

Customer V and Red Energy – Decision and Reasons

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

10 April 2019

Commissioners:

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

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The complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) (the ombudsman) to the commission of a complaint by Customer V.
2. The complaint is about the application of section 48A of the Gas Industry Act 2001 (Vic) (the Act) for an alleged wrongful disconnection by Red Energy Pty Ltd (Red Energy) of Customer V's gas supply at [address redacted] (the premises), from 10:05am on 29 May 2017 to 4:30pm on 15 August 2017 (a period of 78 days, 6 hours and 25 minutes).

Issues for decision

3. The issue for decision by the commission on the complaint is whether or not Red Energy has breached a condition of its gas retail licence regarding an obligation to make a prescribed payment to Customer V in circumstances where:
 - (a) Red Energy disconnected the supply of gas to the premises of Customer V; and
 - (b) Red Energy 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 section 48A(3) of the Act, Red Energy was obliged to make the prescribed payment to Customer V as soon as practicable after the supply of gas was reconnected to Customer V's premises.

The ombudsman's referral

4. Through its formal letter of referral and the accompanying memorandum, the ombudsman acknowledged that Red Energy had demonstrated that it had complied with clauses 109, 110 and 111(1)(e) of the Energy Retail Code (version 11) (the code) with respect to the disconnection. However, the ombudsman considered that it was unclear whether Red Energy had complied with clause 111(2) of the code.
5. Regarding clause 111(2) of the code, the ombudsman noted, and Red Energy did not dispute, that Customer V was a customer experiencing payment difficulties, and therefore Red Energy was required to offer Customer V two payment plans in the 12 months prior to arranging for the disconnection of the supply of gas to Customer V's premises. The ombudsman considered it was not clear whether Red Energy had demonstrated compliance with this requirement.
6. The ombudsman submitted that the first payment plan, established on 23 June 2016, is compliant with the requirements of the code. However the ombudsman considers it is unclear whether the second arrangement, established on 8 November 2016, to pay the outstanding balance in two instalments, meets the code's definition of a payment plan being a "plan for a customer experiencing payment difficulties to pay a retailer by periodic instalments".
7. The ombudsman also suggested that if a wrongful disconnection payment is required in respect of this disconnection, it should be the prescribed capped amount under section 48A(1A) of the Act, as Customer V did not inform Red Energy of the disconnection within 14 days of the disconnection. In response to Red Energy's contention that the amount should be calculated in respect of a period starting at the time of disconnection and ending at the time that supply was reconnected at the premises without authorisation, the ombudsman submitted that in its view "... Red Energy does not appear to have demonstrated any basis for capping the payment..." at an amount lower than \$3,500.
8. Customer V was also invited to make a submission, or provide any information he considered the commission should take into account in making its decision. Customer V did not provide any submission in response to the commission's request.

Red Energy's submission

9. Red Energy was invited to provide any information and documents it considered the commission should take into account in making its decision. Red Energy was also invited to make submissions on the complaint for the commission to consider. Red Energy made a submission for the commission's consideration.
10. Red Energy did not dispute the chronology of events as presented by the ombudsman in its referral memorandum. However, Red Energy provided additional details it considered relevant to the commission's assessment of the disconnection.
11. Red Energy did not dispute that Customer V was a customer experiencing payment difficulties and that, for the purposes of clause 111(2) of the code, Red Energy was required to offer Customer V two payment plans in the 12 months prior to arranging for the disconnection. Red Energy submitted that it had offered Customer V two payment plans, the first on 23 June 2016 and the second on 8 November 2016. Red Energy disputes the ombudsman's position that the arrangement established on 8 November 2016 is, in some way, a deficient payment plan. Red Energy submitted that the arrangement is a compliant payment plan for the purposes of the code, and was:
 - (a) requested by the customer in that particular form and for those particular dates and amounts;
 - (b) suitable to the customer's circumstances at the time;
 - (c) compliant with the requirements of clause 72 of the code, and accepted by Red Energy's billing system as meeting the requirements to establish a payment plan.
12. Red Energy disputes the argument, implicit in the ombudsman's submission, '... that a payment plan comprising of two instalments is not "periodic" and therefore does not meet the definition of a valid payment plan'.
13. Red Energy further submitted that if the disconnection is found to be wrongful, the prescribed amount should be calculated in respect of the period of disconnection which ended when the supply of gas was reconnected to Customer V's property through meter tampering. Red Energy stated that the gas supply was most likely reconnected one day after disconnection.

Relevant facts

14. The commission analysed the ombudsman's request for a decision and sought additional submissions from Red Energy and Customer V. Having assessed the matter and the submissions, the commission makes the factual findings set out below.

Background

15. At all relevant times, Red Energy was the licensee responsible for the supply of gas to the premises.
16. On 13 December 2015, Red Energy established an account for the supply of gas to the premises of Customer V.
17. By 23 June 2016, Customer V's outstanding debt on his gas account amounted to \$175.19. Customer V also had an outstanding debt in relation to his electricity account with Red Energy. Red Energy offered and established a payment plan of \$70 for electricity and \$30 for gas fortnightly, via direct debit, to commence on 1 July 2016, for a period of six months. The plan failed due to non-payment on 5 July 2016, when the direct debit payment was rejected by the bank.
18. On 13 July 2016, Customer V emailed Red Energy advising it to cancel his fortnightly direct debit arrangement. Customer V advised he would pay the balance in full and also pay future bills in full.
19. On 18 July 2016, Customer V made a payment of \$175.19 towards his gas account.
20. On 27 October 2016, Red Energy sent a disconnection warning notice to Customer V in relation to his gas account.
21. On 12 August 2016, Customer V received a gas bill in the amount of \$169.13, comprising current charges of \$72.47, and a brought forward balance of \$96.66.
22. On 8 November 2016, Customer V called Red Energy. During this call Customer V stated he would pay \$50 towards his gas account by 11 November 2016, and would pay the remaining balance of \$119.13 on 19 November 2016.
23. Red Energy's contact notes for Customer V's account confirm that Red Energy established the arrangement proposed by Customer V, and treated this arrangement as a payment plan. Red Energy warned Customer V that this was his second payment plan and that should the plan fail due to non-payment, Red Energy would not offer him another payment plan with respect to his gas account. Customer V did not make any of the agreed payments towards his gas account under the arrangement established on 8 November 2016.
24. On 24 November 2016, Customer V made a payment of \$169.13 towards his gas account.

25. On 14 March 2017, Red Energy issued Customer V a gas bill in the amount of \$192.30, due on 31 March 2017 (the non-payment of which would later trigger the disconnection process), comprising current charges of \$81.64 and a brought forward balance of \$110.66.

Circumstances leading to the disconnection in May 2017

26. On 6 April 2017, Red Energy sent Customer V a reminder notice for \$192.30, requesting payment by 18 April 2017.
27. On 22 April 2017, Red Energy issued Customer V a disconnection warning notice for the amount of \$192.30, stating that if the account was not paid by 3 May 2017, or if contact was not made to come to an alternative payment arrangement, further action would be taken which may result in disconnection.
28. Customer V did not make payment or contact Red Energy. On 23 May 2017, Red Energy raised a service order for disconnection due to non-payment of the outstanding balance of \$192.30.

Disconnection of gas supply to the premises

29. On 29 May 2017 at 10.05am, the distributor disconnected the gas supply to Customer V's premises.

Events after disconnection

30. On 12 July 2017, a scheduled meter read was conducted by the distributor, which indicated that consumption had occurred following the disconnection on 29 May 2017.
31. On 25 July 2017, Red Energy raised a service order for disconnection to occur on 31 July 2017 in response to consumption having been detected at the premises.
32. On 31 July 2017, the distributor attended the property but did not complete the disconnection. The outcome of the service order was recorded as "can't do", with additional comments noting "consumer to contact retailer".
33. On 4 August 2017, Red Energy received the outcome of the service order raised on 25 July 2017. On the same day, it raised a new service order for disconnection of the gas supply.
34. On 8 August 2017, Customer V called Red Energy and authorised his partner, Partner B, to be added as a contact. During this call Red Energy discussed the lack of payment towards the account (the outstanding balance at the time was \$477.49) as well as the perceived meter tampering. Red Energy stated that it had scheduled another disconnection for 9 August 2017. Red Energy indicated it did not intend to stop the disconnection, and suggested that Partner B should transfer to another retailer. Partner B indicated she would do so that evening.

35. On 9 August 2017 at 2.00pm, the gas supply to Customer V's premises was disconnected. Partner B called Red Energy. Red Energy advised that her options were to pay the outstanding balance of \$477.49 in full or seek reconnection via another retailer.
36. On 11 August 2017, Partner B called Red Energy. Partner B advised that Origin Energy was unable to arrange reconnection of the gas supply due to locks on the meter. Red Energy advised that Origin Energy would need to contact the distributor to have the locks removed.
37. On 14 August 2017, Partner B called Red Energy and requested a Utility Relief Grant Scheme application form as well as other assistance in paying the outstanding balance. Red Energy advised that her options were to pay the balance in full or to transfer to another retailer.
38. On 15 August 2017, Red Energy received a transfer request from AGL.
39. On 15 August 2017 at 4.30pm, the gas supply to Customer V's premises was reconnected. The service order was arranged by AGL.
40. As at 10 April 2019, Red Energy has not made any wrongful disconnection payment to Customer V.

Relevant obligations

41. In this matter Red Energy's relevant obligations arise from the following:

(a) The Act:

- (i) Section 48A(1) of the Act which deems a condition into Red Energy's gas retail licence of an obligation to make a payment of the prescribed amount to a customer if Red Energy 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; and
- (ii) Sections 48A(3) and (5) which require 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. Under section 48A(1A) of the Act, the prescribed amount is capped at \$3,500 if the customer does not notify the retailer of the disconnection within 14 days of the disconnection.

(b) Red Energy's gas retail licence:

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

(c) Red Energy's contract with Customer V, which contained the following terms and conditions:

- (i) Clause 8.2, titled "How we can disconnect your supply", which states that "After taking certain steps as set out in the Retail Code, we may disconnect you...". The clause further states: "We may disconnect you if you cannot pay your bill because you lack sufficient income, provided we carry out our obligations under the Retail Code including trying to contact you to offer you an instalment plan and you fail to accept our offer to take up an instalment plan within 5 Business Days of us making the offer."
- (ii) Clause 16.5 which states that "If a term or condition of this Contract is inconsistent with the Retail Code, it is void and the corresponding term or condition in the Retail Code is incorporated into and applied under this Contract."

(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 customer is a hardship customer or where the 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 of the code identifies the requirements in offering a payment plan and in establishing a payment plan.

Clause 3 of the code defines "payment plan" as a plan, for a hardship customer or a residential customer experiencing payment difficulties, to pay a retailer, by periodic instalments in accordance with the code, any amounts payable by the customer for the sale and supply of energy.

42. Red Energy's obligations are discussed further below in the reasons.

Decision

43. Red Energy is not in breach of a condition of its gas retail licence, deemed into Red Energy's gas retail licence by section 48A of the Act (the deemed licence condition).
44. Red Energy disconnected the supply of gas to Customer V's premises at 10:05am on 29 May 2017.
45. Prior to disconnecting the supply of gas to Customer V's premises for non-payment there was no failure on the part of Red Energy to comply with the terms and conditions of its contract with Customer V, specifying the circumstances in which the supply of gas to those premises may be disconnected.
46. The disconnection was therefore in accordance with the deemed licence condition.
47. The supply of gas was not wrongfully disconnected.
48. Therefore, Red Energy is not required to make a prescribed payment to Customer V in respect of its disconnection of the gas supply to Customer V's premises on 29 May 2017.

Reasons

49. Red Energy's gas retail licence requires that:
- (a) Red Energy 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 8.1); and
 - (b) Each term or condition of Red Energy's contract for the sale of gas to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 8.3); and
 - (c) Red Energy must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 8.4).
50. The deemed licence condition requires Red Energy 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.
51. Clause 8.2 of Red Energy's contract with Customer V specifies the circumstances in which the supply of gas to Customer V's premises may be disconnected. By the operation of clause 16.5, clause 8.2 is subject to compliance with, and incorporates by reference into the contract, the requirements of the code relevant to disconnection. As noted at paragraph 4 above, it is accepted that Red Energy complied with the relevant requirements of clauses 109, 110 and 111(1)(e) of the code.
52. The ombudsman considered that Red Energy may not have complied with the requirements of clause 111(2) of the code.

Was Customer V a hardship customer or a customer experiencing payment difficulties? Clause 111(2) of the code

53. Red Energy does not dispute that Customer V was a customer experiencing payment difficulties. Consequently, Red Energy recognises that before it could disconnect the supply of gas to Customer V's premises it had to comply with the requirements of clause 111(2) of the code.

Did Red Energy offer Customer V two payment plans? Clause 111(2) of the code

54. Clause 111(2) of the code required Red Energy not to arrange for disconnection of Customer V's premises unless Red Energy had offered Customer V two payment plans in the previous 12 months (between 23 May 2016 and 23 May 2017, when Red Energy arranged for the disconnection), and:

- (a) Customer V had agreed to neither of them; or
- (b) Customer V had agreed to one but not the other of them but the plan to which Customer V agreed had been cancelled due to non-payment by Customer V; or
- (c) Customer V had agreed to both payment plans but the plans had been cancelled due to non-payment by Customer V.

Clause 3 of the code defines a payment plan to mean a plan for:

- (a) a hardship customer; or
- (b) a residential customer who is experiencing payment difficulties,

to pay a retailer, by periodic instalments in accordance with the code, any amounts payable by the customer for the sale and supply of energy.

55. Both the ombudsman and Red Energy agree that Red Energy made a valid offer of a payment plan to Customer V on 23 June 2016, consisting of fortnightly payments of \$70 for electricity and \$30 for gas, to be paid by direct debit. The plan commenced on 1 July 2016 and was to last for a period of 6 months. This arrangement met the definition of a payment plan in clause 3 of the code, and the offer constituted a valid offer of a payment plan for the purposes of clause 111(2).

56. The ombudsman, in its memorandum, suggested that the arrangement offered by Red Energy to Customer V on 8 November 2016, to pay his arrears in two instalments, may not have met the definition of a payment plan under clause 3 of the code. The ombudsman highlighted that the definition specifies a plan to pay the retailer by periodic instalments, and contrasted this with Red Energy's arrangement of a "two-part payment for the outstanding balance, which Customer V paid in one lump sum". Red Energy contested the ombudsman's position and asserted that there is nothing preventing an arrangement consisting of two instalments from being "periodic".

57. The commission considers that an arrangement that the customer make two payments several days apart towards their account, is a plan to pay by periodic instalments, and thus meets the definition of a payment plan in clause 3 of the code.

58. Red Energy offered two valid payment plans to Customer V in the 12 months prior to arranging for disconnection of the supply of gas to Customer V's premises. Therefore, Red Energy complied with clause 111(2) of the code.

Reconnection date

59. Both the ombudsman and Red Energy provided the commission with submissions about the timing of the reconnection of Customer V's gas supply, with reference to the calculation of any prescribed amount payable. As the commission has found that there is no compensation payable by Red Energy in respect of the disconnection in this case, we have not been required to consider this information in making our decision.