

Customer W and 1st Energy – Response to referral for advice

**Application of section 40B of the Electricity Industry Act 2000 (Vic)
– Compensation for wrongful disconnection**

28 August 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) about the disconnection of the electricity supply to the premises of (name redacted) (Customer W) at (address redacted) (the premises) by 1st Energy Pty Ltd (1st Energy). The referral states that the electricity supply to the premises was disconnected from 10:04am on 5 April 2018 to 5:22pm on 7 May 2018, a period of 32 days, 7 hours and 18 minutes.
2. In the referral, the ombudsman has requested the commission to advise on the following questions in relation to the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to the factual circumstances set out in the referral:
 - (a) whether advice from a third party is relevant in relation to a retailer becoming aware of a customer's payment difficulties,
 - (b) whether 1st Energy met the minimum standard of conduct for compliance with clause 111(2) of the Energy Retail Code (version 11a), and
 - (c) whether 1st Energy failed to meet the terms and conditions of its contract with Customer W that specify the circumstances in which the supply of electricity to the premises may be disconnected.
3. In the referral, the ombudsman noted that on 28 February 2018 Customer W's nurse called 1st Energy to advise that Customer W would not be able to afford to pay the balance of her account. The ombudsman considered that although Customer W was not on 1st Energy's hardship program, and had not personally informed 1st Energy that she was experiencing payment difficulties, 1st Energy '...was made aware that Customer W was experiencing payment difficulties' as a result of the phone call with Customer W's nurse.
4. The ombudsman considered that 1st Energy '...should have...' otherwise believed Customer W was experiencing payment difficulties and that 1st Energy was therefore required to offer Customer W two payment plans in the previous 12 months before arranging for the disconnection of the electricity supply to Customer W's premises. On this basis, the ombudsman queried whether 1st Energy complied with clause 111(2) of the code.

Submissions

Customer W's submissions

5. The commission invited Customer W to provide any information and documents to which she considered the commission should have regard in relation to the referral. Customer W did not make any submissions to the commission.
6. The ombudsman provided the details of Customer W's nurse to the commission who was acting as Customer W's representative in relation to the dispute. The commission made enquiries with Customer W's nurse about the matter. Customer W's nurse provided information to the commission which was consistent with the chronology in the ombudsman's referral.

1st Energy's submissions

7. The commission invited 1st Energy to provide any information and documents to which it considered the commission should have regard in relation to the referral.
8. 1st Energy submitted a chronology of the relevant events to the commission which was consistent with the chronology in the ombudsman's referral. 1st Energy also submitted, in part, that:
 - (a) 1st Energy had not breached clause 111(2) of the code and so it was not required to make a payment of a prescribed amount to Customer W under section 40B of the Act.
 - (b) 1st Energy '...had not formed the view that [Customer W] was experiencing payment difficulties or required payment assistance...' at the time of arranging for the disconnection.
 - (c) The information provided by Customer W's nurse in her phone call to 1st Energy on 28 February 2018 must be disregarded for the following reasons:
 - (i) '1st Energy [was] required to take reasonable steps to protect personal information it [held] from misuse, interference and loss, as well as unauthorised access, modification or disclosure.'
 - (ii) '...the Privacy Act 1988 (in particular [Australian Privacy Principle] 6) [required 1st Energy] to ensure the security of customers (sic) personal information from unauthorised access, modification or disclosure.'

- (iii) '1st Energy [was] unable to rely upon, act or form a belief on customer's account based on an unauthorised parties' (sic) advice and this consumer protection is absolute in that it extends to all matters pertinent to the customer's account. In this scenario it was reasonable to expect the third party could have ensured customer consent was provided to 1st Energy.'
- (iv) 'Without customer consent or authorisation (except in specific circumstances), 1st Energy is unable to disclose personal information to or deal with an unauthorised party... This obligation is also clear under the [Australian Competition and Consumer Commission/Australian Securities and Investments Commission] Debt Collection Guideline (section 9(c)), which we note that the [commission] now expects retailers to comply with under the [commission's] new Guidance Note for Payment Difficulty and Disconnection.'

9. At the time of responding to the commission's enquiries, 1st Energy made additional submissions to the commission. 1st Energy submitted, in part, that:

- (a) In relation to Customer W's nurse's telephone call to 1st Energy on 4 April 2018, 1st Energy '...had the opportunity to engage with the customer more fulsomely and potentially halt the disconnection.'
- (b) While Customer W requested the reconnection of the electricity supply to her premises on 23 April 2018, 1st Energy did not arrange for the reconnection because it required Customer W to pay the outstanding amount of her electricity account in full.
- (c) The events of the reconnection were '...further complicated by [Customer W] requesting a disconnection of the same premises on 10 April 2018...'
- (d) On further review, '...a wrongful disconnection payment maybe (sic) appropriate in these circumstances...'

Relevant facts

10. The commission considered the ombudsman's referral and 1st Energy's submissions. The commission also made enquiries with Customer W's nurse, 1st Energy and Customer W's previous electricity retailer Online Power and Gas Pty Ltd (OP&G). The relevant facts contained in the referral are set out below.

1st Energy commenced supplying electricity to Customer W's premises

11. On 4 April 2016, OP&G commenced supplying electricity to Customer W's premises.
12. On 8 September 2016, Customer W called OP&G to request a payment plan. OP&G offered a payment plan of \$50 per fortnight with two instalments commencing from 15 September 2016. Customer W agreed to this offer (the commission requested OP&G to provide a copy of all recordings of its telephone calls with Customer W. OP&G provided contact notes about this call and did not provide any call recordings to the commission).
13. On 1 October 2016, the payment plan was completed.
14. On 13 April 2017, OP&G sent a letter to Customer W to confirm that OP&G would transfer Customer W's electricity account to 1st Energy on 1 May 2017.
15. Effective 1 May 2017, OP&G transferred all of its existing electricity customers including Customer W to 1st Energy as OP&G was withdrawing its operations from the Victorian energy market. 1st Energy commenced supplying electricity to Customer W's premises. It is unclear whether 1st Energy was aware of the earlier payment plan (OP&G advised the commission that it did not at any time inform 1st Energy of this).
16. On 3 May 2017, Customer W called 1st Energy and requested for 1st Energy to arrange for the move-out disconnection of the electricity supply to her premises in Suburb 1 from 4 May 2017 and the move-in connection to another premises at (address redacted) (the premises in Suburb 2). Customer W did not inform 1st Energy that she was experiencing payment difficulties during the call.
17. On 4 May 2017, Customer W contacted 1st Energy to cancel the move-out disconnection of the electricity supply to her premises in Suburb 1 and the move-in connection of electricity supply to the premises in Suburb 2 (the commission requested 1st Energy to provide a copy of all contact records, telephone call recordings, complaint records, emails, letters and correspondence in relation to the disconnection and reconnection of the electricity supply to Customer W's premises in Suburb 1. 1st Energy did not provide any documentation or

recordings to the commission in relation to Customer W contacting 1st Energy on 4 May 2017).

18. It appears that 1st Energy was subsequently uncertain of Customer W's postal address. It sent bills and notices both to Customer W's actual address in Suburb 1 and the cancelled address in Suburb 2.
19. On 16 May 2017, 1st Energy sent a letter to Customer W at her premises in Suburb 1 to confirm that it had acquired the electricity customers of OP&G. 1st Energy stated in the letter that Customer W's account had been transferred to 1st Energy on 1 May 2017.

1st Energy commenced billing Customer W for electricity supply

20. 1st Energy sent a number of electricity bills, reminder notices and disconnection warning notices to Customer W at both the premises in Suburb 2 and Customer W's actual address in Suburb 1:
 - (a) Between 2 June 2017 and 1 March 2018, 1st Energy sent six electricity bills to Customer W at the premises in Suburb 2 and four electricity bills to Customer W at her premises in Suburb 1. 1st Energy stated in each bill that no payments had been received so the amount included an outstanding balance due immediately. Although 1st Energy sent some bills to the Suburb 2 address, each bill showed the supply address to which the bill related as Customer W's actual address in Suburb 1.
 - (b) Between 30 June 2017 and 1 March 2018, 1st Energy sent six reminder notices to Customer W at the premises in Suburb 2 and three reminder notices to Customer W at her premises in Suburb 1 in relation to the bill dated 2 June 2017.
 - (c) Between 4 August 2017 and 14 March 2018, 1st Energy sent three disconnection warning notices to Customer W at the premises in Suburb 2 and four disconnection warning notices to Customer W at her premises in Suburb 1. 1st Energy stated in each notice 'if your account remains unpaid we will arrange for the disconnection of your electricity without further notice to you.' 1st Energy also stated in each notice:

[If you are experiencing difficulty paying this invoice \[sic\] please contact us on 1300 426 594 as we may be able to offer a payment plan that suits your needs.](#)

21. From 9 May 2017 until 15 February 2018, OP&G received 17 payments of \$50 from Customer W via BPAY. On 7 March 2018, OP&G received a payment of \$54 from Customer W via BPAY. The total amount Customer W had paid to OP&G from 1 May 2017 when OP&G transferred Customer W to 1st Energy up until 7 March 2018 was \$904.

22. On 26 March 2018, 1st Energy sent a 'final disconnection notice' to Customer W at her premises in Suburb 1 to confirm that Customer W's account '...is currently being processed for disconnection due to failure to pay.' 1st Energy stated in the letter that '...your account will be disconnected if you do not contact us immediately upon receipt of this letter.'
23. 1st Energy's contact records show that 1st Energy made 12 call attempts to the telephone number for Customer W that it had received from OP&G between 26 February 2018 and 22 March 2018. However, Customer W did not answer 1st Energy's calls. On two occasions, 1st Energy left voice messages for Customer W.

Customer W's nurse called 1st Energy about Customer W's electricity account

24. On 28 February 2018, at 11:36am, Customer W's nurse called 1st Energy. The nurse identified herself as Customer W's mental health nurse and advised 1st Energy that Customer W was a person with a mental health disability. Customer W's nurse stated that Customer W had received a bill from 1st Energy but she had never signed up to 1st Energy. 1st Energy advised that it had taken over Customer W's electricity account from OP&G. Customer W's nurse advised 1st Energy that Customer W was on a fortnightly disability support pension and had no savings. Customer W's nurse stated that 1st Energy would have to offer a payment plan to Customer W. 1st Energy advised Customer W's nurse that 1st Energy could offer a payment plan, however Customer W would need to be on the phone call with her nurse. Customer W's nurse advised 1st Energy that she would call 1st Energy again with Customer W on the phone to arrange a payment plan.

1st Energy arranged for the disconnection of the electricity supply

25. On 29 March 2018, 1st Energy arranged for the electricity supply to Customer W's premises to be disconnected on 5 April 2018.
26. On 4 April 2018, at 10:50am, Customer W's nurse called 1st Energy about Customer W's electricity account. During the call, Customer W authorised her nurse to act as her agent. 1st Energy provided OP&G's contact details to Customer W's nurse to discuss the payments Customer W had made to OP&G. Immediately after providing OP&G's details to Customer W's nurse, 1st Energy could no longer hear anyone on the call, and so it terminated the call.
27. On 5 April 2018, at 10:04am, the electricity supply to Customer W's premises was disconnected.

The electricity supply was reconnected to Customer W's premises

28. On 12 April 2018, at 11:13am, an electrician from the Department of Health and Human Services called 1st Energy. The electrician notified 1st Energy that the electricity supply had been disconnected to Customer W's premises. During the telephone call, Customer W authorised the electrician to act as her agent.
29. On 7 May 2018, at 5:22pm, the electricity supply to Customer W's premises was reconnected following a complaint by Customer W to the ombudsman.
30. The electricity supply to the premises was disconnected for a period of 32 days, 7 hours and 18 minutes.

Relevant obligations

31. In this matter, the relevant obligations arise from the Act, 1st Energy's contract with Customer W (the contract), its electricity retail licence, the code, the Privacy Act 1988 (Cth) (the Privacy Act) and 1st Energy's privacy policy.
32. The relevant obligations from the Act are:
- (a) Section 40B(1) of the Act provided that it is a condition of 1st Energy's electricity retail licence that 1st Energy must make a payment of the prescribed amount to a relevant customer if 1st Energy disconnects the electricity supply to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the electricity supply to those premises may be disconnected.
 - (b) Section 40B(3) of the Act required 1st Energy to make any payment under subsection (1) as soon as practicable after the electricity supply was reconnected to the premises of the relevant customer.
 - (c) Section 40B(5) of the Act provided that the prescribed amount was \$500 for each whole day that the electricity supply was disconnected and a pro rata amount for any part of a day that the electricity supply was disconnected.
33. The relevant obligations from the contract between OP&G and Customer W, as novated to 1st Energy, are:
- (a) Clause 9.1 of the contract titled 'When can we arrange for Disconnection?' which stated, in part:

Subject to us satisfying the requirements in the Regulatory requirements, we may arrange for the disconnection of your Premises if:

- (a) you do not pay your bill by the Due Date and you:
 - (i) fail to comply with the terms of an agreed Payment Plan; or
 - (ii) if you are a Residential Customer, do not agree to an offer to pay the bill by instalments, or having agreed, you fail to comply with the instalment arrangement;...or ...

(e) we are otherwise entitled or required to do so under the Regulatory requirements or by law.

(b) The section of the contract titled '14 Definitions' which stated, in part:

...law means any law or regulatory or administrative document relating to the sale or supply of energy.

(The applicable 'regulatory... document' in this case is the code.)

34. The relevant obligation from 1st Energy's electricity retail licence is clause 8.1(e) which stated, in part:

...[1st Energy] must comply with: the Energy Retail Code... to the extent they are applicable to activities undertaken by [1st Energy] pursuant to this Licence.

35. The relevant obligation from the code is clause 111(2) of the code which stated, in part:

Where a customer is a hardship customer, is a residential customer who has informed the retailer in writing or by telephone that the customer is experiencing payment difficulties or the retailer otherwise believes the customer is experiencing repeated difficulties in paying the customer's bill or requires payment assistance, a retailer must not arrange for de-energisation of the customer's premises... unless the retailer has offered the customer 2 payment plans in the previous 12 months...

36. The relevant obligations from the Privacy Act are:

(a) Section 6C(1) of the Privacy Act relevantly provided that an organisation includes a body corporate.

(b) Section 6(1) of the Privacy Act relevantly provided that:

(i) An organisation is an APP entity.

(ii) An entity solicits personal information if the entity requests another entity (which includes individuals) to provide the personal information, or to provide a kind of information in which that personal information is included.

(c) Section 15 of the Privacy Act relevantly provided that an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle (APP).

Schedule 1 of the Privacy Act set out the relevant APPs which are:

(d) APP1 set out general principles relating to the management of personal information:

- (i) APP1.3 relevantly provided that each APP entity must have an APP privacy policy about the management of personal information by the entity.
 - (ii) APP1.4 relevantly provided that the privacy policy must describe the kinds of information the entity collects, how it collects information, the purposes for which it collects and uses information and how a person may access that information.
- (e) APP3 set out principles for the collection of solicited personal information.
- (i) APP3.2 relevantly provided that an organisation must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity's functions or activities.
 - (ii) APP3.3 relevantly provided that an organisation must not collect sensitive information (which includes health information) unless the individual consents to the collection of the information and the information is reasonably necessary for one or more of the entity's functions or activities, or subclause 3.4 applied.
 - (iii) APP3.4 relevantly enabled the collection of sensitive information if the collection was required or authorised by or under Australian law.
 - (iv) APP3.5 relevantly provided that information must be collected by lawful and fair means.
 - (v) APP3.6 relevantly provided that information must only be collected from the subject individual unless it is unreasonable or impracticable to do so.
- (f) APP4 set out principles for the collection of unsolicited personal information.
- (i) APP4.1 relevantly provided that if an APP entity receives unsolicited information, it must determine within a reasonable period of time whether it could have collected the information under APP3.
 - (ii) APP4.3 relevantly provided that if an APP entity determines that it could not have collected the information under APP3, then it was required to destroy the information or ensure that it was de-identified as soon as practicable if lawful and reasonable to do.
- (g) APP5 provided that if an APP entity collects personal information about an individual, it must take reasonable steps to notify the individual of the collection and provide the particulars set out in APP5.2.
- (h) APP6 set out principles for the use of personal information that has been collected.

- (i) APP6.1 provided that if an APP entity holds personal information that was collected for a particular purpose (the primary purpose), it must not be used or disclosed for another purpose (the secondary purpose), unless the person has consented to that use or disclosure, of if APP6.2 or 6.3 apply.
- (ii) APP6.2 relevantly enabled the use of personal information for a secondary purpose if the subject individual would reasonably expect that use, and the secondary purpose is related to the primary purpose.
- (i) APP10 and 11 set out principles for the integrity of personal information.
 - (i) APP10.1 provided that an APP entity must take reasonable steps to ensure that the information that the entity collects is accurate, up-to-date and complete.
 - (ii) APP10.2 provided that an APP entity must take reasonable steps to ensure the information it uses or discloses is accurate, up-to-date, complete and relevant.
 - (iii) APP11.1 provided that an APP entity must take reasonable steps to protect the information from misuse, interference or loss, unauthorised access, modification or disclosure.
 - (iv) APP11.2 provided that an APP entity must destroy information it no longer needs.

37. At the relevant time, 1st Energy had a privacy policy in accordance with APP1. The relevant provisions from the privacy policy dated September 2015 are:

- (a) 1st Energy was able to collect information from the subject individual personally, but also from other sources including distributors, sales agents, and other third parties (such as builders).
- (b) 1st Energy used personal information to ‘...supply [its] customers with products and services, including energy use management tools, and to administer and manage the supply of products and services (including billing and collecting debts)’ and to ‘...comply with [its] legal and regulatory obligations.’
- (c) 1st Energy was required to take ‘...reasonable steps to ensure that the personal information [it] collect[s], use[s] and disclose[s] is accurate, up to date, complete and relevant.’
- (d) 1st Energy recorded phone calls with customers for ‘...training, service quality control and compliance purposes.’
- (e) Customers were able to access and seek to correct any information held about them by 1st Energy.

- (f) Third parties were advised 'if you provide [1st Energy] with personal information about another person, please make sure that you tell [the other person] about this privacy policy.'

38. In April 2018, 1st Energy updated the privacy policy. The relevant provisions from the updated privacy policy are:

- (a) 1st Energy was able to '...collect personal information through third party service providers or agents from a source of publicly available information (e.g. a telephone book) or from an employer (e.g. where a contractor provides personal information about its staff).'
- (b) 1st Energy was able to '...use personal information for its primary purpose of collection (e.g. the delivery of goods to the person) or for any related secondary purpose that [1st Energy] could reasonably be expected to use the personal information for.'
- (c) 1st Energy was required to '...take reasonable steps to ensure the accuracy and completeness of the personal information [it held].'
- (d) Customers were able to access and seek to correct any information held about them by 1st Energy.

Response to referral

39. The commission's responses to the questions asked by the ombudsman in its referral are as follow:
- (a) Advice from a third party is relevant in relation to a retailer becoming aware of a customer's payment difficulties.
 - (b) 1st Energy did not meet the minimum standard of conduct for compliance with clause 111(2) of the code.
 - (c) 1st Energy failed to meet the terms and conditions of its contract with Customer W that specify the circumstances in which the supply of electricity to the premises may be disconnected.
40. Based on the information in the referral, the commission further advises:
- (a) 1st Energy was in breach of a condition of its electricity retail licence under section 40B of the Act.
 - (b) The electricity supply to Customer W's premises was disconnected from 10:04am on 5 April 2018 to 5:22pm on 7 May 2018, a period of 32 days, 7 hours and 18 minutes.
 - (c) Accordingly, 1st Energy was required to make a payment of a prescribed amount of \$16,153.00 under section 40B of the Act to Customer W as soon as practicable after the reconnection of the electricity supply on 7 May 2018.
 - (d) As at 28 August 2019, there is no information available to the commission to confirm that 1st Energy has made this payment.

Reasons

41. On the basis of the information available to it, the commission's reasons for its response to the referral are as follow.

1st Energy was required to comply with the code

42. 1st Energy's contract with Customer W included terms and conditions which specified the circumstances in which the electricity supply to Customer W's premises may be disconnected. The terms and conditions stated, in part, that 'Subject to us satisfying the requirements in the Regulatory requirements, we may arrange for the disconnection of your Premises...' The contract also stated, in part, that '...law means any law or regulatory or administrative document relating to the sale or supply of energy.'
43. The commission therefore considers that 1st Energy was required to comply with the provisions of the code specifying the circumstances in which the electricity supply to Customer W's premises could be disconnected as a term of its contract with Customer W.

1st Energy was required to offer payment plans to Customer W

44. The ombudsman queried whether 1st Energy met the minimum standard of conduct for compliance with clause 111(2) of the code in relation to the disconnection of the electricity supply to Customer W's premises.
45. Clause 111(2) of the code relevantly provides that a retailer must not arrange for de-energisation of a customer's premises unless it has offered two payment plans to the customer in the previous 12 months in the following circumstances:
- (a) 'where a customer is a hardship customer...',
 - (b) 'where a customer... is a residential customer who has informed the retailer in writing or by telephone that the customer is experiencing payment difficulties or...',
 - (c) '...the retailer otherwise believes the customer is experiencing repeated difficulties in paying the customer's bill or requires payment assistance...'
46. Clause 111(2) of the code therefore covers a broad range of circumstances where a retailer is required to afford additional protections to a customer prior to arranging for the disconnection of the electricity supply to the customer's premises.
47. If these circumstances applied in relation to the disconnection of the electricity supply to Customer W's premises, then 1st Energy was required to offer two payment plans to

Customer W in the 12 months prior to 29 March 2018 when 1st Energy arranged for the disconnection.

48. In order to respond to the ombudsman's referral, the commission is not required to consider whether Customer W was a hardship customer or whether it was necessary for Customer W to have personally informed 1st Energy that she was experiencing payment difficulties, rather than Customer W's nurse informing 1st Energy of this on Customer W's behalf.

Customer W's nurse provided information to 1st Energy

49. The referral stated that during the telephone call on 28 February 2018 between Customer W's nurse and 1st Energy, Customer W's nurse '...advised 1st Energy that Customer W would not be able to afford to pay the balance of [Customer W's electricity] account...' and '...that a payment arrangement would be required.'
50. During the telephone call, Customer W's nurse provided information to 1st Energy about Customer W (the information). Customer W's nurse informed 1st Energy that:
- (a) Customer W had a mental health disability.
 - (b) The only income Customer W received was from a disability support pension.
 - (c) Customer W had no savings.
 - (d) Customer W required a payment plan in relation to her electricity account.

1st Energy was permitted to collect and use the information

51. 1st Energy submitted that Customer W's nurse was an 'unauthorised third party' at the time of the call and '...authorisation was not provided until [4] April 2018... after the time of arranging [for] the [disconnection] on 29 March 2018.'
52. 1st Energy submitted that the information must be disregarded for the purposes of applying clause 111(2) of the code to this dispute.
53. 1st Energy raised two specific legal obligations which it considered were relevant to this issue:
- (a) 1st Energy considered that it was required '...to ensure the security of [its] customers (sic) personal information from unauthorised access, modification or disclosure' under the Privacy Act, in particular APP6.
 - (b) 1st Energy also considered that an obligation relevant to this dispute was set out at section 9(c) of the Australian Competition and Consumer Commission (ACCC) and the

Australian Securities and Investments Commission (ASIC) debt collection guideline for collectors and creditors (the ACCC/ASIC guideline).

54. 1st Energy was an organisation under section 6(1) of the Privacy Act, and as such it was an APP entity that was subject to the Privacy Act. Under section 15 of the Privacy Act, 1st Energy was not permitted to do an act, or engage in a practice, that breached an APP.
55. However, 1st Energy's collection and use of the information was not an act or practice that breached an APP.

1st Energy was permitted to collect the information under the Privacy Act

56. 1st Energy did not solicit the information under section 6(1) of the Privacy Act by requesting Customer W's nurse to provide the information or provide a kind of information in which the information was included.
57. The Australian Privacy Principles Guidelines issued by the Office of the Australian Information Commissioner under section 28 of the Privacy Act (the APP Guidelines) provide examples of solicited information, including:
 - (a) personal information provided by an individual in response to a request, direction or order, and
 - (b) personal information about an individual provided by another entity in response to a request, direction, order or arrangement for sharing or transferring information between both entities.¹
58. The disconnection warning notices 1st Energy issued to Customer W stated (in part):

[If you are experiencing difficulty paying this invoice \(sic\) please contact us on 1300 426 594 as we may be able to offer a payment plan that suits your needs.](#)
59. The commission considers this request for contact fell short of soliciting the information provided by Customer W's nurse.
60. As the information was unsolicited, APP3 has no direct application to the referral. However, under APP4, if 1st Energy determined that it could not have collected the information under APP3, then it was required to destroy the information or ensure that it was de-identified as soon as practicable if lawful and reasonable to do so.

¹ Australian Privacy Principles Guidelines, version 1.1, July 2019, Chapter 3: Australian Privacy Principle 3 — Collection of solicited personal information, paragraph 3.7.

61. The commission considers that the following points were relevant to 1st Energy's consideration of whether it could have collected the information under APP3:
- (a) 1st Energy was permitted to collect part of the information under APP3.2. The information included that Customer W had been making payments to OP&G via BPAY, that the only income Customer W received was a disability support pension, and that Customer W had no savings. This information was directly relevant to 1st Energy's functions and activities to provide assistance to customers experiencing payment difficulties.
 - (b) 1st Energy may not have been permitted to collect part of the information under APP3.3. In particular, 1st Energy may not have been permitted to collect the information about Customer W's mental health disability. This information was sensitive information. There is no information available to show that Customer W consented to the collection of this sensitive information. Furthermore, it may not have been reasonably necessary for 1st Energy's functions and activities for 1st Energy to collect that information.
 - (c) APP3.4 may not have applied to this sensitive information about Customer W's mental health disability. 1st Energy's collection of this information may not have been authorised by or under Australian law. In particular, no provisions of the Act address or concern the collection of medical information.
62. In any event, 1st Energy did collect the information, including the sensitive information about Customer W's mental health disability. 1st Energy did not destroy the information. 1st Energy provided the information to the ombudsman and the commission. Therefore, it appears to the commission that 1st Energy must have determined that it could have collected the information under APP3.
63. The commission also notes that 1st Energy was required under APP5 to take reasonable steps to inform Customer W that it had collected the information. There is no information available to the commission to confirm that it did so.

1st Energy was permitted to use and disclose the information under the Privacy Act

64. Although 1st Energy submitted that it was not permitted to use or disclose the information under APP6, the commission considers that 1st Energy was permitted to use the information to determine whether it was required to offer Customer W two payment plans under clause 111(2) of the code.
65. APP6 set out whether an entity such as 1st Energy could use information that was collected for a particular purpose (the primary purpose) for another purpose (the secondary purpose).

66. Under APP6.1, 1st Energy was prohibited from using or disclosing the information for a secondary purpose unless either:
- (a) Customer W had consented to that use or disclosure, or
 - (b) Customer W would reasonably expect that use or disclosure and the secondary purpose was related to the primary purpose.
67. If 1st Energy used the information for the primary purpose for which it was collected, or if either of the above circumstances applied, then 1st Energy would not have been prevented under APP6.1 from using or disclosing the information.
68. The commission considers that 1st Energy used the information for the primary purpose for which it was collected. 1st Energy must have collected the information for the purposes of its functions and activities, and in particular its collection activities and associated functions relating to hardship customers and the disconnection process under clause 111 of the code. The information would have been used to determine whether 1st Energy was required to offer Customer W two payment plans before arranging for the disconnection. Therefore, the commission considers that 1st Energy was not prevented from using the information under APP6.

1st Energy’s obligation to protect the integrity of Customer W’s information did not prevent 1st Energy from collecting or using the information

69. 1st Energy made submissions to the effect that it could not collect or use the information because this would have breached its obligations to protect the integrity of the information it already held about Customer W.
70. However, the commission considers 1st Energy was not prevented from collecting or using the information by these obligations.
71. APP10 and APP11 set principles about the quality of information collected and intended to be used. These APPs are not concerned with the authority to collect information.
72. The APP Guidelines note that what is reasonable will depend on the circumstances, and more rigorous steps may be required if the intended use has adverse consequences for the subject individual.²

² Australian Privacy Principles Guidelines, version 1.1, July 2019, Chapter 10: Australian Privacy Principle 10 — Quality of personal information, paragraph 10.6.

73. The APP Guidelines also refer to checking the quality of information where information is collected from a third party. This may include undertaking due diligence in respect of the third party's information gathering and disclosure practices.³
74. Although 1st Energy made 12 telephone call attempts to Customer W between 26 February 2018 and 22 March 2018, prior to arranging for the disconnection, the commission considers that it was open to 1st Energy to take further steps to check the quality of the information. For example, 1st Energy may have obtained the contact details of Customer W's nurse during the call on 28 February 2018 and sought further confirmation from her.
75. However, 1st Energy's use of the information in this case would have had beneficial consequences for Customer W. 1st Energy would have used the information to determine that it was required to offer two payment plans to Customer W in the 12 months prior to arranging for the disconnection. If 1st Energy determined that this was required, then 1st Energy would have been unable to arrange for the disconnection until it had complied with this requirement. As such, the commission considers that the phone calls made were adequate reasonable steps to ensure the quality of the information in all of the circumstances.

The debt collection guideline did not constrain 1st Energy

76. 1st Energy also referred to an obligation which it considered relevant to the referral at section 9(c) of the ACCC/ASIC guideline. 1st Energy submitted that it was prevented from collecting or using the information by the guideline.
77. Chapter 9 of the ACCC/ASIC guideline prescribes contact being made by a creditor with a debtor in circumstances where the debtor has authorised a representative to speak on their behalf. This is not relevant to the provision of information by Customer W's nurse during the telephone call on 28 February 2018 because 1st Energy did not initiate the telephone call.

1st Energy was permitted to collect and use the information under the privacy policy

78. Under APP1.3, 1st Energy was required to have a privacy policy about its management of personal information.

³ Australian Privacy Principles Guidelines, version 1.1, July 2019, Chapter 10: Australian Privacy Principle 10 — Quality of personal information, paragraph 10.8.

79. 1st Energy's privacy policy at the relevant time permitted 1st Energy to collect information about Customer W from her personally, but also from other sources including third parties.
80. Therefore, the commission considers that nothing in the privacy policy prevented 1st Energy from collecting and using the information.

1st Energy must have believed that Customer W was experiencing payment difficulties

81. On the basis that 1st Energy was able to collect and use the information provided by Customer W's nurse, it follows that 1st Energy must have believed that Customer W was experiencing payment difficulties.
82. 1st Energy had not at any time received any payment from Customer W since acquiring Customer W as an electricity customer effective 1 May 2017.
83. Furthermore, during the telephone call on 28 February 2018, Customer W's nurse informed 1st Energy that:
- (i) Customer W had a mental health disability.
 - (ii) The only income Customer W received was from a disability support pension.
 - (iii) Customer W had no savings.
 - (iv) Customer W required a payment plan in relation to her electricity account.
84. These circumstances should have identified Customer W as a customer entitled to the protections afforded by clause 111(2) of the code. As 1st Energy was aware of these circumstances, the commission considers that 1st Energy must have believed that Customer W was experiencing payment difficulties.
85. The commission therefore considers that 1st Energy was required to offer two payment plans to Customer W in the 12 months prior to arranging for the disconnection of the electricity supply to Customer W's premises under clause 111(2) of the code.

1st Energy failed to comply with the terms of the contract

86. Clause 9.1 of 1st Energy's contract with Customer W (as novated from the contract between OP&G and Customer W) provided that 1st Energy could arrange for the disconnection of the electricity supply to Customer W's premises subject to meeting 'regulatory requirements'. The contract did not define or otherwise give content to the term 'regulatory requirements'. However, the commission understands it to refer to the obligations applicable to 1st Energy under the code because these were regulatory requirements.

87. There is no information available to the commission that 1st Energy offered two payment plans to Customer W within the 12 months prior to arranging for the disconnection of the electricity supply to Customer W's premises on 29 March 2018.
88. Therefore, the commission considers that 1st Energy failed to meet the minimum standard of conduct required under clause 111(2) of the code. For this reason, the commission further considers that 1st Energy failed to comply with the terms and conditions of its contract with Customer W specifying the circumstances in which the electricity supply to Customer W's premises may be disconnected.
89. On the basis of the information in the referral, the commission considers that 1st Energy was in breach of a condition of its electricity retail licence under section 40B of the Act.
90. The commission further considers that 1st Energy was required to make a payment of a prescribed amount of \$16,153.00 under section 40B of the Act to Customer W as soon as practicable after the reconnection of the electricity supply on 7 May 2018.

Enforcement

91. As stated above, on the basis of the information available, the commission considers that 1st Energy was in breach of a condition of its electricity retail licence under section 40B of the Act and was required to make a payment of a prescribed amount of \$16,153.00 to Customer W as soon as practicable after the reconnection of the electricity supply on 7 May 2018.
92. There is no information available to the commission to confirm that 1st Energy has made this payment. 1st Energy may therefore have breached a condition of its electricity retail licence by failing to make the payment to Customer W as soon as practicable after the reconnection.
93. 1st Energy should rectify the contravention by making the payment and advise the commission in writing when the payment has been made.
94. If 1st Energy is unable to make the payment, it should inform the commission in writing within five business days of receipt of this paper.
95. If the payment is not made within five business days of 1st Energy receiving this paper, the commission may take enforcement action against 1st Energy under Part 7 of the Essential Services Commission Act 2001 (Vic) in relation to a breach of section 40B of the Electricity Industry Act 2000 (Vic).

Other observations

96. The commission notes that the guidance in this response to referral applies only in respect of the referral and clause 111(2) of the code. Although there are many other circumstances in which a third party may interact with a retailer in relation to a customer's account, it is a matter for the retailer to determine how to meet its legal obligations in these circumstances.
97. The commission also notes that clause 111(2) of the code no longer applies as of 1 January 2019 when version 12 of the code came into effect. This version introduced amendments to the code to implement the payment difficulty framework.