

Customer W and Red Energy – Decision and Reasons

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

1 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 W.
2. The complaint is about the application of section 48A of the Gas Industry Act 2001 (Vic) (the Act) for a disconnection by Red Energy Pty Ltd (Red Energy) of Customer W's gas supply at [address redacted] (the premises). Gas supply to the premises was disconnected from 1:40pm on 10 December 2015 to 12:45pm on 5 January 2016 (a period of 25 days, 23 hours and 5 minutes).

Issues for decision

3. Red Energy and the ombudsman agree that the disconnection was wrongful under section 48A of the Act, and that consequently Red Energy has an obligation to make a payment to Customer W by way of wrongful disconnection compensation in respect of that disconnection as a condition of its gas retail licence.
4. The issue on which the commission has been asked to make a decision on the complaint by Red Energy and the ombudsman is what amount Red Energy is obliged to pay to Customer W, by way of a wrongful disconnection payment, as a condition of its gas retail licence, deemed under section 48A of the Act.
5. As both Red Energy and the ombudsman agree that Customer W contacted Red Energy within 14 days of her gas supply having been disconnected, any wrongful disconnection payment is not the prescribed capped amount under sub-section 48A(1A) of the Act. The commission is asked to determine the quantum of the prescribed amount payable to Customer W.
6. This requires the commission to make findings and reach conclusions regarding the following matters:
 - (a) When did Red Energy disconnect the supply of gas to the premises of Customer W? (see paragraphs 16 and 24 below);
 - (b) Was supply of gas to Customer W's premises reconnected, and if so, when? (see paragraphs 20 and 27 below);
 - (c) For what period of time did the disconnection occur? (see paragraph 28 below);
 - (d) What amount was Customer W entitled to receive by way of wrongful disconnection payment in respect of the disconnection of her gas supply by Red Energy under section 48A of the Act? (see paragraph 29 below);
 - (e) When was Red Energy obliged to make the payment of the prescribed amount? (see paragraphs 21(a), 29 and 32 below);
 - (f) Has Red Energy made the payment to Customer W in accordance with its deemed licence condition under section 48A of the Act? (see paragraph 30 below);
 - (g) Given Red Energy did wrongfully disconnect the supply of gas to Customer W's premises and has not made the payment, what are the consequences? (see paragraphs 43, 44 and 47 below).

7. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman has stated that Red Energy acknowledges that the disconnection of the supply of gas to Customer W's premises was wrongful, but that Red Energy disputes the amount that it is required to pay Customer W by way of a wrongful disconnection payment.
8. Red Energy was provided a copy of the ombudsman's formal letter of referral and invited to provide any information and documents it considered that the commission should consider 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's submission largely accepted the ombudsman's memorandum, stating "Red Energy refers to the Chronology of events included with the Memorandum. Red Energy agrees that the information contained in that Memorandum is correct."
10. In its submission Red Energy did not dispute:
 - (a) the chronology of events as presented by the ombudsman in its referral memorandum;
 - (b) the ombudsman's conclusion that the disconnection of the supply of gas to Customer W's premises by Red Energy was wrongful; and
 - (c) the assertion that Red Energy was obliged to make a wrongful disconnection payment to Customer W in respect of the disconnection of the supply of gas to her premises by Red Energy on 10 December 2015.
11. In its submission Red Energy further remarks that "...[t]he point in question is quite a simple one." Namely, the amount that Red Energy is required to pay Customer W by way of a wrongful disconnection payment, as a condition of its gas retail licence, deemed under section 48A of the Act. In particular, Red Energy does not dispute that it is obliged to make a wrongful disconnection payment for the period of time from Customer W's disconnection to the point when Red Energy lost billing rights for the customer's premises – 10 December 2015 to 15 December 2015 (see paragraphs 16 to 19 below).
12. Red Energy submits that it was not able to arrange for the reconnection of the supply of gas to Customer W's premises, under "the relevant operating procedures as issued by AEMO", as Customer W had requested that billing rights for the gas supply to her premises be transferred to Origin Energy. By way of substantiation, Red Energy provided a copy of the Retail Market Procedures (Victoria), published by the Australian Energy Market Operator (AEMO).
13. Consequently, Red Energy submitted that in the circumstances of Customer W's disconnection "the provisions of Section 48A of the Gas Industry Act *must be limited* because

once the Retailer loses Financial Responsibility status it ceases to have any capacity or standing to make the re-connection occur. Once that occurs, section 48A *must fall away* and the relevant provisions of the National Gas Law and Rules then come into play.” In effect, Red Energy argues that the amount of the wrongful disconnection payment should be calculated with respect to a period of time beginning at the disconnection of supply to Customer W’s premises as arranged by Red Energy, and ending at the point in time that Red Energy lost the billing rights in respect of the supply of gas to Customer W’s premises.

Relevant facts

14. From the commission's review of the matter and information and documents received by the commission, the commission makes the factual findings set out below.

Disconnection of gas supply to the premises

15. On 30 November 2015, Red Energy raised a service order for the disconnection of the gas supply to Customer W's premises, to take effect on 10 December 2015.
16. On 10 December 2015 at 1:40pm, the gas supply to Customer W's premises was disconnected.
17. On 10 December 2015, at approximately 3:20 pm, Customer W called Red Energy. During this call:
- (a) Customer W advised Red Energy that the gas supply was disconnected and requested a Utility Relief Grant application form be sent to her;
 - (b) Red Energy advised Customer W that in order to be reconnected, she would have to pay the gas account in full; and
 - (c) Red Energy advised Customer W that if she was unable to pay her outstanding account in full, she would need to find a new retailer.
18. On 10 December 2015, at 3:37pm Red Energy received a "change request 0002 Move-In" to transfer the billing rights to Origin Energy, as of 15 December 2015 (where an "0002 Move-In Code" is also a reconnection request).
19. On 15 December 2015, Red Energy lost the billing rights to Customer W's gas supply, due to Customer W's request to transfer her gas supply to Origin Energy.
20. On 5 January 2016, at 12:45pm Customer W's gas supply was reconnected by Origin Energy.

Relevant obligations

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

(a) The Act:

- (i) Sub-section 48A(1) of the Act deems a condition into Red Energy's gas retail licence an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection. Sub-section 48A(3) requires such payment to be made as soon as practicable after reconnection of the gas supply.
- (ii) Prior to 1 January 2016, sub-section 48A(5)(b) of the Act provided that the prescribed amount was \$250 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected. From and after 1 January 2016 sub-section 48A(5)(b) provides that the prescribed amount is \$500 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected.
- (iii) Sub-sections 46(1) and (5) of the Act dealing with deemed contracts for supply and sale for relevant customers taking supply of gas without entering into a market retail contract.
- (iv) Sub-section 48I of the Act dealing with hardship policies and including having regard to – the essential nature of gas supply; community expectations that the gas supply will not be disconnected solely because of a customer's inability to pay for the gas supply; and the principle that the gas supply to premises should only be disconnected as a last resort.

(b) Red Energy's gas retail licence:

- (i) Clause 8.1 of the licence 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 Gas Retail Code. Schedule 1, section 2 of the licence states at clause (h) "a reference to a document or a provision of a document includes an amendment or supplement to, or replacement or novation of, that document or that provision of that document". The Energy Retail Code replaced the Gas Retail Code in 2004. A term or condition incorporated by reference into the contract, is taken to be expressly dealt with.
- (ii) Clause 8.3 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 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 standard retail contract, established with Customer W:
 - (i) Clause 8.2 which states in part:

“[a]fter taking certain steps as set out in the Retail Code, we may disconnect you”; and

Where required by the Retail Code, we will give you a disconnection warning stating when we will disconnect you if you continue to not comply with the relevant requirement. 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 8.4 which states in part:

if your supply has been disconnected based on a breach by you of this Contract that permits us to disconnect you under the Retail Code and you rectify your breach within 10 Business Days of disconnection, we will reconnect you on request. You may be required to pay us a reconnection fee.
 - (iii) Clause 16.5 which states, in part:

You and we agree to comply with all requirements in the Relevant Laws except where this Contract is different to those requirements and where that difference is permitted by the Relevant Laws, in which case this Contract will apply.

If you are a Residential or Business Customer, in particular, the Retail Code sets out our obligations to you and your obligations to us and this Contract cannot be inconsistent with the Retail Code. 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.
 - (iv) Clause 19, which defines “Relevant Laws” for the purpose of the contract as follows:

Relevant Laws means any laws, acts, regulations, rules, orders, guidelines, policies, procedures, licences or codes (including the Retail Code) that apply to this Contract or regulate Victorian energy industry from time to time.

(d) Clause 121(2A) of the code, which states:

If a small customer whose premises have been de-energised is eligible for a Utility Relief Grant and, within 10 business days of the de-energisation, applies for such a grant, then the small customer is to be taken by the retailer to have rectified the matter that led to the de-energisation.

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

Decision

23. If Red Energy wrongfully disconnected the supply of gas to Customer W's premises as it concedes in its submission in response to the ombudsman's letter of referral, then it is in breach of a condition of its gas retail licence, deemed under section 48A of the Act (the deemed licence condition).
24. Red Energy disconnected the supply of gas to Customer W's premises at 1:40pm on 10 December 2015.
25. Prior to disconnecting the supply of gas to Customer W's premises for non-payment, the ombudsman claims, and Red Energy does not dispute, that Red Energy failed to comply with the terms and conditions of its contract with Customer W.
26. The ombudsman therefore claims, and Red Energy does not dispute, that the disconnection was not in accordance with the deemed licence condition.
27. The supply of gas to Customer W's premises was reconnected on 5 January 2016 at 12:45pm.
28. The supply of gas to Customer W's premises was wrongfully disconnected for a period of 25 days, 23 hours and 5 minutes.
29. Therefore, under the deemed licence condition, Red Energy was obliged to pay to Customer W a prescribed amount of \$7,624 as soon as practicable after the supply of gas was reconnected to Customer W's premises on 5 January 2016.
30. No payment has been made as at 1 August 2018.

Reasons

31. 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 7.1); 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 7.3); and
 - (c) Red Energy must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 7.4).
32. 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.
33. As noted at paragraphs 8 to 13 above, both the ombudsman and Red Energy accept that in disconnecting the supply of gas to Customer W's premises, Red Energy did not comply with the terms of its contract with Customer W that set out the circumstances in which Red Energy would disconnect the supply of gas to Customer W's premises.
34. Further, Red Energy and the ombudsman accept that as a result of Red Energy's non-compliance, Red Energy is required to make a wrongful disconnection payment to Customer W in respect of its disconnection of her gas supply under the deemed licence condition.
35. Section 48A of the Act only contemplates two possible amounts that the licensee may be required to pay a customer under the deemed licence condition:
 - (a) The prescribed capped amount (sub-section 48A(1A) of the Act) – payable to a customer who was wrongfully disconnected but did not inform the retailer of the disconnection within 14 days of the disconnection occurring; or, in all other cases,
 - (b) The prescribed amount, defined in sub-section 48A(5)(b) of the Act, prior to 1 January 2016 as "...\$250 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected".

36. After the commencement of the Energy Legislation Amendment (Consumer Protection) Act 2015 on 1 January 2016, the definition of prescribed amount under sub-section 48A(5)(b) of the Act changed to \$500 per day and a pro rata amount for each part of a day.
37. The heading of section 48A of the Act – “Compensation for wrongful disconnection” – suggests the objective of the section is to compensate customers whose gas supply has been wrongfully disconnected by their retailer. The operation of section 48A of the Act cannot be limited (as suggested by Red Energy) by any instruments published by AEMO or under the national framework, particularly when none of these documents or instruments specifically mention section 48A of the Act or deal with the calculation of wrongful disconnection payments.
38. Similarly, the operation of the obligations imposed by section 48A of the Act on Red Energy cannot “fall away” or “be limited” (as suggested by Red Energy) because of factual matters that may occur but which are not provided for in section 48A of the Act. The one circumstance in which the Act sets a limit on the amount of the wrongful disconnection payment is where the customer does not contact the retailer within 14 days of the disconnection to notify the retailer of the disconnection. The Act does not contemplate limiting the amount of the wrongful disconnection payment in any other circumstance.
39. The Commission’s decision is based on matters of principle set out in paragraphs 37 and 38 above, however the commission also notes that Red Energy chose to advise Customer W, after she informed Red Energy of the disconnection and requested a Utility Relief Grant application form, that if she cannot make payment she would need to find a new retailer. So it was in response to advice from Red Energy that Customer W transferred to a new retailer (Origin Energy) and which led to Red Energy losing its billing rights and ability to reconnect the supply of gas to Customer W’s premises (see paragraphs 17 to 19).
40. The supply of gas to Customer W’s premises was disconnected for 21 days, 10 hours and 20 minutes prior to 1 January 2016. In respect of this period, the prescribed amount is \$250 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected, amounting to \$5,358.
41. The supply of gas to Customer W’s premises was disconnected for 4 days, 12 hours and 45 minutes after 1 January 2016. In respect of this period, the prescribed amount is \$500 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected, amounting to \$2,266.
42. Red Energy is obliged to pay Customer W a wrongful disconnection payment under the deemed licence condition. The total amount of the wrongful disconnection payment is calculated with respect to the total amount of time that Customer W’s gas supply was disconnected, 25 days, 23 hours and 5 minutes. As the definition of “prescribed amount”

under section 48A(5)(b) of the Act changed during the period of Customer W's disconnection (from \$250 to \$500 per day, commencing on 1 January 2016) the amount of the wrongful disconnection payment is the sum of the two figures calculated above in paragraphs 40 and 41 (namely \$5,358 and \$2,266), amounting to \$7,624.

Enforcement

43. Red Energy concedes in its submission, in response to the ombudsman's letter of referral and memorandum, that it wrongfully disconnected the supply of gas to Customer W's premises. Consequently, Red Energy has breached its retail licence by failing to make a payment of \$7,624 as soon as practicable after the reconnection of the supply of gas to Customer W's premises on 5 January 2016.
44. Red Energy is required to rectify the contravention by making the payment.
45. Red Energy should advise the commission in writing when the payment has been made.
46. If Red Energy is unable to make payment it should inform the commission in writing within five business days of receiving this decision.
47. 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).