

Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235

Lodged online: www.aemc.gov.au

28 June 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) Consultation Paper on *Strengthening protections for customers in hardship*.

The Energy Council is in favour of measures that ensure the regulatory framework and industry practice in the energy sector support consumers experiencing payment difficulties. The effective development and implementation of hardship programs is key to achieving this objective. The AER's findings from its 2017 review into hardship policies point to a number of issues relating to the implementation of hardship policies across retail energy markets. These issues are flagged in the AER's rule change request, and some have been flagged previously in the *2016-2017 Annual Report on Compliance and Performance of the Retail Energy Market*.

The Energy Council welcomes the AEMC's commitment to reviewing the assistance retailers provide to customers in payment difficulty by January 2019. We look forward to engaging with the AEMC on this review. A review conducted by the AEMC, drawing on information from (and consultation with) concerned stakeholders, offers the best way forward in:

- defining problems arising in the current framework for hardship;
- identifying the causes of any problems, including whether and to what extent problems reflect deficiencies with the regulatory framework, issues of compliance with existing regulations, or underlying affordability issues; and
- testing potential solutions to identified problems, including through appropriate analysis of the costs and benefits of alternative solutions (from the perspective of customers experiencing hardship, and customers in the energy market generally).

Similarly, retailers welcome the opportunity to work with the AER to address issues identified in the hardship review, and improve hardship policies viewed by the AER as deficient. We note that the AER has not made public the results of the hardship review, although the rule change proposal points to several issues identified by the AER in its hardship review.

Our comments and concerns regarding the proposed rule change are set out below.

What is the role of hardship policies in the NECF?

Recognising the status of energy as an essential service, the regulatory framework has required energy retailers to provide support to customers in payment difficulty in one form or another for many years. For example, payment plans were a feature of the Victorian regulatory environment prior to the competitive market commencing in 2002.

Formal hardship programs started to be provided in Victoria on a voluntary basis by the tier one retailers (AGL, Origin Energy and EnergyAustralia) in 2003-2004. In 2006, Victoria legislated for all retailers to provide hardship programs. Similar to the Victorian approach, the National Energy Customer Framework (NECF) also provides for hardship programs.

Hardship policies are at the core of the regulation of hardship programs in the NECF (refer Division 6 of the National Energy Retail Law (NERL)). Hardship policies are developed by retailers for the purpose of identifying residential customers experiencing payment difficulties due to hardship and assisting those customers to better manage their energy bills on an ongoing basis. A retailer's hardship policy is enforceable against the retailer – as demonstrated by the AER's recent successful enforcement action. The law sets out

certain minimum requirements for a customer hardship policy (section 44), with additional minimum requirements set out in the National Energy Retail Rules (NERR).

The hardship policy framework allows retailers a degree of flexibility in how they identify and assist hardship customers. While issues of inconsistency across retailers' hardship policies are noted and should be addressed, it is also worth noting that the current framework has allowed some retailers to develop and implement best practice hardship policies which consistently resolve issues of payment difficulties for vulnerable customers. The current approach to hardship regulation allows retailers to tailor their hardship programs to meet the different customer needs and environments. These may differ across retailer customer segments, including geographical and socio economic differences that arise in particular regions.

AER approval of hardship policies and variations

The AER exercises a discretionary power to approve hardship policies. Under the NERL, the AER must approve a hardship policy if the AER is satisfied that the policy meets the minimum requirements, provided that it will or is likely to contribute to the achievement of the legislated purpose (ie, identifying hardship customers and assisting those customers better manage their energy bills on an ongoing basis).

Importantly, the AER also has a discretionary power to direct a retailer to review its customer hardship policy and make variations in accordance with any requirements set out by the AER. These powers are broadly cast under the NERL, and can be exercised if, as a result of the exercise of the AER's functions and powers under the NERL section 204, the AER forms the view that a retailer's customer hardship policy requires review. The functions and powers of the AER under section 204 are themselves broad, and include a power to 'do all things necessary or convenient to be done for or in connection with the performance and exercise of its functions and powers'. There is no requirement under the law for the AER to conduct an investigation or find a compliance breach prior to seeking a variation of a hardship policy: it is enough that the AER forms a view that the policy requires review.

We understand that the AER is concerned that requiring variations to hardship policies is lengthy and requires considerable back-and-forth with retailers. Similarly, the process of approving new hardship policies can be time consuming and resource intensive.

We acknowledge the time and resources required by the AER to require variations to hardship guidelines. However, in practice it is likely to be just as involved approving hardship policies which incorporate the proposed minimum standards in a guideline by reference. We query whether there would be any difference in time or resources approving a hardship policy in the context where Guidelines are issued, or under an approach where the AER uses its existing powers.

Proposed approach

The AER has identified several issues with current hardship policies which form the basis of the rule change proposal. These include:

- difficulties in enforcing compliance where hardship policies are expressed as high level statements;
- customers lack clarity as to their right and entitlements when experiencing payment difficulties; and
- inconsistency across retailer's hardship policies resulting in different customer outcomes depending on who the customer's retailer is.

To address these issues, the AER proposes that the Guidelines would incorporate a uniform set of minimum standard statements (incorporated by reference into the hardship policies) that can be clearly understood by customers and binds retailers.

A question arises as to whether addressing these issues is a regulatory and compliance matter, which should logically be addressed by the AER through a Guideline, or a policy issue of the kind which more correctly falls within the ambit of the AEMC's role. The question is a difficult one, as the answer will depend on the final content of the Guidelines, which is unknowable at this point in time. Retailers' recent experience in working through the payment difficulties framework with the Victorian Essential Services Commission (ESC) demonstrates that a review can start with a compliance focus, but the solutions take the regulator down a path involving broad policy issues. This is particularly so in the context of regulating appropriate assistance to customers experiencing payment difficulties, as the programs are inherently a cross-subsidy between different customer classes. When some customers pay less than the real cost of energy supplied to

their homes, that cost of supply is ultimately borne by other customers. This raises economic and policy issues which are best suited to consideration by the AEMC in the context of its advisory and rule-making roles.

The AER has indicated the potential framing of the Guidelines at a recent forum conducted by the AEMC as part of the rule change process. The AER's stated preferred approach is to issue high level statements leaving retailers with discretion as to how they are operationalised. However, in our view there is a real risk that the development of the Guidelines will require the AER to make key policy decisions as to who receives hardship assistance and what kind of assistance is provided.

By way of example only, a potential area to introduce uniformity and provide clarification to customers is around energy efficiency advice for customers experiencing payment difficulties (and this was flagged by the AER as a potential area that the Guidelines would touch on at a recent AEMC workshop). Currently, there may be inconsistency in whether retailers offer energy efficiency advice, and whether it is offered to some or all customers experiencing payment difficulties. Requiring retailers to provide energy efficiency advice to all customers who experience payment difficulties arguably increases the minimum requirement under the NERL. The current provisions provide that hardship policies must contain *processes or programs* to assist customers with strategies to improve their energy efficiency, only where such processes or programs are required by a local instrument (section 204(1)). Whether energy efficiency should be provided by all customers has already been considered at a policy level by Government when passing the NERL. The policy issue is highlighted in the NSW Parliament's second reading speech for the passage of the NERL, which particularly mentioned that it would not be requiring energy efficiency advice as part of hardship under the national framework as to do so would duplicate Government energy efficiency schemes targeting vulnerable customers.¹

Policy issues also arise in considering how to identify hardship customers – whether by minimum debt levels, or repeat failures to pay, or a combination of factors. The debt level at which hardship customers are identified has direct economic consequences for retailers and for all customers, as setting a lower debt level may increase the number of hardship customers (and increase the level of cross-subsidy in the market) while setting a higher level may reduce customers' access to appropriate assistance.

To the extent that the problems identified by the AER require a rule change, that rule change goes to matters of policy which should more properly be considered by the AEMC. We would welcome the AEMC's close consideration of whether this rule change is required at present, or whether the AER could instead issue new guidance for retailers on the content of hardship policies through its existing powers. Addressing the issues identified by the AER through a rule change at this stage, ahead of the AEMC's review of hardship, risks taking hardship regulation in a new direction which is not ultimately the preferred regulatory outcome. It would be worthwhile considering whether the AEMC should conduct its review into hardship before progressing the rule change.

If a rule change is made requiring the AER to issue a guideline, it should be confined to a guideline relating to how the AER will exercise its discretion to approve a hardship policy. Any rule change requiring the AER to issue new Guidelines should also define the scope of those Guidelines to address the risk that the Guidelines become policy settings which impact customers experiencing payment difficulties and other customers in the market, as well as retailers. The rule change could also require a process for review of retailers' hardship policies in accordance with new guidelines issued periodically by the AER.

The Energy Council does not support the Guideline containing provisions subject to civil penalty. Rather, the mechanism to ensure enforceability should remain with the hardship policies: the Guideline would require certain provisions or a certain approach in the Policy, and the Policy would in turn be enforceable and attract civil penalties. This approach can be adopted even where the Guidelines contain statements which are incorporated into the hardship policies by reference.

Establishing corresponding and separately enforceable instruments governing hardship programs is, at best, duplicative, and risks confusing the regulatory regime governing assistance to customers experiencing payment difficulties. If the AER issues guidelines as to the content of hardship policies, it would be for the

¹ <https://www.parliament.nsw.gov.au/bill/files/595/NATIONAL%20ENERGY%20RETAIL%20LAW.pdf>

AER to ensure that retailer's hardship policies are consistent with those guidelines through its powers to approve and require variation to hardship policies. Any concerns regarding the ability of the AER to require variation of a hardship policy could be addressed in the NERR by requiring periodic review of hardship policies, or prescribing time frames by which a retailer must update its hardship policies.

Hardship indicators

The hardship indicators offer insight into customers experiencing payment difficulties in the retail energy market. The indicators form part of an assessment measure and would not properly belong in a guideline relating to the content of hardship policies.

We caution against relying on social and economic indicators as a measure of the success of a retailer's hardship program. Indeed, success measures for hardship programs may differ for different customers. For example, a customer whose energy supply is maintained on a hardship program despite making payments which are less than the cost of supplying energy to the home will not feature among the successful completion rates. It may however reflect successful hardship program for that customer's circumstances.

The existing legislation allows the AER to amend and adjust its indicators for hardship under the NERR. The current indicators being used, such as looking at debt levels and disconnections, provide only a limited picture of the effectiveness of hardship policies. Customers can enter hardship for a variety of different reasons and for varying periods, hardship policies can only be responsive to circumstances affecting a customer but cannot resolve ongoing problems.

Costs and benefits

Improvements in hardship policy development and implementation which address the issues raised by the AER have the potential to generate significant customer benefits.

However, for the reasons outlined above, it is not clear to us that the rule change is required to achieve those benefits. The AER guideline may soon be redundant if further changes to the rules are implemented following the AEMC's hardship review. In any event, by the time the rule change is complete, and the Guideline is made final, it would be impossible for any new policies to be implemented before 1 July 2019. By this time, the AEMC, AER and industry will know a lot more on where the protections framework needs to improve, with the benefit of the additional work on the issue by the AEMC.

At this point it is difficult to quantify the potential costs of any rule change, as the costs will depend on the content of any Guidelines to be issued. Categories of costs which are likely to flow from the Guidelines include:

- *implementation and systems costs.* Changes to hardship policies as a result of the Guidelines are likely to involve systems changes for some, if not all, retailers. The extent of the costs involved will again depend on the final content of the Guidelines. As an example at one extreme (noting that the PDF revisions very substantially changed the equivalent policy settings in Victoria), the calculated upfront cost across all Victorian retailers for implementation of the payment difficulties framework was estimated at between \$29.0 million to \$46.1 million;²
- *costs of additional services to customers on hardship programs.* If the Guidelines require minimum service provisions (for example, provision of energy efficiency advice) to all customers experiencing payment difficulties, the provision of these services will again incur costs. Similarly, if the Guidelines result in a greater number of customers on hardship programs, take up of existing services to customers can be expected to increase commensurately; and
- *cost of additional customer debt and bad debt.* Changes to hardship programs as a result of the Guideline are likely to impact the levels of customer debt and bad debt on retailers' books. Such changes flow from codifying eligibility criteria for hardship programs and payment arrangements for hardship customers. By way of example, during the development of the PDF, the ESC developed alternative definitions of eligible hardship customers which had a material impact on levels of

² ACIL Allen Consulting, *Report to Essential Services Commission – New Framework for Customers Facing Payment Difficulty*, 9 October 2017, p. 48.

customer debt. [REDACTED]

It is clear that changes to the regulatory treatment of hardship can result in significant business costs. These costs may be worthwhile if they are outweighed by corresponding benefit to customers – including customers experiencing payment difficulties and customers across the market. The difficulty at present is that it is not clear what costs will be involved, or whether corresponding benefits will flow. Further, there is a risk that any costs incurred in this process will be redundant if the AEMC's review of hardship assistance points to an alternative regulatory response to these issues.

To reduce these risks, any rule change should seek to precisely define the scope of the new Guidelines and ensure that the cost associated with the changes are considered at each stage of the process.

We understand that the AEMC intends to work closely with the AER through this rule change process, and in the course of conducting its review of hardship assistance. We understand also that the AER has commenced work on the draft Guidelines, in anticipation of this rule change being made. To improve the ability of stakeholders to quantify potential costs of the rule change, and to respond more generally on the appropriateness of its parameters, we would encourage the AER to publish an early draft of its Guidelines in parallel with the AEMC's future consultation on this issue.

For any questions about our submission please contact David Markham by email at David.Markham@energycouncil.com.au or on (03) 9205 3107.

Yours sincerely

Sarah McNamara
GM Corporate Affairs
Australian Energy Council