

14 January 2019

Sarah Proudfoot
General Manager, Consumer and Markets Branch
Australian Energy Regulator



By email: AERConsumerandPolicy@aer.gov.au

Dear Ms Proudfoot,

Submission to Hardship Guideline Issues Paper

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC welcomes the opportunity to respond to the AER's Issues Paper on the new retailer hardship policy guidelines. PIAC supports the development of enforceable hardship policy guidelines that will help to improve the consistency and application of standardised statements in retail hardship policies. PIAC also supports the intent of these reforms, to ensure more effective and consistent fulfilment of electricity retailers' minimum requirements under section 44 of the National Energy Retail Law (NERL).

At the outset, PIAC highlights the submission by the NSW Ethnic Communities Council (ECC), and our support for the specific requirements that Culturally and Linguistically Diverse (CALD) communities have in accessing support from retailers. The NERL protects the rights and interests of all consumers. Key to the equality of essential access to electricity (and the relevant protections and supports) is ensuring that the guidelines covering retail responses to hardship recognise the needs of the significant proportion of consumers from CALD backgrounds.

PIAC would also like to express support for the issues raised in the submissions by both the Queensland and South Australian Councils of Social Service. We strongly encourage the AER to take the broadest possible interpretation of the scope of the rules in drafting the hardship guidelines, and provide for consistency with the key elements of the Victorian Essential Services Commission Payment Difficulty Framework (PDF), to the greatest extent possible.

While our own report on disconnections¹ illustrates that consumers have little awareness that retailers are required to make available a range of assistance measures to support their continued access to electricity through periods of payment difficulty and 'hardship', the same report also demonstrates that consumer awareness and understanding is not the key barrier. Indeed 74% of the respondents who went on to be disconnected from electricity (the simplest indication of hardship) had been in contact with their retailer immediately prior, but had not been offered the assistance required to manage their payments and debt, and maintain their connection. This is stark evidence of retailers' failure to consistently meet their

¹ PIAC & UMR. [Close to the Edge: A qualitative and quantitative study](#), November 2018. Pp 30-33

minimum requirements in the NER and NERL. A simpler, more objective and more prescriptive approach to identifying and assisting those in need of support is clearly required.

Scope of hardship guidelines should support the intent of the rules

The Issues Paper sets out the intended scope of the Hardship Guideline, and notes that the AER will be bound by the rules. While PIAC agrees that the rules provide for a limitation of the scope of the guidelines, we contend that there is room for a significantly broader interpretation than the issues paper suggests. Rule 75B requires retailers to submit a hardship policy that, in addition to complying with the guidelines and including any standard statements, 'contains clear and specific statements of the actions the retailer will take to meet the minimum requirements for a hardship policy under section 44 of the Retail Law.'² Where the minimum requirements include an obligation for retailers to have a process to identify customers experiencing payment difficulties due to hardship, and processes of 'early response' to those customers, PIAC contends that this provides scope for the AER hardship guidelines to be prescriptive about what specific (minimum) actions constitute identification, and what specific (minimum) actions constitute early response.

PIAC reiterates our previous input (including submissions in relation to both the Hardship rule change, and the development of standardised statements), and that of a range of other consumer representative organisations, that the recently implemented Victorian PDF provides a clear example of an appropriate and effective mechanism for specifying consistency in retailer responses. For example, requiring retailers to contact customers when they first reach a simple (and ideally low) debt trigger amount, and inform them of:

- their rights
- options to lower energy costs
- government and non-government assistance
- how they can set up an affordable payment plan
- further, more tailored assistance measures available through the retailer's own hardship policy.

It is important to note that this does not mean that a debt trigger point entitles a customer to hardship assistance. Instead, it obliges the retailer to use the debt trigger point as the 'early identification point' for the purposes of their hardship policy, and commence the provision of information and the offer of the first stages of assistance to those customers. While PIAC recognises that the PDF responds to jurisdictional rules that are not completely consistent with the National Energy Consumer Framework, there is scope within the newly framed rules to specify consistent identification processes, and utilise standardised statements to ensure consistent application of minimum responses by retailers.

Minimum retail requirements in the NERR, NERL and the purpose of Hardship policies

The NERL sets out very clear minimum requirements that retailers must reflect in their hardship policies, and requires that those policies contribute to the 'purpose' set out in section 43(1) of the NERL. The following considerations are crucial in both the development of hardship policy guidelines, and the standard statements intended to give effect to them:

- Customer hardship policies must contain 'Processes to identify residential customers experiencing payment difficulties due to hardship, including identification by the retailer and self-identification by the residential customer'³; and

² NERR Rule 75B(1)

³ NERL Section 44(a)

- Customer hardship policies must contain ‘processes for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship’⁴;
- Customer hardship policies contribute to the purpose to ‘identify residential customers experiencing payment difficulties due to hardship and assist those customers to better manage their energy bills on an ongoing basis’⁵;
- The principle that ‘the supply of energy is an essential service for residential customers’⁶;
- The principle that ‘retailers should assist hardship customers by means of programs and strategies to avoid de-energisation (or disconnection) solely due to an inability to pay energy bills’⁷;
- The principle ‘that residential customers should have equitable access to hardship policies, and that those policies should be transparent and applied consistently’⁸; and
- The requirement that retailers’ hardship policies contain clear and specific statements of the actions the retailer will take to meet the minimum requirements for a hardship policy under section 44 of the Retail Law.⁹

Key principles for developing standardised statements and hardship policy guidelines

In order to accurately translate the current requirements in the NERL into more effectively and consistently applied retail hardship policies, PIAC considers that a number of key principles must be adhered to. Specifically:

- That any customer-facing policies or material do not utilise the term ‘hardship’ in relation to the consumers intended to be assisted.

PIAC’s recently published research report¹⁰ indicates that even consumers in severe and prolonged payment difficulty do not identify themselves as being ‘in hardship’, and are likely to regard this or any similar terminology as a source of shame and embarrassment. This is a significant barrier to consumers understanding that assistance is available, and seeking assistance at a time when it is most likely to be effective.

In framing hardship policy guidelines and standard statements that rely, even partially, on self-identification and self-advocacy on the part of consumers, the language should be neutral (for instance, utilising terms such as ‘customer payment assistance policy’) to facilitate consumers seeking out the assistance that they need as early as possible. While retailers are required to implement policies that refer to customers experiencing payment difficulty due to hardship, PIAC contends that it is not necessary for the resulting policies to utilise the term.

- That hardship policy guidelines and standardised statements recognise that there is no discernible or practical category of difference between people experiencing payment difficulty due to hardship and other people experiencing payment difficulty.

PIAC’s research on disconnections¹¹ highlights that payment difficulty leading to debt accumulation and disconnection usually results from a complex interaction of contributing social and economic factors. These are not able to be clearly separated into those that

⁴ NERL Section 44(b)

⁵ NERL Section 43(1)

⁶ NERL Section 45(3)(a)

⁷ NERL Section 45(3)(b)

⁸ NERL Section 45(3)(d)

⁹ NERR Rule 75B(1)

¹⁰ PIAC & UMR. [Close to the Edge: A qualitative and quantitative study](#), November 2018

¹¹ Ibid

constitute 'hardship' and those that may be 'other payment difficulties', without inappropriate and intrusive inquiries regarding the detail of a person's circumstances.

While the current legal framework of the NERL has separate provisions relating to consumers experiencing payment difficulty due to hardship, and other consumers experiencing payment difficulty, the current hardship provisions require retailers to implement processes to identify and assist hardship customers early. The lack of discernible or practical difference between hardship customers and others experiencing payment difficulty is crucial. Accordingly, hardship policy guidelines and standardised statements should be drafted to recognise that early identification and assistance of hardship customers should involve narrowing the gap between payment difficulty and hardship policy measures, making hardship policy measures available to all customers experiencing payment difficulty. PIAC reiterates the value of a simple, low debt-trigger amount (such as the \$55 amount in the Victorian PDF) that requires retailers to identify those customers to whom the provision of a range of specified information is required, and to whom appropriate tailored assistance measures should begin to be made available.

- That effective early identification of, and assistance for customers facing payment difficulty due to hardship requires the setting of simple, broad and objective gateway criteria.

Evidence, including the AERs own statistics on retail debt accumulation (for both hardship and non-hardship customers), debt on entry into hardship, hardship program success, and residential disconnection, illustrates that current established retail practice does not identify or assist customers early enough or effectively enough to demonstrate fulfilment of the purpose of retail hardship policy under section 43 of the NERL, or the equitable and consistent access consideration contained in section 45.

PIAC recommends that the development of enforceable retail hardship policy guidelines and standard statements have regard for the approach taken by the new Victorian Essential Services Commission (ESC) payment difficulty framework, in particular the retailer identification and assistance provisions contained in Clause 80(2). These provisions set a simple and objective debt trigger-point for early identification of customers in payment difficulty who must be offered access to the tailored advice and assistance provided through specialist retailer hardship support. PIAC notes that this need not imply that all customers meeting the simple arrears criteria are entitled to receive all available supports, merely that they are entitled to be offered access to the advice and potential supports that are available through retailer hardship policies (as opposed to generalised, credit or debt-recovery service responses).

- That hardship policy guidelines and standardised statements should reflect and enable equal entitlement for consumers to receive assistance with their ongoing access to electricity as an essential service.

The Victorian ESC found significant issues with inconsistency of access to support and assistance, and significant inconsistency of retailer response to consumers experiencing payment difficulty due to hardship¹². PIAC agrees with the ESC's conclusion that this inconsistency (and the ineffective hardship support that it leads to) results from a poor objective definition of hardship, and the consequent discretion afforded to retailers regarding whom they may identify as entitled to support, how and when they offer it, and what that support entails.

These comments are consistent with evidence from PIAC's research on disconnections, and the input provided by a range of consumer stakeholders to the recent rule change process.

¹² ESC, 'Energy Hardship Inquiry Final Report', 2016
<https://www.esc.vic.gov.au/sites/default/files/documents/Energy-Hardship-Inquiry-Final-Report-February-2016-1.pdf>

Accordingly, PIAC recommends that hardship policy guidelines and standardised statements be framed to ensure that the identification of consumers requiring support, the determination of the level of support and the delivery of support by retailers, is subject to objective criteria. These could include the payment history of the consumer, the accumulated debt of the consumer, the type of deal the consumer is on and whether the consumer has utilised a rebate or emergency support assistance.

PIAC again points to the submission by the NSW Ethnic Communities Council, and the specific issues of disadvantage faced by many of the 27% of consumers who speak a language other than English at home. Equality of entitlement to electricity as an essential service, and equity and consistency in access to support and assistance requires not only that the guidelines have objective mechanisms for identifying those in need of support, but also that those guidelines should account for the specific access issues potentially faced by those from CALD communities.

- That hardship policy guidelines and standardised statements focus on the intended outcomes for consumers and the specific actions that a retailer will (and will not) undertake in specific circumstances.

Effective retailer hardship policy guidelines and standardised statements must focus on the outcomes that are intended to be achieved for consumers, to provide clear objective criteria for assessing the adherence of a policy to the guidelines, and their effectiveness in delivering on the intent of hardship assistance. Further, PIAC considers that specific retailer implementation processes or action statements are required which: determine what specific actions retailers will take in specific circumstances; and which achieve the purpose and align with the principles underpinning hardship policies in the NERL. It is important that these statements also include actions which will not be taken, or outcomes which will be avoided. For example, relevant recommendations, informed by PIACs recently released report on disconnections, include:

- Ensuring that customers on payment plans and participating in hardship programs are able to continue to be supported as long as any reasonable attempt at payment has been made, and that participation on plans and programs will not be subject to entrance fees or restrictive conditions that are not in the interests of the consumer.

The AERs own evidence of poor ‘success rates’ for both payment plans and hardship programs stems, in part, from the needlessly strict terms that customers often must meet to retain these supports (such as minimum payments to enter hardship programs, or being removed from assistance programs if defined payment requirements are not met). These consumers often accumulate further arrears and debt, and are more likely to end up disconnected. The objective of hardship support is to assist with ongoing affordability and avoid disconnection, this objective should be explicitly reflected in the hardship guidelines and standardised statements.

- Ensuring that the evaluation of the payment plan and hardship program payment capacity of any customer considers and prioritises their household health and wellbeing, as well as their realistic capacity to pay, on an ongoing basis.

Payment plans and hardship programs are mechanisms for assisting consumers to sustainably afford their ongoing access to electricity as an essential service – they are not a debt-recovery or income maximisation mechanism. Instead, retailers must ensure that the processes by which they are determined, monitored and altered, consider the overall health and financial sustainability of the household. Outcomes specified in the hardship guidelines, and any specific standardised statements should reflect and support this.

- That consistency with the Victorian Payment Difficulty Framework be a primary consideration in the development of enforceable hardship policy guidelines and the standardised statements that give effect to them.

PIAC's view is that while legal frameworks underpinning the National and Victorian hardship and payment difficulty provisions are discrete, more closely aligning them through this process will bring about market and consumer benefits. Considering that most retailers operating in Victoria also operate in other major national markets, the systems and procedures already developed to meet the new Victorian framework requirements could be utilised if new national policy guidelines are effectively aligned where possible.

Continued engagement

PIAC would welcome the opportunity to meet with the AER and other stakeholders to discuss these issues in more depth, and looks forward to providing further input into the processes developing guidelines and standardised statements for retailer hardship policies. For further comment, detail or input regarding this process, please contact Douglas McCloskey.

Yours sincerely,

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