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Senior Advisor
Australian Energy Market Commission

Dear Ms Wild

National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018 consultation paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *National Energy Retail Amendment (Strengthening protections for customers in hardship) Rule 2018 Consultation Paper (Consultation Paper)*. We support the Australian Energy Regulator's (**AER**) rule change proposal, which addresses a clear gap in the AER's ability to enforce laws designed to protect households experiencing payment difficulty. Rules and laws that protect people facing or anticipating payment difficulty in relation to an essential service must be enforceable.

Although limited in scope, this rule change will ensure a consistent level of assistance and better outcomes for many anticipating or facing payment difficulty and is an important first step in a necessary process of ongoing reform to improve protections for all Australians experiencing payment difficulty. Inconsistency in the current form and quality of assistance offered to households can often be attributed to the failure of rules and laws to provide a standard definition of hardship. This rule change must task the AER with clearly defining a binding hardship definition to include all in payment difficulty. Doing this should result in consistent minimum entitlements for all households to access where necessary. Further work should then focus on incorporating features of the Essential Services Commission's (**ESC**) new Payment Difficulty Framework (**PDF**)¹ that give all households anticipating or experiencing payment difficulty an entitlement to adequate assistance specifically tailored to their circumstances in a timely manner.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Responses to consultation paper questions

1 (a) *To what extent do you consider that the current approach to the application of hardship policies provides adequate protections to consumers in financial difficulty?*

¹ ESC, 2017. Payment difficulty framework, final decision, retrieved from: <https://www.esc.vic.gov.au/electricity-and-gas/electricity-and-gas-codes-guidelines-policies-and-manuals/energy-retail-code/energy-retail-code-review-2016-customers-facing-payment-difficulties#tabs-container2>



As demonstrated by the AER's *Annual Report on Compliance and Performance of the Retail Energy Market 2016-2017* and the AER's 2015 and 2017 Hardship Reviews,² current hardship practices are failing to protect many households facing or anticipating payment difficulty. Hardship policies are inconsistently applied and many who are eligible for hardship assistance are not informed of this or do not get access to appropriate assistance when they do identify as eligible. Energy is an essential service, it is needed for health, wellbeing and social participation. If 1.4 per cent of households are disconnected for non-payment in one jurisdiction in a year (as was the case in 2015-16 reporting period in South Australia),³ then protections are inadequate. No one should be disconnected for an inability to pay.

1 (b) *Are general obligations that are more difficult to enforce leading to inadequate consumer protections?*

It is our understanding that recent AER enforcement action resulted in an infringement notice for Origin energy,⁴ because Origin has an adequate actionable statement to enforce against—compared to other retailer hardship policies, which do not. People not receiving hardship assistance they are entitled to is a systemic issue and because retailers use inconsistent terminology in their hardship policies the, AER is presented with a barrier to overcoming this issue. This clearly reflects dysfunctional, inadequate consumer protection.

2 (a) *Do the current indicators appropriately reflect the success or failure of hardship policies in protecting consumers who are facing financial difficulty? Please explain your perspective.*

The current indicators outlined in rule 75 are broad and are applied under the *AER (Retail Law) Performance Reporting Procedures and Guidelines*⁵ (**Performance Reporting Guidelines**). These Performance Reporting Guidelines provide genuine insight into the effectiveness of measures in place to protect people in payment difficulty, but the indicators should be adjusted for greater insight.

These indicators should be added:

- The number of customers denied entry to a hardship program, and on what grounds.
- An expansion of the range debt categories in S4.4 (*debt on entry to hardship programs*) and other relevant sections throughout the Performance Reporting Guidelines to include amounts more than \$5,000 (as debts continue to rise and this is the threshold where creditors can petition for bankruptcy on a judgement debt, meaning these amounts reflect greater risks for the customer).

Retailers should also be asked to volunteer information about hardship initiatives that may have impacted the reported metric. For example, forms of assistance such as payment matching or debt waivers may impact the amount of average debt for hardship customers reported, but not be easily detectable to the public or other interested stakeholders when reading the associated reporting.

Similarly, varying definitions of hardship may impact the comparability and perceived performance of different retailers. Further aligning the Performance Reporting Guidelines for people in payment difficulty but not yet receiving hardship assistance with those who have received hardship assistance may assist the identification of systemic issues. The AER being given the task of providing a standard definition of hardship through this rule change would also help overcome this issue and provide consistent outcomes. This should draw on experiences in other markets which adopt flexible definitions, for example, under the National Credit Code which simply says that people are entitled to assistance where *they* consider that they are unable to meet payment obligations. As outlined below, triggers points for different levels of assistance should also be clear, as proposed by the ESC payment difficulties framework.

² All pointed to in AER's rule change proposal: AER, 2018. Request for rule change – strengthening protections in the National Energy Retail Rules for customers in financial hardship, retrieved from: <https://www.aemc.gov.au/rule-changes/strengthening-protections-customers-hardship>

³ AER, 2017. State of the Energy Market May 2017, p.154.

⁴ AER, 2017. Infringement notices issued to Origin Energy for alleged failure to offer hardship assistance and wrongful disconnection, retrieved from: <https://www.aer.gov.au/retail-markets/compliance/enforcement-matters/infringement-notices-issued-to-origin-energy-for-alleged-failure-to-offer-hardship-assistance-and-wrongful-disconnection>

⁵ AER, 2018. AER (Retail Law) Performance Reporting Procedures and Guidelines, April 2018, Version 3.



2 (b) *Should the hardship program indicators reside in the binding Hardship Guidelines as proposed or remain as separate to the Guidelines as a stand-alone requirement in the NERR? Please explain your perspective.*

The rules should be structured in a way that ensures that, in practice, the indicators are reported to the AER and the public in a way that is consistent with reporting on other indicators. This consistency would give the regulator and the public wider context when assessing the effectiveness of hardship programs. We support either option where the AEMC is confident that this consistency can be achieved.

3 (a) *Are you of the view that Hardship Guidelines that include standard statements adequately protect the long-term interest of consumers in financial difficulty, while providing retailers with flexibility in how they apply hardship provisions?*

We support the AER having the power to improve hardship policies by requiring certain mandatory minimum standards are actionable. Binding standard statements would improve hardship provisions and give the AER greater scope to enforce current laws and rules. It will not prevent retailers from being flexible in combining elements of the minimum standards or providing additional measures to assist consumers in financial difficulty.

As part of this rule change it is important that the AER is given the task of defining hardship to ensure all households anticipating or facing payment difficulty are entitled to access assistance. Our understanding is that retailers currently set this definition which leads to inconsistent access to appropriate assistance across retailers.

While we support the implementation of this proposal, the current rules and laws will not adequately protect the long-term interests of consumers in payment difficulty. Further reform to laws and rules are needed to ensure all households anticipating or facing payment difficulty are adequately protected. Many elements of the ESC's payment difficulty framework should be adopted throughout the NEM to give all households the right to be contacted by a retailer and offered assistance that is tailored to their circumstances in a timely manner. Requiring the AER to define hardship to include all people facing or anticipating payment difficulty within this rule change will go some way to filling this gap by ensuring many more minimum standards of assistance are available to all customers when they need them.

3 (b) *Is there another approach that would better meet the requirements under the NERL in relation to customers in hardship, and allow retailers to meet their obligations more efficiently?*

We believe the proposed approach is the best way for the AER to better exercise powers to ensure requirements are met under the NERL. As above we urge the AEMC and other decision makers to continue to reform laws and rules beyond the scope of this rule change to ensure households anticipating or facing payment difficulty are better protected in the long term.

4 *The AER proposed that all the Hardship Guidelines be enforceable. Do you agree that all aspects of the guidelines should be enforceable? If not, what aspects of the guidelines should or should not be enforceable and why?*

All the Hardship Guidelines should be enforceable. We agree with the AER's statement in their rule change request:

*"a binding guideline will help to achieve a consistent approach across retailers in relation to hardship policies, provide clarity on how the minimum requirements are to be applied and improve the overall quality of policies."*⁶

As acknowledged by the AER, consultation should take place when the binding guideline is developed. Consumer representatives and the public should have the opportunity to participate in consultation on the process for variation and approval of hardship policies.

⁶ AER, 2018. Request for rule change – strengthening protections in the National Energy Retail Rules for customers in financial hardship, p.14, retrieved from: <https://www.aemc.gov.au/rule-changes/strengthening-protections-customers-hardship>



5 (a) What transitional arrangements should be put in place to require that retailers amend their current policies to comply with the Hardship Guidelines, if this rule were made?

All retailers should have to resubmit modified hardship policies with the binding statements required from the AER guideline without delay. Making this process as fast as possible is important given significant consumer harm will be experienced by additional households wherever improvements to the compliance with rules and laws around hardship policies are delayed.

5 (b) What aspects of the rule, if made, should be a civil penalty provision?

The AER should have the ability to use the civil penalty regime and infringement notices to deter non-compliance wherever a retailer:

- Fails to vary or submit a policy that aligns with the guidelines.
- Fails to follow or demonstrate that they follow their hardship policy.
- Fails to accurately report against performance indicators

If the Coalition of Australian Government (**COAG**) Energy Council consultation to raise maximum amounts payable under civil penalties and infringement notices is approved as proposed,⁷ then breaching aspects of this guideline should attract the highest possible amount.

6 (a) Please comment on the benefits and costs that have been identified, in terms of their adequacy in assessing the rule change proposal and any quantification of those factors.

The rule aims to ensure compliance with laws and rules. Additional resources used by retailers to provide compliant hardship assistance following the rule change should not be counted as a cost but a benefit. Current non-compliance and inconsistency is a cost to customers. Benefits of this rule change will be realised by:

- Customers who receive assistance where they wouldn't have if the rule was not made.
- Improved consumer confidence and trust of retailers through improved and more consistent services.
- Improved management of bad debt and the flow on costs to other customers.
- Wider cost savings and social benefits through people overcoming payment difficulty and not requiring other assistance or experiencing further disadvantage due to payment difficulty
- Better efficiency in the use of resources at the AER as it becomes simpler to monitor and enforce compliance.

6 (b) Will improving hardship policies through the Hardship Guidelines result in a cost saving to consumers as a result in a reduction in bad debt? Please explain your perspective.

If hardship policies are strengthened to include actionable commitments that the AER can enforce to deter non-compliance, then more consumers will receive assistance. Currently retailers often fail to intervene early enough when debt begins to accrue, and do not transfer households to internal hardship teams for specialist assistance even though customers are clearly facing payment difficulty. The service levels of teams fulfilling this role can also vary.

Consistent policies will ensure early intervention and reduce barriers to accessing at least a minimum standard of assistance and will result in less households experiencing spiraling and unsustainable energy debt. In time, businesses will accrue less bad debt and in turn pass on less of the cost of bad debt to all consumers.

7 Are there amendments that could be made to the proposed rule to better achieve the intent of the rule change request?

⁷ COAG Energy Council, 2018. AER Powers and Civil Penalty Regime Consultation Paper, retrieved from: AER, 2018. Request for rule change – strengthening protections in the National Energy Retail Rules for customers in financial hardship, retrieved from: <https://www.aemc.gov.au/rule-changes/strengthening-protections-customers-hardship>



Clause 75 (4)(b)(i) should clearly state that the AER will set a definition for hardship. This definition should be consulted on as the AER develops the guideline. Hardship should be broadly defined along the lines of all residential customers unable to pay an amount of energy arrears due. This will overcome definitional issues around hardship, which currently leads to some businesses preventing customers from accessing appropriate assistance.

8 Please identify broader issues with regards to hardship and affordability that may not be addressed by this rule change, if made.

Current hardship rules and laws rely on households self-identifying in order to access assistance. Instead, reforms should require retailers to offer flexible assistance, tailored to a household's needs and circumstances—and offered to all households who are in arrears. We have been extensively involved in the ESC's development of the payment difficulty framework which will give households in Victoria entitlements and the right to be informed of their minimum entitlements during early intervention action by a retailer. Entitlements will be triggered by an overdue amount of \$55 of energy debt. Similar entitlements should be incorporated into rules and laws in other jurisdictions.

One area of ongoing work in both Victoria and throughout the NEM is how to protect people from disconnection when they have completely disengaged from their retailer while experiencing payment difficulty. We will soon present a proposal of how to develop appropriate reforms to address this issue in Victoria and we encourage the AEMC to consider this issue in any future review of assistance provided to people in payment difficulty. As identified in our *Heat or Eat*⁸ report, much more must be done to protect people from the significant and harmful consequences of disconnection.

Concessions and other relief systems vary across jurisdictions. In many instances these schemes are poorly designed and do not achieve the intended purpose of equitably assisting and protecting people's access to essential services. The AEMC should review the application of these schemes throughout the NEM and make recommendations to improve outcomes.

Please contact Jake Lilley on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

⁸ Consumer Action, 2015. Heat or Eat, households should not be forced to decide whether they heat or eat, available at: <https://policy.consumeraction.org.au/2015/08/28/the-real-stories-of-victorians-forced-to-choose-to-heat-or-eat/>

