

Customer N and Momentum Energy – decision and reasons

Application of section 40B of the Electricity Industry Act 2000 – compensation
for wrongful disconnection

10 November 2021

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Referral from the ombudsman

1. On 19 May 2021, the Energy and Water Ombudsman (Victoria) (the ombudsman) referred this matter to the commission for decision. The matter arises from a complaint made to the ombudsman by a small customer, Customer N, about Momentum Energy Pty Ltd (ACN 100 569 159) (Momentum).
2. The referral concerns the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to a disconnection of the electricity supply to Customer N's premises (the premises) arranged by Momentum. The electricity supply to the premises was disconnected at 9.32am on 23 November 2020 and was reconnected at 6.51am on 30 November 2020.
3. The ombudsman and Momentum are of the view that the disconnection was not wrongful because Momentum complied with the disconnection provisions of the Energy Retail Code (the code) when disconnecting the electricity supply to the premises. However, Customer N disagrees with this assessment and has requested that the matter be referred to the commission for a formal decision.
4. Momentum agreed with the chronology provided by the ombudsman with its referral, save for where the facts in the chronology pertain to AGL such that Momentum is not in a position to provide verification. Customer N provided a chronology that largely aligns with that submitted by the ombudsman, and included some additional communications between Customer N and AGL, Momentum and Powercor.

Issues for decision

5. In its referral, the ombudsman raised two questions for decision by the commission.
6. Firstly, whether Momentum met the minimum standard of conduct for compliance with the code. In this regard, the commission notes:
 - (a) the ombudsman is of the view that Momentum complied with clauses 112(2)(a) and (b) of the code; and
 - (b) Momentum's position is that it complied with the code, although Momentum submitted to the commission that clause 115 (rather than clause 112(2)) of the code is the relevant provision in relation to this matter.
7. Secondly, whether Momentum failed to meet the terms and conditions of its contract with Customer N that specifies the circumstances in which the supply of electricity to the premises may be disconnected.
8. If the commission finds that Momentum failed to comply with these requirements, it follows that Momentum may be obliged to make a wrongful disconnection payment to Customer N pursuant to the condition deemed into its licence by section 40B(1) of the Act.
9. In the alternative, if the commission finds that Momentum complied with these requirements, it follows that the disconnection was not wrongful because no contravention of the code is established.

Relevant facts

10. The commission analysed the ombudsman's request for a decision and sought additional submissions from Customer N and Momentum. From the commission's review of the information and documents received from the ombudsman, Customer N and Momentum, the commission makes the factual findings set out below.
11. Prior to 9 January 2020, Momentum was the financially responsible market participant for the electricity supply point for the premises.
12. On 9 January 2020, AGL established an electricity account for Customer N for the premises and the associated meter. AGL's supply under this account was due to commence from 28 January 2020.
13. On 15 January 2020, Momentum received a request for a transfer under the relevant Retail Market Procedures from AGL in relation to the electricity supply point for the premises. AGL subsequently cancelled this request for a transfer and contacted Customer N to advise that a Certificate of Electrical Safety (CES) was required to re-energise the electricity supply to the premises.
14. On 22 January 2020, AGL confirmed receipt of the CES. The CES correctly listed the premises as the supply address. However, the meter number noted on the CES was incorrect and instead related to a separate premises. As such, AGL created an account for and raised a service order to re-energise the electricity supply to the separate premises associated with the incorrect meter number.
15. On 28 January 2020, the re-energisation service order was completed for the separate premises associated with the incorrect meter. AGL continued to supply electricity to the separate premises throughout the relevant period and issued bills to Customer N under this account.¹
16. On 30 January 2020, Momentum received a request for a transfer under the relevant Retail Market Procedures from AGL in relation to the electricity supply point for the premises and associated meter. AGL subsequently cancelled this request for a transfer and Momentum

¹ The commission notes that Customer N raised a complaint with AGL in relation to the bills issued under the account for the separate premises, as they did not believe that the usage shown on the bills was consistent with usage at the correct premises.

established an occupier account (11XXXXXX) for the supply point at the premises as electricity usage had been detected.

17. On 30 March 2020, Momentum sent a welcome letter and a standard retail contract (**March Welcome Pack**), to the premises in relation to occupier account (11XXXXXX). Relevantly, the welcome letter contained the following information:

We're sending this letter because, since you've used the electricity at your premises, you've now entered a 'deemed contract' with Momentum Energy. The prices applying to this contract, and terms and conditions are enclosed here. Your deemed contract will last 180 days, unless it ends sooner in the ways described in this letter.

When you get a minute, you'll need to call us to provide acceptable identification and enter into our standard contract so that we can continue supplying your electricity. You'll also need to pay for the electricity you've used so far.

...

If you don't enter into a new electricity supply contract soon (with us or another retailer), your electricity supply may be disconnected. Once the disconnection process begins, we'll provide a notice of our intention to disconnect along with a disconnection warning notice. If you have a smart meter installed at your property, the disconnection will happen remotely. We encourage you to get in touch as soon as you can, to ensure your continued supply of electricity.

18. On 30 April 2020, Momentum closed occupier account (11XXXXXX) and wrote off the debt accrued under this account.
19. On 1 May 2020, Momentum established a new occupier account (12XXXXXX) in relation to the electricity supply point for the premises.
20. On 3 June 2020, Customer N contacted Momentum and stated that the purpose of the call was to “set up a temporary gas account” for the premises.² In relation to the account Customer N was seeking to establish, Momentum asked if “it was only the gas, that’s correct?” to which Customer N replied “yes”.³ From the start of the call until 16:04 minutes into the call, the only subject discussed was the establishment of the gas account. At 16:04, the following conversation occurred:

² At 0:11 of the call recording.

³ At 1:38 of the call recording.

Momentum [referring to the gas account that has just been established]: Alright so this one is all done, it's booked in to be turned on tomorrow, do you have any questions for me at all?

Customer N: I just wanted to check with you, I've asked both AGL and the other company that deals with the connections but they referred me to you, Australian Gas Networks I think it is, I've got a feeling the previous tenant was not paying her bills and that the meter was locked because of that. Any outstanding amounts to the property, I'm not liable for any of them, am I?

Momentum: No, not at all.

Customer N: Ok, I just wanted to check that, I'm happy with all of that and moving forward getting the connection, when would you anticipate I'll be actually fully connected?

Momentum: I would say tomorrow, but like I said if they do have a huge back up of actual connections to turn on, then it could potentially be Friday. But because you have no gas, whereas other times they're just reading a meter to get it into someone's name, I'd say you'd be a priority over them, so I'm gonna say it should be tomorrow.

Customer N: Ok, that's fine, even if it's Friday that's fine as well.

21. On 23 September 2020, Momentum sent a welcome letter and a standard retail contract (**September Welcome Pack**) to the premises in relation to the electricity occupier account (12XXXXX). The welcome letter contained information identical to that provided in the 30 March 2020 welcome letter, including a request to contact Momentum to provide acceptable identification and enter into a retail contract.

22. On 13 October 2020, Momentum issued a notice of intention to disconnect in relation to the electricity supply at the premises for occupier account (12XXXXX). Relevantly, the notice of intention stated:

Please contact us or risk disconnection.

We wrote to you recently asking you to contact us, to provide us with identification and take up one of our electricity supply contracts, so that we can continue supplying your electricity.

Call 1800 800 487 urgently.

If you don't enter into a new electricity supply contract soon (with us or another retailer), your electricity supply may be disconnected.

23. On 29 October 2020, Momentum issued a disconnection warning notice for the electricity supply at the premises for occupier account (12XXXXX). Relevantly, the disconnection warning notice stated:

Urgent – disconnection warning notice.

We've sent you a couple of letters asking you to contact us, to provide us with identification and take up one of our electricity supply contracts.

We haven't heard from you, so the electricity supply to your property could be disconnected any time after 7 business days from the date of this letter.

24. On 16 November 2020, Momentum arranged for disconnection of the electricity supply to the premises by raising a service order, scheduled to be completed on 23 November 2020.
25. On 18 November 2020, Customer N contacted Momentum and stated that the purpose of the call was to "enquire about an item that has been charged on my bill".⁴ During this call, Momentum and Customer N discussed a charge in relation to the removal of a lock on the gas meter. At around 4:00 minutes into the call, the following conversation occurred:

Customer N: This is the final bill because I've moved from Momentum over to AGL, is that right?

Momentum: Yes, yes, correct. So this has already been pushed out. Let me just confirm that it was to AGL just while I've got you here.

Customer N: I think it is because it's on my AGL app, it's showing I've got an account.

Momentum: Ok great, well the start date with them then should be the day after our final read date, so therefore the 3rd of July, so they shouldn't be charging you anything before that date.

Customer N: Yeah that's what it looks like, it looks correct... I've just got another enquiry, so this is a rented commercial property, the tenant before appears not to have paid her bill and I'm continually receiving Momentum overdue notices and warnings for account shut off. Can you do something to stop them being sent to me or to the property because they're not addressed to me, it just says to the property owner or whatever?

Momentum: Oh the occupier?

Customer N: Yeah to the occupier, but that's not me it's from the previous tenant.

Momentum: So the occupier account, once it's closed, I believe after from my memory four weeks give or take it's actually written off and then you'll stop receiving them anyway.

⁴ At 0:08 of the call recording.

Customer N: I've been receiving them for like a year, they haven't stopped coming for more than a year.

Momentum: That's so weird. Ok now that we've lost the billing right, I'll see what I can do to stop that from going out because we no longer have the billing right to that meter, um yeah, so that's fine you'll definitely stop receiving them.

Customer N: Ok, alright, thanks for your help today.

26. On 23 November 2020 at 9.32am, the electricity supply to the premises was disconnected.
27. On 28 November 2020, Customer N contacted AGL in relation to the electricity supply to the premises. AGL identified that it had established an account for Customer N for the separate premises associated with the incorrect meter number, and established a new account for the correct premises.
28. On 30 November 2020 at 6.51am, the electricity supply to the premises was reconnected by AGL.
29. The premises was disconnected for a period of 6 days, 21 hours and 19 minutes.

The role of AGL

30. For completeness, the commission notes that although Momentum was the financially responsible market participant for the electricity supply at the premises at the time of and in the period leading up to the electricity disconnection, Customer N had intended for AGL to acquire the billing rights to the premises and to establish an electricity account. The commission is of the view that:
 - (a) As AGL was not the disconnecting retailer, AGL's conduct has limited relevance in relation to the questions for decision by the commission about whether the disconnection by Momentum was wrongful – namely, whether Momentum complied with its obligations under the code and whether Momentum complied with the terms and conditions of its contract with Customer N prior to the disconnection of Customer N's electricity supply.
 - (b) Customer N may have had additional contacts with AGL that are not included in the commission's summary of the relevant facts. However, the commission has only considered the conduct of AGL insofar as it provides useful context and directly relates to the questions for decision by the commission.

Relevant obligations

31. The relevant obligations in this matter arise from [the Act](#), Momentum's [electricity retail licence](#), Momentum's contract with the customer and [the code \(Version 17\)](#).

Legislative requirement to pay compensation for wrongful disconnections

32. Section 40B(1) of the Act provides that it is a condition of Momentum's electricity retail licence that Momentum make a compensatory payment of the prescribed amount to a relevant customer if Momentum disconnects the supply of electricity to the premises of that customer without complying with the terms and conditions of the contract with the customer that specify the circumstances in which the supply of electricity to those premises may be disconnected.

33. Section 40B(1A) of the Act provides that, despite subsection (1), where the relevant customer does not notify the licensee of the disconnection within 14 days after the disconnection, the maximum compensatory payment under a subsection (1) condition payable by a licensee is the prescribed capped amount.

34. Section 40B(3) of the Act provides that any payment required under section 40B(1) is to be made as soon as practicable after the supply of electricity is reconnected to the premises of the relevant customer.

35. Section 40B(5) of the Act provides that the prescribed amount payable under section 40B(1) is (unless otherwise prescribed by regulations):

- \$500 for each whole day, and a pro rata amount for any part of a day, that the supply of electricity remains disconnected, and
- the prescribed capped amount applicable under section 40B(1A) is \$3,500.

Licence conditions regarding the code

36. Clause 7.1 of Momentum's electricity retail licence prohibits Momentum from entering into a contract for the sale of electricity with a relevant customer unless the terms and conditions of the contract deal expressly with each matter which is the subject of a term or condition of the code. This includes the terms and conditions included under a deemed contract.

37. Clause 7.3 of the licence requires that each term or condition of Momentum's contracts for the sale of electricity not be inconsistent with a term or condition of the code.

38. Clause 7.4 of the licence provides that Momentum must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

39. Clause 14.1(b)(5) of the licence requires Momentum to comply with all applicable provisions of the code.

40. Clause 21 of the licence requires Momentum to comply with all applicable laws.

Momentum’s contract with Customer N

Deemed contract

41. Under section 39(1) of the Act, if a relevant customer commences to take supply of electricity at premises from the relevant licensee without having entered into a supply and sale contract with that licensee, there is deemed, on the commencement of that supply, to be a contract between that licensee and that customer for the supply and sale of electricity, at the tariffs and on the terms and conditions determined and published by that licensee under section 35 of the Act, and on the conditions decided and provided for by the commission under subsection (5).

42. At all relevant times, Momentum was the financially responsible market participant for the electricity supply point to the premises and Customer N took electricity supply without entering a supply and sale contract with Momentum.

43. The commission accepts the ombudsman’s view that a deemed contract between Momentum and Customer N commenced on or around 30 January 2020 because electricity usage had been detected at the premises, resulting in Momentum establishing occupier account (11XXXXXX).

44. Section 39(7) of the Act sets out the circumstances in which a deemed contract under section 39(1) comes to an end. The deemed contract between Momentum and Customer N came to an end on or around 28 July 2020, being 180 days after its commencement as provided for under section 39(7)(d) of the Act (given none of the other criteria under section 39(7) were satisfied in the circumstances).

Standing offer terms and conditions

45. Clause 14.1 of Momentum’s standing offer terms and conditions stipulated the circumstances in which Momentum may arrange for disconnection. Clause 14.1(e) provides, relevantly, that:

“[s]ubject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises if...we are otherwise entitled or required to do so under the Rules or by law”.

46. Clause 14.2 of Momentum’s standing offer terms and conditions stated that before disconnecting a customer’s premises, Momentum must comply with relevant warning notice requirements and other provisions in the Rules.
47. The “Note for Victorian customers” contained in the preamble to the terms and conditions stated, relevantly:

“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”.

Obligations in relation to retailer initiated de-energisation of premises under the code

48. The relevant obligations in this matter concern Part 6 of the code, which sets out a retailer’s obligations prior to arranging de-energisation of a small customer’s premises. Different clauses under Part 6 will apply depending on the circumstances of the disconnection.
49. The commission considers that following the expiry of the deemed contract between Momentum and Customer N on or around 28 July 2020, Customer N became a “carry-over customer”, as defined in clause 3 of the code to mean:

a small customer who continues consuming energy at premises after the customer’s previously current customer retail contract expires or terminates –

- (a) without provision in that contract for the terms and conditions to apply after the expiry or termination for the continued provisions of those services; and
- (b) without applying to a *retailer* for the provision (after that expiry or termination) of those services.

50. “Customer retail contract” is defined in clause 3 of the code to mean:

a contract between a small customer and a retailer for the provision of customer retail services for particular premises

51. “Customer retail services” is defined in clause 3 of the code to mean:

the sale of energy by a retailer to a customer at premises

52. It follows that Customer N was a carry-over customer in the period leading up to and including the date of disconnection, namely 23 November 2020, such as to enliven clause 115 of the code.

53. Clause 115 of the code sets out a retailer's obligations when arranging for the de-energisation of premises for, relevantly, failure of a carry-over customer to take appropriate steps to enter into a customer retail contract. Clause 115 of the code provides:

- (1) The financially responsible retailer or exempt person for a move-in customer's or carry-over customer's premises may arrange for the de-energisation of the premises if the customer refuses or fails to take appropriate steps to enter into a customer retail contract or exempt person arrangement as soon as practicable.
- (2) A financially responsible retailer or exempt person must not arrange for de-energisation under this clause unless:
 - (a) the retailer or exempt person has given the customer a notice of its intention to do so; and
 - (b) the retailer or exempt person has given the customer a disconnection warning notice after the expiry of the period referred to in the notice of its intention, not being less than 5 business days after the notice of its intention was given.

54. Also of relevance to this matter is clause 112(2) of the code, being the clause subject of the ombudsman's referral.

55. Clause 112(2) of the code sets out a retailer's obligations when arranging for the de-energisation of a customer's premises for refusal to provide acceptable identification. Clause 112(2) provides:

- (2) A retailer may arrange for the de-energisation of a customer's premises if the customer refuses when required to provide acceptable identification (if the customer is a new customer of the retailer) and if:
 - (a) the retailer has given the customer a notice of its intention to do so; and
 - (b) the retailer has given the customer a disconnection warning notice after the expiry of the period referred to in the notice of its intention (being not less than 5 business days after the notice of its intention was given); and
 - (c) the customer has continued not to provide acceptable identification.

56. "Acceptable identification" is defined in clause 3 of the code to mean:

- (a) a residential customer—includes any one of the following:
 - (i) a driver licence (or driver's licence) issued under the law of a State or Territory, a current passport or another form of photographic identification;

(ii) a Pensioner Concession Card or other entitlement card, issued under the law of the Commonwealth or of a State or Territory;

(iii) a birth certificate; or

(b) a business customer that is a sole trader or partnership—includes one or more of the forms of identification for a residential customer for one or more of the individuals that conduct the business or enterprise concerned; or

(c) a business customer that is a body corporate—means Australian Company Number or Australian Business Number of the body corporate;

57. The commission notes that the obligations under clauses 112(2)(a) and (b) are substantively the same as those set out under clauses 115(2)(a) and (b) of the code.

Submissions

The ombudsman's submissions

58. Through its letter of referral and accompanying memorandum, the ombudsman acknowledged that:
- (a) a deemed contract between Momentum and Customer N was established in late January 2020 and expired in late July 2020;⁵ and
 - (b) Momentum demonstrated compliance with clauses 112(2)(a) and (b) of the code prior to arranging disconnection.
59. The ombudsman's referral did not expressly address the question of whether Momentum had complied with clause 115 of the code.
60. As outlined in the issues section of this decision, the ombudsman raised two questions for decision by the commission concerned with whether Momentum complied with its obligations under the code and whether Momentum complied with the terms and conditions of its contract with Customer N that specify the circumstances in which the supply of electricity to the premises may be disconnected.

Momentum's submissions

61. The ombudsman's referral included a position statement from Momentum in which it stated that it complied with the minimum standards of conduct required for compliance with the code when disconnecting Customer N's electricity supply.
62. The commission invited Momentum to provide any further submissions and any information or documents it considered the commission should have regard to in making its decision. Momentum provided a written submission and documents for the commission's consideration in this matter.
63. Momentum's submissions reiterated its position that it complied with the minimum standards required under the code when disconnecting Customer N. Momentum further submitted that:

⁵ The ombudsman also noted in its referral that Momentum was of the view that the deemed contract expired on 28 October 2020. In reaching its conclusion, the ombudsman appears to have rejected Momentum's contention.

The reason for which Momentum believes the disconnection in question was not wrongful is that it was carried out in compliance with the Energy Retail Code Version 17 (1 October 2020), not because the deemed contract had expired.

64. In further submissions, Momentum clarified its position that the relevant clause in the circumstances of this disconnection is clause 115 of the code (de-energisation for non-notification by move-in or carry-over customers), rather than clause 112 of the code (de-energisation for refusal to provide acceptable identification) as stated in the ombudsman's referral.

Customer N's submissions

65. The referral provided by the ombudsman to the commission included a customer statement about the matter. Customer N stated:

1. AGL re-energised the premises in January 2020 using the address and meter Customer N provided.
2. AGL transferred another customer's account to the premises while an active request for the billing rights for the correct meter from Momentum Energy was pending.
3. This resulted in Customer N having an active connection to the correct meter, but receiving and paying bills from AGL for the incorrect meter from January 2020.
4. Customer N lodged a complaint with AGL as they believed the usage on AGL's app was incorrect.
5. Despite Customer N's complaint against AGL, they did not discover AGL had billed them for the wrong meter until 30 November 2020.
6. Customer N had contacted Momentum Energy in response to disconnection notices and despite sending return to sender mail and numerous calls to Momentum Energy, it disconnected the premises on 23 November 2020 due to unpaid bills.
7. The disconnection had a financial impact on Customer N and they believe both AGL and Momentum Energy are at fault.
8. The electricity was reconnected by AGL on 30 November 2020.
9. Customer N was dissatisfied with EWOV's WDP assessment and requested the WDP assessment be referred to the Essential Services Commission for a formal decision.

66. On 28 May 2021, Customer N provided submissions to the commission in response to the ombudsman's referral of this matter. Those submissions included:

- (a) Customer N's chronology (with details of interactions with Powercor, AGL and Momentum);
- (b) screenshots of correspondence with the ombudsman and AGL;
- (c) a formal complaint made to AGL on 27 August 2020 in relation to inconsistent electricity usage accrued under the account that AGL established for the separate premises associated with the incorrect meter;
- (d) a compensation claim form to AGL dated 2 December 2020; and
- (e) submissions made to the ombudsman about the AGL complaint dated 14 December 2020.

67. The commission invited Customer N to provide any additional submissions, which they provided on 23 July 2021. In those submissions, Customer N stated:

Physical letters received at the premises were addressed to 'the Occupier' (or similar). I recall the latest notice, one week before the disconnection, was a disconnection warning notice. Upon my immediate receipt of this letter upon arriving at the premises I called and spoke with Momentum on the phone. A prior letter triggered me to call [sic] Momentum, however I cannot recall what that letter was about, I was just concerned about my connection being affected by the previous tenant's unpaid accounts.

If I did not call Momentum in response to any letters delivered to the premises, I marked and sent them 'return to sender' via post. I did not keep copies or make records of those letters. This is because I was assured by Momentum early in the piece:

- my supply would not be impacted
- I should not have kept receiving those letters
- the letters appeared to have been sent in error and would not be sent again.

...

At no point ever did I receive terms and conditions about being a Momentum customer, or a deemed customer – all evidence I provide substantiates I was reasonable led to believe I held a valid and consenting contract with AGL and that all usage was paid for and up to date.

When the full history and activity of the premises is considered, you will see I made every best effort to clarify confusion and concerns throughout all of 2020. It is frustrating and exhausting to have to continue to continue [sic] justifying this over half way through 2021.

I appreciate this matter is directly associated with Momentum; however, the full picture can only be understood when AGL's actions and inactions are also considered. To not do this is to not fully acknowledge and understand the complexity of the circumstances and my efforts to ensure my account was correctly being managed, paid up to date, and in turn not at risk of disconnection.

I understand the ESC's review must be one of factual circumstances. I have provided as many facts as I possibly can which are substantiated with evidence of phone call records and emails. Other information is substantiated by phone call recordings which you can obtain from the providers directly if you do not have them already.

In addition to your fact and legislative based review, I plead with you to consider the fairness aspect of everything which has led this complaint to be reviewed by you. I have made efforts above and beyond most individuals to properly understand and manage my account and service supply.

Decision

68. The commission has had regard to the information and documents provided by the ombudsman, Momentum and Customer N.
69. Momentum disconnected the electricity supply to Customer N's premises at 9.32am on 23 November 2020.
70. Momentum was required to comply with the code as a condition of its deemed contract with Customer N. However, the deemed contract expired on or around 28 July 2020, being prior to the disconnection of Customer N's electricity supply.
71. The commission considers that Customer N was a carry-over customer who did not have a current customer retail contract or deemed contract in place in the lead up to and on the date that the supply of electricity to the premises was disconnected.
72. The obligation to make a wrongful disconnection payment under section 40B of the Act only arises if the electricity licensee fails to comply with the terms and conditions of the contract that specifies the circumstances in which the premises may be disconnected. Accordingly, section 40B of the Act is not enlivened in the circumstances of this disconnection as there was no contract in place, and therefore no terms and conditions to be complied with.
73. In any event, the commission is of the view that Momentum complied with the disconnection obligations under clause 115 of the code prior to arranging the disconnection of a carry-over customer on 16 November 2020 (when Momentum raised a service order for completion on 23 November 2020). Specifically:
- (a) Momentum had issued to the customer (a) a notice of its intention to disconnect and (b) a disconnection warning notice after the expiry of the period referred to in the notice of its intention; and
 - (b) Customer N had failed to take appropriate steps to enter into a customer retail contract with Momentum as soon as practicable.
74. Further or in the alternative, the commission considers that Momentum complied with the disconnection obligations under clause 112(2) when disconnecting supply to the premises, having satisfied the requirement to issue the required notices to the customer under clause 112(2)(a) and (b), in circumstances where the customer continued to not provide acceptable identification (see clause 112(2)(c)).

75. Accordingly, the commission considers that the disconnection was not wrongful, and Momentum is not obliged to make a wrongful disconnection payment under section 40B(1) of the Act.

Reasons

Obligation to make a prescribed payment under section 40B of the Act not enlivened – No contract in place on date of disconnection

76. As noted, section 40B(1) of the Act provides that an electricity licensee must make a compensatory payment of the prescribed amount to a relevant customer if it disconnects the supply of electricity to the premises of the customer without complying with the terms of the contract with the customer that specify the circumstances in which the supply of electricity to those premises may be disconnected.
77. As discussed, there was no current contract in place between Momentum and Customer N in the lead up to and on the date of disconnection. It follows that section 40B(1) of the Act is not enlivened and Momentum would not be required to make a wrongful disconnection payment even if it had failed to comply with Part 6 of the code.

Compliance with clause 112(2) of the code

78. The commission was requested to assess whether Momentum met the minimum standard of conduct for compliance with the code. As noted in paragraph 6(a) of this decision, the ombudsman has submitted to the commission that it is of the view that Momentum complied with clause 112(2)(a) and (b) of the code.
79. Clause 112(2) relates to a retailer's obligations prior to de-energisation for refusal to provide acceptable identification (if the customer is a new customer of the retailer). Although distinct from clause 115, which relates to a retailer's obligation prior to de-energisation where a move-in or carry-over customer refuses or fails to take appropriate steps to enter into a customer retail contract as soon as practicable, the commission considers that the requirements of clause 112(2) and clause 115, insofar as they relate to the required notices to be issued to the customer, are substantively the same.
80. Although the commission agrees with Momentum's position that clause 115, rather than clause 112(2), is enlivened in the circumstances of this matter, the commission considers that a discussion of Momentum's compliance with clause 112(2) is also required in order to fully address the referral raised by the ombudsman.
81. The commission considers that the notices issued by Momentum to the premises under electricity occupier account (1235202) on 13 October 2020 and 29 October 2020 satisfied the requirements of clauses 112(2)(a) and (b). In particular, the notice issued on 13 October 2020

met the requirement to give the customer a notice of its intention to disconnect, and the notice issued on 29 October 2020 met the requirements of a disconnection warning notice.

82. Under clause 112(2), a retailer may only arrange disconnection where the customer has refused when required to provide acceptable identification (if the customer is a new customer of the retailer) and, upon receipt of the notice of intention and disconnection warning notice, has continued not to provide acceptable identification.
83. During the telephone calls on 3 June and 18 November 2020, Customer N identified that they were receiving letters addressed to the occupier. Momentum did not recognise in return that Customer N was in fact the occupant and responsible for the electricity usage at the premises. The commission considers that Momentum could have conducted further enquiries in relation to the occupier notices raised by Customer N during the phone calls of 3 June and 18 November 2020. Additional diligence of this kind may have helped to avoid the disconnection.
84. However, the commission has not identified any instance of Customer N providing acceptable identification within the meaning under clause 3 of the code in response to Momentum's written requests for acceptable identification in respect to the electricity supply, as summarised in paragraphs 17, 21, 22 and 23 above. Accordingly, the commission considers that Momentum has satisfied this requirement for the purposes of the code, such that Momentum has not failed to comply with clause 112(2) in disconnecting the customer.

Compliance with clause 115 of the code

85. As noted in paragraph 6(b) of this decision, Momentum has submitted to the commission that clause 115, rather than clause 112(2), is the relevant clause for present purposes.
86. As outlined in the obligations section of this decision, the commission considers that following the expiry of the deemed contract between Momentum and Customer N on or around 28 July 2020, Customer N became a carry-over customer.
87. Clause 115 relevantly sets out a retailer's obligations prior to arranging for the disconnection of a carry-over customer.
88. The commission considers that the notices issued by Momentum to the premises under occupier account (12XXXXX) on 13 October 2020 and 29 October 2020 satisfied the requirements of clauses 115(2)(a) and (b), specifically,
- (a) The notice issued on 13 October 2020 met the requirement to give the customer a notice of its intention to disconnect, and the notice issued on 29 October 2020 met the requirements of a disconnection warning notice.

(b) Further, the commission acknowledges that Customer N attempted to enter a customer retail contract with AGL in relation to the premises. However, Customer N failed to take appropriate steps to enter into a customer retail contract with Momentum as soon as practicable (including following receipt of the electricity notices from Momentum in relation to the occupier accounts). Customer N has advised that they raised enquiries and complaints with AGL and sent occupier notices received from Momentum as “return to sender”. However, the commission considers that Customer N did not explicitly discuss the notices with Momentum with reference to the electricity supply.

89. Accordingly, the commission is of the view that Momentum complied with the requirements of clause 115 of the code. However, as noted in paragraphs 75 and 76 above, even if the commission were of the view that Momentum had failed to comply with clause 115, no obligation would arise under section 40B(1) of the Act given no contract was in place between Momentum and Customer N as at the disconnection date.

90. For completeness, the commission also acknowledges that:

- (a) Customer N called Momentum on 3 June and 18 November 2020. However, it appears that the primary purpose of both calls was in relation to a separate gas account. As outlined in the relevant facts, Customer N mentioned that they had received notices addressed to “the occupier”, but they did not specify whether these notices were in relation to gas or electricity.
- (b) It is apparent, particularly from the 18 November 2020 call, that Customer N mistakenly believed the notices sent by Momentum under clauses 115(a) and (b) were intended for the previous occupant, rather than to alert them to the potential disconnection of the electricity supply to the premises as intended by Momentum. This appears to have contributed to Customer N failing to take appropriate steps to enter into a customer retail contract as soon as practicable, which ultimately resulted in Momentum’s disconnection of the premises pursuant to clause 115 of the code.
- (c) In respect of the 18 November 2020 call, Momentum did not ask any questions about whether the customer’s enquiry related to gas or electricity notices (as it did in the 3 June 2020 call), nor did it appear to have conducted any checks regarding any occupier accounts attached to the premises. Instead, it appears that Momentum reasonably believed that the concerns raised by the customer were in relation to the gas account, which had been the subject of the discussion up until that point.

Compliance with the terms and conditions of customer contract

91. The commission was requested to assess whether Momentum failed to meet the terms and conditions of its contract with Customer N that specifies the circumstances in which the supply of electricity to the premises may be disconnected.
92. The commission considers that a deemed contract between Momentum and Customer N commenced on around 30 January 2020 (when Momentum opened occupier account (11XXXXXX) upon usage being identified at the premises) and ended on or around 28 July 2020 (being the end of the 180-day period from commencement, as provided for under section 39(7)(d) of the Act, in circumstances where none of the other criteria under section 39(7) were met).
93. The commission is of the view that the closure of occupier account (11XXXXXX) on 30 April 2020 does not amount to a termination of the deemed contract for the purposes of section 39(7)(a), nor does the opening of a new occupier account (12XXXXXX) on 1 May 2020 amount to entry into a new deemed contract for the purposes of section 39(7)(b) of the Act.
94. The commission considers that following the expiry of the deemed contract between Momentum and Customer N on or around 28 July 2020, Customer N became a carry-over customer within the meaning under clause 3 of the code.
95. The commission's view is that Customer N did not have a current customer retail contract within the meaning under clause 3 of the code, or deemed contract, in place in the lead up to and on the date of disconnection, namely 23 November 2020. Accordingly, the question as to whether Momentum failed to meet the terms and conditions of its contract with Customer N that specifies the circumstances in which the supply of electricity to the premises may be disconnected does not arise.
96. That being said, given the commission's findings that Momentum has not contravened clauses 112(2) or 115 of the code, it follows that Momentum did not fail to comply with the terms and conditions of its contract with Customer N (which, in any event, had expired as at the date on which disconnection was arranged) that specify the circumstances in which the supply of electricity to the premises may be disconnected.

Other observations

Customer N's dispute with AGL

97. The commission notes that Customer N also made a complaint to the ombudsman about AGL's conduct in relation to the premises. The commission has been separately informed that the outcome of this complaint resulted in a payment of \$1,421.55 being made by AGL to Customer N for substantiated losses.

The commission's role

98. As the regulatory body for the energy industry in Victoria, the commission's compliance role involves conducting compliance assessments and taking enforcement action when required in order to promote the long-term interests of Victorian consumers. These compliance assessments are measured against the relevant industry legislation and regulations, which explicitly detail the obligations of energy retailers and distributors, and the scope of any enforcement action is also prescribed by the relevant industry legislation and guidelines.

99. The commission acknowledges the submissions made by Customer N in relation to this matter, in which they requested for the commission "to consider the fairness aspect of everything which has led this complaint to be reviewed". However, the commission does not have the broader discretion to consider or award compensation based on the general fairness of a situation unless this is prescribed by the relevant industry legislation and regulations.

100. In this instance, the relevant sections of the Act and clauses of the code did not permit the commission "to consider the fairness aspect" of this matter in forming its decision and reasons, as was requested by Customer N. Nevertheless, the commission acknowledges the negative experience of Customer N in this situation and recognises the impact that the disconnection of supply can have on a small business.