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Review of Wrongful Disconnection Payment
Essential Services Commission
Level 2, 35 Spring Street
Melbourne VIC 3000

Dear Commission

Submission to the Review of Victoria's Wrongful Disconnection Payment

The Consumer Action Law Centre (**Consumer Action**) welcomes the invitation to make a submission to the Essential Services Commission (the **Commission**) to inform its draft report on its review of Victoria's Wrongful Disconnection Payment (**Review**). We apologise for our delay in making this submission.

Consumer Action remains strongly supportive of the Victorian wrongful disconnection payment legislative obligation. It continues to fulfil its role as an incentive on retailers to guard against non-compliance with their legal obligations relating to disconnection, as demonstrated by low disconnection rates, and to provide some compensation to consumers wrongfully disconnected from supply, which is a distressing event. There may now be a case raise the payment amount by prescribing a new amount in Regulations made under the legislation to ensure that the payment remains effective as an incentive against non-compliance.

Our comments addressing the Terms of Reference in more detail are set out below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Appropriateness

The Minister's Notice of Reference sets out the rationale for the introduction of the wrongful disconnection payment. This was to provide greater protection to customers against unlawful disconnection conduct by a retailer by adding an incentive on retailers to comply with their obligations, and to compensate a customer wrongfully disconnected for the inconvenience suffered. In particular, the new payment obligation was directed at providing an additional incentive to comply with obligations relating to how customers with genuine payment difficulties or in financial hardship must be dealt with. The amount of \$250 per day (or a pro rata amount for a part day) was considered a sufficient amount to achieve this incentive effect.

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In our view, the underlying rationale for the wrongful disconnection payment continues. This is the case because it is effective in its operation as an incentive, it applies only in circumstances in which the disconnection is wrongful (not merely for any disconnection) and only for the period the customer is off supply, and disconnection remains a highly undesirable action for retailers to take against small end-user customers, particularly residential customers who are genuinely unable to pay.¹

In terms of its effectiveness, Victoria's disconnection rates dropped significantly after the wrongful disconnection payment was introduced. The Commission's own energy retailer performance reports show that, after trending upwards for several years, electricity disconnections and reconnections in the same name reached a local peak in 2004 before dropping following the introduction of the wrongful disconnection payment obligation in late 2004, and are now at historically very low levels. The gas disconnection rate has been higher than the electricity rate for the last decade and, with the exception of an anomalous drop in 2003, was at this high level until after the introduction of the wrongful disconnection payment obligation in 2004, when it dropped dramatically and is also now at historically very low levels.² The Energy and Water Ombudsman (Victoria) (**EWOV**) has noted a similar trend in its cases involving disconnection.³ The Commission also points out that Victoria has the lowest disconnection rate in the country, often significantly lower than other jurisdictions.⁴ While it is possible that several factors have led to this result, one noticeable element is that Victoria is the only jurisdiction that provides for a wrongful disconnection payment obligation to encourage compliance with disconnection legal obligations.

With regard to the circumstances involved in triggering the wrongful disconnection payment obligation, it is a simple but important point to make that the payment only applies if the disconnection is wrongful. Clearly it would not be appropriate to require a payment to be made by a retailer to a customer for any disconnection no matter the circumstances. However, a retailer is only obliged to make a wrongful disconnection payment under the *Electricity Industry Act 2000* or *Gas Industry Act 2001* if the retailer has failed to comply with their legal obligations as to the circumstances in which they are allowed to disconnect the customer's energy supply. A retailer that has complied with obligations it should be meeting in any case will not be liable to make wrongful disconnection payments.

The Minister's Notice of Reference points out that retailers should now have established and refined their business processes in order to identify and minimise the potential for wrongful disconnections. This is correct and makes it less acceptable that a retailer undertakes a disconnection in breach of its legal obligations. However, the Commission's most recent energy retailer compliance report notes that, while the overall disconnection rate has dropped as discussed above, wrongful disconnection cases have increased in both number and proportion of

¹ We note that the wrongful disconnection payment obligation only applies where the customer is a residential customer – a household - or is a small business consuming less than 40mWh per annum: *Electricity Industry Act 2000: Order Under Section 36*, Victoria Government Gazette, S 315, 25 November 2008, p5.

² See, eg, Essential Services Commission, *Energy Retailers Comparative Performance Report – Customer Service 2007-08*, December 2008, p23.

³ Energy and Water Ombudsman (Victoria), 'Information on energy disconnection and water restriction rates', *EWOV website*, www.ewov.com.au/PolicyandResearch/Information%20on%20energy%20disconnection%20and%20water%20restriction%20r.aspx.

⁴ Essential Services Commission, above n2, p24.

total disconnections.⁵ Further, the Commission notes that the same things are causing these wrongful disconnection cases as in previous years, including retailer customer service staff incorrectly processing connection, reconnection and disconnection requests, incorrect recording of addresses or meter identification numbers and, most disturbingly, retailers not adequately assessing capacity to pay.⁶

It does not, therefore, appear that the energy retailers have necessarily improved their ability to identify when they have complied with their legal obligations and are allowed to disconnect a customer.⁷ It may be that energy retailers have reduced disconnections generally in an attempt to avoid wrongful disconnections but still do not, in fact, have fully effective business processes in place to identify and avoid wrongful disconnections. A removal of the wrongful disconnection payment obligation in such circumstances would merely remove the risk aversion of retailers and it seems likely that a large increase in disconnections, including wrongful disconnections, would follow.

A more appropriate response would be to increase the wrongful disconnection payment amount to provide a greater incentive to fix business processes and target the avoidance of wrongful disconnections more specifically. Further, the current wrongful disconnection payment amount has not changed since the obligation was first introduced five years ago, despite ongoing inflation and, especially, energy price rises above inflation. The wrongful disconnection payment has not kept pace with these increases and its effectiveness as an incentive to ensure regulatory compliance is therefore being eroded over time. It may be appropriate to increase the payment amount at this time, particularly in light of the ongoing increases in wrongful disconnection cases.

Also relevant to the circumstances in which the wrongful disconnection payment applies, we note that it is only payable for the time during which the retailer's wrongful conduct remains ongoing, that is, the customer remains wrongfully off supply. One of the useful features of the wrongful disconnection payment is that the period the customer is off supply is inherently considered, because the amount of the payment is designed to vary with the time off supply. A retailer which fixes its mistake quickly will make a much smaller payment than a retailer which leaves its breach unaddressed for a longer time, causing greater distress to the customer. This is an appropriate feature of the payment and we recommend it continue, whether or not the payment amount is increased.

In terms of the appropriateness of providing for an additional incentive on retailers to avoid breaching their obligations around disconnection, the wrongful disconnection payment is specifically targeted at this set of legal obligations precisely because disconnection of energy supply is such an undesirable outcome. For example, one of the four key objectives of the

⁵ Essential Services Commission, *2007-08 Compliance Report for Victorian Energy Retail Businesses*, October 2008, pp30-31.

⁶ As above, p32.

⁷ This is also suggested by the figures in the Commission's report showing that the wrongful disconnection cases identified by EWOV greatly outnumber the wrongful disconnection cases identified by retailers on their own: as above, p30. We note that the Commission did investigate retailer internal process and concluded that retailers had generally taken reasonable steps to ensure that wrongful disconnection cases were handled appropriately and that it could be reasonably expected that not every instance of wrongful disconnection eligibility would be identified and dealt with given the volume of calls that retailers receive, although a fuller audit could be warranted. The Commission also recognised that financial payment obligations act as an incentive to maintain and improve practices, noting here that the cost of ongoing EWOV referrals for unresolved wrongful disconnection payments should act as an incentive to increase efforts to adhere to policies and procedures: as above, pp37-38.

Victorian Government's energy policy is to ensure that all consumers, especially low-income earners, can access essential energy services at affordable prices,⁸ and disconnection due to incapacity to pay represents the opposite of achieving this objective. In examining possible improvements to the Victorian energy regulatory system to mitigate customer hardship, the 2005 Committee of Inquiry into Financial Hardship of Energy Consumers established by the Victorian Minister for Energy Industries agreed with stakeholders that a total ban on disconnections was not warranted, but specifically recommended that the limitations on disconnections in the Energy Retail Code and the wrongful disconnection payment provisions be continued.⁹

Further, as our 2004 report (as Consumer Law Centre Victoria) with the Consumer Utilities Advocacy Centre highlighted, disconnection is also a physically and emotionally distressing experience and many households who are disconnected from supply include children.¹⁰ Disconnection has not become any more desirable an occurrence. It is entirely appropriate that Government policy and legislation be directed at ensuring that retailers do not improperly act to disconnect households from supply.

Finally, the mandatory roll-out of smart meters across the entire state over the next four years may have an impact on disconnections and, in our view, this provides an additional reason to maintain an effective wrongful disconnection payment obligation. While we recognise that retailer legal obligations regarding disconnection are not altered by the meter type or technology in place, the practical effect of installing smart meters is that disconnections will be able to be performed remotely and much faster. The ease and speed with which disconnections and reconnections will be able to be undertaken increases the risk of wrongful disconnections and, given the evidence that retailers' business processes are still struggling to identify wrongful disconnections, it is not unlikely that this could result in more wrongful disconnections taking place. In such an environment, an incentive to avoid wrongful disconnection becomes more important. As it will be cheaper to disconnect and reconnect, the financial incentive for a retailer to get it right will also diminish, meaning that the amount of the wrongful disconnection payment probably needs to be increased to ensure it maintains its effectiveness as an incentive, even apart from other reasons to increase the payment discussed above.

Application

As discussed above, Consumer Action believes that the wrongful disconnection payment applies in appropriate circumstances.

There are many different breaches of different legal obligations that could result in a disconnection being wrongful. We accept that some breaches may be more or less egregious than others. However, if the ultimate result is that a household is disconnected from supply, the impact of the situation is the same for the affected consumers. The fact that the wrongful disconnection might have been inadvertent, for example, because the retailer operated its letter dispatch system on a calendar date basis rather than a business day basis and thus did not give sufficient time for disconnection warnings,¹¹ does not lessen the impact on the customer and,

⁸ Department of Primary Industries, 'Energy and Earth Resources Policy', *Department of Primary Industries website*, www.dpi.vic.gov.au/DPI/dpinenergy.nsf/childdocs/-3F827E74C37E0836CA25729D00101EB0?open.

⁹ Committee Of Inquiry Into The Financial Hardship Of Energy Consumers, *Main Report*, September 2005, p72.

¹⁰ Nicole Rich and May Mauseth, *Access to Energy and Water in Victoria - A research report*, Consumer Law Centre Victoria and Consumer Utilities Advocacy Centre, November 2004.

¹¹ See, eg, Essential Services Commission, above n5, p34.

further, it is appropriate that the incentive of the wrongful disconnection payment applies to unintentional errors to encourage improved business procedures.

We also accept that no business is perfect and wrongful disconnections may occur even if a retailer has implemented high quality processes to identify and minimise the incidence of wrongful disconnection. Given this is inevitable, it should be considered to have been taken into account in the decision to implement a wrongful disconnection payment obligation and in the overall amount of the payment set. In addition, again, it does not lessen the impact on the customer of being disconnected from supply. In any case, however, the current evidence does not suggest that wrongful disconnection cases have reduced to anywhere near a level that might be considered consistent with only minimal breaches occurring.

We are aware of statements that the wrongful disconnection payment is being applied in “undesirable situations” or due to “loopholes”. It is difficult to assess such claims in the absence of evidence about the alleged cases being referred to. We therefore ask the Commission to examine any such claims fully, including by reviewing any actual cases raising such issues. Again, we note that the payment is only triggered if the retailer has engaged in a breach of its legal obligations, thus we are unsure how a customer could obtain a wrongful disconnection payment through a “loophole”.

In practice, the application of the wrongful disconnection payment obligations is guided by the Commission’s *Operating Procedure Compensation For Wrongful Disconnection*, which was developed after consultation with EWOV, retailers and consumer representatives.¹² We commend the Commission for having developed the operating procedure and consider that it provides the necessary additional assistance to be able to apply the legislative obligation for wrongful disconnection payments to actual cases in a consistent and fair manner.

Options for appropriate compensation for wrongful disconnection

As discussed above, we believe that the current legislative provisions to make wrongful disconnection payments are generally working well and in appropriate circumstances, although there are arguments that the payment should be increased. There may also be other options that could provide appropriate compensation to consumers who are wrongfully disconnected from energy supply, but we have not considered what such options might be given that it does not seem necessary.

Consumer Action would not support an alternative that gave energy customers a right to compensation for wrongful disconnection but put the onus on energy customers to identify that they had this right and then to pursue these rights at their own expense. Such an approach has been shown to be ineffective in a range of consumer dispute areas, not only energy, and one of the best features of the current wrongful disconnection payment obligations is that the Commission, EWOV and the retailers all play a role (together with the customer) in identifying and resolving potential wrongful disconnection cases.

¹² Essential Services Commission, *Operating Procedure Compensation For Wrongful Disconnection*, August 2007.

National Energy Customer Framework developments

In our view, the development of the new national regime for energy consumer protection through the National Energy Customer Framework (**NECF**) is not currently particularly relevant to the wrongful disconnect payment obligation. The NECF will eventually take the place of the current State-based energy consumer protection regime (which is primarily implemented under the current *Energy Retail Code*). The wrongful disconnection payment obligation stands apart from this energy consumer protection regime, adding a legislative mechanism over the top of the substantive obligations under the regime to encourage compliance with these obligations, and to provide compensation for disconnection if there has been a failure of compliance. It does not add to or alter the substance of the consumer protection regime and can be applied (or not) regardless of the regime's contents. Therefore, once the NECF is implemented and Victoria transfers to this consumer protection regime, the wrongful disconnection payment obligation would be applied to encourage compliance with the NECF obligations rather than the current State-based obligations.

The only way in which we could see the NECF become relevant is if the Federal and State and Territory Governments decided to implement a national wrongful disconnection payment obligation in the NECF, in which case a separate Victorian obligation would not be necessary. However, there has been no indication that this will occur and the first exposure draft of the proposed NECF legislation did not contain any such provisions. Instead, it contained only provisions that correspond to the more detailed substantive consumer protection provisions such as those found in the current *Energy Retail Code*. For example, provisions setting timeframes to send bill payment reminder and disconnection warnings are contained in the NECF draft legislation, but provisions found in the higher-level Victorian legislative framework around matters such as wrongful disconnection payments, the prohibition on late payment fees and the regulation of pre-payment meters are not replicated and remain for Victoria to apply in the overarching legislative framework.

In any case, the NECF is currently only at first draft stage, with a second exposure draft of the legislation expected to be released towards the end of the year before a final Bill is settled in 2010. The legislation is not expected to be enacted before late 2011, with implementation presumably then occurring at a later date. It is too early to make any changes based on the implementation of the NECF, even if the NECF were relevant.

Thank you again for the opportunity to provide this submission to the Review. Please contact us on 03 9670 5088 or at janine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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