

Customer I and Lumo Energy – Decision and Reasons

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

18 July 2018

Commissioners:

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

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Contents

Contents	ii
The complaint	1
Issues for decision	2
Relevant facts	4
Background	4
Circumstances leading to the disconnection in August 2016	5
Disconnection of gas supply to the premises	6
Relevant obligations	7
Decision	9
Reasons	10
Clause 111(2) of the code – Was Customer I a hardship customer or experiencing payment difficulties?	10
Clauses 111(2) – Did Lumo Energy offer Customer I two payment plans?	11
Clause 72(1) – Did the payment plans offered by Lumo Energy need to consider Customer I’s capacity to pay?	12
Other observations	13
Offering payment plans	13
Establishing payment plans	13
Conditional discounts	14

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 I.
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 Lumo Energy Australia Pty Ltd (Lumo Energy) of Customer I's gas supply at [address redacted] (the premises), from 10:15am on 22 August 2016 to 12:50pm on 23 August 2016 (a period of 1 day, 2 hours and 35 minutes).

Issues for decision

3. The issue for decision by the commission on the complaint is whether or not Lumo Energy has breached a condition of its gas retail licence regarding an obligation to make a prescribed payment to Customer I in circumstances where:
- (a) Lumo Energy disconnected the supply of gas to the premises of Customer I; and
 - (b) Lumo Energy 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-section 48A(3) of the Act, Lumo Energy 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 Lumo Energy disconnected the supply of gas to the premises of Customer I (see paragraph 29 below);
 - (b) Was supply of gas to Customer I's premises reconnected, and if so, when? (see paragraph 33 below);
 - (c) If Lumo Energy did disconnect the supply of gas to Customer I's premises, for what period of time did the disconnection occur? (see paragraph 34 below);
 - (d) What was the contract between Lumo Energy and Customer I? (see paragraph 11 below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which Lumo Energy may disconnect the supply of gas to Customer I's premises? (see paragraphs 11 and 36(c) below);
 - (f) Whether or not Lumo Energy failed to comply with *those* terms and conditions (see paragraph 40 below);
 - (g) Was Customer I entitled to receive payment of a prescribed amount because of any wrongful disconnection by Lumo Energy under s48A of the Act? (see paragraphs 42 and 43 below);
 - (h) If so, when was Lumo Energy obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises);

- (i) Has Lumo Energy made the payment to Customer I in accordance with its deemed licence condition under section 48A of the Act? (not applicable as, in this instance, no such obligation arises);
 - (j) If Lumo Energy 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, the ombudsman acknowledged that Lumo Energy had demonstrated that it had complied with clauses 33(3), 109, 110 and 111(1)(e) of the Energy Retail Code (version 11) (the code) prior to the disconnection. However, the ombudsman considered that it was unclear whether Lumo Energy had complied with clauses 111(2) and 72(1)(a)(i) of the code. Regarding clauses 111(2) and 72(1)(a)(i), the ombudsman considered that while two payment plans had been offered by Lumo Energy on 24 June 2016 and 13 July 2016, it was not clear whether these offers adequately took into account Customer I's capacity to pay as required by clause 72(1)(a)(i).
 6. Lumo Energy was invited to provide any information and documents it considered the commission should have regard to in making its decision. Lumo Energy was also invited to make submissions on the complaint from its point of view for the commission to consider. Lumo Energy made submissions for the commission's consideration.
 7. Lumo Energy agreed with the chronology of events as presented by the ombudsman in its referral memorandum. However, Lumo Energy provided additional details relevant to the commission's assessment of the disconnection.
 8. Lumo Energy submitted that the customer's capacity to pay is just one factor that must be considered under sub-clause 72(1)(a)(i) of the code and that the amount of arrears and expected consumption must also be considered under sub-clauses 72(1)(a)(ii) and 72(1)(a)(iii). Lumo Energy considered that clause 72(1) should not be read to oblige a retailer to offer a customer a payment plan that does not cover ongoing consumption and would lead to increased debt. Lumo Energy submitted that both payment plans it had offered Customer I complied with clause 72(1)(a) as each took into account her capacity to pay, her arrears and her expected consumption.

Relevant facts

9. The commission analysed the ombudsman's request for a decision and sought additional submissions from Lumo Energy. Having assessed the matter and the submissions received by the commission, the commission makes the factual findings set out below.

Background

10. At all relevant times, Lumo Energy was the licensee responsible for supply of gas to the premises.
11. On 12 August 2012, Lumo Energy established an account for the supply of gas at the premises of Customer I. It entered into a Market Retail Contract with Customer I for the supply of gas at Customer I's premises, the relevant terms of which are set out at paragraph 36(c).
12. On 1 October 2014, Lumo Energy called Customer I. During that call Customer I informed Lumo Energy of her payment difficulties and that she could only afford to pay \$30 per fortnight. Lumo Energy accepted Customer I into its hardship program and established a payment plan of \$30 per fortnight for three months, which Customer I successfully completed on 24 December 2014.
13. On 15 April 2015, Lumo Energy called Customer I and established a second payment plan of \$30 per fortnight for three months, this plan was successfully completed on 9 July 2015.
14. On 14 July 2015, Customer I called Lumo Energy in response to a message sent to her by Lumo Energy on 13 July 2015. During this call, Lumo Energy offered a \$70 per fortnight payment plan based on Customer I's growing arrears. Customer I advised she could not afford \$70 per fortnight and consequently Lumo Energy established a third payment plan of \$30 per fortnight for three months.
15. From the time the account was established until Customer I was disconnected, Customer I continued to make regular payments of \$30 per fortnight to her account. However, from 7 July 2014 to 12 October 2015 her account balance had increased from being in credit by \$282.99 to being in arrears of \$641.82.
16. On 17 October 2015, Customer I received a utility relief grant scheme payment, reducing her arrears to \$141.82.
17. On 27 November 2015, Lumo Energy issued a bill to Customer I in the amount of \$535.67, which triggered the disconnection process.

18. On 14 December 2015, Customer I called Lumo Energy and advised that she could still only afford to pay \$30 per fortnight. Lumo Energy advised that Customer I was not reducing her arrears and would need to increase her payments, but established a fourth payment plan of \$30 per fortnight for three months, which was successfully completed on 2 March 2016.
19. On 22 March 2016, Customer I made two calls to Lumo Energy. In the first she advised that she still required assistance and that she could not increase her payments. Customer I advised that she would contact her financial counsellor.
20. In the second call on 22 March 2016, Customer I advised that she had made an appointment with her financial counsellor. Lumo Energy again advised that she would need to increase her payments. Customer I stated that she could not do that as she was living on \$67 per fortnight and could only afford to eat one meal per day. During this call, Lumo Energy established a fifth payment plan of \$30 per fortnight for three months, which was successfully completed on 8 June 2016.

Circumstances leading to the disconnection in August 2016

21. On 24 June 2016, Customer I called Lumo Energy. Lumo Energy advised that she would need to increase her payments to \$75 per fortnight. Customer I stated that she could not afford that amount. In response, Lumo Energy offered a revised payment plan of \$35 per fortnight, but Customer I said she could not afford that either. Customer I asked Lumo Energy to contact her financial counsellor.
22. On 24 June 2016, Lumo Energy attempted to contact the financial counsellor and left a message.
23. On 29 June 2016, Lumo Energy removed Customer I from its hardship program. The contact notes state the reason for the removal was “non compliance”.
24. On 5 July 2016, Lumo Energy sent Customer I a reminder notice in the amount of \$588.75.
25. On 13 July 2016, Customer I’s financial counsellor called Lumo Energy. During this call he advised that Customer I was continuing to experience payment difficulties, was making \$30 payments each fortnight and that it was unclear why Customer I had been removed from Lumo Energy’s hardship program. Lumo Energy advised that Customer I would need to increase her payments to \$70 per fortnight and that she would not be admitted back into the hardship program as customers could only be on the hardship program for a short period. Lumo Energy recommended that Customer I consider transferring to another retailer.
26. On 22 July 2016, a disconnection warning notice was issued to Customer I in the amount of \$528.75.

27. On 4 August 2016, Customer I called Lumo Energy. During this call Lumo Energy advised that Customer I was no longer in the hardship program and would need to pay for her consumption. Customer I advised that she was looking into transferring to a new retailer but that she could not afford to pay more towards her account and would contact Lumo Energy again in two weeks' time.
28. On 5 August 2016, Lumo Energy sent a service order to disconnect the supply of gas to the premises of Customer I.

Disconnection of gas supply to the premises

29. At 10:15am on 22 August 2016, Lumo Energy disconnected the gas supply to Customer I's premises for non-payment of the outstanding balance of \$891.10.
30. At 7:25pm on 22 August 2016, Customer I called Lumo Energy seeking an explanation for why her gas had been disconnected. Lumo Energy explained that she had not been making sufficient payments. Customer I explained that was all she could afford as she was on a pension. Customer I also asked for the gas to be switched back on as she had been unwell for the previous 6 weeks. Lumo Energy advised that the distributor could not action any reconnection until the next day and advised Customer I to call back then.
31. At 9:21am on 23 August 2016, Customer I called Lumo Energy seeking to have her gas reconnected. Lumo Energy again stated that the payments that were being made were not enough to cover her consumption and that she would need to make a payment of \$588.75 before it could arrange for reconnection.
32. At 10:01am on 23 August 2016, a representative from the ombudsman called Lumo Energy seeking to arrange reconnection of the supply of gas to Customer I's premises.
33. At 12:50pm on 23 August 2016, the supply of gas was reconnected to the premises of Customer I.
34. The premises were disconnected for a period of 1 day, 2 hours and 35 minutes.
35. As at 18 July 2018, Lumo Energy has not made any wrongful disconnection payment to Customer I.

Relevant obligations

36. In this matter Lumo Energy's relevant obligations arise from the following:

(a) The Act:

- (i) Sub-sections 43(1), (1A) and (2) rendering void any term or condition of Lumo Energy's contract for the supply of gas to the extent that it is inconsistent with terms and conditions decided by the commission that:
 - A. specify the circumstances in which the supply of gas to a premises may be disconnected and
 - B. 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 in place of any void term or condition;
- (ii) Sub-section 48A(1) of the Act which deems a condition into Lumo Energy's retail licence, an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection; and
- (iii) Sub-sections 48A(3) and (5) which require payment of the prescribed amount as soon as practicable after the supply of gas is reconnected. Since 1 January 2016 the prescribed amount is \$500 for each full day, and a pro rata amount for each part of a day that the supply of gas is disconnected.

(b) Lumo Energy's gas retail licence:

- (i) Clause 6.1 of the licence which 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 which 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 which requires Lumo Energy to comply with the terms and conditions of any contract for the sale of gas with a relevant customer.

(c) Lumo Energy's market contract with Customer I, that contained the following terms and conditions:

- (i) Clause 13.1 which states that "[i]f You have difficulty paying Your invoices, You must contact Us to discuss how We can help You. We will offer You the payment

assistance that We are required to offer You in accordance with the Regulatory Requirements and may include instituting a suitable Instalment Plan, referral to a financial counsellor, provision of details concerning government concessions and grants and the provision of efficient use of energy advice.”

- (ii) Clause 21.1(a) which states that Lumo Energy may disconnect the gas supply to the customer’s premises where “You have not paid Your invoice in relation to the Premises by the Due Date and We have complied with the procedures under the Regulatory Requirements.” Clause 21.1(a)(ii) also states that Regulatory Requirements may require that Lumo Energy not disconnect a customer “until We have offered You an alternative payment arrangement in accordance with the Regulatory Requirements and You do not agree to that arrangement or fail to make payments under such a payment arrangement.”
 - (iii) Clause 37 in Lumo Energy’s contract specifies that “Regulatory Requirements means all rules, regulations, codes, statutes, guidelines, licences, 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.”
- (d) The code:
- (i) Clauses 107 to 118 deal with and specify the circumstances in which the supply of gas to premises may be disconnected. In particular, the retailer must not arrange disconnection of a customer’s premises except in accordance with clauses 111 to 118.
 - (ii) Clause 111 of the code sets out conditions under which a customer may be disconnected for failure to pay a bill or to adhere to a payment plan. Clause 111(2) of the code applies where a customer is a hardship customer or, where the retailer is informed that the customer is experiencing payment difficulties. In those circumstances the retailer must not arrange for the disconnection of the customer’s premises unless the retailer has offered the customer two payment plans in the previous 12 months.
 - (iii) Clause 72 identifies the requirements in offering a payment plan and in establishing a payment plan.

37. Lumo Energy’ obligations are discussed further below in the reasons.

Decision

38. Lumo Energy is not in breach of a condition of its gas retail licence, deemed into Lumo Energy's gas retail licence by section 48A of the Act (the deemed licence condition).
39. Lumo Energy disconnected the supply of gas to Customer I's premises at 10:15am on 22 August 2016.
40. However, there was no failure on the part of Lumo Energy to comply with the terms and conditions of the contract between Lumo Energy and Customer I specifying the circumstances in which the supply of gas to those premises may be disconnected.
41. Accordingly, the second condition that has to be satisfied for section 48A of the Act to apply was not satisfied.
42. The supply of gas was not wrongfully disconnected.
43. Lumo Energy was not required to make any payment of a prescribed amount under the deemed licence condition.

Reasons

44. Lumo Energy's gas retail licence effectively requires that:
- (a) Lumo Energy not enter into a contract for the sale of gas with a relevant customer unless the terms and conditions of the contract expressly deal with each matter which is the subject of a term or condition of the code (clause 6.1); and
 - (b) Each term or condition of Lumo Energy's contract for the sale of gas to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 6.3); and
 - (c) Lumo Energy must comply with the terms and conditions of any contract for the sale of gas with a relevant customer (clause 6.4).
45. The deemed licence condition 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.
46. Clause 21 of Lumo Energy's contract with Customer I specifies the circumstances in which the supply of gas to Customer I's premises may be disconnected. Clause 21 is subject to compliance with, and incorporates by reference into the contract, the requirements in Part 6 of the code. As noted at paragraph 5 above, it is accepted that Lumo Energy complied with the relevant requirements of clauses 109, 110 and 111(1)(e) of the code.
47. The ombudsman has suggested that there may have been non-compliance with the provisions of clauses 72(1)(a)(i) and 111(2) of the code.

Clause 111(2) of the code – Was Customer I a hardship customer or experiencing payment difficulties?

48. On 1 October 2014, Lumo Energy was informed by Customer I that she was suffering financial hardship. Lumo Energy accepted that Customer I was a hardship customer and put her into its Hardship Program.
49. Customer I continued to inform Lumo Energy that she was experiencing payment difficulties leading up to and following the disconnection of the supply of gas to Customer I's premises.

50. Leaving aside the reasonableness of Lumo Energy's actions in unilaterally removing Customer I from its hardship program on the basis of "non compliance", Customer I was clearly a residential customer who had informed Lumo Energy that she was experiencing payment difficulties. Accordingly, before Lumo Energy 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.
51. Lumo Energy in its submissions accepted that it was required to comply with clause 111(2) of the code before arranging for the disconnection of the gas supply to Customer I's premises.

Clauses 111(2) – Did Lumo Energy offer Customer I two payment plans?

52. Clause 111(2) of the code required Lumo Energy not to arrange for disconnection of Customer I's premises unless Lumo Energy 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.
53. In offering a payment plan to Customer I, Lumo Energy was required by clause 72(2) of the code to specify:
 - (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;
 - (c) the number of instalments to pay her arrears; and
 - (d) if the customer is to pay in advance—the basis on which instalments are calculated.
54. On 24 June 2016, Lumo Energy offered Customer I a payment plan of \$75 per fortnight, revised to \$35 per fortnight. Customer I did not agree to the plan as she could not afford it (see paragraph 21 above). On 13 July 2016, Lumo Energy offered Customer I's financial counsellor a payment plan of \$70 per fortnight for Customer I and the financial counsellor, acting on behalf of Customer I, did not agree to it as Customer I could not afford it (see paragraph 25 above).
55. Lumo Energy on both 24 June 2016 and 13 July 2016 had commenced making Customer I an offer in accordance with clause 72(2) of the code. However, after Lumo Energy informed Customer I and her financial counsellor of the amount of the payment plan, the plans were

immediately rejected. In those circumstances it would be unreasonable to expect Lumo Energy to go on to provide the additional details required by clause 72(2) after the offer had already been rejected. Accordingly the offers made by Lumo Energy on 24 June 2016 and 13 July 2016 were adequate for the purposes of clause 72(2) of the code.

56. Lumo Energy offered two payment plans in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 5 August 2016 (see paragraph 28 above) as required by clause 111(2) of the code.

Clause 72(1) – Did the payment plans offered by Lumo Energy need to consider Customer I’s capacity to pay?

57. The ombudsman considered that it was unclear whether either payment plan offered by Lumo Energy had appropriately considered Customer I’s capacity to pay in accordance with clause 72(1)(a)(i) of the code.
58. Clause 72(1) of the code requires that a payment plan for a hardship customer must:
- (a) be established having regard to:
 - (i) the customer’s capacity to pay; and
 - (ii) any arrears owing by the customer; and
 - (iii) the customer’s expected energy consumption needs over the following 12 month period; and
 - (b) include an offer for the customer to pay for their energy consumption in advance or in arrears by instalment payments.
59. Clause 72(1)(a) of the code requires a retailer in *establishing* a payment plan for a hardship customer to have regard to each of the three factors set out above, being capacity to pay, arrears owing and expected consumption. As stated at paragraph 54, Lumo Energy offered, but did not establish, payment plans with Customer I on 24 June 2016 and 13 July 2016.
60. Accordingly, the factors under clause 72(1)(a) of the code are not applicable in these circumstances. Lumo Energy complied with the requirements of clause 111(2) of the code and clauses 13.1 and 21.1 of its contract with Customer I by offering two payment plans on 24 June 2016 and 13 July 2016 and Customer I had agreed to neither of those offers.
61. Having done so, Lumo Energy was entitled to disconnect the supply of gas to Customer I at the premises on 22 August 2016. Consequently Lumo Energy has no obligation to make payment to Customer I under the deemed condition of its gas retail licence under section 48A of the Act.

Other observations

Offering payment plans

62. As noted in the reasons above at paragraph 59 a retailer is not required to have regard to capacity to pay, arrears or expected consumption under clause 72(1)(a) of the code in offering a payment plan to a customer. That clause relates only to the *establishment* of a payment plan.
63. However, the Act makes clear at section 48I that a gas retailer is expected to work with its customers to ensure that disconnection of customers' gas supply is always a measure of last resort.
64. The commission expects retailers to act in good faith in offering payment plans to customers who are experiencing payment difficulties in accordance with clause 111(2) of the code.

Establishing payment plans

65. As stated at paragraph 60 above, clause 72(1)(a) of the code is not applicable in these circumstances. However, the commission makes the following observations regarding the application of that clause.
66. Each sub-clause of clause 72(1)(a) of the code is expressed to be a cumulative obligation. That is, when establishing a payment plan, the retailer must have regard to the customer's capacity to pay, and the customer's arrears, and the customer's expected consumption.
67. No single factor is given special or decisive weighting by the code, accordingly each must be considered in light of the relevant circumstances.
68. In this case, had the commission been required to do so, it would have been inclined to find that Lumo Energy had appropriately considered all three factors under clause 72(1)(a), if the \$35 per fortnight payment plan offered on 24 June 2016 had been established. However, the commission would have been inclined to find that Lumo Energy had failed to appropriately consider Customer I's capacity to pay if it had established the \$70 per fortnight plan offered on 13 July 2016.
69. The relevant factors that would have been considered by the commission are that:
 - (a) Customer I's arrears were growing and the cost of her consumption was anticipated to increase based on expected tariff increases.
 - (b) Customer I had informed Lumo Energy that she could not reduce her gas consumption.

- (c) Customer I was not eligible for a utility relief grant for another 14 months from the date of disconnection.
 - (d) Customer I had informed Lumo Energy that she only had \$67 per fortnight to live off after her bills had been paid.
70. In those circumstances it was necessary to increase Customer I's payments to reduce the rate at which her arrears were accumulating. Had Lumo Energy established a payment plan, it would also have been required to take into account Customer I's capacity to pay. A small increase in the fortnightly payment to \$35 would have appropriately accounted for Customer I's capacity to pay in light of her growing arrears.
71. However, while a \$70 per fortnight plan would have started to reduce Customer I's arrears, on the facts presented to the commission, it appears that amount did not have sufficient regard to Customer I's capacity to pay. Customer I was on a fixed income and lived off a very small amount of money each fortnight after her bills had been paid. It does not appear that it would have been feasible for Customer I to increase her payments from \$30 to \$70. Accordingly, had Lumo Energy established that payment plan, the commission would have been inclined to find that Lumo Energy had not adequately considered Customer I's capacity to pay.

Conditional discounts

72. The commission notes that Customer I was on an energy plan with a 15 per cent "early bird" pay on time conditional discount. Between 27 August 2014 and the disconnection on 22 August 2016, Customer I's account remained in arrears and accordingly she was not benefiting from the 15 per cent pay on time discount. This may have resulted in Customer I's arrears accumulating more rapidly than if she had been on a more appropriate tariff with no conditional discount.
73. The commission expects retailers to work together with their customers and to offer appropriate assistance in accordance with their hardship policy. This may include considering whether the retailer has a contract available to the customer that would reduce the cost of the customer's ongoing energy use and slow the accumulation of debt.