

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 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 H through his representative Ms H.
2. The complaint is about the application of section 48A of the Gas Industry Act 2001 (Vic) (the Act) for a disconnection by AGL Sales Pty Ltd (AGL Sales) of Customer H's gas supply at [address redacted] (the premises). Gas supply to the premises was disconnected from 11:20am on 22 February 2017 to 4:42pm on 15 June 2017 (a period of 113 days, 5 hours and 22 minutes).

Issues for decision

3. AGL Sales and the ombudsman agree that the disconnection was wrongful under section 48A of the Act, and that consequently AGL Sales has an obligation to make a payment to Customer H 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 AGL Sales and the ombudsman is what amount AGL Sales is obliged to pay to Customer H, by way of a wrongful disconnection payment, as a condition of its gas retail licence, deemed under section 48A of the Act.
5. Both AGL Sales and the ombudsman agree that Customer H contacted AGL Sales within 14 days of his gas supply having been disconnected. Accordingly, any wrongful disconnection payment is not the prescribed capped amount under section 48A(1A) of the Act. The commission is asked to determine the quantum of the prescribed amount payable to Customer H.
6. This requires the commission to make findings and reach conclusions regarding the following matters:
 - (a) When did AGL Sales disconnect the supply of gas to the premises of Customer H? (see paragraphs 19 and 28 below);
 - (b) Was the supply of gas to Customer H's premises reconnected, and if so, when? (see paragraphs 24 and 31 below);
 - (c) For what period of time was supply to the premises disconnected? (see paragraph 32 below);
 - (d) What amount was Customer H entitled to receive by way of a wrongful disconnection payment in respect of the disconnection of his gas supply by AGL Sales under section 48A of the Act? (see paragraph 33 below);
 - (e) When was AGL Sales obliged to make the payment of the prescribed amount? (see paragraphs 25(a), 33 and 36 below);
 - (f) Has AGL Sales made the payment to Customer H in accordance with its deemed licence condition under section 48A of the Act? (see paragraph 34 below);
 - (g) Given AGL Sales did wrongfully disconnect the supply of gas to Customer H's premises and has not made the payment, what are the consequences? (see paragraphs 53 to 57 below).

7. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman has stated that AGL Sales acknowledges that the disconnection of the supply of gas to Customer H's premises was wrongful, but that AGL Sales disputes the amount that it is required to pay Customer H by way of a wrongful disconnection payment.
8. AGL Sales' position as set out in the ombudsman's referral memorandum was that:
"Although [Customer H's] matter is payable we believe the payment should be limited to the date and time the customer called regarding the disconnection."
9. AGL Sales 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. AGL Sales was also invited to make submissions on the complaint for the commission to consider. On 27 August 2018, AGL Sales made a submission for the commission's consideration.
10. AGL Sales' submission of 27 August 2018 largely accepted the ombudsman's memorandum, stating "AGL [Sales] agrees with [the ombudsman's] general summary of "chronology of events" and concedes to a breach under clause 111(2) of the Energy Retail Code (ERC)."
11. In its submission AGL Sales did not dispute:
 - (a) the chronology of events as presented by the ombudsman in its referral memorandum;
 - (b) the ombudsman's conclusion that AGL Sales failed to meet the terms and conditions of its contract with Customer H;
 - (c) the ombudsman's conclusion that the disconnection of the supply of gas to Customer H's premises by AGL Sales was wrongful; and
 - (d) the ombudsman's conclusion that the only issue outstanding in this matter for the commission's consideration was whether the payment to Customer H should be capped.
12. In its submission AGL Sales said that "... based on the circumstances of this case, outlined below, AGL [Sales] disputes the [wrongful disconnection payment] should be paid for the entire duration of Customer H's disconnection period (from 22 February 2017 to 15 June 2017 (113 days))."
13. AGL Sales submitted that it "understands that section 48(1A) of the Gas Industry Act 2001, outlines the condition in which a payment would be capped (if the customer does not contact the retailer to notify of the disconnection within 14 days after the disconnection), AGL [Sales] does not agree circumstances are always as unambiguous to fit this one condition."

14. AGL Sales further submits, on the basis of its reading of the commission's Operating Procedure for Wrongful Disconnections (the Operating Procedure), that "[t]he purpose of the payment must show a direct balance to its intended application; which is to strictly act as compensation for the disruption caused to Customer H's household. It should not unjustly enrich Customer H's circumstances above this degree of disruption."
15. According to AGL Sales, based on the circumstances of this case the payment should strictly be calculated up to 22 February 2017 (the date Customer H was offered instructions to resolve his missing payment/s issue and get his supply reconnected) and not to 15 June 2017.

Relevant facts

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

Disconnection of gas supply to the premises

17. On 14 January 2017, AGL Sales raised a service order for the disconnection of the gas supply to Customer H's premises.
18. On 16 February 2017, Customer H made a payment of \$178.88 to his gas account through Australia Post. AGL Sales' account statement shows that this payment reduced the outstanding balance on Customer H's gas account from \$1,927.73 to \$1,748.85.
19. On 22 February 2017 at 11:20am, the gas supply to Customer H's premises was disconnected.
20. On 22 February 2017, immediately after the gas supply was disconnected or while it was being disconnected, Customer H called AGL Sales regarding the gas disconnection. During this call:
 - (a) Customer H advised AGL Sales that he was aware that his last bill payment was late but confirmed he had paid all gas bills prior to the disconnection;
 - (b) Customer H advised AGL Sales that he had recently made a payment of \$178.88 to the gas account;
 - (c) AGL Sales advised Customer H that it had only received one payment on his gas account of \$178.88;
 - (d) AGL Sales advised Customer H it would require payment of \$1,619.67 (being the full amount outstanding) before it could reconnect the supply of gas to his premises;
 - (e) Customer H advised AGL Sales that he did not have any money to pay the \$1,619.67 outstanding;
 - (f) AGL Sales advised Customer H that in order to be reconnected, he would have to provide proof of his payment to support his statement which AGL Sales would investigate urgently or to make a full or "decent payment now and an instalment plan for the balance";
 - (g) Customer H advised AGL Sales that he would follow up with Australia Post about the payments he had made to AGL Sales;

(h) Customer H advised AGL Sales he was not able to do anything until the next day.

21. Customer H did not contact AGL Sales to provide proof of his payments.
22. Customer H did not request further assistance from AGL Sales relating to his gas reconnection the next day or after AGL Sales left a voicemail message on 11 March 2017 for Customer H to contact AGL Sales.
23. On 14 June 2017, Customer H contacted the ombudsman and an investigated complaint was registered.
24. Customer H's gas supply was reconnected at 4:42pm on 15 June 2017.

Relevant obligations

25. In this matter AGL Sales' relevant obligations arise from the following:

(a) The Act:

- (i) Section 48A(1) of the Act deems a condition into AGL Sales' gas retail licence of an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection. Section 48A(3) requires such payment to be made as soon as practicable after reconnection of the gas supply.
- (ii) From and after 1 January 2016, 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) Sections 48A(1A) and (5) of the Act provide that if the relevant customer does not notify the licensee of the disconnection within 14 days after the disconnection, the maximum payment under a condition under section 48A(1) is the prescribed capped amount, namely \$3,500.00.
- (iv) 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) AGL Sales' gas retail licence:

- (i) Clause 6.1 of the licence requires AGL Sales 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 6.3 requires each term or condition of AGL Sales' contracts for the sale of gas to be consistent with each term and condition of the Energy Retail Code (Version 11) (the code).

- (iii) Clause 6.4 requires AGL Sales to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.
- (c) AGL Sales' standard retail contract, established with Customer H:
 - (i) Clause 14.1 which states in part:

“Subject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises...”

and

in the definitions section there is a note for Victorian customers: “In Victoria **Energy Retail Code** means the **Energy Retail Code** Version 11 dated 13 October 2014 produced by the Essential Services Commission Victoria and as amended from time to time.”

- (d) Clause 121(1) of the code, which states:

Where a retailer has arranged for the de-energisation of a small customer's premises and the customer has within 10 business days of the de-energisation:

- (a) if relevant, rectified the matter that led to the de-energisation or made arrangements to the satisfaction of the retailer; and
- (b) made a request for re-energisation; and
- (c) paid any charge for re-energisation;

the retailer must, in accordance with any requirements under the energy laws, initiate a request to the distributor for re-energisation of the premises.

26. AGL Sales' obligations are discussed further below in the reasons.

Decision

27. If AGL Sales wrongfully disconnected the supply of gas to Customer H's premises as it concedes to the ombudsman and also concedes in its submission to the commission (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).
28. AGL Sales disconnected the supply of gas to Customer H's premises at 11:20am on 22 February 2017.
29. Prior to disconnecting the supply of gas to Customer H's premises for non-payment, the ombudsman claims, and AGL Sales does not dispute, that AGL Sales failed to comply with the terms and conditions of its contract with Customer H.
30. The ombudsman therefore claims, and AGL Sales does not dispute, that the disconnection was not in accordance with the deemed licence condition.
31. The supply of gas to Customer H's premises was reconnected on 15 June 2017 at 4:42pm.
32. The supply of gas to Customer H's premises was wrongfully disconnected for a period of 113 days, 5 hours and 22 minutes.
33. Therefore, under the deemed licence condition, AGL Sales was obliged to pay to Customer H a prescribed amount of \$56,612.00 as soon as practicable after the supply of gas was reconnected to Customer H's premises on 15 June 2017.
34. No payment has been made as at 12 September 2018.

Reasons

35. AGL Sales' gas retail licence requires that:
- (a) AGL Sales 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 6.1); and
 - (b) each term or condition of AGL Sales' contract for the sale of gas to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 6.3); and
 - (c) AGL Sales must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 6.4).
36. The deemed licence condition requires AGL Sales 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.
37. As noted at paragraphs 7 to 12 above, both the ombudsman and AGL Sales accept that in disconnecting the supply of gas to Customer H's premises, AGL Sales did not comply with the terms of its contract with Customer H that set out the circumstances in which AGL Sales would disconnect the supply of gas to Customer H's premises.
38. Further, AGL Sales and the ombudsman accept that as a result of AGL Sales' non-compliance, AGL Sales is required to make a wrongful disconnection payment to Customer H in respect of its disconnection of his gas supply under the deemed licence condition.
39. 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 (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 section 48A(5)(b) of the Act, after 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."

40. 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 AGL Sales – see paragraph 14, above) by any statements or guidelines published by the commission such as the Operating Procedure.
41. Further and in any event the Operating Procedure expressly states that its purpose is to give guidance to assist interpretation of the code, not the Act. It does not specifically mention section 48A of the Act (other than to note the commencement of the amendments that placed a cap on wrongful disconnection payments – *if the customer does not notify the retailer of the disconnection within 14 days after the disconnection*). The Operating Procedure does not purport to give guidance on or deal with the calculation of the quantum of wrongful disconnection payments.
42. Similarly, the operation of the obligations imposed by section 48A of the Act on AGL Sales cannot be limited and the condition for capping amounts cannot be supplemented by other conditions read into the Act by the commission. This seems to be what AGL Sales is suggesting in its submission – because AGL Sales “does not agree circumstances are always as unambiguous to fit this one condition.”
43. Further, AGL Sales’ submission seems to suggest that the commission has some sort of broad discretion in calculating the amount of the wrongful disconnection payment – to ensure that “[t]he purpose of the payment must show a direct balance to its intended application; which is to strictly act as compensation for the disruption caused to Customer H’s household. It should not unjustly enrich Customer H’s circumstances above this degree of disruption.”
44. The commission does not have any such broad discretion in deciding the quantum of the wrongful disconnection payment. Its task is to apply the statutory criteria imposed by Parliament to calculate the quantum of the wrongful disconnection payment. As stated in paragraph 39 above, the Act only provides two methods for calculating the “prescribed amount”. They are as set out in section 48A(5) of the Act.
45. AGL Sales’ concluding submission that in the circumstances of this case “the payment should be strictly calculated up to 22 February 2017 (the date Customer H was offered instructions to resolve his missing payment/s issue and get his supply reconnected)” has no basis for support in law. On this basis (asserted by AGL Sales) Customer H would receive a wrongful disconnection payment for a day (or only a part of a day) notwithstanding that in fact his actual gas supply was disconnected for over 113 days. In that sense to use AGL Sales’ description, the “degree of disruption” Customer H’s household actually experienced was for over 113 days. Moreover, AGL Sales concedes that the disconnection was wrongful and in the case of wrongful disconnection, the Act prescribes a payment calculated in respect of the

entire period that supply to the premises was disconnected. The Act does not allow an option to limit the wrongful disconnection payment to the date that the retailer informs the customer how to get their supply reconnected.

46. Further, contrary to the assumption implicit in AGL Sales' submission, the "actual disruption" to a household from the disconnection of gas supply does not cease simply because the customer is told by a retailer to provide proof of missing payments or to pay the amount outstanding or to make a "decent payment today and enter into an instalment plan for the balance."
47. The statutory criteria for calculating the payment amount is not based on such subjective matters.
48. 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.
49. The supply of gas to Customer H's premises was disconnected for 113 days, 5 hours and 22 minutes. The prescribed amount is \$500 for each whole day that the supply of gas was disconnected and a pro rata amount for any part of a day that the supply of gas was disconnected, amounting to \$56,612.00.
50. AGL Sales is obliged to pay Customer H 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 H's gas supply was disconnected, 113 days, 5 hours and 22 minutes. As Customer H called and notified AGL Sales of the disconnection within 14 days after the disconnection, the amount payable is the prescribed amount (not the prescribed capped amount).
51. As the ombudsman suggested in its referral memorandum, AGL Sales has not demonstrated that the condition of capping the payment has been met. Therefore, the amount payable is for the entire disconnection period.
52. On that basis, the amount of the wrongful disconnection payment is \$56,612.00.

Enforcement

53. AGL Sales concedes to the ombudsman, and also in its submission, in response to the ombudsman's letter of referral and memorandum, that it wrongfully disconnected the supply of gas to Customer H's premises. Consequently, AGL Sales has breached its retail licence by failing to make a payment of \$56,612.00 as soon as practicable after the reconnection of the supply of gas to Customer H's premises on 15 June 2017.
54. AGL Sales is required to rectify the contravention by making the payment.
55. AGL Sales should advise the commission in writing when the payment has been made.
56. If AGL Sales is unable to make the payment it should inform the commission in writing within five business days of receiving this decision.
57. If the payment is not made within five business days of AGL Sales receiving this decision, the commission may take enforcement action against AGL Sales under Part 7 of the Essential Services Commission Act 2001 (Vic).