

Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235

Lodged online: www.aemc.gov.au

18 October 2018

Strengthening protections for customers in hardship (Ref RRC0017)

The Australian Energy Council (the Energy Council) welcomes the opportunity to make a submission to the Australian Energy Market Commission's (AEMC) draft determination on *Strengthening Protections for Customers in Hardship*. The AEC is the industry body representing 22 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The Energy Council is supportive of measures that assist customers to more easily understand their rights, and retailers' obligations, in relation to hardship. We understand that giving retailers' flexibility in how they create and apply hardship policies can create a lack of clarity, both for a consumer trying to understand what assistance they might be entitled to, and for the AER seeking to enforce compliance. On top of this, the range of different hardship policies and differences in approaches can increase the administrative burden on the AER and make compliance action difficult.

Nonetheless, the intent of s44 of the National Energy Retail Law is a recognition that hardship is a complex problem that requires retailers to develop a complex response, targeted to the needs of their customers. Given this complexity, the Law expressly accepts that only the retailer themselves can determine the appropriate assistance packages to meet the needs of their customers.

In the pursuit of clarity and enforceability, any AEMC rule change must not hand the flexibility and discretion the Law expressly provides retailers to the AER. It is critical that the final rule achieves the outcome sought. The AER must be able to enforce the Law, and retailers must retain the discretion to define their own response to assisting their customers experiencing hardship due to payment difficulties.

A shift in the AER's role in Hardship

The AEMC stated in its draft determination that "the draft rule is not providing the AER with any additional powers. Rather, the rule creates a more efficient and consistent approach for the AER to exercise its powers."¹ We disagree that this will be the outcome of the draft rule in practice.

We understand the issues the AER has experienced in its administration of hardship policies and that consistency and efficiency improvements are needed. We are supportive of measures that avoid these difficulties. But, the discretion afforded to retailers to define hardship customers, and to determine the support measures available to them, must be maintained to reflect the intent of the Law.

¹ AEMC, Strengthening protections for customers in hardship, Draft rule determination, 6 September 2018, p26-27

The draft rule in its current form allows the AER to determine, without limitation on scope or number, standardised statements relating to the hardship obligations in Division 6 of the Law that retailers are required to include in the policies they submit to the AER for approval.

In preparation for the joint AER/AEMC public forum on this rule change, the AER published draft standard statements that it would consult upon if the draft decision was adopted as final. Industry welcomed this level of transparency from all parties involved. The draft statements indicate that the guideline will (amongst other things) list certain customer characteristics, such as the eligibility for concessions, which would require the retailer to immediately refer that customer to be assessed for entry into their hardship program. This essentially gives the AER the power to pre-define hardship through its guideline as any customer displaying any of the indicators listed by the AER, is required to be immediately referred to the hardship program for assessment. If the customer characteristics suggests they are not in hardship at that point, but falls into hardship at a later stage, it could be anticipated that the AER would find that the retailer breached their own hardship policy in failing to appropriately conduct an assessment.

Lack of limitations

The draft rule in its current form is problematic due to the drafting of s75A(2)(b)(i). While we are comfortable with the inclusion of standard statements in certain circumstances, we believe they should be limited to obligations that are administrative, or where the Law does not intend to give retailers great flexibility in determining processes that meet the needs of their business and customer base.

The practical implication of s75A(2)(b) overall is that the AER is given the power to determine the manner in which the retailer develops processes in their hardship policy. This is problematic. The intent of the Law was clearly to give retailers ownership over their hardship policies and procedures, and for the AER to ensure these policies met the intent of the Division.

Standardised statements in the guideline will become the only manner in which a retailer can develop, for example, processes to identify residential customers experiencing payment difficulties due to hardship. By virtue of the AER mandating a standardised statement with regard to s44(a), retailers will have no ability to define what is a hardship customer, as the standardised statement will in effect define it for them.

We do not believe this outcome represents the intent of the AEMC in making the draft rule.

We understand the draft standardised statements were provided to stakeholders to merely represent the AER's early thinking on how they might develop any guideline the final rule required. But, they do highlight that the draft rule allows the AER to utilise their broader powers to compel retailers to deliver hardship assistance in a particular manner. This might not necessarily be above the standard set out by the Law, but requiring retailers to act in a particular manner, when in the Law they have options, is at the very least different from the Law.

This expansion of powers must be tightened. Where the obligations in the law are administrative or straightforward, we are comfortable for the rule to require the AER to develop standard statements retailers must include in their hardship policies. Where the Law expressly places the obligation on the retailers use their discretion to determine the level of assistance they will offer, the AER should only be allowed to offer guidance or examples as to what it considers may illustrate compliance.

Actionable statements to comply with s44

While we note this is not a new issue, we reiterate our earlier position that retailers should be required to develop statements in their hardship policies that are sufficiently clear and actionable so that the AER is able to determine compliance with the requirements of that policy (and by extension, the Law). Vague or general statements setting out the assistance retailers provide may not ultimately deliver good customer outcomes. We accept that the advice of the AER that to date, retailer policies have not been actionable enough to allow enforcement action to be taken.

Standardised statements are not the only means by which to achieve the outcome sought by the AER. It is one method, but one that appears to go against the intent of the Law if used in a particular manner. Requiring

retailers to make clear, and actionable, statements in their hardship policies as to the manner in which they will comply with the requirements in s44 will allow the AER to enforce policies in the same manner as the draft rule might. This represents an appropriate response to the problem identified.

Retailers will use their discretion to submit policies to the AER that they consider meets the intent of Division 6, and the Guideline should detail the minimum standards required for the AER to approve the policy. If the policy was not adequately actionable, the AER should have the ability to reject it by providing advice as to why the minimum standards were not met, and the retailer should have an obligation to resubmit it in a timely manner.

We look forward to continuing to engage with the AEMC on this issue, and working with the AER in future to further improve hardship policies and compliance, to the benefit of consumers.

For any questions about our submission please contact Ben Barnes by email at Ben.Barnes@energycouncil.com.au or on (03) 9205 3115.

Yours sincerely,



Ben Barnes
Director, Retail Policy
Australian Energy Council