



Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

28 June 2018

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Dear Mr Pierce,

RE: AEMC's Consultation Paper on the National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018

As the peak body for the health and community services sector in South Australia, the South Australian Council of Social Service (SACOSS) has an established history of interest, engagement and provision of proposed advice on the necessary market mechanisms and policy for essential services, including electricity. SACOSS would like to thank the Australian Energy Market Commission (AEMC) for providing SACOSS with the opportunity to comment on the Australian Energy Regulator's (AER's) rule change request seeking to strengthen protections for residential customers in financial hardship.

Background

SACOSS has long been concerned with creating better outcomes for energy consumers experiencing financial difficulties. As the providers of an essential service, 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.¹

In the last 12-18 months, affordability issues have reached crisis point, with the greatest impact of increasing energy costs being on low income households.² In South Australia, which has the least affordable electricity

¹ See: SACOSS, November 2014, Better Practice Guideline for Energy Retailers: A collaborative approach to preventing hardship amongst energy consumers, and, SACOSS, January 2016, Better solutions for Helping Customers with Financial Difficulties: Energy and Water – A cross-sector approach to supporting vulnerable customers

² AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.3

in the National Electricity Market (NEM),³ electricity bills alone made up 5.5% of a low income household's disposable income (after concession charges) in 2016-17.⁴ Disconnections and energy bill debt levels increased during the 2016-17 period across the NEM, with South Australia having the largest proportion of electricity customers in debt (almost five in every 100 customers).⁵ The AER's performance data for the first quarter of the 2017-18 financial year found the average residential bill debt for customers **not** receiving assistance via a hardship program in South Australia was \$919,⁶ and disconnection rates are continuing to rise.⁷ Now more than ever, ensuring access to meaningful, individualised and effective supports for customers experiencing payment difficulties is critical.

The National Energy Customer Framework (NECF) includes provisions relating to consumer protections, including:⁸

- 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 legally enforceable consumer protections contained in the *National Energy Retail Law (South Australia) Act 2011*⁹ (Retail Law) and the *National Energy Retail Rules Version 12*¹⁰ (Retail Rules), are in recognition of the essential nature of the service provided by retailers to customers. The meaning and intent of the law is 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.¹¹

SACOSS has recently written a report on the *Effectiveness of Supports for Customers Experiencing Payment Difficulties under the NECF* (SACOSS' 2018 Report).¹² The focus of our report was to build on SACOSS' extensive *Review of the AER's and Essential Services Commission of Victoria's (ESC Vic's) Frameworks for Customers Facing Payment Difficulties* in November 2016 (SACOSS' 2016 Report).¹³ In our 2018 Report, we examined the existing obligations on retailers to support customers experiencing payment difficulties under the NECF, the limitations of the current regulatory framework, the failure of many retailers to effectively and consistently provide supports, and the AER's Rule Change proposal to strengthen protections for residential customers in financial hardship.¹⁴ We also summarised the AER's recent changes to the *AER (Retail) Performance Reporting Procedures and Guidelines, Version 3*.¹⁵

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

⁴ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.3

⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

⁶ Data submitted under the AER's Retail Market performance reporting guidelines (June 2012) for the period 1 July – 30 September 2017

⁷ AER, Rule Change Request, p.6

⁸ AEMC, Consultation Paper, National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018, 24 May 2018

⁹ 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)

¹⁰ See National Energy Retail Rules Version 12 at: <https://www.aemc.gov.au/regulation/energy-rules/national-energy-retail-rules/current>

¹¹ Part 2, Division 6 and Division 7 of the Retail Law

¹² SACOSS, Report on the Effectiveness of Supports for Customers Experiencing Payment Difficulties, June 2018 (unpublished at this stage)

¹³ 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_EnergyPaymentDifficultiesFrameworks_Report_Final.pdf

¹⁴ SACOSS notes that the AER states 'financial hardship', whereas the AEMC refers simply to 'hardship'

¹⁵ AER (Retail Law) Performance Reporting Procedures and Guidelines, Version 3, April 2018

SACOSS has attached a copy of our 2018 Report to this submission. While this submission repeats some of the relevant content from our Report, we are seeking the AEMC consider the entire Report in support of this submission.

Question 1 Rationale for rule change - adequacy of the current approach to hardship

(a) To what extent do you consider that the current approach to the application of hardship policies provides adequate protections to consumers in financial difficulty?

(b) Are general obligations that are more difficult to enforce leading to inadequate consumer protections?

Section 43 of the Retail Law¹⁶ 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.

One of the purposes of a retailer’s hardship policy then, 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).

As summarised in our 2018 Report, 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’.¹⁷ Increasing levels of debt and disconnections, coupled with decreasing numbers of customers on hardship programs (in South Australia) would indicate retailers’ identification processes (both self-identification and retailer identification) are not operating to achieve outcomes consistent with the intent of the consumer protections under the NECF.

SACOSS submits the issue of identification of hardship customers by retailers is of central importance in a consideration of whether the current approach provides adequate protections for customers in financial difficulty. Retailer’s processes of identification (both self-identification and retailer identification) can represent a significant barrier to residential customers’ equitable access to hardship supports.¹⁸ The issue of identification (and therefore access) arises as a consequence of the definition of ‘hardship customer’ under the Retail Law. In summary, the Retail Law defines a hardship customer to mean:

¹⁶ Part 2, Division 6 of the Retail Law and Part 3 of the Retail Rules deal with customer hardship.

¹⁷ AER, Rule Change Request, p.8

¹⁸ Section 45(3) of the Retail Law

*'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**.'*¹⁹

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) SACOSS submits the goal of equitable access to hardship supports will be more achievable.

Through its 2015 and 2017 Hardship Reviews, the AER found that there were significant differences between retailers in their treatment of vulnerable customers, 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 risk²⁰
- 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.²¹

Unsurprisingly, the AER's 2017 Review found that the practice of **early identification and access** to hardship programs by retailers was inconsistent 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.²² Given studies have shown that few people self-identify as being in hardship,²³ the issue of pro-active identification of hardship customers by the retailer 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.

The AER's Reviews also 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.²⁴ These figures highlight the failure of retailers to both identify customers in hardship and to provide adequate supports to those customers who fall outside the 'hardship' definition in line with their obligations under the NECF²⁵ (including the protection from disconnection).

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,²⁶ indicating retailers may be limiting access to those programs. Feedback from SACOSS'

¹⁹ Section 2 of the Retail Law

²⁰ SACOSS, 2016 Report, p.39

²¹ SAOCSS, 2016 Report, p.39

²² AER, Rule Change Request, p.8

²³ 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>

²⁴ AER, Rule Change Request, p.8

²⁵ As summarised in SACOSS' 2018 Report

²⁶ 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

member organisation, the South Australian Financial Counsellors Association (SAFCA) supports this view, citing:²⁷

- 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).

The AER identified significant increases in the proportion of customers excluded from hardship programs in 2016-17.²⁸ 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.²⁹ SACOSS submits the current practices of excluding customers from hardship programs, and applying pre-requisites to re-entry to those programs, does not align with retailers' obligations to both hardship customers and customers experiencing payment difficulties under the NECF.

As outlined above, the central purposes of a retailers' hardship policy is to identify customers in hardship and to assist those customers to better manage their bills on an **ongoing basis**. 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.³⁰ Further, where a customer is excluded from a hardship program, they are reliant on the protections under the NECF for the broader group of 'customers experiencing payment difficulties', and it is not apparent that retailers are applying those protections consistently.

As noted in our 2018 Report, case studies provided to SACOSS via membership organisations,³¹ as well as the AER's hardship reviews³² and performance reporting data,³³ 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. The current approach 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 experiencing payment difficulties, is needed.

In relation to the enforceability of general obligations within hardship policies, SACOSS submits that it may be more difficult, but not impossible for the AER to enforce general obligations. All hardship policies must be approved by the AER in accordance with their approval powers under section 45 of the Retail Law. The

²⁷ South Australian Financial Counsellors Association, Survey of 23 financial counsellors re: proposed AER Rule Change, 19 June 2018

²⁸ An increase from 46 per cent in 2015/16 to 57 per cent in 2016/17 for electricity customers in NECF regions.

²⁹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.39

³⁰ Equitable access, Section 45(3) of the Retail Law

³¹ 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

³² 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

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

AER must be satisfied of a number of matters, including that the policy contains the minimum requirements set out in section 44. Therefore, all approved policies have been found by the AER to contain the minimum requirements (whether in general or more specific terms). Section 43(2)(c) requires the retailer must 'maintain and implement the policy', therefore, SACOSS submits where the retailer has failed to offer supports to a hardship customer in accordance with the minimum requirements, it has failed to maintain and implement its policy.

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.'³⁴ 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'.³⁵ SACOSS therefore submits that the AER does not necessarily need to rely on specific commitments, as the 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).

Nevertheless, SACOSS understands the AER's concerns around enforceability and agrees that clear, action based statements more easily support a 'reason to believe' the retailer has failed to maintain and implement its policy, than general, principle-based statements.

Question 2 Hardship indicators

(a) Do the current indicators appropriately reflect the success or failure of hardship policies in protecting consumers who are facing financial difficulty? Please explain your perspective.

(b) Should the hardship program indicators reside in the binding Hardship Guidelines as proposed or remain as separate to the Guidelines as a stand-alone requirement in the NERR? Please explain your perspective.

SACOSS' 2018 Report reviewed the AER's recent amendments and additions to the Hardship Program Indicators, which will come into effect on 1 January 2019. SACOSS supports the inclusion of these additional indicators (as well as the inclusion of additional indicators relating to customers experiencing payment difficulties and disconnection) and submits that the new indicators will operate to provide a more complete picture of the effectiveness of the application of the consumer protections under the NECF

SACOSS believes the Hardship Program Indicators should remain a stand-alone requirement in the Retail Rules. Therefore, we submit the proposed Rule giving the AER the power to develop a Hardship Guideline should be separate from the existing Rule 75. SACOSS repeats the reasons for our views on the location of the Hardship Program Indicators contained in our 2018 Report, below.

The hardship program indicators are currently contained in Schedule 4 of the AER (Retail) Performance Reporting Procedures and Guidelines. Section 287 of the Retail Law provides that the AER must determine

³⁴ Section 277(1) of the National Gas Law

³⁵ NERA, Review of enforcement regimes under the National Energy laws: A Report Prepared for the Standing Council on Energy Resources, November 2013, p.107

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; 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. Therefore, SACOSS questions whether the AER’s proposed Rule 75 would require amending the Retail Law to reflect publication of the indicators in the proposed Hardship Guideline, or whether the Performance Reporting 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, SACOSS submits the hardship performance indicators, the required data and relevant reporting should remain in the AER’s Retail Performance Reporting Procedures and Guidelines. SACOSS considers it would be somewhat confusing for retailers and stakeholders to have to consult both the proposed Hardship Guideline to determine what indicators they are required to report against, and then the Performance Reporting Guideline to determine the manner and form of the data they are required to provide.

In addition, Schedule 3 to Version 3 of the Performance Reporting Guidelines³⁶ 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), 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

³⁶ 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

(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 and often artificial) distinction between these two groups of customers. SACOSS refers the AEMC to our review of Version 3 of the AER's Performance Reporting Guideline contained in our 2018 Report. SACOSS submits the information provided to the AER by retailers in accordance with the Hardship Program Indicators cannot be viewed in isolation; it must be placed in the context of the information relating to customers experiencing payment difficulties, to be meaningful.

In relation to the proposed Rule 75, SACOSS considers 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.

Question 3 Proposed approach

(a) Are you of the view that Hardship Guidelines that include standard statements adequately protect the long-term interest of consumers in financial difficulty, while providing retailers with flexibility in how they apply hardship provisions?

(b) Is there another approach that would better meet the requirements under the NERL in relation to customers in hardship, and allow retailers to meet their obligations more efficiently?

Retailers' current policies are (by and large) divergent, confusing, full of exclusions and pre-conditions, poorly drafted and can tend to obfuscate the minimum consumer protections under the NECF. SACOSS believes that in some cases, the current policies are more concerned with limiting access to hardship supports, than recognising and applying retailers' obligations at law.

SACOSS agrees with the AER that 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. SACOSS supports the AER's proposal to achieve consistency through the development and inclusion of 'standard statements' within the proposed Guideline, which reflect the minimum requirements under section 44.

It is important to point out that the AER's proposal does not involve the imposition of prescriptive processes and operational practices onto retailers, nor does it involve the imposition of additional obligations, or expand existing obligations. It is proposing to clearly articulate the existing **minimum** requirements under the Retail Law, through the development and inclusion of standard statements in those policies.

SACOSS supports the clear expression of **all** retailers' obligations to consumers under the NECF being consistently and actively communicated to **all** consumers, by both retailers and the AER. Increasing awareness of supports customers can expect to receive from retailers (in line with the law) is crucial to improving outcomes for customers experiencing payment difficulties.

While SACOSS agrees with the AER that industry wide consistency through standard statements will lead to better outcomes for consumers, we don't believe that this measure alone will be sufficient to protect the 'long-term interests of consumers in financial difficulty'.

Where the retailer's policy includes the standard statements, SACOSS cautions against the AER 'fast-tracking' its approval processes. We believe the AER needs to continue to properly exercise its decision-making powers to ensure the proposed hardship policy contributes to the achievement of the overarching purpose³⁷ and aligns with the principles contained in section 45 of the Retail Law (including ensuring equitable access). The inclusion of 'standard statements' alone should not be considered sufficient to satisfy the AER's approval processes for hardship policies under the Retail Law.

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.³⁸ Therefore, retailers will retain flexibility in how they implement the standard statements that meet the minimum requirements.³⁹

SACOSS submits that the retailer's implementation processes are central to the meaningful operation of the standard statements containing the minimum requirements (including implementation processes around **identification**). The AER's assessments of retailers' *implementation processes* within their hardship policies will be of key importance in ensuring those policies are consistent with the retailer's minimum obligations, the purpose of the policy and the underlying principles.

We believe that where a retailer's policy includes implementation processes that restrict the application of the stated minimum requirement (for example by exclusions or pre-requisites to entry / re-entry into hardship programs) then those policies should not be approved by the AER under the proposed rule, and associated provisions of the Retail Law.⁴⁰ Therefore, in the balancing act between prescription and flexibility, SACOSS submits it is of primary importance that the AER ensure the meaning and intent of the consumer protections for hardship customers under the NECF are expressed and applied in accordance with the Retail Law. Flexibility and innovation are important, but need to fall within the parameters set by the law and overseen by the AER.

To remind retailers and customers of the principles underlying hardship policies, SACOSS suggests the AER could include a standard statement in line with section 45(3) stating (our emphasis):

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

³⁷ To identify and assist customers on an ongoing basis, as contained within section 43(1) of the Retail Law.

³⁸ AER, Rule Change Request, p.15

³⁹ AER, Rule Change Request, p.15

⁴⁰ As we believe that pre-requisites to re-entry are unfair and do not align with the principle of equitable access

out the minimum requirements, as well as the processes adopted by retailers in order to give effect to those statements.

Further, SACOSS submits the proposed development and inclusion of standard statements in retailers' hardship policies represents an important step on the path to improving outcomes for consumers, but equally as important, is retailers' *approach* to providing supports. 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'.⁴¹ 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. For example, the statement contained in the AER's Rule Change Request that 'under a retailer's hardship program they can expect to receive...advice on payment plans',⁴² 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.

SACOSS agrees with the central theme of the AER's Rule Change Request, which is to promote clarity and consistency (not just for consumers, but also retailers) in the communication and application of retailers' minimum obligations to hardship customers under the NECF, through the development of a binding Guideline. SACOSS is of the view, as expressed later in this submission, that it is equally important to promote clarity for consumers and retailers around retailers' obligations under the NECF to **all** customers experiencing payment difficulties, and suggests that a binding Guideline that sets out a retailers' obligations to all customers experiencing payment difficulties would engender broader consumer awareness of rights and obligations, and would also enable retailers to meet their obligations to all customers more efficiently.

Question 4 Enforceability of Hardship Guidelines

The AER proposed that all the Hardship Guidelines be enforceable. Do you agree that all aspects of the guidelines should be enforceable? If not, what aspects of the guidelines should or should not be enforceable and why?

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'.⁴³

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 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).

⁴¹ AER, Rule Change Request, p.16

⁴² AER, Rule Change Request, p.14

⁴³ AER, Rule Change Request, p.15

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 only approve policies that 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 and align with the principles). 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, but we repeat our concern that the AER continue to exercise its approval powers in accordance with the Retail Law.

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. SACOSS once again notes the AER need only have a 'reason to believe' there has been a breach of a civil penalty provision in order to issue an infringement notice.

Question 5 Implementation

(a) What transitional arrangements should be put in place to require that retailers amend their current policies to comply with the Hardship Guidelines, if this rule were made?

(b) What aspects of the rule, if made, should be a civil penalty provision?

SACOSS has not yet considered the question of transitional arrangements.

SACOSS recognises that, in conjunction with the Rule change request, the AER has stated it is currently⁴⁴:

- 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 implementation of the Hardship Guideline (if the rule change is made).

⁴⁴ AER, Rule Change Request, p.17

SACOSS has outlined our views on what aspects of the Rule should be a civil penalty provision in Question 4, above.

Question 6 Costs and benefits

(a) Please comment on the benefits and costs that have been identified, in terms of their adequacy in assessing the rule change proposal and any quantification of those factors.

(b) Will improving hardship policies through the Hardship Guidelines result in a cost saving to consumers as a result in a reduction in bad debt? Please explain your perspective.

SACOSS broadly agrees with the AER regarding the benefits of developing a binding Hardship Guideline, and has not assessed the costs to retailers at this stage.

In relation to whether the proposed Guideline will result in a reduction in bad debt, SACOSS refers the AEMC to our 2018 Report and our suggestion contained in Question 7, below.

In summary, SACOSS agrees that 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.

In its Annual Performance Report, the AER found that energy bill debt levels increased during the 2016-17 reporting period and more electricity customers were disconnected. As noted earlier in this submission, South Australia had the largest proportion of electricity customers in debt (almost five in every 100 customers),⁴⁵ and 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 \$919.⁴⁶

It is well recognised that energy bill debt is an indicator of 'the overall affordability of energy and how quickly and effectively retailers are assisting customers'.⁴⁷ SACOSS acknowledges the current energy affordability crisis, but submits increasing numbers of customers with energy bill debt is a clear indication that proactive management of a customer's debt by retailers is failing.

As outlined in our 2018 Report, retailers have specific obligations to **all** customers experiencing payment difficulties under the NECF, not just hardship customers. SACOSS submits one of the most important of these obligations on retailers, is to identify '**other residential customers experiencing payment difficulties**' and to offer those customers a payment plan.⁴⁸ If retailers more broadly complied with this obligation, then the goal of reducing debt through early intervention and pro-active management may more easily be achieved.

'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 meaning. SACOSS

⁴⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

⁴⁶ Data submitted under the AER's Retail Market performance reporting guidelines (June 2012) for the period 1 July – 30 September 2017

⁴⁷ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.27

⁴⁸ Section 50(1) of the Retail Law

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 debt⁴⁹ (retailer identification), or by self-identification.

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) of the Retail Law is clearly to place an obligation on retailers to proactively identify and provide support to **all 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 2016-17.⁵⁰ 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.

While SACOSS strongly supports strengthening protections for hardship customers, we submit a focus on retailers' obligations to **all** customers experiencing payment difficulties, including the very broad obligation to pro-actively offer payment plans to these customers, would assist with early identification and intervention, and may assist with avoiding spiralling levels of debt.

This very important consumer protection will **not** be covered by the proposed Guideline, as the broader group of 'customers experiencing payment difficulties' fall outside of the hardship policy obligations. Therefore, while the Hardship Guideline may improve early identification of hardship customers and access to hardship supports, it will not improve early identification of customers experiencing payment difficulties, or access to supports for those customers. In order to meaningfully address the spiralling debt levels, SACOSS submits the AER needs to use its enforcement powers to ensure retailers are complying with their obligation to offer payment plans to customers in debt, under section 50(1) (which is a civil penalty provision - the AER need only have 'reason to believe' a retailer has failed to offer a customer a payment plan in circumstances outlined in section 50(1)).

SACOSS submits retailers must do all they can to give effect to the intention of the legislature to support customers who are in need of help to pay their bills and avoid disconnection. This includes help for **all** small customers, as well as hardship customers. 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, including the obligation to offer payment plans. It is the early intervention of retailers and the offer of appropriate supports which will result in a reduction in bad debt.

Question 7 Form of rule

Are there amendments that could be made to the proposed rule to better achieve the intent of the rule change request?

⁴⁹ Energy bill debt is defined in the AER's Performance Reporting Procedures and Guidelines to mean an amount that has been outstanding for 90 days or more

⁵⁰ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29

As referred to throughout this submission, the Retail Law clearly creates a distinction between customers facing payment difficulties and customers facing payment difficulties due to hardship, as evidenced by the definition of ‘payment plan’ and ‘hardship customer’ in section 2 of the Retail Law:

‘payment plan means a plan for:

(a) a hardship customer; or

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

to pay a retailer, by periodic instalments in accordance with the Rules, any amounts payable by the customer for the sale and supply of energy.⁵¹

‘hardship customer means a residential customer of a retailer who is **identified** as a customer experiencing financial payment difficulties due to hardship **in accordance with the retailer’s customer hardship policy**.⁵²

Therefore, under the Retail Law, a hardship customer must be identified in accordance with the retailer’s customer hardship policy. Identification of customers in hardship is one of the primary purposes of the policy.⁵³

Identification of a ‘customer experiencing payment difficulties’ can occur either through self-identification, or retailer identification. This is evidenced by the important consumer protection under the law relating to payment plans. The Retail Law clearly provides that retailers **must** offer and apply payment plans for ‘other residential customers experiencing payment difficulties’ if:⁵⁴

- the customer informs the retailer in writing or by telephone that they are experiencing payment difficulties (self-identification), or
- the retailer ‘otherwise believes’ the customer is experiencing ‘repeated difficulties’ in paying the customer’s bill (retailer identification), or
- the retailer ‘otherwise believes’ the customer requires payment assistance (broad pro-active retailer identification).

The obligation on retailers to offer payment plans is intended to be a **very broad obligation**, and should be interpreted as having a wide application. SACOSS repeats our submission that any level of ‘energy bill debt’,⁵⁵ falls within the circumstances contemplated by ‘otherwise believes’. In these circumstances, SACOSS submits retailers have constructive knowledge of the customer’s situation, and are under an obligation to offer assistance. The importance of this section is also recognised by the fact that it is a civil penalty provision under the law.

The Retail Rules (not the Retail Law) then go on to provide a further distinction, by providing for additional consumer protections for customers who inform the retailer (by writing or by phone) that they are experiencing payment difficulties (self-identifying customers). The Retail Rules extend the hardship customer protections relating to disconnection (Rule 111(2) and Rule 116(d))⁵⁶, payment plans (Rule 33 and Rule 72)

⁵¹ Section 2 of the Retail Law

⁵² Section 2 of the Retail Law

⁵³ Section 43(1)

⁵⁴ Section 50(1) of the Retail Law

⁵⁵ AS defined within the AER (Retail Law) Performance Reporting Procedures and Guidelines, April 2018, p.18

⁵⁶ Which are civil penalty provisions by virtue of Rule 107(2) of the Retail Rules

and the provision of information about concessions and rebates (Rule 33(3) - which is also a civil penalty provision) to **self-identifying customers experiencing payment difficulties**.

In SACOSS' analysis of the regulatory framework then, it is apparent that 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 retailer's identification processes in their individual hardship policies, both retailer identification and self-identification)

There is, therefore, a complexity around the application of consumer protections which operates to detract from their effectiveness. This complexity directly relates to 'identification'. SACOSS submits that the AER's Rule Change proposal to develop a Hardship Guideline presents an opportunity to simplify retailer's processes around identification of hardship customers. We recognise that improving retailers' processes around identification of hardship customers may allow for more customers to access hardship supports,⁵⁷ but we are greatly concerned that essential protections under the law are not being offered to the growing group customers who fall outside the hardship identification processes. The only solution would be to broaden the application of hardship supports to all customers experiencing payment difficulties, or to work to ensure retailers are supporting customers experiencing payment difficulties in accordance with their obligations under the NECF.

Therefore, whilst SACOSS strongly agrees with the AER that access to hardship supports **must** be improved, SACOSS submits that access to supports for the broader group of customers experiencing payment difficulties should not be overlooked. We, once again, repeat the following figures in support of our submission:

- In the 2016-17 reporting year, 5 in 100 customers were in energy debt in South Australia.
- Across all jurisdictions during 2016-17, 2.9 per 100 electricity customers were repaying a debt that was on average \$690.
- For the first quarter of **2017-18**, the average debt for electricity customers in South Australia had increased to \$919.⁵⁸
- During 2016-17, the proportion of customers on payment plans **decreased** in South Australia.⁵⁹
- Electricity disconnections increased in Queensland (up 16 per cent), ACT (up 10 per cent) and South Australia (up 3 per cent).

These are **all issues** that relate to a failure of retailers to provide adequate supports **to the broader group of customers experiencing payment difficulties**.

SACOSS believes the evidence points to a lack of understanding from retailers about their obligations to these customers, and there is a clear lack of understanding among 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).

⁵⁷ See our discussion of the ESC Vic's Payment Difficulty Framework in our 2018 Report.

⁵⁸ AER Rule Change Request, p.6

⁵⁹ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.29

SACOSS believes that clearly articulating all of a retailer's obligations under the Law and Rules to customers experiencing payment difficulties is the first step in ensuring consumer protections are more effective.⁶⁰ Therefore, whilst SACOSS supports the AER's Rule Change Request, SACOSS suggests the AEMC could give consideration to a more preferable rule that makes provision for the AER to develop a **Customers Experiencing Payment Difficulties and Hardship Guideline** that includes statements of retailers' obligations to **all** customers experiencing payment difficulties (perhaps requiring that the statements relating to the broader group of customers experiencing payment difficulties are published on retailers' websites and communicated broadly to all customers).

SACOSS appreciates a Rule dealing with all customers experiencing payment difficulties (including hardship customers) may not properly be situated within Part 3 of the Retail Rules, and recognises that further consideration would need to be given to the location and content of the Rule.

SACOSS submits a Rule which requires statements outlining **all** of a retailers obligations to customers experiencing payment difficulties, including hardship customers, would be 'compatible with the development and application of consumer protections for **small customers**' (the consumer protection test). The current proposed Rule, which allows for the development of a Hardship Guideline specifying retailers' obligations to hardship customers *alone*, is only compatible with the application of protections for hardship customers (as opposed to small customers generally), which then brings in the issue of retailer identification (and exclusion). SACOSS submits an alternative rule dealing with all customers experiencing payment difficulties is likely to better contribute to the relevant energy objectives than the AER's proposed rule.

SACOSS understands that the AEMC can only make a more preferable rule, where the subject of the preferable rule is consistent with the scope of the issue identified in the rule change request.⁶¹ SACOSS recognises that the AER has identified the scope of the rule change request as being limited 'to Part 3 of the Retail Rules to improve the development and implementation of hardship policies for the benefit of vulnerable customers'.⁶²

However, the body of the AER's rule change request identifies issues which can only properly be addressed through a guideline which applies to **all** customers experiencing payment difficulties. For example, in the AER's statement of issues, it identifies increased debt levels held by both hardship and non-hardship customers and increased overall electricity disconnections. SACOSS submits that these issues point to a failure of identification of hardship customers, but also a failure of the application of protections for customers experiencing payment difficulties more broadly, not just hardship customers.

We believe Issue 2 in the AER's Rule Change request, which relates to 'customers being unclear about their rights and entitlements when experiencing payment difficulties'⁶³ is not comprehensively addressed by the AER Rule Change proposal. Whilst the proposed binding Hardship Guideline may result in the rights and entitlements of hardship customers being better articulated and communicated, the guideline will not make any provision for the broader group of customers experiencing payment difficulties who are unaware of the supports to which they are entitled.

Also, in identifying the issues to be addressed by the rule change proposal, the AER point to its observation that 'customers experiencing payment difficulties are not receiving a consistent level of assistance, and the implementation of their rights and entitlements under the Retail Law can differ depending on their

⁶⁰ Importantly, this includes clearly articulating retailers' very broad obligation to offer payment plans under section 50(1) of the Retail Law.

⁶¹ AEMC, Applying the energy objectives – a guide for stakeholders, 1 December 2016, p.10

⁶² AER, Rule Change Request, p.18

⁶³ AER, Rule Change Request, p.10

retailer'.⁶⁴ SACOSS would suggest a solution which just addresses hardship obligations represents a **missed opportunity to more fully address the consistency of supports offered to all customers experiencing payment difficulties under the NECF.**

SACOSS therefore believes a more preferable rule could make provision for standard statements of retailers' obligations to hardship customers *and* customers experiencing payment difficulties (in line with the Retail Law and Retail Rules). We have not fully developed our thinking on the proposed form of the Guideline, but suggest it could be divided into two sections, one dealing with consumer protections for the broader group of customers, and the other dealing with consumer protections for hardship customers (in line with the AER's current proposal). The additional statements in the first section 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)
- 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 customers experiencing payment difficulties) and
- protection from disconnection (with particular protection for customers who have self-identified).

For example, SACOSS submits a standard statement reflecting the retailer's obligations to self-identifying customers, could be required to be published on retailers' websites and could simply state:

You don't have to be a hardship customer to get help from us. These are our obligations to you:

If you tell us (in writing or by phone) that you are experiencing payment difficulties, we will:

Offer you a payment plan

- We will establish the payment plan having regard to your capacity to pay, your arrears and your expected energy consumption.
- We will offer you the option to pay for energy in advance, arrears or by instalments.
- We will inform you of the length of the plan, the amount of the instalments, how often they have to be paid and the date when each instalment is due.
- If you are in arrears we will tell you how many instalments you need to pay, to cover the arrears.
- If you want to pay in advance, we will tell you how these instalments are calculated.

If we don't do these things, we may face a civil penalty.

Additional Statements relating to disconnection obligations and information around concessions and rebates could also be included in a similar way.

SACOSS understands that consideration of our suggestion may not be possible at this stage. In this case, we therefore restate that, in relation to the form of the AER's existing proposed Rule 75, we believe the Rule

⁶⁴ AER, Rule Change Request, p.10

should be separate from the rule relating to Hardship Program Indicators, and the existing Rule 75 should remain unchanged (for reasons outlined in Question 2, above).

Question 8 Other issues

Please identify broader issues with regards to hardship and affordability that may not be addressed by this rule change, if made.

Concessions

Although a consideration of the broader issues associated with hardship are outside the scope of this rule change request, the issues around the application of concessions for vulnerable consumers are of central importance in providing effective supports to customers experiencing payment difficulties. The AER found that in 2016-17 only 39 per 100 electricity customers on hardship programs in South Australia received concessions, compared with 78 per 100 in Tasmania.⁶⁵

SACOSS' 2018 Report 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 encourages the AEMC to have regard to our 2018 Report and Cost of Living Policies. We confirm that we are working to encourage the South Australian government to develop a percentage based concession scheme and allow for retailers to administer the scheme.

Definition of 'hardship customer'

In our 2018 Report, and within this submission, we have commented on the definition of 'hardship customer' under the Retail Law, which we consider represents a limitation on the application of supports for customers experiencing payment difficulties under the current framework. We have noted that if the AER can bring some consistency to the retailers' identification processes of hardship customers through the development of standard statements outlining retailer identification and self-identification processes, then this may go some way towards addressing the issue. The AER has broadly indicated that the statements will be developed 'in conjunction with industry and informed by consumer research'.⁶⁶ The issue of identification is a key focus for SACOSS and we will take a keen interest in the development of standard statements dealing with identification, with a view to broadening the application of, and access to, hardship protections.

SACOSS supports the AEMC looking more closely at the operation of the definition of 'hardship customer' under the Retail Law, and its impact on the effectiveness of supports for consumers experiencing payment difficulties under the NECF, recommending law changes if appropriate.

AEMC's Review to assess how retailers support customers in financial difficulty

SACOSS also supports the recommendation contained in the AEMC's recently published 2018 Retail Review that the AEMC assess how retailers support customers in financial difficulty.⁶⁷ 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'.⁶⁸ SACOSS supports the AEMC reviewing the support options retailers provide commercially to **all** customers experiencing payment difficulties, and providing an assessment of how these operate with retailers **obligations to all customers experiencing payment difficulties** (including retailer identified, self-identified and hardship customers) under the NECF.

⁶⁵ AER's Annual Performance Report on Compliance and Performance of the retail energy market 2016-17, p.33

⁶⁶ AER, Rule Change Request, p.14

⁶⁷ Unless advised otherwise by the COAG Energy Council, by January 2019.

⁶⁸ AEMC, 2018 Retail Energy Competition Review, Final Report, 15 June 2018 Final Report p. xiii

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.

We thank you in advance for consideration of our comments. If you have any questions relating to the submission, please contact Jo De Silva via jo@sacoss.org.au or 08 8305 4211.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'RWomersley', enclosed in a thin black rectangular border.

Ross Womersley
Chief Executive Officer