

Customer M and Lumo Energy – Decision and Reasons

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

28 November 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 M.
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 M's gas supply at [address redacted] (the premises), from 9:15am on 27 March 2017 to 5:15pm on 31 March 2017 (a period of 4 days and 8 hours).

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 M in circumstances where:

- (a) Lumo Energy disconnected the supply of gas to the premises of Customer M; 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 of the Act, Lumo Energy was obliged to make the prescribed payment to Customer M as soon as practicable after the supply of gas was reconnected to Customer M'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 M (see paragraphs 30 and 37 below);
- (b) Whether or not the supply of gas to Customer M's premises was reconnected, and if so, when? (see paragraph 31 below);
- (c) If Lumo Energy did disconnect the supply of gas to Customer M's premises, for what period of time was supply to the premises disconnected? (see paragraph 32 below);
- (d) What was the contract between Lumo Energy and Customer M? (see paragraph 12 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 M's premises? (see paragraphs 12 and 34(c) below);
- (f) Whether or not Lumo Energy failed to comply with those terms and conditions (see paragraph 38 below);
- (g) Whether Customer M was entitled to receive payment of a prescribed amount because of any wrongful disconnection by Lumo Energy under section 48A of the Act? (see paragraph 41 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 M 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 compliance 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 it was unclear whether Lumo Energy should have been aware that Customer M was experiencing payment difficulties. Therefore, it was unclear whether Lumo Energy was obliged to offer Customer M two payment plans in the 12 months prior to arranging for the disconnection of the supply of gas to her premises. The ombudsman also considered that it was unclear whether Lumo Energy was obliged to provide Customer M with information about the availability of the utility relief grant scheme under clause 33(3) of the code. The ombudsman noted that although Lumo Energy had Customer M listed as a business customer in its system, Customer M's statement that "it's a residential business" and that the property is a residential home, indicate that Customer M is a residential customer for the purposes of the code.
 7. 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 for the commission to consider. On 14 September 2018, Lumo Energy made submissions for the commission's consideration.
 8. Lumo Energy generally agreed with the chronology of events as presented by the ombudsman in its referral memorandum. However, Lumo Energy noted that Customer M's payment plan, established on 8 November 2016, was cancelled due to non-payment on 23 December 2016, not 23 November 2016.
 9. Lumo Energy submitted that Customer M did not indicate to Lumo Energy that she may be a customer experiencing financial difficulties and so Lumo Energy was not obliged to offer Customer M two payment plans under clause 111(2) of the code. However, despite it not being obliged to, Lumo Energy submitted that it did offer two payment plans to Customer M in the 12 months prior to arranging for the disconnection of the gas supply to her premises. In its submission, Lumo Energy did not dispute that Customer M fits the definition of residential customer, for the purposes of the code. Regarding clause 33(3) of the code, Lumo Energy submitted that Customer M was sufficiently aware of the availability of the utility relief grant

scheme. Lumo Energy also submitted that even if it had not complied with clause 33(3), failure to comply with that clause does not give rise to an obligation to make a wrongful disconnection payment.

Relevant facts

10. 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, the commission makes the factual findings set out below.

Background

11. At all relevant times, Lumo Energy was the licensee responsible for the supply of gas to the premises.
12. On 9 June 2006, Lumo Energy established an account for the supply of gas to the premises of Customer M. Lumo Energy and Customer M entered into a standard retail contract for the supply of gas to Customer M's premises, the relevant terms of which are set out at paragraph 34(c) below.
13. On 27 May 2008, Lumo Energy sent Customer M a contract renewal letter.
14. On 21 December 2015, Customer M called Lumo Energy. During this call Customer M advised Lumo Energy that she had a high outstanding balance on her gas account, was not currently working, was facing financial difficulties, and wanted to establish a payment plan. However, a payment plan was not established at that time. Customer M also requested a utility relief grant scheme application.
15. On 22 and 23 December 2015, Customer M made two payments of \$1,000.00 each towards her account.
16. On 5 January 2016, Lumo Energy sent Customer M a letter advising that her utility relief grant scheme application had been unsuccessful, due to her concession details not matching those recorded.

Circumstances leading to the disconnection

17. On 5 July 2016, Customer M called Lumo Energy to enquire when the last payment was made towards her account. During this call Customer M confirmed her arrears, which amounted to \$2,230.40. Customer M informed Lumo Energy that she would make a payment of \$1,000.00 "tomorrow". Lumo Energy then offered to establish a payment plan with Customer M. Customer M declined this offer of a payment plan, saying "no, not payment plan".
18. On 19 July 2016, Customer M made a payment of \$500.00 towards her account.
19. On 5 August 2016, Customer M made a payment of \$1,500.00 towards her account, reducing her arrears to \$230.48.

20. On 11 October 2016, Lumo Energy issued a bill to Customer M with a balance of \$1,034.48 and a due date of 2 November 2016.
21. On 8 November 2016, Lumo Energy called Customer M to discuss her outstanding balance of \$1,034.48. Customer M informed Lumo Energy that her “husband was meant to make the payments” and entered into a payment plan of \$200.00 per fortnight with Lumo Energy. Lumo Energy asked Customer M if she was requesting a payment arrangement that only covered her arrears or one that covered her arrears and ongoing usage. Customer M responded that she would pay her future bills ‘as [she] gets it’. During this call Lumo Energy informed Customer M that a disconnection had been scheduled for her premises (by Lumo Energy raising a disconnection service order with the distributor) but that Lumo Energy would cancel this request as Customer M had entered into a payment plan.
22. On 8 November 2016, Customer M made a payment of \$200.00 towards her account.
23. On 18 November 2016, Customer M made a payment of \$50.00 towards her account.
24. On 25 November 2016, Customer M made a payment of \$200.00 towards her account.
25. On 23 December 2016, the payment plan established between Customer M and Lumo Energy on 8 November 2016 was cancelled due to non-payment.
26. On 9 January 2017, Customer M made a payment of \$300.00 towards her account.
27. On 7 February 2017, Lumo Energy issued a reminder notice with an outstanding balance of \$565.75. The reminder notice had a due date of 16 February 2017.
28. On 24 February 2017, Lumo Energy issued a disconnection warning notice with an outstanding balance of \$565.75. This disconnection warning notice had a due date of 7 March 2017 and included information about Lumo Energy’s hardship program.

Disconnection of gas supply to the premises

29. On 13 March 2017, Lumo Energy raised a disconnection service order for the premises.
30. At 9:15am on 27 March 2017, the gas supply to Customer M’s premises was disconnected for non-payment of the outstanding balance of \$565.75.
31. At 5:15pm on 31 March 2017, the gas supply to Customer M’s premises was reconnected, following a payment of \$565.75 by Customer M.
32. The gas supply to the premises was disconnected for a period of 4 days and 8 hours.
33. As at 28 November 2018, Lumo Energy has not made any wrongful disconnection payment to Customer M.

Relevant obligations

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

(a) The Act:

- (i) Section 48A(1) of the Act deems a condition into Lumo Energy's gas retail licence of an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection; and
- (ii) Section 48A(3) requires payment of the prescribed amount to be made as soon as practicable after the supply of gas is reconnected.

(b) Lumo Energy's gas retail licence:

- (i) Clause 6.1 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 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 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 standard retail contract with Customer M:

- (i) Clause 18.1 states that "[Lumo Energy] may disconnect, interrupt or terminate energy supply or Related Services to you if you:
 - Have not paid your bill past the due date and you have received the appropriate reminder and disconnection notices and have refused other payment arrangements.
 - Do not agree to an alternative payment arrangement.
 - Fail to meet the terms of an agreed payment plan."
- (ii) Clause 7 states that "If you are a residential customer and have difficulty in paying your bills you must contact us to discuss how we can help you with a suitable instalment plan, referral to a financial counsellor, provision of details concerning government concessions and grants..."
- (iii) Clause 33.4 states that "Where an Applicable Law allows any inconsistency with this Contract, you give your explicit informed consent (as defined in the Retail Code) to any such inconsistent terms in this contract."

- (iv) Clause 33.5 states that “This Contract shall be governed and construed in accordance with the laws of the State 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 for the disconnection of a customer’s premises except in accordance with clauses 111 to 118.
 - (ii) Clause 111 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, is a residential customer who has informed the retailer in writing or by telephone that the customer is experiencing payment difficulties or the retailer otherwise believes the customer is experiencing repeated difficulties in paying the customer’s bill or requires payment assistance. In those circumstances, a retailer must not arrange for the disconnection of the customer’s premises unless they have offered the customer two payment plans in the previous 12 months.
 - (iii) Clause 72 identifies requirements for both offering and establishing a payment plan. Clause 72(2) of the code requires an offer of a payment plan to include the duration of the plan, the amount of each instalment payable under the plan, the frequency of instalments and the number of instalments it will take to pay the arrears.
 - (iv) Clause 33(3) requires a 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.

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

Decision

36. 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).
37. Lumo Energy disconnected the supply of gas to Customer M's premises at 9:15am on 27 March 2017.
38. 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 M that specified the circumstances in which the supply of gas to those premises may be disconnected.
39. Accordingly, the second condition that must be satisfied for section 48A of the Act to apply was not satisfied.
40. The supply of gas to Customer M's premises was not wrongfully disconnected.
41. Lumo Energy was not required to make any prescribed payment to Customer M under the deemed licence condition.

Reasons

42. 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).
43. 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.
44. Clause 18.1 of Lumo Energy's contract with Customer M specifies the circumstances in which the supply of gas to Customer M's premises may be disconnected. Clauses 33.4 and 33.5 of Lumo Energy's contract with Customer M incorporated clauses 111(2) and 72(2) of the code into their agreement.
45. The ombudsman considered that Lumo Energy may not have complied with its obligations under clauses 111(2) and 33(3) of the code.

Compliance with clause 111(2) of the code

46. Clause 111(2) of the code required that Lumo Energy not arrange for disconnection of the gas supply to Customer M's premises unless Lumo Energy had offered her two payment plans in the previous 12 months. This obligation would apply where:
- Customer M was a hardship customer
 - Customer M was a residential customer who had informed Lumo Energy that she was experiencing payment difficulties

- Lumo Energy otherwise believed that Customer M was experiencing repeated difficulties in paying her bill
 - Lumo Energy otherwise believed that Customer M required payment assistance.
47. On 5 July 2016, Lumo Energy commenced making an offer of a payment plan to Customer M (see paragraph 17 above). Customer M rejected this offer before Lumo Energy had an opportunity to specify the elements required by clause 72(2) of the code. As Customer M was engaging with Lumo Energy and had rejected the payment plan 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. Therefore, the offer made by Lumo Energy on 5 July 2016 was adequate for the purposes of clause 111(2) of the code.
48. On 8 November 2016, Lumo Energy and Customer M agreed to a payment plan of \$200.00 per fortnight (see paragraph 21 above). This offer of a payment plan was made in accordance with clause 72(2) of the code.
49. Lumo Energy offered two payment plans in the 12 months prior to arranging for disconnection of the supply of gas to Customer M's premises. Therefore, the commission does not need to decide whether Lumo Energy was required to offer Customer M two payment plans under clause 111(2) of the code.

Does a failure to comply with clause 33(3) of the code give rise to an obligation to make a wrongful disconnection payment?

50. 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 M and Lumo Energy that specifies the circumstances in which the supply of gas to premises may be disconnected. Therefore, even if Lumo Energy had 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.