

Customer S and Origin Energy – Decision and Reasons

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

5 September 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 S.
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 Origin Energy Electricity Limited (Origin Energy) of Customer S's electricity supply at [address redacted] (the premises), from 10:03am on 31 May 2017 to 11:22am on 2 June 2017 (a period of 2 days, 1 hour and 19 minutes).

Issues for decision

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

4. This requires the commission to make findings and reach conclusions regarding the following matters:
- (a) Whether or not Origin Energy disconnected the supply of electricity to the premises of Customer S (see paragraphs 25 and 34 below);
 - (b) Was the supply of electricity to Customer S's premises reconnected, and if so, when? (see paragraph 28 below);
 - (c) If Origin Energy did disconnect the supply of electricity to Customer S's premises, for what period of time did the disconnection occur? (see paragraph 29 below);
 - (d) What was the contract between Origin Energy and Customer S? (see paragraph 12 below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which Origin Energy may disconnect the supply of electricity to Customer S's premises? (see paragraphs 12 and 31(c) below);
 - (f) Whether or not Origin Energy failed to comply with those terms and conditions (see paragraph 35 below);
 - (g) Was Customer S entitled to receive payment of a prescribed amount because of any wrongful disconnection by Origin Energy under section 40B of the Act? (see paragraph 38 below);

- (h) If so, when was Origin Energy obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises);
 - (i) Has Origin Energy made the payment to Customer S in accordance with its deemed licence condition under section 40B of the Act? (not applicable as, in this instance, no such obligation arises);
 - (j) If Origin Energy has not made the payment what are the consequences? (not applicable as, in this instance, no such obligation arises).
5. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman acknowledged that Origin Energy had demonstrated that it had complied with clauses 72(1), 109, 110, 111(1)(e) and 111(2) of the Energy Retail Code (version 11) (the code) prior to the disconnection. However, the ombudsman considered that it was unclear whether Origin Energy had complied with clause 33(3) of the code.
 6. Regarding clause 33(3) of the code, the ombudsman considered that, as Origin Energy was aware of Customer S's payment difficulties, it was required to provide her with information about the availability of the utility relief grant scheme under clause 33(3) of the code. The ombudsman considered that the information given to Customer S by Origin Energy about the utility relief grant scheme did not appear to be of sufficient quality to discharge the obligation under clause 33(3) of the code.
 7. Origin Energy was invited to provide any information and documents it considered the commission should have regard to in making its decision. Origin Energy was also invited to make submissions on the complaint for the commission to consider. Origin Energy made submissions for the commission's consideration.
 8. Origin Energy did not dispute the chronology of events as presented by the ombudsman in its referral memorandum. However, Origin Energy provided additional details relevant to the commission's assessment of the disconnection.
 9. Regarding clause 33(3) of the code, Origin Energy submitted it had provided information to Customer S regarding the utility relief grant scheme on multiple occasions on the bills, notices and payment plan letters it sent to Customer S. Further, Origin Energy argued that, based on previous decisions made by the commission, clause 33(3) is not a relevant consideration in relation to whether a disconnection is wrongful, that is, provision of the information is not a precondition to disconnection.

Relevant facts

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

Background

11. At all relevant times, Origin Energy was the licensee responsible for the supply of electricity to the premises.
12. In February 2016, Origin Energy established an account for the supply of electricity at the premises of Customer S. It entered into a market retail contract with Customer S for the supply of electricity at Customer S's premises, the relevant terms of which are set out at paragraph 31(c).
13. On 13 October 2016, Customer S called Origin Energy and informed it that she was unable to make a payment towards her electricity account at that time. Origin Energy accepted Customer S onto its hardship program and established a payment plan of \$61.00 per fortnight.
14. Origin Energy subsequently sent Customer S a letter confirming the details of the payment plan. The letter included a schedule of each payment under the plan, with the first payment due on 27 October 2016 and the final payment due on 11 October 2018. The letter specified that the arrears would be paid off after 52 instalments.
15. The letter also provided the following information on government rebates and concessions:

If your financial situation's temporary, the Victorian Government might be able to help you pay your electricity bills through its Utility Relief Grant Scheme. You might also be able to get a discount on your winter gas bills through the government's Winter Energy Concession, or a discount on your annual electricity bills through its Annual Electricity Concession. Give us a call for details (or to apply).
16. Between 27 October 2016 and 8 December 2016, Customer S made four payments of \$61.00 towards her electricity account in accordance with her payment plan. After these payments, direct debit payments of \$61.00 on 22 December 2016, 19 January 2017, 2 February 2017 and 14 February 2017 were not honoured by Customer S's financial institution. Only one payment of \$61.00 on 5 January 2017 was successful.

Circumstances leading to the disconnection in May 2017

17. On 2 January 2017, Origin Energy issued a bill in the amount of \$609.92. Origin Energy commenced the disconnection process on the basis that Customer S had failed to pay this bill. The second page of the bill contained the following information on government rebates and concessions:

Concessions and rebates: You may be eligible for the Victorian Government Annual Electricity Concession or Off Peak Energy Concession - call us on 13 24 61 for details.
Payment assistance: Payment extensions, special payments, instalment plans and the Utility Relief Grant Scheme are available if you need it - call us on 13 24 61 for details.

18. On 23 February 2017, Origin Energy cancelled the payment plan it had established with Customer S on 13 October 2016 as Customer S had failed to make the required payments.

19. Subsequently on 23 February 2017, Origin Energy sent Customer S a second letter offering a payment plan of \$61.00 per fortnight, with the first payment due on 16 March 2017 and the final payment due on 14 February 2019. The letter specified the arrears would be paid off after 51 instalments. The letter included the following additional statement:

[Origin Energy has] noticed you're not keeping on top of your agreed Power On payments. We've arranged a final Power On payment plan so we can keep helping you – but if you don't stick to this, we won't be able to offer you another one.

20. On 23 March 2017, Origin Energy cancelled the payment plan offered on 23 February 2017, as Customer S had not made any payment.

21. On 24 March 2017, Origin Energy issued a reminder notice in the amount of \$487.92. The second page of the notice contained the following information on government rebates and concessions:

Annual Electricity Concession: The Victorian Government Annual Electricity Concession is available all year for customers holding an eligible concession or pension card.

Payment assistance: To arrange a payment extension, special payment or instalment plan or obtain information about the Utility Relief Grant Scheme, call us on 13 24 61.

22. On 7 April 2017, Origin Energy issued a disconnection warning notice in the amount of \$487.92. The notice also contained the statement set out above at paragraph 21 above.

23. Between 12 May 2017 and 17 May 2017, Origin Energy sent Customer S four text messages requesting that she contact it in order to stay connected.

24. On 24 May 2017, as Customer S had not contacted it, nor made any payment towards her account, Origin Energy arranged for the disconnection of the supply of electricity to Customer S's premises.

Disconnection of electricity supply to the premises

25. At 10:03am on 31 May 2017, Origin Energy disconnected the electricity supply to Customer S's premises for non-payment of the outstanding balance of \$487.92.
26. On 31 May 2017, a person called Origin Energy on Customer S's behalf. Origin Energy arranged for reconnection.
27. On 1 June 2017, the supply of electricity could not be restored to Customer S's premises as the main switch had been left on.
28. At 11:22am on 2 June 2017, the supply of electricity was reconnected to Customer S's premises.
29. The premises were disconnected for a period of 2 days, 1 hour and 19 minutes.
30. As at 5 September 2018, Origin Energy has not made any wrongful disconnection payment to Customer S.

Relevant obligations

31. In this matter Origin Energy's relevant obligations arise from the following:

(a) The Act:

- (i) Sections 36(1), (1A) and (2) rendering void any term or condition of Origin Energy's 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 Origin Energy's electricity retail licence of an obligation to make a payment of the prescribed amount to a customer if Origin Energy 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; 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) Origin Energy's electricity retail licence:

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

(c) Origin Energy's market contract with Customer S, that contained the following terms and conditions:

- (i) Clause 16 which states that Origin Energy will “follow any procedures set out in the Regulatory Requirements. We may arrange for disconnection of your energy supply in the following circumstances, unless we’re prohibited from doing so under the Regulatory Requirements: ... if you’re a Small Customer and you fail to pay Charges or other amounts on your bill related to the sale of energy by the Due Date; ... if you haven’t paid in accordance with an agreed instalment plan or other payment option.”
 - (ii) Clause 33 which specifies that “Regulatory Requirements means all relevant Acts, regulations, codes, procedures, other statutory instruments, licences, proclamations and laws applicable to the sale and supply of energy to your Supply Address. These include the Competition and Consumer Act 2010 (Cth) and the Privacy Act 1988 (Cth) and in ... Victoria: the Electricity Industry Act 2000 (Vic), the Gas Industry Act 2001 (Vic) and the Energy Retail Code.”
- (d) The code:
- (i) Clause 33(3) of the code requires the retailer to provide information to a hardship or payment difficulties customer regarding the availability of government funded energy charge rebates, concessions or relief schemes, including the utility relief grant scheme.

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

Decision

33. Origin Energy is not in breach of a condition of its electricity retail licence, deemed into Origin Energy's electricity retail licence by section 40B of the Act (the deemed licence condition).
34. Origin Energy disconnected the supply of electricity to Customer S's premises at 10:03am on 31 May 2017.
35. However, there was no failure on the part of Origin Energy to comply with the terms and conditions of the contract between Origin Energy and Customer S specifying the circumstances in which the supply of electricity to those premises may be disconnected.
36. Accordingly, the second condition that has to be satisfied for section 40B of the Act to apply was not satisfied.
37. The supply of electricity was not wrongfully disconnected.
38. Origin Energy was not required to make any payment of a prescribed amount under the deemed licence condition.

Reasons

39. Origin Energy's electricity retail licence requires that:
- (a) Origin 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 Origin 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) Origin Energy must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
40. The deemed licence condition requires Origin 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.
41. Clause 16 of Origin Energy's contract with Customer S specifies the circumstances in which the supply of electricity to Customer S's premises may be disconnected. Clause 16 is subject to compliance with, and incorporates by reference into the contract, the requirements in Part 6 of the code. As noted at paragraph 5 above, it is accepted that Origin Energy complied with the relevant requirements of clauses 72(1), 109, 110, 111(1)(e) and 111(2) of the code.
42. The ombudsman considered that Origin Energy may not have complied with clause 33(3) of the code.

Does a failure to comply with Clause 33(3) of the code give rise to an obligation to make a wrongful disconnection payment?

43. Clause 33(3) is in Part 3 of the code which is titled Customer Retail Contracts and Division 4 which is titled Customer retail contracts - billing. Clause 33(3) of the code is not a term or condition of the contract between Customer S and Origin Energy that specifies "the circumstances in which the supply of electricity to premises may be disconnected".

Accordingly, even if Origin Energy failed to comply with clause 33(3) of the code, it would not be obliged to make a wrongful disconnection payment under section 40B of the Act.

44. Had it been required to do so, the commission would have found that Origin Energy had complied with clause 33(3) of the code.
45. Clause 33(3) of the code applies to hardship customers and customers who have informed the retailer of their payment difficulties. 'Hardship customer' is defined by clause 3 of the code to mean 'a residential customer of a retailer who is identified as a customer experiencing financial payment difficulties due to hardship in accordance with the retailer's customer hardship policy'.
46. Origin Energy had provided Customer S with two payment plans and accepted her onto its hardship program on the basis that she required assistance paying off her bill on 13 October 2016. Customer S was therefore a hardship customer within the meaning of the code and Origin Energy was required to comply with clause 33(3) of the code with respect to Customer S.
47. Clause 33(3) of the code required Origin Energy to provide Customer S with information about the availability of government funded energy charge rebate, concession or relief schemes, including the utility relief grant scheme.
48. The payment plan letters Origin Energy sent to Customer S on 13 October 2016 and 23 February 2017 contained information about government concessions and rebates including the utility relief grant. As did the bill on 2 January 2017, the reminder notice on 24 March 2017 and the disconnection warning notice on 7 April 2017.
49. Origin Energy provided Customer S with information about the scheme, as required by clause 33(3) of the code.