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Essential Services Commission
Level 37, 2 Lonsdale St
MELBOURNE VIC 3000



EnergyAustralia
LIGHT THE WAY

Submitted electronically: <https://engage.vic.gov.au/supporting-energy-customers-through-coronavirus-pandemic>

EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 33
385 Bourke Street
Melbourne Victoria 3000

Phone +61 3 8628 1000
Facsimile +61 3 8628 1050

enq@energyaustralia.com.au
energyaustralia.com.au

Dear Commissioners

Supporting customers through the coronavirus pandemic

EnergyAustralia is one of Australia's largest energy companies with around 2.5 million electricity and gas accounts across eastern Australia. We also own, operate and contract an energy generation portfolio across Australia, including coal, gas, battery storage, demand response, wind and solar assets, with control of over 4,500MW of generation capacity.

EnergyAustralia welcomes the opportunity to make this submission to the supporting customers through the coronavirus pandemic draft decision. We support the ESC's intent to ensure customers are protected through the pandemic; however, we are wary that the proposed protections are based off limited evidence and are concerned that the financial impacts in implementation will have adverse impacts to retailer's customers.

EnergyAustralia understands there is limited time for the ESC to consider their rules and the associated impacts to industry. We suggest that prior to progressing this rule the ESC must establish if the issues they are attempting to address truly exist (based on actual evidence obtained by the ESC), if these issues require additional protections, and if there is a more cost-effective method for achieving the desired result.

Retailers have supported customers throughout the coronavirus pandemic

Customers received immediate protection from the financial impacts of the coronavirus pandemic, this robust protection was established prior to the pandemic. Yet it is understandable if regulators were unclear whether the minimum protections offered under the ESC Payment Difficulty Framework¹ or the AER Customer Hardship Policy Guidelines² were a suitable minimum standard of protection in such an uncertain time.

This uncertainty drove the AER to require retailers to provide additional protections by way of the AER's Statement of Expectations³; The AER's Expectations were not required through regulation and were established with the caution that non-compliance would result in formal regulation, or action against non-conforming retailers. Retailers accepted

¹ ESC Payment Difficulty Framework

² AER Customer Hardship Policy Guidelines

³ AER Statement of Expectation

the increased protections, as we were also unsure of the impacts the pandemic would have on our customers.

On 22 April 2020, the ESC held an industry round table⁴, to establish how the coronavirus was affecting the sector. The ESC advised its expectation was for retailers to continue offering the requirements of the PDF, with any *'going beyond their mandated obligations'* encouraged. On 28 April 2020, the ESC advised in a letter to retailers that disconnections were still possible as *'a measure of last resort'*.

The Draft Determination outlined that retailers have increased protections and assistance provided to customers⁵, with many retailers adopting the AER's Expectations as the minimum standard of protection for Victorian customers.

EnergyAustralia has seen increases in customers seeking assistance; however, we have not experienced the significant ramifications to customer's affordability that were forecast to result from the coronavirus pandemic. EnergyAustralia believes this is partly due to the government assistance (Job Keeper and increased payments to Job Seeker) and mortgage deferrals offered by banking institutions.

It is unclear when the economy will recover from the pandemic, with many estimating the economic downturn to be long and pronounced. With a new wave of infections occurring in Victoria and further lockdowns, we can at least expect any recovery in Victoria to be delayed.

EnergyAustralia is concerned that a prolonged recovery period will have significant impacts on the financial viability of many retailers, due to limitations on collections and debt management capacity since early-2020. This is a view largely supported by the industry, with the Energy Network Australia's Network Relief Package⁶ and the AER Deferral of Network Charges⁷ produced as a way to limit the cash-flow risks experienced by retailers.

The protections provided to customers at the start of the coronavirus pandemic were established without any evidence to support the requirement; however, were adopted in good faith and the shared belief of supporting customers. Regulators have since increased their monitoring⁸ of retailers to ensure customers are protected throughout the coronavirus pandemic.

The ESC should require supporting evidence that further customer protections are required, as the cost to retailers to meet the obligations of formal regulations could exceed the benefit; i.e. the cost imposed on retailers will result in a higher cost to serve (which corresponds in increased retail costs to all customers) and the increasing risk to retailer viability.

Merit and financial impacts of implementation for the proposed regulation

Offering tariff checks

⁴ ESC Energy Industry Roundtable

⁵ ESC supporting energy customers through the coronavirus pandemic: draft decision (pg.17)

⁶ ENA Network Relief Package

⁷ AER Deferral of Network Charges

⁸ Energy watchdogs ramp monitoring up monitoring to protect customers

The proposed obligation for retailers to conduct a tariff check at TA1 (instead of TA2) has a significant impact on resourcing, with the work required being largely manual. There are two options to accommodate; increase resources to enable the increase in tariff checks and increased AHT, or build a technical delivery for the assessment. Both options will require significant cost, and the technical option is unlikely to be possible considering the short timeframe and how customer’s varying details determine the ‘best offer’.

The ESC have not provided any supporting evidence that increasing the tariff check requirement will result in a better outcome for customers, other than the assumption customers are largely not on the ‘best offer’.

EnergyAustralia’s preference is where possible the ESC should leverage off existing regulations; for example, that this requirement is limited to customers that are not on the ‘best offer’, with no requirement to assess and contact the customer if their bill confirms they are on the ‘best offer’. This will limit the unnecessary assessment for a significant portion of customers that may miss a payment; for an amount >\$55.

Supporting Utility Relief Grant Scheme (URGS) applications

There are obvious benefits to retailers if a customer’s URGS application is processed and accepted by the Department of Health and Human Services (DHHS), the reduction in debt reduces a retailer’s risk and can improve the customer-retailer relationship. However, requiring retailers to complete each URGS application will result in an increase in AHT, staff up-skilling, and additional resourcing.

Completing the URGS form is complex, involving many personal questions to the customer and some that require additional time for the customer to confirm. Ultimately, it is only one step in the approval process in ensuring a customers URGS applications is approved.

The table below (from the Draft Determination) outlines the issue is not in the form being complete incorrectly, as water (83%) and energy (79%) have similar approval rates; despite water URGS being completed with the customer and energy largely being sent to the customers to complete. This indicates the major impediment is that the application is not being received.

	Customers given applications by retailer	Applications received by DHHS	Applications approved	Percentage of applications received by DHHS	Percentage of applications approved
Electricity	48,813	20,822	16,530	43 per cent	79 per cent
Gas	36,521	15,930	12,578	44 per cent	79 per cent
Water	13,471	8,876	7,379	66 per cent	83 per cent

Table 1 Utility relief grant applications 2018-19. Source: DHHS.

The proposed obligation will provide the capacity for retailers to submit (with consent) the URGS on behalf of a customer, which will address this shortcoming. However, it has not been established that this is the most cost effective or efficient method for achieving this increased success rate.

The DHHS' retailer portal went live in June 2019, this did not produce increases to approval of applications because retailers were still required to provide the application to customers, and they were then required to provide it to the DHHS. It is conceivable that with improved information provided by the DHHS to customers, that they could reduce the complexity of some of the questions, and potentially allow customers to complete the form directly with the DHHS.

Similarly, efficiencies could be gained by requiring all URGS applications to be the remit of trained financial counsellors; as this would also ensure the people assisting customers in completing the form, are also able to assist with the diverse range of issues customers in hardship experience.

The ESC's intent to support customers through improved successful application of the URGS, is beneficial to customers and retailers. EnergyAustralia suggest the ESC explore with the DHHS, further improvements to the online version of the URGS; something that can be completed by the customer directly, or via an advocate (DHHS, financial counsellor, or their retailer). Improvements to the form will achieve the benefit of URGS application success rates, it will not require any requirements mandated and will limit resource burden on retailers.

Payment assistance for small business

The ESC's Draft Determination requires retailers to provide standard assistance to small business that have not paid their bill by the pay-by date. This proposed obligation may lead to a retailer, which provides a payment plan to a small business acquiring or being deemed to have acquired, a suspicion that the small business was insolvent and thereby being unable to defend or resist any claim from a liquidator (if the small business subsequently becomes insolvent⁹) that any payment received from the small business constitutes an undue preference payment.

As the ESC is no doubt aware, essentially, an unfair preference is where a creditor, within six months before a company goes into administration or liquidation receives payment(s) from that company that is more than it would receive if the payments hadn't occurred, had they proved for the full debt in the liquidation.

Under Australia's existing insolvency laws (Corporations Act 2001):

- If a supplier's payment arrangement with a corporate customer results in the supplier receiving more from the customer than if the payments were set aside and the supplier were to prove for the debt in the winding-up of its customer, then the payments received by the supplier will amount to an unfair preference transaction¹⁰;

⁹ Corporations Act 2001: 'a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable'

¹⁰ Corporations Act 2001: Section 588FA

- The supplier, under its payment arrangement with a customer, may have received payment of 50% of the debt owed to it, for example, while other creditors may not have received any payments. In a winding up scenario, that is considered to be unfair situation;
- The transaction will be an insolvent transaction of the customer if it occurred when the customer is insolvent or if it becomes insolvent because of, or because of matters including, entering into the transaction¹¹;
- The transaction will then be voidable if it was entered into, or an act was done for the purpose of giving effect to it, during the six months ending on the day a liquidator is appointed to the customer¹²;
- On the application of the liquidator, a court can order the supplier to pay its customer the amount paid to the supplier under the transaction¹³.
- The Creditor (in this case a retailer) can defend an unfair preference claim on the basis that they received the payment in good faith¹⁴ and the Creditor had no reasonable grounds for suspecting the company was insolvent and a reasonable person in the creditor's circumstances would not have had grounds to suspect insolvency. Here, there is a real concern that if a retailer is obliged to provide extended payment terms or other related forms of assistance to the small business then, there is a question of whether the creditor had reasonable grounds for suspecting insolvency.

The Draft Determination removes any capacity (restriction on conditions) to manage the associated risk of enabling a business to trade while insolvent. If the proposed obligation for small business is required, the ESC should address the preferential payment concerns of retailers. This can be achieved by establishing the Victorian government enact:

- Changes to law / rules to safeguard against liquidators/administrators going after payments being made to unsecured creditors (utilities/retailers) during the 6-month period; or,
- The government underwrites the risk for payment plans that liquidators/administrators pursue from retailers where the business has subsequently entered into administration.

Alternatively, the ESC could reassess the requirement, requiring assistance for small business to be reliant on the proactive contact with a retailer prior to their account being in arrears. It is a reasonable expectation that when operating any business that appropriate consideration is provided to the ongoing liabilities they are responsible for.

The Draft Determination has not provided any evidence to support their proposal; it has confirmed the opposite, that retailers are already supporting small business through increased protection and access to support (payment plans, payment extensions, etc)¹⁵.

¹¹ Corporations Act 2001: Section 588FC

¹² Corporations Act 2001: Section 588FE

¹³ Corporations Act 2001: Section 588FF

¹⁴ Corporations Act 2001: Section 588FG

¹⁵ ESC supporting energy customers through the coronavirus pandemic: draft decision (pg.27)

The ESC must establish that any assistance it has deemed required is supported by evidence of worsening conditions from existing data requests.

Additionally, the draft version of the Energy Retail Code provided with the Draft Determination does not support the ESC's position that the rules are 'maintaining incentives for small businesses to continue paying their bills on time'¹⁶. The draft version would allow for any business that is in arrears to receive assistance, this effectively enables business that are not experiencing financial difficulty to receive this support, if they elect to not pay a bill.

An alternative option can achieve the required customer protections while stimulating innovation and reducing implementation costs

Regulation is one way of providing certainty that retailers are uniformly operating in a way that meets minimum standards. However, regulation is prescriptive and inflexible, it therefore can be burdensome to accommodate, and restrictive in what it offers.

The proposed date for the Final Decision (August 2020) provides limited time for the ESC to establish the associated impacts to industry from their rule change; however, as documented throughout there are many indicators that a prescriptive rule change (as drafted) will have flow on impacts to retailers cost to serve and increased risk to retailer viability. The date the rule changes is set to take effect (1 October 2020) establishes a timeframe retailers will find very difficult to implement, further constraining retailer's resources and operation.

The ESC's rule making process is guided by the objective of promoting the long-term interests of Victorian consumers; having regard to the price, quality and reliability of essential services.¹⁷ It is then vital that significant consideration is provided to the impacts on *price* (retailers cost to serve) and *reliability* (risk to retailer viability) by comparing the merit of formal regulation against the benefits of alternative options.

The ESC can achieve the desired protection outcomes without prescriptive regulations. The AER Statement of Expectation has confirmed that retailers are able to comply with the intent of a regulators desire, without a formal obligation under the rules. The ESC could employ a similar method of setting the expectation for retailers, it could ensure adherence to the expectations through its oversight of retailer operations (information requests), and would then have the evidence to support action against a retailer or to substantiate the need for further regulation. The benefit from this approach:

1. Retailers can achieve the expectations of the ESC in a method that is suitable and sustainable for their business and customers;
2. Limit increases to retailers' costs to serve and corresponding increases to retail prices;

¹⁶ ESC supporting energy customers through the coronavirus pandemic: draft decision (pg.10)

¹⁷ Section 8, Essential Services Commission Act 2001.

3. Non-compliance with the ESC's expectations is targeted at the appropriate retailer/s; and,
4. There is flexibility for the ESC and retailers to accommodate the evolving requirements for customer protection due to the coronavirus pandemic.

In conclusion, EnergyAustralia support measures that protect customers, where it has been established the protection is required. We implore the ESC to reconsider the prescriptive approach outlined in the Draft Determination, instead producing a statement of expectation; that will outline the requirement, while enabling flexibility in how retailers achieve it.

Response to specific questions from the Draft Determination are attached.

If you would like to discuss this submission, please contact me on 03 8628 1704 or Travis.Worsteling@energyaustralia.com.au.

Regards

Travis Worsteling

Senior Industry Regulation Advisor

Question 1: Are there other measures you think we should be considering to ensure consistent protections for residential customers experiencing financial stress as a result of the pandemic, either in the short or medium term? If yes, please provide details.

In the interest of reducing costs to implement, EnergyAustralia suggest that additional protections that the ESC deem required, should first be based off evidence of worsening condition from existing data requests, and that any requirement is established via a statement of expectation; this is a more suitable format for imposing a time bound requirement, and with oversight from the ESC it will provide the same level of protection.

Question 2: Are there other measures you think we should be considering to ensure consistent protections for small business customers experiencing financial stress as a result of the pandemic, either in the short or medium term? If yes, please provide details.

As above, any assistance to small business customers should be based off evidence from information requests, and that the requirement is established via a statement of expectation. Any protection that is deemed necessary should first establish that there is no implication on Australia's existing insolvency laws, and that the assistance does not have significant ramifications on the operation of the energy market; by way of retailer financial viability.

Question 3: We are proposing that if a small business misses a bill pay-by-date, it will be entitled to repayment of arrears over not more than two years by payments at regular intervals of up to one month. Do you think that two years is an appropriate length of time for small business customers to be asked to repay their arrears? If not, please provide details about what alternative would be appropriate.

This is an unreasonable transfer of risk to retailers, as this will impose the potential for preferential payment claims against retailers (unsecured creditors); as per the Corporations Act 2001. We suggest that a preferable alternative would be, requiring retailers to negotiate in good faith with solvent small business customers upon request, without a specified outcome.

Question 4: We are proposing a temporary entitlement to payment assistance for any small business that misses a bill pay-by-date. Do you think it would be practical or appropriate to restrict eligibility for payment assistance to small businesses that meet a set of criteria for financial stress? If yes, please provide details about what criteria would be appropriate.

Support to small business should be based on the participation of the small business prior to the pay-by date of a bill; allowance can be provided on a case-by-case basis to assist small business after this point. EnergyAustralia believes the criteria for support should align with the understanding that business should be aware of their liabilities and proactive in seeking assistance if needed.

Question 5: Do you think the current network relief package to retailers has worked the way it was intended? Please provide details to explain your answer.

The network relief package was publicised by the ENA to amount to 'hundreds of millions of dollars in "foregone or deferred" revenue for the nations network operators'¹⁸ However, the requirements were restrictive on eligibility for both customers (only those

¹⁸ Sydney Morning Herald: Virus Hit Businesses Power Bills Slashed

that had entered hardship from 1 April 2020) and retailers (most assistance limited to small retailers); as such, there has been little actual benefit to customer's bills.

EnergyAustralia consider in the interest of fairness and equality that any network relief should apply to support all customers that are in need of financial assistance, regardless of the perceived size of the retailer, and that limitations on customer eligibility are broadened to include all customers a retailer has included in their hardship program.

Question 6: Do you think anything further should be put in place in Victoria after the initial network relief package to retailers ends, for example a deferral of network charges similar to the rule change that the Australian Energy Market Commission is currently consulting on? If yes, please provide details.

The AEMC's decision¹⁹ has not included the deferral of network charges to all retailers, excluding retailers registered as a ROLR and government-owned retailers. As stated above, we see merit in applying assistance to all retailers that require financial assistance; however, in the interest of uniformity between jurisdictions and the efficiencies these create (which have corresponding cost savings for retailers and their customers), EnergyAustralia suggest the ESC consider adopting the AEMC's Deferral of Network Charges rule change.

¹⁹ AEMC: Deferral of Network Charges Final Decision