

Customer E and Lumo Energy – Decision and Reasons

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

15 August 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 E.
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 E's gas supply at [address redacted] (the premises), from 9:10am on 14 November 2016 to 5:00pm on 8 December 2016 (a period of 24 days, 7 hours and 50 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 E in circumstances where:

- (a) Lumo Energy disconnected the supply of gas to the premises of Customer E; 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 section 48A(3) of the Act, Lumo Energy was obliged to make the prescribed payment to Customer E as soon as practicable after the supply of gas was reconnected to Customer E'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 E (see paragraph 39 below);
- (b) Was the supply of gas to Customer E's premises reconnected, and if so, when? (see paragraph 41 below);
- (c) If Lumo Energy did disconnect the supply of gas to Customer E's premises, for what period of time did the disconnection occur? (see paragraph 42 below);
- (d) What was the contract between Lumo Energy and Customer E? (see paragraph 14 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 E's premises? (see paragraphs 14 and 44(c) below);
- (f) Whether or not Lumo Energy failed to comply with those terms and conditions (see paragraph 48 below);
- (g) Was Customer E entitled to receive payment of a prescribed amount because of any wrongful disconnection by Lumo Energy under s48A of the Act? (see paragraph 51 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 E 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 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 33(3) of the code.
 6. Regarding clause 111(2) of the code, the ombudsman considered that Customer E had identified herself as a customer experiencing payment difficulties on 31 August 2016, 25 October 2016 and 10 November 2016. The ombudsman therefore considered Lumo Energy was required to offer Customer E two payment plans in the 12 months prior to arranging for the disconnection of the supply of gas to Customer E's premises. The ombudsman considered it was not clear whether Lumo Energy had demonstrated compliance with this requirement.
 7. Regarding clause 33(3) of the code, the ombudsman considered that Customer E had requested that Lumo Energy send her a form to apply for a grant under the utility relief grant scheme on 31 August 2016 and that Lumo Energy had not provided that form. Consequently the ombudsman considered that Lumo Energy may not have complied with clause 33(3) of the code.
 8. 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.
 9. 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.
 10. Regarding clause 111(2) of the code, Lumo Energy submitted that it had offered Customer E two payment plans, the first on 14 April 2016 and the second on 31 August 2016. Lumo Energy also considered that Customer E's failure to engage with Lumo Energy's hardship team had caused it to be unable to reach an effective resolution with Customer E. Finally, Lumo Energy considered that Customer E's repeated promises to make lump sum payments indicated that she was not in fact experiencing payment difficulties.

11. Regarding clause 33(3) of the code, Lumo Energy submitted that on 31 August 2016 it had informed Customer E of the availability of the utility relief grant scheme and that the account support team would contact her to discuss her eligibility within the next few days.

Relevant facts

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

Background

13. At all relevant times, Lumo Energy was the licensee responsible for the supply of gas to the premises.
14. On 21 September 2015, Lumo Energy established an account for the supply of gas at the premises of Customer E. It entered into a Market Retail Contract with Customer E for the supply of gas at Customer E's premises, the relevant terms of which are set out at paragraph 44(c).
15. On 16 October 2015, Customer E provided her concession details to Lumo Energy. Lumo Energy's contact notes show Customer E's concession entitlement was confirmed on 20 October 2015.
16. On 6 November 2015, Lumo Energy issued Customer E with a bill for \$104.27, which would be reduced to \$82.60 if paid on time. On 30 November 2015, Customer E made a payment of \$82.60. As the bill had not been paid by the due date, Customer E did not receive the pay on time discount. Consequently there was an outstanding balance of \$21.67. On 1 December 2015, Lumo Energy sent Customer E a reminder notice for the outstanding amount.
17. On 10 December 2015, Customer E called Lumo Energy questioning why there was an overdue amount on her bill. Lumo Energy explained that, as Customer E had not paid on time, the pay on time discount had not been applied. Lumo Energy agreed to apply the discount as a goodwill gesture.
18. On 3 February 2016, Lumo Energy issued a bill to Customer E for \$116.59.
19. On 3 March 2016, Lumo Energy issued a bill to Customer E for \$348.77, which included new charges of \$232.18 for usage plus the outstanding balance of \$116.59.
20. On 4 April 2016, Customer E made a payment of \$116.59.
21. On 5 April 2016, Lumo Energy sent Customer E a reminder notice.

Circumstances leading to the disconnection in November 2016

22. On 14 April 2016, Customer E called Lumo Energy seeking an extension on the time allowed to pay under the reminder notice sent on 5 April 2016. During this call Lumo Energy offered to set up a payment plan for Customer E, indicating that this would mean she would stop receiving disconnection warning notices and bill reminders. Customer E declined the offer of a payment plan, saying that she was “alright” and just wanted to ensure her gas was not turned off. Customer E indicated that she would make a payment of \$232.18 on 19 April 2016, and would pay the rest of the arrears before 27 April 2016.
23. On 2 May 2016, Customer E made a payment of \$232.18, leaving a balance of \$141.32.
24. On 4 May 2016, Lumo Energy issued a bill to Customer E for \$401.17 with a due date of 25 May 2016. The bill included the outstanding balance of \$141.32 plus new charges of \$259.85. Lumo Energy commenced the disconnection process on the basis that Customer E had failed to pay this bill.
25. On both 30 May 2016 and 27 June 2016, Customer E made payments of \$100 towards her account.
26. On 23 August 2016, Customer E made a payment of \$20 towards her account, by this time her arrears had grown to \$813.13.
27. On 31 August 2016, Customer E called Lumo Energy and requested a payment plan. Customer E informed Lumo Energy that she was a single mother, was on Centrelink benefits and was going through financial difficulties. Lumo Energy offered Customer E a payment plan of \$117 per fortnight, Lumo Energy stated that was the minimum amount it could offer Customer E at that time. Customer E advised she could not afford to pay that amount.
28. After Customer E had rejected the payment plan, Lumo Energy assessed Customer E’s capacity to pay. The assessment determined Customer E’s fortnightly surplus income to be \$73 after her expenses, other than gas, had been paid. Lumo Energy made arrangements for its account support team to contact her in the next few days to assess whether Customer E was eligible for assistance under Lumo Energy’s hardship policy. Lumo Energy also offered to provide Customer E with the number of a free financial counselling service, but Customer E declined saying she did not need the service.
29. Lumo Energy also provided information regarding the utility relief grant scheme during that call, stating that Customer E could receive a payment of \$500 from the Victorian Government to help cover her gas bill once every two years. Lumo Energy indicated that the account support team would discuss this option with her.

30. On 2 September 2016, Lumo Energy attempted to contact Customer E to follow up the assessment that it had conducted on 31 August 2016. Lumo Energy left a voice message and also sent an SMS.
31. On 7 September 2016, as Customer E had not returned Lumo Energy's call, it sent Customer E a potential hardship customer letter.
32. On 19 September 2016, Lumo Energy un-flagged Customer E as a potential hardship customer as she had not responded to its attempts to contact her.
33. On 23 September 2016, Lumo Energy sent Customer E a reminder notice for the outstanding balance of her account (\$769.49) with a due date of 5 October 2016.
34. On 14 October 2016, Lumo Energy sent Customer E a disconnection warning notice for the outstanding amount of \$830.20, due for payment on 24 October 2016.
35. On 25 October 2016, Customer E called Lumo Energy regarding the disconnection warning notice. By this time Customer E's arrears had increased to \$1,005.40. In the call Customer E advised that she would make a payment of \$500 to her account on 29 October 2016. Customer E requested that Lumo Energy establish a payment plan with her for the remaining arrears, being \$505.40, and also for her ongoing usage. Lumo Energy told Customer E to call back on 2 November 2016, after the \$500 payment had been processed, so that the payment would be taken into account in calculating Customer E's minimum payment.
36. On 27 October 2016, Lumo Energy issued a final disconnection notice to Customer E for the outstanding amount of \$830.20. The notice informed Customer E that disconnection was scheduled to occur on 14 November 2016, and that Customer E needed to pay the outstanding amount to avoid disconnection.
37. On 8 November 2016, as Customer E had not made the promised payment of \$500, Lumo Energy raised a service order to disconnect the supply of gas to Customer E's premises to occur on 14 November 2016. In arranging for the disconnection Lumo Energy completed a checklist, as set out in its contact notes. Against the question "Two Payment arrangements [sic] offered? Yes/No" Lumo Energy recorded the response "na".
38. On 10 November 2016, Customer E called Lumo Energy, and queried a reminder notice for \$1,002 sent to her by Lumo Energy on 4 November 2016. Customer E stated that she had already made a payment of \$1,003 on 29 October 2016. Customer E provided the receipt number for that payment. Customer E also informed Lumo Energy that she was a single mother, had used her entire pay cheque to pay the bill and had to rely on family to provide food for her and her children. Lumo Energy stated that the payment had not registered yet and asked Customer E to send it proof of payment by email. Lumo Energy informed Customer E that disconnection was scheduled to occur on 14 November 2016. The account

Relevant facts

reconciliation shows no payment being made by Customer E after this call, until she made a payment of \$1,002 on 14 December 2016.

Disconnection of gas supply to the premises

39. At 9:10am on 14 November 2016, Lumo Energy disconnected the gas supply to Customer E's premises for non-payment of the outstanding balance of \$1,005.40.
40. On 8 December 2016, the ombudsman contacted Lumo Energy informing it that it had received a complaint from Customer E and requesting that Lumo Energy reconnect the supply of gas to Customer E's premises.
41. At 4:00pm on 8 December 2016, the supply of gas was reconnected to Customer E's premises.
42. The premises were disconnected for a period of 24 days, 7 hours and 50 minutes.
43. As at 15 August 2018, Lumo Energy has not made any wrongful disconnection payment to Customer E.

Relevant obligations

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

(a) The Act:

- (i) 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) 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 Lumo Energy 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; and
- (iii) 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. Under section 48A(1A) of the Act the prescribed amount is capped at \$3,500 if the customer does not notify the retailer of the disconnection within 14 days of the disconnection.

(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 E, that contained the following terms and conditions:
- (i) Clause 14.1 which states that "[s]ubject to [Lumo Energy] satisfying the requirements in the Regulatory Requirements, [Lumo Energy] may arrange for the disconnection of your Premises if: (a) you do not pay your bill by the Due Date and you: (i) fail to comply with the terms of agreed Payment Plan; or (ii) if you are a Residential Customer, do not agree to an offer to pay the bill by instalments, or having agreed you fail to comply with the instalment arrangement".
 - (ii) Clause 25 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 of the code identifies the requirements in offering a payment plan and in establishing a payment plan.
 - (iv) Clause 33(3) of the code requires the retailer to provide information to a hardship or payment difficulties customer about the availability of government funded energy charge rebate, concession or relief schemes, including the utility relief grant scheme.

45. Lumo Energy's obligations are discussed further below in the reasons.

Decision

46. 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).
47. Lumo Energy disconnected the supply of gas to Customer E's premises at 9:10am on 14 November 2016.
48. 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 E specifying the circumstances in which the supply of gas to those premises may be disconnected.
49. Accordingly, the second condition that has to be satisfied for section 48A of the Act to apply was not satisfied.
50. The supply of gas was not wrongfully disconnected.
51. Lumo Energy was not required to make any payment of a prescribed amount under the deemed licence condition.

Reasons

52. Lumo Energy's gas retail licence 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).
53. 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.
54. Clause 14.1 of Lumo Energy's contract with Customer E specifies the circumstances in which the supply of gas to Customer E's premises may be disconnected. Clause 14.1 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.
55. The ombudsman considered that Lumo Energy may not have complied with the provisions of clauses 111(2) and 33(3) of the code.

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

56. On 31 August 2016, Customer E had informed Lumo Energy that she was a single mother, receiving Centrelink benefits and experiencing financial hardship. After Customer E had rejected a payment plan of \$117 per fortnight, Lumo Energy assessed Customer E as having \$73 per fortnight left after paying her other bills (see paragraphs 27 and 28 above).

57. Further, on 10 November 2016, four days prior to the disconnection, Customer E had informed Lumo Energy that she was a single mother and had used her entire pay cheque to pay off the bill (see paragraph 38 above).
58. Customer E was clearly a residential customer who had informed Lumo Energy that she was experiencing payment difficulties. The fact that Customer E had indicated an intention to make lump sum payments does not negate this point. Indeed Customer E continued to explain her financial difficulties to Lumo Energy while indicating that she would make the payments.
59. Accordingly, before Lumo Energy could disconnect the supply of gas to Customer E's premises it had to comply with the requirements of clause 111(2) of the code.

Did Lumo Energy offer Customer E two payment plans? Clauses 111(2) and 72(2) of the code

60. Clause 111(2) of the code required Lumo Energy not to arrange for disconnection of Customer E's premises unless Lumo Energy had offered Customer E two payment plans in the previous 12 months, and:
 - (a) Customer E had agreed to neither of them; or
 - (b) Customer E had agreed to one but not the other of them but the plan to which Customer E agreed had been cancelled due to non-payment by Customer E; or
 - (c) Customer E had agreed to both payment plans but the plans had been cancelled due to non-payment by Customer E.
61. In offering a payment plan to Customer E, 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.
62. On 14 April 2016, Lumo Energy offered to establish a payment plan for Customer E. Customer E indicated that she did not want a payment plan (see paragraph 22 above).

63. On 31 August 2016, Lumo Energy offered Customer E a payment plan of \$117 per fortnight. However, Customer E did not agree to it as she could not afford to pay that amount (see paragraph 27 above).
64. On both 14 April 2016 and 31 August 2016, Lumo Energy had commenced making Customer E an offer of a payment plan. However, Customer E had rejected both offers immediately before Lumo Energy had an opportunity to specify the elements required by clause 72(2) of the code. As Customer E was engaging with Lumo Energy and had rejected the payment plans immediately, it would be unreasonable to expect Lumo Energy to go on to provide the additional details required by clause 72(2) of the code. Accordingly the offers made by Lumo Energy on 14 April 2016 and 31 August 2016 were adequate for the purposes of clause 111(2) of the code. The situation is different where the customer is not engaging with the retailer.
65. Lumo Energy offered two payment plans in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 8 November 2016 as required by clause 111(2) of the code (see paragraph 37 above).

Other observations

Did Lumo Energy provide advice regarding government concessions and rebates? Clause 33(3) of the code

66. The ombudsman considered that Lumo Energy may not have complied with clause 33(3) of the code.
67. Clause 33(3) is in Part 3 of the code which is titled Customer Retail Contracts and Division 4 which is titled Customer retail contracts - billing. Clause 33(3) of the code is not a term or condition of the contract between Customer E and Lumo Energy that specifies “the circumstances in which the supply of gas to premises may be disconnected”. Accordingly, even if Lumo Energy failed to comply with clause 33(3) of the code, it would not be obliged to make a wrongful disconnection payment under section 48A of the Act.
68. Had it been required to do so, the commission would have found that Lumo Energy had complied with clause 33(3) of the code.
69. As Customer E had informed Lumo Energy of her payment difficulties, Lumo Energy was required under clause 33(3) of the code to provide Customer E with information about the availability of government funded energy charge rebate, concession or relief schemes, including the utility relief grant scheme.
70. On 31 August 2016, Lumo Energy told Customer E that she may be eligible for a payment under the utility relief grant scheme of \$500 once every two years. Lumo Energy said it would call her back to discuss her eligibility for the utility relief grant scheme and other assistance under its hardship policy. Lumo Energy attempted to do so on 2 September 2016 but was unsuccessful in contacting Customer E.
71. While Lumo Energy could have taken additional steps to provide Customer E with information about the availability of the utility relief grant scheme, for example by sending her an application form, it is clear that Lumo Energy had provided her with information about the scheme, as required by clause 33(3) of the code.

Disconnection notice sent after the customer has made a promise to pay

72. On 25 October 2016, Customer E told Lumo Energy that she would make a payment of \$500 to her account on 29 October 2016. Lumo Energy was expecting that Customer E would call it back on 2 November 2016 to establish a payment plan.

73. On 27 October 2016, two days before Customer E had said she would make a payment on her account, Lumo Energy sent Customer E a final disconnection notice. The notice did not acknowledge Customer E's promise to pay.
74. At the time the notice was sent, Lumo Energy was anticipating that Customer E would make a payment, and call it back to establish a payment plan, in order to avoid the need for disconnection. The commission considers that sending a notice, specifying a date for disconnection, to the customer in these circumstances has the potential to cause the customer undue concern and stress.
75. The commission considers that in the circumstances of this case, best practice would suggest that Lumo Energy not send the final disconnection notice to Customer E while the promise to pay was pending.