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28 June 2018

Mr John Pierce  
Chairman  
Australian Energy Market Commission  
Level 5, 201 Elizabeth St  
Sydney NSW 2000

Submitted electronically

Dear Mr Pierce,

**Re: National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018**

Red Energy (Red) and Lumo Energy (Lumo) welcome the opportunity to respond to the Australian Energy Market Commission (the Commission) on the Strengthening protections for customers in hardship Consultation Paper (the consultation paper).

Effective protections for customers in hardship are paramount to the success of the retail energy regulatory framework. As providers of an essential service, retailers have an important role to play, but it is critical to note that retailers are not the only parties responsible. Hardship requires a holistic assistance framework, in which governments have effective and commensurate social policies, consumer organisations are appropriately resourced to provide emergency relief and assistance, and retailers have processes in place that provide genuine and sustainable assistance to customers who identify as experiencing hardship.

Despite this tripartite responsibility, retailers are the only party regulated under the National Energy Retail Law (NERL) and the National Energy Retail Rules (NERR). This often results in confusion amongst parties as to where responsibilities lie, including a degree of blame shifting, but also tends to result in suggestions that retailers should bear more and more responsibility in a time where financial vulnerability more broadly is increasing<sup>1</sup>.

Red and Lumo support clear and effective hardship policies and procedures. We support retailers having processes in place that assist customers experiencing financial difficulties. Our programs are focused on identifying customers in hardship as

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<sup>1</sup> ESCOSA investigated this in their 2016 review of the efficacy of the NECF following its implementation in 2013. They found that prevailing economic conditions were causing increased use of retailer hardship programs and debt, rather than any failure of the regulatory framework or retailer practices. We expect this analysis remains relevant today given current economic conditions.  
<https://www.escosa.sa.gov.au/ArticleDocuments/933/20160530-Energy-NERLReviewFinalReport.pdf.aspx?Embed=Y>

early as possible when debts are low, and working with them to reduce their energy consumption to an affordable level. To that end, we are comfortable with the Australian Energy Regulator (AER) seeking greater clarity in retailer hardship policies so consumers are better aware of their assistance entitlement.

### **The rule change proposal**

The AER has lodged a rule change proposal that would allow them to issue an enforceable customer hardship policy guideline (the proposed guideline) to “provide a single point of reference to industry regarding how the minimum requirements should be applied, and enable clearer oversight of retailer compliance with the hardship obligations<sup>2</sup>.”

The content of the proposed guideline is unclear, and has not been discussed with industry outside of this rule change consultation. Noting that, we provide these comments in part based on what we have inferred from the AER’s rule change request, and from subsequent discussions with AER staff.

The AER highlights that the problem arises from the minimum requirements in the NERL not being included in hardship policies, and are subsequently not being applied consistently to all customers experiencing payment difficulties. The AER considers that current retailer hardship policies are too high level, don’t allow for consistency, and are having a significant impact on customers experiencing financial difficulties and their ability to access and successfully complete hardship programs.

The rule change proposal is difficult to comment on. While clear guidance on developing hardship policies that enable good customer outcomes is strongly supported, the proposal appears to suggest the AER will be setting policy, rather than merely encouraging compliance within the strict wording of the law and rules. The AER indicated at the Commission’s workshop that they are in the process of developing standard statements to be included in hardship policies that would commit retailers to specific actions that mirror the minimum requirements for hardship policies. They consider these would have a number of benefits, including removing ambiguity over how the minimum requirements are to be applied and providing customers with a clear understanding of their entitlements. While unclear how they would be implemented in practice, standard statements of this nature appear likely to create additional obligations over and above what is specified in the NERL and NERR.

### **The current framework**

The NERL sets out a clear directive that retailers must assist customers in hardship. This includes placing obligations on retailers to develop hardship policies, and sets out at a high level what they must include.

As the rule maker, the Commission has further elaborated on the obligations in the NERL in the NERR, by setting out obligations regarding payment plans and hardship indicators.

The AER is required to ensure authorised retailers maintain compliance with the hardship provisions in the NERL and NERR. This includes an obligation under s45 of

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<sup>2</sup> <https://www.aemc.gov.au/sites/default/files/2018-05/RRC0017%20Rule%20change%20proposal.pdf>

the NERL to approve hardship policies if they comply with both the obligations in s44, and the broad intent clause in s43(1). Section 43(1) requires the AER to reject a policy, or request the retailer re-submit a revised policy, if the policy does not allow the retailer to identify residential customers experiencing difficulty or assist those customers to better manage their ongoing energy bills. While the AER clearly does not have powers to make a guideline above the minimum regulatory standard, it does appear that the obligations under their general powers in s204 of the NERL and the resulting powers in s43 and s45 would allow the AER to request the retailer make amendments to their hardship policy if they considered the wording of that policy were too broad to achieve the intended compliance outcomes.

## Policy vs Compliance

At the heart of this consultation is the determination of the appropriate 'line' between policy development and compliance enforcement. We are comfortable with the AER having an additional power that details how it expects retailers to act in complying with the NERL, however, we do not support the AER having discretionary powers to determine *how* retailers must comply. While this is a tricky distinction, it is an important one. For example, we have no issues with the AER setting out in a guideline that retailers must give clear advice in their hardship policies about the manner and form in which they will offer customers in hardship a payment plan. On the other hand, a determination in a guideline that retailers must include a standard statement in their policies that a payment plan will be at least 12 months in length clearly strays towards policy.

## The proposed guideline

If the Commission considers a guideline is warranted and a rule is made, we consider the purpose of the guideline must be clarified, limiting the AER to expressly provide general boundaries that retail hardship policies must operated within. Policies should be specific enough that customers are aware of what they are entitled to and the AER is able to enforce them. However, the manner in which retailers provide hardship assistance must be at the retailers discretion, taking into account the minimum standards in the NERL and their corporate social responsibility. The current framework is principles based by design, with neither the NERL or the NERR suggesting that assistance should be standardised across the sector. Principles based hardship obligations allow retailers flexibility, allowing assistance to be tailored to the needs of the customer experiencing hardship rather than requiring a one size fits all approach.

Specifically, rule 75(4)(b) of the proposed rule is drafted too broadly. We are concerned with the inclusion of 'any matter that the AER considers necessary' when the intent of the guideline is noted as merely ensuring compliance with the existing obligations. We would be more comfortable with the AER having the power to provide strict guidance to retailers as to the types of information a policy must contain in order to comply with the minimum requirements set out in s44 of the NERL, rather than standardised statements that would give effect to them. While the AER has noted that hardship policies are becoming increasingly legalistic, as part of our implementation of the Victorian Payment Difficulties Framework we are in the process of making ours more customer friendly. While a redraft of the non-Victorian policy has been put on hold as a result of this consultation, we are concerned that our policy, written to assist our customers, will need to include text drafted by a regulator.

We would welcome working further with the Commission to ensure the drafting of any

proposed rule appropriately mitigates this risk.

## Defining hardship customers

At the Commission's workshop on this rule change, it was suggested that the AER should be given the power in the proposed guideline to define hardship customers. We would caution against this approach. No two customers are alike, with the needs of hardship customers particularly varied. We have customers in our program with difficulties ranging from financial to situational.

That being said, hardship programs are not the only manner in which we assist customers experiencing payment difficulty. We also have a number of other assistance measures that enable any customer, not simply those identified as experiencing hardship, the proportionate assistance they need. These measures provide customers with options that suit them, without necessarily having to be accepted into a hardship program which tends to be more onerous on both parties. These short term assistance measures include payment extensions, short term instalment plans, bill smoothing, and more frequent billing. A binary definition of a hardship customer as one unable to pay a bill by a due date would likely capture all of these customers.

On the other hand, setting a higher definition, such as determining that a hardship customer is a customer who is unable to afford their ongoing energy consumption would exclude a vast number of customers. It is critical to note that the Payment Difficulties Framework in Victoria expressly repealed the definition of a hardship customer, considering it unhelpful to customers more broadly<sup>3</sup>. We continue to believe that hardship can only be defined by a retailer taking into account the individual circumstances of a customer.

## The inclusion of indicators in the hardship guideline

We do not agree that an expanded rule 75 would continue to be the best place to set out AER's power to determine the hardship indicators. Section 287 of the NERL gives the AER powers to determine and publish hardship indicators in accordance with the NERR. In the current framework, these indicators are housed in the AER (Retail Law) Performance Reporting Procedures and Guidelines<sup>4</sup>. Separating the hardship indicators out from the performance reporting guideline will add complexity for stakeholders for no apparent benefit. We suggest if a hardship guideline is implemented, it is implemented as rule 75A, retaining rule 75 in its current form.

## Enforceability

The AER suggests in its rule change proposal that the guideline should not only be enforceable, but also subject to a civil penalty. We do not consider that to be necessary.

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<sup>3</sup> Essential Services Commission 2017, Payment difficulty framework: Final decision, 10 October, Pg 136

<sup>4</sup> AER (Retail Law) Performance Reporting Procedures and Guidelines Version 2, June 2012, Schedule 4, <https://www.aer.gov.au/system/files/D12%2090627%20%20AER%20Performance%20Reporting%20Procedures%20and%20Guidelines%20-%20June%202012.pdf>

Retailer compliance with the hardship provisions in the NERL and the NERR are already civil penalty provisions. Practically, if a retailer does not comply with the proposed guideline, the AER would presumably request the retailer re-submit a revised policy for approval. If the retailer fails to do so, or submits a policy disregarding the proposed guideline, the AER would reject the policy in line with its powers set out in s45 of the NERL. Non-compliance with this obligation is already a civil penalty under s43(3). We do not see any additional benefits in recommending the proposed guideline, in full or in part, be a civil penalty provision.

## Timing

It goes without saying that the retail energy sector is in an unprecedented state of flux. The Commission itself noted in the 2018 Retail Competition Review that since April 2017, no less than 25 new rules, policies, and programs have been introduced by governments and market bodies in this space<sup>5</sup>. The Retail Competition Review recommended further work be undertaken by the Commission to assess how retailers support customers in financial difficulty by January 2019<sup>6</sup>. We welcome this assessment. The management of customers in financial difficulty is complex, and requires a holistic understanding of the relevant regulatory and social policy frameworks to be able to make informed decisions that are in the long term interests of consumers. This does not seem to be the time for a quick fix.

This assessment, expected to be commenced shortly after the ACCC releases its Final Report in the Electricity Prices and Supply Enquiry<sup>7</sup>, will allow the Commission to consult with retailers about their respective approaches to managing customer hardship, identify effective practices and then provide advice to policymakers where limitations in the protection frameworks exist. We expect the Commission's assessment will include further recommendations to improve the frameworks (through directly targeted and proportionate regulation), and ultimately consumer outcomes. We welcome the opportunity to assist the Commission with its assessment.

Given this, we are concerned that this consultation is taking place before the end state is known. Best practice regulation should start by determining the policy intent, before the rules are amended to enact it. Compliance mechanisms should only be implemented after these steps are finalised. We strongly recommend the Commission extend the period of time in the rulemaking procedure under s266 of the NERL until early 2019, to ensure any future rule meets the long term interests of consumers. Even minor alterations to hardship policies and procedures are not insignificant, with significant risks of poor consumer outcomes. Retailers cannot be expected to make multiple changes to policies (however well intentioned) in an iterative manner when a comprehensive review is about to be undertaken. Any wasted cost, or unintended outcome, cannot be in the long term interests of consumers.

## About Red and Lumo

We are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we

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<sup>5</sup> AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018, Sydney, pg xi

<sup>6</sup> Ibid, recommendation 2

<sup>7</sup> <https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry>



retail gas and electricity in Victoria, New South Wales and South Australia and electricity in Queensland to approximately 1 million customers.

Red and Lumo thank Company for the opportunity to respond to this consultation. Should you have any further enquiries regarding this submission, please call Stefanie Macri, Manager - Regulatory Affairs on 0481 009 645.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

**Ramy Soussou**  
General Manager Regulatory Affairs & Stakeholder Relations  
**Red Energy Pty Ltd**  
**Lumo Energy Australia Pty Ltd**