

**ESSENTIAL SERVICES COMMISSION**  
**RE: Customer W and EnergyAustralia**  
**Application of s40B of the *Electricity Industry Act 2000* (Vic) (“the Act”) –**  
**Compensation for wrongful disconnection.**

**DECISION AND REASONS**

Dr Ron Ben-David Chairperson,  
 Mr Richard Clarke Commissioner, and  
 Ms Kate Symons Commissioner

**The Complaint**

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) (“EWOV”) to the Commission of a complaint by Customer W.
2. The complaint is about the application of s 40B of the Act for an alleged wrongful disconnection by EnergyAustralia of Customer W’s electricity supply at [address redacted] (“the premises”), from 1:55pm on 17 September 2015 to 6:15pm on 17 September 2015 (a period of 4 hours and 20 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 retail licence regarding an obligation to make a prescribed payment to Customer W in circumstances where:
  - (a) EnergyAustralia disconnected the supply of electricity to the premises of Customer W; and
  - (b) EnergyAustralia failed to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.
 If so, then under sub-s40B (3) of the Act, EnergyAustralia was obliged to make the prescribed payment to Customer W as soon as practicable after the supply of electricity was reconnected to Customer W’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 electricity to the premises of Customer W (see paragraph 31 below);
  - (b) Was supply of electricity to Customer W’s premises reconnected, and if so, when (see paragraph 33 below);
  - (c) If EnergyAustralia did disconnect the supply of electricity to Customer W’s premises, for what period of time did the disconnection occur (see paragraph 34 below);
  - (d) What was the contract between EnergyAustralia and Customer W (see paragraphs 11 to 13 below);
  - (e) What were the terms or conditions of that contract which specified the circumstances in which EnergyAustralia may disconnect the supply of electricity to Customer W’s premises (see paragraphs 11 to 13 and 47 below);

- (f) Whether or not EnergyAustralia failed to comply with *those* terms and conditions (see paragraphs 47, 58 and 59 below);
  - (g) Was Customer W entitled to receive payment of a prescribed amount because of any wrongful disconnection by EnergyAustralia under s40B of the Act (see paragraphs 42 and 43 below);
  - (h) If so, when was EnergyAustralia obliged to make the payment of the prescribed amount (see paragraphs 46 and 64 below);
  - (i) Has EnergyAustralia made the payment to Customer W in accordance with its deemed licence condition under s40B of the Act (see paragraphs 35 and 44 below);
  - (j) If EnergyAustralia has not made the payment what are the consequences (see paragraphs 64 to 68 below).
5. Through its formal letter of referral and the memorandum accompanying the letter EWOV acknowledged that EnergyAustralia had demonstrated that it had complied with clauses 110 and 111(1)(e) of the Energy Retail Code (Version 11) (“the Code”) prior to the disconnection. However, EWOV considered that it was unclear whether EnergyAustralia had complied with clauses 111(2) and 33(3) of the Code. Regarding clause 111(2), this was because EWOV considered that EnergyAustralia had not offered Customer W any payment plans in the 12 months prior to the disconnection due to the lack of contact between Customer W and EnergyAustralia. Regarding clause 33(3) it was because EWOV considered that the information on concessions provided to Customer W in EnergyAustralia’s Welcome Pack letter of 27 August 2014 “does not appear specific to the customer’s circumstances in relation to the disconnection” on 17 September 2015.
6. 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.
7. EnergyAustralia said it generally agreed with the chronology of events as presented by EWOV in its referral memorandum. However, EnergyAustralia provided additional important details relevant to the disconnection assessment.
8. To justify its disconnection, EnergyAustralia has submitted that at the time of arranging disconnection it no longer considered Customer W to be a hardship/payment difficulties customer. Further, EnergyAustralia was unable to provide offers of payment plans wholly due to Customer W’s lack of engagement. EnergyAustralia considers that it complied with the requirements of clause 33(3) of the Code dealing with payment difficulties and an obligation to inform the customer about the Utility Relief Grant Scheme. EnergyAustralia noted that the Code does not specify timing/content requirements for the provision of information under clause 33(3).

## Relevant Facts

9. From the Commission's investigation of the matter and information and documents received by the Commission, the Commission makes the factual findings set out below.

### *Background*

10. At all relevant times, EnergyAustralia was the licensee responsible for supply of electricity to the premises.
11. In September 2010 EnergyAustralia established an account for the supply of electricity at the premises to Customer W. It entered into a Market Retail Contract for the supply of electricity at Customer W's premises. Clause 13 of that contract deals with paying bills and sub-clause 13.3 deals with difficulties in paying bills. Clauses 17 to 19 of that contract contain the terms and conditions specifying the circumstances in which the supply of electricity to the premises may be disconnected. Both clauses 13 and 17 of the contract have incorporated into the contract other terms and conditions by reference. These are EnergyAustralia's Customer Hardship Policy and the provisions of the Code.
12. Relevantly, sub-clause 13.3(a) and (b) provide that:
- (a) "If you're a residential customer and have told us that you have difficulty paying your bill, we must offer you the option of paying your bill under a payment plan. However, we are not obliged to do so if you've had 2 payment plans cancelled due to non-payment in the previous 12 months..."; and
  - (b) "Additional protections may be available to you under our customer Hardship Policy and under the National Energy Retail Law and the Rules if you're a customer experiencing payment difficulties due to hardship. A copy of our Customer Hardship Policy is available on our website."
13. Relevantly, sub-clause 17.1 provides that "subject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises..."; and sub-clause 17.2 similarly provides that "Before disconnecting your premises, we must comply with the relevant notice requirements and other provisions in the Rules..."
14. Between 27 July 2010 and 4 October 2011, Customer W made six payments to the account, totalling \$580.00.
15. For a two and a half year period between 9 November 2011 and 8 May 2014, EnergyAustralia issued 11 bills. Customer W did not make any payments to her electricity account during this period. The outstanding balance on her electricity account therefore increased to \$19,592.13.
16. On 28 May 2014 at 10:30am EnergyAustralia unsuccessfully attempted to make contact with Customer W by a representative attending at the premises. The husband informed the representative that they were going to make a payment when possible. A letter was left with Customer W's husband.

17. On 28 July 2014, Customer W called EnergyAustralia. During this call:
  - (a) Customer W made a \$102.13 payment towards her electricity account; and
  - (b) At Customer W's request to set up a payment arrangement because of her financial hardship, EnergyAustralia placed Customer W onto its hardship program and established a payment plan of \$100.00 per week to commence on 8 August 2014; and
  - (c) EnergyAustralia advised Customer W about the Utility Relief Grant Scheme and sent her an application form.
18. Between 12 August 2014 and 2 September 2014, Customer W made three payments to her electricity account totalling \$300.00.
19. On 25 September 2014, Customer W received a Utility Relief Grant of \$500.00. This was paid directly to EnergyAustralia and reduced her outstanding electricity account balance to \$20,277.45.
20. On 2 October 2014, EnergyAustralia removed Customer W from its hardship program and sent her a letter advising her of that decision.
21. On 16 October 2014, EnergyAustralia cancelled Customer W's payment plan of 28 July 2014.
22. EnergyAustralia removed Customer W from its hardship program and cancelled the payment plan in October 2014, because Customer W failed to make the payments in accordance with the payment plan. Following this failure to pay, EnergyAustralia changed its view and consider that Customer W did not have a genuine intention to make payment when she had capacity to do so and therefore was not a hardship customer.

*Circumstances leading to the disconnection in September 2015*

23. EnergyAustralia made a number of unsuccessful attempts to contact Customer W before raising a service order for disconnection:
  - (a) One phone call on each of 11, 13, and 25 March 2015;
  - (b) One phone call on each of 15 and 27 May 2015;
  - (c) One phone call each on 3, 4 and 24 June 2015;
  - (d) An SMS on 5 June 2015;
  - (e) One phone call on 1 July 2015;
  - (f) Multiple phone calls (to different contact numbers) on 17 July 2015;
  - (g) An SMS on 6 August 2015;
  - (h) Multiple phone calls (to different contact numbers) on 25 August 2015; and
  - (i) 3 calls to 3 different contact numbers on 3 September 2015, prior to the service order for disconnection being raised on the same date.
24. On 11 May 2015 EnergyAustralia issued a bill to Customer W for the supply of electricity to the premises for the period 7 February 2015 to 8 May 2015. The total amount outstanding and due on the bill was \$22,307.24 with a due date of 28 May

2015. 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...."
25. On 1 June 2015 EnergyAustralia sent to Customer W a reminder notice for the outstanding balance of \$22,307.24 (with a due date of 12 June 2015). On the front of the reminder notice EnergyAustralia placed the following heading – "Where to get help if you need it". Underneath that heading was the following: "If you are having trouble paying this bill, ..., just call us on 133 466 and we'll be happy to talk to you about payment options that may help you." On the back of the reminder notice was the following: "Payment Arrangements 133 466 Please contact our Customer Service Advisers to discuss payment assistance and concessions including ... Utility Relief Grant Scheme...."
26. On 4 June 2015 EnergyAustralia sent Customer W a letter with the bold heading "**We may be able to help you with your payments**". Relevantly, the letter also said:
- (a) "We'd like to help you manage your electricity debt. Our Hardship Assistance Program lets you set up a payment plan to help pay off your debt and also cover future bills. This lets you pay what you owe in manageable instalments."; and
  - (b) As part of the program, we can:  
help you apply for State Government grants..."; and
  - (c) "**To accept the offer**  
Just **call us on 1800 558 643** within 14 days of receiving this letter..."; and
  - (d) "When you call, we'll assign you a case manager who will work with you to put together a payment plan that suits you."; and
  - (e) "**If you don't call**  
If you don't call within 14 days and you don't pay the total outstanding amount, we may have to start the disconnection process."
27. On 15 June 2015 EnergyAustralia issued a Disconnection Warning Notice to Customer W for her overdue electricity account of \$22,307.24 (with a due date of 25 June 2015). On the front of this warning notice was the following heading "**Where to get help if you need it**". Underneath that heading was the following: "If you are 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 was the following: "**Payment Arrangements 133 466** Please contact our Customer Service Advisers to discuss payment assistance and concessions including ... Utility Relief Grant Scheme."
28. On 3 September 2015 EnergyAustralia sent to Customer W by registered post a final Disconnection Warning Notice for the outstanding amount of \$22,307.24 (with a due date of 15 September 2015). Information provided by EnergyAustralia on the front and back of this notice addressed to Customer W included the following:

- (a) “Unless we can resolve this matter by 15 September 2015 we’ll **disconnect your supply without any more warnings...**”; and
  - (b) “If you’re having trouble paying this bill, just call us on 133 466. We’ll be happy to talk to you about payment plan options and government funded charged rebates, concessions and relief schemes that may be available to you.”; and
  - (c) “**Payment Arrangements 133 466**  
Please contact our Customer Service Advisers to discuss payment assistance and concessions including ...  
Utility Relief Grant Scheme”.
29. About mid-afternoon on 3 September 2015, EnergyAustralia raised a service order for disconnection of supply of electricity to Customer W’s premises.
30. There was no contact between Customer W and EnergyAustralia in the thirteen and a half month period from about 28 July 2014 to 17 September 2015.

*Disconnection of electricity supply to the premises*

31. At 1:55 pm on 17 September 2015 EnergyAustralia disconnected the electricity supply at Customer W’s premises for non-payment of the outstanding balance of \$22,307.24
32. At 3:54 pm Customer W called EnergyAustralia regarding the disconnection of her electricity supply. She was informed that the supply was disconnected because of non-payment. Customer W made a payment of \$400 to her account. A payment arrangement was agreed between EnergyAustralia and Customer W for her to pay \$750 on a fortnightly basis and EnergyAustralia advised Customer W of the likely timeframes for reconnection of the electricity supply to her premises.
33. At 6:15 pm on 17 September 2015 EnergyAustralia reconnected the electricity supply to Customer W’s premises.
34. The premises were disconnected for a period of 4 hours and 20 minutes.
35. EnergyAustralia has not made any wrongful disconnection payment to Customer W.

**Relevant Obligations**

36. In this matter EnergyAustralia’s relevant obligations arise from the following:
- (a) Sections of the Act: sub-sections 36(1) and (2) – rendering void any term or condition of EnergyAustralia’s contract for the supply of electricity to the extent that it is inconsistent with terms and conditions decided by the Commission that specify the circumstances in which the supply of electricity 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; section 40B of the Act – deeming 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; sections 41 to 46A dealing with hardship policies and in particular the objects of those provisions (s42) and the reference to community expectations that the electricity supply will not be disconnected solely because of a customer’s inability to pay for the electricity supply (s45(2)(c)).

- (b) EnergyAustralia’s Retail Licence (clause 7.1- requiring EnergyAustralia to ensure its contracts for the sale of electricity expressly deal with each matter which is the subject of a term or condition of the Code; clause 7.3 – requiring each term or condition of EnergyAustralia’s contracts for the sale of electricity to be consistent with each term and condition of the Code; and clause 7.4 – requiring EnergyAustralia to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer);
- (c) EnergyAustralia’s market contract with Customer W (clause 8.1 – EnergyAustralia agrees to meet its obligations as set out in the contract and to comply with the energy laws; clause 13.3 – difficulties in paying, offering option to pay under a payment plan and additional protections may be available to customers as set out in EnergyAustralia’s Hardship Policy; clause 17 – disconnection of supply is subject to compliance with the requirements of the Code; and clause 18 – reconnection after disconnection);
- (d) EnergyAustralia’s Hardship Policy which effectively states that EnergyAustralia will inform customers experiencing hardship about government grants and relevantly including the URGS (clauses 7.1 and 7.1.6)
- (e) The Code: clauses 33(3) and (6) requiring EnergyAustralia to provide information to a hardship customer or a customer experiencing payment difficulties about the availability of relief schemes including the URGS; clause 71B identifying that a customer in financial hardship is a residential customer who has the intention but not the capacity to make payment within the timeframe required by the retailer’s payment terms; clause 72 identifying the requirements in *offering a payment plan* and, also, in *establishing a payment plan*; clauses 107 to 118 – dealing with and specifying the circumstances in which the supply of electricity to premises may be disconnected). In particular, that the retailer must not arrange disconnection of a customer’s premises except in accordance with clauses 111 to 118. And clause 111 dealing with disconnection for not paying a bill.

37. EnergyAustralia’s obligations are discussed further below in the reasons.

## Decision

38. EnergyAustralia is in breach of a condition of its electricity retail licence, deemed into EnergyAustralia's Retail Licence by s40B of the Act ("the deemed licence condition").
39. EnergyAustralia disconnected the supply of electricity to Customer W's premises at 1:55pm on 17 September 2015 (the disconnection).
40. The disconnection was not in accordance with the deemed licence condition.
41. The supply of electricity to Customer W's premises was reconnected at 6:15pm on 17 September 2015.
42. The supply of electricity to Customer W's premises was wrongfully disconnected for a period of 4 hours and 20 minutes.
43. Therefore, under the deemed licence condition, EnergyAustralia was obliged to pay to Customer W the prescribed amount of \$45.
44. No payment has been made as at 9 May 2018.

## Reasons

45. EnergyAustralia's retail licence effectively requires that:
  - (a) EnergyAustralia not enter into a contract for the sale of electricity 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 7.1); and
  - (b) Each term or condition of EnergyAustralia's contract for the sale of electricity to a relevant customer must not be inconsistent with the terms or conditions of the Code (clause 7.3); and
  - (c) EnergyAustralia must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
46. The deemed licence condition requires EnergyAustralia to make a prescribed payment to a customer as soon as practicable after the supply of electricity to the customer's premises is reconnected where it:
  - (a) Disconnects the supply of electricity 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 electricity to those premises may be disconnected.
47. Clauses 17 to 19 of EnergyAustralia's contract with Customer W effectively specify the circumstances in which the supply of electricity to Customer W's premises may be disconnected. Clauses 17.1 and 17.2 are subject to compliance with, and incorporate by reference into the contract, the requirements in Part 6 of the Code.



As noted at paragraph 5 above, it is accepted that EnergyAustralia complied with the relevant requirements of clauses 110 and 111(1)(e) of the Code.

48. It is suggested by EWOV 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 W a hardship/payment difficulties customer?*

49. On 28 July 2014 EnergyAustralia was informed by Customer W that she was suffering financial hardship. EnergyAustralia accepted that Customer W was a hardship customer and put her onto its Hardship Program. EnergyAustralia also informed Customer W about the Utility Relief Grant Scheme and sent her an application form. (See paragraph 17 above)
50. Customer W applied for and received the Utility Relief Grant of \$500 paid directly to EnergyAustralia on 25 September 2014 (see paragraph 19 above). Notwithstanding those objective facts of Customer W's financial hardship, without any further contact with Customer W, a week later, on 2 October 2014 EnergyAustralia changed its view and formed, for reasons not made clear to the Commission:
- (a) an adverse view regarding Customer W's intention; and
  - (b) a positive view about Customer W's capacity to pay her bill
- and removed her from its Hardship Program only because Customer W had not made all the payments in accordance with the payment plan established on 28 July 2014.
51. Leaving aside the reasonableness or otherwise of EnergyAustralia's actions in unilaterally removing Customer W from its Hardship Program, Customer W was clearly a residential customer who had informed EnergyAustralia that she was experiencing payment difficulties. There was no further contact between EnergyAustralia and Customer W until 17 September 2015 (though numerous contact attempts were made by EnergyAustralia – see paragraph 23). Accordingly, before EnergyAustralia could disconnect the supply of electricity to Customer W's premises it had to comply with the requirements of clause 111(2) of the Code.
52. Clause 111(2) of the Code required EnergyAustralia to not arrange for disconnection of Customer W's premises unless EnergyAustralia had offered Customer W two payment plans in the previous 12 months, and:
- (a) Customer W has agreed to neither of them; or
  - (b) Customer W has agreed to one but not the other of them but the plan to which Customer W agreed has been cancelled due to non-payment by Customer W; or
  - (c) Customer W had agreed to both payment plans but the plans have been cancelled due to non-payment by Customer W.
53. EnergyAustralia did not offer Customer W any payment plan in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 3 September 2015 (see paragraph 29 above). There was no offer of a payment plan to Customer W in the period 3 September 2014 to 3 September 2015. The best that

could be said is that Customer W was on a payment plan with EnergyAustralia as at 3 September 2014, which was cancelled by EnergyAustralia on 16 October 2014 due to non-payment by Customer W. Arguably, that could satisfy part of the requirements of clause 111(2)(b) as set out at paragraph 52(b) above. But even there the offer of that payment plan was not in the 12 months prior to arranging for disconnection (that plan was offered and agreed to with Customer W on 28 July 2014). There was no offer of a second payment plan.

54. Although it is outside the 12 month period prior to arranging for disconnection, it should be noted that, while the letter of 4 June 2014 from EnergyAustralia can properly be described as an offer to help Customer W with her payments and even an offer to Customer W to pay her bills by instalments for the purposes of clause 111(1)(b)(ii) of the Code, it is not an offer of a payment plan for the purposes of clause 111(2) (see paragraph 26 above).
55. An offer of a payment plan for the purposes of clause 111(2) of the Code required EnergyAustralia to inform Customer W 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.
 (see clause 72(2) of the Code).
56. There was no such offer of a payment plan by EnergyAustralia to Customer W.
57. There was no or no reasonable basis for EnergyAustralia to form a view that Customer W was not a customer who had informed them that she is experiencing payment difficulties without having had any further contact with Customer W since 28 July 2014. That is so even if EnergyAustralia unilaterally changed its view about Customer W's entitlement to be on EnergyAustralia's Hardship Program.
58. Accordingly, EnergyAustralia did not comply with the requirements of clause 111(2) of the Code and clauses 17.1 and 17.2 of its contract with Customer W.
59. EnergyAustralia was not entitled to disconnect the supply of electricity to Customer W at the premises on 17 September 2015. It breached its deemed licence condition by doing so.

### **Other considerations**

*Clause 33(3) of the Code – Did Customer W have to be informed again about the URGS prior to disconnection*

60. EWOV's referral of this matter regarding the application of s40B 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 a 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 EWOV and retailers the Commission provides the following comments.

61. 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 electricity to premises may be disconnected”.
62. 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 40B(1)(b) of the Act. Therefore, there would not be any breach of the deemed licence condition.
63. 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 W about the URGS in compliance with the requirements of clause 33(3) of the Code, (see paragraphs 17 and 19 and 24 to 28 above). Further, and in any event, as Customer W had received the URGS on 25 September 2014 (see paragraphs 17 and 19 above), she would only be able to receive a utility relief grant for electricity once in a two year period (if eligible at the time of application) – not until 2016.

#### **Enforcement**

64. EnergyAustralia has breached its retail licence by failing to make a payment of \$45 as soon as practicable after the reconnection of the supply of electricity to Customer W’s premises on 17 September 2015.
65. EnergyAustralia is required to rectify the contravention by making the payment.
66. EnergyAustralia should advise the Commission in writing when the payment has been made.
67. If EnergyAustralia is unable to make payment it should inform the Commission in writing within five business days.
68. If the payment is not made within five business days, the Commission may take enforcement action against EnergyAustralia under Part 7 of the *Essential Services Commission Act 2001* (Vic).

Dated: 9 May 2018

Essential Services Commission

RM: C/18/10238