



Australian Energy Market Commission

RULE DETERMINATION

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

Australian Energy Regulator

15 NOVEMBER 2018

DETERMINATION

Rule determination

Strengthening protections for customers in hardship
15 November 2018

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 final rule that amends the National Energy Retail Rules (NERR) to require the Australian Energy Regulator (AER) to develop binding customer hardship policy guidelines (Hardship Guidelines).
- 2 The final 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.
- 3 Under the final 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 retailer hardship policies
 - standardised statements for inclusion in a retailer’s hardship policy that:
 - inform customers of how the retailer will meet its minimum requirements under section 44 of the NERL
 - provide guidance to customers on their rights, and retailer obligations, with regards to the customer hardship provisions in the NERL.
- 4 The more preferable final 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.
- 5 Under the more preferable final rule the AER’s discretion regarding the content of the Hardship Guidelines is bounded by the existing provisions of the NERL.
- 6 The more preferable final rule includes transitional arrangements to ensure current retailers have updated and approved hardship policies in place by no later than August 2019.

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 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 Commission published a consultation paper and draft determination on the rule change request. Additionally, the AEMC held a stakeholder workshop on 22 June 2018, and held a joint workshop with the AER on 25 September 2018 to inform its decision. This final determination is informed by stakeholder submissions on the consultation paper and draft determination, as well as information received during the stakeholder workshops.

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 (after 1 April 2019)	Submit a hardship policy that: <ul style="list-style-type: none"> • complies with the Hardship Guidelines¹ • includes the standardised statements¹ • 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 ²
AER	Approve compliant hardship policy	Within 3 months of receiving a hardship policy
New retailer	Implement the approved policy	As soon as practicable after AER approval

Note: ¹ these obligations apply from 1 April 2019 for all new retailers. Prior to this, new retailers must follow the pre-existing process.

Note: ² this timing will change should the recommended law change be made, as outlined in paragraph 18 below.

- 15 The final 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 includes the standardised statements 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 within 3 months after the AER subsequently 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 AER 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 2 October 2019.

- 17 The final rule contains changes to the draft rule to clarify the rule as follows:

- rule 75A(2)(b)(i) has been amended to better reflect the role of the AER in developing standardised statements and that it is the role of retailers to inform their customers as to how they will comply with, and implement, their hardship obligations
- rule 75B(i) has been amended to require that retailers include the AER's standardised statements in their hardship policies
- the transitional arrangements have been redrafted to clarify that the arrangements do not grandfather a retailer's approved updated hardship policy. This will ensure that retailers comply with rule 75B(2) if the AER amends the Hardship Guidelines after the introduction of the rule, and making of the first Hardship Guidelines.

More preferable rule

- 18 The Commission's rule is a more preferable rule for the following reasons:

- The AER proposed in its rule change request that the hardship guidelines include any matter the AER considers necessary. The Commission is of the view that the AER should not be given a broader scope when developing the Hardship Guidelines than exists under the NERL. Therefore the more preferable final rule is limited to the requirements under sections 43 to 45 of the NERL.
- The Commission has also included an additional requirement on retailers to those proposed by the AER in its proposed rule. The Commission considers that consistency across policies is an important outcome of this rule change, however retailers should have flexibility in how they implement their minimum requirements to best suit their

customers. Therefore, the more preferable final rule includes a requirement that a retailer must include clear and specific statements of the actions they will take to meet section 44 of the NERL.

- The AER's proposed rule did not include timeframes for retailers to submit hardship policies or for the AER to approve updated policies. The Commission considers that this is required to ensure retailers have updated policies in place in a timely manner.
- The AER's proposed rule moved the hardship program indicators out of the the AER's *Performance Reporting Procedures and Guidelines* and into the hardship guidelines. In the Commission's view, moving the hardship indicators would not result in any particular benefit but could place an added administrative requirement on retailers by having reporting requirements in multiple documents. Therefore the more preferable final rule requires that the hardship indicators remain in the *AER Performance Reporting Procedures and Guidelines*.

Civil penalty provisions and recommended law change

19 The current framework for hardship is underpinned by civil penalty provisions through both the NERL and the NERR. Consistent with that, the Commission considers that the new rule requiring retailers to submit hardship policies that comply with 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.

20 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

21 The Commission finds that the more preferable rule is an efficient approach for the AER to use its powers under the NERL to ensure all retailers amend their hardship policies in order to improve consistency and clarity.

22 Having regard to the issues in the rule change request, the Commission is satisfied that the final 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 standardised 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.

- 23 The Commission is of the view that the final rule appropriately enhances the existing requirements on retailers under the NERL in relation to customers facing payment difficulties due to hardship.
- 24 The benefits of the final rule are likely to outweigh the costs as there should be minimal cost impacts for complying retailers who already offer adequate protections for customers in hardship.
- 25 The Commission considers the final 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.

CONTENTS

1	Australian Energy Regulator’s rule change request	1
1.1	The rule change request	1
1.2	Current arrangements	1
1.3	Rationale for the rule change request	2
1.4	Solution proposed in the rule change request	3
1.5	The rule making process	4
2	Final rule determination	5
2.1	The Commission’s final rule determination	5
2.2	Rule making test	5
2.3	Assessment framework	6
2.4	Summary of reasons	6
2.5	Contribution to the NERO	8
2.6	Other requirements under the NERL	9
3	Assessment of the final rule	10
3.1	The rationale for the rule change	10
3.2	The scope of the AER’s powers	14
3.3	Standardised statements	17
3.4	Defining hardship	21
3.5	Hardship indicators	23
3.6	Costs and benefits of the rule change	25
3.7	Transitional arrangements	28
3.8	Enforceability and civil penalty provisions	31
3.9	Victoria’s Payment Difficulty Framework	33
3.10	Conclusions	34
3.11	Recommended law change	35
	Abbreviations	37
	APPENDICES	
A	Summary of other issues raised in submissions	38
A.1	Summary of other issues raised in submissions to the consultation paper	38
A.2	Summary of other issues raised in submissions to the draft determination	42
B	Legal requirements under the NERL	45
B.1	Final rule determination	45
B.2	Power to make the rule	45
B.3	Commission’s considerations	45
B.4	Civil penalties	45
B.5	Conduct provisions	46
	TABLES	
Table 2.1:	Key features of the final rule	7
Table A.1:	Summary of other issues raised in submissions to the consultation paper	38
Table A.2:	Summary of other issues raised in submissions to the draft determination	42

1 AUSTRALIAN ENERGY REGULATOR'S RULE CHANGE REQUEST

1.1 The rule change request

On 21 March 2018, the Australian Energy Regulator (AER) (proponent) 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 Current arrangements

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

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. Once approved, the retailer must publish the approved policy on its website, and also maintain and implement the policy. 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.

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.

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 waivers 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.

1.3 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 numbers of customers receiving hardship assistance
- fewer customers completing hardship programs by paying off arrears
- increased electricity disconnections.¹

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 non-compliance it did note that most retailers were deficient in at least one aspect of their policy.² The AER's findings were that:

- there is no consistency in how and when a customer could be identified as requiring assistance

¹ AER rule change request, pp. 5-6.

² Rule change request, p. 7.

- 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.³

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.⁴

1.4 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, make customer hardship policy guidelines (Hardship Guidelines) that will be binding.

The AER proposed that the Hardship Guidelines specify the same hardship indicators that currently exist under rule 75 of the NERR and also specify:

- the 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.⁵

The AER proposed that it may amend the Hardship Guidelines from time to time in accordance with the retail consultation procedure.⁶

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.⁷

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.⁸

3 Rule change request, pp. 7 to 9.

4 Rule change request, p. 9.

5 *ibid.*

6 *ibid.*

7 Rule change request, p. 13.

8 Rule change request, p. 21.

The AER did not provide a timeline for release of the Hardship Guidelines and 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.

1.5 The rule making process

Consultation paper

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.⁹ A consultation paper identifying specific issues for consideration was also published. The Commission received 26 submissions. Additionally, the AEMC held a stakeholder workshop on 22 June 2018 to further inform its decision. Issues raised in submissions are discussed and responded to throughout this final rule determination. Issues that are not discussed in the body of this determination are summarised and responded to in Appendix A.

Draft determination

On 6 September 2018, the Commission published a draft rule determination and draft rule. The Commission received 20 submissions to the draft determination and draft rule. The AEMC held a joint stakeholder workshop with the AER on 25 September 2018 to discuss the draft decision.

The Commission considered all issues raised by stakeholders in submissions and as part of the stakeholder workshop. Issues raised in submissions or in the workshop are discussed and responded to throughout this final rule determination. Issues that are not discussed in the body of this document have been summarised and responded to in Appendix A.

⁹ This notice was published under section 251 of the NERL.

2 FINAL RULE DETERMINATION

2.1 The Commission's final rule determination

The Commission's final rule determination is to make a more preferable final rule. The more preferable final 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 that:
 - inform customers of how the retailer will meet its minimum requirements under section 44 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 section 44 of the NERL.

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

Further information on the legal requirements for making this final 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 national energy retail objective (NERO).¹⁰ This is the decision making framework that the Commission must apply.

The NERO is:¹¹

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.

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").¹²

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.¹³ If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

¹⁰ Section 236(1) of the NERL.

¹¹ Section 13 of the NERL.

¹² Section 236(2)(b) of the NERL.

¹³ That is, the legal tests set out in section 236(1) and (2)(b) of the NERL.

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 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. The Commission 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 retailer costs associated with bad debts.
- **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 Commission 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 Commission has considered the benefits of the 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 final rule made by the Commission is attached to and published with this final rule determination. The key features of the more preferable final rule are outlined in Table 2.1 below.

Table 2.1: Key features of the final rule

ENTITY	OBLIGATION	TIMING
AER	<p><i>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 that: <ul style="list-style-type: none"> • inform customers of how the retailer will comply with s44 of the NERL¹ • provide guidance to customers on their rights in relation to, and retailer obligations with regard 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>Rule 75B (1) and (2):</i> Submit to the AER a customer hardship policy that:</p> <ul style="list-style-type: none"> • complies with the Hardship Guidelines (after the first Hardship Guidelines are published) • includes the standardised statements¹ • contains clear and specific statements the retailer will take to give effect to the minimum requirements under s44 of the NERL. <p>Rule 75B(1) and (2) are 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>Rule 75B(1) and (2); and Transitional arrangements:</i> Existing retailers registered on or before 1 April 2019, with an approved hardship policy before that date must submit an updated policy that complies with Rule 75B to the AER.</p>	Within 2 months of the date the AER publishes the Hardship Guidelines (no later than 2 June 2019).
AER	<p><i>Rule 75B(3):</i> For new retailers after 1 April 2019, 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, includes the standardised statements¹ and contains statements of action the retailer will take to give effect to s44 of the NERL.</p>	Within 2 months of receiving a customer hardship policy.

ENTITY	OBLIGATION	TIMING
	<i>Transitional arrangements:</i> For current retailers submitting an updated hardship policy, the AER must approve the policy if it complies with the Hardship Guidelines, include the standardised statements ¹ and contains clear and specific statements of action the retailer will take to give effect to s44 of the NERL.	Within 2 months of receiving updated customer hardship policy (no later than 2 August 2019).
New retailers	<i>Rule 75(b):</i> Implement and publish the customer hardship policy on the retailer’s website.	As soon as practicable after the policy is approved.
Retailers with an existing approved policy	<i>Transitional arrangements:</i> Implement and publish the updated customer hardship policy.	Within 2 months of having their hardship policy approved by the AER (no later than 2 October 2019).

Note: ¹This wording differs from the draft determination as discussed in section 3.3.

The implication of the above is that the final rule and transitional arrangements require that all current retailers will have their updated, complying customer hardship policies implemented by no later than 2 October 2019.

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

2.5 Contribution to the NERO

The Commission is satisfied that the preferable final 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 final rule will improve hardship protections by enabling the AER to create a Hardship Guideline that will require retailers to have 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 final rule will assist customers in having greater confidence in their ability to get support from their retailer when they are facing hardship.
- The final 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 final 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 final rule passes the consumer protections test as it gives effect to the provision of protections for residential customers facing payment difficult 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.

2.6 Other requirements under the NERL

In applying the rule making test,¹⁴ the Commission has also had regard to section 49 of the NERL. Under this provision, the Commission 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 final 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 final rule meets the purpose set out in section 43(1) of the NERL.

¹⁴ Set out in section 236(1) of the NERL.

3 ASSESSMENT OF THE FINAL RULE

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

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

- the rationale for the rule change
- the scope of the rule change
- the standardised statements
- 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, 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”.¹⁵ The AER has developed guidance to assist retailers in demonstrating that their policies meet the minimum requirements under the section 44 of the NERL.¹⁶ 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 section 43 of the NERL.

The proposed rule sought to address the issues outlined in section 1.3 by requiring that the AER must, in accordance with the retail consultation procedure, make binding Hardship Guidelines.

3.1.1 The AER’s view

As outlined in section 1.3, the AER believed that the rule change was 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
- there is no consistency in how and when a customer could be identified as requiring assistance

¹⁵ Section 43(1) of the NERL.

¹⁶ AER, *Guidance on AER approval of customer hardship policies - FINAL*, May 2011, AER, Melbourne.

- 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

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. In particular the Energy and Water Ombudsman NSW (EWON) noted that while many retailers have improved their policies, the accessibility and deliverables of all hardship programs fall short of what is required to address energy affordability in today's market.¹⁷

Many consumer advocates agreed that there is little consistency in how retailers apply their hardship programs, both across retailers and within the individual retailers. In their view this is not providing adequate protections for all customers facing payment difficulties due to hardship.¹⁸

Two retailers, Powershop and Ergon Energy Queensland, noted their support for the rule change.¹⁹

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. ActewAGL, Aurora Energy and Momentum Energy took the view that the current arrangements provide adequate protections to consumers, while allowing retailer flexibility.²⁰

¹⁷ EWON, consultation paper submission, p. 2.

¹⁸ Consultation paper submissions: SAFCA, p. 2; CALC, p.2; PIAC, p.5; SACOSS, p. 5.

¹⁹ Consultation paper submissions: Powershop, p.1; Ergon Energy Queensland, p. 1.

²⁰ Consultation paper submissions: ActewAGL, p. 2; Aurora Energy, p.1; Momentum Energy, p. 2.

2. AGL, Origin Energy, Red Energy and Lumo Energy, and the AEC argued there are existing powers under section 43 and 45 of the NERL that would allow the AER to improve policies without the need for binding guidelines.²¹

Many retailers and the AEC noted that there are potentially issues with the consistent application of hardship policies across the industry but the current framework has allowed some retailers to develop best practice policies to resolve issues of payment difficulties for vulnerable customers.²² These stakeholders took the position that the AER should rely on its existing powers rather than go down the path of binding guidelines that will add additional cost onto retailers and their customers.

3.1.3 Stakeholder views - submissions to the draft determination

All submissions to the draft determination provided broad support for the draft rule and agreed that there would be benefits resulting from the rule change.²³ The benefits that were noted in the submissions to the draft determination are outlined in section 3.1.2. Many submissions from consumer groups agreed that the draft rule would enhance the existing requirements on retailers in relation to customers facing payment difficulties due to hardship.²⁴

Origin Energy noted that while it considered that that the policy objectives could be best achieved by the AER using its existing powers to request retailers amend their hardship policies, it supports the intent of the draft rule "to provide more consistent information and assistance to customers experiencing hardship".²⁵

Some submissions raised concerns with how far the rule change would go in prescribing how retailers are to implement their obligations under the NERL, which is discussed further in section 3.2 and section 3.3.

3.1.4 Findings - adequacy of current policies

The Commission finds that the current approach to hardship is not providing adequate and consistent protections for customers facing payment difficulties due to hardship.

The AER has provided evidence that suggests 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 is an indicator of how proactive retailers are in the early identification of

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

22 Consultation paper submissions; AEC, p. 2; EnergyAustralia, p5.

23 Draft determination submissions: Consumer Action Law Centre (CALC), p. 1; SA Government (Department for Energy and Mining), p. 1; Energy and Water Ombudsman South Australia (EWOSA), p. 1; Council of the Ageing Australia (COTA), p. 1; AGL, p. 1; Ergon Energy Queensland, p. 1; Public Interest Advocacy Centre (PIAC), p. 1; South Australian Council of Social Services (SACOSS), p. 1-2; Queensland Council of Social Services (QCOSS) p. 1; Australian Energy Council p. 1; Origin Energy, p. 1, Uniting Communities, p. 4, Simply Energy, p. 2; Powershop, p. 1; Red Energy and Lumo Energy, p. 1; Energy Consumers Australia p. 1; Pooled Energy, p. 1; Energy and Water Ombudsman New South Wales (EWON); p. 1, Energy and Water Ombudsman Queensland (EWOQ) p. 1; EnergyAustralia, p. 1.

24 Draft determination submissions: EWON, p. 1; SA Government p. 2; Uniting Communities, p. 4; QCOSS, p.1; SACOSS, p. 2.

25 Origin Energy, draft determination submission, pp. 1 and 3.

customers facing hardship. Having a process for early response to customers identified as being in hardship is a minimum requirement under the NERL.²⁶ 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) has found deficiencies in retailers hardship programs in its *Retail Electricity Pricing Inquiry*.²⁷ It found that “[d]espite the requirements of the NERL and NERR, consumers continue to experience difficulty accessing these services”.²⁸ 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”.²⁹ 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.³⁰

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.³¹ Further, the retailer placed an onerous repayment arrangement on the customer to be reconnected.³²

Similar examples were also provided by the South Australian Council of Social Services (SACOSS), EWON, the Energy and Water Ombudsman Victoria (EWOV) and the South Australian Financial Counsellors Association (SAFCA).³³ The Public Interest Advocacy Centre (PIAC) reported that in a survey it carried out of disconnected customers, 74 per cent of respondents had contacted their retailer immediately after disconnection but did not receive any support in the lead up to prevent disconnection.³⁴

The case studies from the ACCC and consumer groups provide an insight into the issues consumers may experience when facing payment difficulty due to hardship.

The Commission finds 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.

26 Section 44(b) of the NERL.

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

28 *ibid.*

29 *ibid.*

30 *ibid* p. 312

31 *ibid*, p. 307.

32 *ibid.*

33 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.

34 PIAC, draft determination submission, p. 2.

3.1.5 Findings - 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.³⁵ 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 had been in negotiations with the AER for over six months about varying its policies, with no outcomes at the time of this final determination.

Further, the AER would need to negotiate with upwards of 20 retailers who operate under the National Energy Customer Framework (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.

The Commission finds that a 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 The scope of the AER's powers

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 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 standardised statements, would reflect the current minimum requirements in section 44 of the NERL.³⁶ Further, it noted that with regards to standard statements, retailers would be "able to determine how to implement these minimum requirements but the intention is that these statements would allow customers to work out what assistance a retailer will provide under its policy".³⁷

The AER's intent was 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".³⁸

³⁵ If the AER has formed that view under its functions outline in section 204 of the NERL.

³⁶ AER rule change request, p. 14.

³⁷ *ibid.*

³⁸ AER rule change request, p. 15.

3.2.2 Stakeholder views - submissions to the consultation paper

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.³⁹ 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. These submissions requested that, should the rule be made, it be limited to allowing the AER to provide direction around the minimum requirements under the NERL.⁴⁰

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".⁴¹

However, the Consumer Action Law Centre (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.⁴²

3.2.3 Stakeholder views - submissions to the draft determination

Discussion on the scope of the AER's powers was generally limited to discussions about their role in writing standardised statements, which is discussed further in section 3.3.

However, those submissions that commented specifically on the scope of the AER's powers in relation to the NERL, were supportive of the approach taken in the draft rule to limit the scope to the AER's existing powers under the NERL.⁴³ Red Energy and Lumo Energy further supported the Commission removing the reference to the Hardship Guidelines specifying any matter the AER considered necessary.⁴⁴ The Queensland Council of Social Services (QCOSS) agreed that the rule has the objective of clarifying the NERL and the AER's existing powers, and improving the way the hardship policies work in practice.⁴⁵ EnergyAustralia further agreed that the Hardship Guidelines are a mechanism to assist retailers in meeting the minimum requirements set out by the NERL and allow the AER to ensure all retailers are supporting their customers in hardship.⁴⁶

3.2.4 Findings

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:

39 Consultation paper submissions: Origin Energy, p.7; Simply Energy, p. 2; AEC, p. 3; Red Energy and Lumo Energy, p.2; AGL, p.5.

40 *ibid.*

41 AGL, consultation paper submission, p. 2.

42 CALC, consultation paper submission, p. 2.

43 Submissions to draft determination: QCOSS, p. 3; SACOSS; p. 2; EWOSA; p. 1; SA Government (Energy and Technical Regulation Division), p. 2; EnergyAustralia, p. 1.

44 Red Energy and Lumo Energy, draft determination submission, p. 2.

45 QCOSS, draft determination submission, p. 3.

46 EnergyAustralia, draft determination submission, p. 1.

- contains the minimum requirements under section 44 of the NERL⁴⁷
- will or is likely to contribute to the purpose in section 43(1)⁴⁸, namely that 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”⁴⁹

It must also consider that⁵⁰:

- 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.⁵¹

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).

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.

Final 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 is limited to the:

- minimum requirements set out in section 44 of the NERL
- purpose of hardship guidelines outlined in section 43 of the NERL
- principles the AER must apply when approving hardship policies, as outlined in section 45 of the NERL.

The Commission finds that the proposed approach will give the AER a more effective mechanism to improve hardship policies, but will not provide the AER with any powers it does not already have under the NERL.

47 Section 45(1)(a) of the NERL.

48 Section 45(1)(b) of the NERL.

49 Section 43(1) of the NERL.

50 Section 45(3) of the NERL.

51 Section 45(3) of the NERL.

3.3 Standardised statements

The AER's rule change request proposed that the Hardship Guidelines outline standardised statements that retailers would need to include in their policies. These statements need to reflect the minimum requirements under the NERL, while also providing retailers with flexibility in how they implement their hardship programs.

3.3.1 The AER's view

The AER's view was that the compliance of retailers with the minimum requirements under the NERL was inadequate. The ACCC also formed this view as part of its *Retail Electricity Pricing Inquiry*, as outlined in section 3.1.4.

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

- retailers would 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 would increase as the consistency and operation of industry hardship policies improve
- customers would be better able to understand their entitlements
- the AER would be better able to enforce hardship obligations.

3.3.2 Stakeholder views - submissions to the consultation paper

Many stakeholders supported the inclusion of standards statements that allowed for flexibility.⁵² Consumer groups EWON, EWOV, PIAC, Energy and Water Ombudsman Queensland (EWOQ), Energy Consumers Australia (ECA), and CALC all agreed that minimum standards of assistance would provide clear guidance to both retailers and customers.⁵³ As noted by 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]".⁵⁴

All consumer groups agreed that standardised statements would not diminish the ability of retailers to apply their policies or extend additional assistance where necessary.⁵⁵ Powershop noted 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".⁵⁶ It further added that a "level of standardisation also allows retailers to provide personalised assistance as opposed to rigid process driven assistance".⁵⁷

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

52 Consultation paper submissions: EWON, p. 4; EWOV, p. 4; PIAC, p. 7; Powershop, p. 3; EWOQ, p. 2; Momentum Energy, p.2; ECA, p. 7; CALC, p. 3.

53 Consultation paper submissions: EWON, p. 4; EWOV, p. 4; PIAC, p. 7; EWOQ, p. 2; ECA, p. 7; CALC, p. 3.

54 EWON, consultation paper submission, p. 4.

55 Consultation paper submissions: EWON, p. 4; EWOV, p. 4; PIAC, p. 7; EWOQ, p. 2; ECA, p. 7; CALC, p. 3.

56 Powershop, consultation paper submission, p. 3.

57 *ibid.*

policies under the Retail Law”.⁵⁸ 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.⁵⁹

Origin Energy, and Red Energy and Lumo Energy expressed concern over the standard statements and argued that they have the potential to create additional obligations over and above what is specified in the NERL and NERR.⁶⁰

3.3.3

Stakeholder views - submissions to the draft determination

Views from stakeholders on the Commission’s draft rule covered two main areas:

1. the use of standard statements as a tool to improve hardship policies
2. the role of the AER in giving effect to the minimum requirements under the NERL.

Use of standard statements

Consumer groups and some retailers agreed with the intent of including standard statements in the Hardship Guidelines. In SACOSS’s view, both retailers and customers will benefit from hardship policies containing “consistent and clearly articulated statements of the minimum requirements.”⁶¹ Many stakeholders, including SACOSS, EWON, ECA, the South Australian Government and EWOSA agreed that the use of standardised statements would provide clarity for retailers and result in clearer and more consistent policies to improve consumer awareness, confidence and empowerment.⁶² SACOSS also strongly supported the Commission’s draft decision to include standardised statements to provide guidance to customers on their rights, and retailer obligations.⁶³

Origin Energy noted that it was not opposed to “measures which provide transparency to consumers about assistance available to them, as we believe that transparency supports consumer confidence in the energy market”.⁶⁴ The AEC agreed that it was “comfortable with the inclusion of standard statements in certain circumstances”⁶⁵. However, both expressed concerns over the ability of the standard statements to remove a retailer’s discretion to define their own response to assisting their customers.⁶⁶ Simply Energy agreed that any standardised statements retain the flexibility for retailers to offer individualised assistance, where appropriate.⁶⁷

Red Energy and Lumo Energy argued that the use of standardised statements means that “retailers could be limited in how they address hardship or have less flexibility to adapt their

58 *ibid.*

59 QCOSS, consultation paper submission, p. 9.

60 Consultation paper submissions; Origin Energy, p. 5; Red Energy and Lumo Energy, p. 2.

61 SACOSS, draft determination submission, p. 2.

62 Draft determination submissions: SACOSS, p. 2-3; ECA, p. 2; SA Government (Energy and Technical Regulation Division), p. 1; EWON, p. 2; EWOQ, p. 2-3; QCOSS, p. 2-3; EWOSA, p. 1.

63 SACOSS, draft determination submission, p. 2-3.

64 Origin Energy, draft determination submission, p. 2.

65 AEC, draft determination submission, p. 2.

66 *ibid.*

67 Simply Energy, draft determination submission, p. 1.

processes and policies to changing circumstances”.⁶⁸ It requested that the Commission remove or limit the reference to standard statements from the final rule.⁶⁹ In their view, by doing so, the AER would still be able to provide prescriptive information into hardship policies, but would not lock in a “very prescriptive and rigid regulatory model for hardship support”.⁷⁰

AGL and EnergyAustralia further argued that the use of standardised statements would be costly to retailers and would limit the flexibility of retailers to seek out the most effective approach to hardship.⁷¹ Both retailers requested that the final rule be amended to remove the AER’s ability to develop standardised statements.⁷² AGL’s preference was for draft rule 75A(b)(i) to be replaced with a new rule to focus on guidance on the minimum requirements rather than actionable statements.⁷³ EnergyAustralia suggested that draft rule 75A(b) should be redrafted to align the rule with the policy intent to assist retailers to meet the minimum standards set out in the NERL.⁷⁴ This could be done through example statements, rather than standardised statements.⁷⁵ In their view, “the draft rule provides incentives for retailers to give effect to the NERL minimum requirements in clear and specific action statements without the need for the AER to prescribe these”.⁷⁶

AER’s role when developing standardised statements

When discussing their views on the use of standardised statements, retailers who agreed generally to the intent of such statements expressed concern with the draft rule allowing the AER to determine the way in which a retailer develops their hardship programs. Origin Energy argued that the NERL is designed to provide retailers with discretion as to how they assist customers facing hardship. They base their policy on their experience of what is useful to their customer base.⁷⁷ Origin Energy expressed concern that the Commission’s draft rule altered the intent of the NERL by allowing the AER to determine how a retailer ‘gives effect’ to the retailer’s requirements under the NERL. In their view that is the retailer’s role.⁷⁸ Origin Energy requested that the Commission ensure the intent of the standardised statements is to reflect a customer’s entitlements under the NERL.⁷⁹

The AEC also argued that the NERL accepts that it is the role for retailers to determine the appropriate assistance for their customers.⁸⁰ In their view the final rule should be limited to

68 Red Energy and Lumo Energy, draft determination submission, p. 2.

69 Red Energy and Lumo Energy, draft determination submission, p. 3.

70 *ibid.*

71 Draft determination submissions: AGL, pp. 2-3; EnergyAustralia, pp. 1-3.

72 *ibid.*

73 AGL, draft determination submission, p. 3.

74 EnergyAustralia, draft determination submission, p. 2.

75 *ibid.*

76 *ibid.*

77 Origin Energy, draft determination submission, pp. 1-2.

78 *ibid.*

79 *ibid.*

80 AEC, draft determination submission, p. 1.

obligations that are administrative, or where the NERL does not give retailers flexibility in how they meet the needs of their customers.⁸¹

3.3.4

Findings

Use of standard statements

As noted earlier, the Commission considers there is sufficient evidence to support the need for the new approach to hardship policies. The evidence presented is that hardship policies that are written in a general way do not allow customers to understand their rights and can lead to poor consumer outcomes.

The Commission agrees with consumer groups that there is a benefit to ensuring consistency across retailers. The Commission's view is that consistency, through a 'pro forma approach', would be beneficial for 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 Guidelines, they will also build a useful data set over time to measure the success of hardship policies.

The Commission has determined that standardised statements are necessary to achieve a level of consistency and clarity in policies. The Commission does not agree that Hardship Guidelines that only provide non-binding guidance or example statements would achieve the outcomes of improving retailer policies across the board.

However, in the Commission's view, retailers should have some flexibility in how they meet their obligations under the NERL. The Commission considers that the use of standardised statements that reflect the minimum requirements in the NERL will still provide retailers with this flexibility. The two part approach to what retailers must include in their policies supports both consistency and flexibility:

1. The AER will be required to develop standardised statements that reflect only the minimum requirements under the NERL. This will ensure consistent and clear policies that customers and their advocates will be able to understand.
2. Retailers will then be required to provide clear and specific statements of the actions they will take to meet those minimum requirements. These statements allow the retailer to include information about how they will specifically implement their minimum requirements, to best suit their customers. The AER will then be able to assess whether those statements meet the purpose of hardship policies under section 43 of the NERL when approving the policy.

⁸¹ AEC, draft determination submission, p. 2.

As the standardised statements will be developed only around the minimum requirements, there is no restriction on a retailer providing additional protections if they consider these are required to meet the needs of their customers.

The Commission has considered the request from retailers to remove the reference to standard statements. However, the Commission sees this as a key component in improving the way all retailers reflect their individual hardship programs to their customers. As noted throughout this determination, the Commission has limited the scope of the AER's powers when developing the standardised statements to the minimum requirements under NERL.

The Commission does not agree that this is locking in a prescriptive and rigid approach to hardship. The AER has been provided with the power to modify the Guidelines as required. The Commission notes that, over time, the Guidelines may be amended and refined as industry improves its approach to hardship customers. However, as the statements are limited to the minimum requirements under the NERL, it is difficult to see that these statements would need to be modified extensively.

From this, the Commission finds that the AER must include standardised statements in its Hardship Guidelines in order to create consistent and clear hardship policies. This will not remove flexibility for retailers in how they implement their hardship programs, or prevent them from going above and beyond what is required of them in the NERL.

Given the importance of standardised statements the Commission has strengthened the requirements in the final rule, to ensure that retailers include the statements in their policies.

AER's role when developing standardised statements

The Commission notes that the NERL places the onus on the retailer to develop hardship policies that meet the minimum requirements. From this, the Commission agrees the wording of the draft rule could be construed as allowing the AER to prescribe how a retailer will develop its policies, beyond the extent of the minimum requirements of the NERL. As noted earlier, it is the Commission's intent that the standardised statements would reflect only the minimum requirements, and therefore allow the retailer flexibility in how it develops its programs. From this, the Commission has amended the wording of rule 75A(2)(b)(i) to specify that the standard statements are designed to inform customers of how the retailer will comply with the minimum requirements under the NERL.

In the Commission's view this change places the onus on the retailer to comply with the NERL, while also allowing the AER to ensure consistent and actionable standard statements are included in a retailer's policy.

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 NERL or the Hardship Guidelines should define hardship.

3.4.1 The AER's view

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

3.4.2 Stakeholder views - submissions to the consultation paper

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”.⁸² 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”.⁸³

PIAC, SACOSS and CALC all supported a consistent definition of hardship. They argued that:

- the definition should be expanded to include all customers facing payment difficulties to align the NERL to the Essential Services Commission's (ESC) Payment Difficulties Framework (PDF)⁸⁴
- if the AER can bring consistency to the process of identification, equitable access to hardship supports will be more achievable⁸⁵
- hardship should be broadly defined along the lines of all residential customers unable to pay an amount of energy arrears due.

3.4.3 Stakeholder views - submissions to the draft determination

CALC, SACOSS and Origin Energy commented on the Commission's draft decision to not define hardship customers.

Origin Energy supported the Commission's draft decision and agreed that this is the role for retailers.⁸⁶ It also expressed concern that there is potential that the standard statements will go so far as to define what hardship means.⁸⁷

CALC and SACOSS both noted the Commission's draft decision, however, SACOSS also noted that the definition of a hardship customer under the NERL is “directly linked to the identification of the customer in accordance with the retailers hardship policy”.⁸⁸ SACOSS agreed with the Commission's position in the draft determination that in order to identify hardship customers, “retailers need to ensure the initial step in the retailer-identification process is sufficiently broad”.⁸⁹

82 Red Energy and Lumo Energy, consultation paper submission, p. 4.

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

84 PIAC, consultation paper submission, p. 11.

85 SACOSS, consultation paper submission, p. 4.

86 Origin Energy, draft determination submission, p. 2.

87 *ibid.*

88 SACOSS, draft determination submission, p. 7.

89 *ibid.*

3.4.4

Findings

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 does not support the AER defining 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 hardship. The Commission would not expect a retailer to have such a statement in its policy. Rather, the Commission finds 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, the Commission finds that if the retailer defines hardship customers in a way that meets the minimum requirements through appropriate processes, and that meets the purpose under section 43(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.⁹⁰

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*.⁹¹ The proposed rule sought to move the hardship indicators out of the *Performance Reporting Procedures and Guidelines* and include them in the Hardship Guidelines.

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 - submissions to the consultation paper

Both Momentum and PIAC stated that they believed that the hardship indicators should be included in the Hardship Guidelines. Momentum stated that if the guidelines are to be binding, having the reporting requirements within the guidelines would ensure a cohesive

⁹⁰ In accordance with section 45(2) of the NERL.

⁹¹ Section 282 of the NERL.

alignment.⁹² PIAC said that by including the indicators within the guidelines would provide scope for the indicators to be adapted more efficiently, and enforced more effectively without the need for further rule change.⁹³ However, it further added that it would support retaining the current arrangements if it was deemed practical to monitor retailer performance.⁹⁴ CALC supported either approach where the AEMC is confident that consistency can be achieved.⁹⁵

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.⁹⁶ All believe that there is little value in moving the indicators into the Hardship Guidelines.

SACOSS added that it was important to have the hardship indicators within the AER's *Performance Reporting Procedures and Guidelines* to ensure all information in relation to disconnection and customers experiencing payment difficulties was kept together. This would ensure a complete picture around data on hardship customers and vulnerable customers generally.⁹⁷

3.5.3

Stakeholder views - submissions to the draft determination

Three submissions supported the draft decision to retain the hardship indicators in the *Performance Reporting Procedures and Guidelines*.⁹⁸ Red Energy and Lumo Energy noted that separating the hardship indicators from the *Performance Reporting Procedures and Guidelines* would "add complexity for no apparent benefit".⁹⁹ No submissions to the draft determination expressed concern with the Commission's draft decision on the location of the hardship indicators.

3.5.4

Findings

The Commission finds that there would be no value in moving the hardship indicators to be located within the Hardship Guidelines. Moving the hardship indicators out of the *Performance Reporting 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 final rule requires that the hardship indicators remain in the *AER Performance Reporting Procedures Guidelines*.

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

93 PIAC, consultation paper submission, p. 6.

94 *ibid.*

95 CALC, consultation paper submission, p. 3.

96 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.

97 SACOSS, consultation paper submission, p. 7.

98 Draft determination submissions; EWOSA, p. 1; Red Energy and Lumo Energy, p. 4; SACOSS, p. 2.

99 Red Energy and Lumo Energy, draft determination submission, p. 4.

3.6 Costs and benefits of the rule change

The Commission believes that there are likely to be significant benefits from the rule change. 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 1.4.

3.6.2 Stakeholder views - submissions to the consultation paper

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".¹⁰⁰ SACOSS said it "broadly agrees with the AER regarding the benefits of developing a binding Hardship Guideline".¹⁰¹ ECA said "creating a binding guideline could furnish additional incentives for retailers to improve their performance".¹⁰²

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.¹⁰³ 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.¹⁰⁴ QCOSS is further concerned that the change could just standardise current practice which is not providing good customer outcomes.¹⁰⁵

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

101 SACOSS, consultation paper submission, p. 12.

102 ECA, consultation paper submission, p. 5.

103 AEC, consultation paper submission, p. 4.

104 Powershop, consultation paper submission, p. 5.

105 QCOSS, consultation paper submission, p. 12.

Costs

Most submissions on this matter noted that there was potential for this rule change to increase costs. Ergon Energy Queensland stated that while it was expecting minimal impact given its complying policy, 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.¹⁰⁶

Both Origin Energy and AGL noted that it was difficult to assess the costs or benefits of the rule change until such time as the detail of the Hardship Guidelines were developed.¹⁰⁷ Momentum Energy and EnergyAustralia expressed concerns that any additional costs that may be imposed on retailers would be borne by customers.¹⁰⁸ EnergyAustralia further added that 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.¹⁰⁹

The AEC requested that “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”.¹¹⁰

Reduction of bad debts

There were different views on the impact on a retailer’s bad debt resulting from improving hardship policies. CALC, ECA and Ergon Energy Queensland argued that by increasing the early identification of hardship customers as well as improving assistance, the rule change would reduce bad debt as it will result in less households experiencing unsustainable energy debt.¹¹¹

However, Origin Energy and Powershop did not agree with this position. Origin Energy argued that at best it would see a neutral impact on bad debt, and Powershop argued that there may be an increase in bad debt.¹¹²

3.6.3

Stakeholder views - submissions to the draft determination

Benefits

Most submissions agreed that there would be a number of benefits from the rule change, including:

- assisting customers to understand their rights when they face payment difficulty due to hardship, and therefore increasing their confidence¹¹³

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

¹⁰⁷ Consultation paper submissions; AGL, p. 5; Origin Energy, p. 6.

¹⁰⁸ Consultation paper submissions: Momentum Energy, pp. 2-3; EnergyAustralia, p.6.

¹⁰⁹ EnergyAustralia, consultation paper submission, p.5.

¹¹⁰ AEC, consultation paper submission, p. 4.

¹¹¹ Consultation paper submissions: CALC, p. 4; ECA, p. 8; Ergon Energy Queensland, p. 5.

¹¹² Consultation paper submissions; Origin Energy, p. 6; Powershop, p. 5.

¹¹³ Draft determination submissions: COTA, p. 1; Ergon Energy Queensland, p. 1; SACOSS, pp. 1-2; Red Energy and Lumo Energy p. 1; ECA, p. 1; SA Government (Department for Energy and Mining), p. 1.

- creating consistency across retailers in delivering information to consumers¹¹⁴
- improving transparency¹¹⁵
- improving the AER's ability to monitor compliance and enforce breaches¹¹⁶
- fewer complaints to Ombudsman¹¹⁷.

Uniting Communities concluded that it agreed "that the draft rule determination is in the long term (and also the shorter term) interest of consumers".¹¹⁸

Costs

There was limited discussion in submissions to the draft determination on the costs of the rule change. However, Red Energy and Lumo Energy expressed concern that having consistency across retailer hardship policies "may simply shift the AER's monitoring and enforcement costs to retailers, who have to make significant changes to systems and processes to comply with a prescribed approach".¹¹⁹

However, both EWON and the South Australian Government agreed with the Commission's draft decision that considerable additional compliance costs would not be anticipated from the rule change.¹²⁰ As stated by EWON any costs associated with the rule change "will only be incurred if retailers need to take additional actions or system changes to meet their current obligations".¹²¹ In EWON's view the rule change will provide "a level of assurance that retailers cannot operate in a manner which avoids the cost of providing adequate affordability support to their customers".¹²²

3.6.4

Findings

The Commission agrees with the AER and stakeholders that the benefits resulting from the rule change 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.

114 Draft determination submissions: AGL, p. 1; Ergon Energy Queensland, p. 1; SACOSS, pp. 1-2; Origin Energy, p. 1; Powershop, p. 1; ECA, p. 1; Pooled Energy, p.1; PIAC, p. 1; EWOQ, p. 2; SA Government (Department for Energy and Mining), p. 1.

115 AGL, draft determination submission, p. 1.

116 Draft determination submissions: Origin Energy, p. 1; ECA, p. 1; EWOQ, p. 2; SA Government (Department for Energy and Mining), p. 1.

117 EWOSA, draft determination submission, p 1.

118 Uniting Communities, draft determination submission, p. 4.

119 Red Energy and Lumo Energy, draft determination submission, p. 2.

120 SA Government, Energy and Technical Regulation Division, draft determination submission, p. 2.

121 EWON, draft determination submission, p. 3.

122 *ibid.*

No data was provided by retailers on costs that would arise from the changes to hardship policies through the Hardship Guidelines. As noted throughout this determination, the Commission's view is that the final rule does not provide the AER with any additional powers. Rather, the rule creates a more efficient and consistent approach for the AER to exercise its powers. Therefore, the Commission finds that any costs associated with the outcomes of the Hardship Guidelines are costs that relate to retailers giving effect to their requirements under the NERL. 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".¹²³ 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".¹²⁴

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.

The Commission finds 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 are just a mechanism that will assist retailers in meeting the standards set by the NERL.

3.7 Transitional arrangements

The Commission has developed transitional arrangements to require that retailers amend their current policies to comply with the Hardship Guidelines.

3.7.1 The AER's view

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

3.7.2 Stakeholder views - submissions to the consultation paper

There was limited feedback on the concept of transitional arrangements from stakeholder submissions. Views ranged from ensuring retailers submit their updated policies without delay (CALC and PIAC) to needing at least 12 months to allow for system and process

¹²³ ACCC, 2018, *Restoring electricity affordability and Australia's competitive advantage - Retail Electricity Pricing Inquiry - Final Report*, June 2018, ACCC, Canberra, p. 312.

¹²⁴ *ibid.*

updates to be completed (Ergon Energy Queensland).¹²⁵ Powershop requested a six month transition and QCOSS, Momentum Energy and ActewAGL advocated for a reasonable timeframe for implementation, with further consultation required prior to the AER making transitional arrangements.¹²⁶

3.7.3 Stakeholder views - submissions to the draft determination

Most submissions to the draft determination on the transitional arrangements supported the Commission's draft decision on the proposed timings. EWON, PIAC, SACOSS, EWOQ and EWOSA supported the proposed timeframes. However, EWOSA also noted that for the AER to publish its guidelines by April 2019, it needs to "ensure enough opportunity for robust consultation to take place during the development of the Hardship Guidelines".¹²⁷

Origin Energy expressed concern over the timings outlined in the Commission's draft decision. In their view such a timeframe will not deliver the desired improvements as they are too short to be meaningful.¹²⁸ Origin Energy further noted that the ESC provided a longer window for the PDF than that in the draft rule, and retailers have struggled to meet the ESC's timeframe.¹²⁹ Origin Energy urged the Commission to consult with the AER on a more realistic timeframe.¹³⁰

Powershop also requested that the Commission review the proposed timeframes. It believes that that retailers should be given three months from the date the AER publishes the Hardship Guidelines to update their policies, because in their view, the "challenges faced by new and incumbent participants are quite often the same and should not be differentiated".¹³¹ It also argued that implementation should be three months as retailer system changes can take in excess of this, and that the AER should be given three months to approve updated policies.¹³²

3.7.4 Findings

The Commission's findings 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 finds that transitional arrangements are required. This will enable policies to be updated and submitted in a timely and efficient way. The final rule provides transitional arrangements that require any retailer

¹²⁵ Consultation paper submissions: CALC, p. 4; PIAC, p. 8; Ergon Energy Queensland, p. 5.

¹²⁶ Consultation paper submissions: Powershop, p. 4; Momentum Energy, p. 2; QCOSS, p. 11; ActewAGL, p. 4.

¹²⁷ Draft determination submissions; EWON, p. 3; PIAC; p. 1; SACOSS, p. 3; EWOQ, p. 2; EWOSA, p. 2.

¹²⁸ Origin Energy, draft determination submission, p. 3.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ Powershop, draft determination submission, p. 1.

¹³² *ibid.*

with an approved hardship policy to submit a new policy to the AER that contains the matters specified in the Hardship Guidelines and also includes clear and specific statements of the actions the retailer will take to meeting the minimum requirements under the NERL.

Timing of transitional arrangements

Given the importance of improving protections for customers facing hardship, the final rule requires that the AER have its Hardship Guidelines in place by April 2019. The Commission has consulted with the AER on this timeframe, and the AER agrees that this is sufficient time to develop hardship guidelines, while ensuring robust stakeholder engagement.

A majority of retailer submissions 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. In the Commission's view this means that current retailers do not face the same challenges in updating their policy, as a new retailer might when developing a new policy.

Further, as retailers will be involved in the development of the Hardship Guidelines during the retail 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 2 June 2019. The Hardship Guidelines may contain further information relating to processes and timeframes for approval of hardship policies. Once updated, the AER must approve a hardship policy no later than 2 August 2019.

As noted above, as there should be minimal changes to internal processes for already complying retailers, the Commission finds that two months will be sufficient for a current retailer to implement its updated policy once approved by the AER. Therefore, current retailers must have their approved policies implemented no later than 2 October 2019.

Amendments to final rule

As part of its preparation of the final rule, the Commission concluded that the wording in the transitional arrangements could be strengthened. Therefore, the final rule has been redrafted to clarify that the transitional arrangements do not grandfather a retailer's approved updated hardship policy. This will ensure that all retailers comply with rule 75B(2) after the AER subsequently amends the Hardship Guidelines after the first such guidelines is published on 1 April 2019.

3.8 Enforceability and 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 - submissions to the consultation paper

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.¹³³ 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".¹³⁴ PIAC supports the enforceability of the Hardship Guidelines "to 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".¹³⁵

Red Energy and Lumo Energy, Aurora Energy, Momentum Energy and the AEC all took the view that civil penalties were not required for the rule change as the NERL and the NERR already contain civil penalties for breaches of hardship policies.¹³⁶ Origin Energy went on to state that it does not believe "that a civil penalty is proportionate for breaches of this provision".¹³⁷ Powershop added that in its view civil penalty provisions do not necessarily drive better outcomes for customers, but rather, they have the potential to limit innovation and personalised customer assistance.¹³⁸

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.¹³⁹ ActewAGL said that "[t]he only aspect of the rule that should be made a civil penalty provision is the requirement for a retailer to have a policy, approved by the AER, within 3 months of a retailer authorisation being granted".¹⁴⁰

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

134 EWON, consultation paper submission, p.5.

135 PIAC, consultation paper submission, p. 8.

136 Consultation paper submissions: Red Energy and Lumo Energy, p. 8, Aurora Energy, p. 2; Momentum Energy, p. 2; AEC, p. 3.

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

138 Powershop, consultation paper submission, p. 4.

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

140 ActewAGL, consultation paper submission, p. 4.

3.8.3 Stakeholder views - submissions to the draft determination

EWOSA, SACOSS, EWOQ and COTA supported the Commission's draft decision to jointly recommend with the AER that certain aspects of the draft rule be civil penalty provisions.¹⁴¹ However, Origin Energy, and Red Energy and Lumo Energy continued to express concern over the draft decision.¹⁴²

Origin Energy is concerned by the application of civil penalties for breaches of the new rule given the short timeframes to develop and implement the update policies.¹⁴³ Red Energy and Lumo Energy argued that the AER should utilise its powers under section 43(3) of the NERL to require a retailer to review and submit its hardship policy in accordance with the Hardship Guidelines. In their view, this would then be subject to existing civil penalty provisions, and remove the requirement for the AER and Commission to jointly recommend that the new rule be a civil penalty provision.

EWON expressed concern over the Commission's draft decision to limit the recommendation on civil penalties to only apply when a retailer submits its policy to the AER. In their view this seems to counter the accumulated evidence that the current regime is not effective.¹⁴⁴ EWON requested that the Commission reconsider this aspect of its draft determination.¹⁴⁵

3.8.4 Findings

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).

The Commission finds that, 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 for the entire rule be a civil penalty provision.

The Commission notes that a benefit of the proposed rule change, as outlined in section 3.6.4, is improved monitoring of retail policies which will improve the ability of the AER to enforce any breaches of section 43(2)(c) of the NERL. This will ensure that the current

141 Draft determination submissions: EWOSA, p. 2; SACOSS, p. 2; EWOQ, p. 2; COTA, p. 2.

142 Draft determination submissions: Origin Energy, p. 3; Red Energy and Lumo Energy, p. 4.

143 Origin Energy, draft determination submission, p. 3.

144 EWON, draft determination submission, p. 3.

145 *ibid.*

penalty regime under the NERL can be adequately utilised, without the need for this rule change to be a civil penalty in its entirety.

Civil penalty for existing retailers

The final 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.

Therefore, the Commission finds 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 and 50 of the NERL should a retailer fail to maintain and implement a policy.

Civil penalty for new retailers

The final rule also contains a requirement that a new retailer must submit a policy complying with the Hardship Guidelines, the standardised statements, and containing clear statements of how the retailer will meet the minimum requirements within three months of receiving retailer authorisation.¹⁴⁶ The final rule requires new retailers to implement and publish their customer hardship policy as soon as possible after approval. The Commission finds that this should be a civil penalty provision¹⁴⁷ 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 in several submissions to the consultation paper and draft determination relating to the ESC's new PDF in Victoria.¹⁴⁸

3.9.1 The AER's view

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

3.9.2 Stakeholder views - submissions to the consultation paper

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]".¹⁴⁹ PIAC said it

¹⁴⁶ New rule 75B(i)

¹⁴⁷ New rule 75B(2).

¹⁴⁸ ESC, 2017, *Payment difficulty framework - Final decision*, 10 October 2017, ESC, Victoria.

¹⁴⁹ Powershop, consultation paper submission, p. 2.

“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”.¹⁵⁰

With regards to the 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 noted “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”.¹⁵¹

The AEC and EnergyAustralia used the PDF as an example of the potential costs that could be associated with significant changes to hardship policies.¹⁵²

3.9.3 Stakeholder views - submissions to the draft determination

Both CALC and PIAC again recommended that the Commission make specific reference to the PDF and the benefits it will achieve.¹⁵³ CALC noted that, in its view, the PDF “recognises all residential electricity and gas customers are at risk of payment difficulty and should have an entitlement to timely assistance to overcome payment difficulty that is tailored to their circumstances”.¹⁵⁴ Powershop also recommended that the AER consider the PDF when developing the Hardship Guidelines.¹⁵⁵

3.9.4 Findings

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 Conclusions

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

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

151 Powershop, consultation paper submission, p. 5.

152 Consultation paper submissions; AEC, p. 5; EnergyAustralia, p. 5.

153 Draft determination submissions: CALC, p. 1; PIAC pp. 2-3.

154 CALC, draft determination submission, p. 1.

155 Powershop, draft determination submission, p. 1.

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 final 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 final rules for retailers who already have in place an approved hardship policy.

The Commission considers the final 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.

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 final 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 section 49 of the NERL the Commission is able to make rules with respect to the submission, approval and implementation of customer hardship policies. The final 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 a undefined period of time after gaining authorisation. To address the current gap in the NERL the

Commission proposed 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.

3.11.1 Stakeholder views

CALC, SACOSS, EWOQ and Simply Energy expressed strong support for the Commission's proposal to recommend a change to the NERL to address this gap.¹⁵⁶ As noted by CALC, it is unacceptable that a household experiencing payment difficulty could find themselves in circumstances where their newly authorised retailer does not have measures in place to provide the assistance prescribed in law and rules.¹⁵⁷ Simply Energy stated that "[h]ouseholds need energy for heating, cooking, lighting and everyday living...Simply Energy considers that having an approved hardship policy is an imperative consumer safeguard that all authorised retailers should have in place".¹⁵⁸

3.11.2 Findings

To ensure that appropriate consumer protections are in place for customers of a new retailer once that retailer commences operation, the Commission will recommend to COAG Energy Council that section 43(2) of the NERL be amended such that a retailer must have an approved policy in place before it can receive retailer authorisation.

156 Draft determination submissions: CALC, p. 2; SACOSS, p. 3; EWOQ; p. 3; Simply Energy p. 2.

157 CALC, draft determination submission, p. 3.

158 Simply Energy, draft determination submission, p. 2.

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
EWOSA	Energy and Water Ombudsman South Australia
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

A.1 Summary of other issues raised in submissions to the consultation paper

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.

Table A.1: Summary of other issues raised in submissions to the consultation paper

STAKEHOLDER	ISSUE	AEMC RESPONSE
AEC, AGL, and Red Energy and Lumo Energy ¹⁵⁹	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 ¹⁶⁰	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 ¹⁶¹	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.

¹⁵⁹ Consultation paper submissions: AEC, p. 3; AGL p. 2; Red Energy and Lumo Energy; p. 5.

¹⁶⁰ COTA, consultation paper submission, p. 1.

¹⁶¹ Ergon Energy Queensland, consultation paper submission, p. 1.

STAKEHOLDER	ISSUE	AEMC RESPONSE
EWON, COTA ¹⁶²	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.
EnergyAustralia ¹⁶³	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 ¹⁶⁴	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 ¹⁶⁵	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 ¹⁶⁶	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 ¹⁶⁷	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

¹⁶² Consultation paper submissions: EWON, p. 1; COTA p. 2.

¹⁶³ EnergyAustralia, consultation paper submission, p. 1.

¹⁶⁴ Momentum Energy, consultation paper submission, p. 2.

¹⁶⁵ Consultation paper submissions: QCOSS, p. 8; CALC p. 2.

¹⁶⁶ Momentum Energy, consultation paper submission, p. 1.

¹⁶⁷ AGL, consultation paper submission, p. 3.

STAKEHOLDER	ISSUE	AEMC RESPONSE
		every three to four years.
QCOSS ¹⁶⁸	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 ¹⁶⁹	Should reframe hardship policies around building stronger relationships between customer and service provider.	This is a matter for the AER to consider when developing its Hardship Guidelines in accordance with the draft rule.
PIAC and SACOSS ¹⁷⁰	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.	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. 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.
QCOSS ¹⁷¹	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 ¹⁷²	Supports a shared responsibility approach to energy hardship, where energy suppliers, government and the	The Commission agrees that there is a role for government and the community sector in relation to supporting customers facing hardship.

¹⁶⁸ QCOSS, consultation paper submission, p. 4.

¹⁶⁹ QCOSS, consultation paper submission, p. 9.

¹⁷⁰ Consultation paper submissions: PIAC, p. 2; SACOSS p. 10.

¹⁷¹ QCOSS, consultation paper submission, p. 11.

¹⁷² AGL, consultation paper submission, p. 6.

STAKEHOLDER	ISSUE	AEMC RESPONSE
	community sector work together to deliver sustainable improvements for vulnerable customers.	However, the NERL places a requirement on retailers to implement hardship programs which form part of this shared model.
ECC ¹⁷³	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 ¹⁷⁴	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.

¹⁷³ ECC, consultation paper submission, p. 4.

¹⁷⁴ Aurora Energy, consultation paper submission, p. 1.

A.2 Summary of other issues raised in submissions to the draft determination

This appendix sets out the issues raised in the consultation on the draft determination of this rule change request and the AEMC's response to each issue.

Table A.2: Summary of other issues raised in submissions to the draft determination

STAKEHOLDER	ISSUE	AEMC RESPONSE
CALC ¹⁷⁵	Recommends that the AEMC acknowledge the limitations of the NERL and make a recommendation to the COAG Energy Council that it reform the parts of the NERL addressing hardship and payment difficulty.	The Commission would only make recommendation to the COAG Energy Council following its own review of the adequacy of the NERL. Following the Commission's 2018 Retail Energy Competition Review, it proposed to review 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.
PIAC ¹⁷⁶	The current framework is no longer fit for purpose and recommends that the AEMC make a recommendation to the COAG Energy Council that it reform the elements of the NERL relating to hardship and payment difficulty.	This work is to complement the work by the AER to improve hardship policies and improve the implementation of the NERL.
QCOSS ¹⁷⁷	Remains concerned that the issues around hardship stem from problems with the minimum requirements in section 44 of the NERL.	The Commission encourages stakeholders to discuss their concerns with the NERL directly with COAG Energy Council.
COTA ¹⁷⁸	Considers that new retailers should also be required to implement their compliant hardship policy within a specified period, potentially within two months, after their policy has been approved by the AER.	The Commission has drafted this in line with the current requirements of a new retailer under s43(b) of the NERL.

¹⁷⁵ CALC, draft determination submission, p. 1.

¹⁷⁶ PIAC, draft determination submission, pp. 1 and 3.

¹⁷⁷ QCOSS, draft determination submission, p. 1.

¹⁷⁸ COTA, draft determination submission, p. 2.

STAKEHOLDER	ISSUE	AEMC RESPONSE
COTA ¹⁷⁹	Suggest that words such as “hardship” may lead to a social stigma and be a contributing factor to the reported low participation rate.	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.
EWON ¹⁸⁰	Would like to see the use of the term ‘affordability’ rather than the stigmatised term ‘hardship’.	
EWON ¹⁸¹	Would also like to see removal of barriers to access to hardship programs, such as those imposed by some retailers who require lump sum payments or a number of regular payments, before a hardship team referral is made.	Improved identification processes and hardship policies in general should address issues of the barriers to entry into hardship programs.
EWON ¹⁸²	Wants eligibility of disconnected customers to the protections given to customers experiencing financial hardship.	This is outside the scope of this rule change. However, improved protections for customers facing payment difficulties due to hardship should result in improved protections for customers before they are disconnected.
Simply Energy ¹⁸³	<p>Considers that the AER’s power to specify standardised statements should be confined to when:</p> <ul style="list-style-type: none"> • there is identifiable deficiency in the performance of retailers • the standardised statements go no further than to address the identified deficiency 	The Commission is of the view that there are considerable deficiencies in the implementation of hardship policies to warrant the rule change. The Commission also considers that the benefits of the change outweighs the costs, as cost impacts for complying developers should be minimal and the scope of the rule has been limited.

179 *ibid.* p. 3.

180 EWON, draft determination submission, p. 1.

181 *ibid.*

182 *ibid.*

183 Simply Energy, draft determination submission, pp. 1-2.

STAKEHOLDER	ISSUE	AEMC RESPONSE
	<ul style="list-style-type: none"> the AER is able to demonstrate a net benefit to hardship customers. 	
Simply Energy ¹⁸⁴	Encourages the Commission to clearly define the scope of the AER's powers to specify standardised statements under its proposed hardship policy guidelines.	The Commission has limited the scope of the AER's powers to those it already has under the NERL.
SACOSS ¹⁸⁵	Suggests the AEMC consider amending the Draft Rule 75A(2)(b)(ii) to include Part 2 Division 7.	While the Commission agrees that there are elements of Part 2 Division 7 that are relevant to hardship customers, there are more general elements to that division that would be outside the scope of the rule change. In the Commission's view, the requirements outlined in division 7 can be adequately dealt with through the standardised statements that reflect the minimum requirements under s44 of the NERL.

¹⁸⁴ Simply Energy, draft determination submission, pp. 1-2.

¹⁸⁵ SACOSS, draft determination submission, pp. 3-4.

B LEGAL REQUIREMENTS UNDER THE NERL

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

B.1 Final rule determination

In accordance with section 259 of the NERL the Commission has made this final rule determination in relation to the rule proposed by the AER

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

A copy of the more preferable final rule is attached to and published with this final rule determination. Its key features are described in chapter 2.

B.2 Power to make the rule

The Commission is satisfied that the more preferable final rule falls within the subject matter about which the Commission may make rules. The more preferable final rule falls within section 237 of the NERL as it relates to the provision of energy services to customers. Further the more preferable final 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:

- its 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.¹⁸⁶

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.

¹⁸⁶ 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 final 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), 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 submit amended hardship policies in compliance with the new requirements to replace already approved policies to the AER. 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 final rule does not amend any rules that are currently classified as conduct provisions under the NERL or 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 final rule be classified as conduct provisions.