

Australian Energy Market Commission

CONSULTATION PAPER

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

Rule Proponent(s)

Australian Energy Regulator

24 May 2018

RULE
CHANGE

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About the AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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1 Introduction

On 21 March 2018, the Australian Energy Regulator (AER) submitted a rule change request to the Australian Energy Market Commission (AEMC or Commission) seeking to strengthen the protections for residential customers in financial hardship.¹ The rule change proposal aims to amend the National Energy Retail Rules (NERR) to allow for the development of binding Customer Hardship Policy Guidelines (Hardship Guidelines).

This consultation paper has been prepared to facilitate public consultation on the rule change request and to seek stakeholder submissions. Submissions are to be lodged online or by mail by **28 June 2018**.

This paper:

- sets out a summary of, and a background to, the rule change request
- identifies a number of questions and issues to facilitate the consultation on this rule change request
- outlines the process for making submissions.

¹ For the purposes of this paper, the term customer is used to describe a person in a commercial relationship with a retailer; the term consumer is used to describe the relevant group under the retail law, rules and in the wider sense of all consumers in the market.

2 Background

In order to support residential customers who are facing financial difficulty, the National Energy Customer Framework (NECF) includes provisions relating to customer hardship policies.

2.1 National Energy Customer Framework

The NECF is the framework that regulates the connection, supply and sale of energy (electricity and gas) to retail customers. It includes provisions related to consumer protections, how retailers should provide support to customers facing difficulty paying their bills, and the requirements a retailer must adhere to before disconnecting a customer for non-payment.

The NECF has been adopted in the Australian Capital Territory, Tasmania, South Australia, New South Wales and Queensland. Victoria has adopted Chapter 5A of the National Electricity Rules (NER) but not the remaining components of the NECF and so the proposed rule would not apply in that state. However, Victoria has recently completed a process to introduce a new payment difficulty framework as part of its Victorian Energy Retail Code.²

The NECF is comprised of:

- the National Energy Retail Law (NERL)
- the National Energy Retail Regulations
- the NERR
- certain parts of the NER and National Gas Rules (NGR) in relation to:
 - retail customer connections (Chapter 5A of the NER and Part 12 A of the NGR)
 - retail market billing and credit support arrangements (Chapter 6B of the NER and Part 21 of the NGR).

The AER is responsible for monitoring and enforcement of the NECF.

2.2 Hardship provisions under the NECF

The NERL includes provisions relating to customer hardship policies at Part 2 Division 6 . Under the NERL, within three months of being granted a retailer authorisation, a retailer must develop a hardship policy in respect of residential customers for approval by the AER. The purpose of a retailer's hardship policy is to identify residential

² Essential Services Commission, 2017, *Payment difficulty framework - Final decision*, 10 October 2017, Essential Services Commission, Victoria.

customers who are experiencing payment difficulties due to hardship, and assist them to better manage their bills on an ongoing basis.³ Once approved, the retailer must publish the approved policy on its website, and also maintain and implement the policy.⁴ If the AER forms a view that the retailer's policy requires review then the retailer must vary the policy in accordance with the AER's requirements.⁵

Section 44 of the NERL sets the minimum requirements that a hardship policy must contain:

- (a) processes to identify residential customers experiencing payment difficulties due to hardship
- (b) processes for the early response by the retailer in the case of residential customers identified as experiencing payment difficulties due to hardship
- (c) flexible payment options (including a payment plan and Centrepay) for the payment of energy bills by hardship customers
- (d) processes to identify and notify hardship customers of appropriate government concession programs and appropriate financial counselling services
- (e) an outline of a range of programs that the retailer may use to assist hardship customers
- (f) processes to review the appropriateness of a hardship customer's market retail contract in accordance with the purpose of the customer hardship policy
- (g) processes or programs to assist customers with strategies to improve their energy efficiency
- (h) any variations specified by the AER
- (i) any other matters required by the Rules.

Part 3 of the NERR details the obligations of retailers in relation to hardship. This Part covers:

- the obligation of retailers to communicate their hardship policy to a residential customer identified as a hardship customer (rule 71)
- the way in which a payment plan for a hardship customer must be established and communicated (rule 72) and how the retailer is to manage a request from a residential customer to use Centrepay as a payment option (rule 74)
- waivers of late payment fees and waiver of debt for hardship customers (rule 73)

³ Section 43(1).

⁴ Section 43(2)(c).

⁵ Section 43(3).

- hardship program indicators to be determined by the AER (current rule 75), which must cover:
 - entry into hardship programs
 - participation in hardship programs
 - assistance available to and assistance provided to customers under customer hardship policies.

Under the NERL and the NERR, the AER is required to publish a yearly report on the performance of retailers by reference to these hardship program indicators.

The AER has issued guidance to retailers on the information they should include in their hardship policies. This is not enforceable and is for general guidance only.⁶

Figure A.1 in Appendix A provides a simplified diagram of the current framework for hardship protections under the NECF.

⁶ AER, *Guidance on AER approval of customer hardship policies*, May 2011, AER, Melbourne; and Rule change request p. 5.

3 Details of the rule change request

The rule change request from the AER proposes to replace rule 75 of the NERR to allow for the development of binding Hardship Guidelines.

3.1 Rationale for the rule change

In its rule change request, the AER provided its rationale for the rule change. A number of key points raised in the rule change request are discussed further below.

3.1.1 Application of hardship policies - performance reporting findings

As part of its monitoring and enforcement work program, and as described in its *2016-17 Annual Report on Compliance and Performance of the Retail Energy Market*, the AER has identified a number of issues relating to the way in which hardship policies are being implemented. The identified issues include that there are:

- increasing levels of energy debt on entry into hardship programs which may indicate that retailers are not proactively identifying customers who may be facing financial difficulties
- high levels of debt for customers who are not receiving hardship assistance
- low levels of customers receiving hardship assistance
- fewer customers completing hardship programs by paying off arrears
- increased overall electricity disconnections.

3.1.2 AER 2017 Hardship Review outcomes

In 2017, the AER carried out a review of the hardship programs of nine selected retailers. As part of this review the AER sought information on the operation of hardship policies and evidence of implementation. The AER concluded that while it did not observe widespread non-compliance it did note that most retailers were deficient in at least one aspect of their policy.⁷ The AER's findings were that:

- there is no consistency in how and when a customer could be identified as requiring assistance
- there is no corresponding increase in customers on hardship programs that correlates with higher energy prices
- payment plans being offered may not be realistic or based on a customer's capacity to pay

⁷ Rule change request, p. 7.

- some retailers were unable to explain how they implement their policies.⁸

3.1.3 AER enforcement work

As part of an investigation into Origin Energy's alleged failure to implement its hardship policy, the AER determined that hardship policies that did not contain specific commitments were difficult to enforce. The AER observed that many approved policies of other retailers contain general statements, and that general policies offer customers a lower level of protection.⁹

<p>Question 1</p> <p>(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?</p> <p>(b) Are general obligations that are more difficult to enforce leading to inadequate consumer protections?</p>	<p>Rationale for rule change - adequacy of the current approach to hardship</p>
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3.2 Proposed solution

The rule change request includes a proposed rule.¹⁰ A copy of the rule change request may be found on the AEMC website.¹¹ Figure A.2 in Appendix A provides a summary of the proposed frameworks for hardship under the proposed rule change.

The proposed rule aims to address the issues outlined in section 3.1 by requiring that the AER must, in accordance with the retail consultation procedure, make Hardship Guidelines and that the Guidelines will be binding.

The AER has proposed that the Hardship Guidelines must specify hardship indicators. This differs from the current situation where the requirement for the AER to develop hardship program indicators is a stand-alone requirement. The AER has proposed that the Hardship Guidelines would specify the same hardship indicators that currently exist under rule 75 of:

- entry into hardship programs
- participation in hardship programs
- assistance available to, and provided to, customers under the hardship programs.¹²

⁸ Rule change request, pp. 7 to 9.

⁹ Rule change request, p. 9.

¹⁰ Rule change request, p. 20.

¹¹ www.aemc.gov.au/rule-changes/strengthening-protections-customers-hardship.

Question 2 Hardship indicators

- (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.**
- (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 proposed rule also states that the Hardship Guidelines may specify:

- requirements to be complied with in connection with the approval or variation of a hardship policy
- any matter the AER considers necessary for inclusion in the Hardship Guidelines (having regard to the purpose of a hardship policy), including:
 - standardised statements to give effect to the minimum requirements under the NERL for the purpose of guiding consumers
 - guidance or examples of statements that the AER considers meet the minimum requirements
 - matters to be contained in a policy submitted for approval.¹³

The AER proposes that it may amend the Hardship Guidelines from time to time in accordance with the retail consultation procedure.¹⁴

In the AER's view, the creation of Hardship Guidelines would provide a point of reference to industry on how hardship obligations should be applied.¹⁵

Question 3 Proposed approach

- (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?**
- (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?**

12 *ibid.*

13 *ibid.*

14 *ibid.*

15 Rule change request, p. 13.

The AER also suggests that binding Hardship Guidelines would provide additional guidance on hardship approval processes and how the minimum requirements under the NERL should be applied. This may include standardised statements to give effect to the minimum requirements under the NERL for the purpose of guiding consumers.¹⁶

Question 4 Enforceability of Hardship Guidelines

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?

3.2.1 Implementation

The AER has not provided a timeline for release of the Hardship Guidelines, and it notes that timing will be determined by the date of release of the new rule, if made.¹⁷ The rule change request does not discuss transitional arrangements in relation to retailers who already have an approved hardship policy. The AER proposed that this rule, if made, should be a civil penalty provision.

The AEMC will consider the appropriateness of transitional arrangements and civil penalty provisions for this rule change request, if made.¹⁸

Question 5 Implementation

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

3.3 Costs and benefits

The AER considers that binding Hardship Guidelines are likely to have the following costs and benefits.¹⁹

3.3.1 Benefits

Promotion of consistency: the AER is of the view that binding guidelines would achieve consistency across retailers in relation to hardship policies which would improve consumer confidence in the quality and management of hardship policies.

¹⁶ Rule change request, p. 21.

¹⁷ Rule change request, p. 18.

¹⁸ Rule change request, p. 15.

¹⁹ Rule change request, pp. 15 to 18.

Improve clarity: the AER considers that binding guidelines would provide clarity on how the minimum requirements under the NERL are to be met. By providing clarity, the guidelines would generate efficiencies in how a retailer manages their policies.

Guidance for hardship customers: in the AER's view, the proposed addition of standard statements in the Hardship Guidelines would provide a clear and uniform set of retailer commitments a hardship customer is entitled to receive under a retailer's hardship policy. The AER believes this would also ensure that hardship customers receive an appropriate level of information and assistance.

Improved outcomes for consumers: from its review of hardship, the AER considers that the general nature of some hardship policies creates poor outcomes for consumers. The AER is of the view that standard statements will improve hardship customer outcomes by allowing them to easily understand their entitlements.

Improved monitoring and enforcement: strengthening the obligations on retailers will, in its view, assist the AER in more effectively monitoring how retailers are implementing their hardship policies and allow the AER to take action where necessary.

3.3.2 Costs

The AER recognises that the proposed rule will likely result in costs to retailers. This may include costs associated with system changes, staff training, and associated changes involved in implementing new policies.²⁰ The AER notes that given the variety of hardship policies across retailers, these costs will likely vary.

Question 6 Costs and benefits

- (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.**
- (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.**

²⁰ Rule change request, p. 16.

4 Assessment framework

The Commission's assessment of this rule change request must consider whether the proposed rule promotes the National Energy Retail Objective (NERO).

4.1 Rule making test

4.1.1 Achieving the NERO

Under the NERL, the Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the NERO.²¹ This is the decision making framework that the Commission must apply.

The NERO is:²²

“to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.”

The Commission must also, where relevant, satisfy itself that the rule is "compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers" (the "consumer protections test").²³

Where the consumer protections test is relevant in the making of a rule, the Commission must be satisfied that both the NERO test and the consumer protections test have been met.²⁴ If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

There may be some overlap in the application of the two tests. For example, a rule that provides a new protection for small customers may also, but will not necessarily, promote the NERO.

In addition, section 49 of the NERL is also relevant to the assessment of this rule change request. Under this provision, the AEMC must have regard to the purpose set out in section 43(1) when making rules with respect to the development, submission, approval, publication, maintenance and implementation of customer hardship policies, and variations of customer hardship policies. That is, the Commission must have regard to the purpose of a hardship policy being to identify residential customers who are experiencing payment difficulties due to hardship, and assist them to better manage their bills on an ongoing basis.

21 Section 236(1).

22 Section 13 of the NERL.

23 Section 236(2)(b) of the NERL.

24 That is, the legal tests set out in s. 236(1) and (2)(b) of the NERL.

4.1.2 Making a more preferable rule

Under section 244 of the NERL, the Commission may make a rule that is different (including materially different) to a proposed rule (a more preferable rule) if it is satisfied that, having regard to the issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the achievement of the NERO.

Question 7 Form of rule

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

4.2 Proposed assessment framework

To determine whether the proposed rule would be likely to promote the NERO, the Commission will assess the rule change request against an assessment framework.

The long-term interests of consumers is the key component of the NERO test. The NERO requires that efficiency in the investment, operation and use of energy services is the principal consideration for determining what is in the long-term interests of consumers.²⁵

The Commission considers that, where feasible, competitive markets provide the best means of promoting efficiency. Competition can be defined as a process of independent rivalry, where two or more parties (rivals) compete to supply a good or a service to consumers. Where competition is effective, retailers will have strong incentives to provide products and services that consumers value and set prices that reflect efficient costs. The Commission recognises that consumer protections are required above those that might be provided by a competitive market in order to minimise potential harm to customers who may be in financial difficulty and be disconnected for non-payment.

The rule change request seeks to make changes to the rules in order to improve the protection of customers who are experiencing financial difficulties. As hardship provisions relate specifically to the consumer protections test, this will be a key consideration of the AEMC's assessment, along with any impacts on competition that may result from making the rule change.

To determine whether the proposed rule would be likely to promote the NERO, the consumer protection test and section 49 of the NERL, the Commission will consider the rule change request against the following criteria:

²⁵ Efficiency has three components. Allocative efficiency is attained when energy prices reflect as closely as possible the costs of supplying an additional unit of a good or service. Productive efficiency is attained when energy services are provided at least cost, and dynamic efficiency is achieved when allocative and productive efficiency are sustained over time even under changes to technologies and consumer preferences. Investment and innovation are integral to dynamic efficiency.

- **Improved hardship protections:** the role of hardship provisions is to assist customers who are facing payment difficulty in order to minimise potential harm from disconnection. It also provides an avenue for retailers to receive payment for energy used, and is therefore part of their processes to manage bad debt. The AEMC intends to consider the impact of the proposed rule change on improving the outcomes for consumers facing payment difficulties, while also potentially limiting costs associated with bad debts that are passed onto consumers.
- **Transparency:** Lack of appropriate transparency in the market, and in particular a lack of timely information about consumer protections, can lead to consumers both losing confidence in, and failing to engage with, their retailer when they face payment difficulty. The AEMC intends to consider whether the proposed rule change would improve transparency for hardship customers regarding the levels of assistance they are entitled to receive.
- **Regulatory and administrative burden:** Requiring a change to retailer hardship programs could create additional costs for retailers, and the AER and stakeholders in developing the Hardship Guidelines. The AEMC intends to consider the benefits of the proposed rule change against the costs that would likely pass through to consumers in a workably competitive market.
- **Long-term benefits to consumers:** The AEMC will examine whether the long-term benefits to consumers of the proposed rule change exceed the additional costs that would pass through to them.

The proposed rule will be assessed against the relevant counterfactual of not making the change to the NERR.

We invite stakeholders to provide comments on the proposed assessment framework.

4.3 Other issues relating to affordability

The AER has proposed that this rule change, if made, will provide greater clarity for retailers when developing their hardship policies, and improve the way in which they are implemented. The AEMC recognises that there are broader issues with hardship, affordability, social policy and jurisdictional complimentary measures, the consideration of which are outside the scope of this rule change, if made. We invite stakeholders to provide views on other broader concerns that may not be addressed by the rule change.

If broader issues are identified as falling within the remit of the NECF, the AEMC will consider how those issues may be addressed in the national framework, bearing in mind there are complementary approaches available in jurisdictions to support consumers.

Question 8 Other issues

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

5 Lodging a submission

The Commission has published a notice under section 251 of the NERL for this rule change proposal inviting written submission. Submissions are to be lodged online or by mail by **28 June 2018** in accordance with the following requirements.

Where practicable, submissions should be prepared in accordance with the Commission's Guidelines for making written submissions on rule change requests.²⁶ The Commission publishes all submissions on its website subject to a claim of confidentiality.

All enquiries on this project should be addressed to Kate Wild on (02) 8296 7800.

5.1 Lodging a submission electronically

Electronic submissions must be lodged online via the Commission's website, www.aemc.gov.au, using the "lodge a submission" function and selecting the project reference code RRC0017. The submission must be on letterhead (if submitted on behalf of an organisation), signed and dated.

5.2 Lodging a submission by mail

The submission must be on letterhead (if submitted on behalf of an organisation), signed and dated. The submission should be sent by mail to:

Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

The envelope must be clearly marked with the project reference code RRC0017.

²⁶ This guideline is available on the Commission's website www.aemc.gov.au.

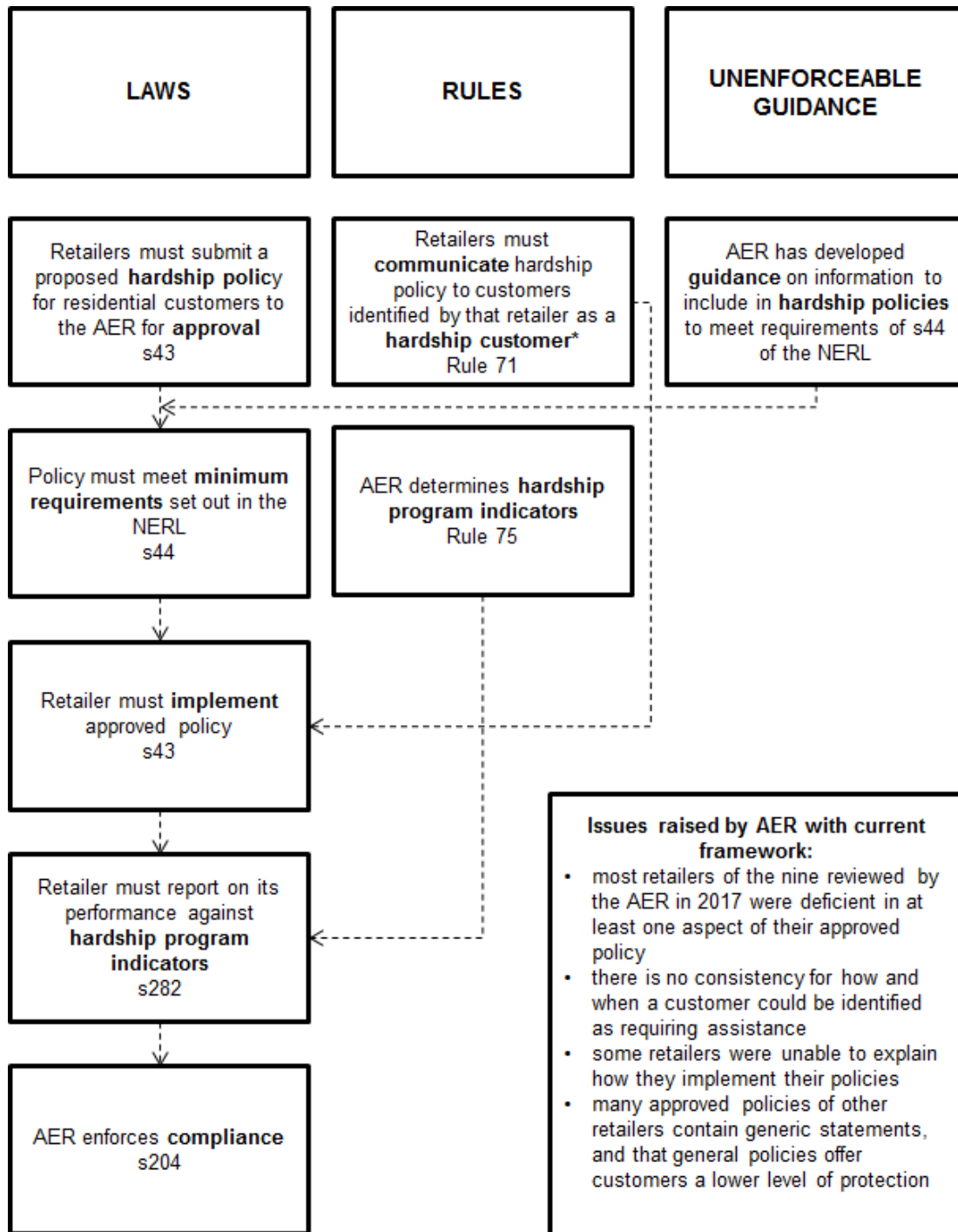
Abbreviations

AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Commission	See AEMC
Hardship Guidelines	Customer Hardship Policy Guidelines
NECF	National Energy Customer Framework
NER	National Electricity Rules
NERL	National Energy Retail Law
NERO	National Energy Retail Objective
NERR	National Energy Retail Rules
NGR	National Gas Rules

A Current and proposed hardship frameworks

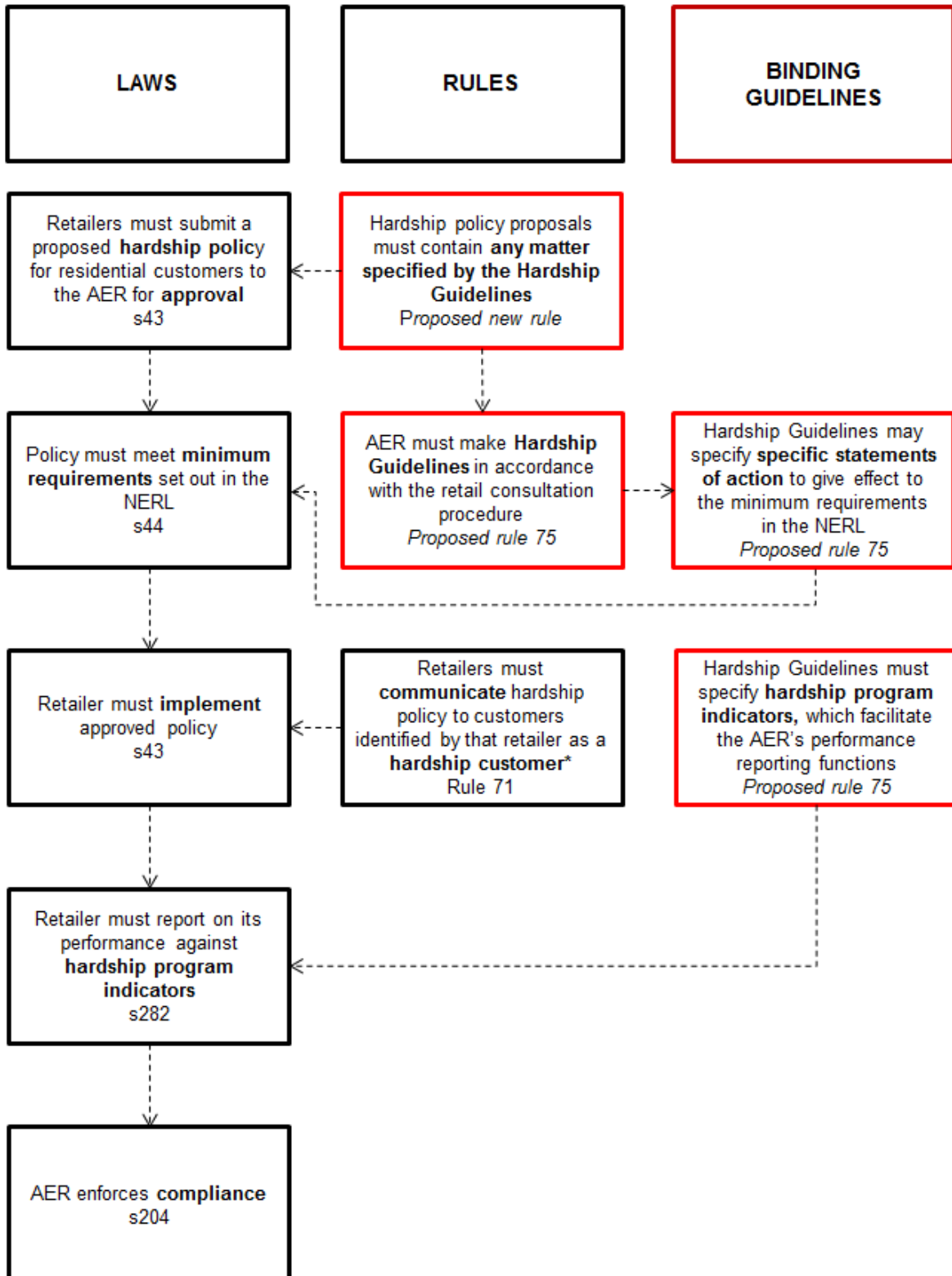
Figure A.1 and Figure A.2 below provide a simplified overview of the current and proposed hardship frameworks under the NECF, and are illustrative only.

Figure A.1 Current hardship framework



* Under s.2 the NERL, **hardship customer** means a residential 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.

Figure A.2 AER's proposed change to the hardship framework



*Under s.2 of the NERL, **hardship customer** means a residential 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