



**Effectiveness of Supports for Customers Experiencing
Payment Difficulties
Strengthening protections for customers under the NECF**

**SACOSS Report
June 2018**

Effectiveness of supports for customers experiencing payment difficulties: strengthening protections for customers under the NECF
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About SACOSS

The South Australian Council of Social Service is the peak non-government representative body for health and community services in South Australia, and has a vision of Justice, Opportunity and Shared Wealth for all South Australians.

SACOSS does not accept poverty, inequity or injustice. Our mission is to be a powerful and representative voice that leads and supports our community to take actions that achieve our vision, and to hold to account governments, business, and communities for actions that disadvantage vulnerable South Australians.

SACOSS' purpose is to influence public policy in a way that promotes fair and just access to the goods and services required to live a decent life. We undertake policy and advocacy work in areas that specifically affect disadvantaged and low income consumers in South Australia.

SACOSS has a long-standing interest in the delivery of essential services. Our research shows that the cost of basic necessities like electricity impacts greatly and disproportionately on vulnerable and disadvantaged people.

SACOSS has a strong membership base of around 300 people and organisations from a broad cross-section of the social services arena. Members of our organisation span both small and large agencies, peak bodies, service providers, individuals, and some government departments. SACOSS is part of a national network, consisting of ACOSS and other State and Territory Councils of Social Service.

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Introduction

SACOSS has long been concerned with creating better outcomes for energy consumers experiencing financial stress. As the providers of an essential service, SACOSS believes energy retail businesses have a special obligation to their vulnerable customers, and our previous work in this area demonstrates our commitment to improving retailers' practices. In 2014, SACOSS (in partnership with energy retailers and community sector organisations) developed a Better Practice Guideline for Energy Retailers¹, which promoted a collaborative approach to preventing hardship amongst energy consumers. In January 2016, SACOSS published a report titled Better Solutions for Helping Customers with Financial Difficulties: Energy and Water- A Cross Sector Approach to Supporting Vulnerable Customers², and in November 2016, SACOSS published its extensive Review of the Australian Energy Regulator's (AER's) and Essential Services Commission of Victoria's (ESC Vic's) Frameworks for Customers Facing Payment Difficulties (SACOSS' 2016 Report).³

SACOSS' 2016 Report analysed the differing approaches of the AER and the ESC Vic, to addressing the issues of rising debt levels and high disconnection rates impacting vulnerable energy customers. Specifically, the 2016 Report assessed the AER's voluntary Sustainable Payment Plan Framework (SPPF) and the ESC Vic's proposed framework titled 'Supporting Customers Avoiding Labels' (which has since been replaced by the recently approved Payment Difficulty Framework).⁴

Nearly two years on, and despite all the efforts of regulators, policy-makers, government, industry and consumer organisations to improve outcomes for vulnerable customers in the National Electricity Market, debt levels and disconnection rates are continuing to rise, and more customers are experiencing financial hardship. The focus of this report is to build on SACOSS' 2016 Report through an examination of the existing obligations on retailers to support vulnerable customers, the limitations of the current regulatory framework, the failure of many retailers to effectively and consistently provide support, and the AER's new proposals to address these limitations and inadequacies.

Specifically, this report focuses on two measures undertaken by the AER to strengthen protections for customers in financial hardship:

- the AER's request to the Australian Energy Market Commission (AEMC) to change the Retail Rules to allow for the creation of a binding Hardship Guideline,⁵ and
- recent amendments to the AER's Performance Reporting Procedures and Guidelines, including amendments to the Hardship Program indicators.⁶

¹ SACOSS, November 2014, Better Practice Guideline for Energy Retailers: A collaborative approach to preventing hardship amongst energy consumers see: https://www.sacoss.org.au/sites/default/files/public/documents/Reports%20copy%201/Better_Practice_Guidelines_FINAL-min2.pdf

² SACOSS, January 2016, Better solutions for Helping Customers with Financial Difficulties: Energy and Water – A cross-sector approach to supporting vulnerable customers see: https://www.sacoss.org.au/sites/default/files/public/Best_Practice_Case_Studies_CLIENT%20%28%29.pdf

³ SACOSS, Review of the Australian Energy Regulator's and Essential Services Commission of Victoria's frameworks for customers facing payment difficulties, November 2016 see https://www.sacoss.org.au/sites/default/files/public/documents/Reports/161101_EnergyPaymentDifficultiesFrameworksReport_Final.pdf

⁴ Contained in Part 3 of the Essential Services Commission of Victoria's Energy Retail Code (as amended on 10 October 2017), which will come into operation on 1 January 2019

⁵ AER, Request for Rule Change: strengthening protections in the National Energy Retail Rules for customers in financial hardship, 21 March 2018 <https://www.aemc.gov.au/sites/default/files/2018-05/RR0017%20Rule%20change%20proposal.pdf>

The first measure involves a proposal by the AER to change the regulatory framework itself, with the second addressing retailer behaviour through the creation of increased monitoring and compliance obligations.

SACOSS believes both measures undertaken by the AER will help to address some of the deficiencies of the current regulatory framework identified in SACOSS' 2016 Report, and provide a clearer picture of retailer behaviour. SACOSS recognises that 'the broader social drivers of energy poverty and disconnection'⁷ are beyond the scope of the AER, but commends the AER on its significant commitment to assessing and improving the current regulatory framework and the behaviour of retailers, with a view to strengthening the protections available to vulnerable energy consumers.

Context for this report

In the last 12-18 months, affordability issues have reached crisis point. In January 2018, Choice reported that 83 per cent of those surveyed for its Consumer Pulse quarterly survey stated that electricity is the household cost that is of most concern,⁸ and unsurprisingly, the AEMC's 2018 *Retail Energy Competition Review June 2018*⁹ (AEMC's Retail Review) found that consumer trust in retailers was at 39% in 2018, a reduction from 50% in 2017.¹⁰

The greatest impact of increasing energy costs is on low income households.¹¹ In South Australia, which has the least affordable electricity in the National Electricity Market (NEM),¹² electricity bills alone made up 5.5% of a low income household's disposable income (after concession charges).¹³ Now more than ever, ensuring access to meaningful, individualised and effective supports for vulnerable consumers is critical.

SACOSS recognises the issues of affordability, consumer vulnerability and resultant energy poverty are complex and multi-faceted. Increasing costs in a transitioning energy market mean Federal and state governments, together with regulators, rule-makers, stakeholders and industry need to focus on supporting households in vulnerable situations who are at risk of energy poverty.¹⁴

The importance of supporting customers experiencing payment difficulties is recognised in the legally enforceable consumer protections contained in the National Energy Customer Framework (NECF), specifically in the *National Energy Retail Law (South Australia) Act 2011*¹⁵ (Retail Law) and the *National Energy Retail Rules Version 12*¹⁶ (Retail Rules). The meaning and intent of the law is

⁶ AER (Retail Law) *Performance Reporting Procedures and Guidelines*, April 2018

https://www.aer.gov.au/system/files/AER%20%28Retail%20Law%29%20Performance%20Reporting%20Procedures%20and%20Guidelines%20-%20April%202018_0.pdf

⁷ SACOSS, *Review of the Australian Energy Regulator's and Essential Services Commission of Victoria's frameworks for customers facing payment difficulties*, November 2016, p.23

⁸ Choice, *Consumer Pulse: Australian's attitude to cost of living in 2014-17*, August 2017, p. 3.

⁹ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018

<https://www.aemc.gov.au/sites/default/files/2018-06/Final%20Report.pdf>

¹⁰ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. xvi

¹¹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.3

¹² AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.3

¹³ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.3

¹⁴ KPMG, *The rise of Energy Poverty In Australia*, Census Insights Series, December 2017, p.8

¹⁵ See National Energy Retail Law (South Australia) Act 2011 at

[https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20\(SOUTH%20AUSTRALIA\)%20ACT%202011.aspx](https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20(SOUTH%20AUSTRALIA)%20ACT%202011.aspx)

¹⁶ See National Energy Retail Rules Version 12 at: <https://www.aemc.gov.au/regulation/energy-rules/national-energy-retail-rules/current>

clear; customers experiencing difficulty in paying their energy bills, whether due to hardship or not, are entitled to the assistance and support of the retailer.¹⁷

Case studies provided to SACOSS via membership organisations,¹⁸ as well as the AER's hardship reviews¹⁹ and performance reporting data,²⁰ paint a grim picture of the disconnect between the legal obligations imposed on retailers to support customers experiencing financial difficulty and the reality of the supports accessed by, and provided to, those customers.

In its *Annual Report on Compliance & Performance of the Retail Energy Market 2016-17* (the AER's Performance Report), the AER found that energy bill debt levels increased during the 2016-17 reporting period and more electricity customers were disconnected. South Australia had the largest proportion of electricity customers in debt (almost five in every 100 customers).²¹ The AER's performance data for the first quarter of the 2017-18 financial year indicates the energy debt crisis is worsening, with the average residential bill debt in South Australia increasing to \$919.²²

The AER's performance data from 2016-17 found fewer customers were successfully completing hardship programs, and more were being excluded from participating in those programs by retailers. These statistics are alarming, but the individual case studies provided to SACOSS by financial counsellors at the 'coal face' of the energy affordability crisis, put a human face on the problem of energy poverty, providing an insight into its devastating effects on individuals and their families. These consumers tell of their repeated struggles to access supports retailers are legally obliged to offer, recounting an unwillingness by retailers to accept customers into their hardship programs, often placing conditions on customers to meet a series of payments prior to entry (even where that customer has repeatedly asked for help).

SACOSS has previously expressed disappointment in the lack of national commitment by the Commonwealth Government and the COAG Energy Council to ensuring that the interests of vulnerable consumers are considered as a priority item in each of the Energy Council's priority areas.²³ However, the continuing energy affordability crisis has recently focused the efforts of governments, regulators and rule-makers on addressing the causes of increasing energy costs, as well as the available supports for energy consumers.

In March 2017 the Commonwealth Government commissioned the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into the supply of retail electricity and the competitiveness of retail electricity prices, with the final report due to be released in June 2018. On 21 November 2017, the AEMC published its advice to COAG Energy Council on strategic priorities, including 'making the market work for consumers, particularly in relation to prices and participation

¹⁷ Part 2, Division 6 and Division 7 of the Retail Law

¹⁸ Uniting Communities has provided SACOSS with 10 case studies and additional observations from a range of financial counsellors and Low Income Support workers on the impact of 'energy stress' on 10 customers in South Australia

¹⁹ See AER, *Review of Energy Retailer's Customer Hardship Policies and Practices*, January 2015 as well as the AER's 2017 Hardship Review, the results of which are summarised in the AER's rule change request to strengthen protections in the Retail Rules for customers in financial hardship, 21 March 2018

²⁰ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17

²¹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

²² Data submitted under the AER's Retail Market performance reporting guidelines (June 2012) for the period 1 July – 30 September 2017

²³ SACOSS, *Review of the Australian Energy Regulator's and Essential Services Commission of Victoria's frameworks for customers facing payment difficulties*, November 2016, p.23

options'.²⁴ In May 2018 the AEMC released its Consumer Protection Action Plan, which contains a suite of new rules and reviews to help deliver more affordable energy by giving consumers more control over their energy bills²⁵, and the AER's 2017-18 work program indicated that 'a key focus for...2017-18 is to equip consumers with the best possible tools to negotiate recent rises in energy bills'.²⁶

The AEMC's recently published 2018 Retail Review recommended the AEMC undertake a further review to assess how retailers support customers in financial difficulty.²⁷ The AEMC stated the review would look at the support options retailers provide commercially, and how these operate with required hardship provisions, identifying and benchmarking best practice.²⁸ SACOSS strongly supports the AEMC conducting this review, and recognises the commitment of the ACCC, AEMC and AER in assessing and improving the current regulatory framework and industry practices to support consumers experiencing difficulty in paying their energy bills.

The current climate of energy affordability

An examination of the supports available to customers experiencing payment difficulties must necessarily be placed in the context of the current climate of energy affordability. How 'affordable' energy is relates to a consumer's capacity to pay their electricity bills and is dependent on the amount of energy used, prices paid, income and other costs of living.²⁹ Increasing energy prices are having a significant impact on consumers' ability to pay their bills. In this current climate, it is critical that consumers get the supports they need, and are entitled to receive.

In its Retail Electricity Pricing Inquiry preliminary report, the ACCC recently summarised the increasing cost of energy in Australia, in the following terms:³⁰

- based on CPI, retail electricity prices have increased by 80 to 90 per cent (in real terms) in the past decade when taking into account price rises in July 2017
- these large increases in electricity prices have not been matched by price increases in other areas of the economy, nor in wage growth
- those on low incomes are finding it increasingly difficult to absorb electricity price increases and are often limited in what they can do to reduce their energy costs.

The ACCC notes that increased bills are a major source of concern for both residential and business customers, but the burden of higher electricity prices disproportionately affects those segments of society least able to afford it.³¹ As an example, in most NEM areas in 2016, the proportion of

²⁴ AEMC, Advice to COAG Energy Council, 21 November 2017 <https://www.aemc.gov.au/news-centre/media-releases/advice-to-coag-energy-council-on-strategic-priorit>

²⁵ AEMC, Consumer Action Plan, 15 May 2015 <https://www.aemc.gov.au/sites/default/files/2018-05/Consumer%20Protection%20Action%20Plan.pdf>

²⁶ Including through updating and enhancing the Energy Made Easy website, reviewing hardship policies, managing retailer failure, updating performance reporting indicators and the Retail pricing information guidelines, see AER, Work Program 2017-18 <https://www.aer.gov.au/system/files/AER%20Work%20Program%202017-18.pdf>

²⁷ Unless advised otherwise by the COAG Energy Council, by January 2019.

²⁸ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. xiii

²⁹ ESB, *The Health of the National Electricity Market – 2017 Annual Report*, ESB Sydney, p. 19.

³⁰ ACCC, Retail Electricity Pricing Inquiry, Preliminary Report, 22 September 2017 p.10 <https://www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Preliminary%20report%20-%202013%20November%202017.pdf>

³¹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.53

household disposable income spent on electricity was around five times greater for the lowest income quintile as it was for the highest income quintile.³²

The AER's Performance Report for 2016-17 found that for a low income household in South Australia, 'the annual electricity bill for the median market offer was \$1427 (\$1318 with a concession). As outlined above, this represents 6 per cent of annual disposable income, or 5.5 per cent with a concession'.³³ Across all jurisdictions, a low income household (on a market offer and without a concession) paid 5.1 per cent of their disposable income towards their electricity bills.³⁴ It is worth noting that the AER's data does not take into account the significant price rises of 1 July 2017 and 1 January 2018.

As KPMG has noted in its report titled 'The rise of energy poverty in Australia':³⁵

*'the rising cost of energy is of concern to all Australians. It forces a reconstitution of budgets and priorities. It can affect a household's quality of life in a very real way since energy is a fixed as opposed to discretionary cost...so fixed are energy costs that the Household Expenditure Survey shows there is barely \$3 per-week difference between per-capita spending in the lowest and highest quintile households on energy. The bigger the household the bigger the energy costs. It's a simple but devastating equation.'*³⁶

It is widely accepted that the current supports for vulnerable consumers are not working in practice, and SACOSS echoes KPMG's call for Australian policy makers to 'rethink how vulnerable customers are able to access and stay connected to a service that is essential to the way we live'.³⁷ The disconnect between the supports retailers are obliged to offer under the NECF, and the operational delivery of those supports, must be bridged. This report will examine the AER's proposals to bridge the gap and strengthen the supports for hardship customers under the NECF.

The Existing Regulatory Framework

The National Energy Customer Framework (NECF)

The National Energy Customer Framework (NECF) is a suite of legal instruments that regulate the connection, supply and sale of energy (electricity and gas) to retail customers.

The NECF is comprised of:

- the National Energy Retail Law (the Retail Law)
- the National Energy Retail Regulations
- the National Energy Retail Rules (the Retail Rules)
- parts of the National Energy Rules and National Gas Rules.

³² ACCC, Retail Electricity Pricing Inquiry, Preliminary Report, 22 September 2017 p.14

³³ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.57

³⁴ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.54

³⁵ KPMG, The rise of energy poverty in Australia: Census insights series, December 2017, p.8

³⁶ KPMG, The rise of energy poverty in Australia: Census insights series, December 2017, p.8

³⁷ KPMG, The rise of energy poverty in Australia: Census insights series, December 2017, p.10

The NECF includes important provisions relating to consumer protections, including:³⁸

- how retailers should provide support to customers facing difficulty paying their bills, and
- requirements a retailer must comply with prior to disconnecting a customer for non-payment.

The NECF has been adopted in the Australian Capital Territory, Tasmania, South Australia, New South Wales and Queensland. Victoria has only adopted chapter 5A of the National Electricity Rules, and recently introduced its own Payment Difficulty Framework into the Victorian Energy Retail Code.³⁹

The AER is responsible for monitoring and enforcement of the NECF. As noted above, the AEMC and the AER have embarked on a series of measures to strengthen protections for consumers within the existing regulatory framework. However, it is apparent that the existing framework is not, in practice, working to adequately protect customers facing payment difficulties.

As outlined earlier, this report focuses on two measures undertaken by the AER to strengthen protections for customers in financial hardship through both its recent rule change proposal and increased monitoring and compliance requirements. Relevant to an examination of both measures, is the distinction under the Retail Law and Retail Rules between ‘a customer experiencing payment difficulties’ and a ‘hardship customer’. As a starting point then, this report will outline the existing regulatory framework that applies to customers experiencing payment difficulties and customers experiencing payment difficulties due to hardship, including the distinction between these two groups of customers and its impact on **access** to supports.

The distinction between ‘Customers experiencing payment difficulties’ and ‘Hardship customers’ under the NECF

The consumer protection framework under the NECF distinguishes between a ‘residential customer experiencing payment difficulties’, and a ‘residential customer experiencing payment difficulties **due to hardship**’ (a hardship customer). The distinction between these two categories of customers is of vital importance, as access to hardship protections under the Retail Law and Retail Rules,⁴⁰ depends upon whether the customer is identified **by the retailer** as a hardship customer, or not.

This distinction within the regulatory framework is usefully illustrated in Part 2, Division 7, section 50 of the Retail Law, which deals with payment plans.

Section 50(1) states that a retailer **must** offer and apply payment plans for (our emphasis):

- **hardship customers**, and
- **other residential customers experiencing payment difficulties** if the customer informs the retailer in writing or by telephone that the customer is experiencing payment difficulties **or** the retailer **otherwise believes** the customer is experiencing repeated difficulties in paying the customer’s bill **or** requires payment assistance.

‘**Other residential customers experiencing payment difficulties**’ is not defined under the Retail Law. SACOSS submits it is reasonable to interpret the phrase in accordance with its natural and ordinary

³⁸ AEMC, Consultation Paper, National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018, 24 May 2018

³⁹ Essential Services Commission, 2017, Payment difficulty framework – Final Decision, 10 October 2017, ESC, Victoria

⁴⁰ See Part 2, Division 6 of the Retail Law and Part 3 of the Retail Rules

meaning. SACOSS suggests this category of customers could quite simply be identified as residential customers who are having trouble paying their bills, as evidenced by energy bill debt (retailer identification), or by self-identification.

A **'hardship customer'** is defined under the Retail Law to mean (our emphasis):

*'a residential customer of a retailer who is **identified as a customer experiencing payment difficulties due to hardship** in accordance with **the retailer's hardship policy**.'*⁴¹

The **definition** of 'hardship customer' under the Retail Law is therefore directly linked to the **identification** of the customer in accordance with the retailer's policy. It follows that, under the Retail Law, it is up to **the individual retailer** to identify a 'hardship customer' in accordance with the criteria or guidance contained in their hardship policy. A customer identified as 'experiencing payment difficulties due to hardship' in accordance with the policy, is by definition of the Retail Law, a 'hardship customer'. The issue of how retailers' policies deal with 'identification' (both self-identification and retailer identification) is therefore of **vital importance** in a discussion of hardship supports.

SACOSS submits the definition of 'hardship customer' under the Retail Law represents a clear limitation within the current regulatory framework. This definition has led to the outcome where, in practice, there 'is no consistency as to how and when a customer may be identified as requiring hardship assistance.'⁴² This is of considerable concern, as where there is no consistency in identifying customers in hardship, there is no consistency in access to hardship supports.

SACOSS believes it is important to highlight the principle contained in the Retail Law that '**residential customers** should have **equitable access to hardship policies** and that those policies should be **transparent and applied consistently**'.⁴³ This principle is of central importance in the development, approval and application of hardship policies. The intention of the law is that **all customers** should have fair, impartial access to hardship supports. SACOSS submits the many and varied hardship identification processes contained in individual retailer's hardship policies operating under the NECF, do not support the principle of equitable access for all customers. We believe the AER's recent rule change request to develop a binding Hardship Guideline represents an important opportunity to develop consistent processes for identifying hardship customers (both self-identification and retailer identification), giving effect to the principle of equitable access. Whether the policies are then applied consistently by retailers is another question, and would be the subject of monitoring and compliance by the AER.

The distinction between customers experiencing payment difficulties and hardship customers under the Retail Law, is further confused by the application of certain Retail Rules (notably Rule 33 and Rule 111) to residential customers who have 'informed the retailer in writing or by telephone that the customer is experiencing payment difficulties,' in other words, customers who have 'self-identified' as experiencing payment difficulties. Therefore, SACOSS submits the current regulatory framework has three tiers of protections:

- Customers experiencing payment difficulties (identified by the retailer)
- Customers experiencing payment difficulties (who have self-identified)

⁴¹ Section 2 of the Retail Law

⁴² AER, Rule Change Request, strengthening protections for customers in financial hardship, March 2018 p.8

⁴³ Section 45(3) of the Retail Law

- Customers experiencing payment difficulties due to hardship (as identified by the retailer in accordance with its hardship policy).

SACOSS believes the operation of the distinction between hardship customers and customers experiencing payment difficulties (and then the further distinction between those who have self-identified and those identified by the retailer) within the Regulatory Framework, creates a certain level of confusion for retailers around their obligations to customers, and without doubt creates confusion for customers and their support providers about their rights under the Retail Law and Retail Rules.

The obligations placed on retailers under the Retail law and Retail Rules to provide supports to hardship customers are much more extensive than those placed on retailers to support the broader group of ‘customers experiencing payment difficulties’ (as outlined in further detail, below). For example, section 44 of the Retail Law outlines a series of minimum requirements which must be included in the retailer’s hardship policy, these minimum requirements comprise the minimum protections for hardship customers.⁴⁴ Also, Rule 72 requires that payment plans offered to **hardship customers** must be established having regard to a customer’s capacity to pay (amongst other things).⁴⁵ Interestingly, Rule 33(4) (as outlined below) provides that Rule 72 does apply to customers experiencing payment difficulties who have self-identified with the retailer (either by phone or in writing).⁴⁶

Overall, supporting and managing a hardship customer is much more labour intensive for retailers, and there is an incentive for retailers to act as ‘gatekeepers’, limiting the number of customers accessing the retailer’s hardship program.

The AER’s 2016-17 Performance Report found that (across jurisdictions) more retailers were offering payment plans to customers in the 2016-17 reporting period, but more customers were being excluded from hardship programs,⁴⁷ indicating retailers may be limiting access to those programs. Feedback from SACOSS’ member organisation, the South Australian Financial Counsellor’s Association (SAFCA) supports this view, citing:⁴⁸

- experience of dealings with obstructionist staff, untrained staff and inaccessible staff (indicating a lack of operational commitment to hardship programs by the retailer)
- consistent failures of retailers to proactively identify customers in hardship, despite customers’ burgeoning debt levels (sometimes in the thousands of dollars)
- evidence of retailers limiting access to hardship programs by requiring customers ‘demonstrate a willingness or commitment to pay’ through a series of fortnightly payments which the customer cannot meet (gatekeeping practices).

⁴⁴ Noting section 44(i) of the Retail Law incorporates ‘any other matters required by the Rules’ which means the other protections contained in the Retail Rules are also ‘minimum requirements’

⁴⁵ Rule 72 of the Retail Rules

⁴⁶ The AER’s Sustainable Payment Plans Framework, if adopted by the retailer, applies to all payment plans, including those for small business. 17 retail businesses have currently signed up to the SPPF.

⁴⁷ Over this period the rate of customers exiting hardship programs due to exclusion increased from 46% to 57% see: AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.4

⁴⁸ South Australian Financial Counsellors Association, Survey of 23 financial counsellors re: proposed AER Rule Change, 19 June 2018

Protections available to the broader group of ‘customers experiencing payment difficulties’ under the Retail Law and Retail Rules

Continuing with the distinction between hardship customers and other customers experiencing payment difficulties, SACOSS has briefly summarised the protections under the existing regulatory framework for customers who are having trouble paying their bills, but **are not identified as ‘hardship customers’** according to the retailer. These protections include:

- the obligation on the retailer to offer a payment plan
- the obligation on the retailer to offer a payment plan established in accordance with the requirements of Rule 72 of the Retail Rules where the customer has ‘self-identified’ as experiencing payment difficulties
- the obligation on the retailer to provide information to customers who have self-identified as experiencing payment difficulties about government funded energy rebate, concession or relief schemes
- the application of the principles and actions contained in the AER’s (voluntary) Sustainable Payment Plans Framework (where the retailer has signed up the framework)
- protection from being placed on a shortened collection cycle
- protection from debt recovery action, and
- protection from disconnection.

Helpfully, rule 167 of the Retail Rules (which deals with the contents of the AER’s retail market performance report) provides that the Performance Report must include information and statistics on retailers’ handling of residential customers experiencing payment difficulties (specifically distinguishing between hardship customers and other residential customers experiencing payment difficulties).⁴⁹

The information gathered and published by the AER on retailers’ handling of customers experiencing payment difficulties in its Annual Performance Reports, greatly assists in an analysis of the effectiveness of the supports for those customers in practice; providing useful insights into the broader problem of energy affordability and the increasing debt levels of customers not in hardship programs.

The South Australian statistics outlined in the AER’s Performance Report are alarming. As referred to earlier in this report, five in every 100 customers has an energy bill debt in South Australia (the largest proportion of electricity customers in debt in the NEM), with the average residential bill debt reaching \$919 in the first quarter of 2017-18. Conversely, the number of customers receiving assistance to repay their debt through hardship programs decreased in 2016-17 (the only state in the NEM where hardship program customers decreased).⁵⁰ This would indicate that there are a great number of customers in debt who are **not** receiving hardship supports, and may in fact not be receiving any supports. SACOSS suggests it is (broadly speaking) this group of customers who fall within the definition of ‘customers experiencing payment difficulties’ under the Retail Law and Retail Rules.

⁴⁹ Rule 167(1)(b) of the Retail Rules

⁵⁰ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

Obligation under the existing regulatory framework to offer Payment Plans to customers experiencing payment difficulties

Section 50(1) of the Retail Law (outlined above) places a clear obligation on retailers to offer payment plans to hardship customers as well as **other** customers experiencing difficulty paying their bills. There are no pre-conditions attached to this obligation. If the customer tells the retailer they are having difficulty paying their bill, then they should be offered a payment plan.

Importantly, section 50(1)(b) additionally provides that if the **retailer ‘otherwise believes’** the customer is experiencing ‘repeated difficulties’ in paying their bill, or even more broadly, requires ‘payment assistance’, then the retailer is under an **obligation** to offer a payment plan.

Payment plans are an important protection under the Retail Law, and operate as a form of early intervention to avoid spiralling levels of debt. The meaning and intent of section 50(1)(b) is clearly to place an obligation on retailers to proactively identify and provide support to customers who are not keeping up with their bills, through the establishment of payment plans.

As noted by the AER, in circumstances where energy is increasingly unaffordable, it would be reasonable to expect that the number of customers being provided with assistance via a payment plan would be increasing significantly. Conversely, the proportion of customers on payment plans **decreased** in South Australia during 2016-17.⁵¹

SACOSS suggests this supports the conclusion that South Australian retailers are failing, in practice, to comply with the legal obligation in sub-section 50(1) of the Retail Law. It is unacceptable for retailers to have customers with **any level** of energy bill debt (being an amount owed to a retailer that has been outstanding for 90 days or more) who have not been offered a payment plan. The accumulation of energy bill debt is a red flag and falls clearly within the circumstances contemplated by the term ‘otherwise believes’ in section 50(1). Sub-section 50(1) is a civil penalty provision, and the failure of retailers to comply with this section may attract the exercise of the AER’s enforcement powers. SACOSS supports the AER in using these powers to encourage change in retailers’ practices.

Part 2 of the Retail Rules deals with customer retail contracts, with Division 4 of Part 2 dealing with billing pursuant to customer retail contracts. Rule 33 under this division makes provision for ‘payment difficulties’, with Rule 33(1) stating it applies:

‘... in relation to the obligations under section 50 of the Retail Law on a retailer to offer and apply payment plans for:

- *hardship customers (Rule 33(1)(a)), and*
- ***other residential customers experiencing payment difficulties** if the customer **informs the retailer** in writing or by telephone that the customer is experiencing payment difficulties (Rule 33(1)(b)).’*

It is interesting to note that the scope and application of Rule 33 is not as broad as section 50(1) of the Retail Law. The obligation on retailers to offer and apply payment plans for customers described in Rule 33(1)(b) does not include the obligation to offer payment plans where the retailer ‘otherwise believes’ the customer is experiencing payment difficulties or requires payment assistance. Rule 33(1)(b) therefore applies to a **narrower group** of customers than section 50(1) of the Act, namely customers who have *self-identified* as experiencing financial difficulties, and excludes the application

⁵¹ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

of Rule 33 to customers identified in accordance with the ‘retailer identification’ obligation, contained within the Retail Law.

Importantly, Rule 33(3) provides that a retailer must ‘provide information to a customer referred to in sub rule 33(1) about the availability of government funded energy charge rebate, concession or relief schemes’. Therefore, in relation to customers experiencing payment difficulties who have self-identified, the retailer is required, under the Rules, to provide information about concessions, rebates and relief schemes. This is an important protection under the Retail Rules, which is acknowledged by the fact that it is a civil penalty provision.

SACOSS recognises the complexity of rebate and concessions schemes across the NEM poses problems for retailers (which we hope will be addressed by jurisdictional governments as a priority issue) but we nevertheless strongly support the AER in ensuring that retailers are complying with their obligations under this sub rule.

Also importantly, Rule 33(4) states that Rule 72 of the Retail Rules (which deals with payment plans for hardship customers), applies to residential customers referred to in Rule 33(1), in the same way as it applies to a hardship customer. Therefore, where a customer has **self-identified** as experiencing payment difficulties, that customer is afforded the same protections in the establishment of that plan, as a hardship customer. Rule 72 is outlined in more detail in the section of this report dealing with protections for hardship customers, below.

Rule 33(2) provides that a retailer is not obliged to offer a payment plan to a hardship customer, or customer experiencing payment difficulties where that customer has had 2 payment plans cancelled due to non-payment in the previous 12 months, or they have been convicted of the illegal use of energy.

The AER’s Sustainable Payment Plans Framework

The importance of payment plans as a support for customers experiencing payment difficulties was recognised by the AER through its creation of the voluntary Sustainable Payment Plans Framework (SPPF)⁵² in July 2016. The intention of the SPPF is to improve the quality of ‘capacity to pay conversations’ with customers, through the adoption of principles to guide retailers’ interactions with customers when discussing payment plans.

As noted above, the requirement under the Retail Rules for retailers to have regard to a customer’s ‘capacity to pay’ when establishing a payment plan, only applies to hardship customers and customers experiencing payment difficulties who have self-identified.⁵³ However, in adopting the framework, the retailer commits to applying the principles and following the good practice actions in its engagement with ‘**current residential customers**’, including non-hardship customers. Currently, 17 retailers have adopted the framework, but the effectiveness of the framework in influencing retailer behaviour is yet to be assessed.

The increasing levels of energy bill debt highlighted by the AER its Performance Report⁵⁴ points to the apparent failure of retailers to proactively offer meaningful assistance to customers who have accumulated debt. Where retailers are offering payment plans to customers, the effectiveness of those plans often depends on the appropriateness of the plan for the individual customer. The

⁵² AER Sustainable Payment Plans: A good practice framework for assessing customers’ capacity to pay, Version 1 July 2016

⁵³ In accordance with Rule 33(1)(b) and Rule 33(4) of the Retail Rules

⁵⁴ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

inability of customers to meet the payments in unaffordable payment plans can eventually lead to disconnection.

SACOSS' 2016 Report was supportive of the SPPF facilitating conversations between retailers and customers, thereby empowering vulnerable customers to take control of their own energy payments,⁵⁵ however, we did express concern that the SPPF was both voluntary and aspirational, and the AER does not have the statutory power to force a retailer to sign up to it, or to enforce a breach of the SPPF. This is because the SPPF goes beyond the minimum requirements set out in the Retail Law and Retail Rules.

The AER indicated that where it found the retailer was not complying with the framework, it would remove a retailer from the published list on its website. Therefore, the AER's only method of enforcing the framework is through 'moral-suasion'. SACOSS' 2016 Report observed that 'if moral suasion is to be a component of the AER's framework, then it is essential that there be more public scrutiny of the different performance (of retailers) and customer outcomes'.⁵⁶

The AER has indicated that it is too early to properly assess the success (or otherwise) of the SPPF. The AER's 2016-17 Performance Report stated that between April and May 2017, approximately six months after the AER published the list of the (then) 15 energy retailers who had adopted the Framework, the AER consulted with a range of relevant stakeholders including energy retailers, Ombudsman schemes, financial counsellors and customer groups. The AER stated that the 'feedback indicated the six month mark was still too early to meaningfully evaluate the effectiveness of the Framework. Stakeholders felt at the 12 month mark they would be in a better position to gauge any significant shifts in processes or impacts resulting from the adoption of the Framework'.⁵⁷

SACOSS is expecting the AER to assess the conduct of retailers that have adopted the SPPF in the second half of 2018. Feedback from EWON in relation to the review of the performance indicators relating to customers experiencing payment difficulties would indicate that retailers are generally failing to follow the framework in practice.⁵⁸

Protection from being placed on a shortened collection cycle

Rule 34 of the Retail Rules deals with shortened collection cycles for standard and market retail contracts. Rule 34(2)(a) provides a retailer may only place a customer on a shortened collection cycle (without the customer's consent) if the customer is not 'experiencing payment difficulties'. This protection therefore covers the broad group of all customers experiencing payment difficulties, including hardship customers, customers who have self-identified and customers identified pro-actively by the retailer.

Protection from debt recovery action

Another protection offered to customers experiencing payment difficulties under the current regulatory framework relates to the **recovery of debt**. Section 51 in Division 7 of the Retail Law states that 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 (our emphasis):

⁵⁵ SACOSS, November 2016, p.85

⁵⁶ SACOSS, November 2016, p.7

⁵⁷ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.36

⁵⁸ AER, Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and guidelines, Version 3, April 2018, p.34

- *the customer continues to adhere to the terms of a payment plan or other agreed payment arrangement, or*
- *the retailer **has failed to comply with the requirements of:***
 - *its customer hardship policy in relation to that customer or this law and the Rules relating to non-payment of bills, **payment plans and assistance to hardship customers or residential customers experiencing payment difficulties.***

This is an important protection for those customers who are having difficulty in paying their energy bills, but have not been identified as a hardship customer by their retailer.

Importantly, this section could protect customers from debt recovery action, where they identify as having difficulty paying their bills but haven't been offered a payment plan by the retailer.

In these circumstances, the retailer has 'failed to comply with the requirement' under the Retail Law to offer a payment plan to a customer experiencing payment difficulties, and would therefore be prevented from pursuing debt recovery.

Notably, as outlined later in this report, the AER has added several indicators to the reporting requirements imposed on retailers in relation to debt recovery under the *AER's Retail Performance Procedures and Guidelines*. This additional information about retailer's debt recovery practices will be important in shining a light on whether retailers are complying with this requirement under the Law.

Protection from disconnection

Part 6 of the Retail Rules deals with de-energisation (or disconnection) of premises for small customers. Division 2 of Part 6 deals with retailer-initiated de-energisation of premises. Rule 111(2) provides that where a customer is a hardship customer **or** a residential customer experiencing payment difficulties who has informed the retailer of this fact by telephone or in writing (therefore a customer who has self-identified), then a retailer must not arrange for de-energisation of the customer's premises, except in certain circumstances, including where the retailer has offered the customer 2 payment plans in the previous 12 months and:

- the customer has agreed to neither of them
- the customer has agreed to one (and not the other) but the plan was cancelled due to non-payment
- the customer agreed to both but they were both cancelled due to non-payment.

Further Rule 116 of the Retail Rules provides that a retailer must **not** arrange de-energisation where *inter alia* (our emphasis):

- *the premises are registered as having life support equipment*
- *the customer has made a complain to the retailer that is related to the reason for disconnection*
- *the customer has made a complain to the relevant Ombudsman that is related to the reason for the disconnection*
- *the customer has raised an issue around explicit informed consent with the retailer*
- *the customer is a **hardship customer** or a **residential customer adhering to a payment plan***
- *the customer has informed the retailer (or the retailer is otherwise aware) that the customer has formally applied for a rebate, concession or relief available under any government funded energy, rebate or relief scheme and a decision about that application has not been made.*

Therefore, when it comes to disconnection, hardship customers and customers experiencing payment difficulties (who have self-identified) broadly receive the same protections under Rule 111.

Rule 116 protects customers from disconnection (outside of hardship customers) where they are adhering to a payment plan, or, interestingly, have applied for concessions, rebates or relief and a decision has not yet been made.

It is worth noting that protections for hardship customers in relation to disconnection are strengthened by Division 6 of the Retail Law (which deals with hardship), specifically section 47 which provides that the retailer 'must give effect to the general principle that de-energisation (or disconnection) of premises of a **hardship customer** due to inability to pay energy bills should be a **last resort option**' (our emphasis).

Protections available for 'hardship customers' under the Retail Law and Retail Rules

Retailers' hardship obligations

As the providers of an essential service, retailers are required under the NECF to provide supports for customers experiencing payment difficulties due to hardship. The supports a hardship customer is entitled to receive under the law, must be contained within the retailer's hardship policy, which retailers are required to maintain and implement.⁵⁹

Part 2, Division 6 of the Retail Law and Part 3 of the Retail Rules deal with customer hardship. Section 43 of the Retail Law makes provision for customer hardship policies, with sub-section 43(1) stating (our emphasis):

*'the purpose of a retailer's customer hardship policy is to **identify** residential customers experiencing payment difficulties due to hardship **and** to **assist** those customers to better manage their energy bills on an **ongoing basis**'.*

It is worth breaking this section down to clearly articulate the specific purpose of retailers' hardship policies:

- to **identify** residential customers experiencing payment difficulties **due to hardship**
- to **assist** those customers to better manage their energy bills on an **ongoing** basis.

Sub-section 43(2) provides that a retailer must:

- develop a customer hardship policy within three months of being granted retailer authorisation
- submit the hardship policy to the AER for approval
- publish the hardship policy on their website
- **maintain and implement** the policy.

This is a civil penalty provision. The recent enforcement action against Origin Energy for failing to implement its hardship policy, related to an alleged breach of this sub-section.

The minimum requirements for hardship policies

Importantly, section 44 outlines the **minimum requirements** for a customer hardship policy, providing that the retailer's policy must contain:

⁵⁹ Section 43(2)(c) of the Retail Law

- (a) processes to **identify residential customers experiencing payment difficulties due to hardship**, including **identification by the retailer 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) processes or programs to **assist** customers with strategies to **improve their energy efficiency**, where such processes or programs are required by a local instrument; and*
- (h) any variations specified or of a kind specified by the AER; and*
- (i) any **other matters required by the Rules**.*

Section 44(i) has the effect of including the requirements contained in Part 2 and Part 3 of the Retail Rules which relate to hardship as 'minimum requirements'. These minimum requirements comprise the **essential protections** established for hardship customers under the NECF.

The law intends that these are **minimum** requirements and therefore SACOSS believes these requirements should not be permitted by the AER to be watered down by retailer's processes, or made conditional upon the achievement of certain pre-requisites. Any lessening of these minimum requirements in practice, would bring the protections below a level which the Law has set as a minimum.

Requirement to inform a residential customer of the hardship policy

Section 46 requires the retailer to inform a residential customer of their hardship policy where it appears to the retailer that the non-payment of an energy bill is due to the customer experiencing payment difficulties due to hardship. Rule 71 of the Retail Rules reinforces this provision by requiring the retailer to inform the hardship customer of the existence of the retailer's hardship policy as soon as that customer is identified as a hardship customer, and provide the hardship customer with a copy of the policy.

Disconnection to be last resort

Section 47 of the Retail Law requires the retailer to **give effect** to the general principle that disconnection of the premises of a hardship customer due to inability to pay energy bills should be a last resort option. Further, Rules 111 and 116 of the Retail Rules outlined above, protect hardship customers from disconnection in certain circumstances (put simply, where the customer is a hardship customer adhering to a payment plan). SACOSS, once again, repeats the importance of ensuring payment plans are tailored and achievable.

Market retail contract to have no effect

Section 48 of the Retail Law provides that a market retail contract shall have no effect in so far as it is inconsistent with a customer hardship policy.

Payment Plans for hardship customers

Division 7 of the Retail Law deals with payment plans, and protection from debt recovery action. Hardship customers are provided with the same protections as customers facing payment difficulties (as outlined above). However, rule 72 of the Retail Rules requires that a payment plan for a hardship customer must be established having regard to the following criteria:

- the customer's capacity to pay
- any arrears owing by the customer
- the customer's expected energy consumption over the following 12 month period.

A payment plan for a hardship customer must also include an offer for the customer to pay for their energy use in advance or in arrears by instalment payments.

Rule 33 of the Retail Rules (outlined above) extends the application of Rule 72 to customers who have self-identified as experiencing payment difficulties.

Information about government concession programs

Section 44(d) requires Retailers' hardship policies to include processes to identify appropriate government concession programs and financial counselling services, and to notify hardship customers of those programs and services. Further, Rule 33(3) places a **positive obligation** on retailers to provide information to hardship customers about government funded rebate, concession or relief schemes. Rule 33(3) is a civil penalty provision, and the failure of a retailer to comply with this rule may attract the exercise of the AER's enforcement powers.

Centrepay

As outlined under the minimum requirements, the Retail Law requires retailers to offer flexible payment options (including Centrepay) to hardship customers (section 44(c)).

Also, rule 32(2) of the Retail Rules provides that a **small customer** may request the retailer to permit payment by Centrepay as a payment option, broadening the application.

Rule 74 (which falls within Part 3 of the Retail Rules dealing with Customer Hardship), provides that if the hardship customer is applying for, or on a standard retail contract, the retailer must allow the customer to use Centrepay as a payment option. If the hardship customer is on a market retail contract and Centrepay is available as a payment option under that contract, then the retailer must allow the customer to use Centrepay as an option. If Centrepay is not an option under the market retail contract, then the retailer must review that contract, and transfer the hardship customer to a more appropriate contract.

This rule is a civil penalty provision for the purposes of the Retail Law.

The AER considers that Centrepay is an important budget management tool that retailers should actively promote and offer to eligible customers, not only those customers in hardship programs.⁶⁰ The AER's voluntary Sustainable Payment Plans Framework states that retailers should offer Centrepay and conduct concession checks to every customer who receives income from Centrelink,

⁶⁰ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.36

as this is a very easy way to assist this particular group of vulnerable customers,⁶¹ and SACOSS strongly agrees. The AER's 2016-17 Performance Report found that New South Wales, South Australia and Queensland have the lowest levels of Centrepay use (fewer than one in three hardship customers).

The AER's 2015 Review of retailers' hardship policies and practices found 'relatively low numbers of hardship customers using Centrepay, suggesting it is not being well-promoted, or even offered to eligible customers by retailers'.⁶² The AER has indicated that it has raised this issue with a number of retailers and communicated its expectation that the number of customers using Centrepay should increase in the future.

Protections not working in practice

The evidence is clear; the protections contained in the NECF for customers experiencing payment difficulties and hardship customers, as outlined above, are not working effectively in practice. The AER's rule change request to allow for a binding Hardship Guideline and the recent changes to its *Performance Reporting Procedures and Guidelines* are an acknowledgement that the current supports for vulnerable consumers have resulted in inconsistent application and poor outcomes for those consumers. The AER cites its performance data, hardship reviews (from 2015 and 2017) as well as the Origin Energy enforcement matter in support of its proposed changes to the regulatory framework.

This section of the report will provide an overview of the nature and scope of the issues that have been identified in the application of hardship protections by retailers through:

- the results of the AER's 2016-17 *Annual Report on Compliance and Performance of the Retail Energy Market*,
- the AER's 2015 and 2017 Hardship Reviews,
- the enforcement action against Origin Energy.

This section will also briefly summarise:

- how three retailers identify or define 'hardship customers' under their hardship policies, and
- two case studies provided by Uniting Communities in South Australia that illustrate retailers' approaches to applying their hardship policies.

SACOS submits the only reasonable conclusion that can be drawn from the following evidence is that retailers are failing, in practice, to provide the required supports for customers experiencing payment difficulties in line with their obligations under the Retail Law and Retail Rules.

AER's 2016-17 Annual Report on Compliance and Performance of the Retail Energy Market

As referenced throughout this report, the data from the AER's 2016-17 Performance Report strongly indicates that the supports and protections for the broader category of 'customers facing payment difficulties', as well as the more defined sub-category of 'customers facing payment difficulties due to hardship', are not working. As covered later in this report, from 1 January 2019 retailers will be required to report quarterly, as opposed to annually, on a variety of performance indicators,

⁶¹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.36

⁶² AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.36

including hardship indicators and indicators relating to customers experiencing payment difficulties. SACOSS expects the information obtained as a result of these increased reporting obligations will provide a clearer picture of the operation of supports for all customers experiencing payment difficulties.

The results of the AER's 2016-17 Performance Report clearly illustrate concerning trends regarding the failure of the current support system. SACOSS has summarised the data relating to both customers experiencing payment difficulties and hardship customers, below.

AER data relating to supports for customers facing payment difficulties

In relation to customers facing payment difficulties in South Australia (not in a hardship program), the following data suggests the current supports are ineffective:

- In the 2016-17 reporting year, 5 in 100 customers were in energy debt in South Australia
- For the first quarter of **2017-18**, the average debt for electricity customers in South Australia had increased to \$919⁶³
- Across all jurisdictions during 2016-17, 2.9 per 100 electricity customers were repaying a debt that was on average \$690
- during 2016-17, the proportion of customers on payment plans **decreased** in South Australia⁶⁴
- electricity disconnections increased in Queensland (up 16 per cent), ACT (up 10 per cent) and South Australia (up 3 per cent).

As the AER noted, energy bill debt is an indicator of 'the overall affordability of energy and how quickly and effectively retailers are assisting customers'.⁶⁵ Increasing numbers of customers with energy bill debt is a clear indication that proactive management of a customer's debt by retailers is failing. The data suggests that the obligation on retailers to pro-actively manage customers experiencing payment difficulties by offering payment plans, is not being implemented in practice.

Increasing energy bill debt is unacceptable, not just because of the extreme impacts on those customers struggling with debt, but also because it impacts on the community as a whole, as ultimately the cost of unpaid debt is passed on to all consumers.

AER data relating to supports for hardship customers

SACOSS has summarised some of the hardship data from the AER's 2016-17 Performance Report, below:

The number of customers who each retailer has on hardship programs⁶⁶

- South Australia had the highest rate of electricity and gas customers on hardship programs, but these had decreased from 2015–16.
- Electricity customers receiving hardship assistance in South Australia **fell** from 1.8 to 1.5 per 100.

⁶³ AER Rule Change Request, p.6

⁶⁴ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29

⁶⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

⁶⁶ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.33

- Decreases in AGL and EnergyAustralia’s proportion of hardship customers for both fuel types contributed to the state-wide fall, offsetting increases from Alinta Energy, Momentum Energy and Origin Energy.

The payment methods used by hardship customers⁶⁷

- Only 39 per 100 electricity customers on hardship programs in South Australia receive concessions, whereas 78 per 100 in Tasmania receive concessions.
- New South Wales, South Australia and Queensland have the lowest levels of Centrepay use (fewer than one in three hardship customers).

The average level of debt held by customers on hardship programs⁶⁸

- The debt customers held when they started receiving hardship assistance increased everywhere except Tasmania.
- In South Australia the debt increased by \$326 in 2016-17.

The reasons for customers exiting hardship programs⁶⁹

- The proportion of electricity customers exiting hardship programs due to successfully paying off debt decreased from 36 per 100 customers exiting in 2015–16 to 27 per 100 exiting 2016–17.
- There were significant increases in both the number and proportion of customers excluded from retailer hardship programs in 2016–17.
- The number of customers exiting due to exclusion increased from around 39 000 to 49 000 - this equated to an increase in the rate of customers exiting hardship customers due to exclusion from 46 to 57 per 100 customers.
- AGL’s rate of exclusions for electricity nearly tripled (to 64 per 100 hardship customers who exited in 2016–17), reflecting an increase from 2100 to 11 200 excluded customers.
- Energy Australia’s exclusion rate more than doubled to 53 per 100 hardship customers.

The AER is concerned about the high number of customers that have been excluded from large retailer hardship programs. It is important that retailers ensure they are providing **ongoing support** to customers when they are experiencing payment difficulties due to hardship, in line with their obligations under the law.

Disconnections⁷⁰

- Electricity disconnections in South Australia rose slightly to over 1.4 customers per 100, with the proportion of customers reconnected making up 59 per cent of all electricity disconnections.
- South Australia had the highest rate of electricity customers disconnected for non-payment. Four larger retailers—Momentum Energy, EnergyAustralia, Origin Energy and Simply Energy—disconnected a smaller proportion of customers than in 2015–16, but these decreases were offset by increases in the rate of disconnections by Alinta Energy, which increased to more than 6 per 100 customers, the highest for a South Australian retailer.

⁶⁷ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, pp.35-36

⁶⁸ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

⁶⁹ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

⁷⁰ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.44

- Data from the first quarter of 2017-18 indicates disconnection rates are continuing to rise.⁷¹

Observations from the AER's 2015 and 2017 Hardship Reviews

The AER's 2015 Hardship Review was undertaken in response to the concerns of various consumer representative organisations about the practical implementation of retailers' hardship policies. Of particular concern were apparent barriers restricting customer access to hardship assistance and retailers establishing unaffordable payment plans.⁷² Also underpinning the review were the results of performance reporting, which revealed high levels of debt on entry to hardship programs, often no reduction in levels of debt as a result of the hardship program and a high rate of drop-out from the programs.⁷³

While the AER found that the review did not identify wide-spread non-compliance by retailers with the hardship requirements, the AER did outline a number of concerns with some retailer's implementation of the current regulatory requirements:⁷⁴

- retailers reporting high levels of debt, with low levels of customers on payment plans or hardship programs
- retailers reporting high levels of debt on entry to hardship programs
- disconnection of hardship customers due to an inability to stop the process even where the customer was entering a hardship program
- low numbers of customers on Centrepay
- lack of 'intuitively locatable and easy to read information' on retailer's website about the availability of assistance
- lack of additional measures to support a hardship customer over and above a payment plan
- incorrect reporting of performance data to the AER.

In relation to identification and access to supports, the AER found that retailers:

- differed in both processes used to identify customers with payment difficulties and their efforts to contact customers who have been identified as at risk⁷⁵
- offered different types and different levels of assistance such as extension of time to pay, realistic payment plans and referrals to the retailer's hardship program.⁷⁶

Further, the AER's 2015 Hardship Review highlighted the inadequacies of some retailers' payment plans. The AER found that there were significant inconsistencies in retailers' approaches to identifying a customer's 'capacity to pay' and therefore, in their ability to place a customer into the most appropriate plan.

In response to the 2015 Hardship Review, SACOSS' 2016 Report encouraged the AER to 'establish regulatory frameworks that will result in more consistent and equitable outcomes for vulnerable customers and more sustainable and constructive relationships between retailers and customers.'⁷⁷ SACOSS is hopeful that the AER's proposal to change the regulatory framework through its recent Rule Change Request to allow for the development of a binding Hardship Guideline will go some way

⁷¹ AER, Rule Change Request, p.6

⁷² AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p.3

⁷³ SACOSS, 2016 Report, p.38

⁷⁴ AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p.4

⁷⁵ SACOSS, 2016 Report, p.39

⁷⁶ SAOCSS, 2016 Report, p.39

⁷⁷ SACOSS, 2016 Report, p.44

towards meeting these outcomes, but is concerned that the consistency of outcomes for **all** customers experiencing payment difficulties (not just hardship customers) may not be adequately addressed by the proposal.

The AER's 2017 Hardship Review⁷⁸ involved nine selected retailers with 100 or more hardship customers. The AER assessed whether retailers were providing assistance in line with the minimum requirements under the Retail Law by asking retailers to provide the AER with information on the operation of their hardship policies and evidence of the implementation of those policies. The AER did not find evidence of 'wide-spread non-compliance', but it did find that most retailers were deficient in at least one aspect of their policy. The AER also found that some retailers were unable to provide 'basic information on the assistance they had provided to customers', making a compliance assessment challenging.⁷⁹

SACOSS suggests that an inability to provide the AER with evidence of compliance with their obligations under section 44 of the Retail Law, leads to the conclusion that the retailer has failed to maintain and implement the policy in accordance with the law. In the face of growing evidence suggesting non-compliance (supported by the AER's own data), SACOSS supports the AER adopting a stronger stance in relation to enforcement actions, encouraging retailers to more closely examine their practices.

The 2017 Hardship Review identified the three areas where the AER considered the retailers' practices were not reflective of the commitments made to hardship customers under their policies, and were not consistent with the minimum requirements under the Retail Law. These findings related to:

- early identification and access
- systems and processes of retailers, and
- evidence to support a hardship policy's implementation.

Unsurprisingly, the practice of **early identification and access** to hardship programs by retailers was found to be inconsistent amongst retailers and potentially inadequate. The AER found that retailers used a number of different 'pathways' to pro-actively identify customers for facilitating referral to hardship programs and this resulted in inconsistency and uncertain outcomes for consumers.⁸⁰

The AER found that a high number of **non-hardship** customers were disconnected with debts over \$1000, and high numbers of **non-hardship** customers had average debts over \$1000 for over 12 months. As the AER observed, this calls into question the retailer's processes for identifying customers in financial difficulties.⁸¹

As noted earlier in this report, the obligation on retailers to offer payment plans to customers experiencing payment difficulties is broad and far reaching. There are no qualifying factors under the Retail Law to limit this obligation. A customer merely has to self-identify as experiencing difficulties paying their bill, or the retailer should 'otherwise know'. SACOSS submits that high average debt for extended periods of time is a clear indication of 'payment difficulties', and it is strongly arguable that retailers should have known that the customer was experiencing payment difficulties. In these

⁷⁸ The outcomes of the AER's 2017 Hardship Review are summarised in the details of the AER's Rule Change Request, March 2018, p.7

⁷⁹ AER, Rule Change Request, p.8

⁸⁰ AER, Rule Change Request, p.8

⁸¹ AER, Rule Change Request, p.8

circumstances, SACOSS submits retailers have constructive knowledge of the customer's situation, and are under an obligation to offer assistance.

The AER also observed the practice of retailers placing conditions on customers prior to re-entering a hardship program. This observation is consistent with feedback from SACOSS' member organisations, recounting numerous examples of customers being kept out of hardship programs on the basis that they cannot afford to 'demonstrate' a willingness to pay, as required by the retailer in the form of a number of upfront payments. These re-entry conditions are, SACOSS submits, unconscionable and not in the spirit of the Retail Law or Retail Rules. The hardship provisions are included in the NECF as a protection, and consumers should not be required to satisfy a payment test to gain access to those protections. Retailers must consider the principle of 'fairness' in developing processes around access to hardship programs.⁸²

The AER also highlighted the low participation rate of one in 100 customers (or 1%) of customers having access to a hardship program across the NEM, which also raises questions about the adequacy of retailers processes to **identify** and assist customers experiencing payment difficulties due to hardship. As SACOSS has previously outlined in this report, identification of hardship customers is a limitation of the current regulatory framework, which we hope may be overcome by the creation of more certainty through a binding Hardship Guideline.

The 2017 Hardship Review also found that the high number of hardship customers unsuccessfully participating in hardship programs calls into question the **systems and processes of retailers**. Specifically, the AER questioned whether the types of payment plans offered to hardship customers were realistic and based on a customer's capacity to pay in accordance with rule 72(1)(a) of the Retail Rules.⁸³

SACOSS and other consumer organisations have consistently identified unaffordable payment plans as a cause of consumers failing to meet payments, leading to disconnection. The AER observed that 'for many customers experiencing payment difficulties, a realistic payment plan is the first step in maximising their capacity to pay their arrears and future consumption, and reducing the likelihood of escalating energy debt'.⁸⁴ SACOSS strongly agrees with the AER, and was supportive of the SPPF in guiding retailers in their conversations with customers to facilitate the creation of more individually appropriate and achievable payment plans for customers experiencing payment difficulties and hardship customers. In the absence of a review into the operation of the SPPF by the AER, the findings of the 2017 Hardship Review would indicate that the voluntary framework has not been effective in creating the customer outcomes intended.

The AER's 2017 Hardship Review also identified serious concerns with the inability of retailers to provide practical evidence of the implementation of their hardship policy. The AER cited the example of a retailer that offered energy efficiency audits to its hardship customers under its policy, but it couldn't provide any data on how many hardship customers were offered an audit in 2016-17.⁸⁵ Where evidence *could* be provided by a retailer for a commitment under a hardship policy (as in the case of one retailer that offered to waive administration charges for its hardship customers), the AER found that the 'practical application of the commitment was...insufficient in giving effect to the minimum requirement', as the retailer had only waived the charges of six customers for the 2016-17

⁸² See section 45(3)(b) which outlines the principle of 'equitable access to hardship policies'

⁸³ AER, Rule Change Request, p.8

⁸⁴ AER, Rule Change Request, p.9

⁸⁵ AER, Rule Change Request, p.9

financial year.⁸⁶ The AER stated that ‘it is challenging to assess the effectiveness of retailer hardship policies without evidence in support of their implementation’.⁸⁷

Notably, under the Retail Law, retailers are under an obligation to establish policies, systems and procedures to enable them to efficiently and effectively monitor their own compliance.⁸⁸ Further, each retailer must submit information and data relating to its individual compliance with the Retail Law, Retail Rules and Retail Regulations to the AER in the manner and form required by the Compliance Procedures and Guidelines.⁸⁹ Relevantly, Customer Hardship (Retail Law Part 2, Division 6) and Payment Plans (Retail Law Part 2, Division 7) are currently defined as Type 2 regulatory obligations in accordance with Appendix A.2 to the Compliance Guidelines.

It follows that retailers are required *under law* to ensure that they have established systems and processes to monitor compliance with their legal obligations relating to **hardship and payment plans**. The evidence outlined above suggests that retailers are failing to establish proper systems and procedures to monitor their compliance with these obligations. The AER has indicated that it is currently undertaking work requiring some retailers to undertake an audit around compliance with hardship provisions under the Retail Law and Retail Rules⁹⁰ and SACOSS strongly supports the AER continuing to act to ensure adequate monitoring and compliance systems are in place, including through enforcement action.

The civil penalty regime and AER’s enforcement action against Origin Energy

The National Energy Law, National Gas Law and the Retail Law each include a civil penalty regime. The focus of a civil penalty regime is ‘on promoting compliance with important statutory obligations through the provision of a serious and enforceable penalty which acts as a deterrent against breach of obligations, but which does not involve the imposition of a criminal sanction’.⁹¹

Section 4(1) of the Retail Law sets out the civil penalty provisions under the Retail Law, and Schedule 1 in Part 3 of the *National Energy Retail Regulations* sets out the civil penalty provisions contained in the Retail Rules.

Under the Retail Law, the AER can impose a civil penalty by either:

- Issuing an infringement notice requiring payment of a civil penalty (section 308), or
- Initiating proceedings in court seeking an order for payment of a civil penalty (section 289).

Part 7 of Chapter 8 of the National Gas Law deals with infringement notices issued by the AER, and is applied in relation to civil penalty provisions within the meaning of the Retail Law (s.308(2) of the Retail Law). Section 308 of the Retail Law and section 277 of the Gas Law give the AER the power to serve an infringement notice on a retailer that the AER ‘**has reason to believe has breached a civil penalty provision**’.⁹² In the case of a body corporate, the penalty payable on issue of an

⁸⁶ AER, Rule Change Request, p.9

⁸⁷ Ibid, p.9

⁸⁸ Section 273(1) of the National Energy Retail Law

⁸⁹ Section 274(1) of the National Energy Retail Law

⁹⁰ AER, Rule Change Request, p.17

⁹¹ Allens and NERA (November 2013), Review of Enforcement Regimes under the National Energy Laws: A Report prepared for the Standing Council on Energy and Resources, p. 67

⁹² Section 277(1) of the National Gas Law

infringement notice is \$20,000.⁹³ The AER does not have a discretion concerning the amount of the penalty.

Notably, 'under the Regulatory Powers Bill and those schemes administered by ACMA, the ACCC and ASIC, the regulator must have *reasonable grounds* to believe that a person has contravened a provision subject to an infringement notice, before issuing the notice'.⁹⁴ For the AER, evidence of the breach need only give rise to a 'reason to believe', which is a relatively low threshold. SACOSS submits that where, for example, a retailer has failed to provide a customer with information about concessions or rebates (in accordance with section 44(c) of the Retail Law and Rule 33(3) of the Retail Rules), then the AER arguably has 'reason to believe' that the retailer has failed to maintain and implement its policy (and has failed to comply with its obligations in accordance with Rule 33(3), which is also a civil penalty provision), and could therefore issue an infringement notice.

The option to issue an infringement notice gives the AER the ability to 'directly impose a lower level penalty, without the need for court proceedings, and for regulated entities to elect to pay the penalty and avoid further enforcement action'.⁹⁵ The retailer receiving an infringement notice can either chose to pay the penalty amount, or decline to pay the amount. Payment of the infringement penalty by the retailer is not taken to be an admission of breach of the relevant law or rule, or of liability. If the retailer pays the infringement penalty, no further action is taken by the AER in relation to the alleged breach. If the retailer declines to pay the penalty, the AER may choose to institute court proceedings and seek a civil penalty up to the maximum level.⁹⁶

The AER recently served an infringement notice on Origin Energy, as it had reason to believe Origin had breached section 43(2)(c) of the Retail Law by failing to maintain and implement its hardship policy in accordance with section 43(2)(c) in relation to one residential customer by (our emphasis):

- failing to **identify** the affected customer as **experiencing payment difficulties due to hardship**, and
- failing to transfer the affected customer to the customer service team who deal with its customer hardship program – 'Power On', in accordance with its customer hardship policy.⁹⁷

In circumstances where the customer (over a period of several months from July to October 2015)⁹⁸:

- informed Origin by phone that he had recently been discharged from hospital
- had a volunteer from St Vincent de Paul Society telephone Origin Energy to negotiate a payment plan on his behalf
- made payments towards his energy bill using Energy Accounts Payment Assistance
- was unable to make several instalments in accordance with two payment plans with Origin Energy
- told Origin that he had 'a few other bills' and some 'financial trouble personally', and that he had lost his arm and was on 'permanent workers compensation for the rest of my life...that's why I've got so behind in my bills...I can't handle it, that's the best way of putting it'.

⁹³ Or \$4,000 if issued to a natural person

⁹⁴ Allens and NERA, Review of enforcement regimes under the National Energy laws: A Report Prepared for the Standing Council on Energy Resources, November 2013, p.107

⁹⁵ Allens and NERA, Review of Enforcement Regimes under the National Energy Laws: A Report prepared for the Standing Council on Energy and Resources, November 2013, p. 73

⁹⁶ See Retail Law, section 2 - \$100,000 for body corporates and up \$10,000 for every day during which the breach continues.

⁹⁷ AER, Infringement Notice No.:AER016-2017, Schedule 1

⁹⁸ AER, Infringement Notice No.:AER016-2017, Schedule 1

The AER also issued Origin with an infringement notice for alleged wrongful disconnection of the same customer.

The AER stated that this enforcement action highlighted ‘the importance of being able to link retailers’ conduct to specific commitments in its hardship policy’.⁹⁹ The AER stated that it is more difficult to determine whether the retailer has acted in accordance with its policy, where the ‘policy contains general principles as opposed to specific commitments’.¹⁰⁰ The AER is therefore suggesting that the proposed Hardship Guideline contain specific commitments to hardship customers in line with the minimum requirements, so these commitments made by retailers can be accessed more equitably by consumers and be more easily monitored and enforced by the AER.

The ‘specific commitment’¹⁰¹ in Origin’s hardship policy referred to by the AER in support of its enforcement action stated ‘*if we’re on the phone with a customer who seems to be experiencing hardship, then we’ll transfer them to the Power On team right away*’.¹⁰² AER suggests statements that commit the retailer to act in a certain way, as opposed to general and subjective phrasing, would improve the ‘clarity and consistency of retailer application of the minimum requirements’.¹⁰³

As noted earlier, and covered in more detail below, evidence from financial counsellors suggests that the practices of retailers are often in contravention of the minimum requirements. SACOSS would suggest that where a policy has been approved by the AER in accordance with the Retail Law, it can be imputed that the policy contains the minimum requirements. Therefore, where the actions of the retailer are inconsistent with the minimum requirements, SACOSS submits the retailer would be in breach of its obligation to ‘maintain and implement’ its policy. SACOSS supports the AER using its enforcement powers to action further breaches of the law, and encourage changes in retailer behaviour, noting the AER need only have ‘reason to believe’ the retailer has breached a civil penalty provision.

Notably, the regulator of energy markets in the United Kingdom, the Office of Gas and Electricity Markets (Ofgem) have enforcement powers (including the levying of civil penalties) which they are not afraid to use. Professor Cosmo Graham from the University of Leicester spoke at a recent SACOSS’ conference about disability and fuel poverty. Professor Graham’s paper on the subject stated that:¹⁰⁴

‘Ofgem estimates that since 2010, energy companies have paid over £220 million in fines and redress payments,¹⁰⁵ with the largest redress payment of just under £26 million by Npower in 2016.¹⁰⁶ In recent years, the typical outcome is that a nominal fine is levied for breach of licence conditions but substantial voluntary redress payments are made in lieu of fine.’

SACOSS suggests that the AER is not a ‘toothless tiger’. It has been given relatively broad enforcement powers¹⁰⁷ by the legislature, and SACOSS supports the AER in using them.

⁹⁹ AER, Rule Change Request, p.9

¹⁰⁰ AER, Rule Change Request, p.9

¹⁰¹ AER, Rule Change Request, p.9

¹⁰² Origin Hardship Policy – Power On Program (29 August 2014), p.3

¹⁰³ AER, Rule Change Request, p.11

¹⁰⁴ Graham, Cosmo, Centre for Consumers and Essential Services, Leicester Law School, University of Leicester, UK, *Disability and Fuel Poverty: a United Kingdom perspective*, May 2018

¹⁰⁵ Effectively a settlement to avoid paying more than a nominal fine.

¹⁰⁶ Details at: <https://www.ofgem.gov.uk/investigations/investigations-and-enforcement-data>

¹⁰⁷ As compared with the ACCC and ASIC, who must be satisfied there are ‘reasonable grounds’

Retailers' identifying criteria for hardship customers under their approved hardship policies and case studies illustrating the application of those criteria

The AER states that 'in order for the requirements around hardship to be effective, it is vital that the minimum requirements specified in the Retail Law are not only included in retailer hardship policies but applied in practice...the commitments made to customers in the policies should be reflected in the day-to-day operation of the business and the minimum requirements mirrored in the assistance provided to customers.'¹⁰⁸

This report looks at the criteria Origin, AGL¹⁰⁹ and Simply Energy have adopted in their hardship policies to identify customers experiencing payment difficulties due to hardship. These three different retailers have three different sets of criteria for identifying hardship. Notably, all three retailers have also signed up to the AER's Sustainable Payment Plans Framework.

Uniting Communities in South Australia has provided SACOSS with case studies outlining the experiences of 10 clients who have accessed the support of financial counsellors because they are having difficulty paying their electricity bills. These case studies have also been provided to the ACCC as part of its Retail Electricity Pricing Inquiry. SACOSS submits that avoiding disconnection for these vulnerable customers has had more to do with the intervention of the financial counsellor than the conduct of the retailers. Without the assistance of financial counsellors, the outcomes for these customers may have been very different, and it is likely that the retailers would have followed through with the 'last resort' option of disconnection.

SACOSS has summarised two of these case studies to illustrate how AGL and Simply Energy have applied their policies in practice. The facts outlined in the AER's recent infringement notice issued to Origin are briefly restated to provide an example of how Origin has applied its policy. SACOSS is concerned about the 'hidden nature' of the day to day operation of hardship policies and application of supports to customers experiencing payment difficulties. Broader trends indicating the failure of supports are apparent through the AER's data, but individual cases need to be brought to the AER's attention to enable appropriate compliance and enforcement action.

Origin Energy's hardship program – Power On

Origin's approved hardship policy is known as the Power On Program. It was last reviewed by Origin on 28 August 2015.

Origin defines hardship as follows¹¹⁰ (our emphasis):

*'We call it **hardship when somebody would like to pay their energy bills, but really can't manage to do so.** This might only be for a short time, such as due to a temporary change in employment, or it may be more ongoing, where a customer has a low fixed income or prolonged illness.*

¹⁰⁸ AER, Rule Change Request- strengthening protections in the National Energy Retail Rules for customers in financial hardship, March 2018, p.3

¹⁰⁹ In 2016-17, Origin Energy (23%) and AGL (43%) together supplied energy to two thirds of small customers in South Australia see AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.53

¹¹⁰ Origin Hardship Policy, Power On Program: supporting customers through times of need, Version 2.3, 28 August 2015, p.3 <https://www.originenergy.com.au/content/dam/origin/residential/docs/your-account/hardship-policy.pdf>

Something important that we really do understand is that customers who fall into hardship all have different circumstances – which means their needs, and the way we can help, might be different.

Power On is a flexible program, which lets us provide tailored assistance for each customer in the program – which may include specialised case management, a once-off payment extension or a longer term payment plan. Our goal is to help our hardship customers help themselves.’

Origin also outlines how it (proactively) looks out for customers in hardship (our emphasis):¹¹¹

‘Sometimes customers let us know they’re having difficulty paying their energy bills, but often doing that is hard – so we’re always on the lookout for signs that a customer might be having trouble. And sometimes financial counsellors or advocates let us know about a problem for a customer.

Identifying a customer in hardship is important because it’s not just about making sure that our bills are paid, it’s also about helping them understand and manage their energy usage – and how this affects their bills. It’s about helping a hardship customer regain control of their energy situation.

We’re constantly monitoring our customers’ payment history for late payments or unpaid bills, and we take notice of how often people apply for government assistance or payment extensions.

If we’re on the phone with a customer who seems to be experiencing hardship, then we’ll transfer them to our Power On team right away – who’ll tell them about the program and how it can help.’

The AER’s enforcement action against Origin¹¹² highlights how a policy can appear to meet all the minimum requirements under the Retail Law, but the application of the policy by the retailer fails to provide adequate protections for customers in financial difficulty.

In this case, the customer affected by Origin’s actions had specifically told Origin that he was in financial trouble due to losing his arm, which meant he was on permanent workers compensation for the rest of his life. SACOSS submits any reasonable interpretation of Origin’s hardship definition (outlined above) would have identified the affected customer as experiencing payment difficulties due to hardship. The affected customer had indicated he was going to be on a ‘low fixed income’ (WorkCover) for the rest of his life, he had suffered an accident and had been hospitalised (in line with Origin’s example of an ‘illness’), and communicated that he was unable to pay his bills due to his change in circumstances (‘would like to pay his bills, but can’t really manage to do so’).

Further, Origin’s policy states staff will proactively monitor ‘payment history for late payments or unpaid bills’ in recognition of the fact that it is sometimes hard for customers to let them know that they are having trouble paying their bills. The affected customer had failed to make instalments in accordance with two payment plans. Not only should this have provided a strong indication to Origin staff that the customer was experiencing payment difficulties, as a signatory to the SPPF, Origin staff should have followed the Good Practice Principles outlined in that framework. Included in those principles is the need for empathy and respect, flexibility and consistency. Arguably, by initiating

¹¹¹ Origin Hardship Policy, Power On Program, p.3

¹¹² Infringement Notice No.: AER 016-2017

disconnection of the affected customer without following those principles, SACOSS submits Origin should be exposed and held to account by being removed from the public list of retailers signed up to the framework on the AER's website. In addition, as the customer had self-identified as experiencing payment difficulties, any payment plan should have been established in accordance with the requirements of Rule 72 of the Retail Rules, and the customer should have been advised of concessions and rebates.¹¹³ Failure of Origin to do so also attracts a civil penalty.

SACOSS strongly supports increased monitoring and enforcement of hardship policy obligations by the AER. SACOSS suggests this case represents the 'tip of the iceberg' in inconsistencies between the retailers' obligations at law, and the operation of those obligations in practice.

AGL's hardship program – Staying Connected

Staying Connected¹¹⁴ is AGL's national hardship program. In the overview of its policy, AGL notes that their 'credit guidelines' should be able to meet the majority of their customer's needs, but recognises that some customers may not be able to meet those guidelines and:

'Therefore, residential customers who display a willingness to pay, but are genuinely prevented from doing so due to either ongoing hardship or temporary difficulties, may be eligible for AGL's Staying Connected program.'

Section 3.1 of the Staying Connected outlines the **eligibility criteria** to gain access to the program:

'To be eligible to participate in the Staying Connected program, the customer must:

- *have an active, residential customer account (business and farm customers, as indicated by their tariff, are ineligible);*
- *be experiencing short or long term financial hardship (based on indicators below);*
- **demonstrate a willingness to pay;** and
- *have a debt outstanding which cannot be paid before the next bill renders.*

Financial hardship indicators might include that the customer:

- *has advised that they are having difficulty paying their bill by the due date;*
- *has experienced a loss of primary income, serious illness, death, disability, domestic violence or separation;*
- *account history indicates that they have had payment difficulties in the past;*
- *is actively seeking assistance from a financial counsellor; or*
- *has been referred to Staying Connected by an external organisation, such as a social welfare or consumer advocacy organisation.*

We understand, however, that this is not an exhaustive list and that there is a range of factors, in addition to the indicators listed above, which may cause financial hardship.

*As mentioned above, to be eligible **to participate in the Staying Connected program, customers must demonstrate a willingness to pay** their utility bills by actions such as:*

- *Making part-payments towards their account;*
- *Contacting AGL as early as possible when experiencing payment difficulties;*
- *Seeing a financial counsellor; or*

¹¹³ See Rule 33 of the Retail Rules

¹¹⁴ AGL's Hardship Policy, Staying Connected https://www.agl.com.au/-/media/aglmedia/documents/help/staying-connected/agl_staying_connected_policy-mar-18.pdf

- *Attempting to make payments or maintain plans.’*

Notably, AGL’s Staying Connected program also states that customers will be **refused** access to the program where the account is:

- *currently disputed, back-billed or estimated;*
- *“final” – unless already on the Staying Connected program; or*
- *a “dear customer” account*

A case study provided to SACOSS by Uniting Communities tells the story of a client named ‘Ben’. Ben is an AGL customer. He is a single male with anxiety and depression on a Mental Health Care Plan. Ben’s anxiety and depression is exacerbated by mail from utilities, and he has been disconnected twice in the past. Ben says he has tried to talk with energy companies to explain his condition, but he doesn’t feel they listen to him. Ben’s outstanding debt with AGL is \$305, and he is currently paying \$65 per fortnight in electricity to cover use. A financial counsellor contacted AGL on Ben’s behalf to try and arrange for bill smoothing, or access to the Staying Connected program. The financial counsellor stated that the AGL employee refused to help, saying it was Ben’s responsibility to pay the outstanding debt of \$305, and then call AGL back. The AGL employee stated Ben’s debt ‘wasn’t AGL’s problem’.

This case study highlights several failures with the operation of the current regulatory framework to ensure Ben is provided with the supports he needs. Despite self-identifying as experiencing payment difficulties, Ben is not offered a payment plan in accordance with section 50(1)(b) of the Retail Law and Rule 33 of the Retail Rules. This is an obligation placed on the retailer irrespective of whether the retailer identifies the customer as a hardship customer, or not. It appears that despite AGL being a signatory to the AER’s Sustainable Payment Plan Framework, AGL staff are unaware of their legal and voluntary commitments.

This case also demonstrates the practice of ‘gatekeeping’ being undertaken by retailers; attaching conditions to entry (or re-entry) into a hardship program, is not contemplated by the regulatory framework. Ben met all of the eligibility criteria and arguably met four of the five hardship indicators outlined in AGL’s hardship policy, where meeting one of those indicators should be sufficient to trigger a referral to the hardship team. However, the AGL staff member required complete payment of the outstanding amount, in circumstances where Ben was clearly unable to do so. The ‘willingness to pay’ criteria imposed by AGL on customers seeking access to the Staying Connected Program, was also satisfied by Ben on the face of the policy, as Ben was making fortnightly payments ‘towards his account’ as required, even though those payments covered ongoing usage and not debt. As the Uniting Communities financial counsellor noted:

‘It’s a sad state of affairs when energy companies treat being on a hardship program or access to bill smoothing as some sort of luxury to be earned through signing up to a “commitment to pay” and requiring four consecutive full payments, on time. All this, when you simply haven’t got money to pay, before even being considered for any empathy or understanding. Surely hardship programs should be for people experiencing hardship now.’ South Australian Financial Counsellor.

Arguably, in this case, AGL’s approach to applying its hardship policy is in contravention of the principles outlined in section 45(3) of the Retail Law. Further, SACOSS would argue that the ‘blanket refusal’ criteria within the policy to deny access to its hardship program, are not contemplated by the Act or Rules, and should not have been approved by the AER.

As noted above, the AER identified significant increases in the proportion of customers excluded from hardship programs in 2016-17.¹¹⁵ The AER noted in its Performance Report that AGL's rate of exclusions for electricity **nearly tripled** (to 64 per 100 hardship customers who exited in 2016–17), reflecting an increase from 2100 to 11 200 excluded customers.¹¹⁶ Excluding customers from hardship supports is inconsistent with assisting customers on an ongoing basis, and imposing payment obligations prior to re-entry is inconsistent with retailers' broad identification obligations (including self-identification), and the principle of fair and impartial access.

AGL's hardship policy was launched in 2003, and it is not clear whether AGL has altered its Hardship Policy since that time (any alteration would have had to have been approved by the AER). Therefore, although AGL's policy has not changed, it is clear from the number of customers excluded from their hardship program that AGL's **practices** in the implementation and application of its policy have changed. This conduct calls into question the usefulness of a policy that is so easily open to different applications and, therefore, outcomes. The purpose of a policy is to provide guidance for consistent, transparent and reliable actions upon which consumers can rely.

SACOSS also notes that, in this instance, and on the basis of the facts provided, AGL seems unaware of their obligations customers who have self-identified as experiencing payment difficulties under the law. An appropriate 'capacity to pay' payment plan, as well as advice around concessions and rebates should have been offered to Ben, irrespective of whether he had access to the hardship program, or not.

Simply Energy – the Bill Assist Program

Simply Energy's hardship policy, known as the Bill Assist Program, was last reviewed on 13 June 2017.

Under their policy, Simply Energy broadly defines hardship to be:

'a domestic customer who wishes to pay their energy bills as they fall due but does not have the financial capacity to do so within the timeframe required by the retailer's payment terms' (paragraph 1.1).

Simply Energy states that it 'will provide its **domestic customers in financial hardship** with equitable access to the options appropriate to their individual circumstances' (our emphasis) (paragraph 1.2). SACOSS notes that the principle under the Retail Law actually requires that 'residential customers' should have equitable access to hardship policies, not 'domestic customers in financial hardship' as contained in Simply Energy's policy. This is an important distinction, as 'residential customers' is all-encompassing, whereas 'domestic customers in financial hardship' requires threshold identification of hardship by the retailer. SACOSS suggests the AER should not have approved this statement in the policy, as it does not reflect the requirements under the Act and Rules.

Simply Energy identifies customers in either short-term or long-term hardship, according to different factors. The policy states that temporary factors causing short-term hardship could include (paragraph 1.3):

- *unexpected one-off expenses*

¹¹⁵ An increase from 46 per cent in 2015/16 to 57 per cent in 2016/17 for electricity customers in NECF regions.

¹¹⁶ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

- *temporary reduction in income (e.g. A period of illness)*
- *financial over commitments.*

Factors indicating long-term hardship may include that the customer (paragraph 1.5):

- *is eligible for a government concession*
- *has previously applied for a government grant*
- *has a payment history that suggests difficulty in adhering to standards repayment plans*
- *is a tenant in public housing*
- *is seeing a financial counsellor.*

To be eligible to participate in the Bill Assist program, the policy additionally provides that the customer must meet the following minimum eligibility criteria (paragraph 3.1), including that the:

- *Customer has an active residential account which is in arrears; and*
- *Customer **demonstrates a willingness to pay by agreeing to a repayment plan**; and*
- *Customer **agrees to prepare themselves for interval increases on their payment plan**; and*
- *Customer agrees to be contactable by the Bill Assist team; and*
- *Updates all their contact details when needed.*

Access will be denied if the customer does not meet the above eligibility criteria. SACOSS is once again concerned about the eligibility criteria requiring a ‘willingness to pay’ and need for the customer to ‘prepare themselves’ for ‘interval increases’ in their payment plan. SACOSS questions the fairness of these criteria in allowing for access to hardship supports.

Uniting Communities has provided SACOSS with an example of Simply Energy’s approach to applying its hardship policy. Sarah is a Simply Energy customer. She is a sole parent supporting two children and living in a Housing SA home. Sarah is on the disability support pension and receives no child support from the children’s father. Electricity is Sarah’s only energy source and she has an electricity debt of \$1750. Sarah’s electricity use costs on average \$117 per fortnight. Sarah’s refrigerator is over 30 years old.

Disconnection of Sarah’s premises was initiated by Simply Energy. Sarah sought out a financial counsellor and together they contacted Simply Energy. Simply Energy advised that Sarah was on a payment plan, but missed three payments so she was removed from their hardship program. The Simply Energy staff member explained that her manager’s permission was required to get her back on the hardship program.

Sarah and the financial counsellor negotiated with the Simply Energy staff member about tolerable payment arrangements. Simply Energy wanted a payment of \$226 to include a debt repayment. Sarah offered to pay \$150 per fortnight through Centrepay, this amount covers her actual use of \$117.

Simply Energy accepted the \$150 per fortnight payment and set up Centrepay arrangements during the call. A free energy audit was arranged by the financial counsellor and an application made to the Wyatt trust for a new energy efficient refrigerator.

Simply Energy did initially identify Sarah as a customer experiencing long term hardship. However, SACOSS submits that Simply Energy then failed to meaningfully provide hardship assistance to Sarah while she was part of the hardship program. In accordance with their policy, Simply Energy commits to providing advice on energy audits (paragraph 5.3 and part 8 of the Policy), connecting to Centrepay (part 7) and offering a fair and reasonable payment plan (paragraph 6 of the policy).

Additionally, Simply Energy has signed up to the AER's Sustainable Payment Plan Framework, and is therefore also committed to observing the principles and processes under that framework.

In practice, on the evidence provided, it appears none of these measures were initially put in place for Sarah as a hardship customer, leading to Sarah's electricity debt spiralling out of control and disconnection being initiated. Had Simply Energy set up an attainable payment plan, including Centrepay, Sarah may have been in a position to meet her re-payments, thereby avoiding disconnection. Also access to home energy audits is an important protection which, when offered, can lead to a substantial reduction in energy use.

This case highlights the fact that identification is not always enough, retailers must also provide access to supports, and customers must be aware of the supports they are entitled to receive.

The AER's Rule Change Proposal

Background

In this report, we have outlined the current regulatory arrangements for customers experiencing payment difficulties and customers experiencing payment difficulties due to hardship. We have summarised how the protections created under the regulatory framework are intended to work, and evidence of how they are actually working in practice. The nature and scope of the issues covered demonstrate that the protections under the NECF for customers experiencing payment difficulties (including due to hardship) are not operating to provide the effective or meaningful supports intended by the law. The failure of the practical application of these supports has been magnified by the current climate of rising energy costs.

On 21 March 2018, the AER submitted a rule change request to the AEMC which aims to strengthen current retailer obligations in Part 3 of the Retail Rules to 'ensure **hardship customers** are adequately protected under legislation'.¹¹⁷ AER Chair, Paula Conboy, has stated that 'many (hardship) policies do not appear to sufficiently align with the minimum requirements and do not provide adequate guidance to customers to assist in their understanding of their rights and entitlements.'¹¹⁸

Arguably, many of the identified failures of existing hardship policies have arisen as the result of a leniency exhibited by the AER in the approval of those policies. However, while SACOSS considers that the existing hardship policy approval provisions under the Retail Law provide scope for a stricter approach by the AER, in the interests of consistency and compliance, SACOSS nevertheless strongly supports the AER's rule change request to allow for the development of a binding hardship guideline, and commends the AER for endeavouring to promote better outcomes for vulnerable consumers.

The rule change request is proposing to amend Rule 75 of the Retail Rules to allow for the development of a **Customer Hardship Policy Guideline** (Hardship Guideline) which would be binding on retailers. The AER has previously prepared Guidance on AER approval of customer hardship policies,¹¹⁹ but the guidance contained in that document was general in nature and not enforceable.

¹¹⁷ Letter to John Pierce, Chairman, AEMC from Paul Conboy, Chair, AER, 21 March 2018

¹¹⁸ Letter to the AEMC from Paula Conboy, Chair of the AER, re: request for a rule change – strengthening protections in the National Energy Retail Rules for customers in financial hardship, 21 March 2018, p.2

¹¹⁹ AER, Guidance on AER approval of customer hardship policies, May 2011 See link:

<https://www.aer.gov.au/system/files/Final%20Guidance%20on%20AER%20approval%20of%20customer%20hardship%20policies%20-%20May%202011.pdf>

The AER has made its rule change request pursuant to Part 10, Division 4 of the Retail Law, which deals with the making of subsequent rules and rule amendment procedures. Within this Division, section 243 of the Retail Law provides that the AEMC may make a rule at the request of *any person* or the COAG Energy Council.

Under the Retail Law, the AEMC may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the National Energy Retail Objective (NERO).¹²⁰ The NERO is set out in section 13 of the Retail Law, and is to:

‘promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.’

In addition to satisfying this test, section 236(2)(b) of the Retail Law provides that (our emphasis):

*‘where relevant, the AEMC must satisfy itself that the Rule is compatible with the **development and application of consumer protections for small customers**, including (but not limited to) protections relating to **hardship customers**’*

This is known as the ‘consumer protections test’, and is clearly relevant to the consideration of the AER’s rule change request to allow for the development of a Hardship Guideline. It is worth noting that these tests are not in the alternative, **both** of the above tests must be satisfied, otherwise the rule cannot be made by the AEMC. SACOSS submits the satisfaction of the consumer protection test brings into consideration the consumer protections for the cohort of customers experiencing payment difficulties (both self-identified and identified by the retailer), as outlined above.

Also relevant to this rule change request is the requirement under section 49(2) of the Retail Law (which falls within Division 6 - Customer Hardship) that the AEMC must, in addition to section 236, have regard to the purpose set out in section 43(1) when making rules that make provision for hardship customers or hardship policies.

As outlined earlier in this report, section 43(1) provides that the purpose of retailers’ customer hardship policies is to:

‘identify residential customers experiencing payment difficulties due to hardship and to assist those customers to better manage their energy bills on an ongoing basis.’

The AER must therefore satisfy the AEMC, that the proposed Rule will:

- contribute to the achievement of the NERO, **and**
- be compatible with the development and application of consumer protections for small customers, including hardship customers, **and**
- be consistent with the purpose of retailer hardship policies to identify and assist hardship customers on an ongoing basis.

Current Rule 75 of the Retail Rules

Rule 75 currently requires the AER to determine Hardship Program Indicators against which the performance of retailers and the implementation of their hardship policies are measured. The hardship program indicators are currently contained within the AER’s *Retail Performance Reporting Procedures and Guidelines* (Performance Reporting Guidelines). These Performance Reporting

¹²⁰ Section 236(1) of the National Retail Law

Guidelines have recently been amended by the AER (as summarised later on in this report), and the AER has stated that their rule change request is consistent with these amendments.

Proposed new Rule 75

For the purposes of clarity and consistency, and in the interests of addressing the inequitable application of hardship policies by retailers, the new Rule proposes to ensure that the minimum requirements under the Retail Law (and relevant Rules) are contained within every retailer's hardship policy in the form of 'standardised statements', in line with the Hardship Guideline. It is proposed this will overcome the existing problem of the spectrum of differently worded and constructed hardship policies currently approved by the AER, and retailers will gain 'a greater level of clarity in relation to their hardship responsibilities'¹²¹ under the Law.

Also, the new Rule would allow for the binding Hardship Guideline to specify the 'processes, timeframes, time limits and requirements to be complied with in connection with the approval or variation of customer hardship policies'. These hardship approval processes are intended to provide guidance to retailers in addition to the requirements contained in section 43(2) and section 43(3) of the Retail Law.

It is worth pointing out that 'the proposed rule change does not expand the current obligations but seeks to provide clarity via the Hardship Guideline on how these obligations are to apply in practice'.¹²² The AER has stated that the aim of the proposed Hardship Guideline will be to provide a single point of reference for industry on all the hardship obligations under the Retail Law and Retail Rules¹²³ as well as a clear and uniform set of commitments a customer is entitled to receive under a retailer's hardship policy.¹²⁴

If made, the changes to Rule 75 proposed by the AER will, however, **expand the AER's powers** in relation to dictating and enforcing the specific content of retailers' policies.

The AER has provided a draft of the proposed Rule 75 in the following form:

75 Customer Hardship Policy Guideline

(1) This rule has effect for the purposes of section 44(i) of the Law.

(2) The AER must, in accordance with the retail consultation procedure, make customer hardship policy guidelines.

(3) The customer hardship policy guideline must specify:

(a) hardship program indicators that cover the following:

(i) entry into hardship programs;

(ii) participation in hardship programs;

(iii) assistance available to and assistance provided to customers under customer hardship programs

(4) The customer hardship policy guideline may specify:

¹²¹ AER, Rule Change Request, p.15

¹²² AER, Rule Change Request, p.15

¹²³ AER, Rule Change Request, p.14

¹²⁴ AER, Rule Change Request, p.14

(a) Processes, timeframes, time limits and requirements to be complied with in connection with the approval or variation of customer hardship policies;

(b) any matter that the AER considers necessary for inclusion in the customer hardship policy guidelines, having regard to the purpose of the customer hardship policies under section 43(1) of the Law, including:

(i) standardised statements to give effect to the minimum requirements as set out in Section 44 of the Retail Law for the purpose of the guidance of consumers on their rights and obligations under the Law or the Rules;

(ii) guidance on, or examples of, statements that the AER considers meet the minimum requirements in section 44 of the Law;

(iii) the matters that the AER considers must be contained in customer hardship policies submitted under section 43(2) of the Law.

(5) A retailer's customer hardship policy submitted to the AER under section 43(2) must contain any matter specified in the customer hardship policy guidelines as a matter that must be contained in a customer hardship policy.

(6) The AER may from time to time amend the customer hardship policy guideline in accordance with the retail consultation procedure.

In summary, the proposed Rule 75 will therefore provide the AER with broad powers in relation to the content of the Hardship Guideline, including (our emphasis).¹²⁵

- processes, timeframes, time-limits and requirements for approval or variation of customer hardship policies
- processes for the variation of **existing** customer hardship policies
- the possible development of **standard statements** for the purpose of giving guidance to consumers on their rights and obligations under the Retail Law or Retail Rules
- any further guidance on, or examples of, statements **that the AER considers meet the minimum requirements in section 44** of the Retail Law.

AER's existing powers to approve hardship policies and direct reviews of those policies

As outlined above, the proposed rule 75 will not expand retailers existing obligations to support hardship customers, but it will expand the AER's powers to require the inclusion of specific content in retailers' hardship policies. It is worth outlining the AER's **existing** obligations under the Retail Law to approve hardship policies, as well as its powers to direct a review and require a retailer to change its existing policy, in the context of the rule change request.

In approving the retailer's hardship policy under the current regulatory framework, section 45 provides that the AER **must** be satisfied that the policy contains the **minimum requirements** set out in section 44 of the Retail Law,¹²⁶ (as outlined above) and that the policy 'will or is likely to' contribute to the achievement of the purpose to '**identify** residential customers experiencing

¹²⁵ AER, Rule Change Request, p.12

¹²⁶ Section 45(1)(a) of the Retail Law

payment difficulties due to hardship and **assist** those customers to better manage their bills on an ongoing basis'.¹²⁷

Also, in considering whether to approve a hardship policy, the AER must have regard to the following principles (our emphasis).¹²⁸

- that the supply of energy is **an essential service** for residential customers
- that retailers should assist hardship customers by means of **programs** and **strategies** to **avoid** de-energisation (or **disconnection**) solely due to an inability to pay energy bills
- that de-energisation (or **disconnection**) of premises of a hardship customer due to inability to pay energy bills should be a **last resort option**
- **that residential customers should have equitable access to hardship policies and that those policies should be transparent and applied consistently.**

It follows that where the AER does not consider that the retailer has ensured equitable access under its hardship policy, or where the policy is not transparent or there is room for inconsistent application, then the policy should **not** be approved by the AER.

Further, the AER does currently have the power to direct the retailer to **change its existing policy**, in accordance with any requirements set out by the AER.

Section 43(3)(a) of the Retail Law provides that (our emphasis):

*'if, as a result of the exercise of the AER's functions and powers **under section 204**, the AER forms the view that a retailer's customer hardship policy **requires review**, the AER may **direct the retailer** to review the policy and make variations in accordance with **any requirements set out by the AER**'.*

Section 43(3)(b) provides that, if directed by the AER, the retailer **must**:

- vary the policy in accordance with the AER's requirements; and
- submit it to the AER for approval under this Division; and
- publish the policy, as approved by the AER, on the retailer's website as soon as practicable after it has been approved; and
- maintain and implement the policy.

Section 43(3)(b) is a civil penalty provision.

Part 8 of the Retail Law provides for the Functions and Powers of the AER. Section 204 of the Act provides that the AER has the following functions and powers (our emphasis):

*'(a) to **monitor compliance** by persons with this Law, the National Regulations and the Rules;*

*(b) without limiting paragraph (a), to **monitor and report on compliance** by regulated entities with this Law, the National Regulations and the Rules;*

*(c) to **investigate breaches or possible breaches** of provisions of this Law, the National Regulations or the Rules, including offences against this Law;*

*(d) to **institute and conduct proceedings** in relation to breaches of provisions of this Law, the National Regulations or the Rules, including offences against this Law;*

¹²⁷ Section 45(1)(b) and section 43(1) of the Retail Law

¹²⁸ Section 45(3) of the Retail Law

- (e) to institute and conduct appeals from decisions in proceedings referred to in paragraph
- (f) AER regulatory functions or powers;
- (g) any other functions and powers conferred on it under this Law, the National Regulations or the Rules.’

Section 205 of the Act provides that (our emphasis):

*‘The AER must, in performing or exercising an AER regulatory function or power, perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national energy retail objective and where relevant, in a manner that is **compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers.**’*

The AER states that ‘many hardship policies contain only **vague commitments** that **do not align** with the **minimum requirements** sufficiently, or oblige the retailer to act in a certain way¹²⁹ (our emphasis). SACOSS agrees with the AER’s assessment of retailers’ current policies, and submits that where the AER (through compliance, monitoring of performance or review processes) has identified retailer hardship policies or practices that are ambiguous, inconsistent, unclear or do not align with the minimum requirements, then the AER should continue to use its powers to direct the retailer to amend its policy and investigate possible breaches of the law.

Whilst the AER is to be commended for its focus on strengthening hardship protections, it is arguable that the AER has previously taken a ‘light-handed’ approach to its obligations to approve retailer’s hardship policies, which may have resulted in policies that are inconsistent, unclear, difficult to enforce and do not sufficiently align with the minimum requirements across the industry.

The AER has also indicated that the current ‘general and principle-based’ nature of retailer’s hardship policies contributes to the disconnect between the commitments in those policies and the practical implementation of those commitments. However, it is arguable that the ‘vague commitments’ observed by the AER through its Hardship Reviews could have been addressed at the time of approval of those policies, in line with the AER’s approval powers.

SACOSS acknowledges that the *operational implementation* or application of retailer’s hardship policies is generally not amenable to regulation, as noted by the ESC:

‘Some of the factors that influence the effectiveness of the assistance that retailers provide to customers are not suited to regulation. These include, for example, the overall culture and attitude of the retailer towards customers facing payment difficulty and the skills, experience and training of staff, and innovative ways of communicating with and providing valuable information to customers.’¹³⁰

A stronger, more consistent and prescriptive application of its approval (and enforcement) powers by the AER may have gone some way towards limiting the divergent approaches of retailers to applying hardship assistance. It is hoped the recent strengthening of the relevant indicators within the AER’s Performance Reporting Guidelines will assist with promoting good practice through monitoring and reporting on retailer performance.

¹²⁹ AER, Rule Change Request, p.10

¹³⁰ ESC Vic, Payment Difficulty Framework, Final Decision, 10 October 2017, p.69

SACOSS recognises that, in conjunction with the Rule change request, the AER has stated it is currently¹³¹:

- engaging with retailers to remediate current deficiencies in hardship policies, with a view to requiring those retailers to vary their policies in accordance with AER directions, and
- requiring some retailers to undertake an audit around compliance with hardship provisions of the Retail Rules and Retail Law.

SACOSS strongly supports the AER continuing to exercise its **existing** powers to ensure all hardship policies align with the minimum requirements and achieve their purpose. The exercise of the AER's powers in this manner is clearly 'compatible with the development and application of consumer protections for small customers' in accordance with section 205, and SACOSS supports the AER continuing to pursue this action as an interim measure, prior to the development of the Hardship Guideline (if the rule change is made).

Proposed Hardship Guideline to include 'standard statements'

Whilst the AER could use its existing powers to require retailers to individually amend their policies, SACOSS agrees with the AER that a more comprehensive and consistent approach to addressing the inadequacies of existing hardship policies, would be through the development of a binding Hardship Guideline. SACOSS believes a binding Hardship Guideline would be a positive step towards ensuring that retailers' hardship policies are consistent, the protections are clearly articulated and accessible for consumers, and breaches are easier to identify and enforce.

As outlined above, the AER proposes that consistency be achieved through the development and inclusion of 'standard statements' within the proposed Guideline, reflecting the minimum requirements under section 44. The AER has indicated that retailers would be required to include these standard statements in their policies, but would be able to set out **how** they will **implement** these standard statements.¹³²

The AER has provided the following example which includes a statement dealing with the issue of identification, as well as a statement outlining what supports customers can expect to receive, such as:¹³³

- *'Requesting access to a retailer's hardship program if they are having difficulties, or anticipate difficulties paying their energy bill;*
- *Under a retailer's hardship program they can expect to receive:*
 - *Flexible payment options*
 - *Advice on how to reduce energy usage*
 - *Advice on payment plans, concessions and payment options including Centrepay.'*

The AER has indicated that the statements will be developed 'in conjunction with industry and informed by consumer research'.¹³⁴ A key focus for SACOSS in the consideration of the AER's rule

¹³¹ AER, Rule Change Request, p.17

¹³² AER, Rule Change Request, p.15

¹³³ AER, Rule Change Request, p.14

¹³⁴ AER, Rule Change Request, p.14

change request is the issue of identification of hardship customers, and SACOSS will take a keen interest in the development of standard statements dealing with identification.

Standard Statements dealing with ‘identification’ of hardship customers

In deciding whether to make the rule, the AEMC must have regard to the purpose of the retailer’s hardship policy. One of the purposes of a retailer’s hardship policy, and the first minimum requirement under section 44 of the Retail Law relates to the identification of hardship customers. Section 44(a) requires retailer’s hardship policies to include processes to ‘**identify** residential customers experiencing payment difficulties due to hardship, including **identification by the retailer** and **self-identification** by a residential customer’ (our emphasis).

The AER’s Hardship Reviews, stakeholder feedback, the Origin enforcement action and the performance reporting data all point to a failure by retailers to consistently and pro-actively identify hardship customers. The AER has observed that ‘pro-active identification practices for customer referral to hardship programs are different for each retailer’.¹³⁵ Increasing levels of debt and disconnections, coupled with decreasing numbers of customers on hardship programs (in South Australia) would indicate retailers are not intervening early enough.

SACOSS submits that the proposed standard statement relating to identification (outlined above) of ‘requesting access to a retailer’s hardship program if they are having difficulties, or anticipate having difficulties paying their bill’ only covers the process of ‘self-identification’ contemplated by section 44(a). Arguably this statement does not cover the process of ‘identification by the retailer’ also contemplated by section 44(a).¹³⁶

It is worth pointing out the inadequacies of relying on self-identification to identify customers in hardship, as a UK study into consumer experience of vulnerability observed:

*“Nobody plans to become vulnerable and few people self-identify as being vulnerable. The situations and circumstances of ‘vulnerable’ individuals are diverse, complex and dynamic; the experience of vulnerability is unpredictable, and it can change over time. Many people manage to cope with their situation by believing – for better or for worse – that ‘things will improve’, that their situation is only temporary, and that ‘normality’ will soon return.”*¹³⁷

The issue of pro-active identification of hardship customers by the retailer then, is **critical** to the effective operation of hardship supports under the NECF. The AER’s Rule change proposal represents an opportunity to create a more inclusive, consistent and equitable process for identifying hardship customers under retailers’ hardship policies. SACOSS will be seeking that standard statements dealing with identification are included in the Hardship Guideline, and will be working to ensure that the appropriate care, consideration and consultation is undertaken in the development of the standard statement that will cover the issue of identification, if the rule change is made.

Earlier in this report, we outlined our concerns with the definition of ‘hardship customer’ under the Retail Law. In summary, the Retail Law defines a hardship customer to mean ‘a residential customer

¹³⁵ AER, Rule Change Request, p.8

¹³⁶ Nor does it cover the process for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship (section 44(b) of the Retail Law).

¹³⁷ ESRO Ltd, Vulnerability exposed: The consumer experience of vulnerability in financial services, December 2014, p.3 <https://www.fca.org.uk/publication/research/vulnerability-exposed-research.pdf>

of a retailer who is **identified as a customer experiencing payment difficulties due to hardship in accordance with the retailer's hardship policy.**¹³⁸

Therefore the definition of a hardship customer is tied to the identification processes contained within a retailer's hardship policy. SACOSS believes that tying the definition of 'hardship customer' to retailer's hardship policies has acted as a significant limitation on access to hardship supports for vulnerable customers. If the AER can bring consistency to the process of identification (both retailer identification and self-identification) it can bring consistency to the definition.

The silence of the legislation in providing more guidance around the definition of a 'hardship customer' may be in recognition of the complex nature of the various circumstances that can lead to a customer experiencing hardship. As SACOSS observed in our 2016 Report:

*'every vulnerable customer is vulnerable in their own way. It follows that any process to better manage these customers, particularly those customers with long-term debt, must take account of the specific circumstances facing that customer.'*¹³⁹

SACOSS believes it is worth briefly looking at the different approaches taken by Victoria's Essential Service Commission (ESC) and the United Kingdom's energy regulator Ofgem to the question of identifying customers in hardship.

Essential Services Commission of Victoria's approach to identifying customers in hardship

Following on from an extensive inquiry into the hardship practices of retailers in Victoria in 2015, the ESC found that the 'broad discretions' given to retailers in how they offered assistance to customers experiencing payment difficulty were ineffective and inconsistent.¹⁴⁰ ESC Vic drafted and consulted on a new payment difficulty framework throughout 2016, with a draft decision released in October 2016 titled 'Supporting Customers Avoiding Labels'.

The proposed framework was highly prescriptive, with rules that outlined how and when different forms of assistance would be made available. SACOSS' 2016 Report was critical of this framework, which included a proposal to implement a highly structured process with automated stages and mandated payment plan options. SACOSS questioned whether a 'systems-based, automated process is the most appropriate method to manage the complex problems identified by the ESC'.¹⁴¹

In the face of a chorus of criticism, the ESC rethought its approach and in October 2017 (after consultation) amended the Energy Retail Code to include a new Payment Difficulty Framework¹⁴² which will come into effect on 1 January 2019. In introducing the new Framework, the ESC Chairperson, Dr Ron Ben-David stated that (our emphasis):

*'In May 2017, we released a new draft decision that replaced the earlier proposal. Our new proposal took a very different approach from our earlier attempt. We took as our starting proposition that payment difficulty was too complex and too varied to be addressed through highly prescriptive regulation. **Because each customer's situation is unique, the framework needed to allow for assistance to be designed in a way that best meets each customer's circumstances.** We needed to shift from a rules-based approach to one that was focused on positive results for customers.'*

¹³⁸ Section 2 of the Retail Law

¹³⁹ SACOSS, 2016 Report, p.81

¹⁴⁰ ESC Vic, Payment Difficulty Framework, p. iii

¹⁴¹ SACOSS, 2016 Report, p.81

¹⁴² <https://www.esc.vic.gov.au/document/energy/54904-payment-difficulty-framework-final-decision/>

The new framework was designed to respond to the findings of the ESC's hardship inquiry which (inter alia) found that (our emphasis):¹⁴³

- customers need assistance that varies with the type of payment difficulty they are facing
- **labelling customers as 'hardship customers' is a barrier to accessing assistance**
- customers do not know what assistance is available
- **eligibility for assistance is very largely at retailers' discretion**
- not all customers facing payment difficulty receive assistance.

The ESC's new Framework therefore steers clear of identifying customers as 'hardship customers' and (in line with the standard statement proposed by the AER) provides *residential customers anticipating or facing payment difficulties* with minimum entitlements to assistance from their retailer when they are facing payment difficulty. The purpose of Part 3 of the Energy Retail Code¹⁴⁴ (the Code) provides:

*The purpose of this Part is to set out the minimum standards of assistance to which **residential customers anticipating or facing payment difficulties** are entitled, so that disconnection of a residential customer for not paying a bill is a measure of last resort.*

SACOSS notes and supports the inclusion of 'anticipating' payment difficulties in the purpose of the framework. Throughout the Code, reference is broadly and inclusively made to '**residential customers**', with Division 2 dealing with 'standard assistance' that applies to all 'residential customers'. The Code is focused on outcomes and does not prescribe how retailers act in every situation. Retailers will need to exercise their judgment about how to comply with the Code taking into account individual customer circumstances¹⁴⁵ with defined minimum standards of assistance that must be provided depending on the type of payment difficulty a customer is facing.¹⁴⁶

The Code does require retailers to prepare a Financial Hardship Policy, which must include the minimum requirements contained in Division 3 of the Code. Division 3 deals with 'tailored assistance' for residential customers. The tailored assistance division applies to '**all residential customers who are in arrears**' (clause 78 of the Code).

Therefore, it appears the Victorian approach differs from the Retail Rules in that there is no distinction between a 'customer facing payment difficulties' and a 'hardship customer'. If a customer is in arrears, then they attract the minimum assistance contained in the 'tailored assistance' Division, as contained within the retailer's hardship policy.

It is unclear from the example of the standard statement provided by the AER, whether the AER is contemplating following the Victorian model by envisaging 'residential customers in arrears' having access to hardship supports. The AER has indicated it proposes to undertake a 'research project' and consult with stakeholders in developing the standard statements.¹⁴⁷ SACOSS acknowledges the requirements of the Retail Law did not apply to ESC Vic in establishing its framework, and therefore the AER's parameters are different to ESC Vic's, nevertheless SACOSS supports the AER consulting

¹⁴³ ESC Victoria Payment Difficulty Framework Final Decision, 10 October 2017, p.63

¹⁴⁴ Amendments to the Energy Retail Code: Payment Difficulties, October 2017

[file:///C:/Users/Georgina/Downloads/energy-retail-code-amendment-payment-difficulties-october-2017-20180117.pdf%20\(1\).pdf](file:///C:/Users/Georgina/Downloads/energy-retail-code-amendment-payment-difficulties-october-2017-20180117.pdf%20(1).pdf)

¹⁴⁵ ESC Vic Payment Difficulty Framework Final Decision, 10 October 2017, p.72

¹⁴⁶ ESC Vic Payment Difficulty Framework Final Decision, 10 October 2017, p.72

¹⁴⁷ AER, Rule Change Request, p.18

with the ESC Vic around its approach to identifying customers in hardship in the development of the AER's standard statements dealing with retailer identification.

The UK approach to identifying customers in hardship

Regulation of the energy market in the United Kingdom is the responsibility of an independent agency, Ofgem. In 2010 Ofgem conducted a review of retailers' approaches to debt management and prevention. The findings of that review aligned with the AER and ESC Vic's findings that supports for customers experiencing payment difficulties were ineffective. As a result of this review, Ofgem initiated a Consumer Vulnerability Strategy¹⁴⁸ (CVS) which underpins an ongoing research program designed to provide evidence backed solutions to the complex issue of consumer vulnerability.

The CVS and the CVS Progress Report¹⁴⁹ (2015) set out Ofgem's expectations of industry to identify and respond to the needs of customers in vulnerable situations. Ofgem's definition of vulnerability is when a consumer's **personal circumstances** and **characteristics** combine with aspects of the market to create **situations** where he or she is:¹⁵⁰

- significantly less able than a typical consumer to protect or represent his or her interests in the energy market; and / or
- significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.

Ofgem's Report into vulnerable consumers in the energy market in 2017 states, 'a well-functioning energy market is accessible, inclusive and responsive to the needs of all consumers, including those in **vulnerable situations**'.¹⁵¹

The CVS makes a clear link between the requirements of vulnerable consumers, with the causes of vulnerability, by talking about '**vulnerable situations**' rather than 'vulnerable consumers', this reminds retailers that vulnerability:¹⁵²

- *'is created by three intertwined factors: individual characteristics, personal circumstance, and the action (or inaction) of firms and the wider market*
- *often changes over time: many consumers will be in a vulnerable situation once and for a limited period of time only. Others will have multiple 'episodes' over a longer period, but with gaps in between where they are not vulnerable. Some, meanwhile, will have ongoing and long-term needs which vary little*
- *can have financial and non-financial impacts: the negative impact of vulnerability – also known as 'detriment' – can lead to financial, affordability, indebtedness, fuel poverty, and engagement issues. However, it can equally affect the wellbeing, health, and overall safety of the consumer.'*

To better identify (and support) consumers, the CVS provides that retailers should be aware of the three factors that can create vulnerable situations, namely¹⁵³:

¹⁴⁸ Ofgem (2013) Consumer Vulnerability Strategy

¹⁴⁹ Ofgem (2015) Consumer Vulnerability Strategy Progress Report

¹⁵⁰ Ofgem, Vulnerable consumers in the retail energy market: 2017, p.12

¹⁵¹ Ofgem, Vulnerable consumers in the retail energy market: 2017, p.2

https://www.ofgem.gov.uk/system/files/docs/2017/10/consumer_vulnerability_report_web_003.pdf

¹⁵² Money Advice Trust and Energy UK, Vulnerability, mental health and the energy sector: a guide to help identify and support consumers, October 2017, p. 7

¹⁵³ Money Advice Trust and Energy UK, Vulnerability, mental health and the energy sector: a guide to help identify and support consumers, October 2017, p. 7

- **Individual factors** (these are things about the consumer that can make them vulnerable to detriment), for example:
 - mental health conditions, including depression
 - physical health conditions caused or exacerbated by living in a cold home
 - physical difficulties with sight, hearing or mobility
 - serious difficulties with decision-making (including mental incapacity).
- **Personal circumstances** (these are things about the consumer’s personal circumstances to look out for) including:
 - life events, sudden household or social changes, or benefit difficulties
 - low income, no ability to deal with ‘bill shocks’ or pay for improvements/repairs
 - digital exclusion, lack of access, including to comparison or switching services.
- **Action (or inaction) of firms and others** (it is important to consider things that the organisation may or may not have done that can contribute to vulnerable situations), for example pursuing a consumer’s debt aggressively, without understanding their needs, can cause upset, anxiety and could even trigger significant mental and physical health problems.¹⁵⁴

In our 2016 Report, SACOSS observed that the CVS illustrates the importance of taking a broader view of vulnerability, including the wider social context in which vulnerability can be reduced or exacerbated.¹⁵⁵ The 2016 Report suggests that retailers and regulators who take this into account will ‘be in a better position to **identify** customers at risk early in the process and to manage these customers before their debt becomes too great’.¹⁵⁶ SACOSS supports the recommendation of a tailored approach to supports for vulnerable consumers as contained in the UK’s CVS and Consumer Policy Research Centre’s recent report which states that:¹⁵⁷

‘Interventions and remedies for vulnerable customers should consider the specific types of vulnerabilities and barriers being experienced. Tailored outreach and intervention strategies should be developed for these specific consumers segments.’

The proposed binding Hardship Guideline will only be effective in improving access to hardship supports if the threshold question of the identification of ‘residential customers experiencing payment difficulties due to hardship’ allows for a broader view of vulnerability, ensuring equitable access to those supports.

Unless the AER provides improved guidance around what defines a ‘hardship customer’ under the proposed binding Hardship Guideline, the (often artificial) distinction between hardship customers and other customers experiencing payment difficulties will perpetuate the current inequities. Further, if retailers’ apparent ‘gatekeeping’ practices are permitted to continue (including in relation to re-entry into hardship programs), the key protections for hardship customers contained in the Retail Law and Rules will be significantly eroded; the broader group of customers experiencing payment difficulties, but not properly ‘identified’ as hardship customers, will continue to miss out on important protections.

¹⁵⁴ Money Advice Trust and Energy UK, Vulnerability, mental health and the energy sector: a guide to help identify and support consumers, October 2017, p.7

¹⁵⁵ SACOSS, 2016 Report, p.58

¹⁵⁶ SACOSS, 2016 Report, p.58

¹⁵⁷ Solomon L., and Martin-Hobbs B., 2018, *Five preconditions of effective consumer engagement - a conceptual framework - Product information, consumer choice and market engagement*, CPRC, Melbourne, p.24

SACOSS submits the AER could usefully look to the approach of other jurisdictions in the development of the standard statements dealing with 'identification'. The evidence indicates the current system is not working and a more inclusive process for identifying hardship customers, together with a more consistent approach to the application of protections offered to customers in financial difficulty, is needed.

Standard statements dealing with supports

Within the AER's Rule Change Request, the AER has suggested (as an example) the following standard statement dealing with some of the supports a customer in a hardship program can expect to receive:

- *Under a retailer's hardship program they can expect to receive:*
 - *Flexible payment options*
 - *Advice on how to reduce energy usage*
 - *Advice on payment plans, concessions and payment options including Centrepay.'*

This statement covers the supports contemplated by section 44(c) of the Retail Law (flexible payment options including a payment plan and Centrepay) and section 44(g) (programs to assist customers with strategies to improve their energy efficiency).

SACOSS strongly supports the inclusion of clearly articulated statements of the supports hardship customers can expect to receive in the proposed Hardship Guideline. Evidence provided by our member organisations suggests there is a great deal of confusion amongst customers about what supports are available, and how customers can access those supports. If adequately communicated by retailers (and the AER), consumers will be in a better position to understand what their rights are, and that those supports will be consistently available across all retailers. Further, SACOSS agrees with the AER that the linking of retailer conduct with specific statements may better enable the AER to enforce alleged breaches of the obligations under the Retail Law.¹⁵⁸

That said, SACOSS is concerned that standard statements of supports, including for example the statement around a customer expecting to receive 'advice on payment plans', should not be considered sufficient to unilaterally address the issue of unaffordable and unsustainable payment plans. The retailer's *approach* to establishing payment plans also needs to be addressed alongside regulatory changes, for example through applying the SPPF's good practice principles of empathy and respect, flexibility and consistency.

Retailers' processes and approach to implementing the standard statements

The AER has indicated that 'retailers will be able to set out how they will implement these standard statements'.¹⁵⁹ Given the standard statements are intended to reflect the **minimum requirements**, SACOSS submits that where a retailer's policy includes implementation processes that water-down these protections (for example by exclusions or pre-requisites to entry into hardship programs) those policies should not be approved by the AER under the proposed rule, and associated provisions of the Retail Law.

The increasing number of exclusions from hardship programs indicates that the current practices of retailers are limiting access to those programs.¹⁶⁰ The AER needs to take a firm hand to the task of approving policies, ensuring that the way retailers 'set out how they will implement the standard

¹⁵⁸ SACOSS observes that the AER could currently exercise its existing enforcement powers more fully.

¹⁵⁹ AER, Rule Change Request, p.15

¹⁶⁰ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report, p.183

statements' is consistent with the retailer's minimum obligations. The policies need to contribute to the achievement of the overarching purpose and satisfy the principles contained in section 45 of the Retail Law (including ensuring equitable access). SACOSS submits that the retailer's implementation practices are central to the meaningful operation of the standard statements containing the minimum requirements (including processes around **identification**).

SACOSS therefore believes it will not be sufficient to simply ensure that the policies contain the standard statements in accordance with the proposed Hardship Guideline, it is essential that the AER **uses its approval powers** under the Retail Law to the fullest extent, to ensure the retailers implementation **processes** contained within their policies, are consistent with their obligations and give effect to the principles outlined in section 45(3).

For example, where the AER has developed a standard statement containing 'processes to identify residential customers experiencing payment difficulties due to hardship', in line with section 44(a), the retailers' proposed implementation processes should not operate to diminish the AER's standard statement. If the standard statement around identification is broad and inclusive, then it should not be limited by processes involving exclusions and pre-requisites. To be clear, SACOSS is not suggesting that the AER include detail within the proposed Hardship Guideline that is beyond the AER's powers. It is consistent with the AER's powers to approve hardship policies in accordance with its obligations under section 45, and to refuse to approve the policy where it considers it is deficient. SACOSS is suggesting the policy will be deficient if it doesn't properly reflect the purpose and principles.

To support the exercise of the AER's approval powers in this manner, and to remind retailers and customers of the principles underlying hardship policies, SACOSS suggests the AER could include a standard statement at the beginning of the Hardship Policy Guideline in line with section 45(3)stating:

This policy has been approved by the AER and is consistent with the principles that:

- *The supply of energy is an **essential service** for all residential customers.*
- *Retailers should assist hardship customers to avoid disconnection solely due to an inability to pay their energy bills.*
- *Disconnection of hardship customers due to an inability to pay their energy bills, should be a **last resort option**.*
- *All **residential customers** should have equitable access to hardship policies.*
- *Hardship policies should be transparent and applied consistently.*

SACOSS suggests this introductory statement would provide the appropriate context for consumers and retailers in relation to the content of the retailer's hardship policy, including the standard statements setting out the minimum requirements, as well as the processes adopted by retailers in order to give effect to those statements.

Retailers' engagement with consumers

As outlined above, the AEMC's 2018 Retail Energy Competition Review found that consumer trust was at 39% in 2018, a reduction from 50% in 2017.¹⁶¹ Clearly, retailers need to change their approach to how they engage with consumers. The experiences of other essential service providers, such as Yarra Valley Water, demonstrate how an approach based on 'strong and consistent commitment to improving the quality of the consumer's experience and maintaining positive lines of

¹⁶¹ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report, p. xvi

communication with the customer' has led to the creation of an effective hardship program that is also good for business.¹⁶²

The AER has suggested that the application of standard statements will 'result in retailers adopting a **more consistent approach** in their **engagement** with vulnerable consumers'.¹⁶³ SACOSS is hopeful that this will be the case, but to achieve this goal, retailers need to have processes that support communication with consumers in a way that empowers and engenders trust. Early, respectful conversations with consumers in line with the principles and processes contained within the SPPF are essential to finding sustainable solutions for customers experiencing payment difficulties.

The Consumer Policy Research Centre's Building Customer Trust principles and practice guide¹⁶⁴ noted that 'the goal of building customer trust is one that all energy and water retailers can embrace as a central business strategy. It is an objective that encompasses the ... goals of fair access and treatment.'¹⁶⁵ The Building Customer Trust Project identified four underpinning Customer Trust principles:¹⁶⁶

- Treat customers fairly
- Set customers up for success
- Embed a culture of customer trust in the business
- **Create systems and processes** that make it easy to build trust.

SACOSS submits that the goals of fair access and treatment for energy consumers encompasses the principle under the Retail Law that 'residential customers should have **equitable access** to hardship policies and that those policies should be transparent and applied consistently' (section 45(3)(d)). A hardship policy that promotes customer trust principles, would also promote the principles of equitable access, transparency and consistency, in line with the Law. Therefore, in approving hardship policies pursuant to its powers under the Retail Law, it is arguable that the AER could support the inclusion of systems, processes and principles that encourage retailers to meaningfully engage with customers.

SACOSS considers that the conduct of retailers is an essential element in building trust and strengthening protections for customers in financial hardship. Improving the quality of conversations between retailers and consumers, ensuring the consumer is engaged in the process and has some sense of control, is imperative to achieving the goal of assisting them to better manage their bills on an ongoing basis. If the rule change is made and the retailer's hardship policy reflects its obligations at law, the AER can use its monitoring and compliance powers to work to ensure the retailer's conduct aligns with its policy.

Enforceability of the proposed Hardship Guidelines and Civil penalty provisions

The AER is proposing that the Hardship Policy Guideline made pursuant to the new Rule 75 be binding on industry.

¹⁶² SACOSS, 2016 Report, p.85 and Yarra Valley Future Water, Response to Essential Services Commission's Energy Hardship Inquiry Draft Report, October 2015, p.12

¹⁶³ AER, Rule Change Request, p.16

¹⁶⁴ Consumer Policy Research Centre, Building Customer Trust: A Principles and Practice Guide, June 2017 http://cprc.org.au/wp-content/uploads/CPRC_BCTR_WEB.pdf

¹⁶⁵ Consumer Policy Research Centre, Building Customer Trust: A Principles and Practice Guide, June 2017, p.3

¹⁶⁶ Consumer Policy Research Centre, Building Customer Trust: A Principles and Practice Guide, June 2017, p.5

SACOSS understands that, broadly speaking, for a guideline to be binding it must be created pursuant to a legislative power. If made, Rule 75 would give the AER the power to develop a Hardship Guideline, which would therefore be binding on industry.

The AER has proposed that 'due to the issues observed with implementation of hardship policies and the importance of these protections to energy consumers, we propose this rule (proposed Rule 75) is a civil penalty provision'.¹⁶⁷ As part of its consultation on the rule change request, the AEMC has asked what aspects of the rule, if made, should be a civil penalty provision.

The current civil penalty provisions under the **Retail Law** relating to retailers' hardship obligations are contained in:

- Section 43(2) which requires that the retailer must develop a customer hardship policy, submit it to the AER for approval, publish the policy and importantly 'maintain and implement' the policy.
- Section 43(3)(b) which requires the retailer to vary its policy in accordance with the AER's requirements, submit it for approval, publish it and 'maintain and implement' the policy.
- Section 50(1) which requires retailers to offer and apply payment plans for hardship customers and other residential customers experiencing payment difficulties.
- Section 276(1)(2) and (4) which deals with compliance audits by retailers
- Section 282(1) which requires that retailers must provide information and data relating to the performance of the entity against the hardship program indicators as required by the AER Performance Reporting procedures and Guidelines.

Broadly, the current civil penalty provisions under the **Retail Rules** relating to retailers' hardship obligations are contained in:

- Rule 33(3) which provides a retailer must provide information to a hardship customer or other residential customer experiencing payment difficulties of government rebate, concession or relief schemes.
- Rule 40(3) which provides a retailer cannot require a hardship customer to provide a security deposit.
- Rule 71 which provides that a retailer must inform a hardship customer of the retailer's hardship policy, and provide them with a copy of the policy.
- Rule 72 which relates to payment plans for hardship customers and the obligation that they be established having regard to a customer's capacity to pay etc.
- Rule 73 which relates to waiver of late fees for a hardship customer.
- Rule 74 which relates to payment by Centrepay.
- Rule 107(2) which provides that retailers must not arrange for the disconnection of customer's premises except in accordance with certain requirements under Part 6, Division 2 of the Retail Rules.
- Rule 141 which deals with pre-payment meters and payment difficulties and hardship, placing various obligations on the retailer in relation to customers experiencing payment difficulties.

SACOSS is somewhat confused about the AER's proposal to make Rule 75 a civil penalty provision in its entirety. Most of the obligations contained in the proposed Rule 75 are imposed upon the AER. Namely, the AER **must** make a hardship policy guideline that must specify hardship program

¹⁶⁷ AER, Rule Change Request, p.15

indicators and **may** specify other matters (including processes for approving retailers' hardship policies and 'standardised statements' reflecting the requirements under section 44 of the Retail Law).

However, the proposed Sub-Rule 75(5) does provide that (our emphasis):

(5) A retailer's customer hardship policy submitted to the AER under section 43(2) must contain any matter specified in the customer hardship policy guidelines as a matter that must be contained in a customer hardship policy.

This obligation is clearly placed on retailers, and therefore SACOSS considers it could appropriately be a civil penalty provision. The intent of this sub-rule is to ensure retailers observe the requirements of the hardship guideline when drafting their proposed hardship policy and that the retailers' draft policies therefore contain the required statements and processes at the time they are **submitted** to the AER for approval.

It is worth noting that the AER will still be approving the policies in accordance with section 45 of the Retail Law, and will arguably not approve policies that do not contain 'matters that must be contained in a hardship policy'. Therefore, the AER would still retain the power to refuse to approve the policy on the basis that it does not contain the minimum requirements or contribute to the achievement of the purpose. SACOSS believes the development of a Hardship Guideline that includes standard statements will better enable the AER to more readily identify deficiencies in proposed policies.

SACOSS submits that where retailers are required to include the minimum obligations within their policies in the form of standard statements, then the most important power the AER can use to enforce compliance with the 'standardised statements' will be through the existing obligation that retailers 'maintain and implement' their policy under the Retail Law (sections 43(2)(c) and 43(3)(b)). Both of these provisions are civil penalty provisions.

Hardship Indicators

The current Rule 75, which is essentially incorporated into the proposed Rule 75, provides that:

(1) The AER must, in accordance with the retail consultation procedure, determine hardship program indicators.

(2) The hardship program indicators must cover the following:

(a) Entry into hardship programs;

(b) Participation in hardship programs;

(c) Assistance available to and assistance provided to customers under customer hardship policies.

(3) The AER may from time to time amend the hardship program indicators in accordance with the retail consultation procedure.

(4) In this rule:

Hardship program means a program outlined in a customer hardship policy (as referred to in section 44(e) of the Law).

The hardship program indicators are currently contained in Schedule 4 of the AER Performance Reporting Procedures and Guidelines.

Section 287 of the Retail Law provides that the AER must determine and publish hardship program indicators in accordance with the Rules, and that the Rules may make provision for the:

- content and development of hardship program indicators
- development and consultation about hardship program indicators
- determination, amendment and publication of hardship program indicators.

The proposed Rule Change, as it relates to hardship program indicators, is consistent with the intent of the Retail Law to have provisions that relate to hardship indicators contained within the Retail Rules.

Section 282(1)(a) of the Retail Law (relevantly) provides that ‘a regulated entity’ (or a retailer) must submit to the AER, **in the manner and form required by the AER Performance Reporting Procedures and Guidelines**, information and data relating to the performance of the retailer against the hardship program indicators. This subsection is a civil penalty provision. Therefore, a failure of the retailer to submit the information required by the Performance Guidelines against the hardship program indicators may attract the exercise of the AER’s enforcement powers.

The AER is proposing that the hardship program indicators be contained in the proposed Hardship Policy Guideline. SACOSS questions whether this would require amending the Retail Law to reflect this change, or whether the Performance Guideline will still contain the information and data required to be submitted in relation to the performance of the retailer against the hardship program indicators. In other words, would the hardship program indicators be separately published to the information and data required?

In the interests of having all required information relating to performance in one place, it would follow that the Performance Reporting Procedures and Guidelines should still contain the hardship performance indicators, the required data and relevant reporting period. SACOSS considers it would be somewhat confusing for retailers to have to consult both the proposed Hardship Guideline and the Performance Reporting Guideline to determine what indicators they are required to report against and what information / data they are required to provide.

In addition, Schedule 3 to Version 3 of the Performance Reporting Guidelines¹⁶⁸ (which will come into effect from 1 January 2019) contains performance indicators relating to ‘handling customers experiencing payment difficulties’. This section also includes definitions of ‘energy bill debt’, ‘payment plans’ and ‘Centrepay’. There are currently 13 indicators relating to customers experiencing payment difficulties against which retailers are required to report (indicators S3.15 - S3.28) under the amended Version 3 of the Performance Reporting Guidelines. Schedule 3 also contains indicators relating to disconnection (indicators S3.36-S3.39).

Given the importance of the data and information collected in relation to disconnection and customers experiencing payment difficulties (particularly regarding how this information provides a more complete picture around data on hardship customers and vulnerable customers generally),

¹⁶⁸ AER, Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines, Version 3, April 2018, p. 18 https://www.aer.gov.au/system/files/Final%20Instrument%20-%20AER%20%28Retail%20Law%29%20Performance%20Reporting%20Procedures%20and%20Guidelines%20-%20%20April%202018_1.pdf

SACOSS considers it is reasonable to keep the Hardship Indicators together with these related indicators within Version 3 of the Performance Reporting Guidelines, rather than moving them to the proposed Hardship Guideline. In addition, there are definitions of certain terms contained in Schedule 3 that are referred to in Schedule 4 (Hardship Program Indicators), so keeping these indicators within the same document allows for ease of cross-referencing.

SACOSS believes that the separation of the Hardship Program Indicators from the other indicators relating to customers experiencing payment difficulties will perpetuate the (sometimes unhelpful) distinction between these two groups of customers.

In relation to the proposed Rule 75, SACOSS considers that the existing civil penalty that applies to retailers under section 282(1) is sufficient to ensure retailers provide the required information against the hardship program indicators.

Taking into consideration our comments in relation to the hardship program indicators, SACOSS believes the proposed rule giving the AER the power to develop a Hardship Guideline should be separate from the existing Rule 75.

Concessions

One of the minimum requirements for customer hardship policies under the Retail Law, is the requirement that retailers have processes for identifying appropriate government concession programs and that they notify hardship customers of those programs.¹⁶⁹ Although a consideration of the broader issues associated with hardship are outside the scope of this report, the issues around the application of concessions for vulnerable consumers are of central importance in providing effective supports.

In its 2015 and 2017 Hardship Reviews, the AER indicated that issues with concessions should be addressed to improve their effectiveness.¹⁷⁰ In 2017, the AEMC recommended that jurisdictions review their concessions schemes with a view to harmonisation.¹⁷¹ Since then, the New South Wales Auditor General released a report on the New South Wales energy rebates for low income households. Some of the key findings of that report were that:¹⁷²

- *The structure of schemes for ongoing support is complex with different application processes for different types of rebates.*
- *The design of the rebates schemes creates some inequities and households can receive different levels of support based on who holds the account, whether they have gas and electricity, and for rural customers with high distribution cost components.*
- *Because of the variability of concessions schemes across jurisdictions many retailers find it difficult to provide accurate information to households.*

The AEMC has attached a Table to its 2018 *Retail Energy Competition Review* which outlines the different concessions and rebates available in each jurisdiction.¹⁷³ The Table illustrates the complexities associated with concessions across the NEM. There are a variety of concessions

¹⁶⁹ Section 44(d) of the Retail Law

¹⁷⁰ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. 187

¹⁷¹ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. 187

¹⁷² New South Wales Auditor-General, *New South Wales Auditor-General's Report - Performance Audit - Energy rebates for low income households - Department of Planning and Environment*, Audit Office of New South Wales, 2017, Sydney.

¹⁷³ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. 238

available in each jurisdiction, a variety of consumers who may be eligible for concessions, different values and calculations of rebates and different ways of applying for rebates (either through a retailer or through a government department). In most cases customers apply for rebates and concessions schemes through their retailer, who then administers the payments.¹⁷⁴

In South Australia, application and administration of all rebates is done through the South Australian Government, which provides a single Energy Concession to assist eligible customers¹⁷⁵ with electricity, and if applicable, mains gas or LPG costs. The rebate is currently capped at \$217.90 per annum. The AER's performance data indicates that only 39 per 100 electricity customers on hardship programs in South Australia receive concessions, whereas 78 per 100 in Tasmania receive concessions.

The AEMC has noted that the administration of concessions by the South Australian state government, as opposed to the retailer, 'can create delays for customers who switch retailers. These customers can only reapply to the government for the concession after they have received their first bill from the new retailer. This may act as a barrier to switching, by discouraging vulnerable customers from changing retailers'.¹⁷⁶

In addition, the South Australian Energy Bill concession does not take account of differences in household consumption. As SACOSS noted in its cost of living policies,¹⁷⁷ 'once a household qualifies for the concession (based on their income) the concession is paid at the same rate regardless of the energy consumption of the household. Accordingly, a family with two children may in practice receive the same concession relief as a single person household, despite having larger consumption needs and consequently higher energy bills'.

SACOSS has therefore called for the modernisation of the energy concession in South Australia, so it is paid as a percentage of the customer's bill (a percentage based concession).¹⁷⁸

In addition, Uniting Communities has identified gaps in the eligibility for concessions for recipients of a Health Care Card- Family Allowance (HCC-FA) through its financial counselling work. Currently, these Health Care Card recipients are not eligible to receive the concession as they have the 'wrong' Health Care Card, even though their income **falls below** that required to receive the Health Care Card – Low Income (HCC-LI) which is the 'right' Health Care Card.

SACOSS submits a review of the South Australian concession scheme, in line with the recommendation of the AEMC, is needed to ensure vulnerable energy consumers are able to access adequate supports. The need for consistency across retailers and jurisdictions is a central theme throughout the various reviews and reports undertaken by the AER, AEMC and ACCC. SACOSS considers that the issue of the complexity and inadequacy of concessions for vulnerable consumers should be addressed as a priority issue.

¹⁷⁴ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. 186

¹⁷⁵ Eligibility includes recipients of a government concession card (Pensioner Concession Card, Low Income Health Care Card, Gold Card from the Department of Veterans Affairs) as well as recipients of various Centrelink payments, including Austudy, Newstart and Sickness Allowance. The concession is also extended to residents of residential parks who are billed by the park operators.

¹⁷⁶ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. 186

¹⁷⁷ SACOSS, Utilities Cost of Living Policies, SA State Election 2018, p.8

https://www.sacoss.org.au/sites/default/files/Cost%20of%20Living%20Policies_FINAL.pdf

¹⁷⁸ SACOSS, Utilities Cost of Living Policies, SA State Election 2018, p.8

AER's compliance and performance regime

Background - Compliance and Performance of Retailers

Part 12 of the Retail Law deals with the Compliance and Performance of 'regulated entities' in the NEM. Regulated entities are defined under section 2 of the Retail Law to mean a 'retailer or distributor or any other person defined in the Rules as a regulated entity'.¹⁷⁹ This report is focussed on the obligations imposed on retailers, and will therefore reference retailers where the Law refers to regulated entities.

This section of our report will outline the compliance and performance regime under the Retail Law, including the obligations imposed on retailers and the AER. Of particular relevance to this report are the recent amendments contained in the AER's (*Retail Law*) *Performance Reporting Guidelines*, April 2018 Version 3 (Performance Reporting Guidelines) of performance indicators relating to customers experiencing payment difficulties, disconnections and hardship customers. SACOSS is hopeful these new and amended indicators will provide a clearer picture of the dynamics of the retailer/customer relationship, and how that is driving consumer outcomes.¹⁸⁰

AER's Compliance Regime

Division 1 of Part 12 of the Retail Law outlines the AER's compliance regime, including the AER's obligations and the obligations of retailers. Included in these obligations is the requirement that retailers establish arrangements to monitor compliance, and provide information and data to the AER in the manner and form required by the AER's *Compliance Procedures and Guidelines* (Compliance Guidelines).¹⁸¹ A breach of this section by a retailer may attract a civil penalty.¹⁸²

The Compliance Guidelines enable the AER to monitor the extent to which the retailers have complied with obligations under the Retail Law and Retail Rules, and also to identify emerging or systemic compliance issues that may indicate further work is required to address those issues.

The AER recently conducted a compliance audit of five energy retailers with respect to the provisions under the Retail Law and Rules relating to disconnections. The audit results were published on 19 June 2018. Interestingly, the audit found that AGL had **not complied** with provisions under the Retail Rules relating to disconnection¹⁸³, and additionally found AGL had 'instances of partial compliance and non-compliance with the requirements on retailers to report to the AER under the Compliance Guidelines'.¹⁸⁴

The Compliance Guidelines are binding on retailers, a failure to comply with the Guidelines may result in the AER using its investigation and enforcement powers.¹⁸⁵ It will be interesting to see whether the AER uses its enforcement powers against AGL, in relation to AGL's non-compliance.

¹⁷⁹ Section 2 of the Retail Law

¹⁸⁰ SACOSS Report, November 2016, p.41

¹⁸¹ Sections 273 and 274 of the Retail Law

¹⁸² See civil penalty provision section 308 and section 289 of the Retail Law

¹⁸³ Rules 111, 115 and 116 of the Retail Rules

¹⁸⁴ AGL Energy, retail audit fact sheet

<https://www.aer.gov.au/system/files/AGL%20audit%20summary%20sheet.PDF>

¹⁸⁵ Including, for example, infringement notices, compliance audits, enforceable undertakings and civil proceedings – see Part 13 of the Retail Law

The Compliance Guidelines were last amended by the AER in December 2017 to improve the layout and functionality of the reporting template. On 18 June 2018, the AER released a Notice of Draft Instrument containing proposed amendments to the Compliance Procedures and Guidelines, with submissions from stakeholders due by 17 July 2018. In addition to amending the Compliance Guidelines to incorporate the AEMC's recent changes to the National Electricity Rules (NER) and the Retail Rules, the AER is proposing amendments that seek to 'refine the reporting framework to ensure it remains consistent with the AER's compliance objectives' and improve the quality of reports submitted by retailers.¹⁸⁶

AER's Performance Regime

Division 2 of Part 12 of the Retail Law outlines the AER's performance regime, including the obligation on retailers to submit information and data required by the Performance Reporting Guidelines. A failure of the retailer to comply with its reporting obligations as contained within the Performance Reporting Guidelines may attract a civil penalty.¹⁸⁷

The Performance Reporting Guidelines provide guidance to retailers about measuring their performance against the hardship program indicators, as well as any additional matters that the AER intends to include in its retail market performance reports.¹⁸⁸ The AER uses the data provided by the retailers to prepare their Annual Retail Market Performance Reports.¹⁸⁹

As outlined earlier in this report, the Retail Law also requires the AER to determine and publish hardship program indicators in accordance with the Retail Rules¹⁹⁰ and gives the AER the power to conduct performance audits in respect of the performance of retailers by reference to the hardship program indicators.¹⁹¹

Rule 75 of the Retail Rules deals with Hardship Program Indicators, and provides that these indicators must cover the following:

- entry into the hardship program
- participation in the hardship program
- assistance available to and assistance provided to customers under customer hardship policies.

Importantly, the Retail Law imposes a specific obligation on retailers to provide data to the AER relating to the performance of the retailer **against the hardship indicators**,¹⁹² as required by the AER Performance Reporting Guidelines. The hardship program indicators have recently been amended by the AER and are currently contained in Schedule 4 of the Performance Reporting Guidelines.

As covered earlier in this report, rule 75 is currently the subject of a Rule Change request by the AER to the AEMC. If made, the rule change would require the hardship program indicators be published

¹⁸⁶ AER, Notice of Draft Instrument: Amendments to AER Compliance Procedures and Guidelines, 18 June 2018, p. 2

¹⁸⁷ Section 282(1) of the Retail Law

¹⁸⁸ Section 286 of the Retail Law

¹⁸⁹ Section 282 of the Retail Law

¹⁹⁰ Section 287(1) of the Retail Law

¹⁹¹ Section 283 of the Retail Law

¹⁹² Section 282(1)(a) of the Retail Law

in the AER's proposed Hardship Guideline, and not in the Performance Reporting Guidelines as is currently the case. Currently performance indicators relating to customers experiencing payment difficulties, disconnections and hardship customers are all contained within the Performance Reporting Guideline. The information obtained from the indicators in all three categories informs the overall picture of the effectiveness of supports for customers experiencing payment difficulties, and therefore SACOSS considers that the reporting indicators for disconnections, customers experiencing payment difficulties and hardship customers should continue to reside in the same document.

AER's Annual Retail Market Performance Report

Section 284 of the Retail Law requires the Australian Energy Regulator (AER) to publish a retail market performance report each year in respect of the previous 12 month period ending with 30 June in that year.¹⁹³ The report covers states and territories where the Retail Law applies; these include Tasmania, the ACT, South Australia, New South Wales and Queensland. The analysis of energy affordability in the report also includes Victoria, as part of the National Electricity Market (NEM).

Importantly, for our purposes, the Retail Law and Rules require the AER to publish information and statistics on:

- the handling of customers experiencing payment difficulties (distinguishing hardship customers and other residential customers experiencing payment difficulties)¹⁹⁴
- de-energisation of premises for non-payment (distinguishing between hardship customers and other residential customers on payment plans), and re-energisation of those premises¹⁹⁵
- concessions for customers where retailers administer the delivery of concessions to customers.¹⁹⁶

The AER's most recent Annual Report on Compliance and Performance of the Retail Energy Market 2016-17 (the AER's Performance Report) was published on 22 November 2017, and for the first time addressed performance, affordability and compliance outcomes together in one report.¹⁹⁷

The information, statistics and analysis published in the AER's 2016-17 Performance Report raise key findings that provide useful indicators of the broader issues facing customers. As AER's Chair, Paula Conboy noted in the foreword to the most recent report:

*'the report yields concerning figures: rises in energy debt levels, a fall in the number of customers successfully exiting hardship programs, and higher overall electricity disconnections'.*¹⁹⁸

¹⁹³ Section 284 of the Retail Law

¹⁹⁴ Section 285 of the Retail Law; Rule 167 (1)(b) of the Retail Rules

¹⁹⁵ Section 285 of the Retail Law; Rule 167(1)(c), 167(1)(d), 167(1)(e) of the Retail Rules

¹⁹⁶ Section 285 of the Retail Law; Rule 167(1)(f) of the Retail Rules

¹⁹⁷ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17 <https://www.aer.gov.au/system/files/AER%20Performance%20Report%20on%20Compliance%20%26%20Performance%20of%20the%20retail%20energy%20market%202016%E2%80%9317.pdf>

¹⁹⁸ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.2

However, the data collected has been insufficient to provide a clear picture of how effective the supports for all customers experiencing payment difficulties are in practice, and how individual retailers deal with customers experiencing payment difficulties (including hardship customers).

In recognition of increasing concerns around energy affordability and hardship, the AER has amended the Performance Guidelines to capture further information about customers experiencing payment difficulties (including in relation to payment plans, hardship programs and referrals to collections agencies).¹⁹⁹ This additional information will provide greater insight into the challenges facing customers experiencing payment difficulties in South Australia, and the effectiveness of the supports made available to those customers by retailers.

The amendments made by the AER, and the importance of those amendments in informing and supporting the AER's reporting and compliance functions, are outlined in further detail below. It is worth repeating that a failure to comply with the Performance Guidelines may attract a civil penalty. Further, it is a serious offence to give information to the AER knowing it to be false or misleading or omitting any matter or thing without which the information is misleading.²⁰⁰

Version 3 of the AER (Retail Law) Performance Reporting Procedures and Guidelines (Performance Reporting Guidelines)

Overview

Version 3 of the Performance Reporting Guidelines was released in April 2018, and **will commence on 1 January 2019** (or the commencement of Quarter 3 of 2018-19). The previous version of the Performance Reporting Guidelines came into effect on 1 July 2012. Version 3 reflects the significant changes that have taken place in the retail energy market in the six years since the commencement of the previous guidelines.

The AER has made some important amendments to the Performance Reporting Guidelines in order to capture the roll out of smart meters which commenced on 1 December 2017, as well as to obtain further information from retailers to provide greater transparency around affordability issues.²⁰¹ The information that will be obtained by the AER as a result of the amendments to the Guidelines will not only provide greater insight into the effectiveness of supports provided to customers experiencing payment difficulties, but it will also assist with enforcing retailer obligations under the Retail Law and Retail Rules.

The Performance Reporting Guidelines are divided into 5 Schedules:

- Schedule 1 contains a glossary and general reporting conventions.
- Schedule 2 contains the reporting requirements to inform the retail market overview.

¹⁹⁹ AER, Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.3

²⁰⁰ *Criminal Code Act 1995* (Cth) - if found guilty of such an offence, a penalty may be imposed under the *Crimes Act 1914* (Cth).

²⁰¹ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.16

- Schedule 3 contains the information and data required to inform the Retail market activities report, including handling customers experiencing payment difficulties, disconnections and reconnection indicators and information.²⁰²
- Schedule 4 contains the Hardship Program Indicators.
- Schedule 5 is set aside to deal with distribution service standards, associated GSL schemes and small claims compensation regimes, but no reporting requirements have been imposed at this time.

SACOSS notes that the Performance Reporting Guidelines apply to retailers of both electricity and gas. Given the focus of this report is on electricity customers, all references in this report are to the reporting obligations on electricity retailers; however it is worth clarifying that all indicators mentioned apply equally to gas retailers.

This Report will outline the relevant changes and additions contained in **Schedule 3** and **Schedule 4** of Version 3 of the AER's Performance Reporting Guidelines.

Schedule 3 of the Performance Reporting Guidelines – handling customers experiencing payment difficulties

The new reporting requirements contained in Schedule 3 of Version 3 of the Performance Reporting Guidelines relating to the handling of customers dealing with payment difficulties, will provide greater detail than is currently available about affordability issues facing energy customers.

The reporting requirements contained in Schedule 3 are of particular importance as they capture information about customers who are experiencing payment difficulties, but **are not on hardship programs**. As the AER have recognised, the need for early intervention when addressing customer debt and inability to pay is paramount; a greater insight into how customers are repaying debt, what customers can afford and what happens when a customer is unable or does not repay energy debt is critical to understanding the effectiveness of supports provided by retailers to customers in experiencing payment difficulties.²⁰³ A lack of support by retailers at an early stage may result in the escalation of debt to an unmanageable level, creating a greater burden on customers.

For the purpose of understanding the impact of the new and amended reporting requirements, it is useful to repeat the definition of 'energy bill debt' and 'payment plans' as contained in Schedule 3 of the Performance Reporting Guidelines:

Energy bill debt is defined in Schedule 3 of the Performance Reporting Guidelines as:

'the dollar amount owed to the retailer for the sale and supply of gas or electricity, excluding other services, which has been outstanding to the energy retailer for a period of 90 calendar days or more. An amount owing after the final bill has been issued by a retailer to a customer

²⁰² Schedule 3 also contains indicators relating to concessions where the concession is administered by the retailer - in South Australia both primary concessions and emergency relief are approved and administered by the government

²⁰³ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.16

*on termination of a customer contract (e.g. where a customer changes retailer) should not be counted as energy bill debt’.*²⁰⁴

Payment Plans are defined in Schedule 3 as:

*‘a plan for a residential customer experiencing payment difficulties to pay a retailer by periodic instalments, any amount payable by a customer. A payment plan must only include an arrangement (oral or in writing) in which the customer is paying off an arrears component (of any overdue amount) and must consist of at least three instalments. Customers using flexible payment arrangements for convenience or budgeting purposes must be excluded for the purposes of ‘payment plan’ reporting’.*²⁰⁵

Indicator S3.16 Nature of Payment Plan – fortnightly amounts (amended)

This indicator has been amended to require retailers to submit the total number of customers (excluding hardship customers) on payment plans on a quarterly basis for electricity **residential and small business** customers paying:

- i. less than \$50 per fortnight*
- ii. \$50 to less than \$100 per fortnight*
- iii. \$100 to less than \$200 per fortnight*
- iv. \$200 or more per fortnight.*

The AER indicated the amounts are based on an assumption that a standard customer will spend on average (based on annual median bills) \$66 per fortnight on a market electricity offer and \$79 per fortnight on a standing electricity offer.²⁰⁶ The information obtained from this indicator will help with ‘benchmarking how customers with payment plans are managing their ongoing energy costs’.²⁰⁷

Some retailers expressed concern about the inclusion of small business customers in this reporting requirement. However, the AER indicated that the Sustainable Payment Plan Framework (SPPF) may apply to small business customers, and the AER is seeking to collect information about the types of payment plans these customers enter into.²⁰⁸ This information will be useful to gain an insight into whether retailers are complying with the SPPF, where they have signed up to do so.

There was also retailer concern about the requirement to report on **fortnightly payment** amounts, when some customer’s repayment of debt is varied and not necessarily repaid fortnightly. The AER appreciated that unique payment options may be offered to customers, but held firm on requiring retailers to calculate fortnightly amounts for customers that pay weekly or monthly.

²⁰⁴ AER (Retail Law) Performance Reporting Procedures and Guidelines, Version 3, April 2018, p.18

²⁰⁵ AER (Retail Law) Performance Reporting Procedures and Guidelines, Version 3, April 2018, p.18

²⁰⁶ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.16

²⁰⁷ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.16

²⁰⁸ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.22

Indicator S3.19 Number of Residential customers that have energy bill debt (New)

This is a new indicator requiring retailers to report (quarterly) the total number of electricity customers (not on a hardship program) who have **accrued an energy bill debt** as at the last calendar day of the reporting period:

- i. over \$1000 but less than \$1500 where the debt is more than 12 months old but less than 24*
- ii. over \$1000 but less than \$1500 where the debt is more than 24 months old*
- iii. over \$1500 but less than \$2500 where the debt is more than 12 months old but less than 24*
- iv. over \$1500 but less than \$2500 where the debt is more than 24 months old*
- v. over \$2500 where the debt is more than 12 months old but less than 24*
- vi. over \$2500 where the debt is more than 24 months old.*

The intent of this indicator is to provide an insight into how customers manage debt with the assistance of the retailer **outside of the hardship program**.

The Energy and Water Ombudsman of NSW (EWON) supported the inclusion of this indicator in the Procedures and Guidelines as it 'may encourage retailers to focus on more pro-active management of customers with aged debt' and will also provide a 'breakdown to show the number of customers experiencing particular levels of debt'.²⁰⁹ SACOSS agrees with EWON, and reiterates the importance of retailers offering early and effective assistance to customers experiencing payment difficulties before energy debt becomes unmanageable.

Retailers are under a legal obligation to assist customers experiencing payment difficulties where the retailer **believes** 'the customer is experiencing repeated difficulties in paying the customer's bill or requires payment assistance'.²¹⁰ Information on the age and level of debt experienced by customers is a clear indicator of customers experiencing difficulty paying their bill. In circumstances where the customer has an aged debt that is in any of the reporting sub-categories above, it would be difficult for a retailer to argue that it did not **believe** the customer was having difficulty paying their bill or required payment assistance. The AER may therefore have access to information that would support the use of its enforcement powers, leading to greater compliance with the Retail Law and Retail Rules.

Despite retailer objections regarding the complexity of this reporting requirement, the AER has determined to include the indicator in the Performance Reporting Guidelines.

Indicator S3.21 Number of residential customers that have missed one or more pay on time (or conditional) discounts as a result of late payment (New)

This is a new indicator requiring retailers to submit (quarterly) the total number of residential and small business electricity customers that have missed receiving pay on time (or conditional) discounts due to making a late or missed payment, during the reporting period.

²⁰⁹ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.24

²¹⁰ Section 50(1)(b) of the Retail Law

The intention of this indicator is to capture the number of customers who have missed an automated discount. This data will also inform analysis on the Australian Energy Market Commission and ACCC's work on pay on time discounts.

The AEMC has recently supported a rule change request by the Honourable Josh Frydenberg MP, Minister for Environment and Energy on behalf of the Australian Government to 'prevent the practice of applying discounts to rates that significantly exceed the base rate as represented by the retailer's standing offer'.²¹¹ The AEMC determined to strengthen the existing regulatory framework by making the required changes to the Retail Rules and adding a civil penalty provision²¹² to the AER's Retail Pricing Information Guideline, both measures are intended to work in tandem with existing Australian Consumer Law (ACL).

The AER stated in support of the new indicator that 'given the increasing issues in the types of contracts offered to customers, including pay on time and conditional discounts, there is a significant need to understand how customers may be impacted by taking up one of these offers only to miss out on the benefit where payment is not met on time'.²¹³

Retailers expressed concern about the new indicator stating that it was complicated and they would be unable to do automated reports of the data required. However, the AER decided to include the indicator in the final version, acknowledging the complexities, but reiterating the importance of the data in providing a greater insight into the effectiveness of pay on time discounts and the actual benefit they serve.

SACOSS supports this indicator and suggests that it may focus retailers on ensuring the appropriateness and manageability of the contracts offered to customers taking into consideration individual customer circumstances.

Indicator S3.26 Number of Residential customers who have been referred to an external credit collection agency for the purposes of debt recovery (New)

This is a new indicator that requires retailers to submit the total number of **current or previous** residential customers during the (quarterly) reporting period who were referred to an external credit collection agency for the purposes of debt recovery for electricity bill debt.

This indicator will assist with understanding what happens to customers who are unable to pay their bills. The AER stated that 'given the increasing levels of debt held by customers, increasing number of customers being excluded from participating in hardship programs, and the reported drop in customers successfully completing hardship programs, there is a need to understand the impact of customer credit collection activity by retailers'.²¹⁴

²¹¹ AEMC, Rule Determination: National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018, 15 May 2018 p.i https://www.aemc.gov.au/sites/default/files/2018-05/Final%20determination_1.pdf

²¹² Allowing the AER to issue infringement notices with penalties of up to \$20,000 (for a body corporate) per breach

²¹³ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.25

²¹⁴ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.18

The AER is seeking to gain greater insight into the full impact of hardship issues affecting customers. The AER noted that credit collection activity is often the final step in the debt management process, and having an understanding of the numbers of customers referred to credit agencies as a result of unpaid debt will provide greater insight into how customers are affected by electricity debt.

The original version of this indicator proposed by the AER in the Draft Guideline required retailers to report on the **category** of customers affected by credit collection activity.²¹⁵ It proposed the retailers provide data on the number of customers **not** on payment plans or hardship programs who were referred to an external credit collection agency, as well as data on the number of customers who were on payment plans or hardship programs and who were referred to an external credit collection agency. This information would have been useful to provide a greater insight into the effectiveness of payment plans and hardship programs in supporting customers to repay debt. SACOSS is disappointed the AER decided to remove the sub-categories and collect only high level numbers of 'residential customers' referred to credit agencies.

The AER did amend the original indicator to include 'current or previous' residential customers, as opposed to just 'residential customers', in order to capture information on customers whose accounts have been closed by the retailer ahead of credit collection activity.²¹⁶ SACOSS supports the inclusion of 'current or previous' residential customers in the final indicator, and agrees with EWON that information collected as a result of this indicator will provide insight into the compliance of retailers with the SPPF (which includes the management of customers with inactive accounts).²¹⁷

It is worth noting (as outlined earlier in this report) the requirement in Section 51 in Division 7 of the Retail Law which states that 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 (our emphasis):

- *the customer continues to adhere to the terms of a payment plan or other agreed payment arrangement, or*
- *the retailer **has failed to comply with the requirements of:***
 - *its customer hardship policy in relation to that customer or this law and the Rules relating to non-payment of bills, **payment plans and assistance to hardship customers or residential customers experiencing payment difficulties.***

Indicator S3.27 Number of residential customers who have been referred to an external credit collection agency for the purposes of debt recovery – amount of debt (New)

This is a new indicator requiring retailers to submit the total number of **current or previous** residential customers during the (quarterly) reporting period who were referred to an external credit collection agency for the purposes of debt recovery, where the energy bill debt is:

i. up to \$500

²¹⁵ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.18

²¹⁶ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.26

²¹⁷ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.26

- ii. over \$500 but less than \$1500*
- iii. over \$1500 but less than \$2500*
- iv. over \$2500.*

The AER states that it is important to understand the **level of debt** at which customers are referred to an external credit agency for the purposes of debt recovery.²¹⁸ SACOSS supports this new indicator as the information provided will assist with gaining a greater understanding of the impact of energy debt on customers, and the individual practices of retailers in supporting customers experiencing payment difficulties.

Indicator S3.28 Number of residential customers who have been credit defaulted – credit rating (New)

This is a new indicator requiring retailers to submit the total number of current or previous residential customers during the (quarterly) reporting period who were referred to a credit collection agency, or through an internal credit collection process, for the purposes of debt recovery, for each of the following:

- i. where a credit default was applied against their name for debt associated with the retailer*
- ii. where a credit default listing was reversed for the debt associated with the retailer.*

For the purposes of the indicator:

- *if a customer has been defaulted for multiple debts each must be recorded separately*
- *if a customer has had separate listings reversed, each must be recorded separately.*

This new requirement is intended to provide a clear indication of the number of customers who suffer long-term negative repercussions as a result of not paying their energy debt.²¹⁹

The AER notes that some retailers may need to seek information from third parties where the debt has been sold, but considers this is a reasonable requirement, and SAOCSS agrees. SACOSS strongly supports this new requirement, and agrees with EWON that reporting on amounts customers are credit listed for may help to:

- guide regulation on fair and reasonable amounts for credit default listing
- provide further insight into the practices of retailers and their management of these customers and their debts, and
- provide industry wide insight into the practices of credit listing and its impact on customers.²²⁰

EWON's position is that customers should not be credit listed for a debt under \$300, which is equal to the amount that the AER sets as the minimum threshold below which a customer cannot be disconnected. EWON's experience is that customers are still often denied credit by financial

²¹⁸ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017 p.18

²¹⁹ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017 p.18

²²⁰ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.29

institutions even where the debt is paid as soon as the customer becomes aware of it and the credit listing is updated as paid (even in circumstances where the failure to pay was as a result of the retailer failing to inform the customer of unpaid balances on their accounts).²²¹

Schedule 3 – De-energisation (disconnection) and re-energisation (reconnection)

South Australia had the highest rate of electricity customers disconnected for non-payment of electricity bills. For the fifth successive year, over 10 000 electricity customers were disconnected for non-payment in South Australia.²²² The experience of disconnection has severe adverse impacts on households and can cause significant social harm.²²³ A 2013 report by the Public Interest Advocacy Centre (PIAC) found that ‘a range of impacts resulted from disconnection, most commonly anxiety and emotional disorders, loss of food and an inability to wash. These impacts were compounded the longer the disconnection’.²²⁴

Through its performance reporting, the AER found that in 2016-17 four large retailers in South Australia (Momentum Energy, EnergyAustralia, Origin Energy and Simply Energy) disconnected a smaller proportion of customers than in 2015–16. However, these decreases were offset by increases in the rate of disconnections by Alinta Energy, which increased to more than 6 per 100 customers, being the highest number for a South Australian retailer.²²⁵

The supply of electricity is an essential service and it is widely accepted that disconnections **must** be seen as a last resort by retailers, particularly when those retailers are assisting a customer with managing their debt. The Retail Rules are clear about the limited circumstances in which a hardship customer, or a customer who has informed the retailer that they are experiencing payment difficulties, can be disconnected for not paying a bill.²²⁶

The AER has amended two indicators relating to disconnection in the Performance Guidelines and has introduced one new indicator.

Indicator S3.36 Number of customers disconnected for non-payment (amended)

This indicator requires retailers to submit the total number of customers during the (now quarterly) reporting period disconnected for non-payment for each of the following:

- ii. small business customers*
- iii. hardship program customers*
- iv. energy concession customers*

²²¹ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.28

²²² AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.48

²²³ St Vincent de Paul Society and Alvis Consulting, Households in the Dark: Mapping electricity disconnections in South Australia, Victoria, New South Wales and South East Queensland, May 2016, p.10

<https://www.vinnies.org.au/content/Document/VIC/2016-June-Households-in-the-dark2.pdf>

²²⁴ PIAC, Cut Off III: the social impact of utility disconnection, 14 April 2013, p.ii https://www.piac.asn.au/wp-content/uploads/13.04.14_final_report.pdf

²²⁵ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.44

²²⁶ Rule111(2) of the Retail Rules

- v. residential customers who have been on a payment plan in the previous 12 months*
- vi. residential customers who have been disconnected for non-payment on more than one occasion in the previous 24 months.*

This indicator has only been slightly amended to include the words ‘disconnection for non-payment’ and to provide for quarterly reporting as opposed to monthly. The reporting required by this indicator has provided useful insights into the patterns of disconnection, and the potential effectiveness of hardship programs in limiting disconnection. For example, in the AER’s 2016-17 Performance Report it was noted that the proportion of people disconnected while on a hardship program remained very low (less than 1 per cent of disconnections), but there were increases in other categories, such as disconnections of customers who had previously been on a payment plan.²²⁷ The number of disconnections for non-payment is essential information that ‘may be analysed alongside hardship program and energy debt statistics to provide an indication of how retailers meet their obligations to help customers manage their debt while ensuring that customers continue to receive an energy supply’.²²⁸

The AER’s analysis usefully indicates that the ‘continuing low disconnection rates for hardship customers clearly highlights the benefit of customers proactively discussing their payment difficulties with their retailer and negotiating a sustainable approach to repaying debt’.²²⁹ SACOSS agrees and believes this reinforces the importance of gaining further insight into the processes around the proactive identification of hardship customers by retailers, and the consequent access to hardship supports for customers experiencing payment difficulty.

This indicator will assist with providing further information on the manner in which retailers deal with customers experiencing energy debt (a clear indicator of payment difficulties) but who are not on a hardship program, as detailed in the indicators discussed above.

Indicator S3.37 Number of customers reconnected within 7 days of disconnection (amended)

This indicator requires retailers to submit the total number of customers during the (quarterly) reporting period reconnected in the same name and address within seven days of disconnection for non-payment for each of the following:

- i. residential customers*
- ii. small business customers*
- iii. hardship program customers*
- iv. energy concession customers*
- v. residential customers who have been on a payment plan in the previous 12 months*
- vi. residential customers who have been disconnected for non-payment on more than one occasion in the previous 24 months.*

²²⁷ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.49

²²⁸ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.44

²²⁹ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.49

This indicator has been amended to include an additional sub-category that highlights the number of multiple disconnections. This will provide a greater insight into the experiences of customers facing repeated difficulty in paying their bills, and also brings the indicator into line with the sub-categories in S3.36.

Indicator S3.39 Total number of customers with debts at time of disconnection (New)

This is a new indicator requiring retailers to submit the total number of customers disconnected for non-payment during the reporting period with debts in the following ranges at the time of disconnection for each of the following:

- a) *Electricity residential customers*
 - i. *less than \$500*
 - ii. *over \$500 but less than \$1500*
 - iii. *over \$1500 but less than \$2500*
 - iv. *more than \$2500.*
- b) *Electricity small business customers*
 - i. *less than \$500*
 - ii. *over \$500 but less than \$1500*
 - iii. *over \$1500 but less than \$2500*
 - iv. *more than \$2500.*

The AER's intention is this indicator will provide further detail on the effectiveness of the disconnection process and the way that it interacts with customers who have been on payment plans.²³⁰

EWON supports the inclusion of this new indicator in the Performance Reporting Guidelines, noting that it will provide greater insight into the amount of debt customers carry when they are disconnected. EWON is particularly interested in the data collected informing the AER's decision-making around the minimum disconnection amount of debt, which is currently \$300, given EWON has previously recommended the minimum amount of debt be raised due to higher energy prices resulting in more quarterly bills being greater than \$300.²³¹ SACOSS supports EWON's comments, and considers this indicator will cast a light on the practices of retailers, with a view to ensuring retailers are complying with their disconnection obligations under the Retail Rules.

Schedule 4 – Hardship Program Indicators

Retailers are required to maintain and implement hardship policies under the Retail Law.²³² This is a key protection for customers under the NECF. As covered earlier in this report, the Retail Law provides that the purpose of a retailer's hardship policy is to 'identify residential customers experiencing payment difficulties due to hardship and to assist those customers to better manage their energy bills on an ongoing basis.'²³³

²³⁰ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017 p.21

²³¹ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.31

²³² Section 43(2)(c) of the Retail Law – this subsection is a civil penalty provision

²³³ Section 43(1) of the Retail Law

The Retail Law requires the AER to publish Hardship Program Indicators,²³⁴ and also provides that the AER may conduct performance audits in respect of the performance of retailers by reference to the Hardship Program Indicators.²³⁵ The Retail Law specifically requires retailers to submit information and data to the AER relating to the performance of the retailer against the Hardship Program Indicators.²³⁶ If the retailers fail to submit the required data, they may attract a civil penalty.

The Hardship Program Indicators are the reporting method by which the effectiveness of the retailers' hardship policies can be assessed. The AER has recognised that more transparency around the manner in which retailers are implementing their hardship policies is required in order to explain the decreasing numbers of customers successfully completing hardship programs.²³⁷

Although South Australia had the highest rate of electricity and gas customers on hardship programs, these numbers have decreased from 2015–16. Electricity customers receiving hardship assistance fell from 1.8 to 1.5 per 100.²³⁸ Decreases in AGL and EnergyAustralia's proportion of hardship customers for both fuel types contributed to the state-wide fall, off-setting increases from Alinta Energy, Momentum Energy and Origin Energy.²³⁹

Earlier in this report, SACOSS outlined the AER's rule change proposal which would, if made, result in the hardship program indicators being published in the proposed Hardship Guideline. As noted earlier, SACOSS supports the indicators remaining in the Performance Reporting Guidelines.

There are 16 Hardship Program Indicators in Schedule 4 of the Performance Reporting Guidelines. The AER has included four new indicators, and has amended eight indicators. These additions and amendments are outlined in more detail, below.

Indicator S4.1 Number of customers on a retailer's hardship program (amended)

This indicator requires retailers to submit the total number of customers on a retailer's hardship program as at the last calendar day of the reporting period for electricity hardship customers. The indicator has been amended to require retailers to report quarterly, as opposed to monthly.

Indicator S4.2 Type of contract for hardship program customers (New)

This is a new indicator requiring retailers to submit the total number of hardship customers as at the last calendar day for the (quarterly) reporting period for each of the following:

- a) Electricity hardship customers*
 - i. on a standard retail contract*
 - ii. on a market retail contract.*

²³⁴ Section 287 of the Retail Law

²³⁵ Section 283 of the Retail Law

²³⁶ Section 282(1) of the Retail Law

²³⁷ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.22

²³⁸ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.33

²³⁹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.33

The AER is hoping the data collected from this indicator will provide detail about whether retailers are working with hardship customers to find rates, tariffs, terms and conditions that are more beneficial to customers and better suit their circumstances.²⁴⁰

The importance of retailers proactively offering hardship customers appropriate market contracts cannot be overstated. The potential saving from switching from the median electricity standing offer to the cheapest market offer varies widely from jurisdiction to jurisdiction, ranging from \$169 for a low income household in South East Queensland to \$735 for a middle income household in South Australia.²⁴¹

The AER's analysis showed that for 2016-17 year, electricity bills for a low income household on a market offer increased across all jurisdictions.²⁴² For a low income household, the annual electricity bill for the median market offer was \$1427 (\$1318 with a concession). This is 6 per cent of annual disposable income, or 5.5 per cent with a concession.²⁴³

EWON supports this new indicator, stating that it will provide useful insight into the number of hardship customers who are able to access the competitive market.²⁴⁴ Gaining insight into retailers' practices in this regard will be useful in informing regulatory developments to deliver more affordable energy and provide customers with more control over their energy bills.²⁴⁵

Indicator S4.4 Levels of debt of customers entering the hardship program (amended)

This indicator requires retailers to submit the total number of customers who entered the hardship program during the reporting period, with an electricity bill debt in the following ranges:

- i. less than \$500*
- ii. over \$500 but less than \$1500*
- iii. over \$1500 but less than \$2500*
- iv. over \$2500 but less than \$3500*
- v. more than \$3500.*

This indicator has been amended to include a new sub category of 'more than \$3500' in recognition of the escalating levels of debt being experienced by residential customers.

Notably, in 2016-17, the debt South Australian customers held when they **started** receiving hardship assistance increased significantly by \$326,²⁴⁶ and the proportion of customers on payment plans

²⁴⁰ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.22

²⁴¹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.59

²⁴² AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.57

²⁴³ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.75

²⁴⁴ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.32

²⁴⁵ See AEMC's Consumer Protection Action Plan <https://www.aemc.gov.au/sites/default/files/2018-05/Consumer%20Protection%20Action%20Plan.pdf>

²⁴⁶ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17 p.27

decreased.²⁴⁷ As the AER stated, ‘at a time when energy affordability is an issue, we would expect to see more customers managing their consumption and paying off energy debt under a payment plan.’²⁴⁸ This data may indicate that retailers in South Australia are failing to proactively engage with customers to manage debt before it gets out of control, leading to those customers requiring assistance via a hardship program. The AER observed that:

‘If a customer enters a hardship program with a low level of debt they have a greater chance of fully repaying their debt, and successfully completing the hardship program. Low debt levels may indicate that retailers are being more proactive in identifying customers experiencing financial issues, as well as greater awareness among customers that they should seek assistance as soon as they experience payment difficulties.’²⁴⁹

In 2016-17, customers with low debt (less than \$500) entered hardship programs mostly with Origin Energy (74 per cent), Lumo Energy (83 per cent) and Red Energy (84 per cent).²⁵⁰

Indicator S4.5 - Average debt of hardship customers (amended)

This indicator requires retailers to submit the average energy bill debt of hardship program customers, as at the last calendar day for the relevant reporting period (quarterly). This indicator was amended to ensure that the calculation of the average energy bill debt amount does **not include hardship customers in credit**.

This amendment will help to clarify the actual debt for hardship customers by removing anomalous amounts.²⁵¹

The AER did consider whether to introduce a threshold debt amount as part of this indicator, but decided that retailers should be pro-actively managing customers experiencing payment difficulties, by offering payment plans and hardship assistance where appropriate, moving customers to normal payment cycles when that assistance is no longer required.²⁵²

Indicator S4.6 - Age of debt for customers on the hardship program (New)

This is a new indicator requiring retailers to submit the age of the oldest energy debt for hardship program customer who entered the hardship program during the quarterly reporting period for each of the following categories:

- i. less than 6 months*
- ii. over 6 months but less than 12 months*
- iii. over 12 months but less than 2 years*

²⁴⁷ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29

²⁴⁸ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29

²⁴⁹ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17 p.37

²⁵⁰ AER’s Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.37

²⁵¹ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.23

²⁵² AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.33

iv. 2 years or more.

The purpose of the hardship program is to assist customers to work with retailers to manage their debt and successfully exit the program. Retailers are under a legal obligation to identify residential customers experiencing payment difficulties due to hardship and to assist those customers to better manage their energy bills on an **ongoing basis**.²⁵³

This requirement will provide key information that will shine a light on the effectiveness (or otherwise) of the support offered by retailers through their hardship programs. Very long term debt on entry into a hardship program may indicate that the retailer has failed in identifying customers with payment difficulties, and has failed to offer timely assistance to those customers. As noted by the AER, this new indicator will ‘provide critical information about customer circumstances (and experiences) in understanding if the assistance provided by retailers through their hardship program is short or long term’.²⁵⁴

The AER believes it is essential to understand how many customers are requiring long term assistance through hardship programs, and EWON states that it will promote increased pro-active management of customers with increasing arrears.²⁵⁵

Energy retailer Powershop was opposed to the inclusion of this new indicator, confusingly stating that ‘it would cost thousands of dollars per customer and there would be minimal Powershop customers as Powershop only ages debt to 180+ days’.²⁵⁶

Indicator 4.8 – Number of hardship program customers on types of payment plans (New)

This is a new indicator requiring retailers to report on the total number of hardship customers making the following categories of payment plans, as at the last calendar day of the (quarterly) reporting period:

- i. less than usage costs*
- ii. meeting usage costs*
- iii. meeting usage costs and expected to clear arrears within 12 months*
- iv. meeting usage costs and expected to clear arrears over 12 months.*

For the purposes of the indicator, ‘usage costs’ is the amount the customer is billed for usage and supply charges.

Retailers are required to work with customers to establish appropriate payment plans suited to individual customer’s circumstances. The Retail Rules require retailers to have regard to a customer’s capacity to pay, any arrears owed by the customer, and the customers expected energy

²⁵³ Section 43(1) of the Retail Law

²⁵⁴ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.23

²⁵⁵ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.33

²⁵⁶ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.33

consumption needs over the coming 12 month period when establishing payment plans.²⁵⁷ Failure to do so attracts a civil penalty.

The AER has developed the voluntary Sustainable Payment Plans Framework²⁵⁸ (SPPF) to guide retailers in their conversations with customers around the customer's circumstances and what they can afford to pay when developing a payment plan (refer to SACOSS' 2016 Report). Currently 17 retailers²⁵⁹ are signed up to the SPPF²⁶⁰, with the list of these retailers published on the AER's website. The enforceability of the SPPF has previously been questioned by SACOSS and other consumer advocates, noting that the 'effectiveness of a regime is greatly undermined if it is not enforceable'.²⁶¹

The addition of this indicator will provide useful information on the affordability of payment plans established, how manageable payment amounts are, and whether retailers that are signed up to the SPPF are adhering to the framework. In support of the addition of this indicator, EWON noted that complaints to EWON 'since the introduction of the SPPF have indicated that a number of retailers are not adhering to the framework, despite being signatories to it.'²⁶²

Indicator S4.9 – Payment methods of hardship program customers (amended)

This indicator has been amended to require retailers to submit the total number of hardship customers making payments using each²⁶³ of the following payment methods during the (quarterly) reporting period:

- a) *Payment plan (excluding those who make their payment plan payments using Centrepay)*
- b) *Centrepay*
- c) *Prepayment meter (PPM)*
- d) *Australia Post*
- e) *Direct debit*
- f) *Any other payment method.*

This indicator has been amended to include the addition of payment methods via Australia Post and Direct Debit, in order to enable the AER to better monitor the payment behaviours of hardship customers and to also monitor the costs and charges imposed by retailers on different payment methods. The AER has also indicated that understanding how hardship customers are making

²⁵⁷ Rule 72(1) of the Retail Rules

²⁵⁸ AER, Sustainable Payment Plans: a good practice framework for assessing customers' capacity to pay, Version 1 July 2016

<https://www.aer.gov.au/system/files/AER%20Sustainable%20payment%20plans%20framework%20-%20Version%201%20-%20July%202016.pdf>

²⁵⁹ <https://www.aer.gov.au/consumers/my-energy-bill/experiencing-trouble-paying-your-energy-bills>

²⁶⁰ <https://www.aer.gov.au/communication/alinta-energy-and-amaysim-adopt-the-aer%E2%80%99s-sustainable-payment-plans-framework>

²⁶¹ Consumer Action Law Centre, Submission to the AER Draft Sustainable Payment Plan Framework, 15 April 2016, p.1

²⁶² AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.34

²⁶³ The AER indicated they would change the word 'each' to 'any' in the final Performance Guidelines, but it appears they have inadvertently failed to do so

payments will assist with appropriate targeted information provision through the Energy Made Easy website.²⁶⁴

Indicator S4.10 – Number of customers entering the hardship program (Amended)

This amended indicator requires retailers to submit the total number of customers during the (quarterly) reporting period who entered the hardship program:

- i. after the customer self-identified as being in hardship*
- ii. via a financial counsellor referral (or external agent acting on behalf of the customer in a professional capacity)*
- iii. via a retailer referral.*

The AER's 2016-17 Performance Report shows that the proportion of customers receiving hardship assistance remains low, with most jurisdictions reporting less than 1 per 100 electricity and gas customers were receiving assistance. Given increasing affordability issues, it is curious that most retailers reported very little change in the numbers of customers in hardship programs, when compared with the previous year.

The data shows an increase in the number of customers being placed on payment plans across jurisdictions, which 'suggests that some retailers are placing customers on payment plans instead of hardship programs'.²⁶⁵ As outlined earlier in this report, despite having the highest number of customers in debt, the proportion of customers on payment plans and on hardship programs both decreased in South Australia during 2016-17.²⁶⁶

After consultation with stakeholders on this indicator, the AER decided to include the additional category of 'via a financial counsellor referral (or external agent acting on behalf of the customer in a professional capacity)'.

SACOSS supports the addition of this category. Stakeholder feedback has indicated that the responses of retailers to customers who self-identify as being in hardship, as opposed to customers who are referred by financial counsellors, can differ greatly. It appears that some retailers are more likely to accept customers into hardship programs where those customers have been referred by a financial counsellor or community organisation.²⁶⁷ This indicator will provide a clearer picture of retailer behaviour specifically relating to circumstances where retailers are more likely to accept customers into the hardship program.

²⁶⁴ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017, p.24

²⁶⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.33

²⁶⁶ South Australia had the highest rate of electricity customers on hardship programs, but this number had decreased from 1.8 per 100 in 2015-16 to 1.5 per 100 in 2016-17. See AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29 and p.33

²⁶⁷ Feedback from case studies compiled by Uniting Communities, and SAFCA survey

It is worth repeating the difficulty of enforcing compliance with a regulatory regime that defines a 'hardship customer' to mean 'a residential customer of a retailer who is identified as a customer experiencing payment difficulties in accordance with the retailer's hardship policy'.²⁶⁸

This definition effectively permits the retailer to subjectively define a 'hardship customer' as per its own hardship policy (noting that the policy must be approved by the AER), granting retailers the discretion to determine **access** to a hardship program on the basis of criteria each retailer has individually defined. As noted in SACOSS' 2016 Report, this allows for divergent approaches amongst retailers in the handling of customers experiencing payment difficulties due to hardship.²⁶⁹

The AER has stated that the amendments to this indicator will provide greater insight into the 'customer traffic' into and out of hardship programs, and that understanding how many customers self-identify as being in hardship may provide some insight into how willing customers are in taking steps to engage with their retailer.²⁷⁰ Whilst SACOSS agrees with the AER on this point, the indicator does require information on customers who have been **accepted into hardship programs**, it may be the case that many more people self-identify as being in hardship, but are not accepted into the program as they fail to meet the retailer's subjective hardship criteria.

Analysis from the information provided as a result of this indicator, may also assist the AER in the performance of its compliance function. Patterns may be identified in retailer behaviour (for example very few self-identified customers in hardship programs coupled with low levels of customers on payment plans) which may alert the AER to possible failure to comply with obligations under the Retail Law to offer payment plans to both hardship customers and customers experiencing payment difficulties.

Several retailers questioned the definition of 'retailer referrals' in the amended indicator, and submitted to the AER that all three categories would be 'difficult to track in operational terms',²⁷¹ given the wide variety of referral options. Simple Energy stated that:

*'there are issue with determining self-determination vs. retailer identified. Also different retailers may have a different threshold or interpretation of what constitutes this, and agents within the same retailer may interpret and record this indicator differently. Therefore consistent recording across retailers is a problem. A customer may also present their case differently to the retailer, claiming that the bill is too high when the main issue is one of affordability and determining this for the retailer is difficult to do.'*²⁷²

This statement is quoted in full as it highlights the limitations of the current regulatory framework, including the definition of 'hardship customer' in the Retail Law, as well as the inadequacy of

²⁶⁸ Section 2 of the Retail Law

²⁶⁹ SACOSS, Review of the Australian Energy Regulator's and Essential Services Commission of Victoria's Frameworks for customers experiencing payment difficulties, November 2016, pp 16-17

²⁷⁰ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017 p.25

²⁷¹ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.37

²⁷² AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.37

retailer's inconsistent hardship policies and the inconsistent application of those policies, which the AER is trying to address through its rule change request.

Simply Energy identifies issues with different retailers having different 'thresholds or interpretation' of what constitutes 'self-determination' or 'retailer identified'. One of the **minimum requirements** for a retailer's customer hardship policy under the Retail Law includes²⁷³:

- processes to identify residential customers experiencing payment difficulties due to hardship, including identification by the retailer and self-identification by a residential customer, as well as
- processes for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship

The retailers should (as they are obligated at law) have clear processes in their hardship policies that guide the retailer in proactively identifying customers experiencing payment difficulties due to hardship, and also clearly guide the retailer in dealing with self-identification.

In its recent Rule Change Request, the AER highlighted the wide range of variation in the quality of customer hardship policies, stating that 'many hardship policies lacked specific action statements to give effect to the minimum requirements under section 44 of the Retail Law and were difficult to navigate, were inconsistent and generally not clear.'²⁷⁴ If approved, this Rule change request, which is currently being considered by the AEMC, will provide the AER with the power to develop a binding Hardship Guideline, which together with the changes to the Performance Guidelines outlined in this report, are positive steps towards resolving some of the issues around inconsistent policies and application.

Indicator S4.11 – Number of customers exiting the hardship program (amended)

This indicator has been amended to require retailers to submit the total number of customers during the (quarterly) reporting period who **exited** the hardship program for each of the following:

- i. after successfully completing the hardship program or exiting with the agreement of the retailer*
- ii. as they were excluded or removed from the program for non-compliance (for example, where the customer did not make the required payments, or where they failed to contact the retailer. This should also include those hardship program customers who leave the program because they feel they are not able to meet the program requirements or payments requested by the retailer)*
- iii. switched, transferred or left the retailer.*

The information obtained as a result of this indicator will provide greater insight into the success (or otherwise) of retailer's hardship policies, the level of supports offered, and the appropriateness of the payment plans established with the customer.

²⁷³ Section 44(a) and section 44(b) of the Retail Law

²⁷⁴ AER, Request for Rule change – strengthening protections in the National Energy Rules for customers in financial hardship, 21 March 2018, p.3

The AER's 2016-17 Performance Report found that the proportion of electricity customers exiting hardship programs due to successfully paying off debt **decreased** from 36 per 100 customers in 2015–16 to 27 per 100 exiting 2016–17, but remained numerically steady across both years at around 23 000 customers.²⁷⁵

The AER's Report showed significant increases in both the number and proportion of customers **excluded** from retailer hardship programs in 2016–17. The rate of customers exiting hardship programs due to exclusion increased from 46 per cent to 57 per cent,²⁷⁶ or from around 39 000 to 49 000 customers. This is extremely worrying, and further investigation by the AER into retailer's exclusion practices is needed.

Indicator S4.12 – Length of customer participation in a hardship program (New)

This is a new indicator requiring retailers to submit the total number of hardship customers that have continuously received assistance through the hardship program, as at the last calendar day of the (quarterly) reporting period for each of the following:

- i. under 1 year*
- ii. over 1 year to under 2 years*
- iii. more than 2 years.*

The AER is hopeful this indicator will provide key information about whether the assistance provided through the hardship programs is short or long term. The length of time a customer is part of a hardship program may provide an indication of the success of the supports offered through that program and whether those supports lead to the customer successfully exiting the program. It is worth repeating that the Retail Law requires retailers to assist hardship customers to 'better manage their energy bills on an **ongoing** basis.'²⁷⁷ There is no time frame or limit imposed under the Retail Law within which assistance is to be provided.

Indicator S4.13 – Number of customers excluded from the hardship program (Amended)

This amended indicator requires retailers to submit the total number of customers that have been **excluded** from participating in the hardship program, as at the last calendar day of the (quarterly) reporting period for each of the following categories:

- i. the customer did not agree to the suggested payment plan*
- ii. the retailer was unable to contact the customer*
- iii. the customer did not make the requested payments*
- iv. it was more appropriate to return the customer to a normal payment plan or billing cycle*
- v. other.*

The original indicator sought information on the number of customers 'denied access' to the hardship program, and did not include reasons. After consultation with stakeholders, the AER

²⁷⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

²⁷⁶ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.4

²⁷⁷ Section 43(1) of the Retail Law

decided to change 'denied' to 'excluded' in order to try and capture the wide range of reasons for why a customer is not on a hardship program.²⁷⁸

The AER has stated that given the increase in customers being excluded from hardship programs, it is important to understand why this is occurring, and the information obtained as a result of this indicator will provide a more detailed picture of the retailer and customer behaviour that led to exclusion.²⁷⁹

In response to this indicator, AGL noted that in practice, it:

'may request customers who have previously been removed from the hardship program to agree to, and keep, a 4 payment plan arrangement to demonstrate an intention and willingness to participate in the program. This is considered a condition of re-entry only and is not used to deny any customer who has not previously participated in the program'.²⁸⁰

SACOSS is concerned about this practice by AGL, especially given AGL is a signatory to the SPPF. The Good Practice Principles in the SPPF specifically state that the retailer should 'recognise that a missed payment is not necessarily a sign of non-engagement or unwillingness to pay.'²⁸¹ AGL is obliged to support customers experiencing payment difficulties, an inability to meet repayment amounts may be as a result of an inappropriate payment plan, and should trigger further conversations with the customer to assist the customer with managing their debt, or referring the customer to a financial counsellor.

The purpose of a payment plan is not to test the customer's willingness to participate as a threshold to re-entry into a hardship program. SACOSS submits this practice by AGL is akin to gatekeeping, and the statistics around decreasing numbers of hardship program participants in South Australia would support the conclusion that this practice may be occurring across the industry.

Customers who are unable to meet payment plan amounts are at risk of disconnection and all the adverse social consequences that entails. Retailers are under an obligation to support customers to manage their debt, while ensuring those customers continue to receive an energy supply. Notably, AGL's rate of exclusions for electricity nearly tripled (to 64 per 100 hardship customers who exited in 2016–17), reflecting **an increase from 2100 to 11 200 excluded customers**. EnergyAustralia's exclusion rate more than doubled to 53 per 100 hardship customers.²⁸²

In light of AGL's comments, it is questionable whether the third category in the indicator will capture customers excluded from the hardship program as a result of this practice, or whether retailers will be able to explain the practice away as 'a condition of re-entry' and not exclusion. This may be

²⁷⁸ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.38

²⁷⁹ AER, Notice of Draft Instrument: AER (Retail) Performance Reporting Procedures & Guidelines Version 3, December 2017 p.25

²⁸⁰ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.39

²⁸¹ AER, Sustainable Payment Plans – a good practice Framework for assessing customers' capacity to pay, Version 1, July 2016 p.1

²⁸² AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

something for the AER to follow up, as the practice clearly goes against the meaning and intent of the key customer protections of hardship assistance.

The AER's 2016-17 Performance Report found that a significant number of customers were excluded from hardship programs after adherence to existing hardship payment plans was reviewed by two large retailers.²⁸³ The AER indicated that it was concerned about the high number of customers that have been excluded from large retailer hardship programs, and reiterated the importance of retailers providing ongoing support to customers when they are experiencing payment difficulties and hardship issues.²⁸⁴

The obligation is on the retailer to provide appropriate assistance to the hardship customer. In circumstances where the customer is experiencing difficulty meeting the repayments established under a payment plan, the retailer should re-examine the customer's capacity to pay, not simply exclude the customer from the hardship program for not adhering to the plan.

EWON supported the amendments to this indicator, stating the information will provide a useful insight into whether retailers are complying with the SPFF.²⁸⁵

Indicator S4.14 – Assistance provided to hardship program customers (amended)

This amended indicator requires retailers to submit data on the types of assistance provided to hardship customers throughout the (quarterly) reporting period. Where possible, retailers should provide quantitative data on the various types of initiatives and assistance provided to hardship customers in the reporting period. Including the number of electricity hardship customers that:

- i. were transferred to a different market retail contract*
- ii. were transferred from a standard retail contract to a market retail contract*
- iii. received concessions that they were not otherwise receiving*
- iv. received a rebate that they were not otherwise receiving*
- v. received new appliances through appliance replacement programs*
- vi. received incentive payments or discounts*
- vii. received debt reductions*
- viii. had onsite energy audits completed by the retailer (or third party agency at the request of the retailer)*
- ix. received reimbursement/credit of late payment fees*
- x. received reimbursement/credit of lost pay on time discounts.*

The more detail of specific types of assistance provided by retailers as required by this indicator, should provide a clearer picture of how retailers' hardship policies interact with customers in practice, to impact their overall energy use and debt management.

²⁸³ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

²⁸⁴ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.40

²⁸⁵ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.38

Through its Hardship Reviews²⁸⁶ (in 2015 and 2017) and performance and compliance reporting, the AER noted a wide variety in the quality of hardship policies, and also discrepancies between the published policy and the application of the policy at an operational level.²⁸⁷ This discrepancy has been illustrated by the recent enforcement action by the AER against Origin Energy for allegedly failing to maintain and implement its hardship policy under section 43(2)(c) of the Retail Law.

This indicator includes ‘common and expected’ types of assistance, and the data will be useful to monitor which retailers are meeting their obligations to implement the policy in practice, potentially leading to compliance actions where retailers are failing to implement their policies in line with the Retail Law. Further, this indicator will provide information that will enable an examination of the effectiveness of the supports offered. EWON very strongly supports this change, and suggests that this information should be published, EWON also noted its previous suggestion that retailers hardship policies be rated to assist consumers with choosing a retailer.²⁸⁸

SACOSS does question why retailers’ obligation to advise customers of Centrepay (where that option is available) was not included in the indicator.²⁸⁹

Summary and Recommendations

Summary

SACOSS commends the AER for its extensive work over several years in evaluating frameworks, reviewing retailer practices and analysing information with a view to improving outcomes for customers experiencing payment difficulties. In this current climate of rising energy costs, it is vital for consumers to be clearly informed of what supports are available, and to have access to effective forms of tailored assistance. The National Energy Consumer Framework (NECF) contains important consumer protections which, the evidence would suggest, are not operating in practice. The AER’s data shows disconnection rates are continuing to rise, average energy bill debt levels are rising, relatively few customers are accessing hardship supports,²⁹⁰ more customers are being excluded from hardship programs, and many customers are simply unable to eliminate their historical debt.

The objective of this study was to build on SACOSS’ 2016 report by reviewing two recent measures undertaken by the AER to address the disconnect between retailers’ obligations to customers experiencing payment difficulties, and the practical application of those obligations. Specifically, through:

- the AER’s recent request to the Australian Energy Market Commission (AEMC) to change the Retail Rules to allow for the creation of a binding Hardship Guideline,²⁹¹ and

²⁸⁶ AER, Review of energy retailers’ customer hardship policies and practices, January 2015

²⁸⁷ AER, Request for Rule change – strengthening protections in the National Energy Rules for customers in financial hardship, 21 March 2018, p.3

²⁸⁸ AER Final Instrument: Amendments to AER (Retail) Performance Reporting Procedures and Guidelines Version 3, April 2018, p.40

²⁸⁹ See section 44(c) of the Retail Law and Rule 74 of the Retail Rules

²⁹⁰ Fewer than 1 per 100 electricity and gas customers, AER Performance Report 2016-17, p. 33

²⁹¹ AER, Request for Rule Change: strengthening protections in the National Energy Retail Rules for customers in financial hardship, 21 March 2018 <https://www.aemc.gov.au/sites/default/files/2018-05/RRC0017%20Rule%20change%20proposal.pdf>

- the AER’s recent amendments to the *Retail Performance Reporting Procedures and Guidelines*, including amendments to the Hardship Program indicators.²⁹²

SACOSS supports both measures undertaken by the AER. We are hopeful the AER’s Rule Change Request, if made, will help to address some of the deficiencies of the current regulatory framework identified in SACOSS’ 2016 Report, particularly in relation to identification of hardship customers²⁹³ and access to supports. We believe the amendments to the AER’s Performance Reporting Guidelines, including the addition of new indicators relating to customers experiencing payment difficulties, disconnections and hardship customers will provide a clearer picture of retailer behaviour into the future.

Whilst we support the AER’s Rule Change Request, we also believe it is within the AER’s existing powers to adopt a more robust regulatory approach, to give effect to the meaning and intent of the consumer protections available to customers experiencing payment difficulties under the NECF. We support the AER exercising all its regulatory powers to the fullest extent, including its powers of approval and variation of hardship policies, monitoring, compliance and enforcement, to ensure retailers’ obligations to all consumers are applied equitably and effectively.

As highlighted throughout this report, the issue of ‘identification’ is central to an examination of the effective operation of supports for customers experiencing payment difficulties under the NECF. It is apparent that under the current regulatory framework, different levels of consumer protections apply to three tiers of customers:

- Customers experiencing payment difficulties (pro-actively identified by the retailer)
- Customers experiencing payment difficulties (self-identified)
- Customers experiencing payment difficulties due to hardship, or ‘hardship customers’ (identified in accordance with retailers’ identification processes in their individual hardship policies – including processes of retailer identification and self-identification)

SACOSS believes the evidence outlined in this report points to a lack of understanding from retailers about their different obligations to all of these customers. Stakeholder feedback also indicates there is a clear lack of understanding amongst customers of their rights and entitlements to supports. To provide clarity for customers identified as hardship customers is absolutely essential, and we would argue that clarity for customers, who are not identified as being in hardship, is equally as important (especially given the issues around retailer identification of hardship customers).

Therefore, whilst we support the AER’s Rule Change Request, we believe the scope of the proposed Hardship Guideline could be broadened to clearly articulate a retailer’s obligations under the NECF to **all** customers experiencing payment difficulties²⁹⁴ (including hardship customers). We believe the goals of pro-active identification and early intervention will be best met if retailers are more aware of, and more bound to, their obligations to all customers experiencing payment difficulties.

²⁹² AER (Retail Law) *Performance Reporting Procedures and Guidelines*, April 2018
https://www.aer.gov.au/system/files/AER%20%28Retail%20Law%29%20Performance%20Reporting%20Procedures%20and%20Guidelines%20-%20April%202018_0.pdf

²⁹³ Created by the definition of ‘hardship customer’ under section 2 of the Retail Law.

²⁹⁴ Importantly, this includes clearly articulating retailers’ very broad obligation to offer payment plans under section 50(1) of the Retail Law.

Ideally then, SACOSS would like to see the AEMC consider a more preferable rule giving the AER the power to develop a **Customer Experiencing Payment Difficulties and Hardship Guideline**. SACOSS considers this may focus retailer attention on the supports it is obliged to offer **all** small customers who are having difficulty paying their bills, which may result in more appropriate operational decision-making and better outcomes for consumers. We believe clearly articulating (and communicating) retailers' obligations to all customers experiencing payment difficulties is the first step towards ensuring the NECF's important consumer protections are more effective.

It is important to point out, as the AER has done, that we are **not** suggesting the obligations imposed on retailers under the Retail Law and Rules be expanded (which is beyond the power of the AER in any event). We are looking for clarity and consistency in the application of retailers' **existing** obligations.

It has been estimated that no less than 200,000 children are exposed to the 'bruising effects of energy poverty'²⁹⁵ in Australia. It is incumbent upon government, industry and stakeholders to do all we can to give effect to the intention of the legislature to support customers and avoid disconnection. We recognise this is not an easy task for retailers, but in this current climate of energy affordability, we encourage retailers to dedicate resources towards meaningfully complying with their obligations.

SACOSS supports the recommendation contained in the AEMC's recently published 2018 Retail Review that the AEMC assess how retailers support customers in financial difficulty.²⁹⁶ The AEMC stated the review would look at 'the support options retailers provide commercially, and how these operate with required hardship provisions, identifying and benchmarking best practice',²⁹⁷ SACOSS is hopeful the AEMC's review will encompass the supports retailers provide to **all** customers experiencing payment difficulties. The AER and the AEMC have indicated they will consult closely through the development of the Hardship Guideline (if the rule change is made) and SACOSS supports the findings of the AEMC's review informing the development of the proposed Hardship Guideline.

Recommendations

Broaden the Guideline to include standard statements of supports for all customers experiencing payment difficulties

- SACOSS broadly supports the AER's Rule Change Request, but recommends the AEMC consider whether a more preferable rule could give the AER the power to develop a **Customers Experiencing Payment Difficulties and Hardship Guideline** that includes clearly articulated statements outlining retailers' legal obligations under the NECF to **all** small customers experiencing payment difficulties, in addition to hardship customers.
- SACOSS suggests the **additional** statements could cover what customers can expect to receive if they are having payment difficulties, **but are not hardship customers**, including statements relating to:
 - payment plans (for retailer-identified customers)

²⁹⁵ KPMG, The rise of energy poverty in Australia, Census Insights Series, December 2017, p.8

²⁹⁶ Unless advised otherwise by the COAG Energy Council, by January 2019.

²⁹⁷ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. xiii

- payment plans established in accordance with the requirements of Rule 72 (for self-identified customers)
- the provision of information to customers about government funded energy rebate, concession or relief schemes (self-identified customers)
- protection from being placed on a shortened collection cycle (all customers experiencing payment difficulties)
- protection from debt recovery action (all residential customers experiencing payment difficulties) and
- protection from disconnection (with particular protections for customers who have self-identified).
- Where the retailer has signed up to the AER's (voluntary) Sustainable Payment Plans Framework, a statement could reference that commitment (this statement would not be binding as, unlike the matters outlined above, there is no legal obligation on retailers to comply with the SPPF, but the statement could operate as an expression of the retailer's commitment to best practice).

The AER's proposed Hardship Guideline

- SACOSS believes it is of vital importance that processes around the identification of hardship customers (both retailer identification and self-identification) be contained within the proposed Hardship Guideline. Under the Retail Law and Rules, access to hardship supports is dependent on retailers' identification of hardship customers; therefore the issue of identification cannot be separated from the issue of access. Retailer identification is a key issue, central to improving the effectiveness of supports for customers experiencing payment difficulties under the NECF.
- SACOSS recommends the AER give significant consideration to the development of the standard statements dealing with the processes of retailer identification of hardship customers, including through an examination of the different approaches of other jurisdictions.²⁹⁸ SACOSS recognises the AER's commitment to a research report and broad consultation on this issue.
- In the development of the proposed Hardship Guideline (if the Rule Change is made), SACOSS recommends the AER take into consideration the benefits of consistency for retailers dealing with customers facing payment difficulties throughout the NEM.
- SACOSS recommends the proposed Rule 75(5) could appropriately be a civil penalty provision, but does not consider the entire Rule should be a civil penalty provision.
- If the Rule Change is made, SACOSS recommends the AER work to ensure it avoids a 'fast-track approval process' of hardship policies, in circumstances where those policies are found to contain the statements set out in the proposed Hardship Guideline.

²⁹⁸ Recommending particular focus on the ESC Vic's Payment Difficulties Framework (Part 3 of the Energy Retail Code) noting the ESC Vic's findings that defining customers as 'hardship customers' is not useful.

- SACOSS recommends the AER continue to vigorously exercise its hardship policy approval powers under the law, to ensure that retailers' hardship policies not only contain the minimum requirements in the form of standard statements, as proposed in the Hardship Guideline (if made), but also that retailers' implementation processes achieve the purpose²⁹⁹ and align with the principles³⁰⁰ underpinning the policies. The obligations on retailers under the proposed Hardship Guideline should not obviate the need for the AER to properly approve the policies in accordance with its obligations at law.
- SACOSS recommends an overarching statement could be included in the proposed Hardship Guideline outlining the principles contained in section 45(3), stating:

This policy has been approved by the AER and is consistent with the principles that:

- *The supply of **energy is an essential service** for all residential customers.*
- *Retailers should **assist hardship customers to avoid disconnection** solely due to an inability to pay their energy bills.*
- ***Disconnection** of hardship customers due to an inability to pay their energy bills, should be a **last resort option**.*
- *All **residential customers** should have **equitable access** to hardship policies.*
- *Hardship policies should be **transparent** and applied **consistently**.*

AER's compliance and enforcement powers

- SACOSS recommends the AER continue to use its powers under the Retail Law and Rules to ensure retailers are acting in accordance with their obligations. SACOSS particularly encourages the AER to ensure compliance with the civil penalty provision containing the broad obligation on retailers to offer a payment plan to customers it 'otherwise believes' are experiencing payment difficulties or repeated difficulties paying their bill.³⁰¹
- SACOSS is concerned about 'gatekeeping' practices by retailers and encourages the AER to continue to investigate and intervene where it has the power to do so.³⁰² SACOSS supports the AER adopting a stronger stance in relation to enforcement actions, encouraging retailers to more closely examine their practices. SACOSS strongly supports increased monitoring and enforcement of hardship policy obligations by the AER.
- SACOSS recommends that where a retailer has been found to have failed to comply with the Sustainable Payment Plans Framework, the AER removes the retailer from the list of retailers who have signed up to the framework.

²⁹⁹ To identify residential customers experiencing payment difficulties due to hardship and to assist those customers to better manage their bills on an ongoing basis, section 43(1) of the Retail Law

³⁰⁰ Section 45(3) of the Retail Law

³⁰¹ Section 50(1)(b) of the Retail Law

³⁰² Potentially through the obligation on retailers to 'maintain and implement' their hardship policy which is civil penalty provision under the section 43(2)(c) of the Retail Law

- SACOSS recommends the AER continue to raise the issue of the promotion of Centrepay with retailers, including its expectation that the number of customers using Centrepay should increase in the future.
- The AER has indicated that it is currently requiring some retailers to undertake an audit around compliance with hardship provisions under the Retail Law and Retail Rules³⁰³ and recently conducted a compliance audit of five energy retailers with respect to the provisions under the Retail Law and Rules relating to disconnections.³⁰⁴ SACOSS supports the AER in continuing to undertake compliance audits and to use its investigation and enforcement powers where appropriate.

Hardship Program Indicators

- SACOSS recommends the Hardship Program Indicators remain in *the AER (Retail) Performance Reporting Guidelines*, and recommends the AEMC make a more preferable rule reflecting this change.

Performance Reporting Guidelines

- Retailers' new reporting obligations contained in the *AER's Retail Performance Reporting Procedures and Guidelines* will come into effect on 1 January 2019. Therefore, the first Annual Performance Report including the information obtained from retailers will be the AER's Annual Performance Report for 2019-20. SACOSS recommends the AER explain the impacts of the changes to the reporting requirements on the results in the 2019-20 Performance Report, including by providing an explanation and analysis of the changes in tracking retailer performance from previous years.

Concessions

- SACOSS recommends the South Australian concession scheme be reviewed, in line with the recommendation of the AEMC and SACOSS' costs of living policies, to ensure vulnerable energy consumers are able to access adequate supports. SACOSS will be working to encourage the South Australian government to develop a percentage based concession scheme and to allow for retailers to administer the scheme.

³⁰³ AER, Rule Change Request, p.17

³⁰⁴ AGL Energy, retail audit fact sheet

<https://www.aer.gov.au/system/files/AGL%20audit%20summary%20sheet.PDF>