft ERC v11 states:

"[a] retailer must not include any term or condition in a market retail contract with a small customer that limits the liability of the retailer for breach of the contract or negligence by the retailer."

Clause 52 of the draft ERC v11 states:

"*[a] retailer must not include any term or condition in a market retail contract with a small customer under which the customer indemnifies the retailer, so that the retailer may recover from the customer an amount greater than the retailer would otherwise have been able to recover at general law for breach of contract or negligence by the customer in respect of the contract."*

Submission

The Consumer Groups submitted that clauses 51 and 52 of the draft ERC v11 should apply to standard retail contracts and that clause 51 should also incorporate the subclauses in clause 16 of the ERC v10 that refer to the Voltage Variations Guideline,

as it still applies in Victoria and "*offers a higher standard of consumer protection than Part 7 (Small Compensation Scheme) of the [NERR]*."[96]

Discussion

Under the NERR, the application of clauses 51 and 52 were limited to market retail contracts intentionally. In relation to standard retail contracts, retailers would be required to adopt the model terms which are consistent with the requirements under clauses 51 and 52, despite not being set out directly.

The Commission notes that under section 29 of the NERL a term or condition of a standard retail contract has no effect to the extent of any inconsistency with the model terms and conditions. The Commission considers it appropriate to include a provision to the same effect as section 29 of the NERL in the draft ERC v11. This will have the effect that if a retailer includes provisions that are inconsistent with the model terms in its standard retail contract, the provisions will have no effect.

It is not possible to precisely replicate the drafting of section 29 of the NERL. The NERL is a statute, and so can directly invalidate contractual provisions that are inconsistent with the model terms. The draft ERC v11 is a Commission instrument and cannot directly invalidate contractual provisions. However, the same substantive outcome can be achieved in the draft ERC v11 by providing that the model terms in Schedule 1 are terms and conditions decided by the Commission for the purposes of section 36(1) of the EIA and section 43(1) of the GIA. This will call into effect the invalidating provisions of those sections of the EIA and GIA.

Accordingly, the Commission will insert a new subclause in clause 12 of the draft ERC v11 which states:

> *"(3A) Each provision of the model terms and conditions set out in Schedule 1, as varied to incorporate any permitted alterations or required alterations:*
>
> *(a) is a term or condition decided by the Commission for the purpose of section 36(1) of the Electricity Industry Act and section 43(1) of the Gas Industry Act in relation to relevant customers who purchase energy under a standard retail contract; and*
>
> *(b) the terms and conditions of the contract must not be inconsistent with the provision; and*

[96] Consumer Groups submission, pp. 28-29.

(c) the terms and conditions of the contract may supplement or augment the operation of the provision; and

(d) the terms and conditions of the contract must not diminish the operation of the provision; and

(e) the provision prevails to the extent of any inconsistency with any other term or condition of the contract."

With regard to the Consumer Groups' submission that clause 51 should incorporate a reference to the Voltage Variations Guideline, the Commission does not find it necessary to include this reference. The draft ERC v11 is not intended to be an all-inclusive instrument, but acknowledges that the Voltage Variation Guideline is still in force in Victoria.

DRAFT DECISION

The Commission proposes to not amend clauses 51 and 52. The Commission proposes to insert a new subclause into clause 12 of the draft ERC v11, which will have the same effect as section 29 of the NERL.

14 OTHER RETAILER OBLIGATIONS – DIVISION 9

This chapter discusses the submission received in relation to Part 2, Division 9 – Other retailer obligations.

14.1 Referral to interpreter services – Clause 55

Clause 55 of the draft ERC v11 states:

> *"[a] retailer must refer a residential customer to a relevant interpreter service if a referral is necessary or appropriate to meet the reasonable needs of the customer."*

Submission

The Consumer Groups suggested that *'reasonable needs'* should be defined, so that it was not solely at the retailer's discretion.[97]

Discussion

'Reasonable needs' is not defined in the NERR or the NERL. Clause 55 of the draft ERC v11 is consistent with the NERR and an equivalent provision is not included in the ERC v10.

The Commission considers that it is clear from the context of clause 55 that the decision to refer a customer to an interpreter service based on their *'reasonable needs'* refers to an assessment of the customer's language needs. In the Commission's view, it would be difficult to develop a prescriptive definition of *'reasonable needs'*, and the NERR drafting is appropriate.

DRAFT DECISION

The Commission proposes to not amend clause 55.

14.2 Provision of information to customers – Clause 56

Clause 56 of the draft ERC v11 defines the information a retailer must publish on its website and other information a retailer must provide to a customer.

[97] Consumer Groups submission, p. 29.

Submission

The Consumer Groups raised concern about the level of information that is contained on retailers' websites and whether customers are able to navigate the website. The Consumer Groups submitted that retailers should be required to *"actively advise a customer of their rights to escalat[e] complaints, including to EWOV, at the time of a complaint*".[98]

The Consumer Groups also submitted that subclauses 26(2) and (3) of ERC v10 should be included in the draft ERC v11, which require retailers to provide a copy of their charter and, on request, a copy of the ERC.[99]

Discussion

The Commission does not see the necessity of requiring retailers to provide a copy of the ERC to customers, as this is a publicly available document.

The Commission also does not see the need for retailers to provide a copy of their charter to customers, as the draft ERC v11 provides adequate obligations on retailers in relation to complaints handling and informing customers of their rights and obligations.

Consistent with the Commission's stated approach, clause 56 has been drafted in accordance with the NERR and the Commission sees no reason to change this drafting.

DRAFT DECISION

The Commission proposes to not amend clause 56.

[98] Consumer Groups submission, pp. 29-30.
[99] Consumer Groups submission, p. 30.

14.3 Retailer obligation in relation to customer transfer – Clause 57

Under clause 57 of the draft ERC v11, a retailer is required to obtain the customer's explicit informed consent to enter into the relevant customer retail contract, and be able to supply energy to a customer prior to submitting a request for the transfer of the customer. Under clause 57, a transfer can be completed prior to the cooling off period provided that a customer can still withdraw from the contract under clause 47.

Submission

The Consumer Groups submitted that transfers should not be permitted until the cooling off period has expired to avoid any issues customers may have in exercising their cooling off rights.[100]

Discussion

Consistent with the Commission's stated approach, clause 57 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the drafting appropriate and sees no requirement to change this agreed drafting.

DRAFT DECISION

The Commission proposes not to amend clause 57.

14.4 Notice to small customers where transfer delayed – Clause 59

Clause 59 of the draft ERC v11 states:

> *"[w]here a retailer has notified a small customer of the expected date of a transfer and that transfer does not occur, the retailer must, within 5 days of becoming aware that a transfer has not occurred on the expected date, notify the customer:*
>
> *(a) that the transfer did not occur; and*
>
> *(b) of the reason for the delay; and*
>
> *(c) of the new expected date of the completion of the transfer, if it is still proceeding."*

[100] Consumer Groups submission, pp. 30-31.

Submission

The Consumer Groups submitted that there was no discussion regarding timeframes for transfers as there was in the Electricity Customer Transfer Code. They said that there was only a suggestion of contacting a client if there was a delay to transfer. Further, they said that there was no discussion of transfer when there was a smart meter, as there was in the Electricity Customer Transfer Code.[101]

Discussion

After considering the Consumer Groups' submissions and as an aid to users of the draft ERC v11, the Commission considers that it would be useful to include a note after clause 59 that draws attention to the fact that additional requirements in relation to customer transfers are contained in the Electricity Customer Transfer Code.

DRAFT DECISION

The Commission proposes to amend the draft ERC v11 to include a note after clause 59 that draws attention to the fact that additional requirements in relation to customer transfers are contained in the ECTC.

[101] Consumer Groups submission, p. 31.

15 ENERGY MARKETING – DIVISION 10

This chapter discusses the submissions received in relation to Part 2, Division 10 – Energy marketing.

15.1 Overview of this Subdivision – Clause 61

Clause 61 of the draft ERC v11 states:

> *"(1) This Subdivision requires a retail marketer to provide specific information to small customers in connection with market retail contracts.*
>
> *(2) The information is referred to in this Subdivision as required information."*

Submission

The Consumer Groups submitted that the draft ERC v11 should:

- state that other Acts, such as the Australian Consumer Law, apply to retail marketers undertaking energy marketing activities; and
- include additional provisions from the Code of Conduct for Marketing, specifically the provisions referring to the marketing of minors or authorised customers.[102]

The Consumer Groups also stated that this clause should also apply to standard retail contracts.[103]

Discussion

As discussed in footnote 222 of the draft ERC v11, DSDBI commented in its Discussion Paper on *'Victorian-specific regulatory requirements under the National Energy Customer Framework'* that the NECF contains significant protections for customers which obviate the need for additional Victorian energy-specific regulation. As the Commission agrees with this view, the sections of the Code of Conduct for Marketing that are not covered in the NERR will not be included in the draft ERC v11.

Further, the Commission does not consider that there is a need to specifically state that other Acts and instruments apply to retailers undertaking energy marketing activities, as the draft ERC v11 is not intended to be an exhaustive list of energy regulations. It is clear in the draft ERC v11 that other instruments interact with it.

[102] Consumer Groups submission, p. 31.
[103] Consumer Groups submission, p. 31.

DRAFT DECISION

The Commission proposes not to amend clause 61.

15.2 Requirement for and timing of disclosure to small customers – Clause 62

Clause 62 of the draft ERC v11 requires retailers to provide required information before the formation of the market retail contract, or as soon as practicable after the contract has been formed.

Submissions

The Consumer Groups submitted that this clause should also apply to standard retail contracts.[104]

EWOV also submitted that this clause should apply to standard retail contracts and the required information should be provided prior to the formation of a contract.[105]

Discussion

The Commission acknowledges that there is a change in the arrangements relating to the requirements for timing and disclosure to small customers, particularly the requirements for the standard retail contract.

However, consistent with the Commission's stated approach, clause 62 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the NERR drafting to be appropriate.

DRAFT DECISION

The Commission proposes not to amend clause 62.

15.3 Form of disclosure to small customers – Clause 63

Under clause 63 of the draft ERC v11, retailers can provide the required information electronically, verbally or in writing. If the information is provided to the customer after the formation of the market retail contract, or if the information was provided to the customer electronically or verbally prior to the formation of the contract, the retailer

[104] Consumer Groups submission, p. 31-32.
[105] EWOV submission, pp. 9-10.

must provide the information in a single written disclosure statement after the contract has been formed.

Submission

The Consumer Groups submitted that the information should be required to be provided in a written format with the customer being provided with a reasonable opportunity to consider the information before entering into the contract.[106]

The Consumer Groups also stated that this clause should apply to standard retail contracts.[107]

Discussion

Consistent with the Commission's stated approach, clause 63 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. The Commission considers the NERR drafting to be appropriate.

DRAFT DECISION

The Commission proposes not to amend clause 63.

15.4 Required information – Clause 64

Clause 64 of the draft ERC v11 sets out the required information retailers must provide to customers, including the commencement date, applicable prices, and rights of the customer regarding withdrawing and complaining. If the information is given in a written disclosure statement, then a copy of the market retail contract must be provided.

Submissions

The Consumer Groups submitted clause 64 should do the following:

- make a provision for the customer to have a reasonable opportunity to consider the information;
- ensure the retailer is clear regarding whether the price is GST inclusive; and

[106] Consumer Groups submission, p. 32.
[107] Consumer Groups submission, p. 32.

- require the retailer to advise customers of rights to complain and information on how to do so.[108]

EWOV suggested that:

- the draft ERC v11 contain the same required information as the ERC v10; and
- clause 64 be moved to the beginning of Subdivision 2 to assist readers to understand other references to *'required information'*.[109]

Discussion

Consistent with the Commission's stated approach, clause 64 has been drafted in accordance with the NERR. In the Commission's opinion, the drafting and current layout of Division 10, Subdivision 2 is appropriate and clear to the reader. Therefore, the Commission does not agree that this provision should be amended.

DRAFT DECISION

The Commission proposes not to amend clause 64.

15.5 No contact lists – Clause 65

Under clause 65, a retailer must create and maintain a "no contact list" and publish a statement on its website with the procedures for being placed on the list. A customer remains on the "*no contact list*" for a period of 2 years from each customer request to be included on the list. This clause does not apply to telemarketing calls or e-marketing activities.

Submissions

The Consumer Groups stated that the 2 year renewal requirements should be removed from the clause and retailers should be required to confirm, in writing, the customer's inclusion on the "*no contact list*". The Consumer Groups also said that retailers should be obliged to advise customers, at the time of marketing, of the "*no contact list*".[110]

[108] Consumer Groups submission, pp.32-33.
[109] EWOV submission, p. 9.
[110] Consumer Groups submission, p. 33.

EWOV submitted that the draft ERC v11 should be amended to include a "*no contact list*" for all marketing mediums as reflected in the ERC v10 with customers remaining on the list until they request otherwise.[111]

Discussion

Consistent with the Commission's stated approach, clause 65 has been drafted in accordance with the NERR. The Commission is of the opinion that the NERR drafting is appropriate. The Commission also notes that the ERC v10 does not currently require retailers to inform customers of the "*no contact list*" at the time of marketing.

DRAFT DECISION

The Commission proposes not to amend clause 65.

15.6 Record keeping – Clause 68

Under clause 68 of the draft ERC v11, retailers are obliged to keep records of all energy marketing activities it carries out, directly or indirectly, for a period of at least 12 months (longer if a complaint is made by a customer regarding the activity).

Submissions

The Consumer Groups submitted that this clause should be amended to be more explicit regarding the details the retailers must keep.[112]

EWOV submitted that under the draft ERC v11 it will be more difficult to conduct investigations into customer complaints, as retailers will not be required to maintain records to the level they are currently required.[113]

Discussion

Consistent with the Commission's stated approach, clause 68 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. It is the Commission's opinion that the NERR drafting is appropriate.

[111] EWOV submission, p. 8.
[112] Consumer Groups submission, p. 33.
[113] EWOV submission, p. 8.

DRAFT DECISION

The Commission proposes not to amend clause 68.

16 TERMINATION – DIVISION 11

This chapter discusses the submission received in relation to Part 2, Division 11 – Miscellaneous.

16.1 Termination of a deemed contract – Clause 70A

Clause 70A of the draft ERC v11 states:

> *"For the purposes of:*
>
> *(a) section 39(5)(b) of the Electricity Industry Act; or*
>
> *(b) section 46(5)(b) of the Gas Industry Act,*
>
> *a deemed contract under that section comes to an end at the end of the period covered by the second bill issued by the retailer to the customer."*

Submissions

EWOV submitted that clause 70A of the draft ERC v11 was inconsistent with section 39(7) of the EIA and section 46(7) of the GIA, and should be amended to provide consistency.[114]

Origin stated that this clause should be amended to state that *"a deemed contract ends on disconnection or when a new contract is entered into."*[115]

Discussion

Clause 70A of the draft ERC v11 adopts the drafting in clause 24.4 of ERC v10.

Section 39(5)(b) of the EIA and section 46(5)(b) of the GIA confer a discretion on the Commission to determine when a deemed contract will come to end as follows:

> *"… the Commission may decide, and provide for in the licence of a licensee, conditions setting out –*
>
> *(a)…*
> *(b) events on the happening of which a deemed contract under this section may come to an end."*

[114] EWOV submission, p. 11.
[115] Origin submission, p. 2.

Section 39(7) of the EIA sets out the statutory circumstances in which a deemed contract will end as follows.

> *"A deemed contract under this section comes to an end-*
> *(a) if the contract is terminated; or*
> *(b) if the customer enters into a new contract for the purchase of electricity from the licensee in respect of the same premises, on the date of taking effect of that new contract;*
> *(c) if the customer transfers to become the customer of another licensee;*
> *(d) at the end of 180 days after the day on which the deemed contract commences;*
> *(e) on the happening of an event decided and provided for by the Commission under subsection (5)(b)*
> *whichever occurs first."*[116]

As such, the Commission is able to decide an event when a deemed contract will terminate under section 39(5)(b). Therefore, the Commission does not agree with EWOV that there is an inconsistency between the draft ERC v11 and the legislation.

However, the Commission has taken into account the submissions of EWOV and Origin, and will amend clause 70A to state *"… a deemed contract under that section comes to an end at the end of the period covered by the second bill issued by the retailer to the customer or if any of the events listed in section 39(7) of the Electricity Industry Act and section 46(7) of the Gas Industry Act occur, whichever occurs first."*

DRAFT DECISION

The Commission proposes to amend clause 70A to clarify what happens to a deemed contract if the customer continues to take supply after being issued a second bill.

[116] Section 46(7) of the GIA is substantially equivalent to section 39(7) of the EIA except that subsection (d) of the GIA provides that a deemed contract comes to an end at the end of 120 days after the day on which the deemed contract commences.

17 CUSTOMER HARDSHIP – PART 3

This chapter discusses the submissions received in relation to Part 3 – Customer hardship.

17.1 Approval process for hardship policies

Submissions

Origin stated that the inclusion of Guideline 21 was unnecessary and resulted in greater administrative burden on retailers.[117]

AGL[118] and Simply Energy[119] submitted that retailers with national hardship policies approved by the AER should not also be required to obtain the approval of the Commission for their hardship policies.

Discussion

Under the EIA and GIA, the Commission is required to review and approve the hardship polices of retail licence holders. This obligation is mandatory, not discretionary. The Commission is unable to fulfil our obligation by relying on AER's review, and must make an independent decision. As such, under the harmonisation period retailers will have a continuing obligation to obtain approval from the Commission with respect to their hardship policies. This means that the inclusion of Guideline 21 in the draft ERC v11 is required in order for the Commission to perform its role.

DRAFT DECISION

The Commission proposes to continue to require retailers to obtain the approval of the Commission for their hardship policies.

[117] Origin submission, p. 1.
[118] AGL submission, p. 2.
[119] Simply Energy submission, p. 4.

17.2 Obligation of retailer to communicate customer hardship policy – Clause 71

Clause 71 of the draft ERC v11 states:

> *"(1) A retailer must inform a hardship customer of the retailer of the existence of the retailer's customer hardship policy as soon as practicable after the customer is identified as a hardship customer.*
>
> *(2) The retailer must provide a customer or a financial counsellor with a copy of the customer hardship policy on request and at no expense.*
>
> *(2) A retailer must publish details of its customers hardship policy on its website;*
>
> *(i) as soon as practicable after it has been approved by the Commission; and*
>
> *(ii) in a way that is easy for a customer to access."*

Submissions

The Consumer Groups submitted that the provisions of clause 71 of the draft ERC v11 do not *"encourage retailers to be pro-active in the way in which they engage with their customers."*[120] Specifically, the Consumer Groups stated that publication of the retailer's hardship policies does not sufficiently draw customers' attention to them, and retailers instead should be required to be pro-active in communicating their hardship policies, including how to access them and providing a copy of the policy when a customer is in the hardship program.[121]

Consumer groups also raised concern that subclause 2.2(xiii) of Guideline 21, which provides that a retailer's financial hardship policy be transparent, accessible and communicated to domestic customers, financial counsellors and community assistance agencies, has not been incorporated into the draft ERC v11.[122]

Discussion

Clause 71 of the draft ERC v11 was amended to incorporate the requirement under section 43(2) of the NERL, which requires a retailer to publish its customer hardship policy on its website as soon as practicable after it is approved, and clause 2.3 of

[120] Consumer Groups submission, pp. 33-34.
[121] Consumer Groups submission, p. 34.
[122] Consumer Groups submission, p. 34.

Guideline 21, which requires a retailer to publish details of the hardship policy on its website in a way that is easy for a customer to access.

The Commission considers that clause 71 of the draft ERC v11 is consistent with the position under Guideline 21 and does not agree with the Consumer Group's submission that further amendments to this clause are required.

The Commission will include clause 2.2 of Guideline 21 in the draft ERC v11 in place of clause 71A. This is discussed further below.

DRAFT DECISION

The Commission proposes not to amend clause 71. However, the Commission proposes to will clause 2.2 of Guideline 21 in the draft ERC v11 in place of clause 71A.

17.3 Minimum requirements for customer hardship policy – Clause 71A

Clause 71A of the draft ERC v11 states:

> *"(1) The minimum requirements for a customer hardship policy of a retailer are that it must contain:*
>
> *(a) the matters set out in section 43(2) of the Electricity Industry Act or section 48G of the Gas Industry Act: and*
>
> *(a) processes to identify residential customers experiencing payment difficulties due to hardship, including identification by the retailer, financial counsellors and self-identification by a residential customer; and*
>
> *(b) processes for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship; and*
>
> *(c) flexible payment options (including a payment plan and Centrepay) for the payment of energy bills by hardship customers; and*
>
> *(d) processes to identify appropriate government concession programs and appropriate financial counselling services and to notify hardship customers of those programs and services; and*

(e) an outline of a range of programs that the retailer may use to assist hardship customers; and

(f) processes to review the appropriateness of a hardship customer's market retail contract in accordance with the purpose of the customer hardship policy; and

(g) details of:

(i) how and in what circumstances the retailer will make field audits of electricity or gas usage available to customers experiencing financial hardship;

(ii) in what circumstances the field audits will be available at partial or no cost to the customer; and

(iii) how the customer's agreement to partially fund a field audit will be obtained and how the benefits of the customer's expenditure will be demonstrated; and

(h) provide details of how and in what circumstances the retailer will provide assistance to customers in financial hardship to replace electrical and gas appliances, including whether the retailer will sell or supply the appliances itself or nominate a third party to do so; and

(i) any variations specified or of a kind specified by the Commission; and

(j) any other matters required by this Code.

Submissions

The Consumer Groups suggested that the following changes to clause 71A be made:

- subclause 71A(1) should:
    - incorporate subclause 2.2(b)(v) of Guideline 21 (which requires the retailer to provide details of the processes the retailer uses to assess appropriate options for customers);
    - include a requirement for information on how customers will be assisted to maintain their participation in payment plans or other options;

- require retailers to notify and refer customers to concession programs;
- include subclauses 2.2(b)(x), (xi) and (xii) from Guideline 21 (which require retailers to set out customers' rights and obligations regarding hardship programs, provide the circumstances when the program will cease, and adequately educate staff on the programs);

- subclause 71A(1)(a) should include *'criteria'* and subclause 2.2(b)(xiii) of Guidelines 21 (requiring the retailer to be accessible and transparent);

- subclause 71A(1)(f) should include subclauses 2.2(b)(xiv) and 2.2(b)(xv) of Guidelines 21 (which require the retailer to recommend the most appropriate tariff and monitor the customer's consumption to ensure they remain on most appropriate tariff).[123]

The Consumer Groups also noted two potential drafting errors in that clause 71A includes two different provisions for subclause 71A(1)(a), and subclause 71A(1)(a) should refer to subclause 48G(2) of GIA.[124]

Momentum submitted that DSDBI had provided no evidence of the effectiveness of the energy audits and the appliance assistance program to justify the retention of the requirements.[125]

Discussion

Consumer Groups submitted that there are additional aspects of clause 2.2 of Guideline 21 which were not incorporated into the draft ERC v11.

The Commission notes our drafting omission in not incorporating the entirety of clauses 2.1 - 2.4 of Guideline 21 in the draft ERC v11. Given this omission, the Commission proposes to incorporate all the provisions of clause 2.2 of Guideline 21 into the draft ERC v11 and not include any of the provisions of the NERL. This approach will ensure that the Commission meets its obligations under the EIA and GIA and will create less confusion for customers and industry, by avoiding combining some aspects of the NERL and some aspects of Guideline 21.

Accordingly, the Commission will remove clause 71A of the draft ERC v11 and incorporate the provisions set out in clause 2.2 of Guideline 21 into a new clause 71B.

[123] Consumer Groups submission. p. 34-35.
[124] Consumer Groups submission, p. 37.
[125] Momentum submission, p. 3.

Momentum's submission raises an issue of policy that is outside the scope of this consultation, and should be raised directly with DSDBI.

DRAFT DECISION

The Commission proposes to remove clause 71A of the draft ERC v11.

The Commission proposes to insert a new 71B which incorporates the provisions of clause 2.2 of Guideline 21.

17.4 Approval and variation of customer hardship policy – Clause 71B

Clause 71B of the draft ERC v11 states:

> *"(1) The Commission must approve a customer hardship policy (or variation) submitted to the Commission for approval if the Commission is satisfied that the policy (or the policy as varied):*
>
> (a) *contains the minimum requirements for a customer hardship policy set out in clause 71A; and*
>
> (b) *is appropriate having regard to:*
>
> (i) *the factors set out in section 45(2) of the Electricity Industry Act or section 48I of the Gas Industry Act; and*
>
> (ii) *the objects set out in section 42 of the Electricity Act or section 48F of the Gas Industry Act, including the promotion of best practice in energy delivery.*
>
> *(2) If it is not so satisfied, the Commission may:*
>
> *(a) indicate to the retailer in what respects it considers the customer hardship policy (or variation) as submitted is deficient and request the retailer to submit another customer hardship policy (or variation); or*
>
> *(b) approve the customer hardship policy (or variation) with alterations agreed to by the retailer so that the Commission is satisfied as to the matters referred to in subclauses 1(a) and (b).*
>
> (3) *If the Commission forms the view that a retailer's customer hardship policy requires review:*

(a) *the Commission may direct the retailer to review the policy and make variations in accordance with any requirements set out by the Commission and;*

(b) *the retailer must:*

(i) *vary the policy in accordance with the Commission's requirements;*

(ii) submit it to the Commission for approval; and

(iii) publish the policy, as approved by the Commission, on its website as soon as practicable after it has been approved.

(4) *A retailer may vary its customer hardship policy independently of a direction referred to in subclause (3) but only if the variation has been approved by the Commission and the varied policy has been published on the retailer's website after the Commission has approved the variation.*

(5) *A reference in this Part 3 to varying a customer hardship policy extends to replacing the policy with another customer hardship policy.*

(6) *Any request by a retailer for the Commission to approve a new or amended customer hardship policy must include a statement as to the nature, impact and reason for the change."*

Submission

The Consumer Groups raised concern that subclause 71B(3)(b) appeared to mirror section 43(3)(b) of the NERL but did not include section 43(3)(b)(iv), which states that the retailer will maintain and implement the policy.[126]

The Consumer Groups also submitted that clause 71B should require retailers to review their hardship policies periodically.[127]

The Consumer Groups noted two potential drafting errors in that they submitted subclause 71B(1)(b)(i) should refer to section 48I(2) of the GIA rather than 48I and subclause 71B(1)(b)(ii) should refer to the EIA and not the Electricity Act.[128]

[126] Consumer Groups submission. p. 37.
[127] Consumer Groups submission, p. 38.
[128] Consumer Groups submission, p. 38.

Discussion

For the reasons stated above in chapter 17.3, the Commission considers that the provisions of clauses 2.1 and 2.4 of Guideline 21, which relate to approval and variation of a financial hardship policy, should have been incorporated into the draft ERC v11 instead of the provisions in the NERL.
Accordingly, the Commission will remove clause 71B of the draft ERC v11 and incorporate the provisions set out in clause 2.1 of Guideline 21 into a new clause 71A, and the provisions set out in clause 2.4 of Guideline 21 into a new clause 71C.

DRAFT DECISION

The Commission proposes to remove clause 71B of the draft ERC v11.

The Commission proposes to insert a new clause 71A which incorporates the provisions set out in clause 2.1 of Guideline 21.

The Commission proposes to insert a new clause 71C which incorporates the provisions of clause 2.4 of Guideline 21.

17.5 Payment plans – Clause 72

Under clause 72 of the draft ERC v11, retailers must offer payment plans for hardship customers or customers experiencing payment difficulties having regard to the customer's capacity to pay, any arrears owing by the customer, and the customer's expected energy consumption needs for the following 12 month period.
Clause 72 also requires retailers to inform the customer of the details of the plan, including the duration.

Submissions

Simply Energy stated that the reference to *'business customer'* in subclause 72(3) should be changed to *'small business customer'* to avoid commercial and industrial business customers being eligible for payment plans.[129]

The Consumer Groups stated that there should be *'universal access'* to payment plans and stated that it was inappropriate to place the clause addressing payment plans under Part 3 Customer hardship, as not everyone on a payment plan was in hardship.[130]

[129] Simply Energy submission, p. 3.
[130] Consumer Groups submission, pp. 37-38.

Discussion

Under the draft ERC v11, a *'business customer'* means a customer who is not a *'residential customer'*. A residential customer means a customer who purchases energy principally for personal, household or domestic use. This definition of business customer is the same as the definition used under the ERC v10 and also under the NERR.

Under the provisions of the draft ERC v11, retailers have specific obligations in relation to business customers, including:

- considering any reasonable request from a business customer for a payment plan, which is an obligation that was introduced to the draft ERC v11 to incorporate clause 12.3 of the ERC v10; and

- when a retailer can require a business customer to provide a security deposit and when a retailer is obliged to return a security deposit to a business customer. These are existing obligations under the NERR that the Commission did not amend because it considered they were substantially consistent with the outcomes achieved under clause 8 of the ERC v10.

The Commission notes that the concern raised by Simply Energy is one that exists under ERC v10 and is not a new issue that arises from the terms of the draft ERC v11. However, the Commission's understanding is that, under the ERC v10, the payment plan and security deposit provisions would be "read down" and apply only to small business customers. This is because ERC v10 applies only to all domestic customers and small business customers. Clause 3B of the draft ERC v11 provides that the draft ERC v11 applies only to all small customers (which is defined in clause 3 as domestic or small business customers). As such, all references to *'business customer'* under the draft ERC v11 would be interpreted as applying only to small business customers.

In the Commission's view, there is merit in avoiding this two-step process of interpretation by amending the definition of a *'business customer'* in clause 3 to a *"small customer who is not a residential customer"*. The Commission will amend the definition of '*business customer'* in clause 3 accordingly.

As previously discussed above at chapter 6.5 of this Paper, the Commission's position is that a residential customer's right to access payment plans under the draft ERC v11 is substantially equivalent to a customer's right to access an instalment plan under ERC v10. The Commission has also considered the impact of the introduction of flexible pricing on the draft ERC v11 and notes that clause 72 is not affected by the new flexible pricing environment.

Whilst the Commission acknowledges that not all customers on a payment plan are in hardship, it is appropriate to keep the payment plans clause under Part 3 Customer

hardship and this is consistent with the NERR drafting.

As discussed above at chapter 10.14 of this Paper, the Commission will delete subclause 72(1A) from the draft ERC v11 and subclause 33(1) will be amended to include the additional text in subclause 72(1A)(b).

The Commission will also renumber subclause 72(2A) to 72(3) to address a drafting error.

DRAFT DECISION

The Commission proposes to amend the definition of *'business customer'* in clause 3 to *"small customer who is not a residential customer"* and replace the reference to instalment plan with payment plan.

The Commission proposes to delete clause 72(1A) and renumber subclause 72(2A) to 72(3).

17.6 Debt recovery – Clause 72A

Clause 72A of the draft ERC v11 states:

> *"A retailer must not commence proceedings for the recovery of a debt relating to the sale and supply of energy from a residential customer if:*
>
> *(a) the customer continues to adhere to the terms of a payment plan or other agreed payment arrangement; or*
>
> *(b) the retailer has failed to comply with the requirements of:*
>
> *(i) its customer hardship policy in relation to that customer; or*
>
> *(ii) this Electricity Industry Act or Gas Industry Act and this Code relating to non-payment of bills, payment plans and assistance to hardship customers or residential customers experiencing payment difficulties.*
>
> *(c) the retailer has failed to comply with guidelines on debt collection issued by the Australian Competition and Consumer Commission concerning section 50 of the Australian Consumer Law as set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth)."*

Submissions

Simply Energy noted a drafting error in 72A(b)(ii) with the reference to *"this Electricity Industry Act"* instead of *"the Electricity Industry Act"*.[131]

The Consumer Groups submitted that subclause 11.4(a) of the ERC v10 should be incorporated into clause 72A of the draft ERC v11. Subclause 11.4(a) states that a retailer cannot *"commence legal proceeding for recovery of a debt from a domestic customer unless and until the retailer has complied with all applicable requirements of clause 11.2."* The Consumer Groups also stated that clause 11.2 of the ERC v10 is not fully incorporated into the draft ERC v11, and suggested that it should be.[132]

The Consumer Groups further submitted that retailers should be required to consider the provisions in subclause 72(1) of the draft ERC v11 (such as a customer's capacity to pay and energy consumption) before commencing debt collection for a customer on a payment plan, and there should be *'universal access'* to payment plans.[133]

Discussion

The Commission notes the drafting error in subclause 72A(b)(ii) and will amend the subclause to refer to *"the Electricity Industry Act"* rather than *"this Electricity Industry Act".*

The drafting of clause 72A is not intended to completely mirror clauses 11.2 or 11.4 of the ERC v10. Rather, it is intended to incorporate some of its requirements and those outlined in section 51 of the NERL. The Commission considers the drafting of clause 72A appropriate and does not consider that there is a convincing reason to amend the clause.

The Commission has already addressed the Consumer Groups' submission regarding *'universal access'* to payment plans in its discussion at chapter 6.5 of this Paper. The Commission has also considered the impact of the introduction of flexible pricing on the draft ERC v11 and notes that clause 72A is not affected by the new flexible pricing environment.

DRAFT DECISION

The Commission proposes to amend clause 72A to refer to *'the Electricity Industry Act'* instead of *'this Electricity Industry Act'*.

[131] Simply Energy submission, p. 3.
[132] Consumer Groups submission, pp. 39-40.
[133] Consumer Groups submission, pp.39-40.

17.7 Payment by Centrepay (SRC and MRC) – Clause 74

Clause 74 of the draft ERC v11 requires retailers to allow a hardship customer on a standard retail contract to use Centrepay as a payment option. For customers on a market retail contract, retailers must allow a customer to use Centrepay if the payment option is available under the contract. If it is not available, the retailer must undertake a review of the market retail contract.

Submission

The Consumer Groups submitted that *"all customers should be offered payment by Centrepay"*.[134]

Discussion

As stated above at chapter 10.13 of this Paper, the Commission disagrees with the Consumer Groups' submission that Centrepay must be available to all customers. Consistent with the Commission's stated approach, clause 74 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision. Furthermore, this optional requirement is not currently provided for under the ERC v10. Therefore, the Commission considers the drafting appropriate and expects that most retailers would be willing to allow a customer to use this payment method as long as there is no valid reason for refusing the request.

The Commission has also considered the impact of the introduction of flexible pricing on the draft ERC v11 and notes that clause 74 is not affected by the new flexible pricing environment.

DRAFT DECISION

The Commission proposes not to amend clause 74.

17.8 Supply capacity control product – Clause 76A

Clause 76A states:

> *"A retailer must not offer a supply capacity control product to a customer for any credit management purpose before 1 January 2014."*

[134] Consumer Groups submission, p. 40.

Discussion

The Commission has been advised by the Minister for Energy and Resources that this current prohibition will be extended beyond 1 January 2014. Therefore, the Commission will amend clause 76A to state that the prohibition on retailers offering a supply capacity control product to a customer is extended to a date to be determined by the Minister.

DRAFT DECISION

The Commission proposes to amend clause 76A to extend to a date to be determined by the Minister for Energy and Resources.

18 DE-ENERGISATION (OR DISCONNECTION) OF PREMISES, SMALL CUSTOMERS – PART 6

This chapter discusses the submissions received in relation to Part 6 – De-energisation (or disconnection) of premises – small customers.

Please note that in its discussion in this section, the Commission has adopted the NECF terminology for consistency even when discussing the provisions under the ERC v10. The terms used in NECF include de-energisation (compared to disconnection under the ERC v10) and re-energisation (compared to reconnection under the ERC v10).

18.1 Definitions – Clause 108

Clause 108 defines disconnection warning period, extreme weather event, protected period, public holiday and reminder notice period.

Submissions

Origin submitted that *"[t]here is the potential to confuse those reading the ERC (including consumers) if references to extreme weather events are included, without obligations applying in practice to retailers or distributors"*.[135]

The Consumer Groups stated that the terms *'de-energisation'* and *'re-energisation'* used throughout in the draft ERC v11 should be replaced with *'reconnection' and 'disconnection'*, in accordance with ERC v10, the EIA and the GIA.[136]

Simply Energy submitted that *"[t]he definition of protected period needs to be changed from 'business customer' to 'small business customer'"*.[137]

Discussion

The Commission has been informed that the inclusion of the optional extreme weather event provision under the NECF is not current DSDBI policy. As such, the Commission will remove the provision in the draft ERC v11. However, if DSDBI's policy on this issue changes, the draft ERC v11 will be amended accordingly. Consequently the Commission will delete the definition of '*extreme weather event*' from clause 108 and the reference to '*extreme weather event'* under subclause 116(1)(h).

[135] Origin submission, p. 2.
[136] Consumer Groups submission, p. 40.
[137] Simply Energy submission, p.3.

The terms *'de-energisation'* and *'re-energisation'* are the terms used in the standard NECF drafting and, as such, have been adopted for consistency.

As previously described at chapter 17.5 of this Paper, the Commission will amend the definition of *'business customer'* to refer to a '*small customer who is not a residential customer'*.

DRAFT DECISION

The Commission proposes to delete the definition of *'extreme weather event'* from clause 108 and the reference to *'extreme weather event'* under subclause 116(1)(h).

18.2 De-energisation for not paying bill – Clause 111

Clause 111 of the draft ERC v11 states that, in certain circumstances, a retailer may arrange de-energisation of a customer's premises for unpaid bills.

Subclause (3) states:

> *"A retailer may arrange de-energisation of a customer's premises, including by de-energising the customer's supply remotely, if:*
>
> *(a) the customer has, while on a shortened collection cycle, not paid a bill by the pay-by date; and*
>
> *(b) the retailer has given the customer a disconnection warning notice after the pay-by date; and*
>
> *(c) the retailer has, after giving the disconnection warning notice, used its best endeavours to contact the customer, in connection with the failure to pay, or to agree to the offer or to adhere to the payment plan or instalment arrangement as referred to in subclause (1)(a)(ii) and (b)(ii), in one of the following ways:*
>
> *(i) in person;*
>
> *(ii) by telephone (in which case contact is, if the telephone is unanswered, taken to have occurred only if the customer acknowledges receipt of a message);*
>
> *(iii) by facsimile or other electronic means (in which case contact is taken to have occurred only if the customer acknowledges receipt of the message); and*

(d) *the customer has refused or failed to take any reasonable action towards settling the debt."*

Submissions

The Consumer Groups submitted that *"clause 111(3) has only partially captured the intent of ERC v10 clause 13.2 which has been drafted explicitly with reference to smart meters … [and] does not adequately address the needs of those consumers with smart meters."*[138]

Consumer Groups also raised concern about the reliance clause 111 places on payment plans, as the plans are not required to consider a customer's capacity to pay.[139]

EWOV submitted that the provisions from ERC v10 should be retained in the draft ERC v11 with regard to requiring a retailer to offer a payment plan, unless in the last 12 months the customer has failed to comply with two payment plans and cannot provide reasonable assurance that they are willing to meet payment obligations under a further instalment plan.[140] EWOV stated that this clause should be redrafted to provide more clarity regarding the retailer's obligation to offer two payment plans.[141]

EWOV also submitted that the draft ERC v11 should be amended to prohibit de-energisation for debt relating to previous sites.[142]

EWOV also raised concerns about a shortening in timeframes for de-energisation and notices, particularly in that the ERC v10 states that de-energisation cannot occur until after the disconnection warning notice's pay-by date has lapsed, whereas the draft ERC v11 is silent on this issue.[143]

Discussion

As far as possible, and in accordance with the Commission's stated approach, clause 111 has been drafted in accordance with the NERR. There are no Victorian derogations for clause 111. The Commission has also considered whether the introduction of flexible pricing in Victoria will have an impact on the provisions of the draft ERC v11 and notes that clause 111 will not be affected by the new flexible pricing environment.

[138] Consumer Groups submission, p. 41.
[139] Consumer Groups submission, p. 41.
[140] EWOV submission, p. 12.
[141] EWOV submission, p. 12.
[142] EWOV submission, 13.
[143] EWOV submission, p. 13-14.

Customers with smart meters

In response to the Consumer Groups' submission regarding the inclusion of subclause 13.2, the Commission notes that subclause 13.2(b) of ERC v10 was not included in the draft ERC v11 in its entirety because the intent of the clause is adequately covered by the NERR sections 111(2) and 111(3) except for the reference to remote de-energisation. In accordance with the Commission's approach of adopting the NERR drafting, the Commission only inserted the reference to remote de-energisation in subclause 13.2(b) of the ERC v10 into subclause 111(3) of the draft ERC v11.

Requirement to offer a payment plan and reliance on payment plans

The Commission disagrees with EWOV's submission regarding the need to clarify the requirement to offer two payment plans. The Commission is of the view that the current drafting of clause 111 clearly outlines that a retailer must have offered two payment plans within the last 12 months to a hardship customer or a residential customer experiencing payment difficulties prior to de-energising the premises. The Commission also disagrees with the Consumer Groups' submission regarding the reliance of clause 111 on payment plans. As outlined above in chapter 6.5, under clause 72 of the draft ERC v11 retailers are required to consider a customer's capacity to pay in developing a payment plan.

Change in timeframes for de-energisiation

The Commission acknowledges that there has been a reduction of three business days in the timeframe for de-energisation for non-payment of a bill under the draft ERC v11. The timeframe outlined in clause 111 is taken from the NERR. The Commission considers the reduction in the timeframe to be appropriate as the notice requirements under clause 111 are the same as the notice requirements under the ERC v10, which means that customers will still be given adequate notice prior to de-energisation.

Further, the Commission disagrees with EWOV that the draft ERC v11 is silent on whether de-energisation can occur before the expiration of the disconnection warning period. Clause 110(2)(c) of the draft ERC v11 provides that a disconnection warning notice must state when the disconnection warning period will expire and that payment of the bill must be made during the disconnection warning period to avoid de-energisation. Given that a retailer is required to advise the customer of the expiration date of the disconnection warning notice, it is clear that only after the expiry of that date will a retailer be entitled to de-energise the customer.

The disconnection warning period under the draft ERC v11 starts on the date of issue of a disconnection warning notice (which must be no earlier than the next business day after the end of the reminder notice period) and ends no earlier than six business days

from the date of issue of the disconnection warning notice. Subclause 116(i) of the draft ERC v11 prohibits a retailer from de-energising a customer during a '*protected period*'. A '*protected period*' includes a business day before 8am or after 2pm for a residential customer, or 3pm for a business customer, a Friday or the day before a public holiday or a weekend or a public holiday.

Therefore, as the disconnection warning period does not expire until 5pm on the sixth day, the earliest that a retailer could de-energise a customer under clause 111 of the draft ERC v11 is the next day after 8am, being 28 days from the bill issue date.

De-energisation for debts from previous premises

The Commission also acknowledges that a retailer may de-energise a customer for debts relating to previous premises under the draft ERC v11. This is currently prohibited under clause 13.1 of the ERC v10. However, as stated above at chapter 9.2, the Commission considers that given the protections in the draft ERC v11, this change is appropriate.

Clarification of '*best endeavours'* requirements

Following further consideration and review of subclauses 111(1)(e) and 111(3)(c) of the draft ERC v11, the Commission considers that there is potential for confusion in relation to the interpretation of the direction provided in paragraphs (ii) and (iii), that a customer is taken to have been contacted when the customer acknowledges receipt of a message, and the requirement in subclauses 111(1)(e) and 111(3)(c) that a retailer use its "*best endeavours to contact the customer"*. In the Commission's opinion, this will lead to practical difficulties for retailers in satisfying the requirements of subclauses 111(1)(e) and 111(3)(c).

To avoid any confusion arising, the Commission will amend subclauses 111(1)(e)(ii) and (iii) and 111(3)(c)(ii) and (iii) to remove the text in brackets. The Commission will also include the following note at the end of subclause 111(3) to highlight that guidance is provided regarding '*best endeavours'* and other issues associated with de-energisation of a customer's premises in the Commission's Operating Procedure Compensation for Wrongful Disconnection:

> *Further guidance in relation to the Commission's expectations with respect to de-energisation of a customer's premises is set out in the Commission's publication Operating Procedure Compensation for Wrongful Disconnection.*

The Commission will also include a further note at the end of subclause 111(3) to clarify that "other electronic means" (referred to in subclause 111(3)(c)(iii)) includes email.

The Commission also acknowledges the drafting error in subclause 111(2)(a) of including the time limit from subclause 13.2(a)(iii) of the ERC v10 of 5 business days for a customer to accept a retailer's offer for a payment plan. Subclause 111(2)(a) of the draft ERC v11 provides:

> *"Where a customer is a hardship customer or a residential customer who has informed the retailer in writing or by telephone that the customer is experiencing payment difficulties, a retailer must not arrange for de-energisation of the customer's premises under subclause (1), unless the retailer has offered the customer 2 payment plans in the previous 12 months and: the customer has agreed to neither of them within 5 business days of the retailer's offer;*"

The NERR does not provide a time limit of five business days for the customer to agree to a payment plan. Consistent with the Commission's stated approach of adopting the NERR drafting, subclause 111(2)(a) will be amended to delete the following words "*within 5 business days of the retailer's offer*". The Commission notes that the NERR position provides greater consumer protection as customers are not limited to only five business days to accept a retailer's offer for a payment plan.

DRAFT DECISION

The Commission proposes to remove the text in brackets from subclauses 111(1)(e)(ii) and (iii).

The Commission proposes to remove the text in the brackets from subclauses 111(3)(c)(ii) and (iii).

The Commission proposes to amend subclause 111(2)(a) to remove the words *'within 5 business days of the retailer's offer'*.

The Commission proposes to add a note at the end of subclause 111(3) referring to the further guidance provided in the Operating Procedure Compensation for Wrongful Disconnection publication produced by the Commission.

18.3 Not paying security deposit or refusal to provide acceptable identification – Clause 112

Subclause 112(1) of the draft ERC v11 states:

> *"A retailer may arrange for the de-energisation of a customer's premises if the customer has failed to pay a security deposit or the customer refuses when required to provide acceptable identification (if the customer is a new customer of the retailer) and if:*

(a) *the retailer has given the customer a notice of its intention to do so; and*

(b) *the retailer has given the customer a disconnection warning notice after the expiry of the period referred to in the notice of its intention (being not less than 10 business days after the notice of its intention was given); and*

(c) *the customer has continued not to provide a security deposit or acceptable identification."*

This clause applies to standard retail contracts and market retail contracts (to the extent that the contract provides for payment of a security deposit).

Submission

Simply Energy submitted that the draft ERC v11 should retain the timeframe of five business days for the issuing of a disconnection warning notice, which would be consistent with the NECF applying in South Australia. Simply Energy stated that extending the timeframe would allow the debt to grow while not giving the customer an incentive to contact the retailer.[144]

Discussion

DSDBI has confirmed with the Commission that the policy intent in relation to preserving Victorian timeframes was limited to timeframes with respect to protected periods and not timeframes more broadly. As such, the Commission will amend subclause 112(b) to provide for a five business day notice period, as suggested by Simply Energy to ensure consistency with the NECF.

DRAFT DECISION

The Commission proposes to amend subclause 112(1)(b) to state that a five business day notice period applies, as opposed to 10 business days.

18.4 Denying access to meter – Clause 113

Clause 113 allows a retailer to arrange for de-energisation of a customer's premises if the customer does not allow access to its premises for three consecutive scheduled meter readings and the retailer has:

[144] Simply Energy submission, p. 3.

- given the customer an opportunity to offer reasonable alternative arrangements for access to the meter;
- provided the customer with notice for each scheduled meter reading and advised that it could arrange for de-energisation for failure to provide access to the meter;
- has used its '*best endeavours'* to contact a customer;
- has provided notice of its intention to arrange for de-energisation;
- provided the customer with a disconnection warning notice; and

the customer has not rectified the matter.

Submissions

The Consumer Groups submitted that this clause should require a retailer to use its '*best endeavours'* to offer a reasonable alternative arrangement, and '*best endeavours'* should be defined.[145]

EWOV submitted that clause 113 of the draft ERC v11 does not define the period in which a retailer must provide the customer with a notice of intention to de-energise premises which has been provided in clause 112. EWOV raised concerns that without defining the period of the notice of intention, customers could be de-energised after fewer days have lapsed than what is currently provided for in clause 13 of ERC v10.[146]

Discussion

Clause 113 of the draft ERC v11 provides that in relation to de-energisation for denying access to a meter, a retailer can arrange for the de-energisation of a customer if they have given the customer a disconnection warning notice after the expiry of the period referred to in the notice of its intention to de-energise the customer.

In contrast, clause 112 of the draft ERC v11, which relates to de-energisation for failure to pay a security deposit or provide acceptable identification, provides that a retailer must only give the customer a disconnection warning notice after the expiry of the notice of intention (being not less than 10 business days after the notice of intention to disconnect the customer was given). This is consistent with ERC v10.

[145] Consumer Groups submission, p. 41.
[146] EWOV submission, p.15.

Under subclause 13.3(a) of ERC v10, the retailer must give the customer *"a disconnection warning including a statement that the retailer may disconnect the customer on a day no sooner than seven business days after the receipt of the notice"*.

The Commission notes that while clause 113 of the NERR does not define the period of the notice of intention, unlike clause 112, subclause 113(e) has the additional requirement that a retailer must provide the customer with a disconnection warning notice. Under subclause 110(d) a disconnection warning notice must, for matters other than not paying a bill, allow a period of no fewer than five business days after the date of issue for the customer to rectify the matter before de-energisation may occur. The Commission assumes that in drafting the NERR, it was decided that as a matter of policy, a sufficient period of time was provided between the retailer giving a customer a notice of intention and then a disconnection warning notice before de-energisation was permitted.

In response to the Consumer Groups' submission regarding '*best endeavours*', as noted above in chapter 6.1 of this Paper, the Commission will be including the definition from ERC 10 in the draft ERC v11. With respect to using '*best endeavours'* to offer a customer a reasonable alternative arrangement, the ERC v10 does not contain this requirement and the Commission is not persuaded that there is a valid reason for deviating from the national provision.

As previously advised, it is the Commission's approach to adopt the NERR drafting unless it is inconsistent with Victorian legislation or policy. As this provision is not inconsistent, it will not be amended.

DRAFT DECISION

The Commission proposes to not amend clause 113.

18.5 Illegally using energy – Clause 114

Under clause 114 of the draft ERC v11, retailers are permitted to take immediate action to de-energise a customer's premises if there has been fraudulent acquisition of energy at the premises or intentional consumption of energy in violation of energy laws.

Submissions

The Consumer Groups submitted that clause 114 of the draft ERC v11 should be amended to be in line with ERC v10 subclause 29(a) which states that *"the retailer*

may estimate the consumption for which the customer has not paid and take debt recovery action for the entire unpaid amount."[147]

The Consumer Groups also submitted that if the use is illegal then there is no contract and the references to the application of clause 114 to standard retail contracts (subclause 114(3)) and market retail contracts (subclause 114(4)) can be deleted.[148]

EWOV submitted that *"disconnection should not be allowed to occur during an open EWOV investigation"* and *"[a]llowing disconnection during the course of an open investigation is contrary to the underlying principles of Alternative Dispute Resolution and prevents negotiation"*.[149]

Discussion

Clause 114 of the draft ERC v11 permits de-energisation of a customer's premises for the illegal use of energy by the customer. The Commission notes that clause 116 of the draft ERC v11 provides a set of circumstances where a retailer is restricted from de-energising a customer. One of these circumstances is where a customer has made a complaint to the EWOV and the complaint remains unresolved. However, subclause 116(4) of the draft ERC v11 provides that this restriction does not apply in relation to de-energisation of a customer's premises for the illegal use of energy.

Consistent with the Commission's stated approach, clause 114 has been drafted in accordance with the NERR. The Commission is not persuaded by EWOV's submission that there is a valid reason to deviate from the NERR drafting as there are still protections in place for a customer who has been de-energised for using energy illegally or fraudulently. These include the customer being able to complain to EWOV and have the matter investigated. If it transpires that the customer was wrongfully disconnected by a retailer, the wrongful disconnection scheme may apply where the retailer may have to compensate the customer for de-energising their premises.

DRAFT DECISION

The Commission proposes to not amend clause 114.

[147] Consumer Groups submission, p. 41.
[148] Consumer Groups submission, p. 41.
[149] EWOV submission, p. 15.

18.6 Non-notification by move-in or carry-over customers – Clause 115

Clause 115 of the draft ERC v11 states that the financially responsible retailer for a move-in customer's or carry-over customer's premises can arrange for the de-energisation of the premises, if the customer refuses or fails to enter into a customer retail contract as soon as practicable. The retailer must first provide the customer with notice of its intention to de-energise and a disconnection warning notice.

Submission

EWOV submitted that under the draft ERC v11, the time period for de-energisation has been shortened by two business days, which results in a significant reduction in the protections of Victorian energy customers.[150]

Discussion

The Commission acknowledges that there is a change in the timeframe for de-energisation from 12 business days to 11 business days for customers on deemed contracts.

However, consistent with the Commission's stated approach, clause 115 has been drafted in accordance with the NERR. The Commission considers that the NERR drafting and timeframe is appropriate and is not persuaded that there is a reason to deviate from the national provision.

DRAFT DECISION

The Commission proposes to not amend clause 115.

18.7 When retailer must not arrange de-energisation – Clause 116

Under clause 116 of the draft ERC v11, retailers are restricted from arranging for de-energisation in certain circumstances, including:

- when the premises are registered under Part 7 as having life support equipment;
- the customer has made a complaint to EWOV directly related to the reason for proposed de-energisation;

[150] EWOV submission, p. 15.

- for non-payment of a bill where the amount outstanding is less than $120 (exclusive of GST); and

- during a protected period.

Submissions

EWOV stated that the AER increased the minimum de-energisation amount to $300 during the NECF consultation phase, and submitted that since the objective is to align the draft ERC v11 to NECF provisions to the extent possible, the draft ERC v11 should adopt the $300 threshold.[151] EWOV also noted that AER stated that the current Victorian figure was too low.[152]

Discussion

DSDBI has confirmed to the Commission that the current $120 threshold is to be retained in Victoria. Therefore, the Commission does not intend to amend this clause to align with the NECF threshold.

As advised above at chapter 18.1 of this Paper, the Commission has decided not to include extreme weather event requirements in the draft ERC v11. As such, the Commission will amend clause 116 to remove the reference to extreme weather events in subclause 116(h).

DRAFT DECISION

The Commission proposes to amend clause 116 to remove references to extreme weather events.

18.8 Timing of de-energisation where dual fuel contract – Clause 117

Clause 117 of the draft ERC v11 defines the de-energisation timing for dual fuel contracts.

Subclause 117(3) states:

> *"[d]espite any other provision of this Division, the retailer may exercise the right to arrange for de-energisation of the customer's gas supply no sooner*

[151] EWOV submission, p. 11-12.
[152] EWOV submission, p. 12.

than seven business days after the date of receipt of the disconnection warning notice."

Subclause 117(4) states:

> *"[t]he retailer may exercise the right to arrange for de-energisation of the customer's electricity supply in accordance with timing determined under the dual fuel contract but no earlier than 22 business days after the date of the de-energisation of the customer's gas supply under subclause (3)."*

Submissions

The Consumer Groups submitted that *"[i]t is unclear what payment process/periods will apply for dual fuel customers".*[153]

EWOV submitted that under clause 117 there was a longer a timeframe for de-energisation of gas, but submitted that *"notifications to dual fuel customers warning of pending electricity disconnection [should] be maintained"* to avoid decreasing customer protections. EWOV further submitted that clause 117 of the draft ERC v11 does not require retailers to include a statement in a disconnection warning notice in relation to the timing for de-energisation of a dual fuel account.[154]

Discussion

DSDBI has confirmed to the Commission that Victoria will not maintain a separate regime for dual fuel contracts, other than in relation to this provision. Therefore, other than in this clause, the draft ERC v11 does not distinguish between dual fuel customers and other customers.

In response to EWOV's submission, under subclause 13.1(c)(A) of ERC v10, a disconnection warning must contain a statement that the retailer may disconnect a customer's gas supply no sooner than seven business days after the date of receipt of the disconnection warning and the customer's electricity supply on a day no sooner than 22 business days after the date of receipt of the disconnection warning.

There is no equivalent provision to subclause 13.1(c)(A) in the NERR. Consistent with the approach adopted by the Commission to adopt the wording and structure of the NERR except where provisions of the NERR were precluded by Victorian legislation or inconsistent with the Victorian Government's stated policy approach, the requirement to include a statement in relation to the timing for de-energisation of dual fuel contracts in a disconnection warning has not been adopted in the draft ERC v11.

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[153] Consumer Groups submission, p. 41.
[154] EWOV submission, p. 12-13.

Upon reviewing EWOV's submission and considering the drafting of clause 117 further, the Commission notes that we have inadvertently increased the timeframe for when a retailer can arrange for de-energisation of a customer's gas supply for customers on dual fuel contracts.

The Commission amended subclause 117(4) of the draft ERC v11 to provide that the retailer could de-energise a customer's electricity supply no earlier than 22 days after the date of de-energisation of the gas supply, whereas the NERR requirement was 15 days. EWOV submits that this is a longer timeframe than what is currently required under ERC v10. The ERC v10 provides that the retailer can de-energise a customer's electricity supply no earlier than 22 days from the receipt of the disconnection warning rather than from the de-energisation of the gas supply.

As the timing between the disconnection warning notice and the de-energisation of the gas supply is seven days, the period of time between the de-energisation of the gas supply and the de-energisation of the electricity supply should only be 15 days in order make up the equivalent 22 day period under the ERC v10. Accordingly, the Commission will amend the drafting of subclause 117(4) to refer to 15 days instead of 22 days.

DRAFT DECISION

The Commission proposes to amend subclause 117(4) to refer to 15 business days, instead of 22 business days.

18.9 Time for re-energisation – Clause 122A

Clause 122A of the draft ERC v11 states:

> *"(1) If a customer makes a request for re-energisation:*
>
> *(a) before 3 pm on a business day, the retailer must re-energise the customer's premises on the day of the request; or*
>
> *(b) after 3 pm on a business day, the retailer must re-energise the customer's premises on the next business day or, if the request also is made before 9 pm and the customer pays any applicable additional after hours reconnection charge, on the day requested by the customer; or*
>
> *(c) where the retailer is able to reconnect the customer by re-energising the customer's premises remotely and reasonably believes that it can do so safely:*

(i) subject to clauses (1)(a) and (b) above, the retailer must use its best endeavours to re-energise the customer's premises within two hours;

(ii) in any event, the retailer must pass on the request to the relevant distributor within one hour after the conclusion of the interaction during which the customer made the request.

(2) A retailer and a customer may agree that later times are to apply to the Retailer."

Discussion

The Commission has determined that there is a drafting inconsistency in clause 122A.

The drafting of subclauses 122A(1)(a) and (b) of the draft ERC v11 was adopted from clause 15.2 of ERC v10. The requirement under ERC v10 is for the retailer to reconnect the customer. In contrast, the requirement under the NERR is for the retailer to arrange for the distributor to re-energise the premises.

Upon review, the Commission considers that for consistency with the NERR, clause 122A should be amended to state that "*the retailer must arrange for re-energisation of the customer's premises"*.

DRAFT DECISION

The Commission proposes to amend clause 122A to state *"the retailer must arrange for re-energisation of the customer's premises"* instead of *"the retailer must re-energise the customer's premises"*.

19 LIFE SUPPORT EQUIPMENT

This chapter discusses the submission received in relation to Part 7 – Life support equipment.

19.1 Retailer obligations – Clause 124

Under clause 124 of the draft ERC v11, when a customer provides a retailer with medical confirmation that a person residing at the customer's premises requires life support equipment, a retailer is required to register the customer's premises as having life support equipment, advise the distributor, not arrange for the de-energisation of the premises, and provide the customer with an emergency telephone contact number for the distributor. The retailer must also notify the distributor when the retailer is notified that the person requiring the life support equipment no longer resides at the customer's premises.

Submission

EWOV raised concern that the ERC v10 provisions requiring retailers to periodically confirm its life support records were correct, and notify the distributor when a customer's property with registered life support was experiencing a fault, had not been included in the draft ERC v11.[155]

Discussion

Consistent with the Commission's stated approach, clause 124 has been drafted in accordance with the NERR and no Victorian derogation has been indicated for this provision.

In response to EWOV's submission, the Commission considers the NERR drafting to be appropriate and is not persuaded that there is a reason for deviating from the national provision. The Commission notes that the draft ERC v11 does not regulate the relationship between retailers and distributors as in the NERR. In Victoria, the relationship between retailers and distributors is provided for in Use of System Agreements between retailers and distributors.

DRAFT DECISION

The Commission proposes to not amend clause 124.

[155] EWOV submission, p. 16.

20 SCHEDULE 1 MODEL TERMS AND CONDITIONS FOR STANDARD RETAIL CONTRACTS

This chapter discusses the submissions received in relation to Schedule 1 – Model terms and conditions for standard retail contracts.

20.1 General comments on the model terms

The majority of the Consumer Groups' and EWOV's submissions in relation to Schedule 1 recommend that the model terms reflect all of the obligations set out in the draft ERC v11.

However, the NERR is drafted so that the model terms provide the information that retailers must disclose to customers in a standard retail contract. The NERR prescribes further obligations on retailers beyond those that are set out in the model terms. Under the NERR drafting, the model terms are not intended to be a comprehensive repository of all retailer obligations. Schedule 1 also uses language that is simplified so that customers understand their rights.

20.2 When does this contract end? – Clause 4.2

Clause 4.2 of Schedule 1 states when the contract will end, including provisions for the retailer and customer to agree to a date, the customer providing notice that it would like to end the contract, or if the customer is no longer a small customer.

Submissions

The Consumer Groups submitted that a customer's right to terminate the contract should be unilaterally protected.[156]

Discussion

Consistent with the Commission's stated approach, clause 4.2 has been drafted in accordance with the NERR. It is the Commission's opinion that the NERR drafting is appropriate and does not consider that there is a reason to deviate from the national provision.

DRAFT DECISION

The Commission proposes to not amend clause 4.2.

[156] Consumer Groups submission, p. 42.

20.3 Vacating your premises – Clause 4.3

Under clause 4.3 of Schedule 1, a customer must provide their forwarding address if they vacate their premises and provide a notice stating their wish to end the contract. The retailer is then obliged to use its best endeavours to arrange for the reading of the meter on the date specified by the customer.

Submission

The Consumer Groups stated that clause 4.3 of Schedule 1 is wider than clause 35 of the draft ERC v11 (request for final bill) and submitted that the terms in Schedule 1 need to be based on corresponding provisions in the draft ERC v11.

Discussion

Consistent with the Commission's stated approach, clause 4.3 has been drafted in accordance with the NERR. The Commission acknowledges that clause 35 of the draft ERC v11 does not reference the customer's obligation to provide a forwarding address, but the focus of the draft ERC v11 is on retailer obligations whereas the terms in Schedule 1 focus on both customer and retailer obligations. As such, in the Commission's opinion, it is not necessary to include the reference to the customer's obligation in clause 35.

DRAFT DECISION

The Commission proposes to not amend clause 4.3.

20.4 Full information – Clause 6.1

Clause 6.1 of Schedule 1 requires customers to provide the retailer with any information the retailer reasonably requires, and that the information be correct.

Submission

The Consumer Groups stated that this clause should specifically identify the type of information the customer needs to provide.[157]

[157] Consumer Groups submission, p. 43.

Discussion

As previously stated under chapter 20.1 of this Paper, under the NERR drafting, the model terms and conditions are not intended to be a comprehensive repository of all retailer obligations.

Consistent with the Commission's stated approach, clause 6.1 has been drafted in accordance with the NERR. In the Commission's opinion the NERR drafting is appropriate.

DRAFT DECISION

The Commission proposes to not amend clause 6.1.

20.5 Our Liability – Clause 7

Clause 7 of Schedule 1 states that other than the warranties or undertakings set out in the contract, the retailer gives no other warranties or undertakings regarding the energy provided.

Submissions

The Consumer Groups submitted that equivalent provisions to clauses 16 (no limitation of liability) and 17 (indemnity) of ERC v10 should apply to the standard and market retail contract. The Consumer Groups stated that this change should be reflected in the draft ERC v11 and the model standard retail contract.[158]

Discussion

Consistent with the Commission's stated approach, clause 7 has been drafted in accordance with the NERR, save for subclause 7(c). Subclause 7(c) was omitted as it refers to the limitation of liability contained in the NERL, which is not in effect in Victoria.

In light of the goal of harmonisation and the fact that DSDBI has decided that retailers' liability does not require Victorian specific requirements, the Commission does not find it necessary to include equivalent provisions to clauses 16 and 17 of the ERC v10 in the draft ERC v11 and model terms.

[158] Consumer Groups submission, p. 44-45.

DRAFT DECISION

The Commission proposes to not amend clause 7.

20.6 Variation of tariff due to change of use – Clause 8.3

Clause 8.3 of Schedule 1 states:

> *"If a change in your use of energy means you are no longer eligible for the particular tariff you are on, we may transfer you to a new tariff under our standing offer prices:*
>
> *(a) if you notify us there has been a change of use – from the date of notification; or*
> *(b) if you have not notified us of the change of use – retrospectively from the date the change of use occurred.*
> *(c) This clause does not limit the obligations we have concerning variations to our standing offer provides contained in the energy laws."*

Submission

The Consumer Groups submitted that this clause was inconsistent with subclause 38(2) of the draft ERC v11, which states that the date of transfer to a new tariff, when a customer notifies the retailer of a change of use, is the date the retailer notifies the customer of the new tariff.[159]

The Consumer Groups also requested clarification regarding the intent of subclause 8.3(c).[160]

Discussion

The Commission agrees with Consumer Groups that it is not clear from subclause 8.3(a) what notice *'from the date of notification'* is referring to. In the Commission's opinion, the reference to notice in subclause 8.3(a) is likely to be construed as a reference to the notice from the customer which would be inconsistent with the requirement under subclause 38(2).

As such, the Commission considers it appropriate to amend clause 8.3(a) to make its intent clearer as follows:

[159] Consumer Groups submission, p. 45.
[160] Consumer Groups submission, p. 45-46.

"*(a) if you notify us there has been a change of use – from the date ~~of notification~~ we notify you of the new tariff;*"

Notification of variations to tariffs

The Consumer Groups also queried why subclause 8.3(c) was introduced. Subclause 8.3(c) provides that the retailer's obligations under Victorian energy laws to vary standing offers are not affected by clause 8.3.

Subclause 8.3(c) was introduced to the draft ERC v11 to clarify that retailers remain bound to their obligations under the EIA and GIA to notify customers of any tariff changes to their standing offers at least by the next bill after the tariff change takes effect.

The Commission has also noticed a typographical error in subclause 8.3(c) and will amend subclause 8.3(c) to change the reference from '*provides*' to '*prices*'.

DRAFT DECISION

The Commission proposes to amend clause 8.3 to clarify that the date is the date the retailer notifies the customer of the new tariff.

20.7 GST – Clause 8.6

Clause 8.6 of Schedule 1 states that standing offer prices and amounts payable under this contract may be stated to be exclusive or inclusive of GST. Unless an amount is stated to include GST, the amount the customer pays under the contract is payment for a *'taxable supply'* as defined for GST purposes and the payment will be increased to include the cost of GST, as permitted by law.

Submission

The Consumer Groups submitted that this clause was inconsistent with subclause 15B(7)(c) of the draft ERC v11, which states that each Price and Product Information Statement must show all monetary amounts on a GST-inclusive and GST-exclusive basis.[161]

Discussion

A key difference between subclause 15B(7)(c) and subclause 8.6(a) of Schedule 1 is that subclause 15B(7)(c) relates to information which must be included in a Price and

[161] Consumer Groups submission, p. 46.

Product Information Statement, while subclause 8.6(a) applies more generally to the specification of amounts and not necessarily to amounts specified in a Price and Product Information Statement.

The Commission disagrees with the Consumer Groups' submission that subclause 8.6(a) of Schedule 1 is inconsistent with subclause 15B(7)(c) of the draft ERC v11. The Commission considers that the drafting in subclause 8.6(a) is adequate and not inconsistent with subclause 15B(7)(c) of the draft ERC v11.

Subclause 8.6(a) provides that standing offer prices and other amounts payable under the contract may be stated to be exclusive or inclusive of GST. Under subclause 15B(7)(c), a Price and Product Information Statement must include both a GST-exclusive and GST-inclusive standing offer price. In the Commission's view, clause 8.6 is a general clause which relates to amounts payable under a standard retail contract whereas subclause 15B(7)(c) sets out specific obligations with respect to the format requirements that must be included in a retailer's Price and Product Information Statement which a retailer is required to publish on its website.

Accordingly, clause 8.6 is not intended to reflect subclause 15B(7)(c). As previously stated at chapter 20.1 of this Paper, Schedule 1 is not intended to be an exhaustive statement of all the provisions of the draft ERC v11.

DRAFT DECISION

The Commission proposes not to amend clause 8.6.

20.8 Estimating the energy usage – Clause 9.3

Clause 9.3 of Schedule 1 states that a retailer may estimate the amount of energy consumed by the customer if the customer's meter cannot be read, metering data cannot be obtained or the customer otherwise consents. The bill must state that it is based on estimation and the bill must be adjusted when the meter is later read.

If the customer has been undercharged, the retailer will allow the customer to pay the undercharged amount in instalments over the period which the meter was not read (up to 12 months).

The customer may be charged for a longer period if the meter was not read due to the customer's actions and the customer requests the estimated bill be replaced with a bill based on the actual reading of the meter.

Submissions

The Consumer Groups submitted that the smart meter specific provisions in subclause 21(2A) of the draft ERC v11 should have been included in the model standard retail contract.[162]

The Consumer Groups submitted that a customer's explicit informed consent should be required, as opposed to *"the customer otherwise consents".*[163]

The Consumer Groups stated that this clause *"gives retailers much discretion in determining what constitutes an 'action'"* by the customer which results in the meter not being able to be read.[164]

Discussion

Subclause 21(2A) sets out retailer's obligations to provide customers information in their bills. There is no requirement that this information be included in the customer's retail contract. On that basis, the Commission does not agree that it is necessary to include this provision in the model terms.

As previously stated above, under the NERR drafting, the model terms are not intended to be a comprehensive repository of all retailers' obligations. For example, subclause 21(2) which sets out the basis for a customer's bill (for non-smart meters) is not replicated in the model terms. Similarly, the Commission has not replicated subclause 21(2A) in the model terms.

Explicit informed consent

As advised in chapter 6.6 of this Paper, the Commission has decided to amend clause 21(1)(a) to require retailers to obtain a customer's explicit informed consent prior to basing their bill on estimation. As such, the Commission will amend subclause 9.3(a) to insert the requirement that retailers obtain a customer's '*explicit informed consent'*.

Smart meter

Subclause 21(2A) of the draft ERC v11 relates to the retailer's ability, in the case of a smart meter, to prepare a bill using estimated and/or substituted metering data in accordance with applicable energy laws, when the retailer is unable to reasonably base a bill on an actual meter reading collected from the customer's smart meter.

[162] Consumer Groups submission, p. 46.
[163] Consumer Groups submission, p. 46-47.
[164] Consumer Groups submission, p. 47.

The Consumer Groups submitted that subclause 21(2A) is omitted from clause 9.3 to Schedule 1 of the draft ERC v11.
Subclause 21(2A) is a right in favour of the retailer. The omission from clause 9.3 to Schedule 1 of the smart meter specific provision in subclause 21(2A) does not affect a customer's rights. Again, the Commission notes that Schedule 1 is not intended to be an exhaustive statement of all the provisions of the draft ERC v11. The preamble used in Schedule 1 also directs customers to the draft ERC v11 for further details on specific rights and obligations of retailers and customers.

The Commission considers that the language used in clause 9.3 is not inconsistent with clause 21 of the draft ERC v11, as it is not giving the retailer additional rights that it does not have under the draft ERC v11. Further, as the clause is not omitting references to important rights that customers have, the Commission considers that clause 9.3 is adequately drafted.

In response to the Consumer Groups' submission regarding clause 9.3 giving retailers "*much discretion*", the Commission disagrees with the Consumer Groups. The Commission is of the view that the NERR drafting is appropriate and there is not a convincing reason to deviate from the national provision.

DRAFT DECISION

The Commission proposes to amend clause 9.3 to require the customer's explicit informed consent.

20.9 Your historical billing information – Clause 9.4

Under clause 9.4 of Schedule 1, a retailer must provide a customer with their billing history for the previous 2 years free of charge, when requested to do so by the customer. The retailer can charge the customer if the customer has already been provided with this information in the previous 12 months or requires information going back further than 2 years.

Submissions

The Consumer Groups stated that *"from a consistency perspective, none of the clauses included by the ESC in clause 28 of the draft ERC v11 are reflected"* in this clause.[165]

[165] Consumer Groups submission, p. 47.

Discussion

As previously stated above at chapter 20.1 of this Paper, under the NERR, the model terms and conditions are not intended to be a comprehensive repository of all retailer obligations. Consistent with the Commission's stated approach, clause 9.4 has been drafted in accordance with the NERR. In the Commission's opinion the drafting is appropriate and it has not been persuaded that there is a reason to deviate from the national provision.

DRAFT DECISION

The Commission proposes not to amend clause 9.4.

20.10 Bill smoothing – Clause 9.5

Clause 9.5 of Schedule 1 states that the retailer can, if the customer agrees, arrange for the customer to pay their bills under a bill smoothing arrangement, which is based on the customer's estimated energy consumption over 12 months.

Submission

The Consumer Groups submitted that the standard retail contract should state that a customer's explicit informed consent is needed before bill smoothing can be implemented, as subclause 23(2) of the draft ERC v11 refers to a customer's explicit informed consent.[166]

Discussion

The Commission has drafted clause 23 and clause 9.5 in accordance with the NERR. The Commission has not made any substantive amendments to either of these clauses.

The Commission notes that under subclause 23(2) retailers are required to obtain a customer's explicit informed consent to bill on the basis of a bill smoothing arrangement. Clause 9.5 to Schedule 1 states that the retailer can only provide a bill smoothing arrangement where the customer '*agrees*'. This is consistent with the customer's rights in subclause 23(2) of the draft ERC v11.

The more restrictive requirement to obtain explicit informed consent contained in clause 23 of the draft ERC v11 is the obligation that applies to retailers. The preamble to the model terms state that in addition to the contract, the energy laws and other

[166] Consumer Groups submission, p. 47.

customer laws (for example, the draft ERC v11) set out specific rights and obligations. Therefore, the Commission does not consider that an inconsistency arises.

As stated above at chapter 20.1 of this Paper, under the NERR, Schedule 1 is not intended to be an exhaustive statement of all of the retailers' obligations under the draft ERC v11.

DRAFT DECISION

The Commission proposes not to amend clause 9.5.

20.11 Late payment fees – Not Used

The draft ERC v11 does not include clause 10.4 of the NERR, which states that a retailer may require a late payment fee if a bill is not paid by the pay-by date.

Submissions

The Consumer Groups submitted that the standard retail contract should include *"a provision stating that retailers cannot charge their customers late payment fees"*.[167]

Discussion

In Victoria, section 40C of the EIA and section 48B of the GIA prohibit a retailer from including a term or condition in a customer's retail contract in relation to fees for late payment of bills.

In the Commission's opinion, the requirements outlined in the EIA and GIA and the deletion of clause 10.4 of Schedule 1 of the draft ERC v11 make it very clear that retailers are not entitled to charge late payment fees in Victoria. Also, as previously advised in chapter 20.1 of this Paper, the model terms set out in Schedule 1 are not intended to contain a comprehensive list of all of the requirements outlined in the draft ERC v11 and other energy laws. Further, the new subclause 12(3A) of the draft ERC v11 provides that the terms and conditions of a standard retail contract must not be inconsistent with the model terms.

DRAFT DECISION

The Commission proposes not to amend the draft ERC v11.

[167] Consumer Groups submission, p. 48.

20.12 Undercharging – Clause 12.1

Under clause 12.1 of Schedule 1, a retailer can recover undercharged amounts from the customer but is limited to only collecting the amount that has been undercharged in the 9 months immediately before the retailer notifies the customer of the undercharging and cannot charge interest on the undercharged amount.

Submission

The Consumer Groups submitted that the standard retail contract should specify that the amount recovered will be separately itemised in the bill together with an explanation, as this is a requirement under subclause 30(2)(c) of the draft ERC v11.[168]

The Consumer Groups stated that subclause 30(2A) of the draft ERC v11 has not been reflected in the model standard retail contract.[169]

Discussion

As previously advised at chapter 20.1 of this Paper, under the NERR, the model terms are not intended to be a comprehensive repository of all retailer obligations.

Consistent with the Commission's stated approach, clause 12.1 of Schedule 1 has been drafted in accordance with the NERR. The Commission considers the NERR drafting appropriate.

DRAFT DECISION

The Commission proposes not to amend clause 12.1.

20.13 Overcharging – Clause 12.2

Clause 12.2 of Schedule 1 requires retailers to credit the amount overcharged to the customer to the customer's next bill. If the amount overcharged is over the current overcharge threshold the retailer must, in addition to refunding the customer, notify the customer of the overcharge within 10 business days of becoming aware of the overcharge.

If the customer stopped buying energy from the retailer, then the retailer must use its best endeavours to pay the overcharged amount to the customer within 10 business days.

[168] Consumer Groups submission, p. 48.
[169] Consumer Groups submission, p. 48.

If the overcharging was the customer's fault, then the retailer may limit the amount it credits the customer to the amount the customer was overcharged in the last 12 months.

Submission

The Consumer Groups submitted that clause 12.2 is not aligned with subclause 31(2)(b) of the draft ERC v11, which states that the overcharged amount is credited to the next bill if there is no reasonable direction from the customer.[170]

Discussion

The Commission does not agree with Consumer Groups that there is an inconsistency between these clauses. Subclause 31(2)(a) requires that a retailer must repay an amount overcharged to a customer as reasonably directed by the small customer. Subclause 12.2(b) provides that if a retailer overcharges a customer they must credit the amount to the customer's bill unless the customer requests otherwise in which case the retailer must comply with that request.

Accordingly, as subclause 12.2(b) explicitly states that a customer may request an alternative option (although in slightly different words) there is no inconsistency in substance between these terms.

DRAFT DECISION

The Commission proposes not to amend subclause 12.2.

20.14 Reviewing your bill – Clause 12.3

Under clause 12.3 of Schedule 1, a retailer is obliged, upon a customer's request, to review the customer's bill and check the meter reading. The customer is required to pay for the cost of the meter check (and may be asked to pay in advance but will be reimbursed if the meter is faulty) and the customer must continue to pay any other bills it receives from the retailer while its bill is being reviewed.

Submission

The Consumer Groups stated that this clause contradicted subclause 29(5)(b) of the draft ERC v11, which states that the retailer must not request the customer to pay for the meter check or test in advance.[171]

[170] Consumer Groups submission, p. 48.

The Consumer Groups also said that the model standard retail contract did not include the provisions stated in subclause 29(6) of the draft ERC v11, which required retailers to make appropriate adjustments to a customer's bill after the bill has been reviewed.[172]

Discussion

As outlined above in chapter 10.10 of this Paper, subclauses 29(5)(b) and (c) are to be amended to provide that a customer is not liable for the costs of testing a meter if the meter or metering data proves to be faulty or incorrect.

As such, the Commission agrees with the Consumer Groups' submission that subclause 12.3(b) to Schedule 1 of the draft ERC v11 should be amended to reflect the amendments made to subclauses 29(5)(b) and (c).

Subclause 12.3(b) will be amended as follows:

> *"If you ask us to, we must arrange for a check of the meter reading or metering data or for a test of the meter in reviewing the bill. You may be liable for the cost of the check or test, however we cannot request payment in advance."*

In response to the Consumer Groups' submission that clause 12.3 should reflect the requirements outlined in subclause 29(6), as previously advised above at chapter 20.1 of this Paper, the model terms are not intended to be a comprehensive repository of all the retailers' obligations. The Commission considers the current drafting appropriate.

DRAFT DECISION

The Commission proposes to amend clause 12.3 to state that the customer may be liable for the cost of the meter check.

20.15 Security Deposits – Clause 13

Clause 13 of Schedule 1 states that retailers may request a security deposit from a customer, which the retailer can use to offset any amount the customer owes to the retailer. The retailer must pay the customer interest on the security deposit and the security deposit must be returned after the customer completes 1 years' payment (if the customer is a residential customer) or 2 years' payment (if the customer is a

[171] Consumer Groups submission, p. 49.
[172] Consumer Groups submission, p. 49.

business customer). The security deposit must also be returned if the customer stops purchasing energy from the retailer.

Submission

The Consumer Groups submitted that clause 13 should set out specifically when a security deposit may be required and when it was prohibited.[173] The Consumer Groups also submitted that clause 13.4 did not align completely with clause 45 of the draft ERC v11 with regard to whether the *"onus is on the customer to contact the retailer to provide instructions on how he/she would want to have the security deposit and accrued interest returned"*.[174]

Discussion

Consistent with the Commission's stated approach, clause 13 has been drafted in accordance with the NERR. As outlined above at chapter 20.1 of this Paper, under the NERR, the model terms and conditions are not intended to be a comprehensive repository of all retailer obligations. As such, the Commission considers the drafting of the clause 13 to be appropriate and is not persuaded that there is any reason to deviate from the NERR drafting.

DRAFT DECISION

The Commission proposes to not amend clause 13.

20.16 Disconnection of supply – Clause 14

Clause 14 of Schedule 1 sets out when a retailer may de-energise a premises, including the warnings the retailer must provide and when de-energisation cannot occur.

Submission

The Consumer Groups submitted that the model standard retail contract should include:

- all the requirements under clause 111 of the draft ERC v11, including that the retailer must provide the customer with a reminder notice and disconnection warning;

[173] Consumer Groups submission, p. 50.
[174] Consumer Groups submission, p. 50.

- the situations where the retailer cannot disconnect (clause 116 of the draft ERC v11);
- the smart meter specific provisions relating to disconnection; and
- that a retailer may disconnect a customer for refusal to provide acceptable identification, as reflected in clause 112 of the draft ERC v11.[175]

Discussion

The Commission agrees with Consumer Groups that the reference to refusal to provide acceptable identification as circumstances which could result in a customer being disconnected should be included in Schedule 1 of the draft ERC v11.

In response to the balance of the Consumer Groups' submission, the Commission advises that the model terms set out in Schedule 1 are not intended to set out all of a retailer's obligations. As previously advised, the preamble to Schedule 1 refers to the more detailed obligations set out in the draft ERC v11. As such, the Commission considers the current drafting to be appropriate.

The Commission is also of the view that the inclusion of the smart meter provisions in clause 14 to Schedule 1 of the draft ERC v11 is not required.

The Commission will amend subclause 14.3(a)(v) to delete the reference to extreme weather events.

DRAFT DECISION

The Commission proposes to amend subclause 14.1(b) to include a reference to the retailer being entitled to de-energerise for failure by a customer to provide acceptable identification.

The Commission proposes to delete subclause 14.3(a)(v) as it refers to extreme weather events.

20.17 Reconnection after disconnection – Clause 15

Under clause 15 of Schedule 1, the retailer must request the customer's distributor to reconnect the premises if, within 10 business days from disconnection, the customer requests reconnection, rectifies the issue that led to disconnection and pays any

[175] Consumer Groups submission, p. 51-52.

relevant reconnection charge. If the customer fails to meet the requirements of reconnection within 10 business days, the retailer may terminate the contract.

Submission

The Consumer Groups submitted that clause 15 should incorporate subclause 121(2A) of the draft ERC v11 (a customer who is eligible for a Utility Relief Grant and applies for the grant is taken to have rectified the matter that led to disconnection).[176]

The Consumer Groups stated that the model standard retail contract does not include reconnection timeframes for customers with smart meters.[177]

Discussion

Consistent with the Commission's stated approach, clause 15 of Schedule 1 has been drafted in accordance with the NERR.

However, the Commission agrees that the timeframes for re-energisation should be included in Schedule 1 of the draft ERC v11.

Schedule 1 will be amended as follows:

"15.2 WHEN WE MUST ARRANGE FOR RECONNECTION

If you ask us to reconnect your premises:

a) *before 3 pm on a business day, we must reconnect your premises on the day of the request; or*

b) *after 3 pm on a business day, we must reconnect your premises on the next business day; or if the request also is made before 9 pm and you pay an additional after hours reconnection charge, on the day of the request; or*

c) *where we are able to reconnect your premises remotely and we reasonably believe we can do so safely:*

    i. *use our best endeavours to reconnect your premises within 2 hours;*

    ii. *in any event, we must pass the request on to your distributor within one hour of the request,*

unless you agree otherwise."

[176] Consumer Groups submission, p. 53.
[177] Consumer Groups submission, p. 53.

DRAFT DECISION

The Commission proposes to amend Schedule 1 to include a new clause 15.2 to include the timeframes for re-energisation.

20.18 Notices and bills – Clause 17

Clause 17 of Schedule 1 states that notices and bills must be sent in writing, unless otherwise stated in the contract or the draft ERC v11. A notice or bill is taken to be received on the date it is handed to a party, 2 business days after it is posted or on the date of transmission.

Submissions

Consumer Groups stated that there is no corresponding clause in the main body of the draft ERC v11 to clause 17 of Schedule 1. Consumer Groups also stated that section 319 of the NERL, which relates to the giving of notices and other documents, is not reflected in the draft ERC v11. Consumer Groups submitted that the draft ERC v11 should include a notice provision.[178]

Discussion

Clause 17 of Schedule 1 to the draft ERC v11 and section 319 of the NERL serve different purposes. Clause 17 of Schedule 1 forms part of the model terms and conditions for standard retail contracts. Accordingly, this provision relates to the giving of notices and the delivery of bills under the standard retail contract and constitutes a term of that contract. The draft ERC v11 adopts the same wording for this provision as the NERR.

Section 319 of the NERL deals with the service of notices and other documents under the NERL and the NERR, as distinct from the provision of bills and contractual notices under standard retail contracts. The Commission does not consider it is necessary or appropriate for the wording of clause 17 of Schedule 1 of the draft ERC v11 to incorporate the more detailed wording of section 319, and to do so would be inconsistent with the approach adopted in the NECF instruments.

However, in order to better align the Victorian instruments with the NECF, the Commission has included a provision equivalent to section 319 of the NERL in a new clause 3F of the draft ERC v11 (see chapter 6.6 of this Paper).

[178] Consumer Groups submission, p. 54.

DRAFT DECISION

The Commission proposes not to amend clause 17.

The Commission proposes to amend the draft ERC v11 to include clause 3F, which is equivalent to section 319 of the NERL.

20.19 Privacy Act notice – Clause 18

Clause 18 of Schedule 1 states:

> *"[w]e will comply with all relevant privacy legislation in relation to your personal information. You can find a summary of our privacy policy on our website. If you have any questions, you can contact our privacy officer."*

Submissions

The Consumer Groups submitted that *"referring a customer to [the retailer's] website is inadequate"* and the retailer's obligations regarding privacy should be stated in the standard retail contract along with the details of the retailer's privacy officer.[179]

Discussion

Consistent with the Commission's stated approach, clause 18 has been drafted in accordance with the NERR. The Commission considers the NERR drafting appropriate.

DRAFT DECISION

The Commission proposes to not amend clause 18.

20.20 Complaints and dispute resolution – Clause 19

Clause 19 of Schedule 1 states that complaints can be lodged with the retailer in accordance with the retailer's standard complaints and dispute resolution procedures, which are published on the retailer's website. The complaint will be responded to within the required timeframes with the customer being informed of the outcome and reasons for the decision. Under subclause 19.2(b), if the customer is unhappy with the decision, the customer may refer the complaint to EWOV.

[179] Consumer Groups submission, p. 54.

Submissions

The Consumer Groups stated that not all customers will have internet access and the clause should state that customers can also call the retailer.[180]

The Consumer Groups also expressed concern that there was a lack of clarity regarding the basis for subclause 19.2(b), specifically whether it came from clause 50 (Small customer complaints and dispute resolution information) or subclause 29(7) (Billing disputes) of the draft ERC v11.[181]

Discussion

Consistent with the Commission's stated approach, clause 19 has been drafted in accordance with the NERR. The Commission considers the NERR drafting appropriate. Further, the Commission notes that clause 50 of the draft ERC v11 only applies to market retail contracts. As such, clause 19.2 is not based upon clause 50.

DRAFT DECISION

The Commission proposes to not amend clause 19.

20.21 Force Majeure – Clause 20

Clause 20 of Schedule 1 states the force majeure provisions, including the requirement for the affected party to provide adequate notice to the other party and an obligation to overcome or minimise the effect of a force majeure event.

Submission

The Consumer Groups stated that the draft ERC v11 does not have a force majeure provision.[182]

Discussion

Consistent with the Commission's stated approach, clause 20 has been drafted in accordance with the NERR. The Commission considers that it is appropriate that a force majeure provision only be included in the model terms as it outlines what happens to a customer's contract in the event of a force majeure event.

[180] Consumer Groups submission, p. 54-55.
[181] Consumer Groups submission, p. 55.
[182] Consumer Groups submission, p. 56.

DRAFT DECISION

The Commission proposes to not amend clause 20.

20.22 Retailer of last resort event – Clause 22

Under clause 22 of Schedule 1, when the retailer is no longer legally able to sell energy to the customer due to a Retailer of Last Resort (**RoLR**) event occurring, the retailer must provide the customer's relevant information to the entity appointed as the relevant designated retailer for the RoLR event and the contract will end.

Submission

The Consumer Groups stated that the draft ERC v11 had no clause on RoLR, and submitted that the Code should be amended to include a reference to the Victorian RoLR provisions.

Discussion

The Commission agrees with the Consumer Groups' submission and will amend the draft ERC v11 to include a new clause 70B incorporating the requirements of clause 24.6 of the ERC v10 regarding the termination of a contract following a RoLR event.

DRAFT DECISION

The Commission proposes to not amend clause 22.

The Commission proposes to amend the draft ERC v11 to include a new clause 70B incorporating the requirements of clause 24.6 of the ERC v10.

21 SCHEDULE 3 – TRANSITIONAL PROVISIONS

This chapter discusses the transitional provisions provided for in the draft ERC v11 in relation to standing offer contracts and market contracts.

Submissions

Consumer groups submitted that it appears that customers currently on standing offer contracts:

> "*… may automatically move to the new standing offer contracts. Based upon the current drafting of the ERC V11, it will result in those consumers being worse off since the model terms and conditions in the standard retail contract are not as comprehensive as what we currently have in the standing offer. This is a transition issue we attempted to address in work with the Department of Primary Industries in 2011 in relation to the NECF, however this is now a key issue for July 2013 should this harmonisation proceed, and we cannot see evidence of this being addressed.*"[183]

Simply Energy submitted that it has

> "*… not been able to identify how the Commission has made provision for the rollover of our existing contracts to the new arrangements. In each jurisdiction, enacted and proposed legislation implementing the NECF have provided for the transitioning of existing retail contracts to the NECF framework … If such recognition is not provided, Simply Energy's customers would be effectively uncontracted on 1 July 2013. Simply Energy would then need to make contact with each customer and place them onto a new contract. Such an arrangement would cause significant confusion amongst the customers and cause significant inefficiencies for Simply Energy.*
>
> *We recommend that the Commission make provision for the rollover of our existing contracts into the new Code.*"[184]

AGL stated that as the NERR model terms and conditions had been adopted with only minor changes then retailers using the NERR model terms should not be required to obtain approval from the Commission before adopting the model terms.[185]

[183] Consumer Groups submission, p. 4.
[184] Simply Energy submission, p. 1.
[185] AGL submission, 3-4.

Discussion

In relation to the Consumer Groups' submission, the Commission disagrees that customers will be worse off under the model terms and conditions outlined in the draft ERC v11.

However, the Commission understands that stakeholders are concerned that upon the adoption of the draft ERC v11, the contracts that retailers currently have with customers will be terminated and new contracts would need to be entered into with each customer.

To address this issue, the Commission intends to include transitional arrangements in the draft ERC v11 which are outlined in detail below:

Standing offer contracts

The Commission proposes to allow retailers 60 days from the date the draft ERC v11 comes into operation to either:

- amend its standing offer to comply with the draft ERC v11; or
- adopt the model terms.

In the event a retailer amends its standing offer, the retailer must:

- do so pursuant to section 35(4) of the EIA or section 42(4) of the GIA; and
- submit the varied terms to the Commission for approval.

If the retailer adopts the model terms as its standing offer, the Commission is taken to have approved the terms by virtue of subclause 12(3) of the draft ERC v11, which should address AGL's concern regarding obtaining approval from the Commission.

Retailers must then publish:

- the approved varied standing offer or model terms in the Government Gazette at least one month before they are to take effect. The varied standing offer or model terms must be published under section 35(4) of the EIA or section 42(4) of the GIA; and
- the details of the standing offer on its website and notify customers of the standing offer before, in or with a customer's first bill after the standing offer takes effect. The Commission notes that pursuant to section 35C of the EIA and 42C of the GIA, it is a condition of a retailer's licence that retailers publish

details of its standing offer on its website, and notify customers in writing of standing offers at any time before, in or with a customer's first bill after the standing offer takes effect. The Commission considers that this would include changes to standing offers. The Commission also notes that Division 2A of the draft ERC v11 replicates the internet publication requirements, which are also included in the model terms at clause 23.2.

Retailers will also have to comply with any other self-imposed notification requirements set out in the retailer's current standing offer.

Market contracts

The Commission is proposing to include a provision in the draft ERC v11 that provides that:

- A contract which is a 'market contract' for the purpose of the ERC v10 in effect immediately before the commencement of the draft ERC v11 is taken to be a 'market retail contract' for the purpose of draft ERC v11.

- The terms and conditions set out in a market retail contract entered into on or after the commencement date of the draft ERC v11 must be consistent with the requirements of draft ERC v11 that apply to market retail contracts.

- The terms and conditions set out in a market retail contract that is in existence on the commencement date of the draft ERC v11 must be varied, or must be replaced by a new market retail contract, so that they are consistent with the requirements of draft ERC v11 that apply to market retail contracts on or before the date which is two years after the commencement date.

The Commission notes that once the draft ERC v11 comes into effect, any term or condition of a market retail contract that is inconsistent with the requirements of the draft ERC v11 will be void to the extent of the inconsistency.

DRAFT DECISION

The Commission proposes to insert transitional arrangements into Schedule 3 for the transition of existing standing offer and market contracts.

22 SCHEDULE 6 – BULK HOT WATER BILLING FORMULAE

This chapter discusses the Commission's proposed amendments to the bulk hot water billing formulae.

Discussion

The Commission notes that Schedule 6 incorrectly referenced standing offer contracts and market contracts.

The Commission will amend section A of the Electric Bulk Hot Water Billing Formulae to state:

> *"Where customers are charged for energy in delivering electric bulk hot water either by their retailer under a standard retail contract or pursuant to a market retail contract …"*

DRAFT DECISION

The Commission proposes to amend Schedule 6 of the draft ERC v11 to refer to standard retail contracts and market retail contracts.

23 SCHEDULE 7 – ACCEPTABLE FORMATS OF GREENHOUSE GAS DISCLOSURE ON CUSTOMER BILLS

This chapter discusses the Commission's proposed amendments to the acceptable formats of greenhouse gas disclosure on customer bills.

Discussion

The Commission will amend the greenhouse gas information graphs included in Schedule 7 to reflect the updated Guideline 13 to refer to www.switchon.vic.gov.au.

DRAFT DECISION

The Commission proposes to amend Schedule 7 of the draft ERC v11 to refer to www.switchon.vic.gov.au.