

1 March 2019

General Manager
Consumer and Markets
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Dear General Manager

NCOSS made a number of recommendations to the Australian Energy Regulator (AER) in a submission to the Hardship Policy Guidelines Discussion Paper in January 2019. We further reiterated these recommendations at the AER consultation forum in Melbourne on 25 February 2019.

This additional submission is provided following our review of the draft Hardship Policy Guidelines (hereafter referred to as 'the draft Guidelines')¹ and the information provided at the consultation forum regarding the AER powers to provide retailers with a consistent evidence-based definition of 'hardship' for the retailer's customer hardship policies. This submission will specifically address:

- The importance of a clear and evidence-based definition of 'hardship';
- The AER's responsibility and power under the *National Energy Retail Law* (NSW) (hereafter referred to as '*the Retail Law*')² to issue guidelines for customer hardship policies;
- Specific feedback to improve the draft Guidelines and standardised statements.

NCOSS would also like to endorse the detailed recommendations made by the Public Interest Advocacy Centre on the draft Guidelines.

Should you require further information please contact Deputy CEO, Anna Bacik at anna@ncoss.org.au or on 02 89607917. We look forward to reviewing the final Hardship Policy Guideline that responds to the priorities identified.

Kind regards,



Joanna Quilty
CEO, NCOSS

¹ Draft AER Customer Hardship Policy Guideline (February 2019), version 1 (hereafter referred to as the 'draft Guidelines').

² *National Energy Retail Law* (NSW) (hereafter referred to as '*the Retail Law*').

1. The Importance of a clear and evidence-based definition of ‘hardship’

As the Hardship Guidelines aim to improve the consistency of, and strengthen, the rights and protections provided to customers across energy retailers, it is essential that the Hardship Guidelines define ‘hardship’.

Leading research resoundingly concludes that a failure to provide any definition of ‘hardship’, or clear and objective ways to identify a customer experiencing it, directly correlates to inconsistency of access to assistance, variation in retailer responses and ineffective support.³

The *Retail Law* currently allows individual retailers to define ‘financial payment difficulties due to hardship’ in their customer hardship policies.⁴ This has resulted in broad inequitable access to hardship supports.⁵

While the retailer’s customer hardship policies are subject to review and approval by the AER, the AER has no consistent definition of hardship. The inclusion of an evidence based definition of hardship to guide retailers will assist the AER in its regulatory role.

The Victorian legislation⁶ captures all people ‘in payment difficulty’ and mandates equitable access to assistance, ensuring that disconnection should only be a measure of last resort. NCOSS recommends that the AER adopt a similar definition to the one operating in Victoria.

2. The AER’s power and responsibility under the National Energy Retail Law (NSW) to issue guidelines for Customer Hardship Policies

NCOSS acknowledges the AER feels legally constrained to define ‘hardship’ within the Guidelines due to an interpretation of the definition of ‘hardship customer’ under the *Retail Law*:

*[R]esidential customer of a retailer who is identified as a customer experiencing financial payment difficulties due to hardship in accordance with the retailer’s customer hardship policy.*⁷

NCOSS understands that it is the AER’s view that reference to the retailer’s customer hardship policy within the above definition precludes the AER from issuing guidelines which define ‘hardship’.

³ Essential Services Commission, Energy Hardship Inquiry Final Report (2016); Payment Difficulty Framework Final Decision (2018); Public Interest Advocacy Centre, Submission to Standardised Statements for use in Customer Hardship Policies Issues Paper (2018).

⁴ *National Energy Retail Law (NSW) s 2 (2)*.

⁵ Australian Energy Regulator, Issues paper: Standardised Statements: customer hardship policies (2018), 13.

⁶ Victorian Essential Services Commission Act 2001 s45; Victorian Electricity Industry Act 2000 s 26; Essential Services Commission, Energy Retail Code (1 January 2019) (version 12), pt 3.

⁷ *Retail Law s2 (2)*.

NCOSS respectfully disagrees with this interpretation of the *Retail Law* and considers that the AER has both the power to define 'hardship' within the Guidelines and responsibility to provide this guidance to the retailers in order for the AER to meet its role and obligations under section 43 of the *Retail Law*.

Section 43 of the *Retail Law* sets out the purpose of the retailer's customer hardship policy, the process that must be followed by retailers in order to have their hardship policy approved by the AER, and the power of the AER to direct the retailer to make variations to the retailer's customer hardship policy.

Specifically, Section 43 (3) states:

If, as a result of the exercise of the AER's functions and powers under section 204, the AER forms the view that a retailer's customer hardship policy requires review--

(a) the AER may direct the retailer to review the policy and make variations in accordance with any requirements set out by the AER.

The *Retail Law* invests power in the AER to direct the retailer to make variations in accordance with 'any requirements set out by the AER'. While the definition of 'hardship customer' refers to the retailer's customer hardship policy, the AER ultimately have the power to review, seek amendments and issue the final approval. It is clear that section 43 (3) alone authorises the AER to set requirements, such as a definition of 'hardship', for retailers to adopt in their customer hardship policy.

Section 204 (2) of the Retail Law outlines the extensive powers of the AER.

The AER has the 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.⁸

The power invested in the AER by section 204 (2) makes it unequivocal that the AER have the power to define 'hardship' in the Hardship Policy Guidelines.

3. Specific feedback to improve the draft Guidelines and standardised statements

- a. NCOSS reiterates a recommendation made in its original submission to the Hardship Policy Guidelines discussion paper in January 2019.

The new Hardship Guideline should advise that customer-facing material should not use the term 'hardship'. Language used in all hardship policy, particularly where self-identification is relied upon, should be neutral and inclusive.

NCOSS is concerned that the draft Guidelines use subjective and potentially judgmental language which poses a significant barrier to people accessing consumer rights. For example, a standardised statement in the draft Guideline states:

⁸ *The Retail Law* s204 (2).

We will let you know if you are accepted onto our hardship program within [x number days].⁹

NCOSS recommends changing the tone of the standardised statements to be inclusive of all customers and remove any references to or implied 'vetting' or 'assessment' processes whereby a customer feels they have to apply and be approved.

- b. The Essential Service Commission Payment Difficulty Framework¹⁰ and the National Energy Retail Rules ('NERR')¹¹ do not include judgmental language, rather they embrace universal entitlements to essential services, as should these Guidelines and standardised statements.
- c. The document should start with a clear and concise declaration of purpose and scope.
- d. Remove 'due to hardship' from the general statement and refer simply to those experiencing difficulties paying their energy bills.
- e. The draft Guidelines clearly identify that the customer hardship policy guideline does in fact represent a minimum standard.
- f. The language in the Guideline be less process based and more outcome oriented:
 - [2.3 (30)] instead of "a retailer's customer hardship policy must" state "a retailer must"
 - [3 (40)] instead of "this section of the Guideline sets out the requirements to be included in a customer hardship policy" state "this section of the Guideline sets out the requirements of retailers' customer hardship policy in order to achieve equitable access..."
 - [4.1 (55)] instead of "detail relevant requirements and processes" state "detail the relevant outcomes sought".
 - In order to undo the implied restriction of retailers to one accessible format, at para [3.1 (41)] the draft Guideline be revised to read "A retailer must ensure that its customer hardship policy is easily accessible on its website via an appropriately named and clearly marked URL/hyperlink from the retailer's homepage, and is available in printable formats."
- g. The standardised statements in their current form are wordy, complicated and inaccessible. The expectation that the customer facing document and the compliance document can be one and the same should be reconsidered.
- h. Disconnection safeguards should be outlined as done in the Essential Services Commission, Payment Difficulty Framework.¹²

⁹ Draft Guidelines p.21.

¹⁰ Essential Service Commission, *Payment Difficulty Framework* (Oct, 2017).

¹¹ *National Energy Retail Rules 2019* (version 17).

¹² Essential Service Commission, *Payment Difficulty Framework* (Oct, 2017).