ESSENTIAL SERVICES COMMISSION

Customer I and EnergyAustralia – Decision and Reasons

Application of s48A of the Gas Industry Act 2001 (Vic) – Compensation for wrongful disconnection

16 May 2018

Commissioners:
Dr Ron Ben-David, Chairperson;
Mr Richard Clarke, Commissioner; and
Ms Kate Symons, Commissioner.

An appropriate citation for this paper is:

Essential Services Commission 2018, Customer I and EnergyAustralia – Decision and Reasons: Application of s48A of the Gas Industry Act 2001 (Vic) – Compensation for wrongful disconnection, 16 May

C/18/10791

Contents

The complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) ("EWOV") to the Commission of a complaint by Customer I.

2. The complaint is about the application of s 48A of the Gas Industry Act 2001 (Vic) ("the Act") for an alleged wrongful disconnection by EnergyAustralia of Customer I's gas supply at [address redacted] ("the premises"), from 10:10am on 9 December 2015 to 1:32pm on 11 March 2016 (a period of 93 days, 3 hours and 22 minutes)

Issues for decision

3. The issue for decision by the Commission on the complaint is whether or not EnergyAustralia has breached a condition of its retail licence regarding an obligation to make a prescribed payment to Customer I in circumstances where:

   (a) EnergyAustralia disconnected the supply of gas to the premises of Customer I; and

   (b) EnergyAustralia 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 sub-s48A(3) of the Act, EnergyAustralia was obliged to make the prescribed payment to Customer I as soon as practicable after the supply of gas was reconnected to Customer I's premises.

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

   (a) Whether or not EnergyAustralia disconnected the supply of gas to the premises of Customer I (see paragraph 27 below);

   (b) Was supply of gas to Customer I's premises reconnected, and if so, when? (see paragraph 28 below);

   (c) If EnergyAustralia did disconnect the supply of gas to Customer I's premises, for what period of time did the disconnection occur? (see paragraph 29 below);

   (d) What was the contract between EnergyAustralia and Customer I? (see paragraphs 11 to 13 below);

   (e) What were the terms or conditions of that contract which specified the circumstances in which EnergyAustralia may disconnect the supply of gas to Customer I's premises? (see paragraphs 11 to 13 and 41 below);

   (f) Whether or not EnergyAustralia failed to comply with *those* terms and conditions (see paragraphs 35, 55 and 56 below);

   (g) Was Customer I entitled to receive payment of a prescribed amount because of any wrongful disconnection by EnergyAustralia under s48A of the Act? (see paragraphs 37 and 38 below);

   (h) If so, when was EnergyAustralia obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises);

(i) Has EnergyAustralia made the payment to Customer I in accordance with its deemed licence condition under s48A of the Act? (not applicable as, in this instance, no such obligation arises);

(j) If EnergyAustralia has not made the payment what are the consequences? (not applicable as, in this instance, no such obligation arises)

5. Through its formal letter of referral and the memorandum accompanying the letter, EWOV acknowledged that EnergyAustralia had demonstrated that it had complied with clauses 110 and 111(1)(e) of the Energy Retail Code (Version 11) ("the Code") prior to the disconnection. However, EWOV considered that it was unclear whether EnergyAustralia had complied with clauses 111(2), 72(1)(a)(i) and 33(3) of the Code. Regarding clauses 111(2) and 72(1)(a)(i), this was because EWOV considered that EnergyAustralia was obliged to offer Customer I two payment plans in the 12 months prior to the disconnection which took into account Customer I's capacity to pay, but did not do so. Regarding clause 33(3) it was because EWOV considered that when EnergyAustralia told Customer I about the availability of URGS during a telephone conversation that took place on 28 April 2015 there was no "further discussion about the application [process] or the eligibility requirements".

6. EnergyAustralia was invited to provide any information and documents it considered that the Commission should have regard to in making its decision. EnergyAustralia was also invited to make submissions on the complaint from its point of view for the Commission to consider. EnergyAustralia did provide information and documents and made submissions for the Commission's consideration.

7. EnergyAustralia said it generally agreed with the chronology of events as presented by EWOV in its referral memorandum. However, EnergyAustralia provided additional important details relevant to the disconnection assessment.

8. EnergyAustralia has submitted that at the time of arranging disconnection it no longer considered Customer I to be a hardship/payment difficulties customer, in light of a history of non-engagement, unspecified information about Customer I's capacity to pay, and a failure to make payments towards his payment plan. While EnergyAustralia agreed with EWOV's assessment that the payment plan offered to Customer I on 28 April 2015 (the first payment plan) was compliant with the Code, it disagreed with EWOV's assessment that the second payment plan, offered to Customer I on 19 October 2015 (the second payment plan), did not take into account Customer I's capacity to pay, in breach of the obligation set out in clause 72(1)(a)(i) of the Code. EnergyAustralia submits that Customer I agreed to the payment plan through the agency of his authorised representative (his son), that capacity to pay was discussed and considered and that, prior to agreeing to the payment plan, Customer I's son advised that his father would be receiving money by way of compensation

for a WorkCover claim within the following month and Energy Australia set the payment date to 25 November 2015, as a direct consequence of this advice.

Relevant facts

9. The Commission analysed EWOV's request for a decision and sought additional information from EnergyAustralia. Having assessed the matter and the information and documents received by the Commission, the Commission makes the factual findings set out below.

Background

10. At all relevant times, EnergyAustralia was the licensee responsible for supply of gas to the premises.

11. In June 2012 EnergyAustralia established an account for the supply of gas at the premises to Customer I. It entered into a Market Retail Contract for the supply of gas at Customer I's premises. Clause 13 of that contract deals with paying bills and sub-clause 13.3 deals with difficulties in paying bills. Clauses 17 to 19 of that contract contain the terms and conditions specifying the circumstances in which the supply of gas to the premises may be disconnected. Both clauses 13 and 17 of the contract have incorporated into the contract other terms and conditions by reference. These are EnergyAustralia's Customer Hardship Policy and the provisions of the Code.

12. Relevantly, sub-clause 13.3(a) and (b) provide that:

    (a) "If you're a residential customer and have told us that you have difficulty paying your bill, we must offer you the option of paying your bill under a payment plan. However, we are not obliged to do so if you've had 2 payment plans cancelled due to non-payment in the previous 12 months…"; and

    (b) "Additional protections may be available to you under our Customer Hardship Policy and under the National Energy Retail Law and the Rules if you're a customer experiencing payment difficulties due to hardship. A copy of our Customer Hardship Policy is available on our website."

13. Relevantly, sub-clause 17.1 provides that "subject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises…"; and sub-clause 17.2 similarly provides that "Before disconnecting your premises, we must comply with the relevant notice requirements and other provisions in the Rules…"

14. On several occasions throughout 2012 and 2013, Customer I advised EnergyAustralia of his inability to pay the gas account as he was unemployed following a workplace accident. Customer I continuously advised EnergyAustralia that he was expecting a 'payout' from WorkCover and that once he received this 'payout' he would be able to pay off his arrears.

15. Between 25 June 2012 and 1 December 2014 Customer I made only two payments towards his gas account – a payment of $200 on 1 November 2013, and $100 on 11 November 2014. By 1 December 2014 the balance of Customer I's gas account was $11,235.81.

16. EnergyAustralia made nine attempts to contact Customer I by phone between June 2014 and September 2014. These attempts were all unsuccessful as the calls were not answered, or terminated once answered.

Circumstances leading to the disconnection in December 2015

17. On 28 April 2015, EnergyAustralia called Customer I. During this call:

    (a) EnergyAustralia placed Customer I onto its hardship program and established a payment plan of $220.00 per fortnight. EnergyAustralia also advised Customer I that it would match his payments "on a 1:1 ratio" in order to clear the arrears within two years.

    (b) Customer I advised he would make a payment of $150.00 during the week and begin paying $220.00 fortnightly shortly after.

    (c) Energy Australia advised Customer I of the existence of the Utility Relief Grant Scheme (URGS) however Customer I stated that he was aware of the URGS and had previously been assisted with an URGS application by the Salvation Army.

    (d) EnergyAustralia sent Customer I a hardship program Welcome Letter.

18. Customer I made no payments towards his payment plans and did not make contact with Energy Australia. On 6 July 2015, EnergyAustralia removed Customer I from the hardship program and sent him an SMS advising him to make payment to remain on the hardship program. Customer I did not make a payment.

19. On 5 August 2015, EnergyAustralia issued Customer I a bill for $12,419.21, of which $10,554.34 was overdue and payable immediately. Customer I did not pay this bill.

20. On 25 September 2015, EnergyAustralia issued a reminder notice for the amount of $10,114.34.

21. On 9 October 2015, Energy Australia issued a disconnection warning notice in the amount of $10,554.34.

22. On 19 October 2015, EnergyAustralia called Customer I. During this call:

    (a) Customer I authorised his son to speak to EnergyAustralia on his behalf.

(b) Customer I's son advised Energy Australia that Customer I was unable to make a lump sum payment in order to avoid the disconnection but that from the following week he could pay $200.00 per fortnight.

(c) Energy Australia offered a payment plan of $280.00 per week however this was declined by Customer I's son who requested a lower amount.

(d) EnergyAustralia and Customer I's son agreed to a payment arrangement of $500.00 to be paid on 28 October 2015, $280.00 on 11 November 2015 and the remaining balance of $12,015.81 to be paid by 25 November 2015.

(e) EnergyAustralia sent Customer I a letter outlining the payment arrangement that was agreed to.

23. On 28 October 2015, Customer I called EnergyAustralia. During this call Customer I's son made a $500.00 payment and requested a call back on 11 November 2015, around 4.00pm to make another payment.

24. On 12 November 2015, Energy Australia called Customer I however he requested a return call later in the day.

25. On 20 November 2015, a final disconnection warning notice was issued, via registered post to Customer I for an outstanding amount of $11,919.21.

26. On 20 November 2015, EnergyAustralia raised a disconnection service order with the distributor, with respect to the supply of gas to Customer I's premises.

Disconnection of gas supply to the premises

27. At 10:10am on 9 December 2015, EnergyAustralia disconnected the gas supply at Customer I's premises for non-payment of the outstanding balance of $12,538.92.

28. On 10 March 2016, Customer I contacted EWOV, an investigation was registered and the gas supply was reconnected at 1:32pm on 11 March 2016.

29. The premises were disconnected for a period of 93 days three hours 22 minutes

30. As at 16 May 2018, EnergyAustralia has not made any wrongful disconnection payment to Customer I.

Relevant obligations

31. In this matter EnergyAustralia's relevant obligations arise from the following:

(a) Sections of the Act: sub-sections 43(1) and (2) – rendering void any term or condition of EnergyAustralia's contract for the supply of gas to the extent that it is inconsistent with terms and conditions decided by the Commission that specify the circumstances in which the supply of gas to premises may be disconnected and 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; section 48A of the Act – deeming a condition into EnergyAustralia's retail licence an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection; sections 48E to 48K dealing with hardship policies and in particular the objects of those provisions (s48F) and the reference to community expectations that the gas supply will not be disconnected solely because of a customer's inability to pay for the gas supply (s48I(2)(c)).

(b) EnergyAustralia's Retail Licence (clause 6.1- requiring EnergyAustralia 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; clause 6.3 – requiring each term or condition of EnergyAustralia's contracts for the sale of gas to be consistent with each term and condition of the Code; and clause 6.4 – requiring EnergyAustralia to comply with the terms and conditions of any contract for the sale of gas with a relevant customer);

(c) EnergyAustralia's market contract with Customer I (clause 8.1 – EnergyAustralia agrees to meet its obligations as set out in the contract and to comply with the energy laws; clause 13.3 – difficulties in paying, offering option to pay under a payment plan and additional protections may be available to customers as set out in EnergyAustralia's Hardship Policy; clause 17 – disconnection of supply is subject to compliance with the requirements of the Code; and clause 18 – reconnection after disconnection);

(d) EnergyAustralia's Hardship Policy which effectively states that EnergyAustralia will inform customers experiencing hardship about government grants and relevantly including the URGS (clauses 7.1 and 7.1.6)

(e) The Code: clauses 33(3) and (6) requiring EnergyAustralia to provide information to a hardship customer or a customer experiencing payment difficulties about the availability of relief schemes including the URGS; clause 71B identifying that a customer in financial hardship is a residential customer who has the intention but not the capacity to make payment within the timeframe required by the retailer's

payment terms; clause 72 identifying the requirements in *offering a payment plan* and, also, in *establishing a payment plan*; clauses 107 to 118 – dealing with and specifying the circumstances in which the supply of gas to premises may be disconnected. In particular, that the retailer must not arrange disconnection of a customer's premises except in accordance with clauses 111 to 118. And clause 111 dealing with disconnection for not paying a bill.

32. EnergyAustralia's obligations are discussed further below in the reasons.

Decision

33. EnergyAustralia is not in breach of a condition of its gas retail licence, deemed into EnergyAustralia's gas retail licence by s48A of the Act ("the deemed licence condition").

34. EnergyAustralia disconnected the supply of gas to Customer I's premises at 10:10am on 9 December 2015 (disconnection).

35. However, there was no failure on the part of EnergyAustralia to comply with the terms and conditions of the contract between EnergyAustralia and Customer I specifying the circumstances in which the supply of gas to those premises may be disconnected.

36. Accordingly, the second condition that has to be satisfied for s48A of the Act to apply was not satisfied.

37. The supply of gas was **not** wrongfully disconnected.

38. EnergyAustralia was not required to make any payment of a prescribed amount under the deemed licence condition.

Reasons

39. EnergyAustralia's gas retail licence effectively requires that:

    (a) EnergyAustralia 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 EnergyAustralia'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) EnergyAustralia must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 7.4).

40. The deemed licence condition requires EnergyAustralia 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.

41. Clauses 17 to 19 of EnergyAustralia's contract with Customer I effectively specify the circumstances in which the supply of gas to Customer I's premises may be disconnected. Clauses 17.1 and 17.2 are subject to compliance with, and incorporate by reference into the contract, the requirements in Part 6 of the Code. As noted at paragraph 5 above, it is accepted that EnergyAustralia complied with the relevant requirements of clauses 110 and 111(1)(e) of the Code.

42. EWOV has suggested that there may have been non-compliance with the provisions of clauses 33(3), 72(1)(a)(i), and 111(2) of the Code.

Clause 111(2) of the Code – Was Customer I a hardship/payment difficulties customer?

43. On 28 April 2015 EnergyAustralia was informed by Customer I that he was suffering financial hardship. EnergyAustralia accepted that Customer I was a hardship customer and put him onto its Hardship Program.

44. Customer I had informed EnergyAustralia that he had suffered a back injury, had been unemployed for two years, and was receiving a Centrelink benefit. On 9 July 2015 EnergyAustralia changed its view and formed:

(a) an adverse view regarding Customer I's intention to make a payment; and

(b) a positive view about Customer I's capacity to pay his bill and removed him from its Hardship Program because Customer I had not made all the payments in accordance with the payment plan established on 28 April 2015.

45. On 20 November 2015 EnergyAustralia noted in the contact notes for Customer I's account that "[t]here are… no obvious signs of hardship or capacity to pay issues". It is not clear to the Commission that EnergyAustralia had sufficient evidence to draw that conclusion in respect of the total amount outstanding (which was now in excess of $12,000).

46. Leaving aside the reasonableness or otherwise of EnergyAustralia's actions in unilaterally removing Customer I from its Hardship Program, Customer I was clearly a residential customer who had informed EnergyAustralia that he was experiencing payment difficulties. There was no further contact between EnergyAustralia and Customer I until 19 October 2015. Accordingly, before EnergyAustralia could disconnect the supply of gas to Customer I's premises it had to comply with the requirements of clause 111(2) of the Code.

Clauses 111(2) & 72 of the Code – Did EnergyAustralia offer Customer I two payment plans compliant with the Code prior to disconnection?

47. Clause 111(2) of the Code required EnergyAustralia to not arrange for disconnection of Customer I's premises unless EnergyAustralia had offered Customer I two payment plans in the previous 12 months, and:

(a) Customer I had agreed to neither of them; or

(b) Customer I had agreed to one but not the other of them but the plan to which Customer I agreed had been cancelled due to non-payment by Customer I; or

(c) Customer I had agreed to both payment plans but the plans have been cancelled due to non-payment by Customer I.

48. EnergyAustralia offered Customer I two payment plans in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 20 November 2015 (see paragraph 26 above). The first payment plan was offered on 28 April 2015, which was cancelled when Customer I failed to make any payment; the second payment plan was offered on 19 October 2015, towards which Customer I (through the agency of his son)

made a first payment of $500, but which was also cancelled when Customer I failed to make any subsequent payments.

49. An **offer** of a payment plan for the purposes of clause 111(2) of the Code required EnergyAustralia to inform Customer I of:

(a) the duration of the plan;

(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 his arrears. (see clause 72(2) of the Code).

50. Both the first payment plan offered to Customer I on 28 April 2015, and the second payment plan, offered to Customer I on 19 October 2015, by EnergyAustralia met the above criteria for an offer of a payment plan under clause 111(2).

51. Clause 72(1) of the Code requires a payment plan for a **hardship customer** to be **established** having regard to:

(a) the customer's capacity to pay; and

(b) any arrears owing by the customer; and

(c) the customer's expected energy consumption needs over the following 12 month period; and

to include an offer for the customer to pay for their energy consumption in advance or in arrears by instalment payments.

52. EWOV and EnergyAustralia are in agreement that the first payment plan, established with Customer I on 28 April 2015, met the requirements of clause 72(1) of the Code, however it is in dispute whether the second payment plan, established with Customer I on 19 October 2015, had sufficient regard to Customer I's capacity to pay.

53. The second payment plan was established by EnergyAustralia during a conversation with Customer I's authorised representative (his son). During the course of the conversation Customer I's son:

(a) rejected an initial offer made by EnergyAustralia, on the basis of insufficient capacity to pay;

(b) indicated that Customer I was about to receive a sum of money, by way of WorkCover compensation; and

(c) subsequently accepted an offer made by EnergyAustralia, in light of the amount Customer I was purportedly about to receive.

It is evident that the conversation EnergyAustralia had with Customer I's authorised representative was largely concerned with Customer I's capacity to pay.

54. While it is sufficient for the purposes of clause 111(2) of the Code that the offers of the payment plans were compliant with the requirements of clause 72(2) of the Code (outlined in paragraph 49, above), both of the plans established by Energy Australia for Customer I also met the requirements of clause 72(1) – which applies to hardship customers – even though at the time of the establishment of the second payment plan Customer I was not on EnergyAustralia's Hardship Program.

55. Accordingly, EnergyAustralia complied with the requirements of clause 111(2) of the Code and clauses 17.1 and 17.2 of its contract with Customer I.

56. EnergyAustralia was entitled to disconnect the supply of gas to Customer I at the premises on 9 December 2015. Consequently EnergyAustralia has no obligation to make payment to Customer I under the deemed condition of its gas retail licence under s 48A of the Act.

Other considerations

Applicability of clause 33(3) of the Code

57. EWOV's referral of this matter states that "EnergyAustralia does not appear to have met its obligations in providing Customer I information about the availability of the URGS" in the context of an alleged wrongful disconnection payment determination.

58. However, clause 33(3) of the Code and the equivalent provisions of EnergyAustralia's terms and conditions of contract are not terms and conditions specifying the circumstances in which the supply of gas to those premises may be disconnected. Accordingly they are not relevant to a decision under s48A of the Act, which is only concerned with a failure to comply with those types of terms and conditions of the contract.