



Australian Energy Market Commission

DRAFT RULE DETERMINATION

NATIONAL ENERGY RETAIL AMENDMENT (STRENGTHENING PROTECTIONS FOR CUSTOMERS IN HARDSHIP) RULE 2018

Australian Energy Regulator

6 SEPTEMBER 2018

DETERMINATION

INQUIRIES

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ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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SUMMARY

- 1 The Australian Energy Market Commission (AEMC or Commission) has made a draft rule that amends the National Energy Retail Rules (NERR) to require that the Australian Energy Regulator (AER) develops binding customer hardship policy guidelines (Hardship Guidelines).
- 2 The draft rule, which is a more preferable rule, was made in relation to a rule change request submitted by the AER. The proposed rule was aimed at strengthening protections for customers in hardship. The Commission invites submissions on this draft determination including the draft rule by **18 October 2018**.
- 3 Under the draft rule, the AER must, in accordance with the retail consultation procedure in the National Energy Retail Law (NERL), develop the Hardship Guidelines by **1 April 2019**. The Hardship Guidelines must specify:
- processes, timeframes and requirements in relation to approval (or variation) of hardship policies
 - standardised statements for inclusion into a retailer's hardship policy to:
 - give effect to the minimum requirements under s44 of the NERL
 - provide guidance to customers on their rights.
- 4 The more preferable draft rule has been drafted to give effect to the:
- minimum requirements set out in section 44 of the NERL
 - purpose of hardship policies outlined in section 43 of the NERL
 - principles the AER must apply when approving hardship policies as set out in section 45 of the NERL.
- 5 As such, under the more preferable draft rule, the AER's discretion regarding the content of the Hardship Guidelines is bounded by the existing provisions of the NERL.
- 6 In addition, the more preferable rule includes transitional arrangements to ensure current retailers update their policies.

Background and rationale

- 7 Currently, under the NERL, retailers are required to have in place hardship policies in respect of residential customers, and to have these policies approved by the AER. The purpose of a retailer's hardship policy is to identify residential customers who are experiencing payment difficulties due to hardship, and assist them to better manage their bills on an ongoing basis.
- 8 Section 44 of the NERL sets the minimum requirements that a hardship policy must contain, including:
- processes to identify residential customers experiencing payment difficulties due to hardship
 - processes for the early response by the retailer
 - flexible payment options
 - processes to identify government concession programs and financial counselling services

- an outline of a range of programs that the retailer may use to assist hardship customers
- processes to review the appropriateness of a hardship customer’s market retail contract
- processes to assist customers with strategies to improve their energy efficiency.

9 The AER has identified a number of issues relating to the way retailers are developing and implementing their hardship policies, including:

- increasing levels of consumer debt on entry into hardship programs
- high levels of debt for customers who are not receiving hardship assistance
- fewer customers successfully completing hardship programs by paying off arrears.

10 The AER carried out a review in 2017 of the hardship programs of nine selected retailers. That review concluded that most retailers were deficient in at least one aspect of their policy. In the AER’s view, there are discrepancies between hardship policies and what occurs in practice. Also, many policies contain general statements, and that these general, non-specific policies offer customers a lower level of protection.

11 As a result of its hardship review, the AER proposed a rule that would require it to develop hardship guidelines in order to strengthen retailer hardship policies and make them more consistent and transparent.

12 The AEMC published a consultation paper on the rule change request on 24 May 2018. This draft determination is informed by stakeholder submissions to that paper. Additionally, the AEMC held a stakeholder workshop on 22 June 2018 to further inform its decision.

Timeframes under the more preferable rule

13 The table below outlines the steps and timing new retailers will be required to follow when developing and implementing hardship policies (once the Hardship Guidelines are published).

14 The AER must, in accordance with the retail consultation procedure, publish the Hardship Guidelines by 1 April 2019.

ENTITY	OBLIGATION	TIMING
New retailer	Submit a hardship policy that: <ul style="list-style-type: none"> • complies with the Hardship Guidelines • contains clear and specific statements of the action the retailer will take to give effect to the requirements in the NERL 	Within 3 months of being granted retailer authorisation*
AER	Approve compliant hardship policy	Within 3 months of receiving a hardship policy
New retailer	Implement the approved policy	As soon as practicable after approval

Note: * this timing will change should the recommended law change be made, as outlined in paragraph 18 below.

15 The draft rule and transitional arrangements include a timeframe for when current retailers who have existing and approved hardship policies must submit and implement an updated customer hardship policy. This is outlined in the table below and follows the publication of the Hardship Guidelines by 1 April 2019.

ENTITY	OBLIGATION	TIMING
Current retailer	Submit updated hardship policy that: <ul style="list-style-type: none"> • complies with the Hardship Guidelines • contains clear and specific statements of the action the retailer will take to give effect to the requirements in the NERL 	Within 2 months of the AER publishing the Hardship Guidelines (and subsequently within 3 months after the AER amends the Hardship Guidelines)
AER	Approve compliant hardship policy	Within 2 months of submission by the retailer
Current retailer	Implement the approved policy	Within 2 months of approval

16 The implication of this timing is that all current retailers will have their updated, complying customer hardship policies implemented by no later than 1 October 2019.

17 Given the importance of protecting vulnerable customers, the Commission considers that the new rule requiring retailers to submit hardship policies initially or following an amendment by the AER to the Hardship Guidelines should be made a civil penalty provision. The Commission and the AER will make a joint recommendation to the COAG Energy Council regarding civil penalty provisions.

18 The Commission is also recommending that the COAG Energy Council make a change to the NERL to require that new retailers have their hardship policies in place before they receive retailer authorisation.

Summary of reasons

19 Having regard to the issues in the rule change request, the Commission is satisfied that the draft rule will, or is likely to, contribute to the achievement of the national energy retail objective (NERO) by:

- creating a more efficient, effective and consistent mechanism to improve hardship policies
- allowing the AER to create standard statements that will provide improved consistency and clarity of policies, while also allowing retailers flexibility in how they implement their hardship programs
- facilitating consistency in hardship policies to assist customers and their advocates in understanding and accessing support programs

- improving the quality and clarity of information in hardship programs, giving consumers greater confidence in their ability to get support
- improving the AER's ability to monitor and enforce hardship policies.

- 20 The Commission is of the view that the draft rule appropriately enhances the existing requirements on retailers under the NERL in relation to customers facing payment difficulties due to hardship.
- 21 The benefits of the draft rule are likely to outweigh the costs as there should be minimal cost impacts for complying retailers who already offer adequate protections to customers in hardship.
- 22 The Commission considers the draft rule in this format to be in the long-term interests of consumers in relation to the quality of energy services and consumer protections and as a result, it will, or is likely to, contribute to the achievement of the NERO.

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1 THE AUSTRALIAN ENERGY REGULATOR'S RULE CHANGE REQUEST

1.1 The rule change request

On 21 March 2018, the Australian Energy Regulator (AER) made a request to the Australian Energy Market Commission (AEMC or Commission) to make a rule regarding the protections for customers in financial hardship (rule change request).

1.2 Background

In order to support residential customers who are facing financial difficulty, the National Energy Retail Law (NERL) includes provisions relating to customer hardship policies.

1.2.1 Hardship provisions under the NERL

The NERL includes provisions relating to customer hardship policies at Part 2 Division 6. Under the NERL, within three months of being granted a retailer authorisation, a retailer must develop and submit a hardship policy in respect of residential customers for approval by the AER. The purpose of a retailer's hardship policy is to identify residential customers who are experiencing payment difficulties due to hardship, and assist them to better manage their bills on an ongoing basis.¹ Once approved, the retailer must publish the approved policy on its website, and also maintain and implement the policy.² If the AER forms a view that the retailer's policy requires review then the retailer must vary the policy in accordance with the AER's direction.³

Section 44 of the NERL sets the minimum requirements that a hardship policy must contain:

- processes to identify residential customers experiencing payment difficulties due to hardship
- processes for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship
- flexible payment options (including a payment plan and Centrepay)
- processes to identify and notify hardship customers of appropriate government concession programs and appropriate financial counselling services
- an outline of a range of programs that the retailer may use to assist hardship customers
- processes to review the appropriateness of a hardship customer's market retail contract in accordance with the purpose of the customer hardship policy
- processes or programs to assist customers with strategies to improve their energy efficiency
- any variations specified by the AER
- any other matters required by the Rules.

1 Section 43(1) of the National Electricity Retail Law (NERL).

2 Section 43(2)(c) of the NERL.

3 Section 43(3) of the NERL.

Part 3 of the National Energy Retail Rules (NERR) details the obligations of retailers in relation to customers in financial hardship (hardship customer). This Part covers:

- the obligation of retailers to communicate their hardship policy to a residential customer identified as a hardship customer (rule 71)
- the way in which a payment plan for a customer must be established and communicated (rule 72) and how the retailer is to manage a request from a residential customer to use Centrepay as a payment option (rule 74)
- waivers of late payment fees and waiver of debt for hardship customers (rule 73)
- hardship program indicators to be determined by the AER (current rule 75), which must cover:
 - entry into hardship programs
 - participation in hardship programs
 - assistance available to and assistance provided to customers under customer hardship policies.

Under the NERL and the NERR, the AER is required to publish a yearly report on the performance of retailers by reference to these hardship program indicators.⁴

1.3

Current arrangements

1.3.1

Rationale for the rule change request

In the rule change request the AER provided its rationale for the rule change. A number of key points raised in the rule change request are discussed further below.

Application of hardship policies - performance reporting findings

As part of its monitoring and enforcement work program, and as described in its *2016-17 Annual Report on Compliance and Performance of the Retail Energy Market*, the AER identified a number of issues relating to the way in which hardship policies are being implemented. The identified issues include that there are:

- increasing levels of energy debt on entry into hardship programs which may indicate that retailers are not proactively identifying customers who may be facing financial difficulties
- high levels of debt for customers who are not receiving hardship assistance
- low levels of customers receiving hardship assistance
- fewer customers completing hardship programs by paying off arrears
- increased overall electricity disconnections.⁵

AER 2017 Hardship Review outcomes

In 2017, the AER carried out a review of the hardship programs of nine selected retailers. As part of this review the AER sought information on the operation of hardship policies and evidence of implementation. The AER concluded that while it did not observe widespread

⁴ Sections 284 and 285 of the NERL.

⁵ AER rule change request, pp. 5-6.

non-compliance it did note that most retailers were deficient in at least one aspect of their policy.⁶ The AER's findings were that:

- there is no consistency in how and when a customer could be identified as requiring assistance
- there is no corresponding increase in customers on hardship programs that correlates with higher energy prices
- payment plans being offered may not be realistic or based on a customer's capacity to pay
- some retailers were unable to explain how they implement their policies.⁷

AER enforcement work

As part of its enforcement work program, the AER determined that hardship policies that did not contain specific commitments were difficult to enforce. The AER observed that many approved policies contain general statements, and that general policies offer customers a lower level of protection.⁸

1.3.2

Solution proposed in the rule change request

The AER sought to resolve the issues discussed above by proposing a rule (proposed rule) to replace rule 75 of the NERR to require that the AER must, in accordance with the retail consultation procedure, both determine the hardship policy indicators as well as make customer hardship policy guidelines (Hardship Guidelines) that will be binding.

The AER proposed that the Hardship Guidelines specify hardship indicators which is currently a stand-alone requirement. The AER proposed that the Hardship Guidelines would specify the same hardship indicators that currently exist under rule 75 of the NER but also that the Hardship Guidelines made by the AER may specify:

- requirements to be complied with in connection with the approval or variation of a hardship policy
- any matter the AER considers necessary for inclusion in the Hardship Guidelines (having regard to the purpose of a hardship policy), including:
 - standardised statements to give effect to the minimum requirements under the NERL for the purpose of guiding consumers
 - guidance or examples of statements that the AER considers meet the minimum requirements
 - the matters the AER considers must be contained in a policy submitted for approval.⁹

The AER proposed that it may amend the Hardship Guidelines from time to time in accordance with the retail consultation procedure.¹⁰

6 Rule change request, p. 7.

7 Rule change request, pp. 7 to 9.

8 Rule change request, p. 9.

9 *ibid.*

10 *ibid.*

In the AER's view, the creation of Hardship Guidelines would provide a point of reference to industry on how hardship obligations should be applied.¹¹

The AER also suggested that binding Hardship Guidelines would provide additional guidance on hardship approval processes and how the minimum requirements under the NERL should be applied. This may include standardised statements to give effect to the minimum requirements under the NERL for the purpose of guiding consumers.¹²

The AER did not provide a timeline for release of the Hardship Guidelines, and noted that timing will be determined by the date of release of the new rule, if made.¹³ The rule change request did not discuss transitional arrangements in relation to retailers who already have an approved hardship policy. The AER proposed that this rule, if made, be a civil penalty provision.

1.3.3 The rule making process

On 24 May 2018, the Commission published a notice advising of its commencement of the rule making process and consultation in respect of the rule change request.¹⁴ A consultation paper identifying specific issues for consultation was also published. Submissions closed on 28 June 2018. Additionally, the AEMC held a stakeholder workshop on 22 June 2018 to further inform its decision.

The Commission received 26 submissions as part of the first round of consultation. The Commission considered all issues raised by stakeholders in submissions. Issues raised in submissions are discussed and responded to throughout this draft rule determination. Issues not addressed in the body of this document are set out and addressed in Appendix A.

1.3.4 Consultation on draft rule determination

The Commission invites submissions on this draft rule determination, including a more preferable draft rule, by 18 October 2018.

Any person or body may request that the Commission hold a hearing in relation to the draft rule determination. Any request for a hearing must be made in writing and must be received by the Commission no later than 13 September 2018.

Submissions and requests for a hearing should quote project number RRC0017 and may be lodged online at www.aemc.gov.au.

11 Rule change request, p. 13.

12 Rule change request, p. 21.

13 Rule change request, p. 18.

14 This notice was published under section 251 of the NERL.

2 DRAFT RULE DETERMINATION

2.1 The Commission's draft rule determination

The Commission's draft rule determination is to make a more preferable draft rule. The more preferable draft rule requires the AER to develop, maintain and publish Hardship Guidelines that contain:

- processes for the approval (or variation) for retailer hardship policies
- standardised statements to:
 - give effect to the minimum requirements under s44 of the NERL
 - provide guidance to customers on their rights, and retailer obligations, regarding the hardship provisions under the NERL.

Retailers must then submit to the AER a customer hardship policy that complies with the Hardship Guidelines and contains clear and specific statements of the actions the retailer will take to give effect to the minimum requirements in s44 of the NERL.

The Commission's reasons for making this draft determination are set out in chapter 3.

This chapter outlines:

- the rule making test for changes to the NERR
- the more preferable rule test
- the assessment framework for considering the rule change request
- the Commission's consideration of the more preferable draft rule against the national energy retail objective (NERO).

Further information on the legal requirements for making this draft rule determination is set out in Appendix B.

2.2 Rule making test

2.2.1 Achieving the NERO

The Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the NERO.¹⁵ This is the decision making framework that the Commission must apply.

The NERO is:¹⁶

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.

¹⁵ Section 236(1) of the NERL.

¹⁶ Section 13 of the NERL.

The Commission must also, where relevant, 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” (the “consumer protections test”).¹⁷

Where the consumer protections test is relevant in the making of a rule, the Commission must be satisfied that both the NERO test and the consumer protections test have been met.¹⁸ If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

There may be some overlap in the application of the two tests. For example, a rule that provides a new protection for small customers may also, but will not necessarily, promote the NERO.

2.2.2 Making a more preferable rule

Under section 244 of the NERL, the Commission may make a rule that is different (including materially different) to a proposed rule (a more preferable rule) if it is satisfied that, having regard to the issue or issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the achievement of the NERO.

In this instance, the Commission has made a more preferable rule. The reasons are summarised below.

2.3 Assessment framework

In assessing the rule change request against the NERO the Commission has considered the following principles:

- **Improved hardship protections:** the role of hardship provisions is to assist customers who are facing payment difficulty due to hardship in order to minimise potential harm from disconnection. It also provides an avenue for retailers to receive payment for energy used, and is therefore part of their processes to manage bad debt. The AEMC has considered the impact of the proposed rule change on improving the outcomes for consumers facing payment difficulties due to hardship, while also potentially limiting costs associated with bad debts that are passed onto consumers.
- **Transparency:** Lack of appropriate transparency in the market, and in particular a lack of timely information about consumer protections, can lead to consumers both losing confidence in, and failing to engage with, their retailer when they face payment difficulty. The AEMC has considered whether the proposed rule change improves transparency for hardship customers regarding the levels of assistance they are entitled to receive.
- **Regulatory and administrative burden:** Requiring a change to retailer hardship programs could create additional costs for retailers, and the AER and stakeholders in developing the Hardship Guidelines. The AEMC has considered the benefits of the

¹⁷ Section 236(2)(b) of the NERL.

¹⁸ That is, the legal tests set out in section 236(1) and (2)(b) of the NERL.

proposed rule change against the costs that would likely pass through to consumers in a workably competitive market.

- **Long-term benefits to consumers:** The AEMC has examined whether the long-term benefits to consumers of the proposed rule change exceed the additional costs that would pass through to them.

2.4 Summary of reasons

The more preferable draft rule made by the Commission is attached to and published with this draft rule determination. The key features of the more preferable draft rule are:

ENTITY	OBLIGATION	TIMING
AER	<p><i>Draft Rule 75A:</i> Develop maintain and publish the Hardship Guidelines, in accordance with the retail consultation procedure, that must specify:</p> <ul style="list-style-type: none"> • processes, timeframes and requirements in relation to the approval of customer hardship policies • standardised statements for inclusion into a retailer’s hardship policy to: <ul style="list-style-type: none"> • give effect to the minimum requirements under s44 of the NERL • provide guidance to customers on their rights in relation to customer hardship. <p>The AER may amend the Hardship Guidelines from time to time in accordance with the retail consultation procedure.</p>	Publish guidelines by 1 April 2019.
New retailers	<p><i>Draft Rule 75B (1) and (2):</i> Submit to the AER a customer hardship policy that complies with the Hardship Guidelines and contains clear and specific statements the retailer will take to give effect to the minimum requirements under s44 of the NERL.</p> <p>Draft Rule 75B(1) provision is recommended to be a civil penalty provision.</p>	Within 3 months of being granted retailer authorisation (in accordance with s43(2) of the NERL).
Retailers with an existing approved policy	<p><i>Draft Rule 75B(1) and (2); and Transitional: Schedule 3 and Part 10, subrule (3):</i> Existing retailers with approved hardship policies must submit an updated hardship policy that complies with Draft Rule 75B to the AER.</p>	Within 2 months of the date the AER publishes or amends the Hardship Guidelines (no later than 1 June 2019).

ENTITY	OBLIGATION	TIMING
AER	<i>Draft Rule 75B(3)</i> : For new retailers the AER must approve (subject to section 45 of the NERL) a customer hardship policy (or variation), subject to s43 of the NERL, if it complies with the Hardship Guidelines and contains statements of action the retailer will take to give effect to the minimum requirements in s44 of the NERL.	Within 2 months of receiving a customer hardship policy.
AER	<i>Transitional: Schedule 2, New Part 10</i> : For current retailers submitting an updated hardship policy, the AER must approve the policy within 6 months, if it complies with the Hardship Guidelines and contains clear and specific statements of action the retailer will take to give effect to the minimum requirements in s44 of the NERL.	Within 2 months of receiving updated customer hardship policy (no later than 1 August 2019).
New retailers	<i>Draft Rule 75(b)</i> : Implement and publish the customer hardship policy.	As soon as practicable after the policy is approved.
Retailers with an existing approved policy	<i>Transitional: Schedule 2, New Part 10</i> : Implement and publish the updated customer hardship policy.	Within 2 months of being approved (no later than 1 October 2019).

The implication of the above is that the draft rule and transitional arrangements require that all current retailers will have their updated, complying customer hardship policies implemented by no later than **1 October 2019**.

Further detail on the more preferable draft rule can be found in chapter 3.

2.4.1

Contribution to the NERO

The Commission is satisfied that the preferable draft rule will, or is likely to contribute to the achievement of the NERO by promoting the efficient use of energy services for the long-term interest of consumers, for the following reasons:

- The draft rule will improve hardship protections by enabling the AER to create a Hardship Guideline that will require retailers to have in place consistent and easy to understand information for customers facing payment difficulties due to hardship. Armed with better information, customers facing payment difficulties due to hardship (and their advocates) will be able to better access the support options available to them. The result of this is that they will have an increased ability to manage their energy bills and therefore limit the amount of debt they owe to a retailer.

- By improving the quality and clarity of information in hardship policies through the Hardship Guidelines, the draft rule will assist customers in having greater confidence in their ability to get support from their retailer when they are facing hardship.
- The draft rule creates a more efficient approach for the AER to exercise its current powers under the NERL. Any costs associated with the outcomes of the Hardship Guideline are costs that are allocated to retailers as part of their requirements under the NERL. In practice, there should be minimal cost impacts for retailers who already comply with the NERL and who provide adequate support for customers facing payment difficulties due to hardship. The benefits of this rule change therefore outweigh any potential costs that might necessarily be borne by a retailer and its customer base.
- The benefits of the draft rule are expected to accrue both in terms of improved protections in the near term for consumers and also over the long-term, as increasing understanding of hardship programs should result in customers managing their electricity bills and reducing their levels of debt with retailers.

The Commission is satisfied that the more preferable draft rule passes the consumer protections test as it gives effect to the provision of protections for residential customers facing payment difficulty due to hardship. It is likely to be compatible with any future development of consumer protections for residential customers facing hardship as it provides the AER with the ability to modify its Hardship Guidelines in accordance with any changes in the NERL.

Further detail on these reasons can be found in chapter 3.

2.5 Other requirements under the NERL

In applying the rule making test,¹⁹ the Commission has also had regard to section 49 of the NERL. Under this provision, the AEMC must have regard to the purpose set out in section 43(1) when making rules with respect to the development, submission, approval, publication, maintenance and implementation of customer hardship policies, and variations of customer hardship policies. That is, the Commission must have regard to the purpose of a hardship policy being to identify residential customers who are experiencing payment difficulties due to hardship, and assist them to better manage their bills on an ongoing basis.

The Commission is of the view that the more preferable draft rule will result in improved identification of customers facing payment difficulty due to hardship, and will facilitate customers and their advocates in understanding and accessing the support they need to manage their energy bills on an ongoing basis. Therefore, the Commission considers that the draft rule meets the purpose set out in section 43(1) of the NERL.

¹⁹ Set out in section 236(1) of the NERL.

3 ASSESSMENT OF THE DRAFT RULE

The Commission considers that the existing provisions relating to hardship under the NERL can be strengthened by the introduction of a rule requiring binding Hardship Guidelines.

This chapter summarises the key issues considered by the Commission in developing the draft rule. It outlines:

- the rationale for the rule change
- the scope of the rule change
- the proposed approach
- defining hardship
- hardship indicators
- the costs and benefits of the rule change
- enforceability and civil penalty provisions
- transitional arrangements.

3.1 The rationale for the rule change

As discussed in section 1.2.1, the NERL and the NERR require that retailers have in place hardship policies 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”.²⁰ The AER has developed guidance to assist retailers in demonstrating that their policies meet the minimum requirements under the section 44 of the NERL.²¹ This guidance was developed in 2011 and is non-binding. Currently, all retailers who have been granted retailer authorisation have in place a hardship policy that has been approved by the AER under s43 of the NERL.

The proposed rule sought to address the issues outlined in section 1.3.1 by requiring that the AER must, in accordance with the retail consultation procedure, make Hardship Guidelines and that the Guidelines will be binding.

The Commission sought stakeholder views on the adequacy of the current approach to the application of hardship protections and the rationale for the rule change.

3.1.1 The AER’s view

As outlined in section 1.3.1, the AER is of the view that the rule change is required to improve the outcomes for customers facing payment difficulties due to hardship.

The AER argued that under the current arrangements:

- most of the nine retailer policies reviewed by the AER in 2017 were deficient in at least one aspect

²⁰ Section 43(1) of the NERL.

²¹ AER, *Guidance on AER approval of customer hardship policies - FINAL*, May 2011, AER, Melbourne.

- there is no consistency in how and when a customer could be identified as requiring assistance
- some retailers were unable to explain how they implement their policies
- many of the approved policies of retailers contain generic statements, and those general policies offer customers a lower level of protection.

In the AER's view, the proposed rule change would:

- promote consistency in the quality and application of retailers' customer hardship policies
- provide retailers with greater clarity on their hardship responsibilities as required under the NERL
- ensure customers are better able to determine what their rights are when they are facing payment difficulties due to hardship
- allow the AER to more effectively monitor performance and enforce hardship policies.

3.1.2

Stakeholder views

Submissions to the consultation paper ranged from agreeing that the rule change is required, to being of the view that the current arrangements adequately support customers who are facing hardship.

Support for the rule change

All consumer advocates supported the need for the rule change. All agreed that the current arrangements were not providing vulnerable customers or those facing hardship with adequate and consistent support. As the Energy and Water Ombudsman NSW (EWON) noted:²²

While some retailers, particularly first tier retailers, have taken large steps to improve the hardship policies they introduced from around 2005, with noticeable results, other retailers' hardship programs, by comparison, fall well short of industry benchmarks. And the accessibility and deliverables of all retailer hardship programs fall short of what is required to address energy affordability in today's market.

Energy Consumers Australia (ECA) and the Public Interest Advocacy Centre (PIAC)²³ both consider that there is strong evidence that the current approach does not provide adequate protections to consumers in hardship.²⁴

Many consumer advocates, including the South Australian Financial Counsellors Association (SAFCA), the Consumer Action Law Centre (CALC), ECA, PIAC and the South Australian Council of Social Services (SACOSS) all agreed that there is little consistency between retailers in how they apply their hardship programs, both across retailers and within the

²² EWON, consultation paper submission, p. 2.

²³ PIAC's submission to the consultation paper was supported by submissions from the Salvation Army, the Physical Disability Council of NSW, the Ethnic Communities' Council of NSW Inc, and the Combined Pensioners and Superannuants Association. Any references to PIAC's position on matters within this draft determination are therefore supported by these organisations. Any additional issues raised by these organisations is addressed separately in Appendix A.

²⁴ ECA, consultation paper submission, p. 2.

individual retailers. In their view this is not leading to adequate protections for all customers facing payment difficulties due to hardship.²⁵

Two retailers, Powershop and Ergon Energy Queensland, noted their support for the rule change.²⁶ As stated by Powershop, while it is comfortable with the way it approaches hardship “the AER’s findings from the Hardship Review indicate that there is room for improvement to ensure consistency of approach across the industry”.²⁷

Support for the current arrangements

Retailers (other than Powershop and Ergon Energy Queensland) and the Australian Energy Council (AEC) did not support the rule change for two reasons:

1. the current arrangements provide adequate protections to consumers, while allowing retailer flexibility
2. there are existing powers under the NERL that would allow the AER to improve policies that are inadequate without the need for binding guidelines.

With regards to the first point above ActewAGL and Aurora Energy took the view that the current regulatory framework provides adequate protections to customers in hardship and that section 44 of the NERL clearly articulates the obligations of retailers in supporting consumers in hardship.²⁸ Momentum Energy noted that regulating hardship policies could “dampen the benefits through the latitude which is currently allowed”.²⁹

AGL, Origin Energy, Red Energy and Lumo Energy, along with the AEC argued the second point above.³⁰ These stakeholders were of the view that where the AER determines that there are failings with retailer policies, it has existing powers under section 43 and section 45 of the NERL to request that the retailer make amendments to their hardship policy.

Many retailers and the AEC noted that there are potentially issues with the consistent application of hardship policies across the industry but also suggested the current framework has allowed some retailers to develop and implement best practice policies to resolve issues of payment difficulties for vulnerable customers.³¹ EnergyAustralia said that “[w]hile, we agree with the AER’s overarching aims, it is still uncertain what regulatory changes would best achieve the desired outcomes”.³² These stakeholders took the position that the AER should rely on its existing powers rather than go down the path of a binding guidelines that will add additional cost onto retailers and their customers.

25 Consultation paper submissions: SAFCA, p. 2; CALC, p.2; PIAC, p.5; SACOSS, p. 5.

26 Consultation paper submissions: Powershop, p.1; Ergon Energy Queensland, p. 1.

27 Powershop, consultation paper submission, p.1.

28 Consultation paper submissions: ActewAGL, p. 2; Aurora Energy, p.1.

29 Momentum Energy, consultation paper submission, p. 2.

30 Consultation paper submissions: AGL, p. 3; Origin Energy, p. 1; Red Energy and Lumo Energy, p. 3; AEC, p. 2.

31 AEC, consultation paper submission, p. 2.

32 EnergyAustralia, consultation paper submission, p.5.

The AEC also said that “[we] query whether there would be any difference in time or resources approving a hardship policy in the context where Guidelines are issued, or under an approach where the AER uses its existing powers”.³³

3.1.3 Analysis - adequacy of current policies

The Commission supports the view provided by consumer groups and some retailers that the current approach to hardship is not providing adequate and consistent protections for customers facing payment difficulties due to hardship.

The AER was able to provide evidence of a number of trends that suggest there are deficiencies in the way consumers facing payment difficulties due to hardship are able to access hardship programs and be provided adequate support under these programs. This evidence includes the increasing debt on entry into hardship programs. In the Commission’s view the average debt on entry into a hardship program provides an indicator of how proactive retailers are in the early identification of customers facing hardship. Having a process for early response to customers identified as being in hardship is a minimum requirement under the NERL.³⁴ Higher debt on entry may mean that a customer is less likely to be able to effectively manage their arrears and exit a hardship program successfully. Also of concern to the Commission is the reduction in the proportion of customers who successfully exit a hardship program by paying off their debts.

Further to this, the Australian Competition and Consumer Commission (ACCC) found deficiencies in retailers hardship programs through its Retail Electricity Pricing Inquiry.³⁵ It found that “[d]espite the requirements of the NERL and NERR, consumers continue to experience difficulty accessing these services”.³⁶ As part of its inquiry the ACCC noted that it was advised “that some smaller retailers take an inflexible approach towards negotiating payment arrangements and show a reluctance to provide medium-to long-term support for consumers experiencing hardship”.³⁷ The ACCC supports the proposed rule change as it considers that it would provide an incentive for retailers to take a more proactive approach to hardship and enable them to independently determine how to best support vulnerable consumers.³⁸

Several stakeholders and the ACCC provided examples of cases where consumers facing payment difficulties due to hardship had inconsistent and inadequate responses from retailers to their situation. For example the ACCC cited the case of a customer with a debt of \$2,285 after eight months with the retailer, but who had not been identified by the retailer as being in hardship and was disconnected.³⁹ Further, the retailer placed an onerous repayment arrangement on the customer to be reconnected.⁴⁰ Similar examples were also provided by

³³ AEC, consultation paper submission, p. 2.

³⁴ Section 44(b) of the NERL.

³⁵ ACCC, 2018, *Restoring electricity affordability and Australia’s competitive advantage - Retail Electricity Pricing Inquiry - Final Report*, June 2018, ACCC, Canberra, p. 308.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.* p. 312

³⁹ *ibid.*, p. 307.

SACOSS, EWON, the Energy and Water Ombudsman Victoria (EWOV) and SAFCA.⁴¹ These case studies provide an insight into the issues consumers who are facing hardship may experience.

The Commission considers that there is sufficient evidence to support the need for a new approach to hardship policies to facilitate retailers providing an adequate level of support for customers in hardship.

3.1.4 Analysis - AER's existing powers

The Commission does not agree that the use of the AER's current powers under the NERL will result in an efficient approach to improving hardship policies.

The Commission generally agrees that under a broad interpretation of the NERL, the AER may have powers to direct a retailer to modify a policy that the AER considers is insufficient.⁴² However, as part of the AEMC's consultation on this rule change, the AER has provided examples of where it has attempted to use these powers under the NERL. While some retailers have modified their policies as directed, one retailer has been in negotiations with the AER for over six months about varying its policies, with no outcomes at the time of this draft determination.

Further, the AER would need to negotiate with upwards of 20 retailers who operate under the NECF to have them each modify their policy. In the Commission's view, this is not an efficient approach to having all retailers meet the minimum requirements of the NERL. It would require significant resources from the AER to create new non-binding guidelines and negotiate with each individual retailer to modify their policy.

In the Commission's view, the more efficient approach would be for the AER to make binding guidelines that would require all retailers to amend their policies in line with the guidelines and therefore create a consistent approach.

3.2 Scope of the rule

As part of the consultation on this rule change request, a number of stakeholders expressed concern about the proposed rule giving the AER powers outside of the scope of NERL.

3.2.1 The AER's view

The AER's rule change request indicated that the development of the Hardship Guidelines, in particular the standard statements' would reflect the current minimum requirements in section 44 of the NERL.⁴³ Further, it noted that with regards to standard statements, retailers would be "able to determine how to implement these minimum requirements but the

40 *ibid.*

41 SACOSS, *Effectiveness of Supports for Customers Experiencing Payment Difficulties - Strengthening protections for customers under the NECF - SACOSS Report*, June 2018, SACOSS, Adelaide, pp. 35-36; Consultation paper submissions; SAFCA p.p. 10-16; EWOV, p. 3, EWON, pp. 6-8.

42 If the AER has formed that view under its functions outline in section 204 of the NERL.

43 AER rule change request, p. 14.

intention is that these statements would allow customers to work out what assistance a retailer will provide under its policy".⁴⁴

The AER's intent is that the proposed rule would not expand the current obligations, "but seeks to provide clarity via the Hardship Guidelines on how these obligations are to apply in practice".⁴⁵

3.2.2 Stakeholder views

A number of stakeholders were concerned that the proposed rule would provide the AER with powers to make social policy when developing the Hardship Guidelines. Of particular concern was the AER's drafting of the proposed rule that the Hardship Guidelines may specify "any matter that the AER considers necessary for inclusion in the customer hardship policy".⁴⁶

The following submissions expressed concern about the scope of the rule change:

Origin Energy	Both subsections 4(b) and (5) [of the proposed new rule] provide the AER with very broad discretion through the use of the phrase 'any matter'; this is particularly concerning for Origin given the potential for the AER to prescribe certain conduct under the law (notwithstanding their stated intention not to do so). ⁴⁷
Simply Energy	If any form of guideline making powers for retailer hardship policies were introduced, Simply Energy considers that the scope of this power should be restricted to allowing the AER to provide high-level direction around the minimum requirements under the National Energy Retail Law. Simply Energy would not, however, support the AER being provided with a broad discretion to publish enforceable guidelines that extend to any matter it considers necessary, as presently proposed under its amended rule 75(4)(b). ⁴⁸
AEC	[I]n our view there is a real risk that the development of the Guidelines will require the AER to make key policy decisions as to who receives hardship assistance and what kind of assistance is provided. ⁴⁹
Red Energy and Lumo Energy	While clear guidance on developing hardship policies that enable good customer outcomes is strongly supported, the proposal appears to suggest the AER will be setting policy, rather than merely encouraging compliance within the strict wording of the law and rule. ⁵⁰
AGL	If the AEMC decision is to allow the rule change request, AGL recommend the scope of the Guidelines be narrowed. AGL welcome guidance on the AER's

44 *ibid.*

45 AER rule change request, p. 15.

46 AER rule change request, p. 20.

47 Origin Energy, consultation paper submission, p. 7.

48 Simply Energy, consultation paper submission, p. 2.

49 AEC, consultation paper submission, p. 3.

50 Red Energy and Lumo Energy, consultation paper submission, p. 2.

	expectations of minimum requirements and hardship policies but ambiguous language can create unintended outcomes. The inclusion of open-ended wording such as ‘matters that the AER considers must be contained in customer hardship policies’ creates a risk for substantial changes to retailer processes and the obligations imposed. ⁵¹
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A number of submissions discussed the role of the AER in enabling consistency of hardship policies. AGL noted that it was unclear “how additional powers under a Guideline could materially change matters of consistency without making judgements on who should receive assistance and what kind of assistance should be provided”.⁵²

However, CALC argued that the use of inconsistent terminology in hardship policies creates a barrier to the AER in overcoming the issues it is seeing with implementation.⁵³

3.2.3

Analysis

Current provisions under the NERL

Under the NERL, when approving hardship policies or variations to hardship policies the AER must be satisfied that the policy:

- contains the minimum requirements under section 44 of the NERL⁵⁴
- will or is likely to contribute to the purpose in section 43(1)⁵⁵, namely that “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”.⁵⁶

It must also consider that:

- the supply of energy is an essential service for residential customers
- retailers should assist hardship customers by means of programs and strategies to avoid disconnection solely due to an inability to pay energy bills
- disconnection of a hardship customer due to an inability to pay energy bills should be a last resort option
- residential customers should have equitable access to hardship policies, and that those policies should be transparent and applied consistently.⁵⁷

Further, section 44(h) of the NERL allows the AER to make variations with regards to how the minimum requirements have been implemented in a hardship policy so that they meet the principles in section 45(3).

⁵¹ AGL, consultation paper submission, p. 5.

⁵² AGL, consultation paper submission, p. 2.

⁵³ CALC, consultation paper submission, p. 2.

⁵⁴ Section 45(1)(a) of the NERL.

⁵⁵ Section 45(1)(b) of the NERL.

⁵⁶ Section 43(1) of the NERL.

⁵⁷ Section 45(3) of the NERL.

The Commission's interpretation of this power is that it does not extend to the AER making additional minimum requirements, and any variations must be within the scope of the minimum requirements.

Draft rule

The Commission considers the NERL gives the AER discretion to specify and assess how retailer hardship policies give effect to the minimum requirements of the NERL. The Commission agrees with retailers that the AER should not be given a broader scope when developing the Guidelines than already exists under the NERL. Therefore, the rule has been drafted to give effect only to the:

- minimum requirements set out in s44 of the NERL
- purpose of hardship guidelines outlined in s43 of the NERL
- principles the AER must apply when approving hardship policies, as outlined in s45 of the NERL.

In the Commission's view, the proposed approach will give the AER a more effective mechanism (as discussed in section 3.1.4) to improve hardship policies, but will not provide the AER with any powers it does not already have under the NERL with regards to approving hardship policies.

3.3 Proposed approach

The Commission sought stakeholder views on the AER's proposed approach of including standard statements in the Hardship Guidelines. Views were also sought on whether standard statements would improve policies, while also providing retailers with flexibility in how they implement their hardship programs.

3.3.1 The AER's view

The AER's view is that the current compliance of retailers with the minimum requirements under the NERL is inadequate. The ACCC also formed this view as part of its Retail Electricity Pricing Inquiry, as outlined in section 3.1.3.

The AER believes that the inclusion of standard statements that a retailer must reflect in its hardship policy would have the following benefits:

- retailers will adopt a more consistent approach to their engagement with vulnerable customers
- the AER's and customers' confidence in the quality and management of hardship policies will increase as the consistency and operation of industry hardship policies improve
- customers will be better able to understand their entitlements
- the AER will be better able to enforce hardship obligations.

3.3.2 Stakeholder views

Stakeholder views in support of the inclusion of standard statements that allow for flexibility are as follows:

EWON	A guideline which commits retailers to consistent action-based hardship policies should help to address some of the issues outlined in the [case studies provided]. ⁵⁸
EWOV	EWOV supports the implementation of a minimum standards of assistance approach that provides clear guidance to both retailers and customers while maintaining flexibility for the retailers to extend additional and practical assistance where necessary. ⁵⁹
PIAC	In PIAC's view, to be effective, the Hardship Guidelines (and any standard statements included in them) must focus on consumers' entitlement to support, and on the intended outcomes for consumers experiencing payment difficulty, rather than expressions of standard principles. ⁶⁰
Powershop	Powershop's view is that there has to be a level of standardised statements in a hardship guideline to ensure that there is enough flexibility to cater for all customer situations in all jurisdictions. A level of standardisation also allows retailers to provide personalised assistance as opposed to rigid process driven assistance. ⁶¹
Energy and Water Ombudsman Queensland (EWOQ)	We concur that general obligations are more difficult to enforce and therefore lead to inadequate consumer protections. General statements around retailer's obligations offer customers a lower level of protection because they are open to interpretation and no guidance as to a standard. ⁶²
Momentum Energy	Momentum does not oppose the approach of 'standard statements' that provide retailers flexibility in how the statements are applied in practice. ⁶³
ECA	We agree with the AER proposition that standard statements that set out clearly the minimum requirements would not necessarily reduce retailers' flexibility in how they apply hardship provisions. ⁶⁴
CALC	Binding standard statements would improve hardship provisions and give the AER greater scope to enforce current laws and rules. It will not prevent retailers from being flexible in combining elements of the minimum standards or providing additional measures to assist consumers in financial difficulty. ⁶⁵

⁵⁸ EWON, consultation paper submission, p. 4.

⁵⁹ EWOV, consultation paper submission, p. 4.

⁶⁰ PIAC, consultation paper submission, p. 7

⁶¹ Powershop, consultation paper submission, p. 3.

⁶² EWOQ, consultation paper submission, p. 2.

⁶³ Momentum Energy, consultation paper submission, p. 2.

⁶⁴ ECA, consultation paper submission, p. 7.

⁶⁵ CALC, consultation paper submission, p. 3.

Stakeholder views regarding the ability for the AER to make standard statements are discussed in section 3.2.2. However, Origin Energy also said:⁶⁶

Despite the AER's explicit intention to reflect section 44 of the law, it is Origin's experience that standard statements could potentially have unintended consequences for retailer practices. This is primarily because Hardship practices operate around differing collection processes within each retailer.

Accordingly, Origin believes the AER should be restricted to reflecting existing standards in the law and then requiring retailers to set out in their policies how those statements will be met in practice.

Red Energy and Lumo Energy argued that standard statements have the potential to create additional obligations over and above what is specified in the NERL and NERR.⁶⁷

SACOSS supported the inclusion of standard statements but went on to say that these "alone should not be considered sufficient to satisfy the AER's approval processes for hardship policies under the Retail Law".⁶⁸ In SACOSS's view, the AER's assessments of how retailers implement their processes will be of key importance in ensuring that those policies are consistent with the retailer's minimum obligations.⁶⁹ QCOSS agreed that standard statements may provide clarity and certainty, but had the potential to fall short of adequately protecting customers in financial difficulty if they are not set at a high standard.⁷⁰

3.3.3

Analysis

To deal with what the AER and ACCC have determined as inadequacies in hardship policies, the Hardship Guidelines will be able to facilitate:

1. Consistency in the format of policies – the AER will be able to create a 'pro forma' for how retailers are to set out their policies.
2. Improved consistency in the substance of the policies by way of standardised statements, and therefore outcomes.

The Commission's view is that this 'pro forma' approach would be beneficial for smaller retailers, customers and their advocates, and the AER in its assessment and enforcement functions:

- smaller retailers with limited resources will be able to create better policies using a pro forma
- customers and their advocates will be able to better identify their rights and obligations under a hardship program
- the AER will have a consistent basis from which to assess and enforce policies and, if the hardship indicators are updated to reflect any requirements under the new Hardship

⁶⁶ Origin Energy, consultation paper submission, p. 5

⁶⁷ Red Energy and Lumo Energy, consultation paper submission, p. 2.

⁶⁸ SACOSS, consultation paper submission, p. 9.

⁶⁹ *ibid.*

⁷⁰ QCOSS, consultation paper submission, p. 9.

Guidelines, they will also build a useful data set over time to measure the success of hardship policies.

Retailers have expressed concern about the AER having a high level of discretion to enable consistency in the substance of policies. However, as noted earlier, this power already exists under the NERL. This rule change will not expand that power. The Commission therefore sees minimal costs from this approach for any currently compliant retailers, as the rule change is not moving away from the existing requirements under the NERL.

3.4 Defining hardship

Under the NERL, a hardship customer is defined as a residential customer who is identified as experiencing financial payment difficulties due to hardship in accordance with the retailer’s customer hardship policy. These policies are subject to the AER’s approval.

Several consumer groups submitted that the NERR or the Hardship Guidelines should define hardship.

3.4.1 AER’s view

The AER did not express any views in its rule change request regarding defining hardship.

3.4.2 Stakeholder views

Red Energy and Lumo Energy did not support the proposition that the NERR or the Hardship Guidelines should define hardship. It said “[w]e continue to believe that hardship can only be defined by a retailer taking into account the individual circumstances of a customer”.⁷¹ Simply Energy said “[w]hile hardship policies may differ between individual retailers, the flexibility under the Law provides retailers with the ability to cater to the differing needs of customers across varying socio-economic environments”.⁷²

Submissions supporting a consistent definition of hardship were as follows:

PIAC	<p>PIAC recommends that the proposed changes to rule 75 be amended to define the term hardship, such that it applies to all consumers facing payment difficulty, facilitating the implementation of guidelines consistent with the Victorian [payment difficulty framework], that provide an entitlement to minimum protections and assistance to all consumers according to their individual circumstances.⁷³</p> <p>PIAC is not attempting to define hardship customers specifically. Rather it aims to enable all potential hardship customers to discuss their situation with the retailers’ dedicated hardship teams. On its analysis, too many customers who are in financial difficulty do not get referred to hardship programs.</p>
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⁷¹ Red Energy and Lumo Energy, consultation paper submission, p. 4.

⁷² Simply Energy, consultation paper submission, p. 2.

⁷³ PIAC, consultation paper submission, p. 11.

SACOSS	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. ⁷⁴
CALC	Clause 75 (4)(b)(i) should clearly state that the AER will set a definition for hardship. This definition should be consulted on as the AER develops the guideline. Hardship should be broadly defined along the lines of all residential customers unable to pay an amount of energy arrears due.

3.4.3

Analysis

Given the NERL empowers retailers to define when a customer is in hardship, it is the Commission's view that it would not be within the AEMC's or the AER's remit to define hardship. This would go beyond the intent of the law, and therefore the Commission will not support or propose that the AER define hardship in the guidelines.

To improve the adequacy of policies, the AER will be able to confirm that retailers have clear definition and identification processes in place when approving a policy under section 43 and section 45 of the NERL. The Commission notes that, given the range of circumstances that may lead to a customer facing hardship, it is difficult to have a statement that defines a hardship. The Commission would not expect a retailer to have such a statement in its policy. Rather, the Commission understands that it is the processes of identification and early response that create effective mechanisms to support hardship customers.

The idea of a filtering process is a useful analogy, noting that to be effective the filter needs to be broad at the beginning of the process to capture all potential hardship customers. If the initial process is too narrow, then too many customers in hardship miss out – as a range of evidence on the effectiveness of the current programs shows.

Therefore, if the retailer defines hardship customers in a way that meets the minimum requirements through appropriate processes, and that meets the purpose under s43(1), then the AER will be able to approve the policy. If the AER forms the view that the definition or process does not meet the purpose under the NERL, then it can request the retailer vary the policy and resubmit for approval.⁷⁵

3.5

Hardship indicators

The NERL requires that retailers report against hardship program indicators which have been developed by the AER under the current rule 75, and as set out in the AER's *Performance Reporting Procedures and Guidelines*.⁷⁶ The proposed rule sought to move the hardship indicators out of the *Performance Reporting Procedures and Guidelines* and include them in the Hardship Guidelines. The Commission sought views from stakeholders on whether the indicators should be included within the Hardship Guidelines.

⁷⁴ SACOSS, consultation paper submission, p. 4.

⁷⁵ In accordance with section 45(2) of the NERL.

⁷⁶ Section 282 of the NERL.

3.5.1 The AER's view

The AER proposed that the Hardship Guidelines should include the hardship indicators in order to have a single point of reference for industry on all hardship matters under the NERL and the NERR. In their view this would also create benefits for the AER in monitoring and enforcing compliance with hardship policies.

3.5.2 Stakeholder views

Both Momentum and PIAC stated that they believed that the hardship indicators should be included in the Hardship Guidelines. Momentum said "we are of the opinion that if the guidelines are to become binding as proposed, the reporting requirements would best reside within the guidelines to guarantee cohesive alignment".⁷⁷ PIAC said that "including program indicators in the binding guidelines, and providing mechanisms for the AER to alter these guidelines as required, could provide greater scope for indicators to be adapted more efficiently, and enforced more effectively, without the need for further rule changes".⁷⁸ However, it further added that it would support retaining the current arrangements if it was deemed practical to monitor retailer performance.⁷⁹ CALC supported either approach where the AEMC is confident that consistency can be achieved.⁸⁰

The remaining stakeholders who commented on this issue were of the view that the indicators should remain as a stand-alone requirement in the rules and as part of *Performance Reporting Procedures and Guidelines*. The stakeholders who supported this approach were SACOSS, AGL, Origin Energy, Ergon Energy Queensland, Red Energy and Lumo Energy and QCOSS.⁸¹ All believe that there is little value in moving the indicators into the Hardship Guidelines. As SACOSS stated:⁸²

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.

3.5.3 Analysis

The Commission agrees with the position that there does not appear to be any value in moving the hardship indicators to be located within the Hardship Guidelines. In the Commission's view, moving the hardship indicators out of the *Performance Reporting*

77 Momentum Energy, consultation paper submission, p. 2.

78 PIAC, consultation paper submission, p. 6.

79 *ibid.*

80 CALC, consultation paper submission, p. 3.

81 Consultation paper submissions: SACOSS, pp. 7-8; AGL, p. 3; Origin Energy, p. 4; Ergon Energy Queensland, p.3; Red Energy and Lumo Energy, p. 4; QCOSS, p. 9.

82 SACOSS, consultation paper submission, p. 7

Procedures and Guidelines would not result in any particular benefit for consumers or industry. It may however, place an added administrative requirement on retailers by having reporting requirements in multiple documents.

Therefore, for consistency of reporting, the draft rule does not include the hardship indicators within the *Hardship Guidelines*, and requires them to be retained in the *AER Performance Reporting Procedures Guidelines*.

3.6 Costs and benefits of the rule change

The Commission sought views on the costs and benefits of the rule change. As noted in section 2.2, in assessing the rule change request against the NERO the Commission considered the following factors:

- the extent to which the rule would improve the outcomes for consumers facing payment difficulties due to hardship, while also potentially limiting costs associated with bad debts that are passed onto consumers
- whether the proposed rule change improves transparency for hardship customers regarding the levels of assistance they are entitled to receive.
- whether the benefits of the proposed rule change outweigh the costs that would likely pass through to consumers in a workably competitive market.

3.6.1 The AER's view

The AER's view of the benefits of the rule change are outlined in section 3.1.1.

3.6.2 Stakeholder views

Benefits

Most submissions agreed, to a greater or lesser extent, that there are benefits from having improved hardship policies. Ergon Energy Queensland said "EEQ acknowledges that the benefits would include consistency across the industry including assessment, application and management of hardship programs".⁸³ SACOSS said it "broadly agrees with the AER regarding the benefits of developing a binding Hardship Guideline".⁸⁴ ECA said "creating a binding guideline could furnish additional incentives for retailers to improve their performance".⁸⁵

CALC said:⁸⁶

Benefits of this rule change will be realised by:

- Customers who receive assistance where they wouldn't have if the rule was not made.
- Improved management of bad debt and the flow on costs to other customers.

⁸³ Ergon Energy Queensland, consultation paper submission, p. 5.

⁸⁴ SACOSS, consultation paper submission, p. 12.

⁸⁵ ECA, consultation paper submission, p. 5.

⁸⁶ CALC, consultation paper submission, p. 4.

- Improved consumer confidence and trust of retailers through improved and more consistent services.
- Wider cost savings and social benefits through people overcoming payment difficulty and not requiring other assistance or experiencing further disadvantage due to payment difficulty
- Better efficiency in the use of resources at the AER as it becomes simpler to monitor and enforce compliance.

The ECA said:⁸⁷

The proposed rule change should result in:

- improved outcomes for consumers;
- increased consumer confidence, by raising the consistency across all retailers;
- facilitation of retailers’ management of policies through greater clarity;
- improved access for consumers, by making consumers’ rights clearer – a situation that would facilitate both consumers and their advocates; and
- improved monitoring and enforcement – building a better evidence base of what measures are effective in helping customers in hardship, and where there is room for improvement.

However, there were mixed views on whether the proposed rule would achieve these benefits, or whether those benefits would outweigh the costs associated with the rule change. The AEC noted that any improvements in hardship policies could generate significant customer benefits, but it does not believe that the rule change is required to achieve those benefits.⁸⁸ Powershop also agreed with the potential benefits that would come with improved consistency, but is concerned that any customer benefits will be eroded if the focus was shifted away from customer experience and more toward compliance and data monitoring.⁸⁹ QCOSS is further concerned that the change could just standardise current practice which is not providing good customer outcomes.⁹⁰

Costs

Commentary on costs was as follows:

Ergon Energy Queensland	As EEQ’s hardship program currently provides comprehensive protections for customers the expected impact is minimal. The rule change may see an increase of referrals to the program, which would result in an increase in costs due to additional staff requirements, as well as system and process modifications. ⁹¹
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87 ECA, consultation paper submission, p. 8.

88 AEC, consultation paper submission, p. 4.

89 Powershop, consultation paper submission, p. 5.

90 QCOSS, consultation paper submission, p. 12.

91 Ergon Energy Queensland, consultation paper submission, p. 5.

Origin Energy	At this stage it is difficult to reasonably assess the costs or benefits of this rule change because most of the proposed changes will occur via the Guideline. ⁹²
AGL	[AGL] is unable to comment on the cost to industry of these Guidelines until the content of the Guidelines has been proposed. ⁹³
Momentum Energy	[C]oncerned that neither the costs nor benefits have been appropriately quantified. The costs associated with the proposal fall firmly on the retailer. However, it does not recognise that these costs, like those associated with a range of similar reforms, will be passed on to the consumers through retailer energy prices. ⁹⁴
EnergyAustralia	Best practice policy development generally assumes that more regulation is not necessarily the answer. Any new regulatory imposition will generally increase retailers' operational costs and the costs to customers. It is illogical to impose costs across the entire industry if there is a low number of poor performers. ⁹⁵ Any regulatory change should address the underlying cause of poor retailer behaviour, without simultaneously adding unnecessary administrative and operational costs which ultimately flow through to customers. ⁹⁶
AEC	To reduce these risks, any rule change should seek to precisely define the scope of the new Guidelines and ensure that the cost associated with the changes are considered at each stage of the process. ⁹⁷

There were different views on the impact on a retailer's bad debt resulting from improving hardship policies. The following submissions believed there would be a reduction in bad debt:

CALC	Consistent policies will ensure early intervention and reduce barriers to accessing at least a minimum standard of assistance and will result in less households experiencing spiralling and unsustainable energy debt. In time, businesses will accrue less bad debt and in turn pass on less of the cost of bad debt to all consumers. ⁹⁸
ECA	Effective assistance to consumers in hardship should definitely reduce 'bad' debt, by ensuring those consumers are on an affordable energy plan that best suits their circumstances, are able to manage their energy efficiently,

92 Origin Energy, consultation paper submission, p. 6.

93 AGL, consultation paper submission, p. 5.

94 Momentum Energy, consultation paper submission, pp. 2-3.

95 EnergyAustralia, consultation paper submission, p.6.

96 EnergyAustralia, consultation paper submission, p.5.

97 AEC, consultation paper submission, p. 4.

98 CALC, consultation paper submission, p. 4.

	and are linked to all relevant external sources of assistances such as rebates, concessions and grants. ⁹⁹
Ergon Energy Queensland	It is recognised that early identification of customers in hardship, with or without contact from the customer, is integral to the reduction in bad debt. Currently EEQ customers are identified as being in financial hardship upon contact from the customer. ¹⁰⁰

The submissions that did not agree that improved policies will decrease bad debt were:

Origin Energy	At best we would expect there to be a neutral impact on debt, if the AER limited its scope to enforcing current Hardship requirements instead of creating new obligations based on their interpretation of those requirements. ¹⁰¹
Powershop	Changes in the hardship guidelines may lead to an increase in bad debt. ¹⁰²
AEC	Changes to hardship programs as a result of the Guideline are likely to impact the levels of customer debt and bad debt on retailers' books. Such changes flow from codifying eligibility criteria for hardship programs and payment arrangements for hardship customers. ¹⁰³

3.6.3

Analysis

As outlined in earlier sections, the Commission agrees that there are benefits resulting from the rule change. These include:

- a more efficient approach for the AER to exercise its powers under the NERL in order to improve hardship policies
- ensuring customers and their advocates understand their entitlements under the hardship policy for all retailers
- providing retailers and consumer groups with the opportunity to have their say in the development of the Hardship Guidelines through the retail consultation procedure
- improving the AER's ability to monitor and enforce hardship policies.

No data was provided by retailers on the expected costs that would arise from the changes to hardship policies through the Hardship Guidelines. The Commission notes that quantifying costs on the Hardship Guidelines is difficult given the uncertainty around the content of those Guidelines. However, as noted throughout this draft determination, the Commission's view is that the draft rule is not providing the AER with any additional powers. Rather, the rule

⁹⁹ ECA, consultation paper submission, p. 8.

¹⁰⁰ Ergon Energy Queensland, consultation paper submission, p. 5.

¹⁰¹ Origin Energy, consultation paper submission, p. 6.

¹⁰² Powershop, Consultation paper submission, p. 5.

¹⁰³ AEC, consultation paper submission, p. 4.

creates a more efficient and consistent approach for the AER to exercise its powers. Therefore, any costs associated with the outcomes of the Hardship Guidelines are costs that relate to retailers giving effect to their requirements under the NERL. In addition to this, the Commission considers there would be minimal cost impacts for those retailers who already comply with the NERL and who provide adequate support for customers facing payment difficulties due to hardship.

With regards to bad debt, the ACCC has reported that providing hardship assistance to more customers may increase a retailer's costs, however it considers that, ultimately, "improved assistance will reduce that retailer's costs (particularly in relation to bad debt) and also costs to the community, as fewer consumers will face difficult financial situations".¹⁰⁴ The ACCC also notes that while retailers must operate their businesses efficiently, they "must also comply with the energy laws which place significant emphasis on the retailers' role to ensure consumers in hardship are assisted and disconnection is avoided".¹⁰⁵ The Commission does not believe there is evidence to support claims of increased bad debt. While better identification processes may see more customers identified as being in hardship, improved assistance processes should see more consumers successfully participating in and exiting hardship programs. For retailers with current and effective programs there is no indication that this rule change will increase their levels of bad debt.

In the Commission's view the benefits of this rule change outweigh any potential costs that might be borne by a retailer and its customer base. This is because the NERL has established a role for retailers in providing assistance to customers in hardship, and the Hardship Guidelines is just a mechanism that will assist retailers in meeting the standards set by the NERL.

3.7 Transitional arrangements

The Commission sought views on what transitional arrangements should be put in place to require that retailers amend their current policies to comply with the Hardship Guidelines.

3.7.1 AER's view

The AER did not propose any transitional arrangements in the rule change request.

3.7.2 Stakeholder views

There was limited feedback on the transitional arrangement from stakeholder submissions. The following submissions provided a view on the transitional arrangements required:

Ergon Energy Queensland	At least 12 months would be required to allow for system and process updates to be completed. ¹⁰⁶
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¹⁰⁴ ACCC, 2018, *Restoring electricity affordability and Australia's competitive advantage - Retail Electricity Pricing Inquiry - Final Report*, June 2018, ACCC, Canberra, p. 312.

¹⁰⁵ *ibid.*

¹⁰⁶ Ergon Energy Queensland, consultation paper submission, p. 5.

CALC	All retailers should have to resubmit modified hardship policies with the binding statements without delay. ¹⁰⁷
Momentum Energy	The implementation period should include ample time to have new retailer policies reviewed and resubmitted for approval. ¹⁰⁸
PIAC	Implementation should be prioritised, and informed by the ESC's [payment difficulty framework] on 1 January 2019. ¹⁰⁹
Powershop	A six month transition timeframe should be implemented. ¹¹⁰
QCOSS	Transitional arrangements should provide retailers with a reasonable time to seek approval and implement the changes. ¹¹¹
ActewAGL	ActewAGL would advocate for the AER to consult with retailers prior to making transitional arrangements. ¹¹²

3.7.3

Analysis

The Commission's view on the need for and timing of transitional arrangements is outlined below.

Need for transitional arrangements

Currently, all retailers who have retailer authorisation have approved policies in place. To compel retailers who already have approved policies in place to resubmit policies to the AER in accordance with the Hardship Guidelines, the Commission considers that transitional arrangements are required. This will enable policies to be updated and submitted in a timely and efficient way. The draft rule provides transitional arrangements that require any retailer with an approved hardship policy to submit a new policy to the AER that contains the matters specified in the Hardship Guidelines.

Timing of transitional arrangements

Given the importance of improving protections for customers facing hardship, the draft rule requires that the AER have its Hardship Guidelines in place by April 2019.

A majority of retailer submissions to the consultation paper noted the adequacy of their policies and hardship programs. Given that the Hardship Guidelines will only be giving effect to the minimum requirements under the NERL, complying retailers should not have to make material changes to their internal processes. Rather, their policies will need to be updated to outline in a more consistent and transparent way the work they already do. Further, as retailers will be involved in the development of the Hardship Guidelines during the retail

¹⁰⁷ CALC, consultation paper submission, p. 4.

¹⁰⁸ Momentum Energy, consultation paper submission, p. 2.

¹⁰⁹ PIAC, consultation paper submission, p. 8.

¹¹⁰ Powershop, consultation paper submission, p. 5.

¹¹¹ QCOSS, consultation paper submission, p. 11.

¹¹² ActewAGL, consultation paper submission, p. 4.

consultation procedure, the types of information that will be required in the new hardship policies should be understood by the time the Hardship Guidelines are finalised.

From this, the Commission considers that, following publication of the Hardship Guidelines, retailers should have two months to prepare and submit an updated customer hardship policy to the AER for approval.

This timing will mean retailers must have their updated policies submitted to the AER by 1 June 2019 or earlier should the AER publish its Guidelines before 1 April 2019. The Hardship Guidelines may contain further information relating to processes and timeframes for approval of hardship policies.

The draft rule also includes a timeframe for when a current retailer must implement its updated policy once approved by the AER. The Commission's view is that this timeframe should be:

1. the AER will be required to approve a hardship policy no later than 1 August 2019.
2. once approved, the retailer will have 2 months to implement the policy (no later than 1 October 2019).

The Commission welcomes views on this timeframe in submissions to this draft determination.

3.8 Enforceability and civil penalty provisions

The Commission sought views on the AER's proposal that the Hardship Guidelines should be enforceable and the rule be made a civil penalty provisions. The Commission cannot create new civil penalty provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NERR be classified as civil penalty provisions.

3.8.1 The AER's view

In its request for a rule change, the AER stated that a single, enforceable guideline would improve the quality of hardship policies as well as improve its ability to monitor and enforce retailers' obligations under the NERL and the NERR. It argued that the proposed rule be a civil penalty provisions due to the current issues it is observing with the implementation of hardship policies as well as the importance of these protections for energy consumers.

3.8.2 Stakeholder views

The ECA, EWON, CALC and PIAC all agreed with the AER that the guidelines should be enforceable and the rule be a civil penalty provision.¹¹³ In their view this would help ensure that retailers apply the guidelines in a consistent way to provide support for all consumers experiencing financial difficulty. EWON said "[e]qual financial support protections for all customers who experience financial hardship cannot be achieved unless the hardship guidelines are enforceable".¹¹⁴ PIAC supports the enforceability of the Hardship Guidelines "to

¹¹³ Consultation paper submissions: ECA, p. 7; EWON, p. 5; CALC, p. 3; PIAC, p. 8.

¹¹⁴ EWON, consultation paper submission, p.5.

help ensure that retailers apply the guidelines consistently and that all consumers experiencing financial difficulty have equal recourse to support and protection informed by those guidelines".¹¹⁵

Those that did not support the guidelines being enforceable at all or in part, or the need for the rule to be made a civil penalty provision are outlined below:

Red Energy and Lumo Energy	Retailer compliance with the hardship provisions in the NERL and the NERR are already civil penalty provisions. We do not see any additional benefits in recommending the proposed guideline, in full or in part, be a civil penalty provision. ¹¹⁶
Aurora Energy	[T]he minimum hardship requirements specified in the [NERL] already have a civil penalty provision and that this is therefore unnecessary. ¹¹⁷
Powershop	Powershop's view is that civil penalty provisions do not necessarily drive better outcomes for customers. Rather, they have the potential to limit innovation and personalised customer assistance. ¹¹⁸
AEC	[AEC] does not support the Guidelines containing provisions being subject to civil penalty. Rather, the mechanism to ensure enforceability should remain with the hardship policy. ¹¹⁹
Momentum Energy	We appreciate the intent of the guidelines imposing a civil penalty as a safeguard for customers, yet as this is merely a duplication of what currently exists in the regulations we are less supportive of this proposal and find it unnecessary. ¹²⁰
Origin Energy	Origin does not believe that a civil penalty is proportionate for breaches of this provision. ¹²¹
Ergon Energy Queensland	[T]he reliance of customer co-operation be considered when reviewing civil penalties to ensure retailers are not unfairly penalised when customers do not adhere to their program responsibilities. ¹²²

Both QCOSS and SACOSS agreed that the Hardship Guidelines be enforceable, but both argued that there was no need to make the rule a civil penalty provision as there are adequate provisions under the NERL for civil penalty provisions relating to hardship.¹²³ ActewAGL said that "[t]he only aspect of the rule that should be made a civil penalty

115 PIAC, consultation paper submission, p. 8.

116 Red Energy and Lumo Energy, consultation paper submission, p. 5.

117 Aurora Energy, consultation paper submission, p. 2.

118 Powershop, consultation paper submission, p. 4.

119 AEC, consultation paper submission, p. 3.

120 Momentum Energy, consultation paper submission, p. 2.

121 Origin Energy, consultation paper submission, p. 7.

122 Ergon Energy Queensland, consultation paper submission, p. 4.

123 Consultation paper submissions: SACOSS, p. 11; QCOSS, p. 11.

provision is the requirement for a retailer to have a policy, approved by the AER, within 3 months of a retailer authorisation being granted".¹²⁴

3.8.3

Analysis

Under the NERL, the following requirements are currently civil penalty provisions:

- submit a hardship policy for approval by the AER within three months of being granted retailer authorisation (section 43(2)(a))
- publish an approved policy (section 43(2)(b))
- maintain and implement an approved customer hardship policy (section 43(2)(c))
- vary a policy as directed by the AER, submit the varied policy to the AER for approval, publish the varied policy and maintain and implement the varied policy (section 45(3)(b))
- offer and apply payment plans for hardship customers and other residential customers experiencing payment difficulty (section 50).

In the Commission's view, because a failure to implement a hardship policy that has been approved by the AER is already a civil penalty provision, it would be duplicative and unnecessary to recommend the rule for the AER to develop binding guidelines be a civil penalty provision. Further, part of the rule places an onus on the AER to develop the guideline. There would be no benefit to the entire rule be a civil penalty provision.

Civil penalty for existing retailers

As discussed in section 3.7, the draft rule requires that current and new retailers submit a new policy to the AER that contains the matters specified in the Hardship Guidelines. The current civil penalty provisions under the NERL are not linked to the minimum requirements that a retailer's hardship policy must contain.

In the Commission's view there is potential detriment to consumers if both new and current retailers do not comply with the requirement that their hardship policies contain, as a minimum, the matters specified in the Hardship Guidelines. This is because retailers may not be compelled to resubmit already approved policies to the AER, and therefore customers would not benefit from the improvements to the quality and consistency of hardship policies.

Therefore, the Commission considers that the new rule requiring retailers to submit hardship policies initially or following an amendment by the AER to the Hardship Guidelines should be made a civil penalty provision. Once a retailer has a policy that has been approved as containing the matters specified by the Hardship Guidelines, the AER will be able to rely on existing civil penalty provisions under sections 43, 45 and 50 of the NERL should a retailer fail to maintain and implement a policy.

Civil penalty for new retailers

The draft rule also contains a requirement that a new retailer must submit a policy complying with the Hardship Guidelines and containing the clear statements of how the retailer will

¹²⁴ ActewAGL, consultation paper submission, p. 4.

meet the minimum requirements within three months of receiving retailer authorisation. The draft rule requires new retailers to implement and publish their customer hardship policy as soon as possible after approval. The Commission's view is that this should be a civil penalty provision, given the lack of incentive in the law for a retailer to have an approved policy in place. This gap in the NERL is discussed further in section 3.11.

3.9 Victoria's Payment Difficulty Framework

There was commentary from several submissions relating to the Essential Service Commission's (ESC's) new Payment Difficulty Framework (PDF) in Victoria.¹²⁵

3.9.1 The AER's view

The AER did not discuss the PDF in its rule change request.

3.9.2 Stakeholder views

Several submissions noted the work of the ESC in its PDF and suggested the AER reflect this in its Hardship Guidelines. Powershop said it "supports the AER in providing a guideline to ensure consistency, provided that it is harmonised with the [PDF]".¹²⁶ PIAC said it "recommends that any binding Hardship Guidelines be consistent with the structure and principles of the Victorian Essential Services Commission Payment Difficulty Framework, and focus on consumer outcomes based upon their entitlements to minimum supports and protections." SACOSS added that it "supports the AER consulting with the ESC Vic around its approach to identifying customers in hardship".¹²⁷

With regards to costs of the rule change Powershop said "[c]reating a different set of requirements in the guideline which do not align with the PDF will introduce additional costs for retailers". PIAC "notes that most retailers operate in Victoria and the major jurisdictions of the National Energy Market (NEM), and consistency with the PDF would result in significant savings through greater administrative simplicity".¹²⁸

The AEC and EnergyAustralia used the PDF as an example of the potential costs that could be associated with significant changes to hardship policies. The AEC said:¹²⁹

As an example at one extreme (noting that the PDF revisions very substantially changed the equivalent policy settings in Victoria), the calculated upfront cost across all Victorian retailers for implementation of the payment difficulties framework was estimated at between \$29.0 million to \$46.1 million.

¹²⁵ ESC, 2017, *Payment difficulty framework - Final decision*, 10 October 2017, ESC, Victoria.

¹²⁶ Powershop, consultation paper submission, p. 2.

¹²⁷ SACOSS, *Effectiveness of Supports for Customers Experiencing Payment Difficulties - Strengthening protections for customers under the NECF - SACOSS Report*, June 2018, SACOSS, Adelaide, p. 48.

¹²⁸ Powershop, consultation paper submission, p. 5.

¹²⁹ AEC, consultation paper submission, p. 5.

EnergyAustralia said:¹³⁰

The costs of the PDF are also driven up by the high level of prescription it requires in terms of support measures. Our current estimates for system implementation and ongoing costs of PDF are already running into the tens of millions.

3.9.3

Analysis

The Commission notes that the PDF is designed to assist customers in accessing programs that help them repay their energy debts. However, it also notes that retailers are not required to implement the new framework until 1 January 2019. Therefore, the Commission is not able to assess the costs and benefits of the new framework.

The Commission supports Hardship Guidelines that provide clear statements of what customers can expect under the policy, while also providing retailers with flexibility in how they implement their policies. In the Commission's view, it would be for the AER to determine if elements of the PDF are consistent with the NERL and should be reflected in the Hardship Guidelines.

3.10

Conclusion

The Commission considers that the draft rule will assist the AER in more effectively exercising its powers under the NERL to improve retailer hardship policies.

In the Commission's view, the creation of binding Hardship Guidelines will facilitate retailers meeting their minimum obligations under the NERL. By producing improved hardship policies that are transparent and consistent, consumers and their advocates will be better able to understand and access the support they need to manage their electricity bills when they are in hardship.

The Commission is of the view that the draft rule, which is a more preferable rule, appropriately enhances the existing requirements on retailers under the NERL in relation to customers facing payment difficulty due to hardship, while also allowing the flexibility to enable retailers to provide a hardship program that suits their customers' needs.

The Commission also considers there should be minimal cost impacts for already complying retailers who offer adequate protections to customers in hardship. The Commission has allowed transitional periods in the draft rules for retailers who already have in place an approved hardship policy.

The Commission considers the draft rule in this format to be in the long-term interests of consumers in relation to the quality of energy services and consumer protections and as a result, it will, or is likely to, better contribute to the achievement of the NERO.

¹³⁰ EnergyAustralia, consultation paper, p. 5.

3.11 Recommended law change

Currently, the NERL requires that a retailer must submit its proposed hardship policy within three months of receiving its retailer authorisation. There is no timeframes set for when a retailer must have an approved policy in place. No other provision of the NERL allows a retailer to develop policies and programs after retailer authorisation.

Currently, unless there is agreement between the AER and the retailer as to the form and contents of a hardship policy, the policy may never be approved. This creates a gap where a new retailer:

- could take on customers and bill them for energy used
- submit a policy to the AER but could have no policy in place for an indefinite period
- not be in breach of any provisions under the NERL and therefore there is no potential enforcement options.

To remove this gap, the Commission has included in the draft rule and transitional provisions a requirement that current retailers must have a hardship policy approved by the AER within six months of submitting the policy to the AER. Under s49 of the NERL the Commission is able to make rules with respect to the submission, approval and implementation of customer hardship policies. The draft rule also requires that new retailers must have an approved policy in place as soon as practicable after receiving approval from the AER, given they are required to submit a hardship policy that complies with the Hardship Guidelines.

However, this approach still places a customer of a new retailer who is facing payment difficulties at risk as that new retailer may not have a policy in place within six months of gaining authorisation. To address this risk the Commission considers that a law change should be made to require that a retailer must have an approved policy in place before it can receive retailer authorisation. This would enable appropriate consumer protections to be in place for customers of a new retailer once that retailer commences operation.

4 ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AEC	Australian Energy Council
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
CALC	Consumer Action Law Centre
COAG	Council of Australian Governments
Commission	See AEMC
COTA	Council of the Ageing
ECA	Energy Consumers Australia
ECC	Ethnic Communities' Council of NSW
ESC	Essential Service Commission
EWON	Energy and Water Ombudsman NSW
EWOQ	Energy and Water Ombudsman Queensland
EWOV	Energy and Water Ombudsman Victoria
Hardship Guidelines	Customer Hardship Policy Guidelines
NECF	National Energy Customer Framework
NERL	National Energy Retail Law
NERO	National energy retail objective
NERR	National Energy Retail Rules
NGR	National Gas Rules
PDF	Payment Difficulties Framework
PIAC	Public Interest Advocacy Centre
QCOSS	Queensland Council of Social Services
SACOSS	South Australian Council of Social Services
SAFCA	South Australian Financial Counsellors Association

A SUMMARY OF OTHER ISSUES RAISED IN SUBMISSIONS

This appendix sets out the issues raised in the first round of consultation on this rule change request and the AEMC's response to each issue. If an issue raised in a submission has been discussed in the main body of this document, it has not been included in this table.

Table A.1: Summary of other issues raised in submissions

STAKEHOLDER	ISSUE	AEMC RESPONSE
AEC, AGL, Red Energy and Lumo Energy, and EnergyAustralia	The rule change should be delayed until the AEMC's proposed review of how retailers support customers in financial difficulty (as recommended in the AEMC's <i>2018 Retail Energy Competition Review - Final Report</i> , 15 June 2018).	The proposed review will look at the programs retailers provide to customers who are facing financial difficulty more broadly and how those operate with hardship provision. The review would benchmark and identify best practices. This work is to complement the work by the AER to improve hardship policies under this rule change. The Commission does not agree that a delay is required.
COTA	The Hardship Guidelines should include statements that include minimum requirements such as free access to energy efficiency programs and mandatory referral to financial counselling.	This would require a change to the NERL with regards to the minimum requirements for hardship policies. It is outside the scope of this rule change process.
Ergon Energy Queensland	The Guidelines should include customer obligations to provide retailers with options where a customer fails to engage.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule. However, the Commission does consider a level of customer engagement is required for a hardship program to operate successfully.
EWON, COTA	Should move away from using the term hardship as it is a barrier and not one used by consumers.	As the NERL uses the term 'hardship' this is outside the scope of the rule change. However, retailers may choose to label their programs without using the term hardship.

STAKEHOLDER	ISSUE	AEMC RESPONSE
EnergyAustralia	Outcomes-based regulation should be used to strengthen protections for residential customers in financial hardship.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule.
Momentum Energy	The AER should ensure proper consultation from industry and behavioural experts to determine standards statements.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule. The AER indicated in its rule change request that submissions from stakeholders and consumer research would inform the Hardship Guidelines.
CALC and QCOSS	Additional indicators should be included relating to customers denied entry into hardship programs or what happens to a customer's debt if they are excluded from a program.	As the more preferable rule is not modifying the current rules on hardship indicators this is a matter for the AER.
Momentum Energy	Indicators should not be used to determine the success or failure of hardship policies are they reflect a snapshot view and are open to misinterpretation.	As the more preferable rule is not modifying the current rules on hardship indicators this is a matter for the AER.
AGL	The AEMC could develop a rule requiring retailers to resubmit hardship policies for approval every 3-4 years.	The draft rule will assist the AER in monitoring and enforcing hardship policies. This will allow the AER to ensure policies that are not meeting the minimum requirements are updated as required, rather than once every three to four years.
QCOSS	To the extent that the standard statements reiterate the current minimum standards for hardship policies they will continue to fall short of adequately protecting the long-term interests of customers in financial difficulty.	This would require changes to the minimum requirements, which is addressed in the NERL and therefore outside the scope of this rule change.
QCOSS	Should reframe hardship policies around building	This is a matter for the AER to consider when developing its Hardship

STAKEHOLDER	ISSUE	AEMC RESPONSE
	stronger relationships between customer and service provider.	Guidelines in accordance with the draft rule.
PIAC and SACOSS	Broaden the application of hardship supports to all customers experiencing payment difficulties, or work to ensure retailers are supporting customers experiencing payment difficulties in accordance with their obligations under the NECF.	<p>It is outside the scope of this rule change to broaden hardship support as the NERL distinguishes between customers facing payment difficulty and customer facing payment difficulty due to hardship.</p> <p>It is a matter for the AER to ensure retailers are meeting their obligations to support all customers facing payment difficulties. This may be addressed by the Hardship Guidelines as part of a retailer's role in the early identification of hardship customers.</p>
QCOSS	Ombudsman schemes must be given the appropriate authority to intervene in all aspects of hardship programs and agreements.	It is outside the scope of this rule change to broaden the authority of Ombudsman schemes.
AGL	Supports a shared responsibility approach to energy hardship, where energy suppliers, government and the community sector work together to deliver sustainable improvements for vulnerable customers.	The Commission agrees that there is a role for government and the community sector in relation to supporting customers facing hardship. However, the NERL places a requirement on retailers to implement hardship programs which form part of this shared model.
ECC	The draft rule change should address the low awareness of entitlements and the low take-up of payment assistance in a range of culturally and linguistically diverse communities to be addressed.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule.
Aurora Energy	The Hardship Guidelines represents greater regulatory prescription, which is likely to limit the effectiveness and efficiency of Aurora Energy's support for vulnerable customers.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule. However, the AER indicated in its rule change request that the standard statements will allow retailers to determine how to implement the minimum requirements.

B LEGAL REQUIREMENTS UNDER THE NERL

This appendix sets out the relevant legal requirements under the NERL for the AEMC to make this draft rule determination.

B.1 Draft rule determination

In accordance with section 256 of the NERL the Commission has made this draft rule determination in relation to the rule proposed by the AER.

The Commission's reasons for making this draft rule determination are set out in section 2.4.

A copy of the more preferable draft rule is attached to and published with this draft rule determination. Its key features are described in section 2.1.

B.2 Power to make the rule

The Commission is satisfied that the more preferable draft rule falls within the subject matter about which the Commission may make rules. The more preferable draft rule falls within section 237 of the NERL as it relates to the provision of energy services to customers. Further the more preferable draft rule falls within the matters set out in sections 49 which allows rule to be made with respect to "the development, submission, approval, publication, maintenance and implementation of customer hardship policies and variations of customer hardship policies".

B.3 Commission's considerations

In assessing the rule change request the Commission considered:

- it's powers under the NERL to make the rule
- the rule change request
- submissions received during first round consultation
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NERL.
- the purpose of hardship policies set out in section 43(1) of the NERL.

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.¹³¹

B.4 Civil penalties

The Commission cannot create new civil penalty provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NERL be classified as civil penalty provisions.

¹³¹ Under section 225 of the NERL the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for energy. On 1 July 2011, the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated council is now called the COAG Energy Council.

The Commission's draft more preferable rule includes the addition of rule 75A and 75B into the NERR. The new provisions that the Commission and the AER is recommending to the COAG Energy Council as civil penalty provisions are rule 75(B)(1) and 75(B)(2)(b), which require retailers to comply with the Hardship Guidelines and implement the policy once approved.

The Commission and the AER consider that the new provisions should be classified as civil penalty provisions to compel retailers to resubmit already approved policies to the AER that comply with the Hardship Guidelines. This will ensure all consumers facing hardship would benefit from the improvements to the quality and consistency of hardship policies.

B.5 Conduct provisions

The Commission cannot create new conduct provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NERR be classified as conduct provisions.

The draft rule does not amend any rules that are currently classified as conduct provisions under the National Energy Retail Regulations. The Commission does not propose to recommend to the COAG Energy Council that any of the proposed amendments made by the draft rule be classified as conduct provisions.