

Customer M and AGL Sales – 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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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 AGL Sales Pty Ltd (AGL Sales) of Customer M's gas supply at [address redacted] (the premises), from 9:13am on 9 June 2015 to 6:42pm on 19 June 2015 (a period of 10 days, 9 hours and 29 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 M in circumstances where:
 - (a) AGL Sales disconnected the supply of gas to the premises of Customer M; 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 M as soon as practicable after the supply of gas was reconnected to Customer M'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 M (see paragraphs 29 and 37 below);
 - (b) Was supply of gas to Customer M's premises reconnected, and if so, when? (see paragraphs 31 and 40 below);
 - (c) If AGL Sales did disconnect the supply of gas to Customer M's premises, for what period of time did the disconnection occur? (see paragraph 32 below);
 - (d) What was the contract between AGL Sales and Customer M? (see paragraphs 34(c) and 34(d) 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 M's premises? (see paragraphs 34(c) and 34(d) below);
 - (f) Whether or not AGL Sales failed to comply with *those* terms and conditions (see paragraphs 46 and 59 below);
 - (g) Was Customer M entitled to receive payment of a prescribed amount because of any wrongful disconnection by AGL Sales under section 48A of the Act? (see paragraph 42 below);
 - (h) If so, when was AGL Sales obliged to make the payment of the prescribed amount? (see paragraphs 34(a), 42 and 45 below);

- (i) Has AGL Sales made the payment to Customer M in accordance with its deemed licence condition under section 48A of the Act? (see paragraphs 33 and 43 below);
 - (j) If AGL Sales has not made the payment what are the consequences? (see paragraphs 60, 61 and 64 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 109, 110, 111(1)(e), and 33(3) 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(2) of the code. The ombudsman considered that AGL Sales did not appear to have met its obligations in offering Customer M two payment plans in the 12 months prior to the disconnection.
 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.
 10. In AGL Sales' view, it was not able to offer Customer M a payment plan when the account was established, as AGL Sales was not able to take into account his arrears as they could not be calculated at that time. Subsequently, according to AGL Sales, it was not able to offer a payment plan because Customer M refused to engage. In such a circumstance, AGL Sales said that it had no ability to establish the customer's capacity to pay and comply with the requirement of establishing a payment plan as contemplated in clause 72 of the code.
 11. AGL Sales submitted that the only interpretation of the code that meets the objectives of the legislation is that an offer is merely an indication to the customer that the customer is entitled to a payment plan that will be determined in accordance with clause 72 of the code when the customer engages with the retailer. AGL Sales submitted further that this type of offer was made to Customer M many times in written correspondence notifying him that payment assistance was available, as he refused to speak to AGL Sales directly.
 12. AGL Sales stated that it considers the act of disconnection to be an act of last resort when AGL Sales is not able to get any engagement from a customer, to ensure that a customer does not continue to accrue debt without seeking assistance from the retailer.
 13. AGL Sales noted that it had sent a registered letter to Customer M on 21 May 2015.

Relevant facts

14. 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

15. At all relevant times, AGL Sales was the licensee responsible for supply of gas to the premises.
16. In 2014, AGL Sales established an occupier account for the supply of gas at the premises of Customer M. It entered into a Standard Retail Contract for the supply of gas at Customer M's premises. On 3 February 2015, during a telephone conversation between Customer M and AGL Sales, Customer M was offered to be put onto AGL Sales' market retail contract from that date, known as the "Select 15%" energy plan. The relevant terms and conditions of those contracts are discussed at paragraph 34 below.
17. On 3 February 2015, Customer M, with the assistance of a representative of the Salvation Army, called AGL Sales. During that call:
- (a) Customer M's representative advised AGL Sales that Customer M had received a disconnection notice and wanted a Utility Relief Grant Scheme (URGS) application form for both his gas and electricity accounts;
 - (b) Customer M accepted responsibility for the gas account with AGL Sales from 2014;
 - (c) AGL Sales advised that once the account was placed into Customer M's name, AGL Sales would send out the bills again along with the URGS application forms;
 - (d) AGL Sales asked Customer M how he preferred to pay for the gas account and Customer M asked whether he could establish Centrepay payments. AGL Sales advised Customer M that he could contact Centrelink and provide it with his account details;
 - (e) AGL Sales also asked Customer M why he wanted to apply for an URGS and Customer M said to AGL Sales "just hardship" and explained several other personal and financial issues he was experiencing;
 - (f) AGL Sales finalised the call by advising Customer M that he would receive the bills and could call Centrelink to arrange Centrepay.
18. AGL Sales' contact notes for 3 February 2015 records an entry at 2:14pm with the following:
- (a) Reason column: "URGS";

- (b) Note column: “* Reason for claiming URGS: Low income, Referred by community worker” and “Customer would like to apply for Utility Relief Grant.”; and
 - (c) Note column: “Accepted S15% on gas”.
19. On 23 February 2015, AGL Sales issued a bill for the supply of gas to Customer M in the amount of \$710.50 with a due date of 16 March 2015. The bill:
- (a) Identified Customer M’s premises as the supply address;
 - (b) Stated the billing period as 19 December 2014 to 20 February 2015 [64 days]; and
 - (c) Identified the relevant energy plans as “Standard Retail Contract” (for the period 19 December 2014 to 2 February 2015 [46 days]) and “Select 15%” (for the period 3 to 20 February 2015 [18 days]).
20. On 18 March 2015, AGL Sales called Customer M. During this call:
- (a) AGL Sales advised Customer M of the outstanding balance on his gas (and electricity) account;
 - (b) Customer M advised AGL Sales:
 - (i) that he had not received a bill; and
 - (ii) that he had applied for the URGS but had “not heard anything back”;
 - (c) AGL Sales attempted to transfer Customer M to a different department; however, the call ended.
21. AGL Sales’ contact notes for the telephone call of 18 March 2015 record that Customer M told them he did not receive an original bill and that Customer M “applied for a Grant though customer never heard anything back”.
22. AGL Sales made numerous attempts in March 2015 to contact Customer M by telephone, which usually went through to an answering machine with no messages being left.

Circumstances leading to the disconnection in June 2015

23. On 23 April 2015, AGL Sales issued a reminder notice to Customer M for the outstanding balance of \$710.50 with a due by date of 5 May 2015. The reminder notice had a section under the heading “Can we help?” which included – “If you are experiencing financial hardship ...please call us on 1300 791 245 (8am-6pm, Monday to Friday). We may be able to help with alternative payment arrangements, information on State Government concessions and rebates, ...”

24. On 6 May 2015, AGL Sales issued a disconnection warning notice to Customer M for the outstanding balance of \$710.50 with a due date for payment of 18 May 2015. The AGL Sales' disconnection warning notice:
- (a) said to Customer M “[w]e have sent you a bill for your gas account, a reminder notice and have made attempts to contact you. However we are yet to receive your payment.”;
 - (b) advised that failure to receive payment by the end of the disconnection notice period of 18 May 2015 may result in disconnection; and
 - (c) had a section under the heading “Can we help?” which included – “If you are experiencing financial hardship ...please call us on 1300 791 245 (8am-6pm, Monday to Friday). We may be able to help with alternative payment arrangements, information on State Government concessions and rebates, ...”
25. On 21 May 2015:
- (a) AGL Sales' contact notes records include the following:
 - (i) “Debt amount: \$710.50”;
 - (ii) “Screening checks – Met”;
 - (iii) “Best Endeavour checks – Met”;
 - (iv) “Hardship Exists – Yes”;
 - (v) “Concession card exist[s] – Yes”;
 - (vi) “All the required attempts were made.”;
 - (vii) “Disconnection Service notification raised – 313270849”;
 - (viii) “Register[ed] Letter sent”.
26. Customer M had not made any payments towards his gas account as at May 2015.

Disconnection of gas supply to the premises

27. On 21 May 2015, AGL Sales raised a service order for the disconnection of the gas supply to Customer M's premises.
28. On 4 June 2015, AGL Sales' contact notes record an entry for internal checks performed by AGL Sales to the following effect: 1. Account class – ok to disconnect for non-payment; 2. Contact history check for any open tasks or dispute notes – Negative; 3. Document and Contract Account Locks – Negative; 4. Overdue amount on account more than disconnection

for non-payment threshold; 5. Active payment arrangement on account – Negative; Hence disconnection for non-payment not cancelled.

29. On 9 June 2015 at 9:13am, the gas supply to Customer M's premises was disconnected.
30. On 18 June 2015:
 - (a) AGL Sales' contact notes record that at about 4:19pm Customer M called AGL Sales and stated that his mail was getting stolen. He was advised by the AGL Sales representative that he could go onto email billing. The entry also records that: "[n]o payments have ever been made on the account – accounts were Dear Customer"; "URGS info was sent 3.2.2015 – never applied and filled in."; and "customer terminated call."; and
 - (b) Customer M lodged a complaint with the ombudsman about disconnection of his gas supply.
31. On 19 June 2015 at 6:42pm, the supply of gas was reconnected to the premises of Customer M.
32. The premises were disconnected for a period of 10 days, 9 hours and 29 minutes.
33. AGL Sales has not made any wrongful disconnection payment to Customer M.

Relevant obligations

34. 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. Sub-section 48A(3) requires such payment to be made as soon as practicable after reconnection of the gas supply.
- (ii) Sub-section 48A(5)(b) provides that the prescribed amount was \$250.00 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected.
- (iii) Sub-sections 46(1) and (5) of the Act dealing with deemed contracts for supply and sale for relevant customers taking supply of gas without entering into a market retail contract.
- (iv) Sub-section 48I of the Act dealing with hardship policies and including having regard to – the essential nature of gas supply; community expectations that the gas supply will not be disconnected solely because of a customer's inability to pay for the gas supply; and the principle that the gas supply to premises should only be disconnected as a last resort.

(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' standard retail contract, established with Customer M for the period 19 December 2014 to 2 February 2015:
- (i) Clause 14.1(e) which states that “[s]ubject to [AGL Sales] satisfying the requirements in the Rules, [AGL Sales] may arrange for the disconnection of your premises if – [AGL Sales] is otherwise entitled or required to do so under the Rules or by law.”
 - (ii) Clause 14.2 which states in part “[b]efore disconnecting your premises, [AGL Sales] must comply with relevant warning notice requirements *and other provisions in the Rules.*” (emphasis added)
 - (iii) The “Note for Victorian customers” contained in the preamble to the terms and conditions, which states:

“For Victorian customers, until the National Energy Retail Law and the National Energy Retail Rules are adopted in Victoria (referred to as ‘NECF implementation in Victoria’), the energy laws applicable in Victoria are the Electricity Industry Act 2000, the Gas Industry Act 2001 and the Energy Retail Code made by the Essential Services Commission. For customers in Victoria, prior to NECF implementation in Victoria all references to the National Energy Retail Law and Rules in this contract should be read as references to the Energy Retail Code unless stated otherwise.”
 - (iv) Clause 24 which states that “energy laws means national and State and Territory laws and rules relating to energy and the legal instruments made under those laws and rules;”
- (d) AGL Sales' market retail contract, known as “Energy Plan Select 15%” with Customer M, established on and from 2 February 2015, 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.”

- (e) The code:
 - (i) Clause 72(2) which sets out the requirements for retailers *offering* a payment plan.
 - (ii) 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.
 - (iii) Under sub-clause 111(2), where a residential customer has informed the retailer that the customer is experiencing payment difficulties, a retailer must not arrange for disconnection of gas supply to the customer’s premises unless the retailer has offered the customer two payment plans in the previous 12 months and the customer has agreed to neither of them.

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

Decision

36. 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).
37. AGL Sales disconnected the supply of gas to Customer M's premises at 9:13am on 9 June 2015.
38. Prior to disconnecting the supply of gas to Customer M's premises for non-payment, AGL Sales failed to comply with the terms and conditions of its contract with Customer M.
39. The disconnection was therefore not in accordance with the deemed licence condition.
40. The supply of gas to Customer M's premises was reconnected at 6:42pm on 19 June 2015.
41. The supply of gas to Customer M's premises was wrongfully disconnected for a period of 10 days, 9 hours and 29 minutes.
42. Therefore, under the deemed licence condition, AGL Sales was obliged to pay to Customer M the prescribed amount of \$2,599 as soon as practicable after the supply of gas was reconnected to Customer M's premises on 19 June 2015.
43. No payment has been made as at 18 July 2018.

Reasons

44. AGL Sales' gas retail licence 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).
45. 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.
46. Clause 10 of AGL Sales' contract with Customer M specifies the circumstances in which the supply of gas to Customer M'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 109, 110 and 111(1)(e) of the code.

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

47. Clause 111(2) of the code deals with disconnection of gas supply for not paying a bill where the customer is a hardship customer or a residential customer who has informed the retailer that the customer is experiencing payment difficulties or the retailer otherwise believes that the customer is experiencing repeated difficulties in paying the customer's bill or requires payment assistance.
48. On 3 February 2015, Customer M told AGL Sales that he needed to apply for the URGS and requested a form for that purpose. He informed AGL Sales that he was under hardship and financial difficulties. AGL Sales' own sales contact notes for that telephone conversation

record that the reason Customer M gave to AGL Sales for applying for the URGS was “low income”. He had also explained that he would have to pay for his gas bill from Centrepay (see paragraphs 17 and 18 above and also note paragraphs 20 and 21 above).

Clause 111(2) of the code – Did AGL Sales need to offer Customer M two payment plans in the 12 months before arranging disconnection?

49. Customer M was a residential customer who had informed AGL Sales that he was experiencing payment difficulties. Accordingly, under clause 111(2) of the code, AGL Sales was under an obligation not to arrange disconnection of gas supply to Customer M’s premises unless AGL Sales had offered, in the 12 months prior to arranging the disconnection (that is, the 12 months prior to 21 May 2015 – see paragraph 27 above), two payment plans.
50. AGL Sales did not offer Customer M any payment plans prior to arranging for the disconnection of gas supply to his premises. As clause 72(2) of the code provides, *the offer of a payment plan* required AGL Sales to inform Customer M of:
 - (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; and as Customer M was in arrears
 - (c) The number of instalments to pay the arrears.
51. AGL Sales submitted that it could *not offer* Customer M a payment plan because Customer M “refused to engage” and therefore AGL Sales had “no ability to establish the customer’s capacity to pay and comply with the requirement of establishing a plan set out in clause 72”.
52. AGL Sales’ submission confuses the requirements of *offering* a payment plan with the requirements of *establishing* a payment plan under clause 72 of the code. The requirements of making an offer of a payment plan as set out in sub-clause 72(2) are different to the requirements for establishing a payment plan as set out in sub-clause 72(1).
53. The offering and establishing of a payment plan do not have to happen at the same time, although they often will. This is especially the case where the customer is not engaging with the retailer. At the *offering stage*, in circumstances where the customer is not engaging despite repeated attempts by the retailer to get the customer to engage, the retailer is not

obliged to have regard to the customer's capacity to pay in making a valid *offer* of a payment plan.¹

54. At that point in time, the retailer has information about the customer's history of gas usage, arrears and payments to date. The retailer also has information about the customer's current and average levels of gas usage. With this information and knowledge that the customer is having payment difficulties the retailer should be able to put together an offer of a payment plan that is as sensitive to the customer's circumstances as the available information allows. That is, the minimum amount of instalment payments and the maximum amount of time or duration for such a plan that the retailer can reasonably allow and offer. An offer prepared on that basis can then be sent to the customer. Should the retailer wish to establish that the offers were received, the retailer may choose to send such offers out to the relevant customer by registered mail. If the customer engages with the retailer in response to such an *offer*, the retailer can then *establish* a payment plan in compliance with sub-clause 72(1) of the code.
55. The commission rejects AGL Sales' submission that the only interpretation of the code that meets the objectives of the legislation is that *an offer* is merely an indication to the customer that they are entitled to a payment plan that will be determined in accordance with clause 72 when they engage with the retailer.
56. AGL Sales could have fashioned an offer meeting the requirements of sub-clause 72(2) without Customer M engaging with AGL Sales. It could have provided that offer to him in writing by post. To be on the safe side and to ensure such an offer reached Customer M, AGL Sales could have sent such an offer letter to him by registered post. The fact that AGL Sales, to its credit, did that in respect of the separate requirement under clause 111(1)(e) of the code (see paragraphs 13 and 25(a) above) to use best endeavours to contact the customer in connection with the failure to pay, after giving the disconnection warning notice, suggests that such an approach is reasonably possible in respect of sending out *offers of payment plans* to customers who are not engaging with retailers.
57. The fact that AGL Sales did comply with the separate requirement of using best endeavours to contact Customer M in connection with his failure to pay (clause 111(1)(e)) and that Customer M was not engaging with AGL Sales is no basis for non-compliance with the requirements of clause 111(2) of the code in respect of Customer M.

¹ The obligation to take into account the customer's capacity to pay is set out in clause 72(1) of the code and only applies to the process of *establishing* a payment plan, not the making of an offer under clause 72(2).

58. Accordingly, AGL Sales has not complied with clause 111(2) of the code by failing to offer Customer M two payment plans in the 12 months prior to arranging for disconnection of gas supply to his premises on 21 May 2015.
59. As a result, AGL Sales did not comply with the terms of its contract with Customer M that set out the circumstances in which AGL Sales would disconnect the supply of gas to Customer M's premises.

Enforcement

60. AGL Sales has breached its retail licence by failing to make a payment of \$2,599 as soon as practicable after the reconnection of the supply of gas to Customer M's premises on 19 June 2015.
61. AGL Sales is required to rectify the contravention by making the payment.
62. AGL Sales should advise the commission in writing when the payment has been made.
63. If AGL Sales is unable to make payment it should inform the commission in writing within five business days of receiving this decision.
64. If the payment is not made within five business days of AGL Sales receiving this decision, the commission may take enforcement action against AGL Sales under Part 7 of the Essential Services Commission Act 2001 (Vic).