

Customer P and Momentum Energy – Decision and Reasons

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

15 May 2019

Commissioners:

Dr Ron Ben-David, Chairperson, 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 Essential Services Commission (the commission) of a complaint by Customer P.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to a disconnection by Momentum Energy Pty Ltd (Momentum Energy) of Customer P's electricity supply at [address redacted] (the premises). The electricity supply to the premises was disconnected from 8:48am on 12 April 2018 to 2:24pm on 12 April 2018 (a period of five hours and 36 minutes).
3. The issue for decision is whether the disconnection warning notice which Momentum Energy issued to Customer P complied with the requirements of clause 110(2)(h) of the Energy Retail Code version 11a (the code).

Issues for decision

4. The issue for decision by the commission on the complaint is whether or not Momentum Energy has breached a condition of its electricity retail licence regarding an obligation to make a prescribed payment to Customer P in circumstances where:
 - (a) Momentum Energy disconnected the supply of electricity to the premises of Customer P; and
 - (b) Momentum Energy 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, Momentum Energy was obliged to make the prescribed payment to Customer P as soon as practicable after the supply of electricity was reconnected to Customer P's premises.

The ombudsman's submissions

5. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman considered that it was not clear whether Momentum Energy had complied with its obligation to issue a disconnection warning notice that satisfied the requirements of clause 110(2)(h) of the code.
6. The ombudsman noted that the disconnection warning notice issued by Momentum Energy to Customer P stated:
 - (a) the issue date of the notice
 - (b) that potential disconnection relates to overdue payment
 - (c) the date by which payment must be made
 - (d) the relevant reconnection procedures
 - (e) the ombudsman's contact details
 - (f) Momentum Energy's phone number.

However, the ombudsman submitted that the disconnection warning notice did not state that disconnection could occur remotely, as is required by clause 110(2)(h) of the code.

Momentum Energy's submissions

7. Momentum Energy was invited to provide any information and documents which it considered the commission should have regard to in making its decision. Momentum Energy made submissions for the commission's consideration.

Necessary steps for disconnection

8. Momentum Energy acknowledged that there was a deficiency in the disconnection warning notice it provided to Customer P. However, Momentum Energy submitted that the deficiency did not result in the disconnection of Customer P's premises being wrongful because all necessary steps for disconnection were followed.
9. Momentum Energy submitted that because it provided Customer P with a disconnection warning notice it was not required to make a prescribed payment to Customer P unless the deficiency in that disconnection warning notice was sufficient to make the entire notice void.

No customer detriment

10. Momentum Energy asserted that Customer P was not prejudiced by the failure to include a statement in the disconnection warning notice that disconnection could occur remotely, on the basis that Momentum Energy used its best endeavours to contact Customer P prior to disconnection.
11. In support of this position, Momentum Energy submitted that, even if the required statement had been included, it does not believe that Customer P's response would have changed.

Relevant facts

12. The commission analysed the ombudsman's request for a decision and sought additional submissions from Momentum Energy. The relevant facts are set out below.

Circumstances leading to the disconnection

13. On 4 March 2015, Customer P and Momentum Energy established a contract for the supply of electricity to the premises.
14. After multiple payment difficulties, on 6 June 2017, Customer P agreed to a payment plan of \$100.00 per fortnight with payments due to begin on 16 June 2017. Customer P did not make the first payment by the instalment due date and the payment plan was cancelled by Momentum Energy.
15. On 19 December 2017, Momentum Energy issued Customer P with a bill in the amount of \$1,581.14 with a pay-by date of 15 January 2018. This invoice triggered the disconnection process.

Disconnection of electricity supply to the premises

16. On 10 January 2018, Customer P agreed to a second payment plan of \$100.00 per fortnight with payments due to begin on 12 January 2018.
17. On 11 January 2018, Customer P made a payment of \$100.00 towards the electricity account, reducing the outstanding balance to \$1,481.14.
18. On 26 January 2018, the second payment plan was failed by Customer P as she failed to make the agreed payment.
19. On 1 February 2018, Customer P made a payment of \$100.00 towards her electricity account.
20. On 5 February 2018, Momentum Energy cancelled the second payment plan because Customer P failed to make the second instalment payment by the due date.
21. On 8 February 2018, Momentum Energy issued a reminder notice in the amount of \$1,381.14.
22. On 14 February 2018, Customer P made a payment of \$100.00 towards her electricity account.

23. On 28 February 2018, Momentum Energy issued a disconnection warning notice in the amount of \$1,281.14.
24. On 19 March 2018, Momentum Energy issued a disconnection imminent notice, via registered post, to Customer P.
25. On 23 March 2018, Momentum Energy raised a disconnection service order for the electricity supply to Customer P's premises.
26. On 12 April 2018 at 8:48am, the electricity supply to Customer P's premises was disconnected for non-payment. At the time of disconnection, the total outstanding balance was \$1,364.96.
27. On 12 April 2018, Customer P raised a complaint about the disconnection with the ombudsman.
28. On 12 April 2018 at 2:42pm, the electricity supply to Customer P's premises was reconnected.
29. The supply of electricity to the premises was disconnected for a period of five hours and 36 minutes.
30. As at 15 May 2019, Momentum Energy has not made any wrongful disconnection payment to Customer P.

Relevant obligations

31. In this matter the relevant obligations arise from the following:

(a) The Act:

- (i) Section 40B(1) of the Act deems a condition into Momentum Energy's electricity retail licence requiring Momentum Energy to make a payment of the prescribed amount to a relevant customer if Momentum Energy disconnects the supply of electricity to the premises of that customer and fails to comply with the terms and conditions of its contract specifying the circumstances in which the electricity supply to those premises may be disconnected.
- (ii) Sections 40B(3) and (5) of the Act require payment of the prescribed amount as soon as practicable after the supply of electricity is reconnected. 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) Momentum Energy's electricity retail licence:

- (i) Clause 7.1 of the licence requires Momentum Energy 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 7.3 requires each term or condition of Momentum Energy's contracts for the sale of electricity to be consistent with each term and condition of the code.
- (iii) Clause 7.4 requires Momentum Energy to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

(c) Momentum Energy's market retail contract, established with Customer P:

(i) Clause 2.34.1 which states, in part:

"Provided that we comply with all of the requirements under the Regulatory Instruments if the Regulatory Instruments apply to you, we may request your distributor to disconnect your Supply Address:

- a) if you fail to pay us an amount we have billed by the due date;
- b) if you refuse or fail to pay a security deposit;
- c) if you have failed to allow access to your meter;

- d) if you are using energy illegally;
 - e) if you are on a payment plan and have not adhered to the terms of the plan;
 - f) if you refuse to provide acceptable identification when required by us; or
 - g) on other grounds the Regulatory Instruments allow if the Regulatory Instruments apply to you.”
- (ii) Clause 2.54 which defines Regulatory Instruments as:

“Regulatory Instrument means any law or regulatory or administrative instrument relating to or affecting the sale or supply of energy in the State or Territory in which your Supply Address is located or otherwise relevant to our obligations under this Contract, including the Energy Retail Code, National Energy Retail Law and the National Energy Retail Rules, as varied or replaced from time to time.”

- (d) The code:

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 for the disconnection of a customer’s premises except in accordance with clauses 111 to 118.

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(1)(d) requires a retailer to issue a customer with a disconnection warning notice.

Clause 110(2)(h) provides that a disconnection warning notice must, for a customer with a smart meter, state that disconnection could occur remotely.

32. Momentum Energy’s obligations are discussed further below in the reasons.

Decision

33. Momentum Energy is in breach of a condition of its electricity retail licence, deemed into its electricity retail licence by section 40B of the Act (the deemed **licence condition**).
34. Momentum Energy failed to comply with the terms and conditions of the contract between Momentum Energy and Customer P that specified the circumstances in which the supply of electricity to those premises may be disconnected.
35. Momentum Energy disconnected the supply of electricity to Customer P's premises at 8:48am on 12 April 2018.
36. Accordingly, both conditions that must be satisfied for section 40B of the Act to apply were satisfied.
37. The supply of electricity to Customer P's premises was reconnected at 2:24pm on 12 April 2018.
38. The supply of electricity to Customer P's premises was wrongfully disconnected for a period of five hours and 36 minutes.
39. Therefore, under the deemed licence condition, Momentum Energy was obliged to pay Customer P the prescribed amount of \$117.00 as soon as practicable after the supply of electricity was reconnected to Customer P's premises on 12 April 2018.
40. As at 15 May 2019, Momentum Energy has not made any wrongful disconnection payment to Customer P in respect of this disconnection.

Reasons for decision

41. Momentum Energy's electricity retail licence requires that:
- (a) Momentum Energy 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 7.1); and
 - (b) each term or condition of Momentum Energy's contract for the sale of electricity to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 7.3); and
 - (c) Momentum Energy must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
42. The deemed licence condition requires Momentum Energy 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.
43. The relevant contract between Momentum Energy and Customer P was a market retail contract. The terms and conditions of that contract expressly required Momentum Energy to comply with the code.
44. Clause 2.34.1 of Momentum Energy's contract with Customer P specified the circumstances in which the supply of electricity to Customer P's premises may be disconnected. This clause required Momentum to comply with all of the requirements under the Regulatory Instruments including the code.

Customer P was a customer with a smart meter

45. The relevant electricity distributor has confirmed that the premises were installed with a smart meter on 7 December 2010. This smart meter was configured for remote capability on 3 July 2012.
46. As Customer P's premises had a smart meter at the date of disconnection (12 April 2018) Customer P was 'a customer with a smart meter' for the purposes of clause 110(2)(h) of the code.

Circumstances in which the supply of electricity to premises may be disconnected

47. Momentum Energy's agreement with Customer P required it to comply with all terms or conditions of the contract that specify the circumstances in which the supply of electricity to premises may be disconnected.
48. Momentum Energy conceded that it did not include the required information that disconnection could occur remotely on the disconnection warning notice that was sent to Customer P.
49. Momentum Energy submitted that the relevant term or condition that specifies the circumstances in which the supply of electricity to premises may be disconnected was confined to clause 111 of the code. Momentum Energy also submitted that it provided Customer P with a disconnection warning notice and thus complied with clause 111 of the code. On this basis, Momentum Energy claimed that it was not required to make a prescribed payment despite the deficiency in the disconnection warning notice.
50. Clause 111(1)(d) of the code requires a retailer to give a customer a disconnection warning notice prior to arranging for the disconnection of the electricity supply to the customer's premises.
51. Clause 110(2) of the code specifies the content required in a disconnection warning notice. Accordingly, clause 110(2)(h) of the code is a term or condition that specifies the circumstances in which the supply of electricity to premises may be disconnected.

Clause 110(2)(h) of the code

52. Clause 110(2)(h) of the code requires a disconnection warning notice that is issued to a customer with a smart meter to state that disconnection could occur remotely.
53. The disconnection warning notice provided to Customer P on 28 February 2018 did not state that disconnection could occur remotely. As indicated above, Customer P was a customer with a smart meter.
54. Accordingly, Momentum Energy failed to comply with the terms and conditions of the contract between Momentum Energy and Customer P that specified the circumstances in which the supply of electricity to Customer P's premises may be disconnected. It therefore also breached the deemed licence condition.
55. The disconnection of the electricity supply to Customer P's premises on 12 April 2018 was wrongful. As a result, Momentum Energy was required to make a wrongful disconnection payment to Customer P.

Enforcement

56. Momentum Energy has breached its electricity retail licence by failing to make a payment of \$117.00 to Customer P as soon as practicable after the reconnection of the supply of electricity to Customer P's premises on 12 April 2018.
57. Momentum Energy is required to rectify the contravention by making the payment.
58. Momentum Energy should advise the commission in writing when the payment has been made.
59. If Momentum Energy is unable to make the payment, it should inform the commission in writing within five business days.
60. If the payment is not made within five business days, the commission may take enforcement action against Momentum Energy under Part 7 of the Essential Services Commission Act 2001 (Vic).

Other observations

Customer detriment

61. Momentum Energy submitted that Customer P was not prejudiced by the failure to include a statement in the disconnection warning notice that disconnection could occur remotely and, as such, the omission of this statement should not result in the notice being treated as void in its entirety.
62. In support of this position, Momentum Energy submitted that even if the required statement had been included, Customer P's response would not have differed.
63. Momentum Energy was required to comply with clause 110(2)(h) of the code. Momentum Energy's opinion that Customer P's behaviour would not have changed if it had included a statement in the disconnection warning notice that disconnection could occur remotely is not relevant to the assessment of whether Momentum Energy 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.

Compliance and enforcement factors

64. Momentum Energy made numerous submissions about the compliance and enforcement factors in the commission's Energy Compliance and Enforcement Policy.
65. The commission has not had regard to Momentum Energy's submissions responding to the compliance and enforcement factors in this disconnection dispute decision as the commission does not have discretion under section 40B of the Act in deciding whether or not a wrongful disconnection payment should be made to the customer, once the matters outlined in paragraph 4(a) and 4(b) are satisfied. The commission's task is to apply the statutory criteria imposed by Parliament to calculate the quantum of the wrongful disconnection payment.