ESSENTIAL SERVICES COMMISSION

Customer N and EnergyAustralia – Decision and Reasons

Application of section 48A of the Gas Industry Act 2001 (Vic)
Compensation for wrongful disconnection

27 June 2018

Commissioners:

Dr Ron Ben-David, Chairperson, and
Ms Kate Symons, Commissioner.

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Essential Services Commission 2018, Customer N and EnergyAustralia – Decision and Reasons: Application of section 48A of the Gas Industry Act 2001 (Vic) Compensation for wrongful disconnection, 27 June

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Contents

The complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) to the Essential Services Commission of a complaint by Customer N.

2. The complaint is about the application of section 48A of Gas Industry Act 2001 (Vic) (the Act) for an alleged wrongful disconnection by EnergyAustralia Pty Ltd of Customer N's gas supply at [address redacted] (the premises), from 8:59am on 16 June 2016 to 2:21pm on 17 June 2016 (a period of 1 day, 5 hours and 22 minutes).

Issues for decision

3. The issue for decision by the commission on the complaint is whether or not EnergyAustralia has breached a condition of its gas retail licence regarding an obligation to make a prescribed payment to Customer N in circumstances where:

   (a) EnergyAustralia disconnected the supply of gas to the premises of Customer N; and

   (b) EnergyAustralia failed to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected.

   If so, then under sub-section 48A(3) of the Act, EnergyAustralia was obliged to make the prescribed payment to Customer N as soon as practicable after the supply of gas was reconnected to Customer N's premises.

4. This requires the commission to make findings and reach conclusions regarding the following matters:

   (a) Whether or not EnergyAustralia disconnected the supply of gas to the premises of Customer N (see paragraphs 28 and 36 below);

   (b) Was supply of gas to Customer N's premises reconnected, and if so, when? (see paragraph 30 and 38 below);

   (c) If EnergyAustralia did disconnect the supply of gas to Customer N's premises, for what period of time did the disconnection occur? (see paragraphs 31 and 39 below);

   (d) What was the contract between EnergyAustralia and Customer N? (see paragraphs 14 and 33(c));

   (e) What were the terms or conditions of that contract which specified the circumstances in which EnergyAustralia may disconnect the supply of gas to Customer N's premises? (see paragraphs 33(c)and 44 below);

   (f) Whether or not EnergyAustralia failed to comply with *those* terms and conditions (see paragraph 55 below);

   (g) Was Customer N entitled to receive payment of a prescribed amount because of any wrongful disconnection by EnergyAustralia under section 48A of the Act? (see paragraph 40 below);

(h) If so, when was EnergyAustralia obliged to make the payment of the prescribed amount? (see paragraphs 38 and 40 below);

(i) Has EnergyAustralia made the payment to Customer N in accordance with its deemed licence condition under section 48A of the Act? (see paragraphs 32 and 41 below);

(j) If EnergyAustralia has not made the payment, what are the consequences? (see paragraphs 63, 64 and 67 below).

5. The ombudsman accepted that EnergyAustralia had demonstrated that it had complied with clauses 109, 110 and 111(1)(e) of the Energy Retail Code (version 11) (the code). However, the ombudsman was of the view that Customer N was a customer experiencing payment difficulties and that EnergyAustralia was required to comply with clauses 111(2) and 33(3) prior to disconnecting the supply of gas to the premises of Customer N on 16 June 2016. The ombudsman said it was unclear whether EnergyAustralia had complied with clauses 33(3) and 111(2) of the code.

6. EnergyAustralia was of the view that Customer N was not a customer experiencing payment difficulties as per clause 111(2) of the code and therefore it was not required to comply with clauses 33(3) and 111(2) of the code prior to the disconnection.

7. Regarding clause 111(2), the ombudsman considered that Customer N had identified herself as a customer experiencing payment difficulties. It was unclear whether EnergyAustralia had offered Customer N two payment plans in the 12 months prior to the disconnection.

8. Regarding clause 33(3), the ombudsman considered that the information on concessions provided to Customer N by EnergyAustralia "does not appear to be of sufficient quality" to discharge the obligation.

9. EnergyAustralia was invited to provide any information and documents it considered that the commission should have regard to in making its decision. EnergyAustralia was also invited to make submissions on the complaint from its point of view for the commission to consider. EnergyAustralia did provide information and documents and made submissions for the commission's consideration. EnergyAustralia confirmed that it agreed with the facts as provided by the ombudsman in its memorandum but provided what it referred to as "additional important details".

10. EnergyAustralia considered that it was not required to make a payment to Customer N under section 48A of the Act because Customer N was not considered by EnergyAustralia "to be a hardship/payment difficulties customer", and therefore clauses 111(2) and 33(3) of the code do not apply. Alternatively, EnergyAustralia says that it used its best endeavours to make contact to offer a payment plan compliant with clause 72(1)(a) of the code but was in fact

unable to make a second offer nor assess Customer N's capacity to pay and establish whether she was a hardship/payment difficulties customer due to the lack of engagement by Customer N.

11. Regarding clause 33(3) of the code, EnergyAustralia considered that it had provided sufficient information to Customer N on the Utility Relief Grant Scheme through the various invoices sent in 2015 and early 2016, a reminder notice sent on 3 May 2016, a disconnection warning notice sent on 16 May 2016 and a support letter and final notice each sent on 27 May 2016.

Relevant facts

12. The commission analysed the ombudsman's request for a decision and sought additional information and submissions from EnergyAustralia. Having assessed the matter and the information, documents and submissions received by the commission, the commission makes the factual findings set out below.

Background

13. At all relevant times, EnergyAustralia was the licensee responsible for supply of gas to the premises.

14. On 5 February 2015, EnergyAustralia established an account for the supply of gas at the premises of Customer N. It entered into a Market Retail Contract for the supply of gas at Customer N's premises.

15. EnergyAustralia issued three bills for the supply of gas to Customer N on 10 April 2015, 10 June 2015 and 10 August 2015, totalling $623.16. These bills were not paid by Customer N and there was no contact between EnergyAustralia and Customer N.

16. EnergyAustralia unsuccessfully tried calling Customer N on 28 August 2015 and 1 September 2015.

17. On 2 September 2015, EnergyAustralia was successful in contacting Customer N. EnergyAustralia's contact notes record that Customer N informed EnergyAustralia that she would make a payment of $50 by post on 3 September 2015. Customer N was asked why she could not make full payment and advised EnergyAustralia that she did not have that big an amount of money and she would be getting her pay tomorrow. Customer N also informed EnergyAustralia that she only has part time work and is a single parent. EnergyAustralia set up a payment extension for Customer N.

18. No payment was received by EnergyAustralia from Customer N on 3 September 2015 or at any time throughout the period leading to disconnection.

19. Between 3 September 2015 and 10 November 2015, EnergyAustralia made 16 unsuccessful attempts to contact Customer N. On three occasions messages were left by EnergyAustralia for Customer N to urgently call the company "to avoid disconnection of [her] gas/electricity supply".

20. On 19 November 2015, Customer N called EnergyAustralia and:

    (a) advised EnergyAustralia that her electricity supply had been disconnected (Customer N also had an electricity supply contract with EnergyAustralia) and arranged for it to be reconnected;

    (b) EnergyAustralia advised Customer N that her gas supply was scheduled for disconnection that day;

    (c) Customer N advised EnergyAustralia that she could not make a payment until the following Thursday (26 November 2015) when she would be able to pay $100.00 per fortnight for each fuel;

    (d) Customer N also advised EnergyAustralia that the reason she had not been making payments towards her account was because she had "financial issues" as she is a single parent with 5 children; and

    (e) EnergyAustralia established a $100.00 per fortnight payment plan to commence on 26 November 2015.

21. No payments were received by EnergyAustralia from Customer N in respect of the payment plan. The payment plan was cancelled by EnergyAustralia on 14 December 2015.

22. On 9 March 2016, EnergyAustralia's contact records show that an assessment for disconnection of Customer N's gas supply for non-payment was undertaken within EnergyAustralia's credit and collections team and Customer N's account was "not eligible to be disconnected".

23. EnergyAustralia's contact records for 11 March 2016 show that the outstanding balance on Customer N's gas account at that time was $1,214.90 and the internal advice was that if Customer N called – "please obtain an appropriate payment solution".

24. On 11 April 2016, EnergyAustralia issued a gas account bill to Customer N for $1,351.28 due for payment on 29 April 2016. Of this amount, $1,214.90 was said to be overdue and payable immediately. On the back of EnergyAustralia's bill was the notice under the heading "Contact Information" which said "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including … Utility Relief Grant Scheme…." It should be noted that the back of all the previous bills issued to Customer N by EnergyAustralia (in 2015 on 10 April,10 June, 10 August, 7 October and 7 December and in 2016 on 8 February) all contained the same notice regarding the URGS.

Circumstances leading to the disconnection on 16 June 2016

25. On 3 May 2016, EnergyAustralia issued a reminder notice for the outstanding amount of $1,351.28 based on the bill that it had issued on 11 April 2016. The due date for payment was stated to be 13 May 2016. On the back of this reminder notice, EnergyAustralia gave notice of the URGS. Under the heading "Contact Information" it said "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including … Utility Relief Grant Scheme…."

26. On 16 May 2016, EnergyAustralia issued Customer N with a disconnection warning notice in the amount of $1,351.28. The due date for payment was 26 May 2016. On the front of this disconnection warning notice was a message directly addressed to Customer N which included the following:

> "**Where to get help if you need it**
>
> If you're having trouble paying this bill, just call us on 133 466 and we'll be happy to talk to you about payment options and government funded rebates, concessions and relief schemes that may be available to help you."

On the back of the disconnection warning notice EnergyAustralia's standard notice of the URGS was given. Under the heading "Contact Information" it said "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including … Utility Relief Grant Scheme…."

27. On 27 May 2016, EnergyAustralia:

(a) Issued Customer N a final disconnection warning notice for the outstanding amount of $1,351.28 with a due date for payment of 7 June 2016. This final notice was sent to Customer N by registered post. On the back of the final disconnection warning notice EnergyAustralia's standard notice of the URGS was given. Under the heading "Contact Information" it said "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including … Utility Relief Grant Scheme….".

(b) In addition, attached a further one page sheet to this final disconnection warning notice which was headed "**Services we offer that may help you with paying your energy bills**." Under that heading was a sub-heading **The EnergyAssist Program.** Below that subheading was the following – "As part of the program, we can also:… help you apply for State Government grants…" And under a further heading **"Government Schemes that may also help you with paying your energy bills." –** it said "Some state governments also provide help for customers who are unable to pay their energy

bills due to a short-term financial crisis or emergency… **Utility Relief Grant Scheme (URGS)** – VIC customers only. For more information, visit dhs.vic.gov.au/for-individuals/financial-support/concessions/hardship/utility-relief-an-non-mains-utility-grant-scheme".

(c) Also sent Customer N a separate letter stating "**We may be able to help you with your payments**". Under a heading "**The EnergyAssist Program**" the letter stated: "As part of the program we can also: … help you apply for State Government grants."

(d) Recorded in its contact notes a message from its Credit to its Energy Assist team –to contact them. "Letter has been issued for potential Hardship Indicators identified during DNP process…"

(e) Issued a disconnection for non-payment service order, with disconnection scheduled for 16 June 2016.

Disconnection of gas supply to the premises

28. On 16 June 2016 at 8:59am, the gas supply to the premises of Customer N was disconnected for non-payment of the outstanding balance of $1,351.28.

29. On 16 June 2016 at 9.24am Customer N contacted EnergyAustralia asking for the gas account to be reconnected. Customer N called back at 9:41am asking EnergyAustralia how much she needed to pay to get her gas reconnected. At 1:49pm, the ombudsman contacted EnergyAustralia and advised of a complaint in respect of Customer N.

30. On 17 June 2016 at 2:21pm, EnergyAustralia reconnected the supply of gas to Customer N's premises.

31. The premises were disconnected for a period of 1 day, 5 hours and 22 minutes.

32. EnergyAustralia has not made any wrongful disconnection payment to Customer N.

Relevant obligations

33. In this matter EnergyAustralia's relevant obligations arise from the following:

(a) The Act:

(i) Sub-sections 43(1), (1A) and (2) rendering void any term or condition of EnergyAustralia's contract for the supply of gas to the extent that it is inconsistent with terms and conditions decided by the commission that specify the circumstances in which the supply of gas to premises may be disconnected and require the licensee to provide information specified by the commission about the rights and entitlements of customers, and instead deeming the terms and conditions decided by the commission to be in the contract;

(ii) Sub-section 48A(1) of the Act which deems a condition into EnergyAustralia's retail licence an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection; and

(iii) Sub-sections 48A(3) and (5) which requires payment of the prescribed amount as soon as practicable after the supply of gas is reconnected. Since 1 January 2016, the prescribed amount is $500 for each full day, and a pro rata amount for each part of a day, that the supply of gas is disconnected.

(iv) Sections 48E to 48K dealing with hardship policies and in particular the objects of those provisions (section 48F) and the reference to community expectations that the gas supply will not be disconnected solely because of a customer's inability to pay for the gas supply (section 48I(2)(c)).

(b) EnergyAustralia's gas retail licence:

(i) Clause 6.1 of the licence which requires EnergyAustralia to ensure its contracts for the sale of gas expressly deal with each matter which is the subject of a term or condition of the code.

(ii) Clause 6.3 which requires each term or condition of EnergyAustralia's contracts for the sale of gas to be consistent with each term and condition of the code.

(iii) Clause 6.4 which requires EnergyAustralia to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.

(c) EnergyAustralia's market contract with Customer N, that contained the following terms and conditions:

(i) Clause 8.1 by which EnergyAustralia agrees to meet its obligations as set out in the contract and to comply with the energy laws;

(ii) Clause 13.3 by which EnergyAustralia deals with difficulties in paying, offering option to pay under a payment plan and additional protections that may be available to customers as set out in EnergyAustralia's Hardship Policy incorporated into the contract by reference;

(iii) Clause 17 by which EnergyAustralia agrees to comply with the requirements of the code in arranging for the disconnection of a customer's premises.

(d) The code:

(i) Clauses 107 to 118 deal with and specify the circumstances in which the supply of gas to premises may be disconnected. In particular, the retailer must not arrange disconnection of a customer's premises except in accordance with clauses 111 to 118.

(ii) Clause 111 of the code sets out conditions under which a customer may be disconnected for failure to pay a bill or to adhere to a payment plan. Clause 111(2) of the code applies where a retailer is informed that the customer is experiencing payment difficulties. In those circumstances the retailer must not arrange for the disconnection of the customer's premises unless the retailer has offered the customer two payment plans in the previous 12 months.

(iii) Clause 72 identifies the requirements in *offering a payment plan* and in *establishing a payment plan*.

34. EnergyAustralia's obligations are discussed further below in the reasons.

Decision

35. EnergyAustralia is in breach of a condition of its gas retail licence, deemed into EnergyAustralia's gas retail licence by section 48A of the Act (the deemed licence condition).

36. EnergyAustralia disconnected the supply of gas to Customer N's premises on 16 June 2016 at 8:59am (the disconnection).

37. The disconnection was not in accordance with the deemed licence condition.

38. The supply of gas to Customer N's premises was reconnected on 17 June 2016 at 2:21pm.

39. The supply of gas to Customer N's premises was wrongfully disconnected for a period of 1 day, 5 hours and 22 minutes.

40. Therefore, under the deemed licence condition, EnergyAustralia was obliged to pay to Customer N the prescribed amount of $612 as soon as practicable after the supply of gas was reconnected to Customer N's premises on 17 June 2016.

41. No payment has been made as at 27 June 2018.

Reasons

42. EnergyAustralia's gas retail licence requires that:

    (a) EnergyAustralia not enter into a contract for the sale of gas with a relevant customer unless the terms and conditions of the contract expressly deal with each matter which is the subject of a term or condition of the code (clause 6.1); and

    (b) Each term or condition of EnergyAustralia's contract for the sale of gas to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 6.3); and

    (c) EnergyAustralia must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 6.4).

43. The deemed licence condition requires EnergyAustralia to make a prescribed payment to a customer as soon as practicable after the supply of gas to the customer's premises is reconnected, where it:

    (a) Disconnects the supply of gas to the premises of that customer; and

    (b) Fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected.

44. Clauses 8, 13 and 17 of EnergyAustralia's contract with Customer N effectively specify the circumstances in which the supply of gas to Customer N's premises may be disconnected. Clauses 13 and 17 are subject to compliance with, and incorporate by reference into the contract, the requirements in Part 6 of the code.

45. It is suggested by the ombudsman that there may have been non-compliance with the provisions of clauses 33(3) and 111(2) of the code.

Clause 111(2) of the code – Was Customer N a hardship/payment difficulties customer?

46. EnergyAustralia disputes that Customer N was a hardship/payment difficulties customer. EnergyAustralia's submission correctly identifies the code definition of a "hardship customer" as being "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". However, EnergyAustralia's submission does not address the fact that the application of clause 111(2) of the code is not limited to hardship customers. The provisions

of clause 111(2) of the code also apply to "*a residential customer who has informed the retailer in writing or by telephone that the customer is experiencing payment difficulties*" (and also apply where "*the retailer otherwise believes the customer is experiencing repeated difficulties in paying the customer's bill or requires payments assistance*").

47. Customer N informed EnergyAustralia by telephone on 2 September 2015 that she could not pay her account in full because she was only working part time and is a single parent (see paragraph 17 above). On 19 November 2015, Customer N informed EnergyAustralia that the reason she had not been making payment towards her account was because she had "financial issues" as she was a single parent of five children (see paragraph 20 above).

48. Accordingly, the Commission considers that Customer N was a residential customer for whom the provisions of clause 111(2) of the code applied. That is, EnergyAustralia was obliged to offer Customer N two payment plans in the 12 months before arranging for the disconnection.

49. EnergyAustralia arranged for the disconnection of Customer N's premises on 27 May 2016. Accordingly, for the purposes of clause 111(2) of the code, consideration has to be given to whether EnergyAustralia offered Customer N two payment plans in the period 27 May 2015 to 27 May 2016. On 19 November 2015, EnergyAustralia both offered to, and established with Customer N, a payment plan fulfilling the requirements of a payment plan in clause 72 of the code. However, Customer N did not make any payments under that payment plan as agreed. It was cancelled by EnergyAustralia on 14 December 2015 (see paragraph 21 above).

50. EnergyAustralia did not *offer* Customer N a second payment plan before arranging for the disconnection of gas supply on 27 May 2016. EnergyAustralia's contention in its submission that it had until 19 November 2016 is misconceived in its calculation of the relevant 12 month period. Under clause 111(2) of the code, the relevant 12 month period is the 12 months prior to the date on which the retailer arranges (issues the service order for) the disconnection. It is not 12 months from the date on which the first payment plan is offered or established as EnergyAustralia's submission contends.

51. EnergyAustralia also submits that, in the circumstances of this case, EnergyAustralia "was in fact unable to make a second offer nor assess her capacity to pay and establish whether she was a hardship/payment difficulties customer. This was a direct result of an inability to contact Customer N due to her lack of engagement."

52. Unfortunately, that submission rolls up and confuses different obligations under the code. As stated above at paragraphs 46 to 48, Customer N's conduct had already established that she was a "payment difficulties" customer regardless of whether or not she was a hardship

customer as defined in the code. Further, in order to make an *offer* of a second payment plan compliant with the requirements of clause 72(2) of the code, EnergyAustralia was not required to have regard to Customer N's capacity to pay. That obligation arises not at the time of *offering* a payment plan but rather at the time of *establishing* a payment plan under clause 72(1) of the code.

53. Even if Customer N was not engaging with EnergyAustralia it could have sent Customer N a second offer of a payment plan (based on its knowledge of Customer N's circumstances as at November 2015) by registered post. EnergyAustralia had itself used this method with the final disconnection notice on 27 May 2016 (see paragraphs 27(a) and (b) above).

54. The *offer* of a second payment plan by EnergyAustralia required EnergyAustralia to inform Customer N of:

    (a) the duration of the plan;

    (b) the amount of each instalment payable under the plan, the frequency of instalments and the date by which each instalment must be paid; and

    (c) the number of instalments to pay her arrears

    (d) if the customer is to pay in advance—the basis on which instalments are calculated.

    (see clause 72(2) of the code). Customer N's capacity to pay would have become relevant if and when such a proposed second payment plan was in fact being established.

55. In conclusion, EnergyAustralia did not comply with the requirements of clause 111(2) of the code, and clauses 8.1(a), 13.3(c) and 17.1 of its contract with Customer N, in disconnecting the supply of gas to Customer N's premises on 16 June 2016.

56. EnergyAustralia was not entitled to disconnect the supply of gas to Customer N at the premises on 16 June 2016. It breached its deemed licence condition by doing so.

Other observations

Clause 33(3) of the code – Did Customer N have to be informed again about the utility relief grant scheme prior to disconnection

57. The ombudsman's referral of this matter regarding the application of section 48A of the Act, also queried EnergyAustralia's compliance with clause 33(3) of the code. In view of the commission's conclusion regarding EnergyAustralia's non-compliance with clause 111(2) of the code and therefore the breach of EnergyAustralia's deemed licence condition, it is strictly not necessary for the commission to deal with the clause 33(3) issue. However, to assist the ombudsman and retailers the commission provides the following comments.

58. Clause 33(3) is in Part 3 of the code which is headed Customer Retail Contracts and Division 4 which is headed Customer retail contracts – billing. It is not a term or condition "specifying the circumstances in which the supply of gas to premises may be disconnected".

59. Accordingly, if there was non-compliance with the requirements of clause 33(3) of the code, that may be a breach of EnergyAustralia's licence conditions. However, such a breach would not satisfy the requirements for the condition at sub-section 48A(1)(b) of the Act. Therefore, there would not be any breach of the deemed licence condition.

60. EnergyAustralia's submission notes that it complied with the requirements of clause 33(3) and that clause 33(3) of the code does not specify timing or content requirements for the provision of the required information. If it had been necessary, the commission would find that EnergyAustralia had informed Customer N about the utility relief grant scheme in compliance with the requirements of clause 33(3) of the code (see paragraphs 24 to 27 above).

Commission's guidance on the status of "staff advice".

61. EWOV's request for a decision on this matter also referred to "staff advice" regarding the offer of a second payment plan. In its submission, EnergyAustralia took exception to EWOV's application of the staff advice, in particular what it saw as the "retrospective application of staff advice to retailer conduct that occurred before the advice was issued, and in particular, where that advice is not made available to retailers".

62. The staff advice expressly states that it is the opinion of the commission staff and does not prejudice any future consideration of the matter by the commission. The commission does not need to have, and has not had, regard to the staff advice in determining the requirements of an offer of a payment plan. Rather, its current decision is based on the requirements of clause 72(2) of the code (see paragraphs 54 to 56 above).

Enforcement

63. EnergyAustralia has breached its retail licence by failing to make a payment of $612 as soon as practicable after the reconnection of the supply of gas to Customer N's premises on 17 June 2016.

64. EnergyAustralia is required to rectify the contravention by making the payment.

65. EnergyAustralia should advise the commission in writing when the payment has been made.

66. If EnergyAustralia is unable to make payment it should inform the commission in writing within five business days of receiving this decision.

67. If the payment is not made within five business days of EnergyAustralia receiving this decision, the commission may take enforcement action against EnergyAustralia under Part 7 of the *Essential Services Commission Act* 2001 (Vic).