

Customer S and Red Energy – Decision and Reasons

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

29 August 2018

Commissioners:

Dr Ron Ben-David, Chairperson
Mr Richard Clarke, Commissioner 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 S.
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 S's gas supply at *[address redacted]* (the premises), from 9:30am on 2 February 2017 to 5:45pm on 3 February 2017 (a period of 1 day, 8 hours and 15 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 S in circumstances where:

- (a) Red Energy disconnected the supply of gas to the premises of Customer S; 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 S as soon as practicable after the supply of gas was reconnected to Customer S's premises.

4. This requires the commission to make findings and reach conclusions regarding the following matters:

- (a) Whether or not Red Energy disconnected the supply of gas to the premises of Customer S (see paragraphs 30 and 38 below);
- (b) Was the supply of gas to Customer S's premises reconnected, and if so, when? (see paragraphs 32 and 41 below);
- (c) If Red Energy did disconnect the supply of gas to Customer S's premises, for what period of time did the disconnection occur? (see paragraphs 33 and 42 below);
- (d) What were the terms or conditions of the contract between Red Energy and Customer S which specified the circumstances in which Red Energy may disconnect the supply of gas to Customer S's premises? (see paragraph 35(c) and 47 below);
- (e) Whether or not Red Energy failed to comply with those terms and conditions (see paragraph 39 below);
- (f) Was Customer S entitled to receive payment of a prescribed amount because of any wrongful disconnection by Red Energy under section 48A of the Act? (see paragraph 43 below);
- (g) If so, when was Red Energy obliged to make the payment of the prescribed amount? (see paragraph 43 below);
- (h) Has Red Energy made the payment to Customer S in accordance with its deemed licence condition under section 48A of the Act? (see paragraph 44 below);

- (i) If Red Energy has not made the payment what are the consequences? (see paragraphs 63 to 66 below).
5. 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) and 33(3) 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 clauses 111(2) and 72(1)(a)(i) of the code.
 6. Regarding clause 111(2) of the code, the ombudsman considered that Customer S had identified herself as a customer experiencing payment difficulties on 24 October 2016 and exhibited other signs of financial difficulty (including Customer S having been issued a concession card, her history of sporadic payments and the issuing of multiple reminder and disconnection warning notices). The ombudsman therefore considered that Red Energy was required to offer Customer S two payment plans in the 12 months prior to arranging for the disconnection of the supply of gas to Customer S's premises. The ombudsman considered it was not clear whether Red Energy had demonstrated compliance with this requirement.
 7. Regarding clause 72(1)(a)(i) of the code, the ombudsman considered that the clause required that the two payment plans Red Energy was obliged to offer to Customer S, within 12 months of arranging for her disconnection "must have regard to the customer's capacity to pay, any arrears owing and the customer's expected energy consumption over the following 12 month period". The ombudsman considered that it was not clear whether Red Energy had regard to Customer S's capacity to pay in its two offers of payment plans made to Customer S in the 12 months prior to disconnection.
 8. Red Energy was invited to provide any information and documents it considered the commission should have regard to 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.
 9. 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.
 10. Regarding clause 111(2) of the code, Red Energy submitted that it had offered Customer S two payment plans, the first on 24 October 2016 and the second on 29 November 2016. Red Energy also considered that Customer S's failure to engage with Red Energy's hardship team had caused it to be unable to reach an effective resolution with Customer S. Further, Red Energy notes that an effective assessment of a customer's capacity to pay requires extended discussion, and that even a customer's own offer to pay their arrears in instalments of a specific amount may not accurately reflect the customer's capacity to pay. Moreover,

Red Energy submits that accepting such an offer may not be in the customer's best interests, noting that "[a]ccepting Customer S's proposal without further investigation may potentially have caused her debt to accumulate."

Relevant facts

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

Background

12. At all relevant times, Red Energy was the licensee responsible for the supply of gas to the premises.
13. On 23 February 2015, Red Energy established an account for the supply of gas at the premises of Customer S. The relevant terms of the contract between Red Energy and Customer S are set out at paragraph 35(c).
14. During 2015, Customer S's payments towards her gas account were sporadic and Red Energy sent her disconnection warning notices on two occasions.
15. Between 14 January 2016 and 6 June 2016, Customer S made a total of \$855.00 in payments towards her gas account. On 6 June 2016 the outstanding balance on her account was a credit of \$1.61.
16. On 29 June 2016, Red Energy issued Customer S a gas bill for an amount of \$469.45.
17. On 2 August 2016, Customer S called Red Energy and gave Red Energy permission to transfer the credit balance of \$458.73 from her electricity account to her gas account. This transfer and a winter energy concession adjustment resulted in a nil balance on her gas account. During this telephone call Red Energy advised Customer S of the availability of the Utility Relief Grant Scheme.
18. On 25 August 2016, Red Energy issued Customer S a gas bill for \$446.66.
19. On 24 October 2016, Red Energy issued Customer S a gas bill for \$873.83, comprising a balance brought forward of \$437.46 and new charges of \$436.37 (the non-payment of which would later trigger the disconnection process).

Circumstances leading to the disconnection in February 2017

20. On 24 October 2016, Customer S called Red Energy on two occasions:
 - (a) During the first call:
 - (i) Red Energy advised Customer S that the gas account balance was \$873.83 (discounted).

- (ii) Customer S requested a direct debit payment plan for the gas account and was transferred to Red Energy's credit department.
 - (iii) Customer S advised she wanted to start a payment plan by direct debit. The representative asked if she would like to make weekly or fortnightly payments, and Customer S replied that she would like to pay \$50.00 per fortnight.
 - (iv) Red Energy advised Customer S the payment plan would need to "coincide with her energy usage" and her arrears of \$437.00.
 - (v) Red Energy asked Customer S whether there was any reason she wanted to commence the payment plan at \$50.00 per fortnight and Customer S advised that she could only afford to pay that amount towards her gas account as she was on a pension and had other bills to pay.
 - (vi) Red Energy's representative stated he would "put the calculator on it first to see what figure it comes up with"; Customer S stated "oh look, if it's too hard don't worry about it, I will just pay myself weekly, thanks very much for wasting my time" and ended the call.
- (b) During the second call:
- (i) Customer S called Red Energy and advised she wanted to establish a direct debit payment plan. She explained that she found the previous representative she spoke to rude and undermining, explaining: "[you] want to tell me how much I have to pay, and I don't want to do that". Red Energy transferred the call to its credit department.
 - (ii) Customer S advised that she wanted to set up direct debit for her gas account on a fortnightly basis.
 - (iii) Red Energy advised that "the lowest amount it could set up would be \$104.00 per fortnight, which covered her previous balance, current and future bills."
 - (iv) Customer S responded "do you not want to take my offer? I want to pay \$50.00 per fortnight...".
 - (v) When the representative informed her that Red Energy could not offer that amount, Customer S responded "So you've got to tell me how much... so that is how the company works. The company works by telling the customer how much they have to pay." Customer S then terminated the call.

21. Between 17 November 2016 and 12 January 2017:

- (a) Customer S made five fortnightly payments of \$100.00 each towards her gas account;

Relevant facts

- (b) Red Energy transferred \$238.46 from Customer S's electricity account to her gas account to prevent disconnection; and
 - (c) Red Energy issued Customer S a gas bill for \$326.49.
22. On 19 November 2016 and 26 November 2016 Red Energy attempted to contact Customer S by telephone, but was unsuccessful and left a voice message. Red Energy also sent Customer S an SMS message requesting that she contact Red Energy urgently. Red Energy attempted to contact the secondary contact for the account, but its records indicate that the number was engaged or disconnected.
 23. On 29 November 2016, Red Energy sent Customer S a letter offering her a payment plan for her gas account of \$105.00 per fortnight to commence on 13 December 2016. Customer S did not respond to the offer.
 24. On 7 December 2016, Red Energy sent Customer S a reminder notice for \$436.37 with a due date of 15 December 2016. This was the amount outstanding from the October bill after taking into account two \$100.00 payments and the \$237.46 transfer from Customer S's electricity account on 5 December 2016.
 25. On 12 December 2016, Red Energy sent Customer S an SMS message requesting that Customer S contact Red Energy urgently.
 26. On 17 December 2016, Red Energy issued Customer S a disconnection warning notice for an amount of \$336.37 with a due date of 29 December 2016.
 27. On 31 December 2016, Red Energy sent Customer S a final disconnection notice and an SMS message requesting that Customer S contact Red Energy urgently.
 28. On 19 January 2017, Red Energy called Customer S and left a message with a third party asking Customer S to contact Red Energy urgently. Red Energy also sent Customer S an SMS stating that her gas supply was at risk of disconnection. Red Energy then raised a service order for the disconnection of the gas supply to Customer S's premises (to occur on 2 February 2017).
 29. On 20 January 2017, Red Energy issued Customer S a disconnection warning letter via registered post. In its submission, Red Energy notes that this letter "included information on Red [Energy]'s hardship programme and how Red [Energy] can assist customers experiencing financial difficulties."

Disconnection of gas supply to the premises

30. At 9:30am on 2 February 2017, Red Energy disconnected the gas supply to Customer S's premises for non-payment. The outstanding balance on Customer S's gas account was \$462.86.
31. On 3 February 2017, Customer S called Red Energy and advised that her gas supply had been disconnected. Customer S also raised a complaint with the ombudsman.
32. At 5:45pm on 3 February 2017, the supply of gas was reconnected to Customer S's premises.
33. The premises were disconnected for a period of 1 day, 8 hours and 15 minutes.
34. As at 29 August 2018, Red Energy has not made any wrongful disconnection payment to Customer S.

Relevant obligations

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

(a) The Act:

(i) Sections 43(1), (1A) and (2) rendering void any term or condition of Red Energy's contract for the supply of gas to the extent that it is inconsistent with terms and conditions decided by the commission that:

A. specify the circumstances in which the supply of gas to a premises may be disconnected, and

B. 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 in place of any void term or condition;

(ii) Section 48A(1) of the Act which deems a condition into Red Energy's 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

(iii) 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 \$500.00 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 \$3,500.00 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 S, 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.

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

Decision

37. Red Energy is 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).
38. Red Energy disconnected the supply of gas to Customer S's premises at 9:30am on 2 February 2017.
39. Prior to disconnecting the supply of gas to Customer S's premises for non-payment, Red Energy failed to comply with the terms and conditions of its contract with Customer S.
40. The disconnection was therefore not in accordance with the deemed licence condition.
41. The supply of gas to Customer S's premises was reconnected at 5:45pm on 3 February 2017.
42. The supply of gas to Customer S's premises was wrongfully disconnected for a period of 1 day, 8 hours and 15 minutes.
43. Therefore, under the deemed licence condition, Red Energy was obliged to pay to Customer S the prescribed amount of \$672.00 as soon as practicable after the supply of gas was reconnected to Customer S's premises on 3 February 2017.
44. No payment has been made as at 29 August 2018.

Reasons

45. 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).
46. 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.
47. Clause 8.2 of Red Energy's contract with Customer S specifies the circumstances in which the supply of gas to Customer S's premises may be disconnected. By the operation of clause 16.5, clause 8 is subject to compliance with, and incorporates by reference into the contract, the requirements in Part 6 of the code. As noted at paragraph 5 above, it is accepted that Red Energy complied with the relevant requirements of clauses 109, 110 and 111(1)(e) of the code.
48. The ombudsman considered that Red Energy may not have complied with the provisions of clauses 111(2) and 72(1)(a)(i) of the code.

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

49. On 24 October 2016, Customer S informed Red Energy that she was on a pension, was struggling to pay multiple bills and was experiencing financial hardship. Further, as noted by the ombudsman, Customer S's payment history and her having qualified for a concession card are further evidence of her experiencing payment difficulty (see paragraph 6 above).

50. In any case, Red Energy does not dispute that Customer S was a customer experiencing financial difficulty. Consequently, before Red Energy could disconnect the supply of gas to Customer S's premises it had to comply with the requirements of clause 111(2) of the code.

Did Red Energy offer Customer S two payment plans? Clauses 111(2) and 72(2) of the code

51. Clause 111(2) of the code required Red Energy not to arrange for disconnection of Customer S's premises unless Red Energy had offered Customer S two payment plans in the previous 12 months (between 19 January 2016 and 19 January 2017, when Red Energy arranged for the disconnection), and:

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

52. In offering a payment plan to Customer S, Red Energy was required by clause 72(2) of the code to specify:

- (a) the duration of the plan; and
- (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; and
- (d) if the customer is to pay in advance—the basis on which instalments are calculated.

53. The ombudsman's memorandum suggests that Red Energy's offers of payment plans to Customer S may not have complied with the requirements of clause 72(1)(a)(i) of the code as the amounts offered in those plans did not take account of Customer S's capacity to pay. This argument confuses the requirements of *offering* a payment plan with the requirements of *establishing* a payment plan under clause 72 of the code. The requirements of making an offer of a payment plan as set out in clause 72(2) are different to the requirements for establishing a payment plan as set out in clause 72(1).

54. The offering and establishing of a payment plan do not have to happen at the same time, although they often will. This is especially the case where the customer is not engaging with the retailer. At the *offering stage*, in circumstances where the customer is not engaging despite repeated attempts by the retailer to get the customer to engage, the retailer is not

obliged to have regard to the customer's capacity to pay in making a valid *offer* of a payment plan.¹

55. At that point in time, the retailer has information about the customer's history of gas usage, arrears and payments to date. The retailer also has information about the customer's current and average levels of gas usage. With this information, and the knowledge that the customer is having payment difficulties, the retailer should be able to put together an offer of a payment plan that is as sensitive to the customer's circumstances as the available information allows. That is, the minimum amount of instalment payments and the maximum amount of time or duration for such a plan that the retailer can reasonably allow and offer. An offer prepared on that basis can then be sent to the customer. Should the retailer wish to establish that the offers were received the retailer may choose to send such offers out to the relevant customer by registered mail. If the customer engages with the retailer in response to such an *offer*, the retailer can then *establish* a payment plan in compliance with clause 72(1) of the code.
56. During the first telephone conversation that took place between Red Energy and Customer S on 24 October 2016, Customer S asked to set up a payment plan of \$50.00 per fortnight but terminated the call before an offer could be made to her. During the second telephone conversation, the Red Energy representative began to offer to establish a payment plan for Customer S, specifying a payment of \$104.00 per fortnight. Customer S indicated during both conversations that she did not want a payment plan on terms offered to her by Red Energy (see paragraph 20 above).
57. During the second telephone conversation on 24 October 2016 Red Energy had commenced making Customer S an offer of a payment plan, however Customer S rejected the offer immediately before Red Energy had an opportunity to specify the elements required by clause 72(2) of the code. As Customer S was engaging with Red Energy and had rejected the payment plan immediately, it would be unreasonable to expect Red Energy to go on to provide the additional details required by clause 72(2) of the code. Accordingly the offer made by Red Energy on 24 October 2016 was adequate for the purposes of clause 111(2) of the code.
58. On 29 November 2016, Red Energy sent a letter to Customer S offering a payment plan of \$105.00 per fortnight, to commence on 13 December 2016. However, Customer S did not respond to the offer (see paragraph 23 above).

¹ The obligation to take into account the customer's capacity to pay is set out in clause 72(1) of the code and only applies to the process of *establishing* a payment plan, not the making of an offer under clause 72(2).

59. While Red Energy’s letter offering a payment plan contained the amount of each instalment payable under the plan (\$105.00) and the frequency of instalments (fortnightly), it did *not* contain the following information required by clause 72(2) of the code:
- (a) The duration of the plan;
 - (b) The date by which each instalment must be paid; and
 - (c) The number of instalments to pay Customer S’s arrears.
60. As the offer was made in writing, Red Energy was able to include all of the elements required by the code in its offer of a payment plan to Customer S, and should have done so. Further, the commission notes that, in addition to lacking the information required under clause 72(2) of the code (see paragraph 59 above), the letter was also unclear with regard to a number of other crucial issues and contained serious factual inaccuracies. The commission notes with concern that the recipient of such a letter would likely be confused as to: whether the letter pertains to their electricity or their gas account; what precisely is being offered in the letter; and what the consequence would be to the recipient should they choose not to accept that offer. Moreover, the commission is concerned that Red Energy’s letter noted that it had not “received payment for the supply of energy” from Customer S, when in fact Customer S had been making fortnightly payments on her electricity account and made a recent \$100 payment to her gas account.
61. Red Energy failed to offer a second payment plan compliant with the requirements of clause 72(2) of the code in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 19 January 2017, as required by clause 111(2) of the code.

Enforcement

62. Red Energy has breached its gas retail licence by failing to make a payment of \$672.00 as soon as practicable after the reconnection of the supply of gas to Customer S's premises on 3 February 2017.
63. Red Energy is required to rectify the contravention by making the payment.
64. Red Energy should advise the commission in writing when the payment has been made.
65. If Red Energy is unable to make payment it should inform the commission in writing within five business days of receiving this decision.
66. If the payment is not made within five business days of Red Energy receiving this decision, the commission may take enforcement action against Red Energy under Part 7 of the Essential Services Commission Act 2001 (Vic).