

Customer P and Lumo Energy – Decision and Reasons

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

26 September 2018

Commissioners:

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

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Contents

Contents	ii
The complaint	1
Issues for decision	2
Relevant facts	4
Relevant obligations	5
Decision	7
Reasons	8
Does a failure to comply with clause 33(3) of the code give rise to an obligation to make a wrongful disconnection payment?	8
Other observations	9
Commission’s guidance on the status of “staff advice”	9

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 P.
2. The complaint concerns 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 P's gas supply at [*address redacted*] (the premises), from 9:00am on 22 June 2017 to 6:15pm on 7 July 2017 (a period of 15 days, 9 hours and 15 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 P in circumstances where:

- (a) Lumo Energy disconnected the supply of gas to the premises of Customer P; 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 P as soon as practicable after the supply of gas was reconnected to Customer P'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 P (see paragraph 12 below);
- (b) Whether supply of gas to Customer P's premises was reconnected, and if so, when? (see paragraph 14 below);
- (c) If Lumo Energy did disconnect the supply of gas to Customer P's premises, for what period of time did the disconnection occur? (see paragraph 15 below);
- (d) What was the contract between Lumo Energy and Customer P? (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 P's premises? (see paragraphs 11 and 17(c) below);
- (f) Whether or not Lumo Energy failed to comply with *those* terms and conditions (see paragraph 21 below);
- (g) Was Customer P entitled to receive payment of a prescribed amount because of any wrongful disconnection by Lumo Energy under s48A of the Act? (see paragraph 24 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 P 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, 111(1)(e) and 111(2) 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 clause 33(3) of the code. The ombudsman noted that while two separate instances of correspondence, dated 2 June 2017 and 14 June 2017 respectively, referred to the existence of the Utility Relief Grant Scheme (URGS), it was unclear whether this was of sufficient quality to satisfy the obligation to provide Customer P with information on the availability of the URGS.
 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 for the commission to consider. On 17 July 2018, Lumo Energy made submissions for the commission's consideration.
 7. Lumo Energy generally agreed with the chronology of events as presented by the ombudsman in its referral memorandum.
 8. Lumo Energy submitted that it complied with the requirements of clause 33(3) of the code by informing Customer P of the availability of the government funded energy charge rebate, concessions or relief schemes including the URGS via written correspondence on two occasions (2 June 2017 and 14 June 2017). Lumo Energy considered that it conducted itself in accordance with the responsibilities and obligations set out in the code. Lumo Energy also submitted that EWOV relied on advice from commission staff in forming its opinion on this matter. The issue of staff advice is addressed at paragraphs 30-31 below.

Relevant facts

9. The commission analysed the ombudsman's request for a decision and sought additional submissions from Lumo Energy. The commission notes that the ombudsman accepts that Lumo Energy complied with clauses 109, 110, 111(1)(e) and 111(2) of the code, and the commission has only been asked to review whether Lumo Energy complied with clause 33(3) of the code. Accordingly, the commission makes limited factual findings as set out below.
10. At all relevant times, Lumo Energy was the licensee responsible for the supply of gas to the premises.
11. On 30 November 2016, Lumo Energy established an account for the supply of gas at the premises of Customer P. It entered into a market retail contract with Customer P for the supply of gas at Customer P's premises, the relevant terms of which are set out at paragraph 17(c).
12. On 22 June 2017, Customer P's gas supply was disconnected for non-payment. The total amount outstanding on the account was \$782.54.
13. On 7 July 2017, Lumo Energy received an email from the ombudsman informing it that Customer P had contacted the ombudsman and that the matter was under investigation.
14. The relevant distributor confirmed that gas supply was reconnected to the premises at 6.15pm on 7 July 2017.
15. The premises were disconnected for a period of 15 days, 9 hours and 15 minutes.
16. As at 26 September 2018, Lumo Energy has not made any wrongful disconnection payment to Customer P.

Relevant obligations

17. 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 specify the circumstances in which the supply of gas to premises may be disconnected and 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;
- (ii) Section 48A(1) of the Act which 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
- (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.

(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 P, that contained the following terms and conditions:

- (i) Clause 14.1(a) which states that "Subject to us satisfying the requirements in the Regulatory Requirements, we may arrange for the disconnection of your Premises if: you do not pay your bill by the Due Date and you: fail to comply with the terms of an agreed Payment Plan; or 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 14.3(d) which states that “We will not disconnect you if the Regulatory Requirements prevent us from doing so.”

(iii) Clause 22 which states “This Contract shall be governed by, and construed in accordance with, the laws of the State in which the Premises is located.”

(d) The code:

Clause 33(3) requires retailers to provide information to a hardship customer or a customer experiencing payment difficulties about the availability of relief schemes including the URGS.

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

Decision

19. 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).
20. Lumo Energy disconnected the supply of gas to Customer P's premises at 9:00am on 22 June 2017.
21. 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 P that specified the circumstances in which the supply of gas to those premises may be disconnected.
22. Accordingly, the second condition that must be satisfied for section 48A of the Act to apply was not satisfied.
23. The supply of gas was not wrongfully disconnected.
24. Lumo Energy was not required to make any payment of a prescribed amount under the deemed licence condition.

Reasons

25. 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).
26. 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.
27. Clause 14 of Lumo Energy's contract with Customer P specifies the circumstances in which the supply of gas to Customer P's premises may be disconnected. As noted at paragraphs 5 and 9 above, it is accepted that Lumo Energy complied with the relevant requirements of clauses 109, 110, 111(1)(e) and 111(2) of the code.
28. The ombudsman has suggested that there may have been non-compliance with the provisions of clause 33(3) 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?

29. 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 P 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.

Other observations

Commission's guidance on the status of "staff advice"

30. Lumo Energy's submission to the commission stated that EWOV's position on this matter relied on "staff advice" regarding the quality of information that retailers are required to provide under clause 33(3) of the code. In its submission, Lumo Energy submitted it is unreasonable that Lumo Energy "...be expected to apply staff advice or recommendations where further guidelines were not available to it at the time."
31. The staff advice expressly states that it is the opinion of commission staff and does not prejudice any future consideration of the matter by the commission. The commission does not need to have, and has not had, regard to the staff advice in coming to its decision in this matter.