On 12 April 2022, the commission provided guidance to the Energy and Water Ombudsman Victoria (EWOV) in response to clauses of the Energy Retail Code.

The commission publishes this guidance to provide transparency for all interested persons.

This guidance relates to obligations under the Energy Retail Code during 2020 and 2021. On 1 March 2022 the Energy Retail Code of Practice commenced. Some provisions the subject of this guidance have been removed or amended (as a result of amendments to the Electricity Industry Act 2000 and Gas Industry Act 2001 which saw parts of the disconnection framework inserted into the legislation). The responses to these referrals refer to the clauses as they were pre-1 March 2022.

Guidance to EWOV in response to requests arising from its consideration of wrongful disconnection disputes

The interaction between clause 89 and 111A(1)(a)(i) of the code

Clause 111A(1)(a)(i) of the code provides that a retailer may only arrange de-energisation of the premises of a residential customer for not paying a bill if the retailer has complied with all of the retailer's obligations to the customer under clause 89.

Clause 89 sets out a number of obligations, including, relevantly, that a retailer must:

(a) in any dealing with a residential customer under, or in connection with Division 3 take into account all of the circumstances of the customer of which they are aware and, having regard to those circumstances, act fairly and reasonably; and

(b) at all times when it is relevant to do so, including on being contacted by a residential customer, give the customer in a timely manner, clear and unambiguous information about the assistance available under this Part [Part 3 of the Energy Retail Code].

Neither clause 111A nor clause 89 has an express temporal limitation. However, their respective operation must be seen in the context in which these clauses appear. Specifically, clause 111A appears in Division 2 of Part 6 of the code. Part 6 titled "De-energisation (or disconnection) of premises—small customers". Division 2 is titled "Retailer-initiated de-energisation of premises". Clause 111A itself is titled "Residential customer only to be disconnected as a last resort for non-payment". This context and the content of the surrounding clauses show that the requirements of clause 111A are concerned with the process that may lead to disconnection of energy supply.

The paragraphs of subclause 111A(1)(a) set out the steps involved in that process after a bill remains unpaid, including:

- Issuing a reminder notice, at [(ii)]
- Issuing a disconnection warning notice, at [(iii)]
- Using best endeavours to contact the customer about the matter, at [(iv)].

The paragraphs marked with roman numerals (i), (v) and (vi) provide surrounding and non-sequential obligations, requiring compliance with clause 89, fair and reasonable treatment, and particular regard to the circumstances of a family violence affected customer, respectively.

Each of these obligations is relevant insofar as it directly concerns the process that may lead to disconnection, but does not apply outside of that process. As such, historical clause 89 non-compliance would generally only be relevant for the purposes of assessing clause 111A(1)(a)(i)

compliance to the extent that the non-compliance with an obligation in clause 89 had not been remedied or superseded in the period between the non-compliance occurring and the retailer arranging for disconnection. To hold otherwise would mean that any failure to comply with clause 89, to act fairly and reasonably or have regard to circumstances of a customer, however far removed from the process under clause 111A itself, would be a bar to any subsequent disconnection.

The requirements of clause 111A are concerned with the process that may lead to disconnection, but do not apply outside of that process. Accordingly, the commission considers that a retailer's prior non-compliance with clause 89 will be relevant for the purposes of assessing compliance with clause 111A(1)(a)(i) where the clause 89 non-compliance has not been remedied or superseded by the retailer's subsequent conduct in the period up to arranging disconnection (independent of timing).

Clause 81(5) of the code and the presentation of information

Clause 81(5)(a) of the code requires that a relevant written schedule of payments show the total number of payments to be made to pay the arrears. Clause 81(5)(b) of the code requires a relevant written schedule of payments to show the period over which the payments are to be made.

On 15 October 2020, the commission issued *Guidance Note 3 (2020): Payment arrangements and the written schedule of payments for residential customers anticipating or facing payment difficulties* (**Guidance Note 3**) in relation to the content and form of these payment schedules[1], which displays both the total number of payments and period over which the payments are to be made as headline information above the table of payments. In response to EWOV's request for further guidance, the commission further notes:

- Clause 81(5)(a) does not require total number of payments and period over which the payments are to be made to be displayed as headline information above the table of payments. While, as shown in Attachment 1 to Guidance Note 3, the commission considers it best practice to display this information in the form of a headline, the commission's view is that it is sufficient if the information is able to be deduced from the payment schedule itself.
- The commission considers that clause 81(5)(b) requires more than identifying the dates by which payments must be made (that is addressed by clause 81(5)(c)), it requires a separate and statement of the period over which the payments are made.
- The commission considers it preferable that the information required by clause 81(5)(a) and (b) of the code is clearly displayed as a headline figure prefacing the detail about each payment

[1] https://www.esc.vic.gov.au/electricity-and-gas/codes-guidelines-and-policies/energy-retail-code/guidance-note-3-2020-payment-arrangements-and-written-schedule-payments-residential-customers

arrangements, as the information is then more accessible to the customer (as the information is displayed in the guidance referred to above).

The scope of clause 89(1)(b), when a customer refuses to answer security questions

The obligation at clause 89(1)(b) of the code is to provide information about assistance available under Part 3 of the code, not for all occasions where there is contact with a residential customer, but "*at all times when it is relevant to do so, including on being contacted by a residential customer*".

The commission considers that "relevant" circumstances for the purposes of clause 89(1)(b), that are likely to enliven the obligation to inform a residential customer of assistance under Part 3 of the code are likely to include (non-exhaustively):

- any customer enquiry about the availability or the scope of Part 3 entitlements;
- any customer communication advising the retailer of payment difficulties;
- any customer communication about arrears (actual or anticipated); and
- any customer enquiry about alternative options for meeting payments or arrears.

In the above examples, these circumstances may arise by the customer independently raising these matters or in the context of a retailer-initiated discussion about assistance options or the customers' circumstances.

A customer's refusal to answer security questions does not necessarily release a retailer from its obligations under clause 89(1)(b) of the code.

Where a customer requests details of payment options over the phone, the obligation at clause 89(1)(b) to provide clear and unambiguous information about the assistance available under Part 3 of the code is enlivened. Even if a customer refuses to answer security questions that enable a retailer to verify the persons identify during the telephone call, a retailer may still provide the relevant information either at a general level, without reference to the customer's confidential details, or alternatively via follow up correspondence in the days following the telephone call.

However, we recognise that the ability of a retailer to provide more tailored information will be reduced where customer identification is not provided.

Clause 111A(1)(a)(iv) and warning of imminent disconnection

Clause 111A(1)(a)(iv) requires a retailer to use best endeavours to contact a customer about a potential disconnection. That requires conveying to the customer that a disconnection may occur (without further action on the customer's behalf). However, the Energy Retail Code does not mandate that the message be conveyed in a particular way or with a particular sense of urgency, such as referencing that the disconnection is "imminent".

Provided a retailer has made it sufficiently clear that disconnection was a potential outcome if appropriate action was not taken by the customer, the obligation at clause 111A(1)(a)(iv) to contact the customer in relation to 'the matter' (the pending disconnection) has been satisfied. For instance, that may be conveyed by referring to action being required to avoid disconnection or to stay connected.

There are other aspects to clause 111A(1)(a)(iv), such as the provision of clear and unambiguous information about the assistance available under Part 3 of the Energy Retail Code, that must be met, that are not the subject of this guidance.

Clause 118(1)(a) and consideration of an alternative to disconnection

Clause 118(1)(a) obliges a retailer or exempt person to use its best endeavours to arrange for de-energisation in accordance with a customer's request.

A customer for the purpose of clause 118 is a person to whom energy is sold for premises by a retailer or exempt person, or who proposes to purchase energy for premises from a retailer or exempt person (as per clause 3 of the Energy Retail Code). A person will continue to be the customer for the purpose of clause 118(1) where a customer has vacated a property, pending termination of the contract, whether through another retailer becoming the responsible retailer at the supply address or through another means.

Clause 118(1)(a) does not require a retailer to consider an alternative to disconnection, but to use best endeavours to arrange for de-energisation in accordance with the customer's request.

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