

Customer H and Dodo Power & Gas – Decision and Reasons

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

10 July 2019

Commissioners:

Ms Kate Symons, Acting Chairperson, and
Mr Simon Corden, Commissioner.

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The referral

1. The Energy and Water Ombudsman (Victoria) (the ombudsman) has made a referral to the Essential Services Commission (the commission) asking the commission to advise on the interpretation of section 48A(1A) of the Gas Industry Act 2001 (Vic) (the Act).
2. The factual circumstances of the referral concern a disconnection by Dodo Power & Gas of the gas supply to the premises of Customer H at [address redacted] (the premises). The gas supply to the premises was disconnected from 12:10pm on 8 May 2018 to 3:02pm on 11 September 2018 (a period of 126 days, 2 hours and 52 minutes).
3. The parties agree that the disconnection of gas to the premises was wrongful. The issue the commission has been asked to provide guidance on is how the compensation amount should be calculated.

Issues for decision

4. Dodo Power & Gas and the ombudsman agree that the disconnection was wrongful under section 48A of the Act, and that consequently Dodo Power & Gas has an obligation to make a wrongful disconnection compensation payment to Customer H in respect of that disconnection as a condition of its gas retail licence.
5. The issue which the commission has been asked to provide guidance on is what amount of compensation Dodo Power & Gas should pay to Customer H.

The ombudsman's referral

6. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman noted it was agreed between the parties that Dodo Power & Gas did not comply with the terms and conditions of its contract with Customer H that specified the circumstances in which the supply of gas to Customer H's premises may be disconnected.
7. The ombudsman asked the commission to advise 'whether the [compensation amount] should be capped in this instance, despite Customer H contacting Dodo Power & Gas within 14 days from the date of disconnection'.
8. The commission has interpreted this question as being to determine how the wrongful disconnection payment should be calculated.

Dodo Power & Gas's submissions

9. Dodo Power & Gas was invited to provide any information and documents to which the commission should have regard. Dodo Power & Gas made submissions for the commission's consideration.
10. In its submission Dodo Power & Gas stated that it 'acknowledge[s] Customer H was wrongfully disconnected'. Dodo Power & Gas submitted that 'the decision in this instance is not whether there was a wrongful disconnection, this has been agreed, however, the disagreement relates to the capping requirement for wrongful disconnection'.

Not seeking reconnection

11. Dodo Power & Gas acknowledged that Customer H contacted it on the day of disconnection and that during this call Customer H informed it that there was no gas supply at the premises.

12. However, Dodo Power & Gas submitted that during the call Customer H said that she was not seeking reconnection and was not prepared to remedy the outstanding debt to Dodo Power & Gas with a sustainable arrangement which was acceptable to Dodo Power & Gas.

Clause 121 of the Energy Retail Code

13. In its submission, Dodo Power & Gas noted the repeated payment difficulties experienced by Customer H, and that Dodo Power & Gas and Customer H had not entered into an arrangement for payment.
14. Dodo Power & Gas also referred to clause 121 of the Energy Retail Code version 11a (the code) and noted that Customer H and Dodo Power & Gas were not able to resolve the cause of disconnection.

Relevant facts

15. The commission considered the ombudsman's request for guidance on how the compensation amount should be calculated and sought submissions from Dodo Power & Gas. The relevant facts from the ombudsman's referral are set out below.

Disconnection of gas supply to the premises

16. On 8 May 2018 at 12:10pm, the gas supply to Customer H's premises was disconnected.
17. On 8 May 2018 at 5:24pm, Customer H called Dodo Power & Gas. During this call:
 - Customer H informed Dodo Power & Gas that there was no gas supply at her premises.
 - Dodo Power & Gas advised Customer H that it could arrange reconnection, but it required an upfront payment of at least \$1,000 to do so.
 - Customer H advised this was unaffordable and that she could not pay anything that day.
 - Customer H agreed to a payment plan of \$50 per fortnight commencing the following week, and understood that the supply of gas to her premises would not be reconnected.
18. On 11 September 2018 at 3:02pm, the supply of gas to Customer H's premises was reconnected.
19. The supply of gas to Customer H's premises was disconnected for a period of 126 days, 2 hours and 52 minutes.
20. As at 10 July 2019, Dodo Power & Gas has not made any wrongful disconnection payment to Customer H.

Relevant obligations

21. In this matter the relevant obligations arise from the following:

(a) The Act:

- (i) Section 48A(1) of the Act deems a condition into Dodo Power & Gas's gas retail licence requiring Dodo Power & Gas to make a payment of the prescribed amount to a relevant customer if it disconnects the supply of gas to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the supply of gas to those premises may be disconnected.
- (ii) Section 48A(1A) of the Act provides that, where a customer does not notify the licensee of the disconnection within 14 days of the date of disconnection, the maximum payment is the prescribed capped amount.
- (iii) Section 48A(3) of the Act requires such payment to be made as soon as practicable after the supply of gas is reconnected to the premises of the customer.
- (iv) From 1 January 2016, section 48A(5) of the Act provides that the prescribed amount is \$500.00 for each whole day and a pro rata amount for any part of a day that the gas supply is disconnected.

(b) Dodo Power & Gas's gas retail licence:

- (i) Clause 8.1 of the licence requires Dodo Power & Gas 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 8.3 requires each term or condition of Dodo Power & Gas's contracts for the sale of gas to be consistent with each term and condition of the code.
- (iii) Clause 8.4 requires Dodo Power & Gas to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.

(c) Dodo Power & Gas's market retail contract, established with Customer H:

(i) Clause 13.3 which states, in part:

'We may only disconnect your Supply Address if we have first complied with any pre-conditions to disconnection specified in Energy Laws. Generally, Energy

Laws require us to provide you with advance warning notice of the disconnection. However, we are not required to provide a warning notice prior to disconnection in certain circumstances (for example, where there has been illegal or fraudulent use of energy at your Supply Address or where there is an emergency or health and safety issue).'

- (ii) Clause 26 which defines Energy Laws as: 'any acts, regulations, by-laws, rules, orders, licenses, guidelines, approvals or codes relating to the supply of Energy in your state or territory as may be in force and as amended from time to time.'

Decision

22. If Dodo Power & Gas wrongfully disconnected the supply of gas to Customer H's premises as it concedes to the ombudsman and also concedes in its submission to the commission, then it is in breach of a condition of its gas retail licence, deemed under section 48A of the Act.
23. Dodo Power and Gas disconnected the supply of gas to Customer H's premises at 12:10pm on 8 May 2018.
24. The supply of gas to Customer H's premises was reconnected at 3:02pm on 11 September 2018.
25. Customer H notified Dodo Power & Gas of the disconnection of the supply of gas to her premises in the telephone call at 5:24pm on 8 May 2018. This was within 14 days of the disconnection. Therefore, the amount payable to Customer H by Dodo Power & Gas is not subject to the cap specified in section 48A(1A) of the Act.
26. The supply of gas to Customer H's premises was wrongfully disconnected for a period of 126 days, 2 hours and 52 minutes.
27. Consequently, the prescribed amount of \$63,060.00 is payable as soon as practicable after the supply of gas was reconnected to Customer H's premises on 11 September 2018.
28. As at 10 July 2019, Dodo Power & Gas has not made any wrongful disconnection payment to Customer H in respect of this disconnection.

Reasons for decision

29. As noted above, Dodo Power & Gas and the ombudsman have agreed that the disconnection of the supply of gas to the premises of Customer H was wrongful.
30. Accordingly, the commission has only addressed the question it has been asked. That being what amount of compensation Dodo Power & Gas should pay to Customer H.

Notification of disconnection

31. Section 48A(1A) of the Act provides that if a customer does not notify a retailer of the disconnection within 14 days, the maximum payment is the prescribed capped amount.
32. This section of the Act makes no reference to circumstances where a customer contacts a retailer but does not request reconnection.
33. Dodo Power & Gas has submitted that because Customer H stated she was not seeking reconnection, the compensation amount should be capped up to when she contacted Dodo Power & Gas, that being 5 hours and 14 minutes after she was disconnected.
34. The commission does not have discretion in deciding the amount of the wrongful disconnection payment. Our task is to apply the statutory criteria to calculate the amount of the wrongful disconnection payment. As stated above, the Act allows for two situations when calculating a wrongful disconnection compensation amount. The first is where a customer does not notify the retailer of the disconnection within 14 days and the second is where a customer does notify the retailer of the disconnection within 14 days. In the first circumstance the compensation amount will be subject to a legislative cap, and in the second circumstance it will not.
35. Customer H called Dodo Power & Gas at 5:24pm on 8 May 2018. During this call she informed Dodo Power & Gas that there was no gas supply at her premises. Reconnection of the gas supply was discussed during this call and Customer H was advised that, in order to be reconnected, she would have to make a payment of \$1,000. Dodo Power & Gas concedes that the disconnection was wrongful and in the case of wrongful disconnection, the Act prescribes a payment calculated in respect of the entire period that supply to the premises was disconnected. The Act does not allow an option to limit the wrongful disconnection payment to the date that the retailer informs the customer how to get their supply reconnected.
36. The one circumstance in which the Act sets a limit on the wrongful disconnection payment is where the customer does not contact the retailer within 14 days of the disconnection to notify

the retailer of the disconnection. The Act does not contemplate limiting the amount of the wrongful disconnection payment in any other circumstance.

37. Given that Customer H notified Dodo Power & Gas that there was no gas supply at her premises within 14 days of the disconnection, the payment is calculated from the time of disconnection until the time of reconnection. It is not subject to the cap specified in section 48A(1A) of the Act.
38. In response to Dodo Power & Gas's argument about clause 121 of the code, the commission notes that clause 121 relates to circumstances where the retailer has arranged for disconnection and the customer then requests reconnection. This is irrelevant to the question asked of the commission, that being whether the compensation amount should be subject to a cap. The requirement for compensation to be capped under section 48A(1A) of the Act is that Customer H did not notify Dodo Power & Gas of the disconnection within 14 days of the disconnection. Customer H did notify Dodo Power & Gas within 14 days of the disconnection, and as such the wrongful disconnection compensation amount is not subject to any legislative cap.

Enforcement

39. Dodo Power & Gas and the ombudsman agree that the disconnection was wrongful under section 48A of the Act, and that consequently Dodo Power & Gas has an obligation to make a wrongful disconnection compensation payment to Customer H in respect of that disconnection as a condition of its gas retail licence. Consequently, Dodo Power & Gas has breached its gas retail licence by failing to make a payment of \$63,060.00 to Customer H as soon as practicable after the reconnection of the supply of gas to Customer H's premises on 11 September 2018.
40. Dodo Power & Gas should rectify the contravention by making the payment.
41. Dodo Power & Gas should advise the commission in writing when the payment has been made.
42. If Dodo Power & Gas is unable to make the payment, it should inform the commission in writing within five business days.
43. If the payment is not made within five business days of Dodo Power & Gas receiving this decision, the commission may take enforcement action against Dodo Power & Gas under Part 7 of the Essential Services Commission Act 2001 (Vic).