

# Customer A and AGL Sales – Decision and Reasons

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

6 June 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 A.
2. The complaint is about the application of section 48A of the Gas Industry Act 2001 (Vic) (the Act) for an alleged wrongful disconnection by AGL Sales of Customer A's gas supply at [address redacted] (the premises), from 8:50am on 8 December 2015 to 11:15am on 14 December 2015 (a period of 6 days, 2 hours and 25 minutes).

## Issues for decision

3. The issue for decision by the commission on the complaint is whether or not AGL Sales has breached a condition of its gas retail licence regarding an obligation to make a prescribed payment to Customer A in circumstances where:
  - (a) AGL Sales disconnected the supply of gas to the premises of Customer A; and
  - (b) AGL Sales 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.
4. If so, then under sub-section 48A(3) of the Act, AGL Sales was obliged to make the prescribed payment to Customer A as soon as practicable after the supply of gas was reconnected to Customer A's premises.
5. This requires the commission to make findings and reach conclusions regarding the following matters:
  - (a) Whether or not AGL Sales disconnected the supply of gas to the premises of Customer A (see paragraph 21 below);
  - (b) Was supply of gas to Customer A's premises reconnected, and if so, when? (see paragraph 25 below);
  - (c) If AGL Sales did disconnect the supply of gas to Customer A's premises, for what period of time did the disconnection occur? (see paragraph 26 below);
  - (d) What was the contract between AGL Sales and Customer A? (see paragraph 12 below);
  - (e) What were the terms or conditions of that contract which specified the circumstances in which AGL Sales may disconnect the supply of gas to Customer A's premises? (see paragraph 28(c) below);
  - (f) Whether or not AGL Sales failed to comply with *those* terms and conditions (see paragraphs 32, 40 and 56 below);
  - (g) Was Customer A entitled to receive payment of a prescribed amount because of any wrongful disconnection by AGL Sales under section 48A of the Act? (see paragraph 36 below);
  - (h) If so, when was AGL Sales obliged to make the payment of the prescribed amount? (see paragraphs 36, 39 and 61 below);

- (i) Has AGL Sales made the payment to Customer A in accordance with its deemed licence condition under section 48A of the Act? (see paragraphs 27 and 37 below);
  - (j) If AGL Sales has not made the payment what are the consequences? (see paragraphs 61 and 65 below).
6. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman acknowledged that AGL Sales had demonstrated that it had complied with clauses 108, 109 and 110 of the of the Energy Retail Code (version 11) (the code) prior to the disconnection.
7. However, the ombudsman considered that AGL Sales had not complied with clause 111(1)(e) of the code. The ombudsman considered that AGL Sales was required to act in good faith and do what was reasonably necessary in the circumstances, in order to demonstrate it had used best endeavours to contact Customer A in the month prior to disconnection. The ombudsman’s view is that when attempting to contact a customer outside of business hours, the retailer should include two telephone calls where a voicemail message is left after each of the two telephone calls.
8. AGL Sales was invited to provide any information and documents it considered that the commission should have regard to in making its decision. AGL Sales was also invited to make submissions on the complaint from its point of view for the commission to consider. AGL Sales made submissions for the commission’s consideration.
9. AGL Sales did not dispute the chronology of events as presented by the ombudsman in its referral memorandum. However, AGL Sales considered that it had complied with clause 111(1)(e) as it had used best endeavours to contact the customer by calling the customer on eight occasions and leaving a message at 5:24pm on 20 November 2015. In support of its position, AGL Sales contended that the ‘Operating Procedure Compensation for Wrongful Disconnection’<sup>1</sup> (the operating procedure) states that one contact attempt in business hours, and if a message was not able to be left within business hours, two contact attempts outside of business hours, could constitute best endeavours. AGL Sales noted that the operating procedure sets out what could be considered best endeavours and that it does not provide an exhaustive list. AGL Sales considered that the time at which the message was left is immaterial, as the customer was able to listen to the message at their convenience. Further, in AGL’s view, “the obligation in the Operating Procedure [regarding ‘best endeavours’] is to ensure that a customer is aware that their retailer has attempted to call them”.

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<sup>1</sup> Essential Services Commission 2014, Operating Procedure Compensation for Wrongful Disconnection, 13 October, C/14/8542

## Relevant facts

10. 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.

### Background

11. At all relevant times, AGL Sales was the licensee responsible for supply of gas to the premises.
12. On 28 May 2013, AGL Sales established an account for the supply of gas at the premises of Customer A. It entered into a Market Retail Contract for the supply of gas at Customer A's premises. The relevant terms and conditions of that contract are discussed at paragraph 28(c).

### Circumstances leading to the disconnection in December 2015

13. On 25 September 2015, Customer A was issued a bill for \$701.59, with a due date of 15 October 2015. The ombudsman noted Customer A was surprised by the amount on this bill, and that a gas leak was detected on the supply side of the meter. Customer A was unsure whether this contributed to the high bill.
14. Customer A made two payments of \$100 on 29 September 2015 and 1 October 2015.
15. On 23 October 2015, AGL Sales issued a reminder notice in the amount of \$403.62, with payment being required by 4 November 2015. AGL Sales also informed Customer A that the total overdue balance on their account was \$501.59.
16. On 16 November 2015, AGL Sales issued a disconnection warning notice in the amount of \$501.59 and requiring payment by 26 November 2015.
17. AGL Sales made a number of unsuccessful attempts to contact Customer A before raising a service order for disconnection:
  - (a) Two phone calls on 18 November 2015 at 4:47pm and 6:10pm. AGL Sales reached an answering machine and did not leave a message on both occasions.
  - (b) Three phone calls on 19 November 2015 at 12:47pm, 1:12pm and 6:35pm. AGL Sales reached an answering machine and did not leave a message on each occasion.
  - (c) Two phone calls on 20 November 2015 at 12:49pm and 1:55pm. AGL Sales reached an answering machine and did not leave a message on both occasions.

- (d) One phone call on 20 November 2015 at 5:24pm. AGL Sales on this occasion did leave a message.
18. AGL Sales did not record the voice message left for Customer A on 20 November 2015. However, AGL Sales has provided the scripting that was used for this call. “This is an important message from AGL for <CONTACT\_FORMAL\_1>. Please contact us as soon as possible on <CALLBACK\_NUM> between <OPERATING HOURS> Monday to Friday, Eastern Standard Time”.
19. On 26 November 2015 and again on 4 December 2015 Customer A made payments of \$100.00 towards their gas account.

### **Disconnection of gas supply to the premises**

20. On 1 December 2015, AGL Sales raised a service order for the disconnection of the gas supply to Customer A's premises.
21. On 8 December 2015, at 8:50am the gas supply to Customer A's premises was disconnected.
22. On 8 December 2015, Customer A contacted AGL seeking an explanation for the disconnection and explained that Customer A can pay an amount towards the outstanding balance the following week.
23. On 11 December 2015, a representative from the ombudsman contacted AGL Sales seeking restoration of gas supply to the premises of Customer A.
24. On 14 December 2015, a representative from the ombudsman again contacted AGL seeking an update on the restoration of gas supply to the premises of Customer A.
25. On 14 December 2015, at 11:15am the supply of gas was restored to the premises of Customer A.
26. The premises were disconnected for a period of 6 days, 2 hours and 25 minutes.
27. AGL Sales has not made any wrongful disconnection payment to Customer A.



## Relevant obligations

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

(a) The Act:

- (i) Sub-section 48A(1) of the Act deems a condition into AGL Sales' gas retail licence an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection.
- (ii) Sub-section 48A(5)(b) of the Act at the time of disconnection provided that the prescribed amount was \$250.00 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 is disconnected.

(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 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' market contract with Customer A, established on 28 May 2013, that contained the following requirements:

- (i) Clause 10.1(1) which states that "[w]here [AGL Sales has] complied with all relevant obligations under the Regulatory Requirements, [AGL Sales] may ask your Distributor or Meter Service Provider to disconnect the Supply of Energy to the Supply Address if ... (ii) you fail to pay a bill by the Due Date."
- (ii) Clause 10.3 which states that AGL Sales "will not arrange Disconnection otherwise than in accordance with the Regulatory Requirements".

(iii) Clause 18.1 which states that “Regulatory Requirements means any relevant Commonwealth, State or local government regulation, including all laws, regulations, subordinate legislation, proclamations, Orders in Council, licence conditions, codes, guidelines or standards applicable from time to time in the State in which the Supply Address is located.”

(d) The code:

(i) Clause 111 of the code sets out the conditions under which a retailer may arrange disconnection of a customer’s premises for failing to pay a bill. It is important to note that the sub-clauses of clause 111 of the code impose cumulative obligations.

(ii) Under sub-clause 111(1)(e), after retailers have given the required disconnection warning notice, they must use best endeavours to contact the customer in connection with the failure to pay (or to adhere to a payment plan or instalment arrangement) in one of the following ways – in person; by telephone; by facsimile or other electronic means.

29. AGL Sales’ obligations are discussed further below in the reasons.

## Decision

30. AGL Sales is in breach of a condition of its gas retail licence, deemed into AGL Sales' gas retail licence by section 48A of the Act (the deemed licence condition).
31. AGL Sales disconnected the supply of gas to Customer A's premises at 8:50am on 8 December 2015.
32. Prior to disconnecting the supply of gas to Customer A's premises for non-payment, AGL Sales failed to comply with the terms and conditions of its contract with Customer A.
33. The disconnection was therefore not in accordance with the deemed licence condition.
34. The supply of gas to Customer A's premises was reconnected at 11:15am on 14 December 2015.
35. The supply of gas to Customer A's premises was wrongfully disconnected for a period of 6 days, 2 hours and 25 minutes.
36. Therefore, under the deemed licence condition, AGL Sales was obliged to pay to Customer A the prescribed amount of \$1,525 as soon as practicable after the supply of gas was reconnected to Customer A's premises on 14 December 2015.
37. No payment has been made as at 6 June 2018.

## Reasons

38. AGL Sales' gas retail licence effectively 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).
39. 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.
40. Clause 10 of AGL Sales' contract with Customer A specifies the circumstances in which the supply of gas to Customer A's premises may be disconnected. Clauses 10.1 and 10.3 are subject to compliance with, and incorporate by reference into the contract, the requirements in Part 6 of the code, including clause 111. As noted at paragraph 6 above, it is accepted that AGL Sales complied with the relevant requirements of clauses 108, 109 and 110 of the code.

### **Clause 111(1) of the code – did AGL Sales demonstrate best endeavours in seeking to contact Customer A?**

41. Clause 111 of the code deals with disconnection of gas supply for not paying a bill. In respect of Customer A, a residential customer, clause 111 of the code imposed obligations on AGL Sales not to arrange for the disconnection of gas supply to Customer A's premises if Customer A had not paid the bill by the 'pay-by' date until all of the following had occurred:
- (a) AGL Sales had given Customer A an offer to pay the bill by instalments and Customer A had not agreed to the offer or, having agreed to the offer, had failed to adhere to the instalment arrangement (clause 111(1)(b)); *and*
  - (b) AGL Sales had given Customer A a reminder notice (clause 109 and 111(1)(c)); *and*

- (c) AGL Sales had given Customer A a disconnection warning notice after the expiry of the period referred to in the reminder notice (clause 111(1)(d)); *and*
  - (d) AGL Sales had, after giving the disconnection warning notice, used its best endeavours to contact Customer A, in connection with the failure to pay or to agree to AGL Sales' offer or to adhere to the instalment arrangement, in one of the following ways:
    - (i) in person;
    - (ii) by telephone;
    - (iii) by facsimile or other electronic means (clause 111(1)(e)); *and*
  - (e) Customer A had refused or failed to take any reasonable action towards settling the debt (clause 111(1)(f)).
42. In this case, the relevant bill which was not paid and led to the disconnection of Customer A's gas supply was issued by AGL Sales on 25 September 2015 with a due date for payment of 15 October 2015 (see paragraph 13 above).
43. Clause 111(1)(b) of the code required AGL Sales to offer Customer A the option of paying this bill by instalments. It is not clear whether this occurred, or whether Customer A had accepted any such offer. As this matter is not directly relevant to the ombudsman's referral it has been assumed for the purposes of this decision that AGL Sales did offer Customer A the option of paying the bill by instalments and either Customer A had not accepted that offer, or alternatively, that Customer A had accepted the offer but in making only two payments of \$100 had not adhered to the instalment arrangement. This matter is further discussed at paragraph 58.
44. After Customer A failed to pay AGL Sales' bill of 25 September 2015 and had either not agreed to an offer by AGL Sales to pay that bill by instalments or having agreed to the offer, failed to adhere to the instalment arrangement, AGL Sales was obliged to give Customer A a reminder notice and subsequently a disconnection warning notice.
45. After giving the disconnection warning notice to Customer A on 16 November 2015, AGL Sales had to use its best endeavours to contact Customer A in connection with Customer A's failure to pay or failure to agree to AGL Sales' offer to pay the bill by instalments or Customer A's failure to adhere to the instalment arrangement.
46. After AGL Sales had used its best endeavours to contact Customer A for the relevant purposes, it was still necessary to establish that Customer A had refused or failed to take any reasonable action towards settling Customer A's debt (as required by clause 111(1)(f) of the code).

47. Between 18 November 2015 and 20 November 2015, AGL Sales made eight attempts to contact Customer A by telephone. On seven occasions, AGL Sales did not leave a message on the answering machine. On the eighth and final call to Customer A on 20 November 2015, AGL Sales did leave a message on the answering service (see paragraphs 17 and 18 above).
48. The operating procedure was published by the commission to “assist retailers and [the ombudsman] to satisfy the wrongful disconnection compensation obligations and to give customers greater assurance about the satisfaction of such obligations”. However, the operating procedure expressly states at clause 3.1 that the guidance given in Appendix A is “not a formal supplement to the code to be applied in abstract without full regard to the circumstances, nor is it exhaustive.”
49. The “best endeavours” required of AGL Sales by clause 111(1)(e) of the code are not best endeavours in the abstract or without any purpose. They are best endeavours to inform or alert the customer (Customer A) of the pending or imminent disconnection of the customer’s (Customer A’s) gas supply to enable the customer (Customer A) to have one final chance to take reasonable action towards settling the outstanding debt. This is consistent with the principle that the supply of gas to premises should only be disconnected as a last resort as noted in AGL Sales’ customer charter and in the Act.
50. AGL Sales’ submission to the commission suggested that “the obligation in the operating procedure is to ensure that a customer is aware that their retailer has attempted to call them”. However, in the present context and the stage at which the code requires AGL Sales to use its best endeavours, the commission considers that the obligation is to ensure that a customer is aware that their retailer has attempted to call them about a pending disconnection of their gas supply.
51. The commission’s view in the previous paragraph is further reinforced by the guidance given in Appendix A of the operating procedure in respect of a registered letter, the contents of which should advise the customer “of the pending disconnection process”.
52. In this sense, the message required to be left by AGL Sales was one informing Customer A of the pending disconnection of Customer A’s gas supply. The actual message left by AGL Sales on Customer A’s answering machine on 20 November 2015 did not do that (see paragraphs 17 and 18 above).
53. AGL Sales made five attempts to contact Customer A by telephone during business hours, and three attempts outside of business hours between 18 and 20 November 2015. However, only one of those calls made by AGL Sales between 18 and 20 November 2015 resulted in a message being left for Customer A. Only that final call could reasonably be expected to demonstrate to Customer A that AGL Sales was attempting to contact them. Accordingly,

even if AGL Sales' view of the obligation imposed by the operating procedure (at paragraph 50 above) was correct, the attempts to contact Customer A would not have been sufficient to establish best endeavours.

54. As stated, the requirement to use best endeavours to contact and inform the customer of the pending disconnection process is intended to ensure that disconnecting a customer from an essential service is always a measure of last resort.
55. AGL Sales made more attempts to contact Customer A than was required by the operating procedure. However, AGL Sales failed to leave a message that adequately disclosed the pending disconnection process to Customer A. Accordingly, AGL Sales' efforts cannot be construed as meeting the requirement of best endeavours in its context.
56. Accordingly, AGL Sales has not complied with clause 111(1)(e) by failing to use best endeavours to contact Customer A prior to arranging for the disconnection of the gas supply to the premises.

## Other observations

57. While these matters were not directly raised by the ombudsman's referral, the commission has doubts as to whether AGL Sales complied with the requirements of clauses 111(1)(b) and (f) of the code.
58. There is no evidence that AGL Sales offered Customer A the possibility to pay "the bill" of 25 September 2015 by instalments as required by sub-clause 111(1)(b) of the code.
59. Further, following the answering machine message that was left by AGL Sales on 20 November 2015, on both 26 November 2015 and 4 December 2015 Customer A made payments of \$100.00 to their gas account. It is certainly arguable that these actions of actual payments by Customer A constituted "reasonable actions toward settling the debt" for the purposes of clause 111(1)(f) of the code. If so, then that is a further reason why AGL Sales failed to comply with the requirements of clause 111 of the code.
60. As the commission has held that AGL Sales has failed to comply with sub-clause 111(1)(e) of the code, it is unnecessary for the commission to reach a conclusion on AGL Sales' compliance with the requirements of sub-clauses 111(1)(b) and 111(1)(f) of the code.



## Enforcement

61. AGL Sales has breached its retail licence by failing to make a payment of \$1,525 as soon as practicable after the reconnection of the supply of gas to Customer A's premises on 14 December 2015.
62. AGL Sales is required to rectify the contravention by making the payment.
63. AGL Sales should advise the commission in writing when the payment has been made.
64. If AGL Sales is unable to make payment it should inform the commission in writing within five business days.
65. If the payment is not made within five business days, the commission may take enforcement action against AGL Sales under Part 7 of the Essential Services Commission Act 2001 (Vic).