

Strengthening protections for customers in hardship

QCOSS submission in response to the Australian Energy Market Commission draft rule change

18 October 2018

QCOSS welcomes the opportunity to make this submission to the Australian Energy Market Commission (AEMC) in response to their draft rule change aimed at strengthening protections for customers in hardship. QCOSS agrees that the rule change is urgently needed to address the issues with the current application of hardship policies that have led to:

- 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 that 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.

These issues undermine the intent of the hardship rules: that retailers identify customers that are experiencing payment difficulties due to hardship and assist them to better manage their bills on an ongoing basis.

While QCOSS supports the rule change, we remain concerned that the issues around hardship stem from problems with the minimum requirements in section 44 of the National Energy Retail Law (NERL). The impact of the rule change should be closely monitored and formally evaluated to determine whether the law itself needs to be amended. Ultimately, this rule change cannot rectify defects in the law itself.

In this submission, we have set out our reasons for why we support the AEMC's rule change, and also made recommendations for the Australian Energy Regulator (AER) to consider when they give effect to the rule change through the development of revised guidelines and standard statements.

Key messages

In this submission the key messages are:

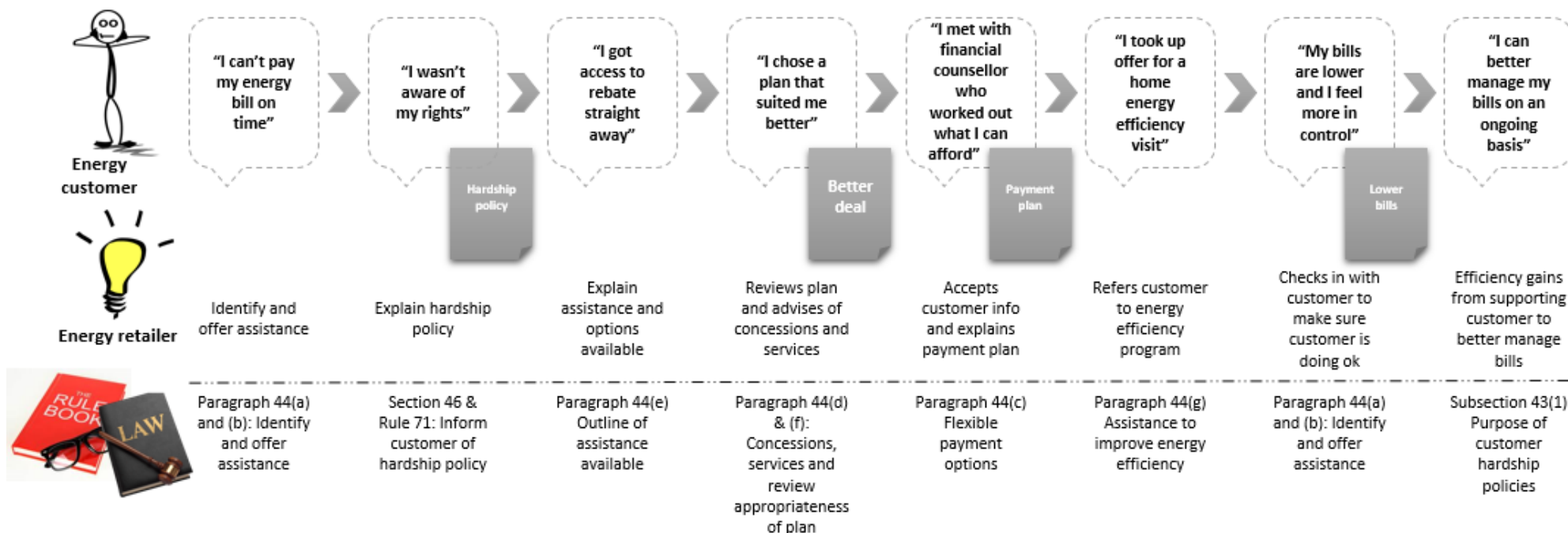
- QCOSS supports the AEMC's draft rule change as we believe it will more effectively address the issues raised by the AER in its proposed rule change and will strengthen protections for customers experiencing hardship.
- It is important to recognise that there are also efficiencies for the retail business that flow from investing in more effective supports for customers experiencing payment difficulties. For example, reduced reverse workflow, reduced need for debt collection enforcement, lower amounts of debt, reduced need for legal enforcement, improved customer experience and improved customer loyalty.

Figure 1 below provides an overview of how QCOSS believes the customer experience may look as a result of the rule change and revised hardship guidelines.

Figure 1: Overview of strengthened hardship protections for customers experiencing hardship

Customer hardship policies: Journey map

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



The rule change draft determination: For the AEMC

QCOSS supports the AEMC proposed new Rules 75A and 75B because:

There is compelling evidence demonstrating that the hardship policies are not working. For example, unpublished research by Public Interest Advocacy Centre has shown that a large number of customers were being disconnected without being offered a payment plan or hardship supports. The Energy and Water Ombudsman Queensland (EWOQ)¹ also confirms rising numbers of complaints about poor practice by retailers.

The proposed rule change is within the scope of the powers of the AER as it provides interpretative guidance about how the law applies under the hardship framework. The objective is about clarifying the law, and the AER's existing powers, and improving the way the hardship policies work in practice.

The proposed rule change, through the development of standardised statements, will give better effect to the requirements in the section 44 of the NERL. The new rules will lead to:

- Greater consistency in the application of hardship policies.
- Improved access to hardship programs (and earlier access).
- Reduction in the power imbalance between retailers and customers.
- Stronger obligation for retailers to comply with the rules.

This will lead to customers having more confidence about what the retailers should be doing, what their rights and obligations are if they have difficulty paying their bills and what they can do if their retailer does not follow the hardship rules. Further the greater consistency in the application of hardship policies through standardised statements will make it easier for financial counsellors and customer advocates to assist their clients.

The proposed rule change will reduce the asymmetry of information between retailers and customers and at least go some way to improving the imbalance of power between them.

After the rule change: For the AER

If the rule change goes ahead, the AER will have the challenging task of giving effect to the rule change through the revised hardship guidelines.

The revised guidelines must address the issues identified by the AER in its *2016-17 Annual Report on Compliance and Performance of the Retail Energy Market*:

- 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.

QCOSS encourages the AER to look to the broader consumer law framework in interpreting and applying the law in relation to hardship. For example, standard statements could be made consistent where possible with the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) *Debt collection guideline: for collectors and creditors* and the Essential Services Commission *Energy Compliance and Enforcement Policy: Guidance note – payment difficulty and disconnection*.

This part of our submission focuses on the issues that the AER raised in its request for this rule change and gives consideration to how these may be addressed through the development of the revised hardship guidelines. We focus in particular on the standardised statements that must be included in revised hardship policies to give effect to the minimum requirements set out in section 44 of the NERL and to provide guidance to customers on their rights.

QCOSS would welcome the opportunity to discuss this submission and the development of the revised hardship guidelines with the AER in more detail, even if the rule change does not go ahead.

¹ Energy and Water Ombudsman Queensland (2018), *Annual Report 2017/18* reports that complaints about electricity retailers increased by 37 per cent during 2017-18 across all primary issues.

Issue 1: There is no consistency in how and when a customer could be identified as requiring assistance

QCROSS believes that the lack of consistency in how and when a customer could be identified as requiring assistance is as a result of uncertainty in the interpretation and application of section 44 of the NERL about the minimum requirements that a hardship policy must contain. This uncertainty is not adequately addressed in the current guidelines. This has given retailers broad discretion in how they interpret and apply the requirement to have:

- 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.

The two key issues that must be addressed are set out below.

Hardship is not adequately defined in the hardship guidelines

The above minimum requirements cannot be effective if customers, retailers, ombudsman schemes and the AER have no shared understanding of the meaning of the phrase 'customers experiencing payment difficulties due to hardship'. QCROSS suggests that this phrase could be more appropriately defined as any customer that has an overdue amount of more than \$300, has missed a payment or payments under a payment plan, or the customer or their representative says that they are experiencing payment difficulty (when overdue amount is less than \$300).

No clear protection for customers

For a requirement to be effective there needs to be a corresponding protection for customers. At a minimum we suggest that a retailer is required to identify, make contact with, and offer assistance under its hardship program to, any customer that is identified, or identifies themselves, as experiencing payment difficulties. Retailers should be encouraged to include a statement in their hardship policies that clearly recognises their responsibility to customers and protects customers from adverse consequences if the retailer fails to act.

By doing this, retailers would also meet the obligation under rule 71 of the National Energy Retail Rules to communicate their hardship policy to a residential customer identified as a hardship customer and would at least partly satisfy the requirements in rule 75 about hardship program indicators covering entry into and participation in hardship programs.

- **Recommendation 1:** That the AER include in the revised guidelines a standard statement that clearly explains the meaning of the phrase 'customers experiencing payment difficulties due to hardship' to provide greater consistency and certainty for residential customers.

Issue 2: There is no corresponding increase in customers on hardship programs that correlates with higher energy prices

QCROSS is of the view that many customers experience barriers to accessing a retailer's hardship program, even when the retailer should have identified that they are in hardship. This may explain why there is no corresponding increase in customers on hardship programs even though energy stress has risen. The NERL minimum standards imply that if a customer is identified by the retailer as experiencing payment difficulties due to hardship, then they must be offered assistance including access to the retailer's hardship program.

QCROSS believes that hardship provisions are meant to provide protection from disconnection to customers who are experiencing hardship and cannot meet their payment obligations. This is underpinned by the principle that customers should only be disconnected as a last resort. It is also meant to protect customers from unmanageable accumulated debt. However, there is a clear power imbalance between retailers and customers in respect to hardship that needs to be addressed. There is little consequence for retailers if they fail to meet their obligations to customers, but the impact of not getting assistance can be devastating for customers. It is important that the standard statements in the revised guidelines address this imbalance of power, as explained below.

Effectiveness of retailer's hardship policy

A retailer's hardship policy needs to be more than just words on a page. It must be effectively implemented, with supporting policies, procedures, systems and training for staff.

Good outcomes for customers experiencing payment difficulty are largely dependent on the overall effectiveness of a retailer's hardship policy and how effective it has been implemented. The capacity and capability of staff is critical to this. QCOSS is aware that some retailers do not have staff that are trained in how to recognise and respond to customers that are experiencing hardship. Similarly, many retailers do not have staff dedicated to providing assistance to customers that are experiencing payment difficulty. This can lead to staff failing to recognise that a person should be offered hardship assistance.

There may also be barriers built in to the way the hardship policy has been implemented, such as the requirement to make a payment(s) to demonstrate goodwill or a requirement to provide evidence of hardship. In our view, this is in part based on a mistaken belief that many people are just trying to avoid paying what they owe. QCOSS is not aware of any evidence to support the notion that people falsely claim that they are experiencing difficulty paying their bill.

Customer awareness of rights

Many customers may not be aware of their rights to assistance including access to hardship programs. They will rely on the retailer to explain their rights and options to them. The obligation should be on the retailer to explain their hardship policy and the rights and options available to a customer that is experiencing payment difficulties due to hardship.

Role of financial counsellors and other customer advocates

There will always be customers that find it difficult to engage with their energy retailer. These are often customers that are facing other difficult circumstances, financial and personal. Under paragraph 44(a) of the NERL, a retailer's hardship policy must contain processes to identify appropriate government concession programs and appropriate financial counselling services and to notify hardship customers of those programs and services. If a retailer fails to this, there is no practical consequence for the retailer but the impact on the customer can be severe, including that their debt is higher than it should be had they been made aware of concession programs and services.

Recommendation 2: That the AER ensure that the standard statements in the revised guidelines address this imbalance of power between retailers and customers experiencing payment difficulty. The standard statements need to acknowledge and articulate the barriers for customers in engaging with retailers, as well as what actions the retailer is undertaking to reduce these barriers.

Issue 3: Payment plans being offered may not be realistic or based on a customer's capacity to pay

Energy is an essential service and good hardship policies have this at their core. A good hardship policy that focuses on finding a sustainable energy outcome for their customer will also get good debt collection outcomes, but a debt collection policy will not get good outcomes for customers experiencing hardship.

Even in the context of debt collection, the ACCC and ASIC guidelines, which aim to ensure that debt collection activity is undertaken in a way that is consistent with consumer protection laws, promote a flexible, fair and realistic approach to debt collection. An example of a fair and realistic approach may be for a retailer to not seek full recovery of an accumulated debt where, had the retailer done all that they should have under their hardship policy, the debt would never have got that large.

The ACCC and ASIC believe that the need for collection activity will be greatly reduced when debtors act promptly and responsibly, and collectors are flexible, fair and realistic. They recognise that debtors may default on their debts because of circumstances beyond their control, such as unemployment, illness or family breakdown and that most people are honest and want to meet their commitments if given a reasonable opportunity to do so.

The ACCC and ASIC encourage flexibility on the part of creditors and collectors. This includes recognising debtors who are experiencing vulnerability or financial hardship, and recognising that debtors may have a number of debts owing to different creditors. A flexible approach involves making meaningful and sustainable payment arrangements that reasonably take into account a debtor's ongoing living expenses to enable them to live in basic comfort and prevent impoverishment or humiliation. This should encompass a clear mechanism for customers to vary or renegotiate a payment plan at any time.

Under the consumer law framework, a debtor also has a right to have an authorised representative (such as a financial counsellor, financial advisor, community worker, solicitor, guardian or carer) represent them or advocate on their behalf about a debt. This in part aligns with the requirement for retailers to notify customers on a hardship program about financial counselling services.

The hardship guidelines would be further strengthened by the inclusion of case studies or examples from within both the energy sector and other sectors to demonstrate how retailers and other providers give effect to the requirement to have regard to the customer's capacity to pay. Retailers should endeavor to include a number of these case studies or examples in their hardship policies.

- **Recommendation 3:** That the AER look to current best practice and guidance, including the ACCC and ASIC *Debt collection guideline: for collectors and creditors*, to clarify the meaning of the phrase "the customer's capacity to pay"; develop case studies or examples for inclusion in the revised hardship guidelines; and encourage retailers to include these approaches in their hardship policies.

Issue 4: Some retailers were unable to explain how they implement their policies

If a retailer can't explain how they have implemented their policy, they are probably not doing it very well, leaving their customers without access to support and protections.

This issue could be addressed by improving the effectiveness of accountability and enforcement mechanisms for retailers. This includes clarifying the rights and obligations for customers experiencing hardship through the revised guidelines, and by providing more information and understanding about how customers can enforce their rights. Retailers need to be more effectively held to account by customers, consumer advocates, ombudsman schemes and, ultimately, the AER.

Rights and obligations are meaningless if there is no practical way for people to enforce them. Effective complaints and dispute resolution processes are essential to a framework to strengthen protections for customers in hardship. If a retailer denies a customer access to a hardship program, or forces the customer into a payment plan that the customer can't afford, there is no real consequence for the retailer while the impact on the customer can be devastating. The obligation should be on the retailer to have a clear mechanism for customers to enforce their rights under a hardship policy.

The ACCC and ASIC guidelines provides the following information about resolving debtor complaints and disputes:

Complaints and disputes must not be ignored. You must have effective internal processes in place for logging, assessing, and where appropriate, taking timely action in response to them.

A robust compliance program is a prudent risk management tool which assists managers and staff to understand their legal obligations and reduces the risk of breaching competition, consumer and other relevant laws.

You should establish and implement clear, appropriate, effective and fair policies and procedures for identifying and dealing with vulnerable debtors. A debtor may be vulnerable for a variety of reasons including experiencing mental health problems or mental capacity limitations.

The AER should provide guidance on complaints and dispute resolution processes that must be included in a hardship policy, using examples so that retailers understand practical compliance approaches that would be acceptable.

QCROSS encourages the AER to concentrate efforts on matters that pose the highest risk to customers experiencing hardship. This needs to be balanced where appropriate with allowing retailers scope to make decisions about the efficient and effective allocation of resources.

- **Recommendation 4:** That the AER include in the revised guidelines standard statements about mechanisms to resolve hardship customer complaints and disputes.