

Customer B and AGL Sales – Decision and Reasons

**Application of section 40B of the Electricity Industry Act 2000 (Vic)
– Compensation for wrongful disconnection**

8 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 B.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) for an alleged wrongful disconnection by AGL Sales Pty Ltd (AGL Sales) of Customer B's electricity supply at [*address redacted*] (the premises), from 10:07am on 6 March 2017 to 12:04pm on 20 March 2017 (a period of 14 days, 1 hour and 57 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 electricity retail licence regarding an obligation to make a prescribed payment to Customer B in circumstances where:
- (a) AGL Sales disconnected the supply of electricity to the premises of Customer B; and
 - (b) AGL Sales failed to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.

If so, then under section 40B(3) of the Act, AGL Sales was obliged to make the prescribed payment to Customer B as soon as practicable after the supply of electricity was reconnected to Customer B's premises.

4. This requires the commission to make findings and reach conclusions regarding the following matters:
- (a) Whether or not AGL Sales disconnected the supply of electricity to the premises of Customer B (see paragraph 32 below);
 - (b) Was the supply of electricity to Customer B's premises reconnected, and if so, when? (see paragraph 34 below);
 - (c) If AGL Sales did disconnect the supply of electricity to Customer B's premises, for what period of time did the disconnection occur? (see paragraph 35 below);
 - (d) What was the contract between AGL Sales and Customer B? (see paragraph 12 below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which AGL Sales may disconnect the supply of electricity to Customer B's premises? (see paragraphs 12 and 37(c) below);
 - (f) Whether or not AGL Sales failed to comply with *those* terms and conditions (see paragraph 41 below);
 - (g) Was Customer B entitled to receive payment of a prescribed amount because of any wrongful disconnection by AGL Sales under section 40B of the Act? (see paragraph 45 below);
 - (h) If so, when was AGL Sales obliged to make the payment of the prescribed amount? (see paragraph 45 below);
 - (i) Has AGL Sales made the payment to Customer B in accordance with its deemed licence condition under section 40B of the Act? (see paragraph 46 below);

- (j) If AGL Sales has not made the payment what are the consequences? (see paragraphs 65 to 68 below).
5. In 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 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 AGL Sales had complied with clause 111(2) of the code. Regarding clause 111(2), the ombudsman considered that only one payment plan had been offered by AGL Sales to Customer B within 12 months of disconnection – on 29 November 2016 for \$50.00 per fortnight and that this plan “appears compliant with the requirements of clause 111(2) [of the code].”
 6. AGL Sales was invited to provide any information and documents it considered the commission should have regard to in making its decision. AGL Sales was also invited to make submissions on the complaint for the commission to consider. AGL Sales made submissions for the commission’s consideration.
 7. AGL Sales generally agreed with the chronology of events as presented by the ombudsman in its referral memorandum. However, AGL Sales provided additional details relevant to the commission’s assessment of the disconnection.
 8. AGL Sales notes that the material submitted by the ombudsman does not sufficiently emphasise that it “...made numerous contact attempts to the customer around the time that the reminder notice and disconnection notice were issued in January and February 2017... More than 30 attempts by phone call, SMS, letter, and registered mail, were made in 2017 prior to the disconnection and these contact attempts were unsuccessful.”
 9. AGL Sales submitted that it was required to have regard to the customer’s capacity to pay under clause 72(1) of the code, in order to make a compliant offer of a payment plan under clause 111(2) of the code. AGL Sales states that it used its “...best endeavours in trying to engage the customer and offer appropriate assistance in compliance with the [code], however, due to Customer B being unwilling to enter into conversations with AGL Sales regarding payment plans and other assistance that may have been appropriate, we were unable to confirm her capacity to pay.” Hence, AGL Sales submits that it could not “...offer a payment plan [that AGL Sales was] confident [would] be compliant with all aspects of clause 72(1).” AGL Sales submits “that in the absence of successful contact with the customer, it is unreasonable to expect retailers to assume what a fair and reasonable payment plan would be. This is particularly the case when a customer is clearly experiencing payment difficulty and has already failed a payment plan.”

Relevant facts

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

Background

11. At all relevant times, AGL Sales was the licensee responsible for the supply of electricity to the premises.
12. On 19 February 2014, AGL Sales established an account for the supply of electricity at the premises of Customer B. It entered into a Market Retail Contract with Customer B for the supply of electricity at Customer B's premises, the relevant terms of which are set out at paragraph 37(c) below.
13. On 3 February 2015, AGL Sales called Customer B, to advise her that her outstanding account balance was \$254.24. During that call Customer B informed AGL Sales of her payment difficulties, stating that she "doesn't have the money."
14. On 12 March 2015, Customer B spoke to AGL Sales. During this call AGL Sales confirmed that a concession was being applied to Customer B's account. AGL Sales placed Customer B onto its hardship program and established a payment plan for \$67.00 per fortnight commencing on 27 March 2015 and agreed to send Customer B a Utility Relief Grant Scheme (URGS) application form.
15. Customer B made one payment of \$67.00 towards her payment plan on 25 March 2015, and made no further payments. On 12 October 2015, AGL Sales removed Customer B from its hardship program due to non-participation.
16. On 17 November 2015, Customer B made contact with AGL Sales. During this call AGL Sales placed Customer B on its hardship program and established a bill smoothing payment plan of \$50.00 per fortnight commencing on 23 November 2015.
17. On 17 December 2015, Customer B made contact with AGL Sales. During this call AGL Sales advised Customer B her bill smoothing payment plan established in November 2015 had been cancelled for non-payment. AGL Sales established a new bill smoothing payment plan for Customer B of \$50.00 per fortnight commencing on 1 January 2016.
18. In December 2015, Customer B made four payments towards her electricity account totalling \$250.00.
19. On 5 March 2016, Customer B called AGL Sales. During this call AGL Sales advised her that her bill smoothing payment plan that had been established in December 2015 had been cancelled for non-payment. Customer B requested that her payment plan of \$50.00 per

fortnight be re-established. AGL Sales advised that a specialist would call her back within 24 hours.

Circumstances leading to the disconnection in March 2017

20. On 7 March 2016, AGL Sales called Customer B and left her a voicemail message.
21. On 13 April 2016, Customer B called AGL Sales. During this call Customer B advised AGL Sales that "she wanted to discuss a payment arrangement on the account." AGL Sales advised Customer B that her outstanding balance on her electricity account was \$640.52, and \$604.55 on her gas account. Customer B disputed her gas bills with AGL Sales and when AGL Sales offered to send her an account statement Customer B terminated the call.
22. On 4 May 2016, Customer B made a payment of \$50.00 towards her electricity account.
23. On 13 November 2016, AGL Sales attended Customer B's property. During this site visit, contact was made with Customer B, and Customer B requested that AGL Sales send her Centrepay forms in order for her to establish a direct debit arrangement.
24. On 17 November 2016, AGL Sales issued an electricity bill, which triggered the disconnection process, in the amount of \$1,257.10, comprising an overdue amount of \$1,047.76 and new charges of \$220.92 and a discount of \$11.58.
25. On 29 November 2016, Customer B called AGL Sales. During this call Customer B advised AGL Sales that her gas supply had been disconnected. Customer B advised AGL Sales that she was experiencing hardship and was unable to pay any of her bills. AGL Sales established a payment plan for Customer B of \$50.00 per fortnight for her electricity account and advised Customer B that she must demonstrate a willingness to pay, by making payments over four fortnights (commencing on 30 November 2016), in order to be assessed for placement on its hardship program.
26. On 30 November 2016, Customer B made a payment of \$50.00 towards her electricity account.
27. On 24 January 2017, AGL Sales issued a reminder notice for Customer B's electricity account with an amount due of \$220.92.
28. On 7 February 2017, AGL Sales issued a disconnection warning notice for Customer B's electricity account with an amount due of \$220.92.
29. On 17 February 2017, AGL Sales raised a service order for the supply of electricity to Customer B's premises to be disconnected.
30. On 18 February 2017, AGL Sales issued a registered letter to Customer B relating to her non-payment of her electricity account.

31. AGL Sales' contact notes for Customer B's account reflect that AGL Sales made numerous attempts to contact Customer B in January and February 2017, including several telephone calls, SMS messages, and registered mail after issuing Customer B a disconnection warning notice, and prior to the disconnection. These contact attempts were unsuccessful (see paragraph 8 above).

Disconnection of electricity supply to the premises

32. On 6 March 2017 at 10:07am, Customer B's electricity supply was disconnected for non-payment. The total amount outstanding on the electricity account was \$1,451.90. This comprised the \$1,268.68 outstanding on 17 November 2016 and an additional \$233.22 accrued in the interim, less the \$50.00 paid by Customer B on 30 November 2016. On the same day, Customer B contacted AGL Sales by telephone and informed them that her supply had been disconnected.
33. Customer B contacted the ombudsman on Friday 17 March 2017 and raised a complaint.
34. Customer B's electricity supply was reconnected on Monday 20 March 2017 at 12:04pm.
35. The premises were disconnected for a period of 14 days, 1 hour and 57 minutes.
36. As at 8 August 2018, AGL Sales has not made any wrongful disconnection payment to Customer B.

Relevant obligations

37. In this matter AGL Sales' relevant obligations arise from the following:

(a) The Act:

(i) Sections 36(1), (1A) and (2) rendering void any term or condition of AGL Sales' contract for the supply of electricity 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 electricity 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 40B(1) of the Act which deems a condition into AGL Sales' 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 40B(3) and (5) which require payment of the prescribed amount as soon as practicable after the supply of electricity 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 electricity is disconnected.

(b) AGL Sales' electricity retail licence:

(i) Clause 6.1 of the licence which requires AGL Sales to ensure its contracts for the sale of electricity 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 AGL Sales' contracts for the sale of electricity to be consistent with each term and condition of the code.

(iii) Clause 6.4 which requires AGL Sales to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

(c) AGL Sales' market contract with Customer B, that contained the following terms and conditions:

(i) Clause 10.1(a) 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.”
- (d) The code:
- (i) Clauses 107 to 118 deal with and specify the circumstances in which the supply of electricity 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 (at 72(2)) and in establishing a payment plan (at 72(1)).

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

Decision

39. AGL Sales is in breach of a condition of its electricity retail licence, deemed into AGL Sales' electricity retail licence by section 40B of the Act (the deemed licence condition).
40. AGL Sales disconnected the supply of electricity to Customer B's premises at 10:07am on 6 March 2017.
41. Prior to disconnecting the supply of electricity to Customer B's premises for non-payment AGL Sales failed to comply with the terms and conditions of its contract with Customer B.
42. The disconnection was therefore not in accordance with the deemed licence condition.
43. The supply of electricity to Customer B's premises was reconnected at 12:04pm on 20 March 2017.
44. The supply of electricity to Customer B's premises was wrongfully disconnected for a period of 14 days, 1 hour and 57 minutes.
45. Customer B informed AGL Sales of the disconnection within 14 days, therefore under the deemed licence condition, AGL Sales was obliged to pay Customer B the prescribed amount of \$7,041.00 as soon as practicable after the supply of electricity was reconnected to Customer B's premises on 20 March 2017.
46. No payment has been made as at 8 August 2018.

Reasons

47. AGL Sales' electricity retail licence requires that:
- (a) AGL Sales not enter into a contract for the sale of electricity 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 electricity 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 electricity with a relevant customer (clause 6.4).
48. The deemed licence condition requires AGL Sales to make a prescribed payment to a customer as soon as practicable after the supply of electricity to the customer's premises is reconnected where it:
- (a) Disconnects the supply of electricity 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 electricity to those premises may be disconnected.
49. Clause 10 of AGL Sales' contract with Customer B specifies the circumstances in which the supply of electricity to Customer B'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 5 above, it is accepted that AGL Sales complied with the relevant requirements of clauses 109, 110 and 111(1)(e) of the code.
50. The ombudsman has suggested that there may have been non-compliance with the provisions of clause 111(2) of the code.

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

51. In its submission to the commission, AGL Sales concedes that Customer B "...was experiencing payment difficulties and therefore the protection in clause 111(2) applies."

Clause 111(2) – Did AGL Sales offer Customer B two payment plans?

52. Clause 111(2) of the code required AGL Sales not to arrange for disconnection of Customer B's premises unless AGL Sales had offered Customer B two payment plans in the previous 12 months, and:
- (a) Customer B had agreed to neither of them; or
 - (b) Customer B had agreed to one but not the other of them but the plan to which Customer B agreed had been cancelled due to non-payment by Customer B; or
 - (c) Customer B had agreed to both payment plans but the plans have been cancelled due to non-payment by Customer B.
53. In offering a payment plan to Customer B, AGL Sales 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 29 November 2016, AGL Sales offered Customer B a payment plan for \$50.00 per fortnight and the ombudsman concedes that this plan “appears compliant with the requirements of clause 111(2) [of the code]” (see paragraphs 5 and 25 above).
55. AGL Sales did not make any further offers to Customer B to pay the outstanding balance of her electricity account in instalments until Customer B's electricity supply was disconnected on 6 March 2017. AGL Sales thus failed to offer two payment plans in the 12 months prior to arranging for disconnection by raising the service order for disconnection on 17 February 2017 (see paragraph 29 above) as required by clause 111(2) of the code.

Were payment plans offered by AGL Sales pursuant to clause 111(2) of the code required to have regard to Customer B's capacity to pay?

56. AGL Sales submitted that a payment plan offered pursuant to clause 111(2) of the code must also appropriately consider Customer B's capacity to pay in accordance with clause 72(1)(a)(i) of the code. AGL Sales submits that as Customer B refused to engage with AGL Sales despite its numerous attempts to contact her, AGL Sales was unable to assess Customer B's capacity to pay, and therefore unable to make an offer of a second payment plan that was compliant with clause 72(1) of the code (see paragraph 9 above).

57. 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).
58. 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
59. At that point in time, the retailer has information about the customer's history of electricity usage, arrears and payments to date. The retailer also has information about the customer's current and average levels of electricity 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 clause 72(1) of the code.
60. Clause 72(1)(a) of the code requires a retailer in *establishing* a payment plan for a hardship customer to have regard to capacity to pay, arrears owing and expected consumption. However, to satisfy clause 111(2) of the code it would have been sufficient for AGL Sales to have *offered* two payment plans to Customer B within 12 months of arranging disconnection, and not necessarily to have successfully *established* those plans.
61. AGL Sales could have fashioned an offer meeting the requirements of clause 72(2) without Customer B engaging with AGL Sales. It could have provided that offer to her in writing by post. To be on the safe side and to ensure such an offer reached Customer B, AGL Sales could have sent such an offer letter to her 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 paragraph 30 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

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).

approach is reasonably possible in respect of sending out offers of payment plans to customers who are not engaging with retailers.

62. Accordingly, AGL Sales has not complied with clause 111(2) of the code by failing to offer Customer B two payment plans in the 12 months prior to arranging for disconnection of electricity supply to her premises on 17 February 2017.
63. As a result, AGL Sales did not comply with the terms of its contract with Customer B that set out the circumstances in which AGL Sales would disconnect the supply of electricity to Customer B's premises.
64. AGL Sales has breached its retail licence by failing to make a payment of \$7,041.00 as soon as practicable after the reconnection of the supply of electricity to Customer B's premises on 20 March 2017.

Enforcement

65. AGL Sales is required to rectify the contravention by making the payment.
66. AGL Sales should advise the commission in writing when the payment has been made.
67. If AGL Sales is unable to make payment it should inform the commission in writing within five business days of receiving this decision.
68. 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).

Other observations

Offering payment plans

69. As noted in the reasons above at paragraph 60, 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.
70. However, the Act makes clear at section 45(2) that an electricity retailer is expected to work with its customers to ensure that disconnection of customers' electricity supply is always an act of last resort.
71. The commission notes that AGL Sales' submission expressly states that AGL Sales "considers the act of disconnection to be an act of last resort when AGL [Sales] is not able to get any engagement from the customer."
72. AGL Sales' submission also states that in AGL Sales' view, "to establish non-compliance, the [commission] must establish how AGL [Sales] could have been compliant in this scenario, given the facts." To further assist AGL Sales in this respect, the commission notes, in addition to the matters at paragraphs 57 to 61 above, that in this case AGL Sales also had information from the first payment plan, within the relevant 12 month period of \$50.00 per fortnight (see paragraph 25 above). AGL Sales also had historical information of its dealings with Customer B as set out in paragraphs 19 and 23 above. AGL Sales could have used all of this information in preparing, in good faith, an offer of a second payment plan compliant with the requirements of clause 72(2) of the code.
73. The commission also notes that the relevant obligation under clause 111(2) of the code is for the retailer to offer the customer "two payment plans in the previous 12 months." The obligation is not, as AGL Sales put in parts of its submission, an obligation "to offer the customer the option of a payment plan."
74. 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. The commission notes that in the circumstances of this case, throughout the history of Customer B's electricity account, AGL Sales made significant and commendable efforts in good faith to engage Customer B and assist her with her payment difficulties. However these efforts did not constitute two compliant offers of payment plans within the timeframe prescribed in the code.

Establishing payment plans

75. 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.

76. 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.
77. No single factor is given special or decisive weighting by the code, accordingly each must be considered in light of the relevant circumstances.