

Customer K & Lumo Energy – Response to referral for advice

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

14 August 2019

Commissioners:

Ms Kate Symons, Acting Chairperson, and
Mr Simon Corden, Commissioner.

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Contents

The referral	3
Issues for decision	4
The ombudsman’s referral	4
Lumo Energy’s submissions	5
The first disconnection (for non-payment)	5
Subsequent disconnections (for unauthorised use of energy)	6
Relevant facts	7
Disconnection of gas supply to the premises	7
Relevant obligations	10
Response to referral	13
Reasons	15
Other observations	17

The referral

1. The Energy and Water Ombudsman (Victoria) has made a referral to the Essential Services Commission asking the commission to advise on the interpretation of section 48A(1A) of the Gas Industry Act 2001 (Vic) (the Act); relevant provisions of the Energy Retail Code (version 11) (the code); and conditions of the gas retail licence held by Lumo Energy Pty Ltd.
2. The factual circumstances of the referral concern a disconnection by Lumo Energy of the gas supply to the premises of Customer K [address redacted] (the premises). The gas supply to the premises was disconnected on 12:30 pm on 6 June 2016, and, according to the chronology prepared by the ombudsman in investigating the customer's complaint, may have been unlawfully reconnected by or on behalf of the customer at some time before 22 June 2016.
3. The questions referred by the ombudsman to the commission for advice are as follows:
 - (a) *Whether Lumo Energy met the minimum standard of conduct for compliance with the ERC?*
 - (b) *Whether Lumo Energy failed to meet the terms and conditions of its contract with Customer K that specifies the circumstances in which the supply of gas to those premises may be disconnected?*
 - (c) *Section 48(1A) of the Gas Industry Act – whether the WDP for the disconnection on 6 June 2016 is capped at \$3,500?*
 - (d) *What implications the possible self-reconnection may have on calculating the WDP amount?*
 - (e) *Whether the subsequent disconnections on 13 December 2016, 16 May 2017 and 20 November 2017 should be treated as separate disconnections, or as measures to put into effect the first disconnection.*

1. Lumo Energy has accepted the key facts as presented in the chronology provided by the ombudsman with its referral. Lumo Energy also agrees that the disconnection of the gas supply to the premises was in breach of a term or condition of Lumo Energy's contract with Customer K, specifying the circumstances in which Lumo Energy may disconnect the supply of gas to the premises. Both parties agree that Lumo Energy is obliged, as a condition of its gas retail licence, deemed under section 48A of the Act (the statutory licence condition), to make a wrongful disconnection payment to Customer K. The issue on which the commission has been asked to provide guidance, is how the compensation amount should be calculated.

Issues for decision

4. Lumo Energy stated to the commission that it accepts that in arranging for the disconnection of Customer K's gas supply it did not comply with a condition of its contract with Customer K specifying the circumstances in which it may disconnect her gas supply and, and that consequently Lumo Energy has an obligation to make a wrongful disconnection compensation payment to Customer K in respect of that disconnection as a condition of its gas retail licence under section 48A of the Act.
5. The commission has been asked to provide guidance on what amount of compensation Lumo Energy may be required to pay to Customer K.

The ombudsman's referral

6. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman advised that Lumo Energy considered that it complied with the terms and conditions of its contract with Customer K that specified the circumstances in which the supply of gas to Customer K's premises may be disconnected (Lumo Energy has since conceded this point in its submission to the commission on this matter – see below).
7. The ombudsman asked the commission to advise how any prescribed compensation amount payable in respect of the disconnection of Customer K's gas supply, on 6 June 2016, should be calculated. The ombudsman noted that in two of the commission's recent decisions, the matter of *Customer H & AGL Sales*¹ and the matter of *Customer W & Red Energy*², the commission indicated that section 48A of the Act only contemplates two possible amounts that the retailer may be required to pay a customer – the prescribed amount and the prescribed capped amount.
8. Subsequent disconnection service orders were raised by Lumo Energy after it was advised by Customer K's gas distributor, Australian Gas Networks Ltd (AGN), that it appeared a third party had removed the locks on the meter without the authorisation of Lumo Energy or AGN. The ombudsman's memorandum describes these subsequent disconnections as disconnections "for illegal consumption". The ombudsman considered it is "...unclear whether

¹ Essential Services Commission 2018, *Customer H and AGL Sales* – Decision and Reasons: Application of section 48A of the Gas Industry Act 2001 (Vic) – Compensation for wrongful disconnection, 12 September

² Essential Services Commission 2018, *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

the disconnections occurring after the original disconnection on 6 June 2016, should be treated as separate disconnections for the purposes of section 48A of the Act, or whether the service orders raised by Lumo [Energy] were to put into effect the original disconnection.”

9. If the disconnections on 13 December 2016, 16 May 2017 and 20 November 2017 are to be treated as separate disconnections, the ombudsman considers it unclear whether additional wrongful disconnection payments may be warranted.

Lumo Energy’s submissions

10. Lumo Energy was invited to provide any information and documents to which the commission should have regard. Lumo Energy made submissions for the commission’s consideration.
11. In its submission, Lumo Energy stated that it does not generally dispute the chronology provided by the ombudsman. Further Lumo Energy stated that “...upon further review, Lumo [Energy] considers that the disconnection of Customer K’s gas supply on 6 June 2016 was procured by [Lumo Energy] without satisfying the requirements under clause 111(2) of...” the code, and conceded that a wrongful disconnection compensation is payable in respect of the disconnection.
12. Lumo Energy submitted that the principles related to the calculation of prescribed compensation amount, cited by the ombudsman arising from the commission’s previous decisions may not apply in the particular circumstances of this disconnection. Lumo Energy distinguished this case on its facts from the cases of *Customer W and Red Energy* and *Customer H and AGL Sales* as those cases “... did not involve any unauthorised self-reconnection by the customer...”.

The first disconnection (for non-payment)

13. Lumo Energy acknowledged that it did not comply with clause 111(2) of the code in arranging for the disconnection of Customer K’s gas supply on 6 June 2016. However it stated that it seeks to ‘limit the period of time that the customer remained “disconnected”’ for the purposes of the calculation of the amount of the wrongful disconnection compensation.
14. Lumo Energy submitted that the meter reads obtained on 6 June 2016 and 22 June 2016 indicate that the average consumption of gas per day for this period was 52 megajoules. Lumo Energy noted that this reading was not inconsistent with Customer K’s average daily consumption for the period 22 April 2016 to 22 June 2016, which was 46.63 megajoules. Lumo Energy submits that this usage suggests that reconnection occurred almost immediately after the disconnection on 6 June 2016.

Subsequent disconnections (for unauthorised use of energy)

15. In its submission, Lumo Energy stated that the subsequent disconnections of the gas supply to Customer K's premises on 13 December 2016, 16 May 2017, and 20 November 2017 were procured as a result of Customer K's unilateral reconnection of the gas supply' in order to 'restrict the customer's unauthorised consumption of gas.'
16. Lumo Energy also submitted that removal of locks by parties not authorised by the distributor or retailer may constitute a breach of the deemed distribution agreement between the relevant distributor and the customer by virtue of clause 11.1(a) of the Gas Distribution System Code.

Relevant facts

17. The commission considered the ombudsman's request for guidance on how the compensation amount should be calculated as well as the submission from Lumo Energy. The relevant facts from the ombudsman's referral are set out below. The commission has not investigated these facts and relies on the summary provided by the ombudsman.

Disconnection of gas supply to the premises

18. On 6 June 2016, the gas supply to Customer K's premises was disconnected due to non-payment. The outstanding balance was \$1,768.79.
19. On 22 June 2016, a scheduled meter reading showed that there had been consumption at the premises since the disconnection on 6 June 2016, indicating that the customer or another person had reconnected the supply.
20. Based on the meter reads obtained on 6 June 2016 and 22 June 2016, the average daily consumption for this period was 52 megajoules. This reading was not inconsistent with Customer K's average daily consumption for the period 22 April 2016 to 22 June 2016, which was 46.63 megajoules, and suggests that reconnection occurred almost immediately after the disconnection on 6 June 2016
21. On 21 July 2016, Lumo Energy called Customer K. During this call:
- Lumo Energy offered to establish a new payment plan of \$177 per fortnight. At this date, the outstanding balance was \$2,265.08. Customer K advised that she could afford to pay \$10 to \$20 per fortnight towards the account.
 - The call was transferred to Lumo Energy's hardship team. Customer K advised that she wanted to apply for URGS and stated that her maximum capacity to pay was \$50 per fortnight. Lumo Energy established a payment plan for this amount.
 - Lumo Energy asked if Customer K had gas connected and she advised that she was unsure.
22. On 21 July 2016, Lumo Energy's hardship team sent an internal email to its credit management team requesting a review of whether Customer K's gas supply was connected. It was confirmed that the supply was 'back on' and that Customer K was therefore eligible to apply for URGS.
23. On 15 November 2016, Lumo Energy sent an email to AGN requesting confirmation as to whether a different retailer had arranged reconnection.

24. On 24 November 2016, AGN responded to Lumo Energy and advised:
'It would appear your customer has had the locks removed themselves. Please raise a RML/MTN to commission this MIRN and check for safety.'
25. On 29 November 2016, Lumo Energy raised a 'RML' service order to commission the meter and check for safety. This service order was completed on 7 December 2016, at which point Lumo Energy raised a disconnection request.
26. On 13 December 2016, Customer K's gas supply was disconnected for unauthorised consumption.
27. On 20 April 2017, after consumption continued to be recorded on the meter, Lumo Energy sent an email to AGN requesting confirmation as to whether a different retailer had arranged reconnection,
28. On 2 May 2017, AGN responded to Lumo Energy and advised:
'It would appear your customer has had the locks removed themselves. Please raise a RML/MTN to commission this MIRN and check for safety.'
29. On 16 May 2017, Customer K's gas supply was again disconnected for unauthorised consumption following Lumo Energy's disconnection service order.
30. On 11 August 2017, Lumo Energy sent an email to AGN advising that there had been continued consumption following the disconnection on 16 May 2017 and requested confirmation as to whether the site had been reconnected by another retailer.
31. On 17 August 2017, AGN sent Lumo Energy an email and advised:
'It would appear your customer has had the locks removed themselves. We have no reconnection jobs from any retailer in the system.'
32. On 24 August 2017, Lumo Energy raised a service order to disconnect Customer K's gas supply from the street.
33. On 31 August 2017, AGN attempted to disconnect Customer K's gas supply from the street. However, Customer K refused and AGN emailed Lumo Energy advising *'very irate verbal customer unable to complete this job'*.
34. On 14 November 2017, Lumo Energy raised a service order to have Customer K's gas meter removed.
35. On 20 November 2017, Customer K's gas meter was removed.
36. On 7 December 2017, Customer K contacted Lumo Energy in relation to the disconnection and to request a payment plan. Customer K disconnected the call and then contacted the

ombudsman. The ombudsman registered an investigation and Lumo Energy arranged for a new gas meter to be installed.

Relevant obligations

37. In this matter the relevant obligations arise from the following:

(a) The Act:

- (i) Section 48A(1) of the Act provides a statutory licence condition in Lumo Energy's gas retail licence requiring Lumo Energy to make a payment of the prescribed amount to a relevant customer if it disconnects the supply of gas to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the supply of gas to those premises may be disconnected.
- (ii) Section 48A(1A) of the Act provides that, where a customer does not notify the licensee of the disconnection within 14 days of the date of disconnection, the maximum payment is the prescribed capped amount.
- (iii) Section 48A(3) of the Act requires such payment to be made as soon as practicable after the supply of gas is reconnected to the premises of the customer.
- (iv) From 1 January 2016, section 48A(5) of the Act provides that:
 - the prescribed amount is \$500.00 for each whole day and a pro rata amount for any part of a day that the gas supply is disconnected.
 - the prescribed capped amount is \$3,500, and applies if a customer does not notify the licensee of the disconnection within 14 days.
- (v) Section 152(1)(c) which prohibits a person from interfering in any way with a meter or preventing a meter from properly registering the quantity of gas supplied;
- (vi) Section 152(1)(d) which prohibits a person from fraudulently taking gas of a gas company.

(b) The Gas Distribution System Code

'11.1 Customer obligations

- (a) A term or condition notified by the Distributor in accordance with section 48(1) of the Gas Industry Act shall not be inconsistent with the Distribution System Code to the extent that it provides that the customer must not:...
- (iv) tamper with, or permit tampering with, the meter or associated equipment;...

- (viii) allow a person, other than a person who is (to the best of the customer's knowledge) a gas installer, to perform any work on the gas installation;

The Gas Safety Act 1997 (Vic)

'Section 79D – Interference with pipeline, gas installation or meter assembly

- (1) A person must not knowingly, recklessly or negligently break, injure, open or tamper with any pipeline, gas installation or meter assembly.

Penalty: In the case of a natural person, 40 penalty units;
In the case of a body corporate, 200 penalty units.

- (2) This section does not apply to any person lawfully carrying out gas work in respect of the pipeline, gas installation or meter assembly.'

(d) Lumo Energy's gas retail licence:

- (i) Clause 6.1 of the licence requires Lumo 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 6.3 of the licence requires each term or condition of Lumo Energy's contracts for the sale of gas to be consistent with each term and condition of the code.
- (iii) Clause 6.4 of the licence requires Lumo Energy to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.

(e) Lumo Energy's contract with Customer K:

- (i) Clause 14.1(a) of the contract which states that Lumo Energy may arrange for disconnection of supply to Customer K's premises is subject to its 'satisfying the requirements of the Regulatory Requirements'.
- (ii) Clause 14.1(d) of the contract under which Lumo Energy retains the right to disconnect the supply of gas to Customer K's premises where there has been illegal or fraudulent use of energy at her premises in breach of clause 15.5 of the contract.
- (iii) Clause 14.3(d) of the contract which states that Lumo Energy will not disconnect supply to Customer K's premises if the Regulatory Requirements prevent them from doing so.
- (iv) Clause 15.5 of the contract which states:

'Illegal and fraudulent use of Energy

You must not, and must take reasonable steps to ensure others do not:

- (a) illegally use Energy supplied to your Premises; or
 - (b) interfere or allow interference with any Energy equipment that is at your Premises except as may be permitted by law; or
 - (c) use the Energy supplied to your Premises or any Energy equipment in a manner that:
 - (i) unreasonably interferes with the Connection or supply of Energy to another Customer; or
 - (ii) causes damage or interference to any third party; or
 - (d) allow Energy purchased from us to be used otherwise than in accordance with this Contract and the Regulatory Requirements; or
 - (e) tamper with, or permit tampering with, any Meters or associated equipment.
- (v) Clause 25 of the contract which defines Regulatory Requirements as: ‘all rules, regulations, codes, statutes, guidelines, licences, legislation, orders in council, tariffs, proclamations, directions or standards applicable where Your Premises is located that relate to the supply of electricity, gas or both as the case may be, including... in Victoria: the Energy Retail Code published by the Essential Services Commission of Victoria.’

Response to referral

38. Lumo Energy agrees that it disconnected the supply of gas to Customer K's premises at 12:30pm on 6 June 2016. Lumo Energy acknowledged in its submission to the commission that in disconnecting the supply of gas to Customer K's premises it did not comply with a condition of its contract with Customer K specifying the circumstances in which it may disconnect her gas supply, and that it is therefore in breach of a condition of its gas retail licence, deemed under section 48A of the Act.
39. Customer K did not notify Lumo Energy of the disconnection within 14 days of the disconnection occurring. Any amount payable to Customer K by Lumo Energy is subject to the cap specified in section 48A(1A) of the Act. However, in the commission's view, if the gas supply was restored through an unauthorised reconnection, then no valid reconnection occurred for the purposes of section 48A of the Act. The consequence is that the amount of compensation cannot be assessed, and the time for payment 'as soon as practicable after reconnection' does not fall due. Consequently Lumo's obligation to make a payment to Customer K in respect of the disconnection as a condition of its gas retail licence under section 48A of the Act cannot be applied in this case.
40. The commission further considers that, under the circumstances described by the ombudsman in its referral, no payment of compensation for wrongful disconnection obligations under section 48A of the Act is required in respect of the subsequent disconnections of the gas supply to Customer K's premises for unauthorised consumption on 13 December 2016, 16 May 2017 and 20 November 2017. That is because these disconnections were authorised under s 152 of the Act and therefore not wrongful.
41. The commission's responses to the specific questions referred to it by the ombudsman, and based on the information in the ombudsman's referral, are as follows:
- (a) *Whether Lumo Energy met the minimum standard of conduct for compliance with the ERC? and*
 - (b) *Whether Lumo Energy failed to meet the terms and conditions of its contract with Customer K that specifies the circumstances in which the supply of gas to those premises may be disconnected?*
- In respect of both of these questions, Lumo Energy has acknowledged that the disconnection on 6 June 2016 was wrongful.
- (c) *Section 48(1A) of the Gas Industry Act – whether the WDP for the disconnection on 6 June 2016 is capped at \$3,500?*

Yes. The customer did not notify Lumo Energy of the disconnection within 14 days from the date of the disconnection. A price cap of \$3,500 would be applicable under Section 48(1A) to any wrongful disconnection compensation amount payable in respect of the disconnection of Customer K's gas supply on 6 June 2016.

- (d) *What implications the possible self-reconnection may have on calculating the WDP amount?*

Section 48A of the Act does not anticipate unlawful self-reconnection by or on behalf of a customer. Any such reconnection should be disregarded for the purposes of s 48A. The consequence in most cases will be that the prescribed amount of compensation cannot be calculated.

Further, s 48A(3) of the Act imposes an obligation on the retailer to make the payment required under s 48A(1) as soon as practicable after reconnection. In cases where there is no lawful reconnection because of a self-reconnection by or on behalf of the customer, the obligation to pay does not fall due.

In the circumstances of this case, the commission considers that the eventual lawful reconnection in December 2107 is to be disregarded for the purposes of s 48A. That is because it followed several lawful disconnections by the retailer, and has no direct nexus with the wrongful disconnection that occurred in June 2016.

- (e) *Whether the subsequent disconnections on 13 December 2016, 16 May 2017 and 20 November 2017 should be treated as separate disconnections, or as measures to put into effect the first disconnection.*

The subsequent disconnections should be treated as separate disconnections that resulted from the unlawful self-reconnections, and were authorised under s 152(3) of the Gas Industry Act.

Reasons

42. The statutory licence condition imposed under section 48A of the Act requires Lumo 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.
43. As noted above, Lumo Energy accepted that in disconnecting the supply of gas to Customer K's premises, Lumo Energy did not comply with the terms of its contract with Customer K that set out the circumstances in which Lumo Energy may disconnect the supply of gas to Customer K's premises.
44. Further, Lumo Energy accepted that as a result of Lumo Energy's non-compliance, Lumo Energy is required to make a payment by way of compensation for wrongful disconnection to Customer K in respect of the disconnection of the gas supply to her premises under the statutory licence condition.
45. Section 48A of the Act only contemplates two possible ways of calculating a payment that a licensee may be required to pay a customer under the statutory licence condition:
 - (a) A maximum prescribed capped amount (capped at \$3,500)(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, and whose gas supply was disconnected for a period of seven days or more; or, in all other cases,
 - (b) The prescribed amount, defined in section 48A(5)(b) of the Act, prior to 1 January 2016 as "...\$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".
46. The terms 'disconnection' and 'reconnection' are not defined in the Act, and therefore take their meaning from the context within which they occur. Regard may also be had to the plain meaning of the words. In the case of gas, a disconnection occurs when the supply of gas is disabled. Reconnection occurs when the supply of gas is again enabled. However, in the commission's view the reconnection must occur in a lawful manner. Section 152 of the Act makes it an offence to interfere with a gas meter or fraudulently take gas. Similarly, s 79D of the Gas Safety Act makes it an offence for any person to knowingly or recklessly break, injure, open or tamper with any pipeline, gas installation or meter assembly. Section 48A should be

understood as not anticipating unlawful reconnections by or on behalf of customers. The commission is of the view that an unlawful reconnection must be disregarded for the purposes of s 48A.

47. The period of time that the supply of gas to Customer K's premises was disconnected for the purposes of section 48A of the Act began on 6 June 2016. The ombudsman's referral indicates that an unlawful reconnection may have occurred at some point before the next meter reading was obtained by AGN on 22 June 2016. Following the possible unlawful reconnection, Lumo Energy again disconnected the gas supply in December 2016. It did so under the express authorisation of s 152(3) of the Act.
48. As noted, the commission will disregard an unlawful reconnection for the purposes of s 48A. One consequence of an unlawful reconnection procured by the customer is that the method of calculation for a prescribed amount under s 48A cannot be applied.
49. Based on the chronology provided by the ombudsman in its referral, Customer K did not contact Lumo Energy within 14 days of the disconnection to inform Lumo Energy of the disconnection. Accordingly, it is arguable that s 48A(1A) of the Act is engaged and the maximum amount payable in respect of the wrongful disconnection is the prescribed capped amount under section 48A(1A) of the Act.
50. However, it may be that the unlawful reconnection of gas occurred very shortly after the disconnection on 6 June 2016, and that Customer K did not lack a gas supply for any material period of time. The commission is unable to determine the time of the actual period of disconnection. The commission considers that the self-reconnection by the customer affects its ability to assess the amount payable.
51. Further, under s 48A(3) of the Act the compensation amount (if quantifiable) only becomes payable following a lawful reconnection. No lawful reconnection occurred in this matter that has a relevant nexus with the wrongful disconnection. The commission is of the view that the obligation to pay cannot be applied in these circumstances.
52. Both the ombudsman and Lumo Energy submitted that the subsequent disconnections on 13 December 2016, 16 May 2017 and 20 November 2017 were arranged in respect of illegal or unauthorised use of energy, and not for non-payment of a bill. The commission agrees, and considers these disconnections to be separate to the disconnection on 6 June 2016.
53. Relevantly, under s 152(3) of the Act and clause 114 of the code, as well as clause 15.5 of Lumo Energy's contract with Customer K, Lumo Energy was entitled to disconnect supply without notice where there has been illegal use of gas at the premises.

Other observations

54. The commission expresses its concern about any customers arranging self-reconnection of the supply of gas. This type of conduct presents a serious risk to the safety of the community, and constitutes a criminal offence under s 152 of the Act and s 79D of the Gas Safety Act 1997. Appropriate mechanisms to address wrongful disconnections are in place. The commission notes the effectiveness of the ombudsman's involvement in this case, which led to almost immediate reconnection of the gas supply after being contacted by the customer on 7 December 2017.
55. The commission has written to Energy Safe Victoria to bring this matter to its attention.